Bulletin of the *Transilvania* University of Braşov
Series VII: Social Sciences • Law • Vol. 8 (57) No. 2 - 2015

CONSIDERATIONS ON THE ENFORCEMENT OF THE MOST FAVOURABLE CRIMINAL LAW IN CASE OF REQUESTS FOR PUNISHMENTS MERGER AND REQUESTS FOR CONDITIONAL RELEASE

Constantin I. GLIGA[1]

Abstract: *This article intends to draw the attention to some situations which can occur in the practice of the courts concerning the enforcement of the most favourable criminal law in terms of the provisions of the Decision no. 265 from May 6th 2014 of the Constitutional Court of Romania and tries to propose solutions for the cases in which the "combination" of the provisions of successive criminal laws is impossible to avoid*

Key words: *the most favourable criminal law, punishments merger, conditional release, decision, Constitutional Court of Romania.*

1. Introduction

The entry into force of the New Criminal Code on February 1st 2014 brought some important modifications to the fundamental institutions of criminal law. Therefore, although concerning the sentencing regime we notice a reduction of the special punishment limits, the modifications brought to this institution have a determinant contribution to the punishment establishment in case of multiple offences. Therefore, a special issue was the modality in which the most favourable criminal law is enforced until the definitive judgement of the case (art. 5 of the New Criminal Code), the practice and doctrine providing different solutions concerning this aspect. This controversy culminated in the issuance of two totally opposite solutions, coming to offer an interpretation to art. 5 of the New Criminal Code. Therefore, by Decision no. 2 from April 14th 2014, published in the Official Gazette of Romania, Part I, no. 319 from April 30th 2014, the High Court of Cassation and Justice – Panel for the judgement of certain legal issues on criminal matters – decided that, by enforcing art. 5 of the Criminal Code, the statute of limitation of the criminal liability is an autonomous institution, as compared to the institution of punishment, establishing the mechanism for deciding the most favourable criminal law in two steps, first the easier provisions of successive laws concerning the punishment are identified, and next the most favourable law is selected in case of

[1] Faculty of Law, *Transilvania* University of Braşov.

the statute of limitation of the criminal liability by taking into consideration all incidental provision from the same law (duration, interruption and suspension of the statute of limitation). Subsequently, by the Decision no. 265 from May 6th 2014, published in the Official Gazette of Romania, Part I, no. 372 from May 20th 2014, the Constitutional Court stated that: "*the provisions of art. 5 of the Criminal Code are constitutional to the extent in which they do not allow the combination of successive laws provisions for the establishment and enforcement of the most favourable criminal law*".

Therefore, the Constitutional Court's decision practically invalidated the High Court of Cassation and Justice's decision, establishing that the most favourable criminal law must be interpreted and enforced globally and not by autonomous institutions.

The multitude of problems related to the enforcement in time of the criminal law, which the judiciary practice deals with following the publication in the Official Gazette of the Decision of the Constitutional Court of Romania no. 265 from May 6th 2014, determined, as it was expected, a multitude of discussions concerning the modality in which the principle of global enforcement of the most favourable criminal law is to be put into force and applied to actual cases subject to judgement.

1.1. The most favourable criminal law in case of multiple offences – theoretical aspects

If under the old regulation, art. 34 letter b) of the 1968 Criminal Code provided that when the court established only imprisonment punishments for the acts subject to judgement, the resulting punishment consists of the hardest punishment, which can be increased up to its special maximum limit, and if this maximum limit is not sufficient, an increase of up to 5 years can be added, art. 39 letter b) of the New Criminal Code established the mandatory character of adding an increase of 1/3 from the total of the other established punishments to the hardest punishment.

The modality in which the most favourable criminal law is to be established in case of multiple offences generated large debates also in the specialised literature, there were both authors who advocated for the enforcement of criminal law by autonomous institutions, as well as promoters of the principle of the global enforcement of the most favourable criminal law.

Therefore, one opinion advocated for the point of view of the High Court of Cassation and Justice, according to which the most favourable criminal law should be enforced by autonomous institutions, being therefore allowed to combine the provisions of successive criminal laws: "*In case of multiple offences, the entry into force of the New Criminal Code can bring two categories of modifications: the modification of the punishment limits enforceable for each offence, namely the modification of the sentencing treatment provided by the law for multiple offences* [3].

