CRIMINAL LAW REFORM BY THE NEW CODES

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ABSTRACT. The new codes, criminal and criminal procedure, entered in force on the date of February 1st, 2014, represent a new stage in the development of the Romanian society. By many novelty elements that they bring, they represent a challenge for law professionals and not only.

KEY WORDS: criminal law, new codes, reform.

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The new criminal code, adopted by the Law no. 289/2009, was adopted on June 25th 2009, after binding the Government in front of the House of Commons and Senate, in the common meeting from June 22nd 2009, was amended by the Law no. 27/2012, Law no. 63/2012 and Law no. 187/2012.

As the old criminal code, adopted by the Law no. 15/1968, with the subsequent amendments, this is systematized in two parts, namely: the general part that contains 10 titles and the special part that contains 13 titles.

By the Law no. 187/2012 in order to implement the Law no. 286/2009 with regard to the Criminal Code, a number a 212 special laws have been amended, completed or certain incrimination texts repealed – namely those that have been taken over in the Criminal Code or that were superposed upon its provisions - to achieve a unified and clear regulation of the acts that constitute offenses.

As novelty elements compared to the previous regulation, the followings are mainly retained:

In accordance with the regulation stipulated in art. 15 par. 1, the new Criminal Code renounces to the social danger of the deed as general feature of the offense, being retained as general features of the offense: the provision in the criminal law, committing the deed with guilt, the unjustified character and the imputable character.

Thus, from the new legal framework disappeared the possibility of the judicial bodies to apply sanctions with administrative character in the event of deed under the criminal law, but

regarding which was appreciated that it does not show the degree of social danger of an offense, according to art. 18^1 of the old Criminal Code.

In connection to the guilt forms, the new Criminal Code explicitly establishes by art. 16 par. 5, together with the intent and guilt, oblique intent or praeterintention, previously recognized by the legal doctrine.

In the new Criminal Code, the supporting causes together with the non imputable ones, replace the causes that removed the criminal character of the deed, according to the old Criminal Code.

Another novelty element brought by the new Criminal Code is represented by the regulation of the continued offense. Unlike the old code regulation, the condition of the unique passive subject of the offense (art. 35 par. 1 Criminal code) is imposed by the legislator in the current regulation. Also the sanction of the continued offense is different from the one foreseen in the old Criminal code. According to the current provisions, the continued offense is sanctioned with the punishment foreseen by the law for the committed offense, whose maximum may be increased by not more than 3 years in case of prison, namely at most one third in the case of fine.

In respect of the plurality of offenses, the new Criminal Code does not present differences compared to the old regulation in terms of living conditions, but it sets up its penalization according to the legal accumulation system with compulsory and fixed increase, equal to a third from the all punishments that are added to the most serious. The punishment of fine is also entirely added to the imprisonment.

The conditions regarding the terms of relapse have been amended by the new Criminal Code. Thus according to art. 41 from the new Criminal Code, the first term of relapse is represented by the conviction to a penalty of more than one year, unlike the old regulation that made provision to the condition of the prior conviction to a penalty of more than six months. The second term of the relapse in the current regulation is represented by the conviction to imprisonment for one year or more, for an offense committed with intent or exceeded intent, unlike the old regulation that made provision to a intentionally committed offense for which the foreseen punishment was higher than one year.

The current Criminal Code regulated such a situation that although it was not expressly regulated in the old Criminal Code, still it is imposed as a reality recognized by case law, meaning to take into account when determining the state of relapse, and the conviction judgments pronounced abroad and recognized according to the law.

The current regulation no longer provides the small relapse.

The penalty system of relapse is also different compared to the previous one, being more drastically.

Thus, regarding the post-conviction relapse, the current penalizing system is based on the arithmetic accumulation, based on adding to the punishment inflicted for the second term of the relapse the previous unexecuted punishment or the rest remained to be executed from this.

In the case in which the second term of relapse is represented by a plurality of offenses under the form of the competition, the order to exploit the two forms of plurality is the following: the established punishments are merging according to the stipulations regarding the plurality form of offenses, and the resulted punishment is added to the previous unexecuted punishment or the rest remained to be executed from this.

