Law Review ● vol. VII, special issue, December 2017, p. 209-217

SOME CONSIDERATIONS ON THE ENFORCEMENT OF THE MOST FAVOURABLE CRIMINAL LAW TO THE DEES ON TRIAL IN SPECIAL CIRCUMSTANCES

PhD Student Alexandra-Raisa ROŞCAN
The West University of Timişoara, Law Faculty,
Public Law Department, Romania,
e-mail raisaroscan@hotmail.com

Abstract

This article aims to analyze the changes introduced by the new Criminal Code in relation to the criminal law enforcement in some special situations which can occur in the practice of the courts in terms of the provisions of the Decision no. 265 from May 6th 2014 of the Constitutional Court of Romania and the Decisions of The High Court of Cassation and Justice.

It tries to determinate the phases of the application of the most favourable criminal law in case of concurrence of offenses, continuous offenses, plurality of offenses, post executory recidivism, deeds with a low social danger.

Keywords: *Public Law, Criminal Law, the most favorable criminal law, concurrence of offenses, plurality of offenses, post condemnatory recidivism.*

1 The enforcement of the most favourable criminal law in the case of the concurrence of offenses

The joinder of offenses has been regulated in the 1936 Penal Code in the article no.101 and no.104, in the 1969 Penal Code in the article no.3 letter a and in the 2009 Penal Code in the article no.38, alignment 1.

What the 1969 penal code brings new from the previous one is a legal accumulation of the two categories of main punishments: the prison and the penalty. What the actual penal code brings new to the previous legislation is that the concurrent offenses can be accomplished through distinct actions or inactions.

Applying the mitior lex principle in the case of the concurrence of offenses involves two phases. In the first phase, the judge will decide which is the most favourable penal law considering each concurrent offense and then he will apply the rules specific to the concurrence of offenses established by the most favourable criminal law.

A good example in this sense would be that of a person who had commited the offenses of racketeering and conflict of interest, before the new penal code took effect. If we consider racketeering, the dispositions of the new penal law are more favourable, the judge establishing the penalty according to this normative act.

Then, when the successive laws are compared, we notice that the most favourable law, with regards to the conflict of interest is the previous penal code. After the phase of establishing the sentence attached to each of the offenses, what follows is the phase of choosing the least favourable law, based on the penal treatment specific to the concurrence of offenses. If the Court doesn't want to apply an increment and if the increment it intends to apply is inferior to one third, the most favourable law is the 1969 penal code. Otherwise, the most favourable law is the new penal code[1].

This way of identifying the softer law in the case of the concurrences of offenses has undergone numerous critics[2], because a lex tertia has emerged out of the combination of the dispositions of two laws.

Doctrina[3] didn't share the same opinion, as it has been stated that in this case the dispositions of two laws for the same deed do not apply, but the resulting sentence is the result of an autonomous operation, as opposed to each offense which forms the plurality.

The more lenient law regarding the sanction will be established in concreto, combining the sentences established according to the old law, and then, to the new law. De jure, the new penal code is more favourable most of the times, because it restricts the increment applicable to 1/3 from the sum of the other sentences. The new penal law also enforces the possibility of applying life sentence according to the number and the gravity of the concurrent offenses.

If one of the concurrent offenses had occurred after the new penal code took its effects, the dispositions of the article 10 in the Application Law are applied which state that "the punishment treatment of the concurrence of offenses is applied according to the new law when at least one of the offenses in the structure of plurality has been committed by the new law, athough for the others, the sentence has been established according to the old, more favourable law. " In this sense, The High Court of Cassation and Justice stated, through decision no. 7/02.03.2016, which admitted the statement made by the Court of Appeal Bacău, -Penal Section and decided that: in applying the dispositions of the article no. 5 in the Penal Code[4], in the case of plurality of offenses, consisting of offenses occurring before the date of the1-st of February 2014, respectively of some offenses which occurred after the New Penal Code took effects, for the offenses which occurred before the date of the1-st of February 2014, the more favourable penal law is applied-

