THE LEGAL CONSEQUENCES OF THE CONSTITUTIONAL COURT"S DECISIONS IN THE CONTEXT OF THE LEGALITY PRINCIPLE OF THE CRIMINAL PROCEDURE

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Abstract

The principle of legality of the criminal procedure is the established general rule according to which the criminal trial is carried out under the provisions stipulated by the law. In order to fully understand the application of the fundamental principle of legality of the criminal proceeding, it is necessary to clarify, on the one hand, the notion of "criminal procedural law" - a term that does not have a legal definition and, on the other hand, it is necessary to analyze the evolution of the concept referring to the source of criminal procedural law, in the current conventional context, as well as in the context of the Constitutional Court"s jurisprudence. Ensuring the application of the criminal process" lawfulness is firstly achieved by the legislator"s fulfillment of the obligation to clearly regulate the rules of conducting the criminal proceedings and other judicial proceedings in connection with a criminal case. However, the actual reality proves the existence of numerous legal provisions declared unconstitutional, the Constitutional Court"s decisions being binding for both the legislator and the judicial bodies. Thus, the purpose of the research is to identify the consequence of the legislator"s lack of intervention so that the stipulations declared unconstitutional would agree with the Constitution"s provisions if it grants valences of some sources of law to the decisions of the Constitutional Court, if it transforms the Constitutional Court into a positive lawmaker or it just assigns the entire task of guaranteeing of the criminal process" lawfulness to the judicial bodies. In fact, although the nullity is the main procedural guarantee of the legality of the criminal trial, the consequences of the Constitutional Court"s decisions raise many problems of unitary interpretation and application of the law even in this area, thus questioning the legality of the criminal process.

Keywords: *the legality of the criminal trial, criminal procedural law, the effects of the Constitutional Court"s decisions, sources of criminal procedural law, absolute and relative nullity*

1. Introduction

The legality of the criminal process is the fundamental principle governing the conduct of the entire criminal process, its incidence sights all phases of the criminal process: prosecution, preliminary chamber, judgment and enforcement of judgments.

The fundamental principle of legality is generally enshrined in the Romanian Constitution, in art. 1 para. (5) showing that, in Romania, the observance of the Constitution, its supremacy and the laws is compulsory, and in particular, as regards the criminal proceedings, in art. 2 of the Code of Criminal Procedure, according to which the criminal proceedings are carried out in accordance with the provisions prescribed by the law.

Starting from the general framework of the principle of legality of the criminal process, although the existence of a clear and predictable law-as a source of law,

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constitutes an imperative in this area, the notion of criminal procedural law does not know a legal definition, being imposed a detailed analysis of it in the context of the case-law of the Constitutional Court and the European Court of Human Rights.

In order to respect the principle of legality of the criminal process, it is mainly the legislature"s task to lay down legal rules governing the conduct of the criminal proceedings, but, as any regulation of an activity, the law cannot capture in detail all the issues that will arise during the criminal process.

It also equates to the lack of a text of law and the assumption that there is a written law, but which does not meet the quality conditions.

In contrast to the field of criminal law when the lack of legal provision constitutes an impediment to the criminal liability of a person, the criminal process will not stop in the event of a lack of regulation of a particular procedural situation.

The inability of the legislator to provide in a text of law all situations which may be encountered in the conduct of the criminal proceedings or their respective regulatory provisions, leads to the exercise of obligations imposed on constitutional authorities or judicial bodies, precisely in order to comply with the principle of legality.

Thus, the exclusive competence to legislating, mainly attributed to the Parliament, is not discretionary, but is subject to scrutiny of the constitutionality of the Constitutional Court of Law. However, that intervention should not confer on the Constitutional Court legislative powers when the legislature has not fulfilled that obligation.

Despite the latter aspect, new rules of general binding criminal law have been established through the recent case-law of the Constitutional Court.

It remains to be determined whether, in those circumstances, the decisions of the Constitutional Court should be included in the notion of criminal procedural law, which is required to be analysed in the light of the case-law of the European Court of Human Rights, according to which the autonomous notion of "law" also includes jurisprudence, or if the decisions of the Constitutional Court acquire the nature of criminal procedural law sources.

The binding nature of the decisions of the Constitutional Court requires the adoption of one of the abovementioned solutions, although at this time, in the national legal order, in the concept of law, is not also included the compulsory case-law, and the doctrine is reserved in classifying the decisions of the Constitutional Tribunal as the sources of criminal procedural law.

The latter approach should be announced in the context of the evolution of the case-law of the Constitutional Tribunal, especially in the field of interpretative decisions, which, in certain specific cases, bear the valences of a true regulation.

In this legal context, the hardest task lies with the judicial bodies, as the main actors of the criminal process, who have an obligation to interpret the law in accordance with the principle of legality, to comply with the decisions of the Constitutional Court or, in the absence of the total laws or other rules of criminal procedural law, application of the analogue supplement.

It is therefore necessary to identify the legal pathways for carrying out the criminal liability activity of the persons who committed offences, by reconciling an imperfect law with the effects of the decisions of the Constitutional Court, when they appear nuances in fulfilling the obligations and observance of the legal competences of each of the two powers, the criminal process will be carried out in all

cases, imperative under the principle of legality.

2. Criminal Procedural law

2.1. The notion of law

As a consequence of the fact that the conduct of the criminal proceedings is governed by the adage, "*the nulum judicium sine lege*", "the repressive Courts must work only in the cases, in the form and, in the forms prescribed by law, avoiding and refusing any other process that does not bear the seal of legality, even if it were, in cases, more comfortable, propor and more rational. On the other hand, that principle requires the legislator to make a full and wise bundle of rules to ensure the proper conduct of the repressive action within the reach of repressive justice."[1]

In applying the principle of legality, the conduct of the criminal process must take place in accordance with the provisions laid down by law, so the existence of a law and the application and compliance with the legal provisions is required.

There is no regulated definition of the notion of "criminal procedural law", but relevant in this respect are the provisions of art. 173 of the Penal Code defining the notion of " criminal law " as any criminal provision contained in organic laws and emergency ordinances or other normative acts which, at the time of their adoption, had the power of law.

