

ENFORCEMENT IN TIME OF THE CRIMINAL LAW IN RELATION TO THE NEW CRIMINAL LEGISLATION

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Abstract

The author accomplish a comparative examination over the criminal law provisions related to the enforcement of the more favorable criminal law in opposition with the previous regulation, underlining the added value and the shortcomings of the new Criminal Code. The presentation methods are based on examples, personal opinions and suggestions meant to improve the legal text subjected to this assessment.

Finally, the author draws up his personal conclusions concerning the subject in question, briefly adding the main *de lege ferenda* proposals for the enhancement of the new criminal legislation.

Keywords: Criminal Code of 1969; the new Criminal Code from 2009; criminal law enforcement over time; enforcement of the more favorable criminal law prior to the final judgment of the case; enforcement of the more favorable criminal law after the final judgment of the case

1. INTRODUCTIVE NOTIONS

In accordance with article 264 of the Law no. 187/2012¹ for amending the Law no. 289/2009 on the Criminal Code², the New Criminal Code (also referred to as the 2009 Criminal Code), adopted through Law no. 286/2009 related to the Criminal Code, will enter into force starting with 1st of February 2014, when the republished Law no. 15/1969 (also referred to as the 1969 Criminal Code or the previous Criminal Code or the previous criminal law) on the Romanian Criminal Law³ will be rendered obsolete.

The main grounds that supported the elaboration of the new Criminal Code were presented within the recitals of the Criminal Code's project⁴ (referred to as the Project), drawn up during 2006-2008 by a commission formed of prestigious criminal law specialists (in theory and in practice) and within the Government Decision no. 1183/2008 for the approval of the preliminary thesis for the Criminal Code's project⁵.

Within the process of issuing the new criminal law, the commission emphasized on a hand the need to maintain the traditional value of the Romanian criminal legislation

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² Published within the „Romanian Official Journal”, part I, no. 510/24.07.2009, amended and updated.

³ Republished within the „Romanian Official Journal”, part I, no. 65/16.04.1997, amended and updated.

⁴ The project of the new Criminal Code is available at the following web address: <http://www.just.ro/MeniuStanga/Normativepapers/Proiectedeactenormativeafiate%C3%AEndezbatere/tabid/93/Default.aspx>, uploaded on the Ministry of Justice site on 24th of January 2008 (the website was last accessed on 10th of March 2012).

⁵ Published within the Romanian Official Journal”, part I, no. 686/8.10.2008.

and on another hand to complement it with some of the juridical systems considered as reference points within the European criminal law.

The starting points in sustaining the traditional value of the Romanian criminal legislation relate to the provisions of the 1937 Criminal Code (inspired from the Italian and Austrian examples), most of them being maintained by the 1969 Criminal Code, also taking into consideration that currently the criminal regulations with the most influence within the European area belong to the German and Italian territories. The new Criminal Code provisions' junction with these legislations, and also with the ones inspired by them (the Spanish, Swiss, Portuguese law), so that the editors not to ignore the solutions of other European systems, such as the French, Belgium, Dutch law or even the one of some Scandinavian countries, allowed the creative valorization of the national tradition in the same time with achieving regulations in compliance with the current trends of the criminal law of the European states with a more advanced experience within this domain.

Part of the institutions specific to the Romanian criminal law (some of them inserted by the 1969 Criminal Code) were maintained due to the fact that the commission was convinced by their functionality [for instance, there was maintained the mandatory enforcement of the more favorable criminal law after the final judgment of the case or the indirect participation to committing an offense, even though most of the legislations use in such hypothesis the institution of the immediate author].

As a result, the new Criminal Code was developed after a thorough examination of the traditional solutions, foreseen by the our previous criminal codes (this would explain why many texts of the 1937 Criminal Code were "resurrected", such as the incriminations related to the murder requested by the victim – art. 190⁶ or the insurances fraud – art. 245 or the patrimonial exploitation of a vulnerable person – art. 247 etc.), after the identification also of other criminal legislations' experiences (in this respect, it's to appreciate the new criminal law editors' effort for mentioning within the recitals the foreigner inspiration for the new texts).

2. THE GENERAL PRESENTATION OF TITLE I OF THE NEW CRIMINAL CODE'S GENERAL PART

The Title I – General Part of the 2009 new Criminal Code – which will enter into force of 1st of February 2014 – referred to as **"The Criminal Law and its scope"** has the same structure as the Title I – general part of the 1969 Criminal Code, namely two chapters: general principles (chapter I) and the applicability of the criminal law (chapter II). Nevertheless, comparing with the previous criminal law, this one contains more novelty elements.

More precise, due to the doctrine suggestions⁷, the new Criminal Code firstly regulated the applicability in time of the criminal law and then foreseen the provisions

⁶ From editorial reasons, within the content of this paper, where it's not mentioned the legal act after the article's number, we must take into consideration the Criminal Code adopted through the Law no. 286/2009, revised and updated.

⁷ Also see: George Antoniu, Aplicarea legii penale în timp și spațiu, within „Revista de drept penal” no. 4/2001, p. 9-10; George Antoniu, Un nou pas pe calea reformei penale, within „Revista de drept penal” no. 3/2002, p. 11; Idem, Examen critic al unor dispoziții din Codul penal. Partea generală (Reforma penală și unele aspecte critice ale legislației penale în vigoare), within „Reforma legislației penale” by George Antoniu (coordinator), Emilian Dobrescu, Tiberiu Dianu, Gheorghe Stroe, Tudor Avrigeanu, Publishing House:

related to the territorial applicability of the criminal law, since the legislator, previous to determining the territorial applicability of the criminal law, has to establish the conditions related to its existence from the temporal point of view. Thus, the existence of the criminal law involves the assessment of the moment (extracted from a period of time) when the legislator's will becomes law and the effects caused in time, determined by the law's existence, these representing a priority comparing with the subject related to the territorial applicability of the criminal law.