In such situation, according to the majority opinion in the doctrine and jurisprudence, it is considered that the principle of the most favourable criminal law must be applied both when establishing the punishment for each offence, as well as when enforcing the resulting punishment for multiple offences.

Therefore, first of all the punishment for each concurrent offence is to be established based on the principle of the most favourable criminal law, and next the punishment for multiple offences is to be enforced based on the same principle, therefore complying with the mechanism for deciding the resulting punishment for multiple offences.

This way of acting was accused sometimes in the specialised literature of leading to the generation of a *lex tertia*, by combining the provisions of two laws, starting from the assumption that one of the laws is more favourable for the multiple offences, and the other one with regard to the resulting punishment.

We consider this objection as unfounded due to the fact that in this case it is not about enforcing the provisions of two laws for the same acts, the enforcement of the resulting punishment being an autonomous operation in relation to the establishment of the punishment for each concurrent offence.

Or, as it is known, once the act is established and the punishment enforced according to one of the laws, the independently acting institutions of the other law can be appealed to, if they are more favourable for the offender.

In conclusion, within the criminal laws succession in time, as regards the sentencing treatment for multiple offences, the most favourable criminal law shall be enforced independently from the law determined to be more favourable in relation to each of the concurrent offences, without saying that a *lex tertia* may be generated in this manner."

Nevertheless, other authors adopted a totally opposite point of view, appreciating that the most favourable criminal law must be interpreted and applied globally, the simultaneous enforcement of provisions from multiple successive laws being prohibited: "*It is to be noticed that the determination of the most favourable criminal law implies an actual requirement, which means taking into consideration both the successive laws, as well as their actual influence on the situation of the offender. Since at issue is a comparison between the successive laws, in order to identify the one which is actually most favourable for the offender, the court shall assess first of all the solutions which arise from the enforcement of each of the successive laws and choose that law whose solutions in the actual enforcement are most favourable for the offender* [1, p. 67]. *In the criminal doctrine, the criteria for determining the most favourable law have been organised, as to how they are referring to the conditions of incrimination, the conditions of holding a person criminally liable and to the sanctioning conditions. The mentioned criteria shall be assessed not generally, but in actual fact, meaning in relation to all criminal law institutions emerging in the respective case, such as attempt, participation in a criminal offence, single and multiple offences, aggravation and mitigating circumstances etc. This assessment must lead the court to the identification of the most favourable law in its whole, totally excluding the other law, not being allowed to combine the most favourable provisions of successive laws, in order to generate a third law (lex tertia), due to the fact that the law is a creation of the legislator and not of the judge."*

At the same time, we must also mention the circumstance in which the jurisprudence associated with the former regulation sustained the thesis of applying the most favourable criminal law by autonomous institutions as regards the rules applicable for multiple offences.

Therefore, in a case decision presented within a specialty study, it was decided that if the concurrent offences were sanctioned with fine according to the former most favourable criminal law, it is correct to apply the rules concerning multiple offences according to the new criminal law, which provides the punishments merger and not their summation, as the former law (Supreme Court, department for criminal cases, decision no. 939/1969) [2].

1.2. The most favourable criminal law in case of conditional release – theoretical aspects.

As regards the institution of conditional release, the provisions of the former Criminal Code are obviously more favourable, considering the following aspects.

First of all, in the New Criminal Code, conditional release can be granted only if the convicted person fulfilled all the civil obligations set by the conviction decision, except if he/she proves that he/she had no possibility to fulfil them.

The former regulation had no such conditioning for the conditional release regarding the fulfilment of the civil obligations set by the conviction decision, the settlement of the requests for conditional release implying, in the current regulation, that the convicted person provides the evidence of paying these amounts.

Secondly, the new regulation provides that conditional release can be granted only to the person deprived of freedom who serves the punishment in an open or semi-open condition, requirement which was not provided in the former Criminal Code.

Last but not least, in the former Criminal Code regulation, persons convicted for offences committed by negligence could have been entitled to conditional release after serving, or considered as being served, smaller fractions of the punishment following community service.

The New Criminal Code does not have such distinction and, therefore, persons convicted for offences committed by negligence have to serve the same fractions of punishment as those convicted for offences committed with intention.