[1] Hotca, M., A.: Once more about applaying the more favorable criminal law based on article no.5 from the New Penal Code, https://www.juridice.ro/312661/din-nou-despre-aplicarea-legii-penale-mai-favorabile-in-baza-art-5-din-noul-cod-penal.html;

[2] Barbu, C.: Applying the Romanian Criminal Law in space and time, The Scientific Publishing, Bucharest 1972, p.261;

[3] Streteanu, F.: Aspects regaring applying in time of the Criminal Law by entry into force of the New Penal Code, Penal Law Notebooks, The Juridical Universe Publisher,Bucharest 2013, p.19;

[4] Article no.5 from the Criminal Code;

identified as being the old or the new law- and for the offenses which occurred under the influence of the new Penal Law, as well as for the punishment treatment of the concurrence of offenses[5], the new law will be applied, according to article no. 3 in the Penal Code, and article no. 10 in the law no. 187/2012, for applying the law no. 286/2009 regarding the Penal Code.

Therefore, in the case of committing one of the concurrent offenses, after the new Penal Code took its effects, the retroactivity of the new law does not apply, because the plurality of the offenses has been outlined after the abrogation of the old law, and the guilty person has assumed the effects of breaching the new law.

At the same time, from the interpretation per a contrario of the dispositions of the 10 article of the Law Enforcement, we may understand that when all the offences in the structure of plurality have been done under the influence of the 1969 Penal Code, we may apply the punishment treatment of the plurality of offences established by the 1969 Penal Code or by the new Penal Code.

2 Section Applying the more favorable penal law in the case of continuous offence

In the 1969 Penal Code, the definition of the recurring offense was established in the article no. 41 the 2-nd alignment, which stated that the offense was recurring when a person commits, after certain periods of time, but in the making of the same resolution actions or inactions which present, each by itself, the content of the same offense.

The New Penal Code stipulates the definition of the same offense at the article no.33 the 1-st alignment, and what brings new besides the old regulation is the statement that the recurring offense must be performed against the same passive subject.

Regarding the recurring offense, the more favourable penal law is established in two phases.

In the first phase, the more favourable penal law is identified under the aspect of the special limits of punishment for the committed offense, and in the second one the softer punishment is established under the aspect of the conditions of existence and the applicable punishment treatment. The latter are assessed altogether, because they make up a single institution[6].

Regarding the enforcement of the article no. 5, in the case of the recurring offenses, The High Court of Cassation and Justice has pronounced itself through Decision no. 5/2014 in 26.05.2014. Therefore, it has been discussed if the recurring

[5] Article no. 39 from the Criminal Code;

[6] Streteanu, F.: Documentation regarding applying in time of the Penal Code in the conditions of entry into force of the New Penal Code, p. 14, http://www.academia.edu/9171827/DOCUMENTARE_PRIVIND_APLICAREA_%C3%8EN_TIMP_A_LEGII_PENALE_%C3%8EN_CONDI%C5%A2IILE_INTR%C4%82RII_%C3%8EN_VIGOARE_A_NOULUI_COD_PENAL;

offense may function as an autonomous institution with reference to the punishment limits.

In this sense, the High Court has defined the recurring offense as being a unit of offenses, and not a type of offense, with the capacity of functioning independently, having it own conditions of existence and rules concerning the punishment treatment, different from the conditions of indictment and from the punishment regime established for the offense in the content of which the constituent actions and inactions are to be found[7].

In spite of the fact that the specialists in Penal Law have come to the conclusion that the recurring offense is an autonomous institution, The High Court of Cassation and Justice has decided that in the application of the article no. 5, the combination of the legal dispositions in two successive laws is not allowed. Therefore, in order to identify the more favourable penal law in the case of the recurring offense, the criterion of the global assessment will be taken into consideration.

3 The application of the more favorable penal law in the case of the post condemnatory recidivism or of the plurality of offences

The old regulation established the post condemnatory recidivism at the article no. 37 letters a and c, which may appear only in certain conditions.

The New Penal Code brings new perspectives in this area, so that the post condemnatory recidivism will bear the name of intermediary plurality and will be defined in article no. 44. This new penal regulation modified the limits of punishment for the offenses in the structure of recidivism, the conditions for the existence of recidivism and for the punishment treatment, so that the legal cumulus established in the 1969 Penal Code has been substituted by the arithmetic cumulus.