On another hand, it has been told that such a legislative option is meant to ensure the continuity of the legal incrimination and the penal sanctions principle, foreseen by articles 1 and 2, principle that finds its grounds in connection with the law's existence in time and with the conduct of the criminal law's recipients⁸.

The 2009 legislator justifiably renounced to the optional enforcement of the more favorable criminal law for the final and binding decisions. Maintaining such a solution could be supported by the full compliance with the intangibility of the *res judicata*'s principle applicable to the final and binding court's decisions.

Moreover, the content of some principles was better defined and updated according with the doctrine's suggestions, but also with the solutions existent within other European Union's criminal law systems.

Through the Law no. 187/2012 for implementing the Law no. 289/2009 on the Criminal Code⁹ there were adopted several provisions related to the settlement of the criminal law's temporal conflicts determined by the entrance into force of the new Criminal Code – the Law no. 286/2009 – and that will not be solved by simply applying the general rules within the matter contained by the code.

Chapter II ("Criminal Enforcement"), which was named in the previous law "limits of the enforcement of the criminal law" is divided into two sections: Section I – "Enforcement of criminal law in time" (art. 3-7) and Section II – "the enforcement of criminal law in space" (Art. 8-14).

3. ENFORCEMENT OF THE CRIMINAL LAW IN TIME

Under Section I – Enforcement of the criminal law in time – are regulated principles governing the enforcement, in time, of the Romanian criminal law like: business criminal law (art. 3) enforcement of the criminal law of decriminalization (art. 4), the enforcement

Academia Română, Bucharest, 2003, p. 83; Idem, *Noul Cod penal. Codul penal anterior. Studiu comparativ*, Publishing House: All Beck, Bucharest, 2004, p. 6. Also see: Rodica Mihaela Stănoiu, *Teritorialitatea legii penale (Aplicarea legii penale)*, within „Noul Cod penal comentat”, vol. I by George Antoniu (coordinator), Constantin Mitrache, Rodica Mihaela Stănoiu, Ioan Molnar, Viorel Pașca, Avram Filipaș, Nicoleta Iliescu, Matei Basarab, Publishing House: C. H. Beck, Bucharest, 2006, p. 94; Marin Făgăraș, *Aplicarea legii penale în spațiu*, PhD. Thesis supported by the Juridical Research Institute „Acad. Andrei Rădulescu” from within the Romanian Academy under the scientific coordination of univ. PhD. George Antoniu, Bucharest, 2009, p. 26-27.

⁸ See: Constantin Mitrache, *Activitatea legii penale (Comentarii)*, within „Explicații preliminare ale noului Cod penal”, vol. I, articles 1-52 by George Antoniu (coordinator), Costică Bulai, Constantin Duvac, Ioan Griga, Gheorghe Ivan, Constantin Mitrache, Ioan Molnar, Ilie Pascu, Viorel Pașca, Ovidiu Predescu, Publishing House: Universul Juridic, Bucharest, 2010, p. 41; Idem, *Reflecții asupra unor reglementări de aplicare în timp a legii penale prevăzute în noul Cod penal*, within „Noua legislație penală: tradiție, recodificare, reformă, progres juridic”, vol. I, Publishing House: Universul Juridic, Bucharest, 2012, p. 52.

⁹ Published within the „Romanian Official Journal”, part I, no. 757/12.11.2012.

of the more favorable criminal law up to final judgment of the case (Article 5), the enforcement of the more favorable criminal law after the final judgment of the case (Article 6) and the temporary enforcement of the criminal law (art. 7).

3.1. Article 3 – "The activity of the criminal law" – establishes the rule that "The criminal law applies to offenses committed while it is in force," meaning while it is active. The text is identical to that of art. 10 of the previous criminal law so requires no additional information.

In this section, *de lege ferenda* would require the introduction of a legal norm to be discipline the content and the principles for resolving criminal competition of rules or of texts, or by taking the Italian model (art. 15 of the Criminal Code) or the Spanish (art. 8 of the Spanish Penal Code), adapted to the legal and social realities from us, either in an own drafting, given that this issue is not handled uniformly in the doctrine and jurisprudence.

Such a provision would be even more necessary after 1989 when the tendency was to increase artificially the competition of criminal texts, which reveals a flawed legislative technique, capable of controversy and difficulty in applying criminal law¹⁰. This trend was expressly recognized by the legislature when by the Romanian Government Decision no. 1183/2008 for the approval of the project prior theses of the Criminal Code¹¹ stated that "there are currently around 250 of special laws or extra-criminal containing criminal provisions with numerous overlapping texts, with implicitly repealed, over which hovers uncertainty, with legal penalties including flagrant differences despite the similar nature of the alleged misconduct, making them difficult to be enforced by the judiciary and very less predictable for citizens" because, after only 3 years in the Explanatory Memorandum¹² of Law. 187/2012 stating that the number has reached 300 of special penal laws or extra-criminal containing criminal provisions.

The excess of competing criminal rules prevent the proper functioning of the criminal justice system, being generator of confusion in judicial practice and is one of the ways to "legal pollution" by excess of incrimination, a phenomenon manifested in Romanian positive law¹³.

Since the Romanian criminal law (nether the old nor the new one) does not contain explicit provisions for the handling of competition of texts, our doctrine and jurisprudence have failed to develop uniform criteria for identifying criminal provision applicable when there is a plurality of criminal provisions seem to apply to facts, because in reality only one of the rules is applicable.

The central problem facing the interpreter regarding the competition of rules is the criteria (principles) and then chooses from the competing rules the applicable one.

¹⁰ For details, see Constantin Duvac, Apparent plurality of offences, Universul Juridic Publishing House, Bucharest, 2008, p. 53-109.

¹¹ Published in the Romanian Official Gazette, part I, no. 686 from 8.10.2008.

¹² Available at http://www.just.ro/Sections/PrimaPagina_MeniuDreapta/LegeAplicareCP/tabid/1438/Default.aspx.

