Bulletin of the *Transilvania* University of Braşov – Special Issue
Series VII: Social Sciences • Law • Vol. 11 (60) No. 2 - 2018

OBSERVATIONS FROM A CONSTITUTIONAL PERSPECTIVE REGARDING THE SOURCES OF CRIMINAL LAW AND CRIMINAL PROCEDURE LAW

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Abstract: *The sources of criminal law and criminal procedure law consist of provisions contained only by normative acts with legal power, thus passed by the Parliament or, in the case of legislative delegation allowed by art.115 of the Constitution, by the Government. Therefore, the inclusion of some common law offenses in the category of offenses against national security cannot be realized by means of an administrative act, even with normative value, as it does not have the legal power requested by the constitutional guarantee from art. 53(1). Moreover, the law enforcement by analogy is completely forbidden in criminal matter.*

Keywords: *sources of criminal law and criminal procedure law, normative acts with legal power, lex tertia, offenses against national security*

1. Introduction

By carrying out an analysis in correlation between the art. 15 of the Constitution and more constitutional texts, presented in the following, we are facing a certainty by affirming that it is not possible that normative acts with legal force inferior to the law should determine the modification of normative acts with legal power or should add to these, which is a unitary opinion in the doctrine and jurisprudence.

2. Analysis

The correlation of art.15 with most of the norms contained by Chapter II (Fundamental rights and freedoms) of Title I – General principles, especially the dispositions of art. 20 – International treaties regarding the human rights, art. 21 – The free access to justice, art. 23 – Individual freedom, art. 24 – The right to defence, art. 26 – The intimate, family and private life, art. 28 – The secret of correspondence, art. 31 – The right to information, art. 52 – The right of the person harmed by a public authority, art. 53 – Restriction of the exercise of some rights and freedoms, with art. 57 – Exercise of rights and freedoms, illustrates the essential importance of the principle of legality as a

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constitutional principle in the matter of fundamental rights and freedoms within the contemporary legal system of Romania.

This interpretation results from other constitutional provisions as well, which can be enumerated in an exemplary manner: art. 61 para. 1 – The Parliament is the supreme representative body of the Romanian people and the only law-making authority of the country, art. 73 – Categories of laws, art. 126 – Courts (highlighting para. 2 – the competence of the courts and the trial procedure are provided only by the law, respectively para. 4 – the composition of the High Court of Cassation and Justice and its rules of functioning are established by the means of the organic law), art. 129 – The use of the appeal, as well as art. 131 – The role of the Public Ministry. Also, the attributions of the Constitutional Court, as they are enumerated in art.146 of the Constitution, highlight the supremacy of the Constitution – the fundamental law – and induce the necessity for constitutionalising the law, respectively, as the doctrine mentions, "[…] the realization of a concordance between the normative system subordinated to the Constitution and the norms consecrated through it" (Deaconu, 2008, p. 109), therefore the adaptation of the whole national legislation to the normative frame established by the fundamental law.

Art.73 para.3 lett.h) of the Constitution expressly consecrates the fact that the criminal offenses, punishments and their execution regime is regulated by the means of the organic law, a legal act of the Parliament, adopted after a certain procedure summarily described in art. 76 para. 1 of the Constitution (with the vote of the majority members of each Chamber). Thus, no act or fascicle of acts correlated between them on certain criteria (usually, the set, the family of social values defended by the incriminating rules related and reunited under the same title) may not be incriminated, defined or redefined (in the sense of establishing the qualification and legal nature of these) by legal norms inferior to the organic law, as they would collide with the aforementioned constitutional provisions.

In the matter of the procedural law, of judiciary procedures unfolded during the realization of justice (respectively the trial activity of the courts), the site of the matter is represented, at the level of the fundamental law, mainly by the provisions of art. 126 para. 1-4, where the constituent legislator constantly uses collocations such as "established by the law", "provided by the law", "by the means of the organic law", respectively the provisions of art. 23 regarding individual freedom, being beyond any doubt that the judiciary provisions and the competent courts may be established only through normative acts with legal power (the organic law being the rule). Therefore, any completion or modification of the judiciary procedures by the means of normative acts inferior to the law (Government decisions, normative decisions of other public authorities, other categories of normative acts with legal force inferior to the law) is *de plano* excluded. Thus, even the decisions of the Parliament may not bring modifications to the judiciary procedures or may not change the competences of the courts and, implicitly, of the criminal prosecution bodies, although the issuer is also the legislator, as they do not have the legal nature of laws, respectively their constitutional legal regime is different from the one of the laws.