In conclusion, we appreciate that the regulation of the conditional release institution in the New Criminal Code is much more restrictive as compared to the provision of the 1968 Criminal Code, thus the former provisions will always be more favourable as regards the requests for conditional release.

2. Practical aspects concerning the enforcement of the most favourable criminal law, in the light of the principle of its global enforcement, stated by the Decision no. 265 from May 6th 2014 of the Constitutional Court of Romania.

2.1. The most favourable criminal law in case of requests for punishments merger

Hereinafter we intend to analyse the effects of the decision of the Constitutional Court of Romania on the requests for punishments merger filed after the definitive conviction in distinct case files, respectively the modality in which the most favourable criminal law applicable for these requests is to be established. We consider the assumption in which, after the defendant was definitively convicted in a case before February 1st 2014, he/she was judged in another case file settled after that date, the court considering that in the latter case the provisions of the New Criminal Code are more favourable.

Thus, the issue of establishing the most favourable criminal law applicable to the merger request arises, under the conditions in which both punishments set according to the 1968 Criminal Code, as well as punishments set according to the provisions of the new law (2009 Criminal Code) are to be merged. Under this assumption, no matter what shall be the law according to which the merging shall be carried out, the simultaneous enforcement of provisions from successive criminal laws shall be practically the result, thus appearing a new situation to which the judicial practice shall have to

offer a solution, in default of guidelines established by the doctrine. In the attempt to offer an answer to this problem, we want to submit to your attention the following case: Through the request filed on March 24th 2015 at Braşov Court, the petitioner S.I.D requested the merging of punishments applied through the criminal sentence no. 199/April 29th 2011 of Timiş Court and the criminal sentence no. 313/November 11th 2011 of Braşov Court, requesting also deduction of the served period. Therefore, through the criminal sentence no. 199/April 29th 2011 of Timiş Court, final through the criminal decision no. 702/February 27th 2013 of the High Court of Cassation and Justice, S.I was sentenced to the resulting punishment of 3 years of imprisonment, following the merging of the following three punishments:

- *3 years of imprisonment* for committing the offence provided by art. 323 par. 1 and 2 from the Criminal Code 1968 related to art. 17 letter b from Law no. 78/2000
- *3 years of imprisonment* for committing the offence provided by art. 26 from the Criminal Code related to art. 23 point 1 letter b) from Law no. 78/2000, with the application of art. 27 from the Criminal Code 1968 and art. 17 letter e from Law 78/2000
- *1 year of imprisonment* for committing the offence provided by art. 290 from the Criminal Code related to art. 17 letter c from Law no. 78/2000, with the application of art. 41 par. 2 from the Criminal Code

Following the merging of these punishments, the court applied the hardest punishment of *3 years of imprisonment*, without applying an increase. Through the criminal sentence no. 313/November 11th 2011 of Braşov Court, final through the criminal decision no. 330/March 12th 2015 of the High Court of Cassation and Justice, S.I.D was sentenced to a punishment of *3 years of imprisonment* for committing the offence of money laundering. Through the criminal sentence no. 121/S from May 8th 2015, Braşov Court merged the above-mentioned punishments according to the rules concerning the concurrence of several offences in one action regulated by the New Criminal Code. Thus, the court considered that in the conditions in which the High Court of Cassation and Justice, through the criminal decision no. 330/March 12th 2015, ruled that the most favourable criminal law in that case is the New Criminal Code, a merging of punishments according to the provisions of the old Criminal Code would be in contradiction with the reasons of the Constitutional Court decision no. 265/May 6th 2014, through which the Court noticed that the provisions of art. 5 from the Criminal Code are constitutional as far as they do not allow the combination of provisions from successive laws in establishing and enforcing the most favourable criminal law.