As regards the post-enforceable relapse, the current penalizing treatment makes provision that the special limits of the punishment foreseen by the law for a new offense are increased by half, thus imposing a more drastically punishment.

Another novelty element of the new Criminal Code is the introduction of the fine days. Thus, in the individualization of the punishment, in order to determine the accumulation of the fine first are individualized the fine days, contained between 30 days and 400 days, which is multiplied with the corresponding amount of a fine day, contained between 10 lei and 500 lei, correspondingly individualized, taking into account the defendant's material situation and his legal obligations towards the dependants.

The new Criminal Code also regulates the execution of the fine punishment by the provision of community service work and also as novelty element, it foresees the fine that accompanies the imprisonment, if the offense was intended to obtain a patrimony use.

As regards the general criteria of individualization of the punishments, the new Criminal Code brings clearer explanations compared to the old regulation.

The judicial mitigating circumstances have a more restrictive regulation in the new Criminal Code and also as differentiation element compared to the old code, the replacement of the imprisonment with the fine in case of their arrest is no longer allowed.

The judicial aggravating circumstances are no longer foreseen in the new Criminal Code.

The new Criminal Code also brings essential amendments to the methods for enforcement, and also in regard with the penalizing regime applicable to infant offenders.

Thus, the current Criminal Code does not regulate the conditional suspension of punishment, and in case of suspension under supervision of the execution of the established punishment, including for the plurality of offenses, there must be the imprisonment not exceeding 3 years. Unlike the old Criminal Code, according to the current regulation the suspension under the supervision of the execution of punishment has no longer the effect of the rightful rehabilitation.

The new Criminal Code makes provision to the new institutions such as waiver of the punishment and postponement of the execution of punishment, as a consequence of the renunciation to the social danger criterion as a general feature of the offense and consecration of the opportunity principle of prosecution in the new Criminal procedure code.

In such circumstances, the new regulation allows the court to sanction the commission of low gravity offenses, for which the criminal proceedings should not have been exercised since the prosecution phase.

As regards the penalizing regime applicable to infant offenders, the new Criminal Code makes no provision to punishments in case of infants, but the penalizing system in this case is exclusively based on the educational measures, non-custodial or custodial - in the event of committing certain serious offenses.

Significant amendments have been made in terms of the convicted persons' conditions of parole by the new Criminal Code. There are found among them for example the introduction of the condition to fulfill the civil obligations for granting release or equalizing the age at which one can benefit from the special regime of granting release, 60 years for both men and women.

As regards the institution of criminal liability prescription, the terms regulated by the new Criminal Code are similar to those foreseen in the Criminal Code of 1969, with one exception, namely for the punishments contained between 15 and 20 years that were lost by limitation in 10

years and not in 15 years like in the previous regulation. Amendments were also brought regarding the moment at which the term starts to run in certain cases.

Some novelty elements were also brought in regard with the institution of the prior complaint, and the incidence of reconciliation was limited in the new Criminal Code.

The entering into force of the new Criminal Code, which has a different philosophy of punishments compared to the previous Criminal Code, rearranging them for the same offenses, in other limits, usually smaller, together with the decriminalization of certain offenses, had as immediate effect the application of the more favorable criminal law to the finally adjudicated offenses, this being performed in accordance with the provisions of art. 6 from the new Criminal Code.

The mandatory application of the more favorable law in definitive punishments aims both the unexecuted punishments and being executed, and those executed.

Unlike previous Criminal Code, the new Criminal Code does not contain stipulations regarding the optional application of the more favorable criminal law in case of final convictions.

Even in these conditions, the regulatory imprecision led to the creation, both in theory and in case law, of two tendencies of different views regarding the application of the more favorable criminal law in case of final convictions.

Only two and a half months after the entry into force of the codes, namely by the decision no. 1 of April 14th 2014, High Court of Cassation and Justice – the Panel of Judges to solve some legal issues in criminal matters – pronounced a compulsory decision with effects in regard with the future unification of judicial practice.

Another very important matter and having special consequences for the persons undergoing trial in the entering into force of the new codes, is represented by the mandatory application of the more favorable criminal law in the case of non-final prosecuted offenses – in accordance with the provisions of art. 5 from the new Criminal Code.