On the one hand, the determination of the meaning of "criminal law" is only a starting point for the identification of the framework for applying the principle of legality of the criminal process, since the provisions of art. 173 of the Penal Code concern substantive rules of criminal law, and the conduct of the criminal proceedings takes place on the basis of procedural criminal law rules, in the latter case, in relation to the principle of legality of the criminal process, the notion of law being interpreted *lato sensu*. The difference between substantive and procedural law rules has been highlighted by the fact that, "all the rules of law confering such a rights will constitute substantive rules, contrary to all the rules of their content, do not indicate only how the rights granted will be exercised and the formalities after which the entire activity leading to the realisation of the repressive justice will be carried out shall be rules of formal law (procedural provisions)."[2]

On the other hand, the conduct of the criminal process and other judicial proceedings involves the competition of both the judicial authorities and other parties or other persons in achieving its purpose, which implies the undertaking of numerous activities governed by secondary legislation, such as government decisions, orders or internal organisation regulations. The verification of compliance with the principle of legality of the criminal process is not limited to fully respecting only the provisions of the laws, but also by analysing the lower-level acts, without the power of law, but which come to detail the rules of procedural law compliance with the legal limits.

In this respect, in the literature of specialty[3] it has been shown that the

[1] I. Tanoviceanu, *Treaty of Law and Criminal Procedure*, vol. IV, Second edition of the course of law and criminal Procedure, reviewed and supplemented by V. Dongoroz and. A., typography, "The Judicial Courier", Bucharest, 1924, p. 35;

[2] *Idem*, p. 25;

[3] N. Volonciu, *Treaty of Criminal Procedure*, Vol. I, Peideia Publishing House, Bucharest, 1998, p. 83; V. Dongoroz etc., *New Criminal Procedure Code and previous Criminal Procedure Code*, Political Publishing House.,

compliance with the principle of legality is checked against all the rules governing an act, and not only in relation to a certain provision of law.

In the case-law of the Constitutional Court [4] as regards the notion of "law", it was noted that the notion of law "has several meanings according to the distinction between the formal or organic and material criteria."

Thus, a distinction is made between the existence of a law text according to the formal citerium (*lex scripta*) and the quality of the law – in relation to the substantive criterion (*lex certa*).

The formal criterion shall be assessed on the basis of the issuing body and the procedure to be complied with in the adoption of the law. According to art. 61 para. (1) the second sentence of the Constitution, the Parliament is (...) the only legislature of the country, further the provisions of art. 76, 77 and 78, stipulating that the law adopted by Parliament is subject to promulgation by the President of Romania and enters into force three days after its publication in the Official Gazette of Romania, part I, if no further date is foreseen in its content.

As regards the government"s Ordinances, The Court held[5] that, "by drafting such normative acts, the administrative body exercises a competence by award which, by its nature, falls within the legislative competence of Parliament. Therefore, the ordinance is not a law in a formal sense, but an administrative act of the law, assimilated to it by the effects that it produces, while respecting the substantive criterion."

Next, the analysis of the existence of a law from the point of view of the substantive criterion relates to the subject matter of the norm, namely the nature of regulated social relations. These conditions add to the clarity and accessibility of the text of law, the European Court of Human Rights, in its case-law[6] showing that there is not enough the existence of a procedural legal rule contained in laws, ordinances, Government emergency ordinances, in international conventions and treaties to which Romania is part or other acts regulating a particular activity, but the notion of law incorporates the right of origin both legislative and jurisprudential and involves some qualitative conditions, inter alia those of accessibility and predictability.

For the full understanding of the substantive nature of the law, the relevant considerations are the recitals of decision No. 600 of 9th of November 2005 of the Constitutional Court[7] by which, concerning the concept of "law", the Court held that, "by definition, the law, as a legal act of power, is unilateral, giving expression exclusively to the will of the legislature, whose content and form are determined by the need to regulate a particular area of social relations and its specificities. "

The condition of accessibility of the law is fulfilled through the provision of art.

Bucharest, 1969, apud. M. Udroiu, in M. Udroiu (coord.), *Code of Criminal Procedure. Commentary on articles*, ed. 2, C. H. Beck Publishing House, Bucharest, 2017, p. 6;

[4] Decision No. 146 of 25 March 2004 a Constitutional Court, Published in the Official Gazette of Romania, Part I, Nr. 416 of 10 May 2004;

[5] *Ibidem;*

[6] ECHR, judgment in Dragotoniu and Militaru-Pidhorni v. Romania, 24 May 2007, paragraph 34 and 35; ECHR, judgment in Cantoni v French, 15 November 1996, paragraph 29; Judgment of the ECHR, Coëme and Others v. Belgium, 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, paragraph 145, ECHR 2000-VII and E.K. v. Turkey, No. 28496/95, paragraph 51, 7 February 2002;

[7] Decision No. 600 of November 9, 2005 of the Constitutional Court, Published in the Official Gazette Nr. 1060, Part I, of 26 November 2005;

10 of Law No. 24 of 27 March 2000 to the fact that, with a view to their entry into force, the laws and other normative acts adopted by Parliament, the ordinances and judgments of the Government, the normative acts of the autonomous administrative authorities, as well as the orders, the instructions and other normative acts issued by the Central public administration bodies shall be published in the Official Gazette of Romania, part I.

It is therefore necessary to give the person the opportunity to acknowledge the content of the legal norm. By publishing it in the Official Gazette of Romania, the law fulfils the the requirement of accessibility, in the same vein as the European Court of Human Rights in in the cause Rotaru v. Romania, judgment of 29 March 2000, paragraph 54.

As far as secondary legislation is concerned, the condition of accessibility is achieved by bringing it to public knowledge, for example, by publishing on the websites of the institutions, and that the fulfilment of that condition is established in concrete, in relation to each subject and the circumstances of the case.

The predictability of the law provision presupposes that it must be sufficiently clear and precise to be applied.

In this respect, according to art. 7 para. (4) of Law No. 24 of 27 March 2000 on the rules of legislative technique for the drafting of normative acts, the legislative text must be formulated clearly, fluently and intelligible, without syntactic difficulties and obscure or equivocal passages. No affective load terms are used. The form and aesthetics of the expression must not prejudice the legal style, accuracy and clarity of the provisions.

With regard to the accessibility and predictability of the law, the Constitutional Court noted[8] that "one of the requirements of the principle of compliance with laws relates to the quality of normative acts and that, in principle, any normative act must fulfil certain qualitative conditions, including predictability, which presupposes that it must be sufficiently clear and precise to be applied. Thus, the wording with sufficient precision of the normative act allows the persons concerned, who may, if necessary, appeal to the advice of a specialist, to provide a reasonable measure, in the circumstances of the case, of the consequences which may result from an determined act . Concerning the same law-quality requirements, the guarantee of the principle of legality, the European Court of Human Rights, by judgments of 4 May 2000, 25 January 2007, 24 May 2007 and 5 January 2010, rendered in the cases Rotaru v. Romania (Paragraph 52), Sissanis v. Romania (paragraph 66), Dragotoniu and Militaru-Pidhorni v. Romania (paragraph 34) and Beyeler v. Italy (paragraph 109), made it compulsory to ensure these laws quality standards as guarantee of the principle of legality laid down in article 7 of the Convention for the Protection of Human rights and fundamental freedoms.

