

## **ENFORCEMENT OF THE MORE FAVORABLE CRIMINAL LAW AFTER THE ENTERING INTO FORCE OF THE NEW CRIMINAL CODE**

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**ABSTRACT** The new codes, criminal and criminal procedure, entered in force on the date of February 1<sup>st</sup>, 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. The entering into force of the new Criminal Code had as immediate effect the problem of determination of the more favorable criminal law.

**KEY WORDS:** criminal law, criminal procedure, the more favorable criminal law.

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

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regard to the Criminal Code, a number a 212 special laws have been amended, completed or certain incrimination texts repealed – namely those that have been taken over in the Criminal Code or that were superposed upon its provisions - to achieve a unified and clear regulation of the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.

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 to put to the judiciary system of Romania the problem of the application of the more favorable criminal law.

In principle, the more favorable criminal law (*lex mitior*) is the law that contains provisions that more favorable to the offender, in the case of succession of criminal laws in time; it can be either retroactive or ultra-active.

As a general rule, criminal law applies to all offenses committed while that it is in force (principle of criminal law activity). This principle is inextricably linked to that of legality, which is a characteristic of the rule of law, so that the constituent legislator stated in Article 1 paragraph (5) that “In Romania, the observance of the Constitution, its supremacy and the laws mandatory.” In criminal matters, Article 23 par. (12) of the Basic Law enshrines the rule that “No punishment can be established or applied except in accordance and pursuant to law.”

From this rule are allowed two exceptions, consisting either in retroactivity or in ultra-activity of the law. These exceptions apply in situations of transition determined by the sequence of criminal law, when an offense is committed under the influence of the prior criminal law but the perpetrator is prosecuted, tried or serving sentences under the new criminal law.

The issue of criminal law enforcement in transition situations caused two currents of opinion expression, diametrically opposing: the ultra-activity of the old law thesis according to which in case of transition the existing law at the time of the offense will apply, and the retroactivity of the law in force thesis, according to which in case of a transitional situation the new criminal law will apply.

Since neither of the two solutions was entirely fair, the literature, the jurisprudence and modern legislation imposed a third legal solution, known as the *lex mitior* principle, the principle that says that in cases determined by the succession of laws, the more favorable criminal law will apply. This principle was enshrined at a constitutional level in 1991, when the constituent legislator held through art. 15 (2) of the Constitution that "the law disposes only for the future, except the more favorable penal law" and with the revision of the Fundamental Law, through art. 15 (2), the principle has been extended to minor offenses, meaning that "the law disposes only for the future, except for the more favorable penal law."

In this context, the imprecision of legislative regulation of the new Criminal Code entered into force on 1 February 2014 led to the creation of the specialized doctrine before the entry into force of the new codes, the two schools of different opinions, regarding the more lenient mechanism for penal law enforcement.

The first view, most favorable criminal law is determined by reference to each institution which applies independently, so if one classifies an offense was made after the law, which was more favorable, this does not preclude the application of other provisions of the law on relapse of the offenses, if they are more favorable. It shows that, for instance, of the offense is one of those criminal-law institutions (like prescription or suspended sentences etc.) whose rules apply in the case of succession of criminal laws in time, autonomously, independent of the legal classification of the facts after the new law or after the previous one.

According to the second opinion, the more favorable criminal law is determined by comparing successive laws, concretely establishing the more favorable law and its final application as a whole. The principle underpinning this orientation is the doctrine according to which laws are compared, but not combined.

In support of that approach, it was revealed that a combination of the more favorable provisions of the two successive laws is a judicial hybrid, and leads to the creation of a third law (*lex tertia*), therefore inadmissible, because it would mean that the judicial bodies can exercise an attribute that that does not belong to them, and which falls under the constitutional jurisdiction of the legislature. This view was based on an argument text, respectively art. 13 of the Criminal Code of 1968, which stated that in the event that between the offense and until the final judgment

of the case one or more criminal laws occurred, the most favorable law will apply, emphasizing that it is the law, and not the more favorable provisions of the successive laws. In fact, the new Criminal Code took in art. 5 the same solution according to which, "If from the offense until the final judgment of the case one or more criminal laws occurred, the more favorable law will apply", so it was argued that the reasoning is still valid based on the legal provisions in force.

The entering into force of the new Criminal Code, on the date of February 1<sup>st</sup>, 2014, 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 14<sup>th</sup> 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 14<sup>th</sup> 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 1<sup>st</sup> 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 6<sup>th</sup> 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.

In reasoning, the Court held that the provisions of art. 5 of the current Criminal Code, in the interpretation which allows courts, in determining the most favorable criminal law to combine the provisions of the Criminal Code of 1968 to those of the current Criminal Code, is contrary to the constitutional provisions of Article 1 par.(4) on separation and the balance of powers in State and of Article 61 paragraph. (1) on the role of Parliament as single legislative authority of the country.

According to Article 1 par. (4) of the Fundamental Law, "The State is organized on the principle of separation and balance of powers - legislative, executive and judicial - within the framework of constitutional democracy", while according to Article 61 par. (1) "Parliament is the supreme representative body of the Romanian people and the sole legislative authority of the country."

Compared to these constitutional provisions, the Court held that the legal provisions governing the work of Courts and secures their position on the law, unanimously accept that "the powers of the judge involves identifying the law applicable, the analysis of its content and a necessary adapting it to the legal acts it established so that the legislator, who was unable to provide all legal situation leaves to the judge, invested with the power to tell the law, a part of the initiative. Thus, in the activity of interpreting the law, the judge must strike a balance between the spirit and the letter of the law, between the demands of drafting and the purpose pursued by the legislator, without the power to legislate, by substituting the competent authority in this field "(to be seen the Constitutional Court Decision No. 838 of 27 May 2009 published in the Official Gazette of Romania, Part I, no.461 of 3 July 2009).

