THE ROLE OF THE CONSTITUTIONAL COURT OF ROMANIA IN THE CONSTITUTIONALIZATION OF CRIMINAL LAW

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Abstract

This paper aims to approach in a synthetical manner the evolution of criminal law, shaped by the historic decisions of the Constitutional Court of Romania, which, in light of the contemporary society's need for morality and justice, acts as modeller of the contextual criminal law norms. We live in an unprecedented legal reality in which the Constitutional Court responds to an acute need of normality, a need of a judicial system tributary to a rapid modernization during which the legislator of both the criminal code and the criminal procedure code introduced, in a faulty manner, criminal institutions from different legal systems, but which lack a unitary vision. For instance, in theory, the purpose of the preliminary chamber procedure is that of protecting the suspect's right to defense, enjoyed by him during criminal prosecution, but which was proved inefficient in practice, the author of this study considering it a formal and not an effective procedure.

Keywords: constitutionalism, constitutional review, criminal law

"The need" for constitutionalism appeared ever since the first sovereign states, which through written or unwritten rules considered necessary to organize and limit state authority. Thus, the first known constitutions throughout the history of mankind were the customary - flexible, as they are called today - constitutions that appeared in Great Britain.

The imposition of the objective-historical realities on the political stage led to the emergence of "the constitutionalist movement".

MATERIAL AND METHOD

This movement appeared relatively recent - about 200 years ago – during the "Enlightenment" and marked the transition from the customary constitution to the written constitution (Genoveva Vrabie, *Constitutional Law and Contemporary Political Institutions*, St. Procopiu Publishing House, Iaşi, 1993, p. 194). Basically, the form that could generate discretionary state action was substituted with the original form of the social pact.

Modern constitutionalism was born in the context of the great revolutions that generated by their effervescence the implementation of a new ideology, usually achievable through the phenomenon of constitutional transplant. Doctrine pointed out two apparently divergent tendencies manifested either by the need to assert one's own constitutional identity or by finding the expression of one's own constitutional values in light of the institutions created by others (Manuel Guțan, *Constitutional Transplant and Constitutionalism in Modern Romania 1802-1866*, Hamangiu Publishing House, Bucharest, 2013, p. 56. K. Von Beyme, Institutional Engineering and Transition to Democracy, in J. Zielonka (ed.), Democratic Consolidation in Eastern Europe, vol. 1: Institutional Engineering, Oxford University Press, Oxford, 2001, p.4).

According to the doctrine of constitutionalism, the constitution should take the form of a written document, should be a social contract which has as its primary goal the establishment of the separation of powers, of their balance within the state, as well as the establishment, protection and safeguard of the fundamental rights and freedoms of the individual.

The idea of constitutionalism can be summarized, in a first phase, as the necessary endeavor to formally organize the structures and limits of state policy by means of the constitution (D.T. Butleritchie, *The Confines of Modern Constitutionalism,* în Pierce Law Review, vol. 3/2004, p. 3). There are also authors who consider constitutionalism as the effective way in which a people assumes the constitutional values and principles that bear the reflection of the manner of feeling, believing, thinking and speaking in relation to its own national values (N. Wenzel,

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From contract to mental models Constitutional culture as a fact of the social sciences, in The Review of Austrian Economics, vol.23/2010, pp.61,65). Thus Hegel argued: "the people should have toward its constitution the feeling of its right and of its state of fact, otherwise the constitution can materially exist, but it has no meaning and no value" (Apud, *The Principles of Law Philosophy*, IRI Publishing House, Bucharest, 1996, p. 273). In the same spirit, Montesquieu in his work L'Esprit des lois supported the idea that "the spirit of the constitutional law is not found in the positivist legal construction, however good it may be, but in the manner a certain society actually relates to its own legislative texts" (L. Zucca, Montesquieu, *Methodological Pluralism and Comparative Constitutional Law*, in European Constitutional Law Review, vol. 5/2009, pp. 458-486).

The first initiative to adapt written constitutions belonged to Sweden in 1720, whose example was followed in 1787 by the U.S.A. and in 1791 by France with its "Declarations of rights". The doctrine of constitutionalism was also taken over by the "Declarations of the Rights of Man and Citizen", which mentioned it clearly and precisely in their preamble.

RESULTS AND CONSIDERATIONS

Constitutionalism is expressed both at political and legal level. On these two levels it must display as its goal the supremacy of the Constitution (Ion Deleanu, *Constitutional Justice*, Lumina Lex Publishing House, Bucharest, 1995, p.60). Politically, constitutionalism defines the concordance of the fundamental law with the wishes and aspirations of the majority of those who make up the state. In legal terms, the supremacy of the constitution must be guaranteed, which is made possible only by means of constitutional justice.