¹³ To be seen Sofia Popescu, The state of law in contemporary debates, Academia Romana Publishing House, Bucharest 1998, p. 150-152. Also, Constantin Duvac, op. cit, p. 56; Andreea-Alexandra Popa, Counterfeiting the object of a patent, în „Revista română de dreptul proprietății intelectuale”, nr. 3/2008, p. 133.

Although they regulate the same matters, between competing rules there may be some objectives differences: for example, a rule can be more recent than another (chronological criterion) or a competing norm to have a more general content including the particular hypothesis covered by another rule (specialty criterion) or a competing standard to provide a penalty heavier than the other (criterion of subsidiarity) or a competing rule may also be in relationships with other competing rule so that it becomes applicable. Such differences not only allow individualization of competing norm applicable, but also contribute to highlighting the entire concurrence.

The reason to accurately solve the competition of criminal rules (texts) by applying the principle of specialty, subsidiarity and alternation, being to avoid that a person is criminally liable twice for the same offense (*ne bis in idem*), would be desirable that the Romanian law, like other foreign criminal laws, to regulate in the future ways of solving the competition of rules¹⁴.

The introduction of a norm of criminal law to establish means to ensure the principle of *ne bis in idem* would require even more as recognizing the importance of this principle, the Romanian legislator explicitly enshrined in art. 6 of the new Criminal Procedure Code adopted by Law no. 135/2010 on the Code of Criminal Procedure¹⁵.

The text entitled "Competition of criminal rules" could have the following drafting "When several criminal provisions of the Criminal Code or in special criminal laws or special extra-criminal laws govern the same subject, the special criminal norm is applied derogating from the general criminal norm, unless otherwise provided".

3.2. Applying the criminal law of decriminalization (art. 4). Under this name the legislature from 2009 reproduces in full the provisions of art. 12 paragr. 1 of the previous criminal law, without accepting the provisions of paragr. 2 of that text. Thus, according to art. 4, "The criminal law does not apply to offenses committed under the old law, if not provided by the new law. In this case, the execution of sentences, educational measures and safety measures, imposed under the old law, and all penal consequences of decisions regarding these facts cease with the entry into force of the new law".

The phrase "acts committed" has the meaning stated in Art. 174, which provides that "perpetrating an offense" or "committing an offense" means the commission of any of the acts which the law punishes as the crime or attempted consumption and participation in their commission as co-author, instigator or accomplice.

In fact, when explaining the text of article. 174, it was stated that the phrase "perpetrating an offense" is used generically by the legislature when referring to an undetermined offense (not individualized), whatever it may be, likely to have certain consequences such as criminal law enforcement in time and space, effects of mitigating or aggravating circumstances, the consequences of the criminal liability of minors, the effects of amnesty, the calculation of the limitation period for criminal liability, etc.¹⁶

¹⁴ For details, see Constantin Duvac, op. cit., p. 53-203, 276.

¹⁵ Published in the Official Gazette of Romania, part I, no 486, of 15.07.2010.

¹⁶ See Constantin Duvac Public Official (Comments) in the "Preliminary Explanations of the new Criminal Code", Vol II, Articles 53-187 of George Antoniu (ed.), Alexander Boroi, Nicolae Bogdan-Bulai, Costica Bulai Ștefan Daneș, Constantin Duvac, Mioara-Ketty Guiu, Constantin Mitache, Cristian Mitache, Ioan Molnar, Ion Ristea, Constantin Sima, Vasile Teodorescu, Ioana Vasiu, Adina Vlăsceanu, Universul Juridic Publishing House, Bucharest, 2011, p. 504.

The title of this text is changed, the legislature of 1969 using the "retroactivity of criminal law." In this regard, the doctrine observed rightly that the name of art. 4 suggests that the new law of decriminalization applies to offenses committed under the old law that criminalized those facts, although the provisions of art. 4 mention not "applying", but rather "failure to apply" it. This creates a mismatch between the content of art. 4 and its name. To resolve this discrepancy, it was proposed either, if they keep the current name, the reformulation text such as "decriminalization criminal law applies to acts committed before its entry into force" either it be renamed to the "Retroactive criminal law"¹⁷.

No taking paragr. 2 of art. 12 of the Criminal Code of 1969 was justified by the fact that the old regulation allowed retroactive safety measures and educational measures, without any circumstantial¹⁸, new measures are likely to be more severe than those in the old law¹⁹, or by the fact that art. 12 paragr. 2 of the previous Criminal Code contravened the principle of legality of criminal sanctions²⁰.

Preservation of paragr. 2 of art. 12 of the Criminal Code of 1969 provision that established the permanent retroactive character of the law providing for security measures and educational²¹ measures would contravene the principle emerged of art. 15 paragr. (2) of the Romanian Constitution, according to which only the more favorable criminal law may have for the past (otherwise the law disposing only for the future,

¹⁷ To be seen Constantin Mitrache, Reflections on the application of rules of criminal law as laid down in the new Criminal Code, cit. supra, p. 53.

¹⁸ See Mihai Adrian Hotca, new Criminal Code and previously Criminal Code – Differential aspects and transitory situations, Hamangiu Publishing, Bucharest, 2009, p. 6.

¹⁹ See: Matei Basarab, Current Issues of Criminal Law, in "Criminal Law Review" no. 1/1994, p. 50. Pointing out this possibility, the author admitted retroactivity safety measures (contrary to the doctrine which held the majority in this case the principle most appropriate law enforcement or social protection in accordance with the needs of society), but only when they are more favorable to the offender, George Antoniu, New criminal Code. Previous Criminal Code. Comparative Study, cit. supra, p.7; Traian Dima, Criminal Enforcement of decriminalization (Comment) in the "new Criminal Code commented. General part "of Ilie Pascu, Vasile Dobrinioiu, Traian Dima, Mihai Adrian Hotca, Costică Păun, Ioan Chiș, Mirela Gorunescu, Maxim Dobrinioiu, Universul Juridic Publishing House, Bucharest, 2012, p. 36.

