Some considerations about the application of the more favourable criminal law regarding deeds on trial in some countries of European Union

PhD. student **Alexandra Raisa ROŞCAN**[1]

Abstract

The purpose of this paper is to realize a study regarding the comparison of the penal provisions that uphold the application of the more favorable criminal law until the final judgment of the cause between Romania and France, Italy, Spain and Portugal. The study is realized as result of a doctrine, jurisprudential and legal analysis from all the five countries, and the author is proposing to identify not only the similarities but also the differences of applying the more favorable criminal law until final judgment of the cause in Romania and another four European countries. We will identify the definitions of the more favorable law, legal regulations, conditions of application, special application situations, application limits. Special attentions will be paid to the concept de lex tertia, because we need to establish if one of these countries applies the more favorable criminal law on autonomous institutions, meaning if there can be a combination of more legal provision from two or more consecutive penal laws. We will see if Romania rallied to the penal policy of the other European countries but also what do they bring new to the matter.

Keywords: *the more favourable criminal law, lex tertia, non-retroactivity, retroactivity.*

JEL Classification: K14, K33

1. Introductory considerations

Until the entry into force of the new Criminal Code, application of the more favorable criminal law did not raise major problems in Romania. After February 1, 2014, the new criminal law created the premises of multiple conflicts of opinion regarding the application of this principle. As a result, the doctrine was divided into two, one part supported the global application of criminal law, and the other, more numerous, supported its application to autonomous institutions.

Article 5 of the new Criminal Code has generated heated theoretical discussions and practical antagonistic solutions, resulting in the issuance of two diametrically opposed solutions, the first by the High Court of Cassation and Justice and the second by the Constitutional Court, which invalidated, the decision of the High Court of Cassation and Justice. By decision no. 2 of 14.04.2014, the High Court of Cassation and Justice, establishes that the effects of the autonomous institutions are not generated by the same type of juridical fact, the institutions being autonomous both between themselves and with regard to criminalization and sanction.

[1] Alexandra Raisa Roşcan - West University of Timişoara, Romania, raisaroscan@hotmail.com.

The Constitutional Court pronounces, 22 days later, the decision no. 265 / May 6, 2014, which stipulates that the provisions of art. 5 of the Criminal Code are constitutional as they do not allow the combination of the provisions of successive laws in the establishment and application of more favorable criminal law.

So, for 22 days, the courts have applied the more favorable criminal law to autonomous institutions, that is, combining the more favorable provisions of the two successive criminal laws.

Hence, we considered it necessary to identify and study the legislation, doctrine and jurisprudence of five European Union Member States in order to identify the way in which more favorable criminal law is applied to the cases under judgment in order to determine whether Romania has raided their criminal policies.

2. France

Criminal laws apply immediately to previous untried facts at the time of their entry into force when they are favorable to those prosecuted, or more gentle.

This is the second principle governing the enforcement of criminal law over time. In this case, it is retroactivity in mitius, even if Article 112-1, (3) of the Criminal Code, rather provides for the principle of the immediate application of more favorable laws[2]. According to this text, the new provisions, less stringent than the old provisions, apply to offenses committed prior to their entry into force unless a conviction has been passed under the authority of the trial.

This principle is particularly important during the period of legislative instability. In this respect, the Constitutional Council gave constitutional features to this principle by Decision no. 80-127 DC of 01.20.1981, invoking the application of art. 8 of the Declaration of Human and Civic Rights. Georges Vedel[3] was one of the members of this Constitutional Council who had advocated this principle being established in his report on the "Security and Freedom" Decision[4].

Criminal law may retroactively include provisions more favorable to the guilty person because it does not threaten individual privileges.

The Old Criminal Code did not include this principle, but the Court of Cassation succeeded in establishing it with a decision of the Criminal Chamber on 10.01.1813.

A. Applying this principle. The principle of retroactivity of the more favorable criminal law is an immediate application principle. More favorable criminal law applies to crimes committed before its entry into force, but not yet judged or facts already judged, but only in appeals.

The French Criminal Code provides for several conditions for the application of this retroactivity. The first condition is imposed by par. (3) of art.