The conformity of the elements of the normative legal system is also ensured by compliance with the principle of legality and the principle of constitutionality. The principle of legality has as foundation the obligation of all subjects of law to respect the legal rules in force. In this regard we also have the two constitutional provisions, namely Article 16, para. 2 "No one is above the law" and Article 51, "Compliance with the Constitution, its supremacy and with the laws is mandatory."

The principle of legality also imposes respect for the hierarchy of legal norms and their organization into a pyramidal system. The Constitution, as the fundamental basis and the essential guarantee of legal order in a state, is located on top of the pyramidal system, system that continues with the other normative acts, among which the covenants and other international treaties to which Romania is a party, provided they are ratified by the Parliament, the organic and ordinary laws, the Government's ordinances and decisions, the Ministers' instructions as well as the acts of the local authorities (Genoveva Vrabie, *Constitutional Law and Contemporary Political Institutions*, St.Procopiu Publishing House, Iaşi, 1993, p. 71).

As it seems, this hierarchy of the normative legal system is determined by the hierarchy of the bodies that issue them. But in a rule of law in which public authorities are autonomous, among them there are only relations of cooperation and mutual complement and not relations of subordination and exclusion, thus the presented pyramidal system is questionable, at least. Thus, the ranking of the legal norms vary from state to state according to "the legal civilization" of each, the type of political regime and the historical period. However, no one and nothing can "dismiss" the Constitution from its position of "leader" in the hierarchy of legal norms of a constitutionalist state.

Authors such as Manuel Guțan believe Romanian constitutionalism is one of liberal nature and which caught momentum in the nineteenth century, given the ideological changes occurred at the level of the autochthonous political and intellectual elites under the influence of the Western European thinking. This phenomenon was facilitated by the education the Romanian elite of that time received, that got a taste of the ideology of political liberalism, detached from the non-liberal valences of the German-Austrian constitutionalism. The author concludes that the phenomenon of modern Romanian constitutionalism, although imported, cannot be considered the result of a legal imperialism of colonialist type, and that it is the result of the voluntary assumption of the liberal phenomenon, nevertheless transposed into the fundamental law through traditional Romanian institutions (Manuel Guțan, *Constitutional Transplant and Constitutionalism in Modern Romania 1802-1866*, Hamangiu Publishing House, Bucharest, 2013, pp. 86-87).

The concept of constitutionalism was not perceived by the Romanian legal doctrine in the manner it is today, thus, authors such as Aristide Pascal considered the concept of constitutionalism specific of 1866 as a set of principles and institutions of political-state organization recognized by the civilized states (Al. Pencovici, *The Constituent Assembly's Debates in 1866 on the Constitution and the Electoral Law in Romania*, Tipografia Statului Publishing House, Şerban Voda Court, Bucharest, 1883, p. 27). Other

scholars, such as Titu Maiorescu, used in 1884 the term of constitutionalism for the idea of free expression of differences of opinion (L. Vlad, *Romanian Conservatism. Concepts, Ideas, Programs*, Nemira Publishing House, Bucharest, 2006, p. 69).

The second principle, to which we have referred, the principle of constitutionality, includes the legal means by which compliance of the legal rules with the fundamental law is achieved. This compliance can be seen in two ways. The first aspect is concerned with material compliance, that is, that conformity of the rules with the content of the constitutional regulations. The second aspect, the formal one, concerns the conformity of the rules with the procedures established by the Constitution for their issuance (*Ibidem*, p.73).

These two aspects of the principle of constitutionality must be met simultaneously in order for compliance with this principle to exist. Constitutional justice, precisely to achieve such compliance of all legal regulations with the Constitution, has the means of a control technique, a legal means, namely the constitutional review of laws. But, in a sovereign state, any form of control would seem at first sight inadmissible, resulting from this that the law would be virtually uncensorable because it is the expression of "general will".

But law is the symbol, the expression of "general will" only to the extent that it complies with the Constitution, which by its content and form is "a law with a squared power" (Ion Deleanu, *Constitutional Justice*, Lumina Lex Publishing House, Bucharest, 1995, p. 78). Therefore, law is an act of application of the Constitution, an act subjected to interpretation and therefore it is necessary to establish this constitutional review of laws, without which the Constitution would become "a simple common noun", a "paper barrier" (Genoveva Vrabie, *Constitutional Law and Contemporary Political Institutions*, p. 196) in front of the authorities and its place in the pyramidal system would no longer be justified.

The lack of this instrument of constitutional review of laws would lead to an institutional imbalance, to non-compliance with the fundamental rights and freedoms of citizens which would remain only in the state of desiderata.