²⁰ See: Ilie Pascu, Petre Buneci, The new Criminal Code, the general and the Criminal Code, the general effect – comparative presentation, Universul Juridic Publishing, București, 2010, p. 16; Valentin Mirișan, Romanian criminal law enforcement time. Comparative presentation of the provisions of the Criminal Code in force and the new Criminal Code, collective works "New criminal legislation discussion Romanian Association of Penal Sciences members", Universul Juridic Publishing, București, 2012, p. 39.

²¹ This provision has been criticized doctrine rightly signaled the possibility that some safety measures or educational measures, with all their character preventive and repressive be obvious even to consist imprisonment of the perpetrator, in which case it would be questionable to argue that retroactive application of such measures is a fair solution and in line with the principle of legality of criminal offenses and penalties. In this view, would be more appropriate, and where safety measures as well as educational measures to make enforcement more favorable (in full or at least, only on measures that would involve a restriction of freedom person). See George Antoniu, Retroactivity of criminal law (Comment 10) in "criminal judicial practice. The general part (art. 1-51 Criminal Code) ", vol. I de George Antoniu (coordinator), Constantin Bulai (coordinator), Rodica Mihaela Stănoiu, Avram Filipaș, Constantin Mitrache, Vasile Papadopol, Cristiana Filișanu, Academiei Române Publishing, București, 1988, p. 24-25; George Antoniu, Penal reform in the first step (I), cit. supra, p. 17. On this occasion, the professor proposed to amend the text so that in cases where such measures are custodial apply only to actions under the criminal law committed after the entry into force of the law, unless they are milder; Also see Vasile Dobrinioiu, Ilie Pascu, Constitution and criminal law, in "Criminal Law Review" no. 2/1995, p. 59-61.

meaning that it is not retroactive), where, on these measures, the new law is more serious. By waiving this provision on which the view is that it is already implicitly repealed after the entry into force of the Constitution of 1991²², a bill that would provide future security or educational measures will follow the general rule of non-retroactivity of criminal law, unless they constitute a disposition more favorable.

According to other authors, art. 4 should be completed with the provision of art. 12 para. Previous 2 of the Criminal Code in respect of security measures and educational measures, which, in principle, must retro activate, the new law being usually more appropriate. After taking this text, it would require, in this view, addition of the words "unless the law provides otherwise"²³ to avoid some possible excesses of the new law, solution promoted in the preliminary solution of the Institute of Legal Research "Acad. Andrei Rădulescu" in 2002²⁴.

The 2009 legislature has not approved that new law proposal and decided to completely abandon the retrospective nature of these measures, referred to in art. 12 paragr. 2 of the previous criminal law, following that in these cases always apply the rules of more lenient criminal law (*lex mitior*) solution fully justified and in accordance with art. 15 paragr. (2) of the Romanian Constitution.

3.3. The enforcement of the more favorable criminal law before the final judgment of the case (art. 5). The content of the art. 5 paragr. 1 – „If from the moment the offense was committed until the case was finally judged there existed one or several criminal laws, the more favorable law is applicable.”– was retrieved from the art. 13 paragr. 1 of the previous criminal law’s text without significant changes (the term "the most" attached to the word law was removed, even though this attribute was stipulated namely to emphasize the fact that in case of appearance of more than two criminal laws, each one having the prerogative of being more favorable comparing to the other, but not comparing with a third or a fourth and so on, finally the most favorable law would have been applied; for all these reasons, the term should have been maintained).

Therefore, *de lege ferenda* it will be required to include again the term "the most" within the content of the paragr. 1, so that this one to foresee that "the most favorable law will be applied".

Also, the legislator changed the title of this text from "The enforcement of the most favorable criminal law" into "The enforcement of the more favorable criminal law before

²² See Florin Streteanu, op. cit., p. 253. In a previous study, the author argued, rightly, that the provision of Art. 12 paragr. 2 of the Criminal Code in 1969 will retroactively only if its provisions are more favorable (See Florin Streteanu, Retroactivity of criminal law under art. 15 paragr. 2 of the Constitution, in Studia Universitatis „Babeş-Bolyai”, Iurisprudentia series, no. 2/1992, p. 64-65). Also see: Viorel Paşca, Safety measures and application of criminal law in time, "Criminal Law Review", no. 1/1997, p. 42; Florean Ivan, op. cit., p. 135; Valentin Mirişan, op. cit., p. 39.

²³ See George Antoniu, Comments on the preliminary draft of a second new Penal Code (I), cit. supra, p. 10. Also see Constantin Mitrache, Applying criminal law of decriminalization (Comments), cit. supra, p. 53. The author is of the opinion that it was better if art. 4 would be out in full the content of art. 12 of the previous Criminal Code, keeping the name "retroactivity of criminal law," the more that changes the text in question was neither required nor doctrine and jurisprudence.

²⁴ Published in the "Criminal Law Review" no. 3/2002, p. 127-156.

the final judgment of the case", this being considered a more complete and precise *nomen iuris* in what concerns its delimitation from the one described by art. 6.

The content of the art. 13 paragr. 2 of the previous Criminal Code wasn't taken over because it couldn't suggest²⁵ the fact that new law's provisions related to the complementary penalties are retroactive applicable no matter if they are more favorable or more strict than the old law's ones, the more favorable law being determined in connection with the main penalty, interpretation that contravene the art. 15 paragr. 2 of the republished Romanian Constitution, even though some authors²⁶ sustained that the text in question would be applicable only if the complementary penalty foreseen by the new law is more favorable.