In order to apply the lex mitior principle, it is necessary to undergo two phases. The first phase resides in identifying the the more favourable penal law with regards to the special limits of punishment established for the two offenses in the structure of recidivism, and the two phase refers to identifying the more lenient law with regards to the conditions of existence and the punishment treatment established for the post condemnatory recidivism.

As with the concurrence of offenses, if at least one of the offenses which constitutes the terms of the post condemnatory recidivism has occurred under the influence of the new law, then the article no. 10 in Applicational Law is applied. Therefore, the punishment treatment of the new law will be applied, although for the rest of the offenses, the punishment has been established according to the new, more favourable law.

[7] Decision of High Court of Cassation and Justice no. 5 from 26.05.2014, p. 2;

The High Court of Cassation and Justice admitted through decision no. 13/2015, pronounced on the 6-th of May 2016, the statement issued by The Court of Appeal Bucharest –Penal Section 1, in the file no. 26.687./3/2014, by which the pronouncement of a preliminary resolution for the principle clarification of the matter: "if, in applying the dispositions of the article 5 in the Penal Code, according to the Decision of the Constitutional Court no. 265/2014 in the case of the plurality of offenses consisting of an offense for which, according to the previous Penal Code, a sentence has been applied , through absolute judgement, with the conditional arrest of judgement, which, according to article 41 alignment 1 in the Penal Code, doesn't meet the requirements for making up the first term of the post condemnatory recidivism, and, respectively, an offense occurring in the trial period, for which the more favourable law is the new law, the establishing and the execution of the punishment, as a consequence of the reversal of the arrest of judgement, is accomplished according to the dispositions of article no. 15, alignment 2, in the Law no. 187/2012 for applying the Law no. 286/2009 referring to the Penal Code referring to the article 83, alignment 1 in the previous Penal Code or according to the dispositions of article 96, alignment 5, referring to article 44, alignment 2 in the Penal Code, referring to the intermediary plurality.

In this sense, The Higher Court stated that in the case of the plurality of offenses consisting of an offense for which, in the previous Penal Code, a sentence has been applied through absolute judgement, with the conditional arrest of judgement, which, according to article 41, alignment 1 in the Penal Code, doesn't meet the requirements for making up the first term of the post condemnatory recidivism, and offense occurring in the trial period, for which the more favourable law is the new law the establishing and the execution of the punishment, as a consequence of the reversal of the arrest of judgement, is accomplished according to the dispositions of article no. 15, alignment 2, in the Law no. 187/2012 for applying the Law no. 286/2009 referring to the Penal Code referring to the article 83, alignment 1 in the previous Penal Code.

4 Applying the more favourable law in the case of post executory recidivism

The post executory recidivism is stated in the new Penal Code at the article no. 41. In this case, the article no 10 in the Law of Application is to be taken into consideration again.

If it is previously noticed that the requirements referring to the post executory recidivism established in the two successive penal laws are met, the judge will establish in concreto what the more favourable penal law is.

If the Trial Court intends to apply a sentence towards to special maximum, the more favourable law is either the new law (of the maximum is under 20 years), because to the special maximum an increment up to ten years. If the summation of sentences would overcome with more than ten years the general maximum of

prison sentence or if one of the offenses has a 20 year prison sentence, then alignment 3 of article no. 43 states that the prison sentences can be replaced by life sentence.

De jure, the new Penal Code might be more favourable, taking into account the large applicable sentence increment, according to the old regulations[8]. Yet, de facto, the old regulation is more favourable, because the courts don't apply the increments, or apply them on a lower scale.

5 Applying the more favourable penal law in the case of deeds with a low social danger

The New Penal Code didn't take over the dispositions of the article no. 18 in the old penal regulation, athough, these could be applied after the abrogation of the 1969 Penal Code of the deeds commited before the 1-st February 2014, according to article 19, in the Law no. 255/2013. Therefore, the new Penal Code doesn't establish social danger as a general feature of the offense, and as a consequence, the exclusion of the offensive character in considering the intensity of reducing this danger is not taken into consideration any longer[9].