[2] X. Pin: *Droit penal general*, 5e edition, Dalloz, Paris, 2012, p. 98.
[3] Georges Vedel was member of the Constitutional Council between 1980-1989.
[4] The Decision no. 80-127 DC January 20th, 1981 of the Constitutional Council, cons. 75, the document is available at http://www.conseil-constitutionnel.fr/conseil-con..decision-n-80-127-dc-du-20-janvier-1981.7928.html, accessed on 06.10.2017.

112-1, which provides that the new more favorable law applies only if there is no conviction entered under the authority of the trial.

Another condition is stipulated in par. 2 of art. 112-4, which provides that the sentence shall cease to be enforced if the new law, adopted after the conviction has been pronounced, no longer criminalises the offense. Consequently, convictions already pronounced and entered into the incidence of the trial must be applied according to the old law, unless a sentence has been pronounced for an act which, according to the subsequent law, is no longer a crime.

Another clear rule established in jurisprudence[5] is that: unless otherwise provided, the repeal of the law imposing a penalty prevents its enforcement.

According to the French Criminal Code, criminal law is more favorable when incrimination is abrogated or when it has been amended.

In the latter case, three cases are distinguished:

a) The new law amends the punishment. If the new law amends the stipulated punishment, it is more favorable when it surpasses a crime in offense (legislative corrective measures) or a criminal offense or when it eliminates a punishment or diminishes its limits[6]. If the new law changes the judge's power in sentencing, it is more gentle when it is more favorable to the defendant (creating a new case of suspension, creating an alternative sanction). Thus, the Law of November 26th, 2003 on the rule of migration was considered a more favorable criminal law since it introduced in the Criminal Code article 131-30-2, which stipulates that the punishment for prohibiting the stay in the territory of France cannot be pronounced for some humanitarian considerations.

This law immediately applied to a convict whose state of health required medical care that he would not have received in his country of origin[7]. The Law of August4th, 2008 was also considered more favorable as it abolished the automatic nature of the prohibition to pursue a profession in the field of commerce or the administration of societies and gave it the particularities of an optional punishment. Consequently, the person accused of breaching this prohibition resulting from a conviction prior to the entry into force of the new law has been exonerated[8].

b) The new law amends the incrimination. The new law is obviously milder when it abolishes an incrimination because the pre-existing legal condition

---

[5] The Decision from June 28th, 2002 of the Court of Cassation, Criminal Chamber.

[6] For instance, by adopting the Law 2009-526 from May 12, 2009 the punishment of dissolution of legal entities in cases of fraud is abolished. Violation of this punishment was considered suspicious because it took place during a process involving the Church of Scientology, which could benefit from *in mitius* retroactivity. Reintroducing this penalty by Law 2009-1437 of November 24th, 2009 is a more severe law that cannot be applied retroactively.

[7] The Decision from January 6th, 2004 of the Court of Cassation, Criminal Chamber, the document is available at https://www.courdecassation.fr/jurisprudence_2/chambre_criminelle_578/arret_n_1223. html, accessed on 06. 10.2017.

[8] The Decision from December 16th, 2009 of the Court of Cassation, Criminal Chamber, the document is available at https://www.courdecassation.fr/jurisprudence_2/chambre_criminelle_ 578/6888_16_14631.html, accessed on 06. 10.2017.

disappears[9]. It is also more favorable when adding new constituents so that the crime will be more difficult to commit. Thus, the law of July 10th, 2000 redefines the unintentional act by establishing more difficult conditions for it.[10] Also, the new law is milder when it implies the existence of intent to the presumed intention provided by the old Criminal Code[11]. A similar situation is also encountered when the text whose breach is permissible for reference is removed [12] or when the new law turns a simple offense into a common offense [13]. However, criminal law is more severe when the number of punishable acts increases. Thus, a vague term substituted for a specific term is a worsening. For example, the abuse of trust provided by Article 408 of the old Criminal Code provides for a limited list of contracts under which the delivery of the work was finally to be carried over, while the current text is limited to misappropriation of assets or values without specifying the type of supply contract. So the new law is more severe. Also, the law redefining incrimination is more severe, removing a cause of attenuation of punishment.[14]