Thus, by judgment in Sissanis v. Romania (paragraph 66), the European Court held that the phrase <prescribed by the law>requires the contested measure to have a basis in national law, but also seeks the quality of the law in question: it should indeed be accessible to the vigilante and predictability in relation to its effects.

It was also held that, in order for the law to satisfy the requirement of predictability, it must state with sufficient clarity the extent and modalities of the exercise of the discretion of the authorities in that field, taking into account the aimed legitimate purpose to provide the person

[8] Decision no. 1 of the 10th of January 2014 of the Constitutional Court, Publised in The Official Gazzette of Romania, Part I, no. 123 of the 19th of February 2014;

with adequate protection against the arbitrary.

In addition, it has been held that it cannot be regarded as <law> merely a rule set out with sufficient precision, in order to enable the citizen to control his conduct, by appealing in need of expert advice on the matter, he must be able to provide, to a reasonable extent, to the circumstances of the case, the consequences which may result from a particular act. "

Moreover, the European Court of Human Rights has shown[9] that the significance of the notion of predictability depends largely on the context of the text, the area it covers, and the number and quality of its recipients.

The predictability of the law does not preclude the person concerned from having to resort to good advice in order to assess, at a reasonable level in the circumstances of the case, the consequences that might arise from a certain action[10]. This usually happens with professionals, accustomed to proving a great prudence in the exercise of their profession. It can also be expected from them to pay particular attention to the assessment of the risks involved[11].

Consequently, as a normative legal act, in general, is defined both by form and by content, the law in a broad sense, thus including assimilated acts, is the result of combining the formal criterion with that material.[12]

2.2. International conventions and treaties

The conventions and international treaties to which Romania is a party are included in the notion of "law" in this regard being the provisions of art. 11 of the Romanian Constitution, which establishes that the treaties ratified by Parliament, according to the law, form part of national law, and if a treaty to which Romania is to become a party contains provisions contrary to the Constitution, the ratification can take place only after the revision of the Constitution.

Also, according to the provisions of art. 20 of the Constitution, the constitutional provisions on citizens" rights and freedoms will be interpreted and applied in accordance with the Universal Declaration of Human Rights, with the pacts and other treaties to which Romania is a party. If there are inconsistencies between the pacts and the treaties on fundamental human rights, to which Romania is a party, and domestic laws, they have priority over international regulations, unless the constitution or national laws Contain more favourable provisions.

2.3. Compulsory case-law

Decisions given in the appeal in the interest of the law and the decisions rendered by the Panel on the untying of legal matters have binding force for the courts from the date of publication of decisions in the Official Gazette of Romania.

According to art. 474 para. (4) of the Code of Criminal Procedure, the unlinking of the matters of legal proceedings is compulsory for the courts from the date of publication of the decision in the Official Gazette of Romania, part I.

Also, as regards the decisions of the High Court of Cassation and Justice, pronounced by the panel for the untying of legal matters in criminal matters, according to art. 477 para. (3) of the Code of Criminal

[9] ECHR, Groppera Radio AG and Others v. Switzerland of 28 March 1990, paragraph 68;
[10] ECHR, Tolstoy Miloslavsky v. The United Kingdom of Great Britain, July 13, 1995, paragraph 37;
[11] ECHR, Cantoni v. France, 22 June 2000, paragraph 29;
[12] Decision no. 146 of 25 March 2004 of the Constitutional Court, Published in the Official Gazette of Romania, Part I, no. 416 of May 10, 2004;

Procedure, the unlinking of matters of law is compulsory for courts from the date of publication of the decision in the Official Gazette of Romania, part I.

However, the judiciary cannot enter the field of legislative power.

In this respect, the Constitutional Court has held[13] that it has no power to engage in the field of law-making and criminal policy of the State, any contrary attitude constituting an interference with the jurisdiction of that constitutional authority. The Court acknowledges that, in that area, the legislature enjoys a rather large margin of discretion, given that it is in a position which allows it to assess, according to a number of criteria, the need for a particular criminal policy.

Therefore, on the basis of the principle of separation of powers in the state, the High Court of Cassation and Justice has no competence in the field of law.

This issue is relevant in the present case, given that the decisions of the High Court of Cassation and Justice on appeal in the interests of the law or for the untying of matters of law in criminal matters may also concern a question of procedural low. The High Court of Cassation and Justice has held[14] in this regard the following: "the question of which the untying is subject to the examination of the high Courts of Cassation and Justice must, as a rule, concern a matter of substantive law which depends on the substantive settlement of the case, which may only, as an exception, concern a procedural problem, i.e. to the extent that the solution given to it is significantly passed on to the settlement of the fund."

Regarding the absence of the law of a judgment of the High Court given on appeal in the interests of the law or for the untying of matters of law, it was stated that[15] că the "Decision No 2 of April 14, 2014 of the Supreme Court is not a normative act, in the meaning given to this notions of law no. 24/2000, republished, with subsequent amendments and additions, which in art. 11, makes a limitative enumeration of issuers of such acts, which does not include the High Court of Cassation and Justice by judgments given in the uniform interpretation and application of the law.

On the other hand, the judgments of the High Court on appeal in the interest of the law or for the untying of matters of law cannot be regarded as statutory laws, in the meaning of art. 173, the final sentence of the Penal Code, and, in the light of the fact that it does not regulate social defence relationships, does not establish rules of conduct and rules of crimination or which relate to criminal liability, its bases and limitations, but reflects only a interpretation of such provisions contained in normative acts drawn up and adopted in accordance with the legislative technical procedure applicable to the matter. In the same context, accepting the idea that the interpretative solutions rendered by the Supreme Court by prior judgments for the untying of matters of

[13] Decision no. 405 of 15 June 2016 of the Constitutional Court, Published in the Official Gazette, Part I, no.517 of 08 July 2016; Decision no.629 of 4 November 2014 of the Constitutional Court, Published in the Official Gazette of Romania, Part I, no.932 of 21 December 2014;

[14] Decision No. 7 of 17 April 2015 of the Panel for the untying of matters of law in criminal matters of the High Court of Cassation and Justice, Published in the Official Gazette of Romania, Part I, No. 359 of 25 May 2015;