In accordance with the new situations arisen within the juridical domain after the appearance of the 1991 Romanian Constitution and as a result of the doctrine's suggestions²⁷, the provisions related to the enforcement of the more favorable criminal law during the criminal trial were revised with the provisions of the art. 5 paragr. 2 related to the situation of the normative acts or some provisions declared unconstitutional and also governmental emergency ordinances approved by the Parliament with changes or updates or rejected, if during their existence they contained more favorable provisions, situation when these acts, even though they are obsolete – totally or partly – the enforcement is maintained for the juridical situations subjected at some point to their provisions, regulation that is in compliance with art. 15 paragr. 2 of the revised Romanian Constitution.

The new Criminal Code's solution of extending also in this case the provisions of the more favorable criminal law is fully justifiable and consequently settles a very controversial issue²⁸ after 1991 in a fortunate manner and in compliance with art. 15 paragr. 2 of the revised Romanian Constitution.

In these cases, based on art. 5 paragr. 2, the possible changes brought by the Parliament to a normative act or as a result of declaring unconstitutional some provisions will cause *ex nunc* effects (starting with the moment the changes were operated) and not *ex tunc* (from the initial moment of the normative act).

²⁵ In this respect, see Florin Streteanu, *Tratat de drept penal. Partea generală*, vol. I, Publishing House: C. H. Beck, București, 2008, p. 288. On contrary, see Constantin Mitrache, *Aplicarea legii penale mai favorabile până la judecarea definitivă a cauzei (Comentarii)*, within „Explicații preliminare ale noului Cod penal. Articolele 1-52”, vol. I, by G. Antoniu (coordinator), cit. supra, p. 79. The author considers that the chosen solution is not critics' free and doesn't solve the complementary penalty's matter which is complex, because it's possible, for instance, that the new law to no longer foresee those complementary penalties from the old law. De lege ferenda, the author suggests adding a regulation similar to the one from the art. 13 paragr. 2 of the previous criminal law, taking into consideration that its absence could generate difficult situations, if not even impossible to solve or by seriously violating the principle related to the legality and the enforcement of the more favorable criminal law for the ongoing judged offenses. This doctrine position seems to have been influencing the 2012 legislator, on the occasion of enacting the art. 12 paragr. 1 of the Law no. 187/2012.

²⁶ See Constantin Barbu, *Aplicarea legii penale în spațiu și timp*, Publishing House: Științifică, Bucharest, 1972, p. 239-240.

²⁷ See George Antoniu, *Examen critic al unor dispoziții din Codul penal. Partea generală (Reforma penală și unele aspecte critice ale legislației penale în vigoare)*, cit. supra, p. 90-92. A similar opinion was expressed by the professor within older papers. See, George Antoniu, *Aplicarea legii penale în timp și spațiu*, cit. supra, p. 15-16; Idem, *Un nou pas pe calea reformei penale*, cit. supra, p. 11.

²⁸ For a thorough examination of this subject, see Florin Streteanu, op. cit., p. 301-311.

The Romanian legislator explicitly and in a complete manner establishes through art. 5, the theory of the more favorable criminal law's extra-activity, the softer law being applicable, either the previous law (in this case the law is ultra-active), or the new law (in this case the law is retroactive).

Practically, the decisive criteria²⁹ in choosing from the laws in conflict the enforceable criminal law, is the creation of an actual more favorable situation for the offender, the origin of this criteria residing from the procedural principle *in dubio pro reo*.

3.4. The enforcement of the more favorable criminal law after the final judgment of the case (art. 6). This principle assumes that if within the period between the court's decision is final and binding and the complete execution of the imprisonment penalty or fine, a new occurred law foresees a lighter amendment, if the inflicted penalty is higher than the special maximum established by the new law for the committed offense, the penalty will be mandatory reduced to this maximum.

The provision of the text's paragr. 1 is retrieved without changes from the article 14 paragr. 1 of the previous criminal law³⁰, the 2009 legislator changing the name of art. 6 from "The mandatory enforcement of the more favorable criminal law in the cases of final penalties" in "The enforcement of the more favorable criminal law after the final judgment of the case".

The content of paragr. 2 of the article 6 is repeated from the paragr. 2 of the article 6 of the previous Criminal Code, with the specification that the text is applicable only if the new law stipulates for the same offense only the imprisonment penalty. By adding this term – "only" – the legislator removed a shortcoming of the previous regulation that didn't offer clear solutions for the cases when the penalty foreseen by the new law was also life imprisonment, but alternative to the imprisonment penalty within lower limits than the ones comprised by the old law.

The provision of paragr. 2 is not incident, the criminal law being strictly interpreted, if the new law establishes the imprisonment penalty for the same offense, but alternative to the life imprisonment or only the fine (even if this last hypothesis is most likely only theoretical). A fortiori enforcement of the text³¹, in our opinion, would be contrary to one of the aspects of the legality principle (*nullum crimen sine lege stricta*).

De lege ferenda, it was suggested to rewrite paragr. 2 in order to cover also these situations, namely "If after a final conviction to life imprisonment and until its execution, there was adopted a new law that foresees for the same offense the imprisonment penalty

²⁹ For a thorough examination of the criteria used to determine the more favorable criminal law, see Florin Streteanu, op. cit., p. 280-283.

³⁰ It's worth mentioning that art. 2 paragr. 2 of the Spanish Criminal Code foresees the retroactive effects of the criminal laws even in the cases when a final and binding decision was issued and the convicted person is executing the penalty.

³¹ See Constantin Mitrache, *Aplicarea legii penale mai favorabile până la judecarea definitivă a cauzei* (Comentarii), within „Explicații preliminare ale noului Cod penal”, vol. I, articles 1-52 by George Antoniu (coordinator), Costică Bulai, Constantin Duvac, Ioan Griga, Gheorghe Ivan, Constantin Mitrache, Ioan Molnar, Ilie Pascu, Viorel Pașca, Ovidiu Predescu, Publishing House: Universul Juridic, Bucharest, 2010, p. 84.

or the imprisonment penalty alternative to a fine, the life imprisonment is being replaced by the maximum imprisonment prescribed for the same offense"³².

