The Constitutionalization of Romanian and French Criminal Law.

Comparative Law Study

- Abstract of Doctoral Thesis –

The chosen topic sets forward the interest of an interdisciplinary approach as well as the approach from the perspective of comparative law, thus conferring originality, but also an innovating vision on the intersection of two law branches. We propose the analysis of criminal law constitutionalization due to the general trend in which criminal law is equally subscribed, namely that of internationalization, Europeanization and constitutionalization of law. Moreover, the study of the two law branches is relevant given the highly intimate connections between them, through rendering more effective the protection of fundamental rights and liberties.

As research method we subscribed the entire thesis to a well-known method of Romanian and French university school which embraces a new binary structure: problematization – solutions or hypothesis – demonstrations. The problem or hypothesis raised by the thesis is ”What is the starting point and how does the process of constitutionalization of the criminal law acts/functions?”, implicitly admitting the existence of such a phenomenon. The solutions or demonstrations are reflected as answers to the central questions, forged on the research plan of the thesis: highlighting the relations between criminal law and the Constitution, respectively of the means of constitutionalization and the effects of this phenomenon.

Following the principles exposed by Legal Sociology regarding the integration of a process in the limits of a phenomenon, we reached the conclusion that in the case of constitutionalization, it fulfills all necessary requirements in order to be catalogued as such. An argument in this respect is represented by the spread of this phenomenon both from the spatial perspective (being encountered both in the European space as well as in the international space) and from the perspective of the branches of law, which are subject to the process of constitutionalization (accordingly, we identified a series of illustrations from Administrative Law, Labor Law, Economic Law, European Law of Contracts or the Right to a Healthy Environment).

The crystallization of the constitutionalization notion is carried out by reporting to other terms, so as to configure the delimitation of the concept. In order to delimit the concept of constitutionalization we conducted a reporting to codification, constitutionalism, conventionality and constitutionality, underlining the existing discrepancies between these

terms. It is estimated that there are seven stages of constitutionalization: 1) rigid constitution, 2) jurisdictional guaranteeing of the Constitution, 3) the compulsory force of the Constitution, 4) ”over-interpretation” of the Constitution, 5) interpretation of laws in accordance with the Constitution, 6) direct application of constitutional norms, 7) influence of the Constitution on political reports.

The binary structure of the doctorate thesis proposes the analysis of the constitutionalization phenomenon from a dual perspective: the premises of constitutionalization (materialized in the supremacy of the Constitution, the constitutional grounds of criminal law, as well as constitutional guarantees in criminal matters), and the proper constitutionalization of criminal law (which we equally structured on the means of achievement of constitutionalization and the effects of this phenomenon).

PART I.

Premises of the Constitutionalization of Criminal Law

The supremacy of the Constitution, as complex notion, expresses “the supra-ordered position of the Constitution” and it is expressly proclaimed in the text of the Romanian fundamental law. The importance of the supremacy of the Constitution in the constitutionalization process is underlined by two aspects: on the one hand, the ranking of legal norms on the Kelsenian pyramid pattern grants to the Constitution the position of law situated at the top of the hierarchy, contributing to the definition of constitutional order; on the other hand, we cannot argue on a constitutional supremacy with a final role in the process of constitutionalization process if the fundamental law would not govern the legal order, whereas it is important to identity the place of criminal law in its structure.

Without challenging the indisputable position of the Constitution at the top of the hierarchy of legal norms, we raise the following issue: does the constitutionalization of the law bring a new perspective on the relations between the legal norms? If one of the effects of constitutionalization is the elevation at the rank of constitutional value of a branch principle, then we can no longer argue about a unilateral determination, but about a double meaning: on the one hand, the Constitution is the fundamental norm determining the content of other norms, but on the other hand the norms of any law branch themselves, have the ability to influence the content of the constitutional provisions.

The rigidity of the Constitution arising both from limits and from the procedure distinct from the revision, forges itself as a condition of constitutionalization since, if in the

case of flexible constitutions the constitutional and common laws are located at the same level in the legal hierarchy, the rigid constitutions mark a net difference between constitutional laws and common laws by underlining the supremacy of the former, occupying the first position in the hierarchy of legal norms.

The supremacy of the Constitution is guaranteed by both the expressly sanction in the text of fundamental law and through the constitutional justice. Without crossing the research framework, we identified the two models of constitutional justice (American and European), as well as the types of constitutionalization control (by means of action and by means of exception, *a priori* and *a posteriori*, abstract and concrete).

The lawfulness in criminal law is a fundamental principle of law, as its dual legislative sanction (constitutional and criminal) strengthens its position at the level of norms with principle value.