6 Applying the more favourable law in the case of mitigating and aggravanting circumstances

According to the New Penal Code the efects of mitigating circumstances are limited, because they do not presume the mandatory lowering of the penalty under the special minimum.In this sense, there efect will be limited to reducing the legal limits with 1/3.In the doctrine[10] it is layed down that when a mitigating circumstance is retaind according to both laws, it will constitute a more favorable criminal law the code wich circumstance is retained it has larger efects regarding the lowering of the penalty under the special minimum.

In witch case the new law modifies the penalty limits, as also widening the mitigating circumstances, the issue being idetifing the most favorable criminal law.In this case i consider not applying the most favorable criminal law on autonomus institutions, meaning that the legal classification of offences is to be realised based on a law, and the mitigating circumstances applyied based on the other law.Also the doctrine before 1969[11] established the rule according to which in

[8] Streteanu, F.: Documentation regarding applying in time of the Penal Code in the conditions of entry into force of the New Penal Code, p. 14, http://www.academia.edu/9171827/DOCUMENTARE_PRIVIND_APLICAREA_%C3%8EN_TIMP_A_LEGII_PENALE_%C3%8EN_CONDI%C5%A2IILE_INTR%C4%82RII_%C3%8EN_VIGOARE_A_NOULUI_COD_PENAL;

[9] Streteanu, F.: Aspects regaring applying in time of the Criminal Law by entry into force of the New Penal Code, Penal Law Notebooks, The Juridical Universe Publisher,Bucharest 2013, p.19;

[10] Basarab, M.: Penal Law. General part, Didactical and Pedagogical Publisher, Bucharest, 1983, p. 32;

[11] Dongoroz, V.: Penal Law. Re-Editing the 1939 Edition, The Romanian Asociation of Penal Scienties, Bucharest, 2000, p. 109-110;

applying the mitior lex, the softest law is that which in concreto leads to a more favorable situation for the defendant.

The doctrine after 1969[12] established than when the penal laws contend of more favorable dispositions and more severe ones, the softest law will apply not the most favorable disposal.

The High Court of Cassation and Justice pronuced regarding appling the more favorable criminal law in case of mitigating circumstances by the no. 10/2014 Decision. This established that the mitigating circumstances will be globaly valued depending on incrimination and penalty , because they can not be looked apon and analised distictivly before the institution of punishment.

7 Applying the more favourable law in the case of individualization modalities regarding execution of the sentance

Conditional remission , remission under supervision and correctional work stipulated by the 1969 Criminal Code will be under alaysis. Acording to the New Criminal Code we will examinate the postponing of penalty enforcement and the suspending service of a sentance under supervision.

One way to individualize a sentance without correspondance in the New Penal Code is conditional remission of executing the sentance.If we make a comparison of this institution with the postponing of a penal enforcement we observe the reglementations of the 1969 Penal Code are more favorable. On this line, article 15 from Law no. 187/2012 stipulates that the conditional suspending of the penal enforcement applied according to the Penal Code from 1969 is maintained even after the New Penal code came into force. Therefore , the regulation of conditional suspesion of the penal enforcement, including under the view of revocation or annulment of it, is the one stipulated by the 1969 Penal Code.

Also, analysing the comparison of the conditional suspension of the penal enforcement from the consecutive Penal Laws we can conclude that the more favorable criminal law is the Penal Code from 1969, because it does not stipulate the obligation of correctional work. The measure of suspending service of a sentance under supervision aplied by the 1969 Penal Code it is maintained according to article 16 from la no. 187/2012 even after entry into force of the New Penal Code, until the fulfilment of the probational period established by the conviction decision. However line no. 2 of article no.16 from the same law stipulates that for determening the more favorable criminal law regarding suspension service of a sentance under penal enforcement according to article no. 5 from the Penal Code, the Court will take to consideration the obligation imposed to the convicted and the efects of the suspens according to consecutive laws, with priority over the probation or supervision period. In conclusion, if both

[12] Dongoroz, V. and contr.: Theoretical Explinations of Romanian Penal Code, The General Part, First and second volume, Second edition, The Romanian Academy Publisher, Bucharest, 2003, p. 71;

consecutive Penal Codes stipulate the application of the supending service of a sentance under supervision, therfore identifing the more favorable criminal law it will be taken into consideration the obligations imposed to the convicted and the efects of this suspension according to both laws.