[15] Decision No. 21/2014 of the High Court of Cassation and Justice-the panel for the untying of matters of law in Criminal Matters, Published in the Official Gazette of Romania, Part I No. 829 of 13 November 2014, *which established that the provisions of article 5 para. 1 of the Penal Code must be interpreted, including the limitation of criminal liability, in the sense that the more favourable criminal law is applicable to offences committed before 1 February 2014 which have not yet been definitively judged, in accordance with decision No. 265/2014 of the Constitutional Court;*

law and decisions given in appeal in the interest of the law are included in the sphere of criminal law would amount to a violation of the principle of separation of powers in the state by the judicial authority taking over the powers of the legislative power with the consequence of verifying the constitutionality of those judgments by the Court of Constitutional law. "

2.4. Case-law

In the Romanian criminal law, jurisprudence does not constitute a source of law, in this regard being also the decision no. 23 of 20 January 2016 of the Constitutional Court[16], whereby the Constitutional Court held that, in the continental system, the case-law does not constitute a source of law so that the meaning of a rule can be clarified in that way, because, in such a case, the judge would become a lawgiver.

However, this view must be nuanced with the case-law of the European Court of Human Rights[17], according to which the notion of " law ", within the meaning of the EU Convention for the Protection of human rights and fundamental freedoms, incorporates the right of origin both legislative and jurisprudential.

In order for the case-law to equate to the acceptance of the European Court of Human Rights with a law, it must undergo a stage of crystallization leading to the existence of a constant jurisprudence, formed over a large period of time, so as to enable the citizen to reasonably expect a certain interpretation of the rules, taking into account the developments in practice.

The analysis of jurisprudence as a source of law, in the light of the jurisprudence of the European Court of Human Rights, was made on the occasion of establishing the existence of a more favourable criminal law as a result of decision No. 2/2014 of the High Court of Cassation and Justice (by which it was decided that in the application of article 5 of the Penal Code, the limitation of criminal liability is an autonomous institution for the institution of the penalty) and subsequently to the decision of the Constitutional Court No. 265/2014 (by which it has been held that the provisions of article 5 of the Penal Code are constitutional in so far as they do not allow the combination of the provisions of successive laws in the establishment and enforcement of more favourable criminal law).

Thus, the High Court of Cassation and Justice recalled[18] that " it has been held in principle by the Strasbourg court that the notion <law>in the light of the European Convention encompass the right of origin both legislative and jurisprudential, but decision No. 2 of 14 April 2014 handed down by the High Court of Cassation and Justice-the Assembly for the untying of matters of law in criminal matters, does not subdue to this notion, constituting only a stage in the complex process of crystallization of a case of jurisprudences consistent with the determination and enforcement of more favourable criminal law after the entry into force on 1 February 2014 of the new Penal Code, adopted by Law No. 286/2009.

In other words, a single judgment, either in the untying of a matter of law by the Supreme Court, in accomplishing its powers of interpretation and uniform application of

[16] Decision No. 23 of 20 January 2016 of the Constitutional Court, Published in the Official Gazette of Romania, Part I, no 240 of 31 March 2016;

[17] ECHR, Kokkinakis v. Greece of 25 May 1993; ECHR, judgment of S.W. and C.R. v. The United Kingdom of 22 November 1995; ECHR, judgment in Cantoni v. Franceadin 15 November 1996; ECHR, judgment of the E.K. v Turciadin 7 February 2002; ECHR, judgment in Pessino v Franceadin October 10, 2006);

[18] Decision no. 21/2014 of the High Court of Cassation and Justice - The Criminal Law Enforcement Unit, Published in the Official Gazette, Part I no. 829 of November 13, 2014;

the law, does not amount to the European Court"s acceptance of a law, a concept which implies the existence of a constant jurisprudential guidance, formed over a long period of time.

However, the requirement of consistent case-law has not been met with regard to the determination and application of milder criminal law by national courts after 1 February 2014, given the very short period of time, only three months, pending the publication of the Constitutional Court"s Decision no. 265 of May 6, 2014, and the different interpretations made in judicial practice for the purpose of assessing criminal law more favorably either globally or autonomously, especially as there was no unitary view of the latter in the latter as autonomous of different criminal law institutions.

In those circumstances, it cannot be the shaping of a constant case-law either in the application of the more favourable criminal laws in matters of criminal prescription in the period of only 20 days following the publication on 30 April 2014 of the judgment of the Supreme Court of Untying this issue of law until the end of its effects on 20 May 2014, when the interpretation in accordance with the Constitution of the provisions of art. 5 of the Penal Code became of immediate application and general compulsory. "

In the light of the case-law of the European Court of Human Rights, as has been mentioned above, the autonomous notion of " legislation " also includes jurisprudence, but this case-law must be constant. The decision-making function for the courts serves precisely to remove the doubts that may exist with regard to the interpretation of the rules, taking into account the developments in the daily practice, provided that the result is coherent with the substance of the offence and clearly foreseeable [19].

Consequently, it can reasonably be argued that a jurisprudential rule, as it is respected by the majority of the internal courts, is clear and accessible and that its application in the present case is foreseeable[20], it can be considered, "law" within the meaning of Jurisprudence of the European Court of Human Rights.

3. Deciziile Curţii Constituţionale şi efectul general obligatoriu al acestora

According to the provisions of art. 147 para. (4) of the Constitution of Romania, from the date of publication, the decisions of the Constitutional Court are generally binding and have power only for the future. The Court[21] has ruled, with a value of principle, that the compulsory force accompanying the judicial Acts, so also the decisions of the Constitutional Court, attache not only to the device, but also to the considerations which it supports. Thus, it was noted that both the recitals and the device of its decisions are generally binding and are imposed with the same force on all the subjects of law.

Although its decisions are generally binding, the Constitutional Court has no competence in the field of law-making.