c) The new law amends incrimination and punishment. When incrimination and punishment are altered in the same direction, it is not clear whether the new law is more favorable or more severe. The difficulty is that a law may include both mild and more severe provisions. In this case, it should be made clear whether these provisions are separable or not. If they are divisible, ie if they refer to a distinct object, they will be subject to separate law enforcement conditions over time. Smaller provisions will apply immediately to the facts committed prior to its entry into force, while the tougher provisions will apply only to the future[15]. For example, the Berenger Law of March 26th, 1891 provided for a postponement of imprisonment, but also stipulated a small recidivism. Therefore, the law applies distributively: the postponement of execution can retroactivate, the small recidivism cannot retroactivate.

---

[9] The Decision from March 22th, 2011 of the Court of Cassation, Criminal Chamber, https://www.legifrance.gouv.fr/affichJuriJudi. do?idTexte=JURITEXT000023802980, accessed on 06.10.2017.

[10] The Decision from September 5th, 2000 of the Court of Cassation, Criminal Chamber, the document is available at https://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000007069557**,** accessed on 06.10.2017.

[11] The Decision from June 28th, 1995 of the Court of Cassation, Criminal Chamber, the document is available at https://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000007066143**,** accessed on 06.10.2017.

[12] The Decision from December 17th, 1997 of the Court of Cassation, Criminal Chamber, the document is available at https://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000007573246**,** accessed on 06.10.2017.

[13] The Decision from June 6th, 1974 of the Court of Cassation, Criminal Chamber, the document is available at https://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000007059269**,** accessed on 06.10.2017.

[14] The Decision from June 23th, 2009 of the Court of Cassation, Criminal Chamber, the document is available at https://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000020836948, accessed on 06.10.2017.

[15] The Decision from August 22th, 1981 of the Court of Cassation, Criminal Chamber, the document is available at https://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000007061237 accessed on 06.10.2017.

Another example is the French Criminal Code of 1992 which contains numerous autonomous provisions more or less favorable than the previous criminal law and the law of December 23rd, 1980 was more severe as it extended the notion of rape to the punishments of attacks on good morals[16]. If the provisions of the text are indivisible, what is rarely done in French practice [17], they "cannot be arbitrarily separated"[18], so the legislator's intention must be respected or the text "as a unitary one"[19] or to follow the main provisions[20].

In the latter case, one should take into account the fact that between a provision on incrimination and others on punishment, the one on criminalization is the main one[21]. Between two provisions, one on the nature of the punishment, and the other on the amount of punishment, the main one will be that referring to the nature of the punishment. Between two legal norms providing for the benchmark punishment (life imprisonment and fine or imprisonment and fine), the main provision will be that of the deprivation of liberty.

In the French jurisprudence two methods of identifying more favorable criminal law have been stated. The first method is to identify the main disposition that will indicate how the verdict is reached, and the second method is that of globally applying one of the two criminal laws in question. If the new criminal law is more favourable globally, then it will have retroactive effects. An example in this respect is the 1992 Criminal Code, which criminalizes sexual aggression with two years' imprisonment and a fine of 200,000 francs[22]. Before the entry into force of the Criminal Code, the offense was absorbed by non-violent attempt on morals [23], which was sentenced to 5 years in prison and a fine of 60,000 francs. In this situation, the new law is more global and its provisions will apply retroactively.

B. Limiting the retroactive application of more favorable criminal law only in cases strictly provided by law. As a courtesy, we might think that retroactivity in mitius knows no exceptions to criminal law aimed at individual freedoms [24]. However, the Court of Cassation has always accepted that this retroactivity could be ruled out in some cases. In the meantime, its application has

[16] The Decision from April 21th, 1982 of the Court of Cassation, Criminal Chamber, the document is available at https://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000007059774, accessed on 06.10.2017.

[17] X. Pin, *op. cit*. p. 101.

[18] The Decision from May 6th, 1942 of the Court of Cassation, Criminal Chamber: The law of 2nd September 1941 punished the crime of infanticide and excluded the possibility of applying mitigating circumstances. In comparing the texts, the main provisions of the law were considered.