Regarding criminal law and criminal procedure law, the judiciary procedures in

criminal matter, we may identify in art. 23 of the Constitution more texts which underline without any doubt the fact that any rule with incriminating normative role may be established only by the means of the law (as legal act of the Parliament, in the sense of art. 73 of the Constitution), respectively by means of legislative delegation, through Government ordinances (art. 115 of the Constitution – the so-called simple ordinances and emergency ordinances, with the specifics of each one described in the aforementioned text), namely: para. 2 regarding the search, the detainment and the arrest of a person (allowed in the respective cases and with the procedure provided by the law), para. 7 (court orders regarding the measure of preventive arrest are subject to appeal provided by the law), as well as para. 9-13 which lay out rules with essential relevance in the criminal trial, respectively regarding criminal liability and its constitutional legal regime. The principle of legality with relevance in criminal matter is also consecrated by art. 27 regarding the inviolability of the domicile, being expressly mentioned in the paragraphs 2 and 3 of this constitutional text.

A constitutional norm of great importance in the configuration of the ample principle, the legality principle regulated by the Constitution of Romania, consists of art. 53 regarding the restriction of the exercise of some rights or freedoms, where the constituent provided that the exercise of rights and freedoms may be restricted only by the means of the law and only if it is imposed, being enumerated in limitative manner the hypotheses accepted by the fundamental law.

By analysing the aforementioned constitutional provisions, the list being only exemplary and with a greater relevance for the criminal law field, results that no other public authority or institution besides the Parliament or the Government (through the constitutional hypothesis of the legislative delegation allowed by art. 115 of the Constitution), may create new rules in criminal matter or in the criminal trial or regarding the execution of the punishment, new rules which would add to the law or would modify legal norms established at the level of the law.

Otherwise, through the rules regarding the hierarchy of the legal norms, the hierarchy of the normative acts is outside any doubt: in the decreasing order of the legal force, in the constitutional order the most important source of the positive law is the fundamental law, followed by the organic laws, then by the ordinary laws, in parallel with these two being the simple and the emergency ordinances (their regime is regulated by art art. 115 of the Constitution – the institution of the legislative delegation), followed by the Government decisions, the acts of the central public administration and the acts of the local public administration (Muraru & Tănăsescu, 2008, p.29-31). Somewhere in this hierarchy, but lower than the law and the Government ordinances, are the CSAT (SCND, namely the Supreme Council for National Defence) decisions, the interinstitutional agreements and protocols and the common orders of the ministers and heads of the central public administration, all of these having a high degree of specialization, according to the field for which each of them is issued.

Generalizing, we may affirm that all of the aforementioned constitutional provisions demand a law interpretation and, implicitly, an application rule in the sense that all procedures of judiciary nature and all measures which restrict fundamental rights and

freedoms must be expressly regulated by the law (such as by legal act of the Parliament or, where possible, by Government ordinance which, in its turn, must pass the censorship of the Parliament).

Further, the analysis is related to the presently controversial theme of the assimilation, through normative acts inferior to the law, of some common law criminal offenses (those of corruption and some economic and financial ones) to the national safety criminal offenses, by the means of expanding the definition of national safety regulated by the specific legislation (more precisely the Law of national safety no. 51/1991), namely the expansion of the area of threats to the national safety.

From the information publicly circulating until the date of the present study, results that it was the preoccupation of the SCND (CSAT) to rethink the definition of the threats to national safety, based on the legal attributions of this constitutional forum, being, apparently, adopted the SCND (CSAT) Decision no. 17/2005 in the sense above, centred on the negative effects of corruption on the safety of the Romanian state, decision through which the SCND (CSAT) has expanded the area of the definition or rather of the content of the threats to national safety by including the phenomenon of corruption in this category.