The emergence of the constitutionalization process of Romanian and French criminal law is based on the importance given to criminal law by both the Romanian and French constituent power, by sanctioning a considerable number of legal provisions in the fundamental laws. The constitutional provisions regarding criminal law, either only material criminal law or criminal procedural law, are characterized by an inconsequence of the Romanian or French constituent lawmaker. Thus, he oscillates between the presence of numerous provisions with criminal character in the fundamental laws, but he does not dodge even from their almost integral absence in the constitutional texts, a reason for which we opted for a chronologically ranked presentation to underline the individual relations of Romanian and French criminal codes with each Constitution.

Another aspect regarding the premises of the constitutionalization phenomenon is reflected in the constitutional guarantees in criminal matter. The main analyzed constitutional guarantees in criminal matter are human dignity, the right to life, the right to physical and psychic integrity, the right to freedom and the right to private life (grouped in intangible fundamental rights and conditional fundamental rights).

PART II.

Proper Constitutionalization of Criminal Law

The Romanian and French constitutional process is the most vivid illustration of the attribute of the law to be "alive". The rich constitutional jurisprudence of constitutional courts of Romania and France, mainly in criminal law, reflects the preoccupation of modern societies to strengthen and consolidate the state of law. The distinct vision of the two states on the constitutional process has inevitably lead to the main differentiation, concretized in a constitutionalization of the criminal law mainly by anterior control in France, respectively in a constitutionalization of the criminal law mainly by posterior control in Romania. The implications of this observation are reflected in two aspects: in France it was granted, by introducing the *a posteriori* control, the possibility to widen the criminal legislative fields that can be subject to constitutional verification; in Romania, the constitutionalization by posterior control contributed to the increase of guarantees regarding man's rights and liberties, an aspect the necessity of which came from the reminiscences of the Communist regime.

The constitutionalization of criminal law in Romania by *a posteriori* control focused around the offences against public propriety, against patrimony, against dignity, sexual relationships between same sex persons, special prescription, etc.

The importance of constitutional interpretation in the process of constitutionalization of criminal law is fundamental, at the very chore of the phenomenon being the impact of the constitutional judge's vision on the transformations of the criminal law, concretized in the effects of the process. The approach of the previous chapter regarding constitutional interpretation is outlined around the identification of techniques used by the constitutional judge in the constitutional interpretation and around the applications which constitutional interpretation knows in re-dimensioning the Romanian and French criminal law.

The constitutionalization of the Romanian and French criminal law is undoubtedly carried out, mainly, through the constitutional judge's work. As soon as the means of manifestation of constitutionalization are evidenced by the classicism of the constitutionality control, *a priori* and *a posteriori*, we focused the research on two distinct techniques: the reserve of interpretation and the jurisprudential revival.

We may affirm that the effects of the phenomenon of constitutionalization are generated by many factors, as we identify the constitutional judge's interpretation, doctrine interpretation, but also the lawmaker's interference in the sphere of criminal law. All these

factors actually lead to the formation of a series of effects acting directly and to effects acting indirectly. A direct consequence of the way in which constitutionalization is carried out in Romania and France: the effects of the phenomenon are distinct, the main criterion of differentiation being the way in which the constitutional courts are acting.

Through constitutionalization, criminal law is subject to a modernization process, by uniformization and reformation so that indirectly the jurisprudence of constitutional courts is constituted as guide of criminal policy.

The acme of our research is represented by the identification of a series of texts of the criminal Code on which we suspect an appearance of nonconstitutionality, as subsequent to this aspect is the one referring to the formulation of some *ferenda law* propositions in criminal matter.

Conclusions

1. The topic of this thesis, defiant by the nature of the approach, but also byits interdisciplinary character, exceed the ordinary framework of classic research, by confronting the two distinct law branches, balanced at the level of the comparative law study. Apparently disparate and without common elements, the Romanian and French law are structured on identical principles, if we are referring to the criminal law in its materiality. The comparative approach, as an analysis method of criminal law, is necessary from multiple aspects: firstly, because no legal order is pure and then because the law is "alive", the general tendency of approach by comparison leading to the identification of a series of gaps in the national law or otherwise of a series of innovating ideas by relating to other methods. The French criminal law can be considered as an archetype structure for the Romanian criminal law, since the directing lines are similar, the history of criminal law in the two states underlining this aspect.