The need for constitutional review is also emphasized by Marius Bălan (Marius Bălan, *Constitutional Law and Political Institutions, vol 1. The General Theory of the State and Constitution. Romanian Constitution in the European Context*, Hamangiu Publishing House, Bucharest, 2015, pp.159-161), who appreciates that the guarantee of the supremacy of the Constitution necessarily involves the existence of a mechanism that deprives of effects the acts contrary to constitutional provisions. This mechanism should focus first on all legislative acts, but without being limited thereof.

Constitutional review of laws, theorized by Kelsen (1918), is organized into two major systems: control by a jurisdictional body, also called the American system, and control by a unique, special and specialized body, or the European system.

The American model was first consecrated in the United States, in 1803, in the famous case Marbury versus Madison. It is undeniable that the adoption in 1787 of the United States Constitution was a binding agent that led to the strengthening of the young American federation. But no provision of this Constitution enshrines, even today, constitutional review. The reason for this is the result of fierce fight in the Philadelphia Convention of the Federalists (who were representatives of the great states: Virginia, Pennsylvania etc.) and the Antifederalists (defenders of the rights of the smaller states: Delaware, New York, Rhode Island etc.). The former states were the promoters of a strong federal state, interested in ensuring the supremacy of the Constitution in relation to the laws and constitutions of the constituent states. Far from being a triumphant victory, the adoption of the US Constitution, today still in force, encountered quite strong resistance from public opinion, certain newspapers and politicians. Even if at the level of doctrine there were a number of standpoints in support of the supremacy of the Constitution, a legal act was needed as basis of the principle of supremacy of the Constitution of the federation in relation to the other laws and constitutions of the states. It was essential that the principle of admissibility of judicial constitutional review be established so as to gain indisputable value and the jurisprudential way was the most appropriate. The pretext for this was Madison's (Minister of Justice under President Jefferson) refusal to hand Marbury the document of appointment as judge at the Supreme Court of Justice, document that had been issued by former President Adams. The Supreme Court, led by Chief John Marshall, ruled that the law obliging the Minister of Justice to hand this document was unconstitutional because the new President Jefferson had the constitutional right to appoint a judge he preferred (the spoil system). Thus, although Jefferson's Antifederalists were governing, due to alternation, they expressed their full agreement with the solution of the Supreme Court and this decision inaugurated the constitutional review of laws by judicial interpretation which, paradoxically, had, among other consequences, the strengthening of

the American federation (Constantinescu M., Amzulescu M, *Litigious Constitutional Law*, 3rd Edition, "Spiru Haret" University, Bucharest, 2005, p. 10).

Judge John Marshall, the inspirer of the decision of the Supreme Court of Justice, grounded then the constitutional review on a judgment that became classic: either the Constitution is superior to the law, which therefore must comply with it, or, if it has the same power as a law, the Constitution is unnecessary and can be changed at any time by the ordinary legislator, like any other law. In the United States, nowadays, constitutional review is still made by judicial interpretation, due to the existence of the common law system, based on the rule of judicial precedent.

The characteristic procedures of the American model, widespread especially in the countries of common law that have adopted a written Constitution, are: the constitutional challenge invoked in a trial (with repressive character), the injunction invoked outside a trial (having preventive character) and the declaratory judgment in case of difficulty in the enforcement of law.

The European model was influenced by the concepts of Hans Kelsen's normative school that based the need for review starting from the reality of the legal system's pyramidal structure, with the Constitution as the supreme norm:

- The review is centralized, thus ensuring uniform application of the Constitution, and is performed by an authority which is not part of any of the three traditional powers - legislative, executive and judicial – being the fruit of their cooperation; thus, it is avoided the politicization of the constitutional review of laws;
- The effects of the decisions are "erga omnes" opposable;
- The European model is the result of the evolution of the American model; it developed in Europe in successive waves: after World War I (Austria, Czechoslovakia), following the collapse of fascist or authoritarian regimes (Germany, Italy, Spain, Portugal) or some change of regime (France after the Constitution of 1958, Belgium after becoming federation) and after the fall of the communist regimes in the Eastern European countries;
- The review can be done by way of: constitutional challenge;
- Direct recourse ("in amparo" action in Spain and Portugal);
- Preventive review, before the law being published (in France this is the only way of review);
- In other manners, such as prior approval (Canada).

The Romanian Constitution of 1991, revised in 2003, took over constitutional challenge, preventive control and, in a more limited manner, direct recourse for parliamentary regulations and the constitutional challenge through direct action by the Romanian Ombudsman.

The difference between the two models of constitutional review of law should not be overestimated because, in fact, they both pursue the same goal, and there is a rapprochement tendency between the two systems, the American and the European, due to the growing movement of jurisdiction-making. The methods used by the constitutional courts contribute to the increasing spread of their influence in the political system, giving them the means to lead a genuine jurisdictional policy.