S.I.D filed an appeal against this solution, criticizing the judgement of Braşov Court for the following reasons:

First of all, the decision of the Constitutional Court no. 265/May 6th 2014 referred to in the reasons of the Criminal Sentence no. 121/S from May 8th 2015, refers to the impossibility to enforce the most favourable criminal law according to the principle of autonomous criminal law institutions in a criminal case, solution approved previously by the High Court of Cassation and Justice. Therefore, the Romanian Constitutional Court established that both the provisions from the old Criminal Code and those from the New Criminal Code cannot be enforced within the same file, as the most favourable criminal law was to be established by the court from case to case, depending on the file object. In other words, another court of

law, called to render a decision on other aspects, namely on a request for merging punishments remained final as in the case herein, must establish the most favourable criminal law strictly related to the object of the case submitted for trial. If we were to approve the thesis supported by the court of first instance, according to which when in one of the files in which S.I was prosecuted and convicted, it was determined that the New Criminal Code is the most favourable law, the new provisions must be also enforced in the case herein, which has a different object, namely the merging of punishments already established, it would mean to violate the case law itself of the criminal sentence no. 199/April 29th 2011 of Timiş Court.

We support this point of view because the acts submitted for trial in that case have been punished according to the old Criminal Code, both concerning limits of punishments and also the concurrence of several offences in one action, the court considering at that moment that the enforcement of an increase is not justified. Taking further the argument of the court of first instance, it would mean that no matter what law would be considered the most favourable with respect to the merging of punishments, the result would be the violation of the provisions of the Romanian Constitutional Court decision invoked, combining the provisions of successive criminal laws, since S.I.D was sentenced both according to the provisions of the Criminal Code from 1968 through the criminal sentence no. 199/April 29th 2011 of Timiş Court and also according to the provisions of the New Criminal Code (law considered to be the most favourable in the case settled by Braşov Court).

Thus, within a new file, which has another object, namely the merging of punishments remained final, the court shall establish the most favourable criminal law concerning the concurrence of several offences in one action, the provisions from the old Criminal Code being without a doubt the most favourable, since they do not provide the obligation to enforce a punishment increase.

Moreover, the reasons of the Romanian Constitutional Court's decision invoked in the Criminal Sentence no. 121/S from May 8th 2015 of Braşov Court, have nothing to do with the case herein because, as we showed previously, the solution suggested by the petitioner S.I.D, through the lawyer, does not violate in any way those ruled by the Constitutional Court. We consider that only if the High Court of Cassation and Justice, through the criminal decision no. 330/March 12th 2015, besides the conviction of S.I.D for committing the offence of money laundering, would have also merged the concurrent punishments applied to him in the two files mentioned above, the Supreme Court had to apply the merging rules provided by art. 39 from the New Criminal Code and therefore apply the mandatory punishment increase.

But in this case, taking into account the fact that the concurrent punishments have been merged following the formulation of a separate merging request, we are in the presence of a different file, for the settlement to which the court of law must determine the most favourable criminal law strictly related to the case object, so to the institution of concurrence of several offences in one action, the old law being undeniably the most favourable in this respect. Through the Criminal decision no. 75/2015, returned on July 10th 2015, the Braşov Court of Appeal ruled in favour of the appeal filed by S.I.D against the criminal sentence no. 121/S/May 8th 2015, issued by Braşov Court, which it cancelled concerning the criminal law applicable to the concurrence of several offences in one action and re-judging the case within these limits, merged the concurrent punishments according to the rules established by art. 33

of the Criminal Code from 1968, art. 34 paragraph 1 letter b from the Criminal Code from 1968 and art. 35 of the Criminal Code from 1968.

2.2. Most favourable criminal law in case of conditional release requests

Another problem present in practice concerns the determination of the most favourable criminal law applicable to a sentenced person who requests conditional release, in the conditions in which he/she was sentenced both based on the provisions of the Criminal Code from 1968 and according to the provisions of the New Criminal Code. The petitioner M.A was sentenced to a suspended punishment of 3 years of imprisonment for an act committed by negligence during 2012. Subsequently, during the test time established for this act, on November 7th 2013, M.A commits two other offences for whom he/she is sentenced on April 28th 2014 by Târgu Secuiesc District Court to 8 months, namely 9 months of imprisonment, following the merging of these punishments according to the rules provided by the Criminal Code from 1963, the court establishing a resulting punishment of 9 months.