Also, the provisions of art. 6 paragr. 3 are copied without changes from the content of the art. 14 paragr. 3 of the 1969 Criminal Code.

Within the context of their explanation, it was sustained that the court should replace the imprisonment with the fine's special maximum foreseen by the new law, taking into consideration that it's not possible to establish a lower fine, because within this phase the judge cannot reassess the penalty, but he/she may do so within the next stage when will be able to dispose the fine's execution and by taking into account the executed imprisonment and will may dispose partly or entirely to remove the fine's execution"³³.

As well, paragr. 3 will not be applicable if the new law foresees the fine penalty, but alternative to the imprisonment. Within the recent criminal doctrine³⁴, there were proposals– in reference to art. 6 paragr. 2 – concerning the extension of the text also to this hypothesis, with the following form: "... a law that foresees for the same offense only the imprisonment punishment or alternative to the fine's penalty".

Practically, the enforcement of the more favorable criminal law after the final judgment of the case is being achieved when the new law prescribes a lighter main penalty either from the duration point of view (the special maximum is lower than the inflicted penalty on the basis of the old law), or as characteristics (the imprisonment instead of life imprisonment or fine instead of imprisonment).

Comparing with the previous regulation some changes were operated in order to remove the shortcomings in what concern the text's appliance. In this respect, the hypothesis of the educational measures received a different regulation, such that they are considered main penalties and cannot be assimilated to the complementary punishments. Consequently, „the unexecuted educational measures and not foreseen by the new law will no longer be executed and the ones that have a correspondent within the new law will be executed as they are described and within the limits prescribed by the new law, if this one is more favorable.” – paragr. 4.

Moreover, paragr. 5 contains a new provision according to which "when the new law is more favorable in compliance with paragr. 1-4, the unexecuted complementary penalties and the safety measures and not foreseen by the new law will no longer be executed and the ones that have a correspondent within the new law will be executed as they are described and within the limits prescribed by the new law".

By inserting this provision, it was considered that the more favorable law arisen after the final conviction of the defendant is first of all determined in accordance with the main penalty, even if the complementary punishment or safety measure would be more severe, so that the complementary punishments from the old law that have a

³² See Constantin Mitrache, *Reflecții asupra unor reglementări de aplicare în timp a legii penale prevăzute în noul Cod penal*, within „Noua legislație penală: tradiție, recodificare, reformă, progres juridic”, vol. I, Publishing House: Universul Juridic, Bucharest, 2012, p. 55.

³³ See: Constantin Mitrache, *Aplicarea legii penale mai favorabile până la judecarea definitivă a cauzei* (Comentarii), cit. supra, p. 84; Idem, *Reflecții asupra unor reglementări de aplicare în timp a legii penale prevăzute în noul Cod penal*, cit. supra, p. 55-56.

³⁴ See Constantin Mitrache, *Aplicarea legii penale mai favorabile după judecarea definitivă a cauzei* (Comentarii), cit. supra, p. 83-84.

correspondent within the new law would be executed as they are described and within the limits prescribed by the new law.

If the complementary punishments and safety measures were already executed before the enforcement of the new more favorable criminal law, these penalties will remain executed and it's not a question to debate, the law expressly stipulating that the penalties taken into account are only the ones not executed. Therefore, the new more favorable law doesn't lead to the reestablishment of the situation prior to the conviction, but only removes the penalties' execution (the complementary penalties and the safety measure that don't longer have a correspondent within the new law, which creates effects only for the future)³⁵.

When the new law doesn't modify the main penalty, the complementary penalties and the safety measures, foreseen by both laws, will be executed as they are described and within the limits prescribed by the new law, if this one is more favorable (paragr. 6), this solution not having a correspondent within the previous criminal law. This represents an extension of the enforcement of the more favorable criminal law also for the case when this is lighter in what concerns the complementary penalties and safety measures.

The text of paragr. 5 of the art. 14 of the previous Criminal Code is comprised by paragr. (7) of art. 6, which means that the provisions of the more favorable criminal law will benefit also to the ex-convicts that entirely executed the inflicted penalty or for which the penalty is being considered executed (for instance, in case of reprieve) in accordance with some consequences caused by the inflicted penalty [for example, the rehabilitation terms will be calculated in this case from the execution of the reduced or replaced penalty according to art. 6 paragr. 1-6 and not from the actually execution of the punishment].

Even though the commission admitted that after the enforcement of the 1991 revised Romanian Constitution, the constitutional principle related to the separation of powers imposed the reduction up to minimum of the prejudices brought to the *res judicata* principle, this one arguably chosen to maintain the regulation related to the mandatory enforcement of the more favorable criminal law after the final judgment of the case, even if it could be sustained that such detriment is justifiable if it's also based on a constitutional principle, such as the penalty's legality principle or if only this way it could be avoided that part of the penalty executed by the convicted not to have a correspondent within the law.

This solution specific to the Romanian criminal law, which mainly represents an interference (even if some authors consider it general, it's still an interference) of the legislator within the judicial authority's activity by violating the principle of the intangibility of *res judicata*, isolate us from other regulations of the criminal codes of the states with tradition within the penal sciences (such as Germany, Italy, France) and consequently, *de lege ferenda* we reiterate³⁶ the proposal to remove the text.

³⁵ See Constantin Mitrache, *Reflecții asupra unor reglementări de aplicare în timp a legii penale prevăzute în noul Cod penal*, cit. supra, p. 57.

³⁶ In this respect, see Constantin Duvac, *Unele observații critice cu privire la proiectul unui al doilea nou Cod penal*, within: „Revista română de criminalistică” no. 4/2009, p. 150. By contrary, see Constantin Mitrache, *Aplicarea legii penale mai favorabile după judecarea definitivă a cauzei (Comentarii)*, within „Explicații preliminare ale noului Cod penal”, vol. I, articles 1-52 by George Antoniu (coordinator), Costică

The solution of extending the principle of the enforcement of the more favorable criminal law also to the final and binding decisions was criticized and within the doctrine it was asserted that this contravenes to the separation of powers principle and paves the way to possible abuses of the legislator which, from political reasons, may adopt a more favorable law in order to release some political partisans from prison before the term foreseen by the conviction decision³⁷.