Constitutional justice progressively conquered a central position in the system of liberal institutions; by ensuring constitutional balance and by protecting rights and freedoms it exerts major influence on the whole political system. Insofar as the spectrum of "the judges' government" is quite agitated, often the latent conflict of legitimacy that it opposes to political power compels constitutional justice to certain prudence, translated through a jurisprudential policy oscillating between activism and reserves, according to the political context.

In our country, the constitutional review of laws was imposed for the first time in 1912, also by means of judicial interpretation, according to the European model, through the so-called Trial of the trams, by Ilfov Tribunal, which denied the applicability of a law ruling it unconstitutional, judgement confirmed also by the Court of Cassation.

In 1909 a law was passed that would establish a stock company having as main activity the execution of the works for introducing the electric tram network in Bucharest. Under this law, the municipality drafted the statute, issued shares and registered the company with the Tribunal of commerce. The share capital of this company was carried out by public subscription.

Following a political changes, the Liberal government was replaced by a Conservative one which, under the influence of owners of horse-pulled trams, annulled the statute approval given by the former cabinet. The new mayor and the new city council did not take into account the provisions of the law by which the Tram Company was established, and Parliament passed a law approving a new statute of the company. According to this law the municipality was

authorized to repurchase the assets of the company at production price and, if shareholders would not accept the imposed conditions, they would be reimbursed the face value of shares at a rate of 6%, which basically amounted to an expropriation. Before Ilfov Tribunal, the Tram Society argued that the law violated the principle of separation of powers regulated by the Constitution of 1866, as it solved litigious issues which were of concern to the judiciary, as well as the Article in the Constitution that establish that property is sacred and inviolable, while by that law the Company was deprived of its assets, and the shareholders of their shares. The Ilfov Tribunal's decision validated for the first time the supremacy of the Constitution in relation to law and, within the filed appeal, the High Court of Cassation confirmed the first court's decision.

The American model was taken over mutatis mutandis being a diffuse control that could be achieved by all judicial authorities. In practice, because the Romanian legal system was built on the Roman-Germanic line, in which the judge interprets the law, but does not create law - as it happens in common law -, there was the risk of reaching contradictory situations, if in similar cases the decisions of different courts would be contradictory.

The 1923 Constitution enshrines the principle, but restricts the scope of the courts having jurisdiction, giving only to the Court of Cassation, in reunited sections, the possibility to judge the constitutionality of laws (which diminished the effects of the diffuse control, without however removing them, the decision falling under res judicata and having effects only "inter partes litigantes"; thus, a law declared unconstitutional could be applied in another case by another court or administrative body, which considered it constitutional).

This solution was maintained in the 1938 Constitution, but with the communist regime, control is abolished and constitutional review of laws became solely a matter for the legislature. Starting from the principle that "no one can be judge in his own case", it is clear that control by the legislature itself was ineffective and unjustified.

The 1991 Constitution reaffirms the principle, but does not return to the solution in the 1923 Constitution, adopting instead, like all other former socialist countries, the European model; thus control is achieved by a Constitutional Court, a jurisdictional body centrally exercising a special and specialized procedure of constitutional review of laws.

In Romania, with the adoption of the Constitution of 1991, the European model of constitutional review of laws was adopted, whether it is done previously to the promulgation of laws or subsequently by way of challenge, and it was entrusted to a special and specialized body called the Constitutional Court.

Thus, Romania falls within the categories of (Constantinescu M., Amzulescu M, *Litigious Constitutional Law*, 3rd Edition, "Spiru Haret" University, Bucharest, 2005, p. 15):

The European-wide evolution from the legal state, within which law is uncontrollable, opaque screen between the Constitution and society, to the rule of law, ensuring the priority of human rights and observance of the separation of powers, resulting from the institutional balance of the constitutional regime, corresponding to constitutional democracy;

The general characteristic of establishing constitutional review of laws after the collapse of authoritarian, dictatorial and/or totalitarian regimes (Germany, Italy, Spain, Portugal, the former socialist countries);

The general tendency of expansion of the European model of control not only in Europe but also in Africa and Asia (31 European countries and 31 countries outside the continent in 1996).

In Romania, constitutional review is regulated in Articles 142-147 of the Constitution and in Law no. 47/1992 on the organization and functioning of the Constitutional Court, as amended in 1997. In the development of the constitutional and legal provisions, the Constitutional Court adopted its Rules of organization and functioning. Provisions on the jurisdiction of the Constitutional Court can also be found in other laws such as Law no. 69/1992 on the election of the President of Romania.