Consequently, the court of first instance revokes the benefit of the 3-year suspended sentence, M.A having to finally serve 3 years and 9 months of imprisonment. Settling the appeal declared by M.A, on September 4th 2014, Braşov Court of Appeal modifies the appealed sentence and rules to sentence M.A to pay a criminal fine of 2000 lei (200 fine days* 10 lei/day) and to this punishment along with the punishment of 3 years of imprisonment, the suspension of which was revoked. During September 2015, M.A files a conditional release request which is rejected by Braşov District Court, the court considering that the convicted petitioner does not fulfil the objective conditions for release. Thus, the court admitted the fact that M.A did not serve the fraction of two thirds from the punishment duration of 3 years of imprisonment, as provided by art. 100 from the New Criminal Code, and determined that the new regulation is applicable to this case, taking into account that M.A was sentenced to the fine punishment according to the provisions of the New Criminal Code. We consider that this solution is not solid because the court of first instance should have taken into account the provisions of art. 59^1 par. 2 from the Criminal Code from 1968, according to which M.A should have to serve one third of the 3-year punishment applied for committing an offence by negligence. The fact that M.A was sentenced to the fine punishment in the conditions of the New Criminal Code does not automatically entail the enforcement of the new provisions concerning the institution of conditional release. We state this because all the acts for which M.A was sentenced have been committed under the old regulations. Moreover, the fine punishment established according to the new provisions was to be served along with the imprisonment. In other words, the punishment of 3 years of imprisonment to be served by M.A is related to the revocation of the conditional suspension benefit ruled for acts committed under the old Criminal Code, so that all aspects concerning the serving of this punishment, including concerning the conditional release, are subject to the old provisions.

Moreover, according to the provisions of art. 15 par. 2 from Law no. 187/2012 for enforcing Law no. 286/2009 of the Criminal Code: "*The conditional suspension regime of serving a punishment provided at par. (1), including its revocation or cancellation, is that provided by the Criminal Code from 1969*."

Therefore, the provisions of art. 59^1 par.

3 from the old Criminal Code are not applicable in this case because the 3-year punishment to be served by M.A is not the result of the concurrence of several offences in one action between deliberate offences and offences committed by negligence (in order to apply art. 59 from the old Criminal Code) but it is exclusively a punishment for an offence committed by negligence, for the deliberate offences the resulting criminal fine punishment of 2000 lei was applied which is to be served along with the punishment of 3 years of imprisonment.

Therefore, taking into account that the punishment to be served by M.A is the result of the revocation of the conditional suspension benefit applied for committing an offence by negligence before February 1st 2014, we consider that the criminal law applicable to the conditional release request filed by the petitioner is the old law, so that the court had the obligation to analyze the subjective conditions concerning M.A. because he/she had served the punishment fraction requested by the law (1/3 of the punishment as provided by art. 59¹ par. 2 from the Criminal Code from 1968 in case of offences committed by negligence).

3. Conclusions

Without making considerations on the fairness of arguments included in the Decision no. 265 from May 6th 2014 of the Romanian Constitutional Court or without commenting in relation to the opportunity of the global enforcement principle of the most favourable criminal law established by the Constitutional Court, we believe that this principle must not be strictly applied but particularized depending on the concrete circumstances of every case.

We are claiming this because, as we showed above, some situations can occur in practice when the "combination" of provisions from successive criminal laws is impossible to be avoided.

Thus, we consider that the global enforcement principle of the most favourable criminal law, instituted through the Decision no. 265/2014 of the Romanian Constitutional Court must not have an absolute value, the more so as in our opinion, the solution suggested by the Constitutional Court does not cover all situations that may occur in practice concerning the enforcement of the most favourable criminal law.

References

1. Antoniu, G.: *Explicații preliminare ale noului Cod penal,* Vol. I (*Preliminary explanations of the new Criminal Code)*. Bucharest. Universul Juridic Publishing House, 2010.
2. Streteanu, F.: *Considerații privind aplicarea legii penale mai favorabile în cazul legilor complexe (Considerations on enforcing the most favourable criminal law in case of complex laws)*. Available at: http://www.juridice.ro/317849/consideratii-privind-aplicarea-legii-penale-mai-favorabile-in-cazul-legilor-complexe.html. Accessed: 01-09-2015.
3. Streteanu, F.: *Documentare privind aplicarea în timp a legii penale în condițiile intrării în vigoare a noului Cod penal (Documentaries on the enforcement in time of the criminal law in the conditions of the entry into force of the new Criminal Code*). Available at: http://www.just.ro/LinkClick.aspx?fileticket=j6vg%2Flz8r40%3D&tabid=2112. Accessed: 01-09-2015.