The Constitutional Court has pronounced itself in the last three years regarding the legal texts which interfere with this special field, namely the confluence between the field of the *lato sensu* criminal law and the one of national security defence and anti-terrorism, introducing certain limits to the intervention margin and contribution of the special institutions which activate in the field of national safety and anti-terrorism, through the decisions no. 51 of 16th of February 2016 regarding the exception of unconstitutionality of art. 142 para. 1 of the criminal procedure Code, decision no. 802 of 5th of December 2017 regarding the exception of unconstitutionality of art. 342 and 345 para. 1 of the criminal procedure Code, respectively the decision no. 91 of 28th of February 2018 referring to the exception of unconstitutionality of art. 3, art. 10, art. 11 para. 1 lett. d) and art. 13 of the Law no. 51/1991 regarding the national security of Romania, in the form prior to the modification through Law no. 255/2013 for the enforcement of Law no. 135/2010 regarding the criminal procedure Code and for the modification and completion of some normative acts which contain criminal procedure provisions. In essence, the Constitutional Court has established that intelligence agencies may not be involved in any manner in the evidence administration within the activities of criminal investigation and prosecution, in general, as it would violate some rules of the European Convention of Human Rights, especially those referring to the fair trial. Also, the jurisprudence of the ECHR (CEDO) is, in this sense, in favour of avoiding the involvement of intelligence agencies in judiciary activities in criminal matter, because the judiciary procedures would be exposed to some interferences in the private life of the person and in the fair trial, prohibited by the ECHR, being widely acknowledged that the work methods specific to the field covered by the intelligence agencies is much more invasive and more discreet, with a very reduced publicity of the professional activities unfolded and of the used work methods.

By not observing the legal nature which is completely different from the one of other normative acts, i.e. a complex one, of the acts issued by SCND (CSAT) (acts of military

command to a certain degree, classified administrative acts with a normative character) which, usually, approves proposals of the military institutions and other bodies of the defence, national safety and public order system, some judiciary institutions have agreed upon the interpretation according to which the special legal regime of the criminal offenses against national safety, expressly provided by the law (those incriminated in the chapter for national safety and those contained by the special laws with criminal law provisions within the same resort), would also be applicable to the criminal acts to which the SCND (CSAT) appears to extend the definition of threats to national safety (corruption and tax evasion are acts of a greater seriousness, as it resulted from numerous public debates in the period 2017-2018).

According to the latter hypothesis, the procedural actors who have extended the use of national safety warrants to other criminal fields, unregulated by the special legislation regarding national safety (or anti-terrorist), have thereby granted such wrong legal qualification to the aforementioned acts issued by the SCND (CSAT) (admitting that they truly exist, with such provisions within their content), in the sense of artificially and, obviously, unconstitutionally placing them, as legal force, on a level of equality with the law. The consequence of this legal reasoning of interpretation by analogy consists of the use of investigative and technical means specific to the segment of national safety protection and defence in the case of common law criminal acts, offenses which, obviously, have a legal regime established by the Criminal code and, correlatively, by the Criminal procedure code.

The enforcement of some means of investigation specific to the intelligence and counterintelligence, specialized in this very sensitive and exceptional field, has determined an interference of the special operating mode, obviously derogatory, of these public authorities with a validated profile in the defence of the Romanian state safety, with the typical judiciary operating mode applicable in the common criminal law (*lato sensu*), namely with the classic criminal investigation regulated by the Criminal procedure code. The purpose of the demarche was probably the one of ensuring the efficiency of the judiciary work of investigation, the use of some techniques and work methods able to ensure a faster elucidation of the state of affairs which forms the object of the criminal investigation, the faster establishment of the criminal liability of the persons who are liable for committing the illegal acts for which they have been accused, namely motivations apparently valid, convincing as scope, but objectionable as work methodology.

In concrete terms, it was opened the way for some investigative and evidence administration practices in the criminal trial through means specific to the segment of national safety and with the legal derogations which may be found in the special legislation of this field, being largely used (if the statistics published in the last two years are credible) the national safety warrant, warrant of continuous and untroubled interception/recording/surveillance for 6 months, with the possibility of renewal for durations of 6 months. Eventually, there could be taken measures of forming criminal investigation teams in the sense of including specialists from the national safety field, who are familiar with the activities of gathering intelligence and, implicitly, with the composition of evidence in a more detailed manner and usually very discrete, unseen by

the other parties in the criminal trial during the phase of criminal prosecution.