The only exception from complying with the principle of the intangibility of *res judicata* that could be admissible would be the non-incrimination law that could produce effects towards the final conviction and also towards the other penal consequences that could reside from it.

In reference to the prevalence of the article 15 of the previous Criminal Code, even after the enforcement of the new Criminal Code, it was been worthily asserted that not having a correspondent within the new criminal law, these provisions can no longer be claimed, not existing juridical grounds for an affirmative solution. When the new Criminal Code entered into force, a person finally convicted based on the old law would have found him/her in the hypothesis of article 6 or not³⁸. Under the influence of the doctrine's position, in a fair manner, through article 4 of the Law no. 187/2012 it has been established that the inflicted penalty established for an offense by a decision that became final and binding under the applicability of the 1969 Criminal Code, if the penalty doesn't exceed the special maximum foreseen by the new Criminal Code, cannot be reduced as a result of entering into force of this law.

3.5. Temporary criminal law enforcement (art. 7). This principle implies that the criminal law is applied temporarily to the crime committed when it was in force, even if the act was not prosecuted or tried in that time frame [paragr. (1)]. In terms of content, we observe that the principle is the same as that emerges from art. 16 of the previous criminal law.

A novelty in this area is the introduction of a contextual explanatory rule on the meaning of the concept of temporary criminal law thus understood "the criminal law

Bulai, Constantin Duvac, Ioan Griga, Gheorghe Ivan, Constantin Mitrache, Ioan Molnar, Ilie Pascu, Viorel Pașca, Ovidiu Predescu, Publishing House: Universul Juridic, Bucharest, 2010, p. 81-82. The author considers this solution perfectly justifiable.

³⁷ See, George Antoniu, *Aplicarea legii penale în timp și spațiu*, cit. supra, p. 14.

Within this context, it's worth mentioning the legislative abuse from 1997 in what concerns the fraudulent bankruptcy offense; when this criminal act, foreseen, at that time, within art. 208 of the Law no. 31/1990 concerning the commercial societies, republished within the „Romanian Official Journal”, part I, no. 1066/17.11.2004, revised and updated, was rendered obsolete with no ground through the Government Emergency Ordinance no. 32/1997 for revising and updating the Law no. 31/1990 concerning the commercial societies, published within the „Romanian Official Journal”, part I, no. 133/27.06.1997, so that in short time to be incriminated again with the same content, but punished with an higher penalty through Law no. 195/1997 for the approval of the Government Emergency Ordinance no. 32/1997 for revising and updating the Law no. 31/1990 concerning the commercial societies, published within the „Romanian Official Journal”, part I, no. 335/28.11.1997.

³⁸ See Constantin Mitrache, *Reflecții asupra unor reglementări de aplicare în timp a legii penale prevăzute în noul Cod penal*, cit. supra, p. 58. By contrary, see Valentin Mirișan, *Aplicarea legii penale române în timp. Prezentare comparativă a dispozițiilor Codului penal în vigoare și ale noului Cod penal*, within the collective paper „Noua legislație penală în discuția membrilor Asociației Române de Științe Penale”, Publishing House: Universul Juridic, Bucharest, 2012, p. 44-45.

which provides on its output of force or application of which is limited by the temporary nature of the situation imposed adoption".

By this norm are consecrated explicitly both forms of the temporary criminal law, namely formal or proper and by its nature or exceptional.

The doctrine proposed the completion of this rule with the explanatory words "the inevitability temporary or exceptional situation which forced its adoption" as this would emphasize the distinction between the temporary character of the criminal law determined by a temporary situation and the temporary character of the criminal law determined by an exceptional situation (for example, the state of emergency)³⁹.

On the same line of thought, it was also proposed adding after paragr. (2) a new paragraph stating that "the termination date of the exceptional character of the situation which required temporary adoption of the law will be determined by a subsequent law."

In fact, art. 55 paragr. (3) of Law no. 24/2000⁴⁰ regarding the legislative technique for drafting laws, re-impose the rule that the regulatory act temporarily to provide for the period of application or date of termination of its application.

4. PROVISIONS RELATED TO MITIOR LEX FORESEEN BY THE LAW NO. 187/2012

A. Within the process of preparing the entrance into force of the new Criminal Code, from legislative point of view, it was necessary to elaborate a law for the enforcement of the Code, namely the Law no. 187/2012 (referred to as the Law), which needed to comprise also the legislative solutions for the transition situations determined by the existence of some juridical relations in conflict occurred under the enforcement of the old law that aren't solved until the 1st of February 2014.

B. The Chapter II of the Title I of the Law– "**The general provisions related to the enforcement in time of the criminal law**" – contains several rules applicable for the regulation of the transition situations, out of which the ones foreseen within the articles 4 and 8 are of interest for our intercession.

1. According to article 4 of the Law, the inflicted penalty established for an offense by a decision that became final and binding under the applicability of the 1969 Criminal Code, if the penalty doesn't exceed the special maximum foreseen by the new Criminal Code, cannot be reduced as a result of entering into force of this law.

This provision, which we agree with, is listed on the line imposed by the legislator for the adoption of the 2009 Criminal Code, related to the removal of the hypothesis of the optional enforcement of the more favorable criminal law, inclusively during the transition situation. The solution is justifiable not only from consistency reasons, but also in order to avoid the threat of unreasonable punishment reductions within the accommodation with the penalties foreseen by the new Criminal Code.

The reduction of the inflicted penalty can operate neither if the special maximum prescribed by the new Criminal Code for that offense is equal with that inflicted penalty.

³⁹ See George Antoniu, Comments on the preliminary draft of a second new Criminal Code (I), cit. supra, p. 11.