[19] The Decision from June 5th 1971of the Court of Cassation, Criminal Chamber, the document is available at https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000007057271&fastReqId=677430605&fastPos=3, accessed on 06.10.2017.

[20] The Decision from May 6th, 1942 of the Court de Cassation, Criminal Chambre.

[21] X. Pin, *op. cit*. p. 102.

[22] In art. 227-25 of the current French Code, the amount of 200,000 francs was changed to 75,000 euros.

[23] Article 331 of the French Criminal Code of 1810, as amended by Law no. 80-1041 of December 23rd,1980, the document is available at www.legifrance.gouv.fr/jo_pdf.do?id=JORFTEXT000000886767&pageCourante=03029, accessed on 06.10.2017.

[24] X. Pin: *op. cit*. p. 102.

been accepted in case of temporary economic laws[25], then the Court of Cassation reconsidered the matter and decided to admit the retroactive application of criminal law more favorable only in the cases provided by law [26]. This decision was criticized in terms of the hierarchy of norms, whereas the principle of retroactivity in mitius is stipulated in Article 15-1 of the United Nations Covenant on Civil and Political Rights. It stipulates that if a law that either no longer provides for the offense or establishes a lighter punishment is passed after the offense has been committed, then the offender must benefit from it. But the Court of Cassation maintained its position by considering that this text does not apply to the abolition of the text of incrimination or to the reduction of its domain[27].

This literal interpretation is difficult to justify and an action has been brought against France before the UN Human Rights Committee[28]. It would have been more reasonable to assume that Article 15-1 applies a fortiori in the case of more flexible criminalization. The Committee has determined that the principle of the retroactive effect of the lighter penalty and in this case the absence of a sanction applies, Article 110 of the Law of 17 July 1992 infringing the principle of retroactivity of the more favorable criminal law provided for in Article 15 of the Covenant.

C. Limiting the application of the principle of retroactivity to the more favorable law in case of repeal of the only implementing regulations. The Court of Cassation also ignores retroactivity in mitius when the legal rules governing the application of the old law have been abrogated and replaced by more favorable provisions[29]. It is, indeed, regularly stated that "where a legislative provision, legal support for an incrimination, remains in force, the repeal of the laws on its application does not have retroactive effect"[30]. An example of this is "favoritism"[31], provided in art. 432-14 French criminal code, in which case a public procurement procedure was "cut" in order to avoid the financial threshold that required the

[25] The Decision from May 3rd, 1974 of the Cour de Cassation, Criminal Chambre, the document is available at www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000007057175, accessed on 06.10.2017;

[26] The Decision from June 1st, 1981 of the Court of Cassation, Criminal Chamber: *It is assumed that the economic regulations are not retroactive, except in cases expressly provided by law*: www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT00000 7060851**,** accessed on 06.10.2017.

[27] The Decision from Octobre 6th, 2004 of the Court of Cassation, Criminal Chamber, the document is available at https://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000007609985, accessed on 06.10.2017.

[28] Cochet v. France Cause, Communication No. 1760/2008 of International Covenant on Civil and Political Rights, the document is available at http://juris.ohchr.org/Search/Details/1592, accessed on 07.10.2017.

[29] Pin, X., *op. cit.*, p. 103.

[30] The Decision from February 8th, 1988 of the Court of Cassation, Criminal Chamber, the document is available on https://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000007524624**,** accessed on 07.10.2017.

[31] The Decision from January 28th, 2004 of the Court of Cassation, Criminal Chamber, the document is available on https://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000007612070, accessed on 08.10.2017.