It is to be reminded that, by definition, all measures of criminal procedure order for investigating the common law causes are realized by the letter and the spirit of the norms contained by the Criminal procedure code, within the limits expressly established by the legislator, limits and rules which apply unitarily in all the so-called "common law" files. Regarding any other special procedures, as those which are related to the segment of national safety and anti-terrorist defence (for example), they have a derogatory character, having special legal sources, laws specific to those fields which also contain criminal and criminal procedure provisions, thus being exclusively applicable those special legal provisions to the acts that the special law was issued for and which it regulates (being incident the rule of interpretation of the legal norms "*specialia generalibus derogant*"). In the latter situation, the special rules are being completed by the common law norms.

The reverse situation, namely that an investigative or jurisdictional special procedure may not apply to another field, would interfere with the common law in the sense of producing legal effects and would thereby generate, for example, new rules of criminal procedure in the common law, suspending or eliminating general norms which are *de plano* applicable to that sphere of the common law. More precisely, the common law criminal offenses, for which the Criminal procedure code provides the frame rules for the administration of the evidence and in general of realizing the criminal prosecution, may not be investigated by means of some special judiciary procedures consecrated by the special laws and which refer to other categories of criminal offenses, as is the case of investigative procedures provided by the anti-terrorist legislation or the one regarding national safety. The enumeration of the criminal offenses against national safety is realized, on the one hand, by the Criminal code, in the dedicated chapter, respectively in the special laws from the national safety field, especially Law no. 51/1991 modified as a special law being emblematic.

It may be observed that the special legislation on national safety operates with particular legal instruments, specific to the defence of the extremely important social values which form the object of these above-mentioned special laws, legal instruments adapted to the much higher rigor which is typical for this highly sensitive field. This justifies the existence of a derogatory criminal procedure frame regulated by this specific legislation, the emblematic criminal procedure institution being the national safety warrant, with a duration of 6 months, much more than the 30-days warrant provided by the common law, namely the Criminal procedure code. Obviously, the special law establishes a much more drastic criminal procedure mechanism, because the restriction of some fundamental rights and freedoms directly for a duration of 6 months, with the unimpeded access of the criminal prosecution bodies to all elements of the private life of a person for this whole period, composes the elements of an intrusive and more drastic legal regime which obviously affects in a greater measure the private life and the freedom of the person against whom the special procedural measure is taken.

But the problem of constitutionality and, at the same time, of legality, which hovers over this type of criminal procedure demarche, consists of the application for some common law criminal offenses, by analogy, of the investigation methods from the

national safety field and the administration of evidence within the criminal trial with legal and technical instruments specific to this particular, special field, which demands the application of legal rules completely different from the general ones, obviously derogatory from the common law. Therefore, it may easily be observed that this investigative method, more intrusive in the private life – namely the typical surveillance warrant for the criminal offenses against national safety, with a duration of 6 months from its issuance – may not be applied or used by analogy for other segments of the criminal substantial law, for other criminal offenses (regardless of how serious they might be), because the criminal law and criminal procedure law norms are of strict interpretation and may not be applied by analogy, and the criminal procedure legal regime is the one established by the Criminal procedure law frame, as positive law. From this point of view, to the extent that it would establish new legal rules, different from the norms contained by the Criminal code or by other laws with criminal law provisions, the SCND (CSAT) decisions which would induce such changes of legal nature to some criminal offenses that would obviously be unconstitutional and, implicitly, illegal, as it would mean that the public authority of SCND (CSAT) would have exceeded its constitutional role established by art. 119 of the Constitution, respectively it would have entered in the regulation field of the Parliament (respectively of the Government, regarding legislative delegation), thereby unconstitutionally interfering with the attributions of the Parliament.

In this regard, the SCND (CSAT) decisions which have accomplished such assimilations may be censored by the courts in administrative litigations, according to the legal regime of Law no. 554/2004 and within the constitutional frame created by art. 21 and, of course, within the limits of art. 126 para. 6 of the Constitution of Romania.