The judiciary power, through the High Court of Cassation and Justice, has the constitutional role of giving certain interpretations of a legal text in order to find a uniform application by the courts. This does not imply that the Supreme Court can substitute the Parliament's legislative, the sole legislative power in the state, but involve certain constitutional requirements concerning the manner in which the interpretation is made.

The interpretation that involves the application of the more favorable criminal law involves the application of more favorable autonomous institutions, is likely to infringe the constitutional requirements because otherwise it would break the organic link between the institutions of criminal law pertaining to each successive law, with a direct consequence of the content and meaning change of normative acts adopted by the legislature.

Also, the Constitutional Court stated that, as guarantor of rights and freedoms, it cannot ignore other consequences of constitutional nature such as requirements of non-discrimination of the offender, either, in this case positive, which not only justifies, but impose an identical treatment.

This means that suspects / defendants who committed offenses under the old law will be judged under the rule of law, must have, according to the more favorable law a legal situation identical, with those previously convicted under the old law or those who committed crimes

under the new law, a third form of treatment that combines punitive provisions of both codes being forbidden.

Therefore, to meet the constitutional requirements of article 16 par. (1) of the Constitution, according to which "citizens are equal before the law and public authorities, without any privilege or discrimination" is prohibited an alternating the two laws, because, otherwise, the application of the more favorable criminal law would create positive discrimination with the consequence of creating a privilege for the offender who is being tried in the transition period of the law.

Given the above, the Constitutional Court held that only an interpretation of article 5 of the Criminal Code in that more favorable criminal law applied in its entirety is the only one that can eliminate the unconstitutional flaws.

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<sup>1</sup> 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 14<sup>th</sup> 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.

Regarding the mechanism for determining the most favorable criminal law, it is worth noting that the law does not absolutely determine the criteria by which it is identified so that its determination to judicial organs is not an abstract process, but a concrete one, reported directly to the crime committed and its author.

In the science of criminal law is generally accepted that, to determine more favorable law, we must examine and compare the successive laws in terms of conditions of criminality of the act, prosecuting and sanctioning. We must consider not only the punishment provided for the offense, but also all rules and institutions related to the case and which influence the criminal liability of the perpetrator: aggravation causes and mitigation of punishment, complementary punishments and accessories, provisions on attempt, participation etc. On a practical solution it is recommended to examine first the conditions of the ground and conditions concerning criminal responsibility for the crime committed. It is possible that the successive laws criminalize different in the sense that one of the law provides that the conduct would constitute a criminal offense, conditions or requirements that other law may not provide. In this case, the more favorable law it will be the one that provides for such conditions, if they are not in fact fulfilled.

It is also possible that, in relation to the offense committed, one of the laws lay down certain conditions for criminal liability (eg prior complaint of the injured party, notification to

the competent body, etc.), or in some cases eliminating the criminal nature of the act criminal liability, sentencing or execution.

In such circumstances, the more favorable law will be the one that provides special conditions for criminal liability if these conditions are not achieved, or what the law provides that exclude the offense, which removes criminal liability, penalty application, etc., if these causes are found in reality.

If after considering these factors do not determine the more favorable law, we consider the successive laws under penalties for the offense committed, being the most favorable, the law that provides for a lighter sentence. For lighter sentencing, first take into account the nature of the penalty, imprisonment being heavier than the penalty of fine. When penalties are of the same nature, take into account the duration or the amount thereof, the maximum and minimum limits set by law. We must also take into account the causes of aggravation and mitigation of sentence provided in successive laws, being generally the more favorable law for establishing and applying a lighter penalty for the offense committed.

Regarding the mechanism for determining and applying the more favorable penal law, by judicial bodies the following clarifications must be made:

If the new law is a decriminalization law, the provisions of art. 4 of the new penal code and not the criminal law more favorable, provided for by art. 5 or art. 6 of the Code.

Also, the Law no. 187/2012 for the implementation of Law no. 286/2009 on the Criminal Code, as amended by Law no. 255/2013 with effect from 1 February 2014 also includes several legal provisions to be observed in the enforcement of the more favorable criminal law, such as:

In the case of multiple offenses, if at least one of the offenses was committed under the new law, the punitive treatment under the new law applies, even if the penalty for other crimes was established under the old more favorable law (art. 10 of the implementing law application).

If the succession of criminal law occurred until the final judgment of conviction, the complementary and accessory penalties apply according to the law which has been identified as the more favorable law in relation to the offense committed (art. 12 par. 1 of the enforcement of law). However, the additional punishment consisting in publication of the sentence shall not apply to offenses committed before the entry into force of the new Criminal Code, even if the more favorable criminal law in relation to the offense committed is the new law (art. 12 par. 2 of the enforcement of law).

To determine the most favorable criminal law concerning the suspension of the sentence under supervision in accordance with art. 5 of the new Criminal Code, the court will consider the scope of the obligations imposed upon the convict under the laws and effects of the suspension according to successive laws, taking priority over the duration of the probation or supervision period (art. 16 par. 2 of the enforcement of law).

Also regarding juvenile defendants, which according to the new Penal Code cannot receive punishments, but educative measures for the offenses committed, the law states that in implementing the provisions on the more favorable penal law occurred during the process, a sentence with suspension of execution, applicable to the juvenile defendant under the Criminal Code of 1969 is considered more favorable than an educational measure of deprivation of liberty under the new Criminal Code.

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