CONCLUSIONS

The Constitutional Court ruled in Decision 206/2013 (Official Journal no. 350 of 13 June 2013) on Art. 4145 para. 4 of the Criminal Procedure Code, the admission of the constitutional challenge and simply stated that the mentioned provision is unconstitutional. For reasons which we will present below, we believe that the Constitutional Court should have ruled that Art. 4145 para. 4 of the Criminal Procedure Code is unconstitutional only if interpreted as the decisions of the High Court of Cassation and Justice in recourses on points of law are binding on courts even if contrary to certain decisions of the Constitutional Court, and therefore violating Art. 147 para. 4 of the Constitution. In other words, the Constitutional Court should have

ruled unconstitutionality provided conform interpretation.

The commented decision occurred in the context of the High Court of Cassation, ruling in a recourse on points of law (Decision 8/2010, published in the Official Journal no. 416 of 14 June 2011), held that the offenses of insult and slander are no longer in force, although an earlier decision of the Constitutional Court (Decision 62/2007, published in Official Journal no. 104 of 12 February 2007), declaring unconstitutional Law 278/2006 which repealed Art. 205 - on to the offense of insult - and Art. 206 - on to the offense of slander - of the Criminal Code, held that the repealed provisions would continue to produce effects. Following this decision of the High Court, the courts were in difficulty with regard to what decision to apply in matters of insult and slander: that of the High Court, mandatory under Art. 4145 para. 4 of the Criminal Procedure Code, or that of the Constitutional Court, mandatory under Art. 147 para. 4 of the Constitution. In other words, the courts had to consider either that the two offenses no longer exist in the legal order, or, on the contrary, that they still exist and should be punished according to Articles 205 and 206 of the Criminal Code.

The High Court's decision, regardless of the possible validity of its arguments, violates the binding nature of the Constitutional Court's decisions, consecrated in Art. 147 para. 4 of the Constitution, which is unacceptable; Article 64 para. (3) of Law 24/2000 on legislative technique for drafting legal norms is not applicable in this case, as it is not the case of a reinstating into force by will of the legislator or by that of the Constitutional Court itself, but a re-entry into force as an automatic effect of the penalty applied to a law not complying with the Constitution - declaring the law unconstitutional; not admitting such an effect would destroy the principle that the Constitutional Court's decisions are mandatory, thus leaving the Constitution at the will of the legislator; automatic re-entry into force of some criminal provisions is not contrary to the principle of legality of incrimination, the concept of "law" - as defined by the European Court of Human Rights – also including the constant and predictable case law; or, by decisions being published in the Official Journal, by them only having prospective effect and by the Constitutional Court itself stating in their content the effect of re-entry into force of the repealed offenses, decisions such as the one mentioned meet the requirements to consider that the principle of legality of incrimination has been respected. Following these arguments, we conclude, regarding the analyzed article, that the courts must comply with the Constitutional Court's decision and not that of the High Court because, since the case law of the Constitutional Court is incorporated in the Constitution and the case law of the High Court is incorporated into the law it interprets - in this case, the Criminal Code - they actually have a choice between the Constitution and the law, the decision with this choice being more than obvious.

The arguments of Decision 206/2013 take over some of these arguments and also bring some new ones, showing that Art. 64 para. 3 of Law 24/2000 addresses the legislator only and that the reentry into force of the repealed incriminating provisions is but a specific effect of finding the unconstitutionality of the repealing provision, in the absence of which such decisions of the Constitutional Court will have no actual effect; then again the repealing provisions are not exempt from constitutional review (and, we would add, there is no objective reason for them to be exempted) and this specific effect is based on Art. 142 para. 1 of the Constitution - which consecrates the Constitutional Court's role of guarantor of the supremacy of the Constitution - and on Art. 147 para. 4 of the Constitution - which establishes the binding nature of Constitutional Court's decisions. On the other hand, the Constitutional Court notes that the fundamental law and, based on it, the infra-constitutional laws (among which, we assume - as the Court does not specify -, the Criminal Procedure Code with its Art. 4145 here in question) have created for it and the High Court of Cassation and Justice different jurisdictions: the former rules on the constitutionality of laws (which we would like to add, involves the interpretation of the Constitution), while the latter rules on the interpretation of infra-constitutional laws, thus insuring their unitary interpretation and application; these different jurisdictions preclude the possibility of them having conflicting decisions, therefore ensuring compliance with the decisions of both courts.