[19] ECHR, the decision of S.W. v. the United Kingdom of Great Britain, 22 November 1995, Series A no. 335-B, p. 41, paragraph 36;

[20] ECHR, Lupas and others v. Romania of 14 December 2006, paragraph 69;

[21] Decision of the Plenum of the Constitutional Court no. 1/1995 regarding the mandatory of its decisions under the constitutionality control, Published in the Official Gazette of Romania, Part I, no. 16 of 26 January 1995; Decision no. 1.415 of November 4, 2009 of the Constitutional Court,, Published in the Official Gazette of Romania, Part I, no. 796 of 23 November 2009 and Decision no. 414 of April 14, 2010 of the Constitutional Court, Published in the Official Gazette of Romania, Part I, no. 291 of May 4, 2010;

According to art. 2 para. (3) of Law No. 47/1992, the Constitutional Court shall only pronounce on the constitutionality of the acts in respect of which it was seised, without being able to amend or supplement the provisions subject to scrutiny. In its case-law[22], it held that Parliament is free to decide on the state"s criminal policy, any opposite attitude constituting an interference with the jurisdiction of that constitutional authority. While, in principle, Parliament enjoys exclusive competence in regulating measures relating to the State"s criminal policy, that competence is not absolute in the sense of excluding the exercise of constitutionality control over the measures adopted.

The principle of legality is naturally complemented by the principle of separation of powers in the state, the Constitutional Court having no legislative powers.

It must not be understood from that conclusion that the decisions analysing the constitutionality of a legal provision do not affect the rule of law. As previously mentioned, they are compulsory from the date of publication in the Official Gazette of Romania, and the application and interpretation of the provisions laid down by law must be carried out only in accordance with those which are made by simple decisions or interpretative finding of unconstitutionality.

Therefore, their contribution, in our particular case, in criminal procedural matters, in compliance with the limits of the principle of legality, shall be retreated to the legal provisions analysed, already existing, by excluding the non-constitutional norm from the Legal order or by granting the constitutional meaning.

Although this aspect proves to be clearly established, the general binding effect of the decisions of the Constitutional Tribunal continues to exist by imposing rules of law on the nature of criminal procedural law.

The establishment of a rule of criminal procedural conduct both by the recitals of decisions rejecting the exceptions of unconstitutionality and by the removal of unconstitutional legal rules in force, but especially by the imperative stipulation of a certain positive conduct exceeding the scope of the rule which formed the subject-matter of the exception of unconstitutionality – the aspect encountered in the interpretative decisions, gives to the decisions of the Constitutional Court the nature of sourses of procedural, criminal law[23].

This is the direct consequence of the general binding effect of the decisions of the Constitutional Court and the failure of the legislature to agree unconstitutional provisions with the provisions of the Constitution, within 45 days after publication of the decision, thus creating a legislative void.

However, the passiveness of the legislature does not take effect in the event of decisions rejecting unconstitutionality exceptions-when the legal rules continue to enjoy the presumption of constitutionality.

The provisions of art. 147 para. (4) of the Constitution of Romania, which establishes the binding of the general effect, do not distinguish between decisions which reveal the unconstitutionality of a legal provision and decisions rejecting unconstitutionality exceptions. A well-known rule of interpretation is that „where the law does not distinguish, neither should

[22] Decision no. 405 of 15 June 2016 of the Constitutional Court, Published in the Official Gazette, Part I, no. 517 of July 8, 2016; Decision no. 629 of 4 November 2014 of the Constitutional Court, Published in the Official Gazette of Romania, Part I, no. 932 of December 21, 2014;

[23] F. Streteanu, D. Nițu, *Criminal Law. General Part, Vol. I*, Universul Juridic Publishing House, Bucharest, 2014, p. 75;

we distinguish „(*ubi lex non distinguist, nec nos distinguere debemus*). Perfectly applicable in the present case, all the decisions of the Constitutional Tribunal, without distinguishing whether or not the unconstitutionality of a law or ordinance or a provision of a law or ordinance have been established, are general mandatory.

In the case of decisions establishing the unconstitutionality of a text by law, by virtue of the negative legislature, the Constitutional Court excludes the rules contrary to constitutional provisions from the legal order and is fully justified the effect generally binding *erga omnes*, without the possibility of a text being both unconstitutional and constitutional in the light of the subjects of law.

The general binding effects of erga omnes are a natural consequence of the constitutional provision found in art. 147 para. (1) stating that the provisions of the laws and ordinances in force and those of the regulations, as established as unconstitutional, cease to be legal effects at 45 days after the publication of the decision of the Constitutional Court if, in this The Parliament or the Government, as the case may be, do not agree the unconstitutional provisions with the provisions of the Constitution. During that period, the provisions established as unconstitutional are suspended by law.

As regards the decisions rejecting unconstitutionality exceptions, there is obviously no such effect of the suspension of law and, subsequently, the termination of legal effects. By the time the finding of its unconstitutionality is found, any rule is presumed to conform to the provisions of the fundamental law. However, as previously mentioned, the Romanian Constitution confers a generally binding effect on all decisions of the Constitutional Court. As a symmetry of the consequences of the finding of the unconstitutionality of legal provisions, the general binding effect is manifested in the case of decisions rejecting the exception of unconstitutionality by maintaining the obligation of application, in the rules of law considered constitutional within the limits of the control carried out. [24]

However, in that case, the determination of the framework of the binding general effect must be carried out in accordance with the authority of the court ruling of the judicial decision, the general binding effect being significantly diminished.

Therefore, we note that the rules on Civil Procedure, which are compatible with the nature of the proceedings before the Constitutional Tribunal, confer on the authority of the judgment, including the decision rejecting the exception of unconstitutionality, but only in Relation to a new exception of unconstitutionality raised by the same parties, in the same case and relating to the same legal provisions, for the same reasons. As such, the generally binding effect, is limited in this case, to the question cut with the authority of work judged. The analysis of the Constitutional Court is circumscribing the criticality and factual and legal situation existing in the case in which the exception was lifted. At the same time, the interpretation of the provisions of art. 29 para. (3) of Law No. 47/1992 on the organisation and functioning of the Constitutional Court, it is apparent that the provisions which have not been found unconstitutional by an earlier decision of the Constitutional Court may be subject to the exception. Therefore, the general binding effect of the decisions establishing the constitutionality of the legal provisions criticized should not be absoluted. Under no circumstances will such a decision be able to

[24] I. Morar, M. Constantinescu, *The Constitutional Court of Romania*, Albatros Publishing House, Bucharest, 1997, p. 162;

be opposed to the power of work judged in another case or even in the same procedural framework, but for other reasons.

By Decision No. 169/1991[25] The Constitutional Court held that, the same parties and for the same reasons cannot reiterate the exception of unconstitutionality, since the authority of the work on trial would be infringed. But in another process the exception can be reiterated, thus enabling the Constitutional Court to reanalyze the same issue of unconstitutionality, as a result of invoking new grounds or of intervening other new elements, which amend the case-law of the court. " The consequence of the elements of differentiation of law and of fact between the cases in which the exceptions of unconstitutionality are raised, the general binding effect of the decision establishing the constitutionality of a legal provision will operate only *inter partes*.