2. The constitutionalization of the law can be framed in the category of contemporary legal phenomena, which surpassed the sphere of some "fantasy" preoccupations on behalf of the constitutionalists from everywhere. Consequently, one may note a strong extension of the phenomenon, both in the European law, as well as in the international law, a fact which makes us consider that the researched topic is one of continuous actuality, which is equally of interest both methodologically, as well as from the point of view of the activity of carrying out constitutional justice regarding criminal law. Together with the increase of protection means of fundamental rights and liberties, the constitutionalization phenomenon surpassed the

frontiers of a mere relation between two law branches and was defined as an opportunity to forge a new law.

Often in the specialty literature the notion of constitutionalization was inadequately used, mainly due to its confusion with other legal phenomena, such as constitutionalism. At the same time, the constitutionalization was wrongly interpreted either through the confusions created around the notions of constitutionality control, respectively of conventionality control. However, our opinion is that this concept is autonomous, being endowed with the ability to lead to the development of a series of subsequent phenomena and which reveals interest from the perspective of contouring a finality speculated long ago by international jurists, either on the branch of private law or on the one of public law, as we refer to the unification of the law.

The constitutionalization of law, as distinct legal phenomenon, was manifested in all branches of the law, both in Romania and France. A clearcut delimitation from other legal phenomena has lead to the crystallization of the concept, the evolution of the law by its feature to be "alive" contributing to underlining the distinct characteristics of this phenomenon. Moreover, the representation of the dimensions of the constitutionalization process gives us the right to study the way in which it is manifested from the perspective of comparative law, the French and Romanian law being considered similar in their depth, thus the comparison points between the two can give birth to the emphasize of a series of components and new facets of this phenomenon, with a particularization on the criminal law in its materiality.

3. Nowadays, constitutionalization can be defined as a contemporary legal phenomenon, which has as premises the report between the Constitution and any branch of law, carried out by the interpretation of constitutional courts and via which the state governed by the law and the legal security are consolidated, as a niche legal branch occurs or at another level the law is transforming, the final effect being the one of law modernization.

4. The *lex superior* character of the Constitution together with its feature to be rigid constitutes the main triggering elements of the constitutionalization of the law, through the constitutionality control. Both in Romania and France, the constitutionality control represents the essential way through which the constitutionalization of the criminal law is carried out. The integration of criminal law in normative hierarchy, by its placing in a central location, represents another argument favoring the research with the priority of criminal law constitutionalization. If in both countries the constitutional courts operate, by their jurisprudence, as guarantors of the supremacy of the Constitution and implicitly of observing the fundamental rights, we consider that the premises of criminal law constitutionalization are

without a doubt constitutional grounds of criminal law, respectively the constitutional guarantees both the French and the Romanian constituent lawmaker are instituting in the matter of criminal law.

Both in Romania and France, constitutionalization was possible since it was forged on the existence of a rigid constitution, respectively on the interpretative role of constitutional courts. The limits imposed to the revision, in both countries, as well as the difficult procedure of revision, underline the supreme character of the fundamental law, a direct consequence of this supremacy being the need of integrating the criminal law norms in the positive legal order. The characteristics of criminal law, identified in prevention and repression, place it at the chore of legal order, an aspect equally doubled by the impressive number of provisions with criminal character from the Constitution text.

5. The principle of lawfulness of incrimination and punishment is the main pillar in the construction of Romanian and French criminal law, thus a constitutional sanction would stand as the expression of the beginning of the creation of the constitutional criminal law. The correlation of the lawfulness principle with the constitutional provisions represents a means of setting up a formal compatibility between the positive criminal law and the fundamental principles. Formally, the two legislations, Romanian and French, sanction the lawfulness principle both in criminal law and in the Constitution, so that its constitutional value should represent an impulse for the constitutionalization process of the criminal law. The numerous applications of the lawfulness principle in the sphere of constitutionality control prove the importance of the principle in the positive law and beyond this aspect by the constitutional interpretation of the lawfulness principle, the corollary of the principle are delimited and evidenced, concretized in individualization, necessity and proportionality.

6. Both in Romania and France, the constitutional edifice was built by incorporation in the texts of the first fundamental law of the criminal nature provisions, a natural selection since only exercising the coercive power can lead to the creation of a legal order, the natural right being explanatory in this regard. The reference of human condition to the idea of social progress, by understanding the need of granting guarantees to the dignity of each person has lead to the contouring of a constitutional framework marked by centering the idea of liberty in both countries. The sanctioning regime and the French criminal policy, being in an incipient stage, are tougher than in Romania, an important role being played here by the late separation of the state as political and legal entity from the Western Church. In both countries, by dedicating a central place to criminal law in the economy of constitutional texts, the

repression of a series of eventual behaviors of revolt against state administration was also desired.