Regardin the correctional work stipulated by old Penal Law we can observe that is was not taken over by the New Criminal Code. Therefore if for the same convition the Penal Code from 1969 stipulates correctional work the New Penal Code stipulates serivce of a sentance under supervion, the more favorable criminal law is the New Penal Code. The doctrine considers that the New Penal Code is more soft even if it stipulates imposing some obligation and supervision measures.

8 Applying the more favorable criminal law in case of juvenile offending

Regarding the sanctions applyied to juvenile offenders we observ that the New Penal Code does not stipulate punishments, only educational measures, wich fact sustaines the theory that the New Law is always more favorable. Therefore article no.113 from the New Penal Code stipulates that the juvenile offender under 14 years does not have penal resposability, those betwen 14 and 16 years old will have penal responsability only if it can be proven that they had criminal capacity when comiting the crime, and the 16 years old juveniles will have full penal responsabilities. The court will establish in concreto the more favorable criminal law, because the rebuke is not stipulated in the New Criminal Code, even if it is the softest educational measure from all stipulated in the New Penal Code.

In cases of penal consecutive laws the stipulations of article no18-22 from the Law no. 187/2012 must be fulfiled.

Regarding the repetition of ofence artice no.9 line no.1 from the Application Law stipulates that imprisionment penalties will not be taken into consideration stipulated in the Penal Code when repetition of ofence is established by the stipulations from the 1969 Penal Code regarding juvenile offending.

9 Conclusions

The New Penal Code respects the guidelines established in the 1969 Penal Code, therefore is borrows most of the dispositions mutatis mutandis. In case of special situations mentioned above we can se that the New Criminal code is a more favorable criminal law, because it enforces more soft penalties.

REFERENCES

(1) Hotca, M., A.: Once more about applaying the more favorable criminal law based on article no.5 from the New Penal Code, https://www.juridice.ro/312661/din-nou-despre-aplicarea-legii-penale-mai-favorabile-in-baza-art-5-din-noul-cod-penal.html;

(2) Barbu, C.: Applying the Romanian Criminal Law in space and time, The Scientific Publishing, Bucharest 1972, p.261;

(3) Streteanu, F.: Aspects regaring applying in time of the Criminal Law by entry into force of the New Penal Code, Penal Law Notebooks, The Juridical Universe Publisher,Bucharest 2013, p.19;

(4) Streteanu, F.: Documentation regarding applying in time of the Penal Code in the conditions of entry into force of the New Penal Code, p. 14, http://www.academia.edu/9171827/DOCUMENTARE_PRIVIND_APLICAREA_%C3%8EN_TIMP_A_LEGII_PENALE_%C3%8EN_CONDI%C5%A2IILE_INTR%C4%82RII_%C3%8EN_VIGOARE_A_NOULUI_COD_PENAL;

(5) Decision of High Court of Cassation and Justice no. 5 from 26.05.2014, p. 2;

(6) Streteanu, F.: Documentation regarding applying in time of the Penal Code in the conditions of entry into force of the New Penal Code, p. 14, http://www.academia.edu/9171827/DOCUMENTARE_PRIVIND_APLICAREA_%C3%8EN_TIMP_A_LEGII_PENALE_%C3%8EN_CONDI%C5%A2IILE_INTR%C4%82RII_%C3%8EN_VIGOARE_A_NOULUI_COD_PENAL;

(7) Basarab, M.: Penal Law. General part, Didactical and Pedagogical Publisher, Bucharest, 1983, p. 32;

(8) Dongoroz, V.: Penal Law. Re-Editing the 1939 Edition, The Romanian Asociation of Penal Scienties, Bucharest, 2000, p. 109-110;

(9) Dongoroz, V. and contr.: Theoretical Explinations of Romanian Penal Code, The General Part, First and second volume, Second edition, The Romanian Academy Publisher, Bucharest, 2003, p. 71;