However, although a decision rejecting the exception of unconstitutionality enjoys the authority of the Court of Justice, that aspect is recognised only in respect of the considerations which support and explain the solution adopted (decisive considerations), As well as (...) of those who have been debated in the process (decision-making considerations). The Working authority shall not concern the indifferent considerations, which may be lacking in the content of the reasoning, without it leading to the lack of foundation of the judgment." [26]

Therefore, we do not exclude *de plano* the possibility of establishing in the recitals of decisions rejecting exceptions to non-constitutionality of general procedural law rules, and not strictly limited to the cause of the judgment, which, at the same time, constitutes decisive considerations supporting the given solution and thus the general binding effect imposed on all legal subjects.

In the case of interpretative decisions, the Constitutional Court establishes the constitutional interpetation of a text of law, thus saving the legal provision from its wholly removal from the legal order.

However, there are precedents when the constitutionality control has been adopted by the interpretative powers of judicial bodies, but also of positive legislating powers. By imposing a constitutional interpretation mechanism, the Constitutional Court excludes from application a certain procedural rule of law in a given interpretation or may determine its constitutional meaning even by effectively adding to the text of law of new rules of law, in order to confer to the rule a constitutional meaning.

If the limitation of the application of a text of law capable of several interpretations, by establishing its constitutional meaning, falls within the exercise of the powers of the Constitutional Tribunal"s negative legislature, the same cannot be stated in establishing constitutional interpretation by adding new rules of law. In the latter case, the nature of the legal source of the decisions of the Constitutional Tribunal is evident.

4. Effects of Constitutional Court decisions in criminal proceedings – sources of criminal procedural law on invalidity

"The first consequence of the principle of legality is absolute and legal invalidity (Ope Legis), of all acts carried out not in

[25] Published in the Official Gazette of Romania, Part I, no.151 of 12 April 2000;

[26] The Decision no. 554 of the 19th of September 2017 of the Constitutional Court, Published in The Official Gazette of Romania, Part I, no. 1013 of the 21 of December 2017;

conformity with or contrary to the positive rules of Criminal Procedure law."[27]

The Constitutional Court noted [28] that, "the nulities of procedural and legal acts occupy an important place in the sphere of collateral ensuring the effectiveness of the principle of legality of the criminal process and the principle of the finding of truth, being designed to remove infringements of the procedural rules which intervened on the occasion of the establishment of a procedural act or of the proceeding to the fulfilment of a legal act and the negative consequences which those infringements have caused in the criminal proceedings."

The matter of nullity has been reformed by the current regulation, being limited in cases of absolute nullity, with the excluding from the absolute nulities of non-compliance with the provisions on referral to the court, the conducting of the investigation of social responsibility for minors, material competence and the quality of the person of the Court superior to the competent legal authority, as well as the material competence and the quality of the person of the criminal prosecution body and the attenuated sanctioning thereof by the establishment of deadlines to which it may be invoked, as a consequence of the regulation of the preliminary chamber. As regards the exclusion from absolute nulities of infringements of the provisions relating to substantive jurisdiction and the quality of the person of the criminal prosecution body, in the doctrine[29] it was shown that it seeks to avoid exceeding the duration of the reasonable grounds for resolving the cases, the possible harm caused by the conduct of judicial research.

Furthermore, as regards the relative nulities, the relevant is to eliminate the possibility of the judge or court to invoke, on its own motion, the relative nulities and to take them into account at any stage of the process, except in breach of the rules of Material competence or the quality of the person, where the judgment was carried out by a court superior to the competent legal authority and the irregularity of the procedure for the citation of a party.

In the absence of a clearly defined purpose by the legislator and on the basis of the fundamental principle of legality, the Constitutional Court has penalised some of the amendments adopted in matters of nullity, in that regard by stating[30] regarding the provisions of art. 281 para. (1) lit. (b) of the Code of Criminal Procedure, that the legislative solution contained in those provisions, which does not govern in the category of absolute nulities, breaches of the provisions relating to material competence and the quality of the person of the Criminal prosecution is unconstitutional.

The consequence of the decision of the Constitutional Court, definitive and generally binding, is to sanction the absolute nulity of non-compliance with the provisions regulating the substantive competence and the quality of the person of the criminal prosecution body . Although it can be argued that the decision of the Constitutional Court has not been dictated by procedural law, but has established the constitutional meaning of the provisions of art. 281 para. (1) lit. b) of the Code of Criminal Procedure, we cannot omit the fact that the provisions of art. 281 para. (1) lit. (b) of The Code of Criminal Procedure have a clear and strictly delimited

[27] I. Tanoviceanu, *op.cit.*, p. 35;

[28] The Decision no. 554 of the 19th of September 2017 of the Constitutional Court, Published in The Official Gazette of Romania, Part I, no. 1013 of the 21 of December 2017;

[29] C. Ghigheci, The principles of the criminal trial in The Criminal Procedure Code, Universul Juridic Publishing House, Bucharest 2014, p.37;

[30] Decision no. 302/04 May 2017 of The Constitutional Court, Published in The Official Gazette of Romania, Part I, no. 556 of the 17 of July 2017;

content to the material competence and the quality of the person of the Superior Court, and is evident the intention of the legislator to express the removal from the absolute nulity of the infringement of the rules on material competence and the quality of the person of the criminal prosecution body.

An interpretative decision is likely to intervene if the legal norm has several interpretations, one of which is unconstitutional, the Constitutional Court rescuing the provision of law from its inapplicability by preserving the constitutional meaning.

In the present case, we note that the provisions of art. 281 para. (1) lit. b) of the Code of Criminal Procedure, only by an interpretation per a contrario, exclude from the category of absolute nulities the infringements of the provisions relating to material competence and the quality of the person of the criminal prosecution body. Although the latter interpretation was penalised by decision No. 302/04.05.2017 of the Constitutional Court, the direct effect is to establish a new case of absolute nullity, unregulated by law, so of a new rule of criminal procedural law.

Also, by Decision No. 554/2017 the Constitutional Court[31] upheld the exception of unconstitutionality and found that the legislative solution contained in the provisions of art. 282 para. (2) of the Code of Criminal Procedure, which does not allow for the invocation of the relative nullity, is unconstitutional. According to art. 282 para. (2) of the Code of Criminal Procedure, the relative nulity may be invoked by the prosecutor, the suspect, the defendant, the other parties or the injured person, where there is a procedural interest in the breach of the legal provision violated. In that case, the exclusion of the possibility of the judge and the Court of Justice to invoke the relative nulity is apparent from the logical interpretation – per a contrario of the provision which formed the subject-matter of the exception of unconstitutionality.