⁴⁰ Republished in the "Official Gazette of Romania", Part I, no. 260 of 21 April 2010, as amended and supplemented.

Due regard to the imprisonment penalty, the comparison between the inflicted penalty and the special maximum limit foreseen for that offense is easy to accomplish. This activity becomes more difficult when what it needs to be compared are the fines punishments. In this case there has to be taken into consideration the special limits of the penalty foreseen by the new criminal legislation for that offense and the provisions of the art. 61 (establishing the fine) or of the art. 137 (establishing the fine for the legal person).

2. In compliance with art. 8 of the same Law, the provisions of art. 4 of the Law are suitable applicable to the inflicted penalty established through the decision that became final before the Law no. 187/2012 entered into force, for deeds incriminated through the normative acts foreseen by its Title II ("Provisions related to the modification and completion of several normative acts that contain penal provisions), rule that is fully justified and in agreement with the opinion of the authors of the paper Preliminary Explanations related to the new Criminal Code (Explicații preliminare ale noului Cod penal).

Subsequently, neither these inflicted penalties for the deeds incriminated under special laws (penal or extra-penal), in case they don't exceed the special maximum imposed by the Law no. 187/2012, cannot be reduced as a result of the entering into force of this law on 1st of February 2014.

In what concerns the legislative technique, it's a subject to reflect on if the two provisions (articles 4 and 8 of the Law) couldn't be jointly expressed in only one stipulation using as benchmarks the expressions "the previous criminal legislation" and "the new criminal legislation, entered into force on 1st of February 2014".

C. The Chapter III of the Title I contains provisions related to the enforcement and execution of the penal amendments, out of which some refers also to the enforcement of the more favorable criminal law, the stipulations contained within this chapter being imposed by the changes brought by the new Criminal Code in what concerns the criminal law sanctions. From editorial reasons the analysis will refer only to some of them.

1. First of all, the 2012 legislator foreseen that article 62 provisions concerning the fines correspondent to the imprisonment penalty doesn't apply to the offenses committed prior to the entrance into force of the Code and cannot be taken into account for determining the more favorable criminal law (art. 11 of the Law). It's to be noticed that the previous criminal law didn't comprise in any manner the possibility of applying two main penalties in the same time for one offense.

2. Within the legislative practice it's possible that the complementary punishments to be differently presented within the content of successive laws, both in accordance with themselves or with the main penalties, being possible that an existent juridical regime for the main penalties not to correspond to the one for the complementary punishments (for example, it is possible that a law to be more favorable in what concerns the main penalty and to be more severe in relation to the complementary punishments and the other way around). In these cases we may ask what the applicable complementary penalty is.

The new Criminal Code no longer copied art. 13 paragr. 2 of the 1969 Criminal Code in relation to the enforcement of the more favorable criminal law in the case of the complementary punishments (these having a subsequent attribute towards the main

ones), solution that might suggest that also these ones must take the course of the main penalty, which in the favorable case, will be entirely enforceable, even if the correspondent complementary punishment would be more severe. Such a thesis is contradicted by the provisions of art. 12 paragr. 1 of the Law, in accordance with which "In case of successive criminal laws occurred before the conviction decision is final and binding, the accessory and complementary penalties are enforceable in compliance with the law identified as being the more favorable in connection to the committed offense". Such a solution seems wiser.

Considering the criteria of the more favorable law in connection with the committed offense and not to the main penalty inflicted to the defendant, the 2012 legislator decided that in all cases, the principle of the more favorable criminal law to be determined independently (separately) also for the accessory and complementary penalties, no matter the prescribed regime for the main penalty.

This way, it's being legislatively stated a certain functional autonomy of the complementary penalties in relation to the main ones, being enforceable independently from the situation of the main penalties, without being able to sustain that a *lex tertia* is being created in the favor of the accused person, because such a ban related to mixing different penal provisions from successive laws which may be incidental in a certain case in order to create a softer situation for the defendant, is opposable only to the criminal judiciary authority during the process of incriminating the ones that committed offenses, and no to the legislator who from penal policy considerations or other reasons superior to the existent ones from the moment the concurrent law was elaborated, could established such rules that may be differently used.

The text of art. 12 paragr. 1 of the Law corroborated with art. 5 foresees, thus, the enforcement of the more favorable criminal law, in case of successive criminal laws occurred before the conviction decision is final and binding, in what concerns all types of penalties stipulated within the positive criminal law, even in the asymmetrical situations (when the conditions related to these ones may be different from law to law and from category to category).

In compliance with the principle related to the penal law sanctions' legality, within art. 12 paragr. 2 of the Law it's being stipulated that the complementary penalty foreseen by art. 55 let. c) of the 2009 Criminal Code („the publicity of the conviction decision”) is not applicable in the cases of the offenses committed prior to its entrance into force, natural solution that seems to take into consideration that such a penalty is foreseen by art. 53¹ paragr. 3 let. e) of the 1969 Criminal Code only for the legal persons under the modality of displaying and spreading the conviction decision.

5. CONCLUSIONS

The enforcement in time of the criminal law is generally better structured and with a superior content comparing with the previous criminal law. In this respect we could mention, the regulation of criminal law enforcement in time firstly, followed by the enforcement of the criminal law provisions in space, the removal of the optional enforcement of the more favorable criminal law in what concerns the final penalty, the improvement of several provisions' content and the applicability limitation of art. 6 through art. 15 and art. 16 paragr. 1 of the Law no. 187/2012.

We also take notice that the 2012 legislator was concerned in offering as many legislative solutions (sometimes excessively) in order to settle the transition situations determined by the existence of some juridical relations in conflict occurred during the applicability of the old law, which aren't completely solved until the 1st of February 2014. Thus, through the Law no. 187/2012, within its Title I there were foreseen 20 texts containing several provisions related to the applicability in time of the criminal law, the applicability and execution of the penal sanctions and the punishment regime for the under aged persons (minors).

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