7. A special place in the economy of fundamental texts is occupied by the guarantees instituted for rights and liberties, in both countries there is a direct correlation between the catalogue of rights and liberties and the means of criminal protection, a fact constituting as premise of the constitutionalization process of the criminal law. If in France the constitutional value of fundamental rights and liberties was conferred together with the recognition of the existence of a "constitutionality block", in Romania the recognition was implicit since the catalogue of rights and liberties is integral part of the Constitution.

8. The constitutional interpretation is one of the essential means of constitutionalization of the law, in general, and of the criminal law, in particular. Although both countries embraced the Kelsenian model, until 2008, constitutionalization was carried out in various ways in France, as compared to Romania. In France, criminal law was exclusively constitutionalized by *a priori* control, during 50 years and in Romania the form of constitutionalization was *a posteriori*. In France, the constitutionalization of criminal law c has a history of over 55 years, but the constitutionalization in Romania dates from 1992, respectively 22 years, so that implicitly the consequences will be distinct. The fact that France accepted the introduction of control by means of exception demonstrates the openness of the lawmaker towards the individual's free and direct access in assessing the conformity of legislative provisions with the fundamental law. The importance of *a posteriori* control was recognized by the Romanian lawmaker long before the French lawmaker, since he was aware of the fact that the law addresses to the litigant as it becomes during litigation the most competent and directly interested to signal the existence of an inconsistency between the common law legal norm and the fundamental norm.

9. The position expressed by constitutional courts guides the criminal lawmaker in formulating and modifying the criminal law, while the judge is held in applying the criminal law in accordance with the provisions of the Romanian and French fundamental law. Every time the constitutional judge formulates a reserve of interpretation, he becomes the main mediator between the formulation and the application of criminal law.

To the same extent, the possibility of reconsidering an own interpretation, by jurisprudential revival or by changing the circumstances represents another constitutionalization technique of criminal law, since the evolution of fundamental norms assumes the reinterpretation and re-adaptation of the legislative body.

As proper effects, the reserve of interpretation assumes the existence of a double coordinate: firstly it is manifested as a law salvation from suspension of effects and secondly by the reserve of interpretation the constitutional judge impregnates the norm with proper exigencies derived from the fundamental law. The reserve of interpretation is used more and more frequently by Romanian and French constitutional courts, thus marking the evolution of the mentioned technique, being a way through which the art of checking the constitutionalization of a law comes off from the need to identity the means in which the law must be interpreted in order to be in accordance with the constitutional provisions.

10. Although it was stated that the interpretation of a law is a source of legal insecurity, we do not share the idea in its integrality since exactly interpretation is in our opinion the balance factor between the legal norm and the fundamental one. With the standardization of all legal provisions to those of the Constitution, the forge of a stable framework is assured, aligned to the same set of values.

11. The interpretation of the constitutional judge leaves a mark on criminal law, which contributes to the "taming" of repressive norms, as proved by the new Romanian criminal law, for which the lawmaker corroborated the Romanian Constitutional Court decision so that an organic law was forged, which is characterized by prevention features. A reduction of punishment limits, justified by a consistent legal practice of aiming sanctions to a minimum, but also the elimination of some aggravating circumstances from the incrimination text of some actions, represents the undisputed proof of this aspect.

12. The analysis of the constitutionalization phenomenon leads to the idea that it is divided in two broad categories: direct constitutionalization and indirect constitutionalization.

By direct constitutionalization we have in a view the declaration of unconstitutionality of some provisions of the criminal law both in Romania and in France, as well as implicitly the suspension or abrogation of the provision criticized by the constitutional court.

The indirect constitutionalization is a phase subsequent to the direct one, in the way that following the declaration of unconstitutionality of a provision of the criminal law, it is the task of criminal lawmaker to intervene on the text of law, a moment in which the role of the constitutional court is distinguished in guiding the criminal policy.

13. Through the constitutionalization of the criminal law, a balance is achieved between the repression and protection of fundamental rights and liberties. Once lined up, the provisions of two laws of different rank, respectively constitutional and organic, are joined and implicitly two interests are mediated: the constitutional one, of guaranteeing and

increased protection even of the individual and the criminal one, of prevention and repression of some behaviors that lead to prejudice exactly the values inscribed in the fundamental text.

14. If the beginning of law underlined the existence of some distinct law branches (as it is the case of criminal law and constitutional law), nowadays, regarding criminal law constitutionalization, we are arguing about an interference of the constitutional law in the sphere of the criminal law, but also about the fact that is almost impossible to analyze the criminal law without referring it to the frame traced out by fundamental norms.