Both as a result of the fact that in the case of interpretative decisions the legal provision does not cease to have legal effects at 45 days after the publication of the decision of the Constitutional Court if, within that period, the Parliament or the Government, as the case may be, do not put in agreement the unconstitutional provisions to the provisions of the Constitution, but it continues to produce effects in the constitutional sense established and as a result of the general binding effect, by Decision No. 554/19.09. 2017 the Constitutional Tribunal, shall be granted directly to the judge and to the Court of Justice to invoke the relative nulity, although this is not governed by law.

In other words, the Constitutional Court does not remove from application a provision of a law, on the basis of its duties as a negative legislature, is not confined to preserving the constitutional meaning of the legal norm, but penalises the lack of regulation by the establishment of new rules of criminal procedural law, thus constituting a genuine source of law.

It should be pointed out that the object of the exception of unconstitutionality may only form a provision of a law, and not its absence, by decisions given to the Constitutional Court not having jurisdiction to amend or supplement the provisions subject to Control.

Moreover, with regard to the establishment of the constitutional meaning, it should be noted that the reasoning per a contrario, by itself, does not give the legal norm more meanings, but on the contrary, limits the applicability of a provision,

[31] The Decision no. 554/19 September 2017 of the Constitutional Court, Published in the Official Gazette of Romania, Part I, no.1013/21.December 2017;

without extended to unforeseen cases of law.[32]

Although an intrinsic issue of constitutionality is not identified in the aforementioned legal provisions, but only a lack of regulation, and the intervention of the Constitutional Court does not find it justified, we nevertheless consider that the solutions arranged on the merits of the case are in total agreement with the principle of legality of the criminal process, although the legislative powers are the legal power and the interpretation and enforcement of the law is incumbent upon judicial bodies.

In this context, the granting of the character of the source of criminal procedural law to the decisions of the Constitutional Court proves to be an imperative, in this way, the conduct of the criminal process taking place predictably, the consequence that according to art. 147 para. (4) of the Constitution of Romania, from the date of publication in the Official Gazette of Romania, the decisions of the Constitutional Court are generally binding.

That assertion is fully valid in the cases analysed, the sanction which arises in the event of non-compliance with the provisions relating to the jurisdiction of the material and the quality of the person of the criminal prosecution body and the possibility of the judge or the Court of Justice to invoke the relative nulity of its own motion.

However, the task of integrating and applying the new rule of criminal procedural law established by the decisions of the Constitutional Tribunal in the conduct of the criminal proceedings lies with the judicial bodies, without there being any rules for the application of the mandatory character .

Thus, the provisions of art. 281 para. (3) and (4) of the Code of Criminal Procedure, lay down deadlines in which or until absolute nulity can be invoked, depending on the time of the process in which it intervenes.

It is concluded from the economy of the rules of nullity that the legislature expressly limited the possibility of invoking absolute nullity in the criminal prosecution phase after the preliminary chamber procedure was concluded. According to art. 281 para. (4) lit. (a) the Code of Criminal Procedure breaches of the provisions sanctioned with absolute nullity which may intervene in the criminal prosecution phase (set out in article 281 para. (1) lit. e) and F):

The presence of the suspect or defendant, when his participation is obligatory according to the law; the assisting by the lawyer of the suspect or defendant and the other parties, where the assistance is obligatory must therefore be invoked until the procedure is concluded in the preliminary chamber, if the infringement intervened during the criminal prosecution or in the preliminary chamber procedure.

On the other hand, the cases of absolute nullity which may interfere with the preliminary chamber and Judgment (referred to in article 281 para. (1) lit. A)-D): Composition of the trial panel; the substantive competence and personal competence of the courts, when the judgment was carried out by a court lower than the competent legal authority; advertising of the court hearing; the prosecutor"s participation, when his participation is compulsory according to the law may be invoked in any state of the process.

Although the decision of the Constitutional Court No. 302/04.05.2017 concerns the provisions of art. 281 para. (1) lit. (b) of the Code of Criminal Procedure, the infringement of which may be invoked in any state of the criminal proceedings, in determining the period up to which the

[32] I. Neagu, *A Criminal Procedure Treaty, General part, second edition*, Universul Juridic Publishing House, Bucharest,2010, p. 57;

infringement of the provisions relating to material competence may be invoked and the quality of the person of the Prosecution cannot omit the rationale of the limitation of the allegation of absolute nulliity according to the procedural phase in which the infringement took place.

At the same time, the provisions of art. 282 para. (2) and (3) of the Code of Criminal Procedure, govern the deadlines to which the relative nulity may be invoked, without there being a legal provision at present to stipulate whether the judge or court is bound by those deadlines following the decision of the Constitutional Court No 554/19.09. 2017 through which was directly awarded to the judge, namely the Court of Justice, to invoke the relative nulity.

We are therefore witnessing the creation of a vicious circle in which the decisions of the Constitutional Court become sources of criminal procedural law by establishing rules of law, in the case of a legislative loophole inconsistent with constitutional principles, rules such as cover the legislative void but which generate new legislative loopholes by the lack of legal rules governing the application of the new rules of criminal procedural law.

In this situation, it is up to the judicial bodies to interpret the law by analogy or application of the analogue supplement, without being able to invoke the lack of legal provision in the conduct of the criminal proceedings. "The activity leading to the realisation of justice repressive must necessarily follow its course and reach the end. The law of Criminal Procedure disciplines this activity, but in the course of its conduct may arise exceptional situations, which have escaped the legislature"s provision and are therefore not governed by the law. The silence of the law does not dispense with the interpreter to settle the new situations, so the repressive activity would remain suspended and condemned to abandon.

While the interpretation of the substantive criminal law when it finds that the law is silent, absolses and terminates the prosecution, the interpreter of criminal procedural law, has to make the law speak even when it is silent, because it owes the action repressive to the end."[33]

In this respect, in the doctrine it was shown that "then, when the gaps in the criminal Procedure Law cannot be fulfilled by an extensive interpretation, it will necessarily have to resort to the analogue supplement.