So the question arises: how did the Constitutional Court come to consider that Art. 4145 para. 4 was "to be blamed" for having different decisions of the two courts in the matter of insult and slander, for non-compliance with Decision 62/2007 of the Constitutional Court? With more so as in its arguments it clearly stated that the only interpretation consistent with the Constitution of Art. 4145 para. 4 is that, on the one hand, the interpretation and uniform application of laws exclude the Constitutional Court's decisions (in other words, they cannot be subject to the interpretation of the High Court) and, on the other hand, that the interpretation provided by the High

Court is binding only for the courts and not for the Constitutional Court also (which is not part of the courts' system); only in such an interpretation the decisions given by the High Court on points of law may be mandatory. Further, for the reasons given, the Constitutional Court concludes that the interpretation of the High Court of Cassation and Justice contained in the Decision 8/2010 is unconstitutional, violating the constitutional provisions relating to legal certainty, separation of powers, the role of the High Court and that of the Constitutional Court, the mandatory nature of the Constitutional Court's decisions, the High Court arrogating the role of court for judicial review of the Constitutional Court's decisions. In other words, in the first part of the arguments the Constitutional Court gives the impression that it is to give an interpretative decision and not one simply finding for unconstitutionality. However, the Constitutional Court believes that the created precedent is very serious for legal security and its role so that it deemed necessary to penalize any interpretation of the provision in question which would give the High Court the opportunity to give mandatory dispensations that contravene the Constitution and the Constitutional Court's decisions. Nevertheless, as seen from the Constitutional Court's arguments shown before, Art. 4145 para. 4 of the Criminal Procedure Code does not give the High Court the right to interpret the decisions of the Constitutional Court, nor the right to review them, that is the right not to respect the separation of powers established by the Constitution, the attitude of the High Court - which has exceeded its powers – being the only one responsible for the created situation, thus, a decision of conform interpretation was required, the Constitutional Court "extracting" the interpretation inconsistent with the Constitution. That fact that a serious precedent was created - so a consideration of practical nature, extrinsic to the science of law - cannot justify the ruling of a legally incorrect decision.

Insult was criminalized in Article 205 of the Criminal Code: "Harming one's honor or reputation through words, gestures or any other means or by exposure to mockery, or assigning a person a defect, illness or disability that, even if real, should not be revealed". Slander was criminalized in Article 206 of the Criminal Code: "The affirmation or imputation in public, by any means, of a certain deed relating to a person, which, if true, would expose that person to a criminal, administrative or disciplinary penalty or public contempt". Article 207 of the same Code regulated the cases of admissibility of the evidence of truth for these two offenses: "The evidence of truth of the things stated or imputed is admissible if the statement or imputation was committed in defense of a legitimate interest. The deed which was proved by evidence of truth does not constitute the offense of insult or slander".

By Art. I point 56 of Law no. 278/2006 amending and supplementing the Criminal Code, the provisions of Articles 205-207 of the Criminal Code were expressly repealed.

The three arguments for repeal can be found at pages 4-5 of the explanatory memorandum that accompanied the bill, and they are: (1) under the permanent threat of a criminal sanction freedom of expression is significantly affected, because it imposes a person's self-censorship which should be determined only by ethical and not sanctionatory reasons; (2) even if it violates a person's dignity by exercising freedom of expression, regardless of the damage caused, the criminal punishment is manifestly disproportionate to the aim pursued by sanctioning such deeds; (3) in case of abusive exercise of freedom of expression, the injured person can pursue civil damages.

Through Decision no. 62/2007, the Constitutional Court admitted the constitutional challenge, finding that the provisions of Art. I point 56 of Law no. 278/2006 on amending and supplementing the Criminal Code are unconstitutional.

The Constitutional Court of Romania established that the repeal of Articles 205, 206 and 207 of the Criminal Code and, in this way, the decriminalizing of the offenses of insult and slander, violates Art. 1 para. (3) and Art. 21 of the Romanian Constitution, republished, relating to some guaranteed values in the rule of law and the principle of free access to justice, correlated with the right to a fair trial and to an effective remedy, as they are regulated in Articles 6 and 13 of the Convention for the Protection of Human Rights and Fundamental Freedoms. It was also considered that by repealing those three texts in the Criminal Code, the principle of equal rights provided in Art. 16 of the Constitution was also violated, as well as breaching the interdiction to injure dignity, honor, privacy and the right to own image as a result of the exercise of freedom of expression, as this freedom is limited by Art. 30 paragraphs (6) and (8) of the Romanian Constitution, republished.

According to Article 147 para. 1 of the Constitution "The provisions of the laws and ordinances in force, as well as those in regulations, declared unconstitutional, cease their legal effects within 45 days of the publication of the Constitutional Court's decision if, during that period, the Parliament or the Government, as

appropriate, do not harmonize the unconstitutional provisions with the provisions of the Constitution. During this period, the provisions declared unconstitutional are suspended by law".