If there are such criminal procedure situations, then it is obvious that in those criminal common law cases, the use of national safety warrants was made with a legal fiction through which *lex tertia* was created. In any criminal or contraventional procedure, "the procedural hostilities" unfold only based on the rules provisioned by the law (a normative act with the legal force of a law) – an aspect explained by the Constitutional Court, as well as by the ECHR (CEDO). Also, the Constitutional Court has expanded the area of interpretation of the two aforementioned matters to the disciplinary segment, starting from the right premise that even in the disciplinary matter the fundamental rights and freedoms can be restricted and the legal regime of the disciplinary sanctions and procedures must comply with the constitutional rigors of the criminal and contraventional liability.

In the hypothesis of the national safety warrants, the legal frame applicable to them regarding the acts which may hold the liability for the offenses against the state and national safety are expressly regulated in the specific legislation on national safety, as well as in the dedicated chapter from the Criminal code. Therefore, through analogy realized by the interpreter of the law (judiciary bodies of prosecution, courts, intelligence agencies *etc.*) or through decisions of the SCND (CSAT), there may not be included in the category of national safety criminal offenses some common law criminal offenses which have their regulation in the Criminal code or in any other special criminal laws or with criminal law provisions, because the application of the law by analogy is

completely forbidden in criminal matter.

Consequently, according to the fundamental principle of criminal procedure – *nullum judicium sine lege/nulla justitia sine lege* – corroborated with the symmetrical principle *nulla poena sine lege* from criminal law, no judiciary body and no other institution of the state, regardless of its role and legal attributions, may not invent new criminal procedures, alternative to those strictly and expressly provided by the criminal legislation in force, based on some legal acts inferior to the law. The situation is this because, in a very simple reasoning, those acts are subject to the criminal procedure legal regime of nullity, being realized outside the criminal procedure law applicable as common law.

The only hypothesis which stands is the one in which national safety criminal offenses were regarded in connection with the common law offenses, so that the legal panel seems to be different, usually the criminal offenses of corruption being means for committing criminal offenses against national safety.

However, if the promoted reasoning was the one derived from decisions of the SCND (CSAT) as I have previously exemplified, which expand the area of threats to national safety beyond the express provisions of the legislation of national safety itself, with the consequence of having issued intercept warrants for common law criminal offenses in an exclusive manner (without figuring any national safety criminal offense in the procedural documents of proposal sent to the supreme court), then that work hypothesis is outside the standard criminal procedure law and outside the constitutional norms enumerated above, because in concrete terms it was used a *lex tertia* reasoning obviously inadmissible especially in criminal procedure matter.

Thus, for those categories of common law criminal acts, regarded *ut singuli*, an administrative act with normative value, as is the case of the SCND (CSAT) decisions, it may not expand itself the field of application expressly provided by the law of national safety towards the common law, as it would equate with an adding to the law, by using a legal norm which has a legal force inferior to the law, the hypothesis being *de plano* inadmissible.

In essence, the inclusion of some common law criminal offenses in the category of the offenses which are a threat to national safety represents greater restrictions for the fundamental rights and freedoms, thereby restrictions in the sense of art. 53 of the Constitution, and the content of art. 53 (1) expressly provides that the restrictions may only be realized by the law, so they may not be realized by normative acts inferior to the law, such as normative administrative acts as is the case of the SCND (CSAT) decisions.

However, *per se*, those decisions of the SCND (CSAT), if limited to only an enumeration of the new threats against the national safety and only expand a list of interest for the intelligence services, then those SCND (CSAT) decisions do not have themselves problems of legality, to the extent that the SCND (CSAT) has the legal competence to extend the area of this definition offered in a generic manner by the legislation of national safety. However, in the latter case, the problem of the correspondent and consequences in criminal matter (more precisely criminal procedure) obviously passes into the charge of those judiciary bodies which have accepted to apply by analogy the criminal procedure law, assuming to create *lex tertia* and to actually omit fundamental

rules of criminal law and criminal procedure law, as well as the above-mentioned principles of constitutional law. Therefore, there is the possibility that the SCND (CSAT) Decision no. 17/2005 is, *per* se, legal (if there is a control of legality in administrative litigation), but the manner of interpretation and application by analogy and extension to common law criminal offenses of the special criminal procedure rules contained by the legislation of national safety (namely the legal texts which consecrate the national safety warrant and its legal regime) continues to be the real problem.