For this it will be sought in the law of Criminal Procedure if there is no express provision regulating in another matter a situation or a similar report. If there is such a provision then the completion of the gap by analogy may be accepted if we encounter the same conditions as they make interpretation possible by analogy."[34]

Application of the interpretation to the case in question, in relation to the reason for the imposition of the deadlines for invoking absolute nullity, namely the limitation of the possibility to invoke infringements of the provisions sanctioned with absolute nullity in the follow-up phase following the preliminary chamber procedure, invoking the infringement of the provisions relating to material competence and the quality of the person of the criminal prosecution body will not be able to take place in any state of the process, but only until conclusion of the procedure in the preliminary chamber, according to art. 281 para. (4) lit. A) of the Code of Criminal Procedure.

Things are different for the time limit by which the judge or court may invoke the relative nulleness. In this respect, the recitals of Decision No. 554/2017 of the

[33] I. Tanoviceanu, *op.cit.*, p. 49;
[34] *Idem*, p. 50;

Constitutional Court, which also enjoys the general binding effect, which has established that the possibility of a relative nullity is required "in the light of the outcome of the procedure in the preliminary chamber concerning the determination of the legality of the administration of evidence and the conduct of procedural acts by the prosecution authorities, has a direct influence on the conduct of the judgment on the merits, which may be decisive for the determination of guilt/innocence of the defendant (...) and as regards the role of the court at the trial stage of the criminal proceedings, the court considers that such a legislative solution — which does not allow, as a rule, the claim of relative invalidity of its own motion — cannot be justified only by the philosophy of the restriction of the active role of the court and, in general, by rethinking the system of criminal proceedings, in the sense of its approximation, in certain respects, by the adversial system. In this respect, the Court notes that, unlike the adversial system, in which the judge bears responsibility, in principle, solely on the correctness of the conduct of the proceedings, the task of establishing the facts and the guilt of the jurors, in the Romanian criminal process the court also assumes responsibility for these essential elements, which constitute the purpose of the process —-the determination of the offence and the guilt."

Therefore, the possibility for the judge and the court to take account of its own motion of the relative nullity is required on the basis of the principle of finding the truth and for the full clarification of the circumstances of the case.

However, that judgment is not attained in the event of limitation of the possibility of relying on the relative nullity by the court under the conditions of art. 282 para. (2) and (3) of the Code of Criminal Procedure, namely in the course or immediately after the act or at the latest until the closure of the preliminary chamber procedure, if the infringement intervened during the prosecution or in this proceeding, until the first period of judgment with the legal procedure fulfilled, if the infringement intervened in the course of prosecution, when the court was seised of an agreement to recognise the guilt, until the next period of judgment with the full procedure, if the infringement intervened during the judgment.

Without identifying, in this case, express provisions regulating a similar situation or report and fully agreeing with the rules of compulsory procedural law laid down in the decision of the Constitutional Court, the judicial bodies will appeal to the systematic interpretation consisting, "in the clarification of the meaning of a legal rule by linking it with other provisions belonging to the same branch of law."[35]. Therefore, "from all the methods of interpretation will be used with priority in interpreting the rules of criminal Procedure all those methods that allow to the interpreter to converge towards the fundamental principles of Criminal procedure. Also between two methods of which one leads to a solution in accordance with these principles will be given priority to the latter. "[36]

Consequently, by a systematic interpretation it can be concluded that the judge of the preliminary chamber will be able to invoke the relative nullity when it is necessary to find out the truth and to resolve the case until the closure the preliminary chamber procedure, including in the procedure governed by the provisions of art. 347 of the Code on Criminal proceedings, to resolve the appeal against the conclusion of the preliminary chamber. As regards the

[35] I. Neagu, *op.cit.*, p. 56;
[36] I.Tanoviceanu, *op. cit.*, p. 46;

court, I conclude that, on the basis of the same arguments, the court will be able to invoke the relative nullity in any state of the criminal proceedings, that interpretation being consistent with the principle of legality of the criminal process and the finding of the truth.

5. Conclusions

The law constitutes the foundation of the principle of legality, and its observance is imperative in conducting the criminal proceedings. As an activity governed by law, but which also knows legislative loopholes and is not permitted to abandon the law, it is necessary to exclude equivalence between criminal procedural law and the source of criminal procedural law, with a wider area of existence.

The extensive interpretation of the notion of criminal procedural law encompasses both primary and secondary legislation, which comes to detail the rules of law, within the limits and conditions imposed by them. However, the rules of criminal procedural law are not confined to the law lato sensu, with the obligation to comply with compulsory jurisprudence, including the decisions of the Constitutional Court and the compulsory interpretation of the legal norms by Judicial bodies.

The establishment, mainly of the notion of criminal procedural law, led to the exclusion of the possibility of granting this nature to the decisions of the Constitutional Tribunal and their attribution of the nature of the source of criminal procedural law. Although the autonomous sense of the notion of law encompasses the concept of the European Court of Human Rights and the case-law, a single decision, even with a generally binding effect, does not satisfy the conditions for a consistent and crystallized practice over a long time. Therefore, I conclude that the decisions of the Constitutional Court do not fall within the notion of criminal procedural law, this possibility remaining open to the constant and lengthy case-law subsequently developed on the basis of the general binding effect of Constitutional Court decisions.

The affirmation of the nature of the criminal procedural law, the decisions of the Constitutional Tribunal, even in the absence of legislative intervention to implement the rules not conforming to the constitutional principles, are supported by the mandatory general effect of those stated by the constitutional authority.

Both the judicial bodies and all other participants in the criminal proceedings will also be held equally in compliance with the rules of criminal procedural law established by the decisions of the Constitutional Tribunal, which are governed by the principle of Fundamental nature of the general legality of the Romanian Constitution.

The impact of the lack of provision of a text of law or of sanctioning it through the decisions of the Constitutional Tribunal and the establishment of new rules of criminal procedural law conveys to judicial bodies the task of identifying the most optimal solutions in conducting the criminal process in agreement with the principle of legality. The interpretation by analogy or application of the analogue supplement is not contrary to the principle of legality, as the basis for any interpretation is the fundamental principles of the criminal process, including that of legality.

However, sanctioning the legislative void through the intervention of the Constitutional Court and its complacement by new rules of law lacking rules of application and integration as a whole of the regulation of the criminal process, in addition to the fact that it establishes as a responsibility of the Judicial bodies a much

too large burden, lacking predictability in the conduct of the criminal process.

The evolution of the case-law of the Constitutional Tribunal remains an open topic, with the aim of crystallizing or not its character as a source of criminal procedural law. Likewise, the passiveness of the legislature in fulfilling the obligation to agree unconstitutional provisions with the provisions of the Constitution requires a thorough analysis in order to justify the full transmission to the judicial bodies of the duty to comply with the principle of legality, although in this respect the main task lies with the legislator by providing for legal rules

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