Following the publication of Decision no. 62/2007, the Parliament failed to fulfill its obligation. Therefore, on the effects of this decision, in the legal doctrine and case law there were two opinions:

- The provisions of Articles 205, 206 and 207 of the Criminal Code remain in force: this is the case because the Romanian Constitutional Court's decisions are binding and because the provisions of Art. I point 56 of Law no. 278/2006 ceased to exist since the Parliament has failed to fulfill its obligation to harmonize this text of law, which had been found unconstitutional, with the relevant provisions of the Constitution.
- The provisions of Articles 205, 206 and 207 of the Criminal Code are no longer in force: re-criminalizing the acts of insult and slander based solely on the Constitutional Court's decision that declared unconstitutional the provision repealing the texts of law by which the two acts were criminalized would not be in accordance with the principle of legality of incrimination, consecrated by the Constitution.

The High Court of Cassation and Justice – the United Sections settled this dispute, admitting a recourse on points of law by Decision 8/2010 in which it stated that "The norms of criminalization of insult and slander contained in Articles 205 and 206 of the Criminal Code and the provisions of Art. 207 of the Criminal Code regarding evidence of truth, repealed by the provisions of Art. I point 56 of Law no. 278/2006, provision declared unconstitutional by Decision No. 62/2007 of the Constitutional Court, are not in force."

The argument was that only the Parliament can criminalize offenses (Art. 2 of the Criminal Code) and that is inadmissible for the repeal of a prior repealing act to reinstate into force the initial law (Art. 64 para. 3 of Law no. 24/2000).

On the 29th of April 2013, the Constitutional Court of Romania unanimously found that "the dispensation given to the judged issues of law by the Decision no. 8/2010 of the High Court of Cassation and Justice – the United Sections is unconstitutional, as it is contrary to the Constitution and to Decision no. 62/2007 of the Constitutional Court of Romania".

Indeed, we consider that the High Court's decision to invalidate a decision of the Constitutional Court of Romania constitutes forbidden interference with the latter's attributions. Moreover, the new decision of the Constitutional Court of Romania is in line with its constant practice, assumed by Decisions no. 20/2000, no. 62/2007, no. 783/2009, no. 124/2010, no. 414/2010, no. 1039/2012. In the last mentioned decision, the Constitutional Court of Romania expressly held that "if certain repealing provisions are found unconstitutional, they cease their legal effects as provided by Article 147 para. (1) of the Constitution and the provisions that formed the subject of repeal continue to produce effects, since this is a specific effect of the loss of constitutional legitimacy (...), different and more serious sanction than a mere repealing of a legislative text". The Court further finds that no other public authority, be it a court, cannot contest the arguments resulting from the case law of the Constitutional Court, and it is bound to properly apply them, as complying with the Constitutional Court's decisions is an essential component of the rule of law.

The effects of the interpretation of the High Court of Cassation and Justice have resulted in the appearance of vulgar language in the public space. Insults and slanders perpetrated in public and especially through media and by ordinary citizens, politicians and journalists have become current. In the absence of criminal sanctions, we have powerlessly witnessed the serious and continuous injury of human personality, dignity, honor and reputation of the aggressed ones. However, this was encouraged by the lack of firmness of the National Audiovisual Council of Romania in the application of sanctions for violation of specific legislation (anyway, this authority does not have jurisdiction over the printed media), and also by the long duration of civil proceedings and the relatively small amount of the compensations granted for those who have yet resorted to this way of reparation of moral damages.

Then again, Art. 1 para. 3 of the Constitution states that human dignity is a supreme value which is guaranteed. But in the absence of the legal protection provided by Articles 205, 206 and 207 of the Criminal Code, people's dignity, honor and reputation do not benefit from any other form of real and adequate legal protection (Decision no. 62/2007 of the Constitutional Court of Romania). It is true that the injured person has had and has the possibility of suing for damages by way of a civil action. Still this form of legal protection is not explicitly regulated, but established by case law and anyhow it does not constitute an adequate legal protection in the present case because dishonor is by its nature irreparable, and human dignity cannot be assessed in money, nor compensated by material gains – so, what one gets by way of civil action is not the protection of dignity, but reparation for the suffered injury.

With regard to the media, Art. 30 para. 8 of the Constitution states that "Civil liability for the information or creation made public rests with the publisher or producer, the author, the organizer of the artistic performance, the owner of the copy machine, radio or television station, under the law. Press offenses are established by law". But then again, press offenses should be established either by a special law - but in Romania, after the repeal of Law no. 3/1974 the adoption of a new law in this area was consistently refused, although such laws exist in other countries, for example France – or by the Criminal Code, from which the Parliament eliminated them by Law no. 278/2006. Thus, the constitutional provision on the need to establish press offenses by means of a law remains inapplicable.

It is true that freedom of expression is consecrated by Article 30 paragraph 1 of the Constitution, Article 10 paragraph 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms and Article 19 paragraph 2 of the International Covenant on Civil and Political Rights.