We shall see the evolution of the courts' jurisprudence, of the doctrine in criminal matter and constitutional law, as well as the jurisprudential reactions of the Constitutional Court (with the mention that it is possible for none of the hypotheses to apply, as I have critically exposed above, in the judiciary cases pending before the courts, but to only be the case of related causes between common law criminal offenses and proper criminal offenses against national safety).

Through normative acts inferior to the law, as is the case of the SCND (CSAT) decisions and of the protocols between the intelligence agencies and judiciary institutions such as the Prosecutor's Office affiliated to the High Court of Cassation and Justice (PICCJ) or the High Court of Cassation and Justice (ICCJ) or the Superior Council of Magistracy (CSM), new rules in the criminal law or the criminal procedure law may not be introduced. In the case that such norms of criminal substantial or procedure law were adopted through such normative acts inferior to the law as legal force, then all acts of procedural order issued by the judiciary institutions or other public authorities based on these categories of legal norms inferior to the law would be practically hit by absolute nullity, more exactly null by law, to the extent that they would be built based on these surrogate rules artificially introduced and obviously unconstitutional.

As effects of the criminal trial, it is beyond any doubt that the evidence obtained in the criminal trials based on national safety warrants which had been issued for criminal acts or offenses which do not pertain to the category of national safety (therefore common law criminal acts, by reference to those of national safety) is null by law, because of being illegally administered, namely the national safety warrants had been issued in the absence of a legal frame which would have allowed their issuance as national safety warrants. The sources of the criminal procedure law and criminal law may only be the Constitution, the organic law, the ordinary law (in certain situations, when the Constitution does not expressly impose an organic law), in these categories also entering the emergency ordinances and the simple ones issued by the Government by means of the constitutional law institution of legislative delegation, provided by art. 115 of the Constitution. In this regard the provisions of art. 64 para. 2 of the old criminal procedure Code apply (the means of proof obtained in an illegal manner may not be used in the criminal trial), in the legal regime applicable when in force, respectively art. 102 para. 2 of the new criminal procedure Code (the evidence unlawfully obtained may not be used in the criminal trial). Therefore, in a logical manner, correlatively, the criminal trials in which there is evidence administered in the above-mentioned manner should be tried with the elimination of such evidence, as it is expressly provided by art. 102 para. 3 and 4 of the new criminal procedure Code.

3. Conclusions

The controversial situation generated by the wrong practice of using and/or issuing national safety warrants for criminal acts which do not enter in the category of the national safety criminal offenses may be solved in the easiest way by assuming the entering into legality by the main institutional actors with attributions regarding the entire observance of the principle of legality and supremacy of the Constitution: the Parliament of Romania, by issuing explicit, clear, unequivocal legal norms with legal force in this regard, in this matter, also seeing the very obsolete aspect of Law no. 51/1991 regarding national safety by reference to the Constitution and the rest of the Romanian and European normative frame, updating it in the light of the practice of national courts, of the CCR, as well as the practice of ECHR (CEDO) and CJEU (CJUE), including the specialized doctrine to date. Another public authority with essential attributions regarding the adjustment of such delicate situations is the HCCJ (ICCJ), which has the specific legal instruments to correctly interpret and enforce a unitary application of the procedural law at national level, mandatory for all courts.

In concrete terms, the HCCJ (ICCJ) could carry out an analysis of the criminal law and criminal procedure law sources in order to identify how, as legal reasoning, we ended up issuing national safety warrants for common law criminal acts, respectively if those grounds for the issuance of these atypical and derogatory categories of intercept warrants are justified in the light of the legal frame of Romania at the level of the former criminal Code and criminal procedure Code, as well as the legal regime introduced by the two new codes – criminal and criminal procedure. Proceeding in this manner, the HCCJ (ICCJ) could apply the aforementioned recent decisions of the CCR through which the constitutional court has clearly established that intelligence agencies may not have a determining role in the investigations in criminal matter and may not administer evidence, especially in the case of criminal offenses which exceed the sphere of criminal offenses against national safety.

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