Also in this case, due to the imprecision of legislation, an effective solution was not expressively established by the legislator, which also led to the outline of two tendencies of contrary views, both in doctrine and in case law.

In such a view, the identification of the more favorable law during trial, until the final judgment of the case, is performed under two aspects. The more favorable law in terms of constitutive elements and punishments is established in a first step, and related to the application of the other institutions – unity and plurality of offenses, minority, prescription, etc. – these are separately analyzed, as autonomous institutions, and the one from the successive laws identified as most favorable of each will be applied. This first solution is known under the name of "the application of the more favorable criminal law on autonomous institutions".

In another opinion, the identification of the more favorable criminal law must be done by comparing and applying the law in its entirety and not on separate institutions.

As regards this matter, by the decision no. 2 of April 14th 2014, the High Court of Cassation and Justice – the Panel of Judges to solve some legal issues in criminal matters – pronounced a judgment, mandatory according to the stipulations of art. 477 par. 3 of the Criminal procedure code, from its publication date in the Official Gazette, by which it decides that in the application of the provisions of art. 5 of the new Criminal Code, the prescription of criminal liability is an autonomous institution to the institution of punishment, deciding in this

way the most favorable criminal law on autonomous institutions, in case of non final judged lawsuits on the date of entering into force of the new codes, February 1st 2014.

Following the adoption of this decision by the High Court of Cassation and Justice – the Panel of Judges to solve some law issues, by the decision no. 265 of May 6th 2014, the Constitutional Court admitted the constitutional challenge of the stipulations of art. 5 from the new Criminal Code and observed that these stipulations are constitutional to the extent that they do not allow the combination of the provisions from successive laws in establishing and applying the more favorable criminal law. Since the time of publication in the Official Gazette of this decision, the stipulations of art. 147 par. 1 from the Constitution become incidents, such as: during the 45 days of publication in the Official Gazette of the decision, the stipulations found unconstitutional will be rightfully suspended, and after the expiration of this term, to the extent that the legislative bodies (Parliament, Government) do not interfere for the amendment of the legal stipulation in compliance with the decision of the Constitutional Court, this will stop its effects.

According to the stipulations of art. 477^1 from the new Criminal procedure code, the effects of the decisions pronounced by the High Court of Cassation and Justice to solve some law issues cease in case of abrogation, unconstitutional finding or amendment of the legal stipulation that generated the solved law problem, except the case in which the law problem persists in the new regulation, so the decision no. 2 from April 14th 2014, pronounced by the High Court of Cassation and Justice – the Panel of Judges to solve some problems in criminal matters, ceases its effects.

As a consequence, the application of the more favorable criminal law is not made on autonomous institutions by combining the provisions of successive laws, but by the global applying one or other laws, as applicable.

A new institution in the Romanian judicial system is represented by the guilty plea agreement. This constitutes, in essence, an agreement made between the prosecutor and the defendant regarding the type of penalty and the way to execute it, due to be settled in a simplified procedure, in order to reduce the duration of judicial proceedings.

Taking this institution in the German-Roman law systems has been accompanied by a system of guarantees, to prevent a person to be found guilty based on a simple statement in this regard. In the law system in Italy for example, the judge notes the penalty agreed between the prosecutor and the defendant, without pronouncing a conviction that has the force of a judged thing.

The condition that the agreement to intervene only in terms of the existence of guilt evidence was introduced in the French law system, for this modality also opting the Romanian legislator.

Thus, according to art. 480 par. 2 of the Criminal procedure code, the agreement concluded when, from the administrated evidence, results sufficient data in regard with the existence of deed for which was set in motion the criminal action and in regard with the defendant's guilt, and the agreement is approved by the hierarchically superior prosecutor. Also, according to art. 485 of the Criminal procedure code, the court pronounces an admission decision of the guilty plea but in the situation in which he founds fulfilled the conditions foreseen by art. 480 from the code, also being the possibility of its motivated rejection.

Therewith, additional guarantees were set up, in the sense that the infant defendants cannot conclude guilty plea agreements, and the legal assistance is required at its closure.

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