But freedom of expression is not an absolute right (Decision no. 139/2005 of the Constitutional Court of Romania). In a democratic society a person's freedom ends where another person's freedom begins (Decision no. 62/2007 of the Constitutional Court of Romania) - in this regard, Article 57 of the Constitution expressly stipulates the obligation of Romanian citizens, foreigners and stateless persons to exercise their constitutional rights in good faith, without infringing the rights and freedoms of others. Freedom of expression also has certain limits: Article 30 para. (6) of the Constitution provides that "Freedom of expression may not harm the dignity, honor, privacy of a person, nor the right to his own image". Moreover, these values regulated as limits on the freedom of expression are found in Article 10 paragraph 2 of the Convention for the Protection of Human Rights and Fundamental Freedoms and in Article 19, paragraph 3 of the International Covenant on Civil and Political Rights.

In case of finding the unconstitutionality of certain repealing provisions, those provisions cease to apply and the law repealed by a provision found unconstitutional continues to be active and to produce effects. Therefore, one no longer has to expect the publication in the Official Journal of the arguments for yesterday's decision of the Constitutional Court, as prosecution offices and courts are compelled to directly consider the Constitutional Court's Decision no. 62/2007 and ignore Decision no. 8/2010 of the High Court of Cassation and Justice – the United Sections.

Our opinion is that the deeds that injure dignity can be included in the text of Art. 205 or, where applicable, Art. 206 of the Criminal Code, even if they were committed before the 26th of April. This is the case because since February 12th, 2007, when Decision no. 62 was published in the Official Journal no. 104/2007, the two offenses of insult and slander are part of the Criminal Code. However, the issue is raised for a limited number of cases as in order to start criminal investigation, the victim is required to lodge a prior complaint within two months of having knowledge of the identity of the perpetrator (Art. 284 of the Criminal Procedure Code).

There is no incompatibility between the principle of freedom of expression and the criminalization of insult and slander (Constitutional Court's Decisions no. 298/2003, no. 62/2007). Furthermore, similar incrimination to that contained in the Criminal Code on the offenses against dignity, some even more severe, are also meet in the laws of other European countries such as France, Germany, Italy, Switzerland, Portugal, Spain, Greece, Finland, Czech Republic, Slovenia, Hungary.

REFERENCES

Pencovici, Al., 1983 - *The Constituent Assembly's Debates in 1866 on the Constitution and the Electoral Law in Romania*, Tipografia Statului Publishing House, Şerban Voda Court, Bucharest.

Bălan, M., 2015 - *Constitutional Law and Political Institutions, vol 1. The General Theory of the State and Constitution. Romanian Constitution in the European Context*, Hamangiu Publishing House, Bucharest.

Vlad, L., 2006 - *Romanian Conservatism. Concepts, Ideas, Programs*, Nemira Publishing House, Bucharest.

Diaconu (Mihalache), C.M., 2014 - *The Role of the European Court of Justice and the civil service tribunal in creating the necessary prerequisites for developing European code for European publicly appointed officeholders.* - Agronomy Series of Scientific Research/ Lucrari Stiintifice Seria Agronomie 57.2 (2014), Simpozionul organizat de U.S.A.M.V.Iasi, Ştiinţele vieţii, o provocare pentru viitor, 23-25 octombrie.

Diaconu (Mihalache), C.M., Matei, E., Manea, G., Cocoş, O. şi Dumitrache, L., 2013 - *Begging Phenomenon in Bucharest City:Dimensions and Patterns of Expresion,* The Journal of Research and Social Internevention / Revista de Cercetare si Interventie socială (vol.43).

Constantinescu, M., Amzulescu, M., 2005 - *Litigious Constitutional Law*, 3rd Edition, "Spiru Haret" University, Bucharest.

Iftimiei, A., 2013 - *Reflection of the principle of equality in the special part of the new criminal code, expression of globalization, Conference,Criminal repression in the context of the economic crisis*

and the maximization of crime at european and global level, p.119-p.122 Bucharest.

Guțan, M., 2013 - *Constitutional Transplant and Constitutionalism in Modern Romania 1802-1866*, Hamangiu Publishing House, Bucharest.

Panainte, R., 2015 - *The Manifesto on European Criminal Procedure Law – Foundation for Creating a Common Space of European Criminal Justice. CESWP, Vol. VII, Issue 2A,pp.566- 572.*

Panainte, R., 2014 – *Noua concepție a legiuitorului penal român privind individualizarea judiciară a pedepsei – expresie a armonizării legislației penale române cu legislațiile europene, Conferința Internațională. Ed. Hamangiu, Iaşi, p.689-695..*

*****, 2007 -** Decision no. 62/2007 of the Constitutional Court of Romania