opening of procedures for the organization of tenders. In this case, a decree would establish that this threshold is established after the act was committed, the defendant invoking the principle of retroactivity in mitius to escape condemnation. However, in this case, the Court of Cassation has also shown hostility to the more favorable criminal law retroactivity by condemning the defendant. Another example is that of a person accused of opening a pub in a protected area[32], but before being tried, the prefect's order defining the scope was abrogated, so that its violation no longer seemed illegal. And yet, he was condemned[33]. In favor of this solution, it can be argued that the legislation in question, economic or related to public health, is applied contingently and temporarily [34] and fraudsters should not take advantage of this temporary nature to escape criminal liability. It should also be noted that the breach of the principle of retroactivity in mitius is not complete, since that applies only where the legal provisions, the basis of the incrimination is not altered[35]. Some authors[36] even justifies these solutions based on the constitutional principle[37] of the necessity of punishment: the need to repress the past by finding "the objective circumstances that are not a capricious affair of the legislator" as a basis. The problem is that the principle of retroactivity in mitius also derives from the same principle of necessity. Perhaps it would be better to justify these solutions on the basis of the principle of equality before the law, which would impose equal punishment for all those who violated the same law at the same time. The subsequent modification of the regulatory conditions for the application of this law does not in any way alter the guilt of one or the other [38].

D. Restricting the retroactive application of the more favorable law in case of "more severe previous repression inherent to the rules that the new law has replaced". A reversal of the situation regarding the application of the principle of retroactivity in mitius is Decision no. 2010-74 QPC on December 3rd, 2010[39],

---

[32] Art. L. 3335-1, L. 3335-3 et L. 3352-2 of the Public Health Code, the document is available at https://www.legifrance.gouv.fr/ affichCode.do;jsessionid=07035CF591952C6C8E9311A2BA289CA5.tpdila15v_1?idSectionTA=LEGISCTA000031928185&cidTexte=LEGITEXT000006072665&dateTexte=20170620, accessed on 06.10.2017.

[33] The Decision from April 15th, 2008 of the Court of Cassation, Criminal Chamber, the document is available at www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000018807635, accessed on 08.10.2017.

[34] X. Pin, *op. cit*. p. 103.

[35] The Decision from 16th february 1987 of the Court of Cassation, Criminal Chamber, the document is available at https://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000007063018, accessed 08.10.2017; The Court of Cassation has established that unless otherwise specified, the new law, be it economic, which for one or more offenses determined, provides lesser penalties will apply to acts committed before its entry into force have not been judged definitively.

[36] F. Desportes, F. Le Gunehec: *Droit penal general*, 16e ed. Economica, 2009, p. 343.

[37] Article 67-1 of the French Constitution, the document is available athttp://www.conseil-constitutionnel.fr/conseil-constitutionnel /root/bank_mm/constitution/constitution_roumain.pdf, accessed on 22.10.2017.

[38] X. Pin, *op. cit*. p. 104.

[39] The Decision no. 2010-74 QPC on December 3rd, 2010 of the Constitutional Council, the document is available at http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/2010/2010-74-qpc/decision-n-2010-74-qpc-du-3-decembre-2010.51020.html, accessed on 06.10.2017.

pronounced by the Constitutional Council. The provision under consideration was Article 47 of Law no. 2005-882 of August 2nd, 2005[40], which lowered the financially disadvantageous resale threshold [41], incriminated by Article 442-2 of the Commercial Code, stating that acts performed prior to the entry into force of this law were still in line with the threshold previously set. The applicants claimed a violation of Article 8 of the Human Rights Statement and should have been successful in the light of the constitutional integration of the principle of retroactivity in mitius. But this has not happened because the Council has introduced a limitation by considering that "except that the earlier severe repression is inherent to the rules that the new law has replaced, the principle of the necessity of punishment implies that milder criminal law is immediately applicable to offenses committed before its entry into force and not judicially judged"[42]. In conclusion, "the above definition of this threshold was inherent in the current economic legislation", so that, by excluding the immediate application of the new threshold, the Law of August 2nd, 2005 did not violate the principle of the need for punishments. This uncertain decision was criticized in the doctrine, because even if the scope was limited to economic law, this definition introduces a subtle detail that is not surprised neither by Article 112-1 nor by Article 112-4 of the Criminal Code, the main criminal law subject to retroactivity in mitius. Of course, it can be thought that the Constitutional Council is watching for the interest of economic efficiency by agreeing that it is necessary to prevent the anticipation of business criminals who consider that "the provisions of the old law may apply beyond the promulgation of the new law if the objective circumstances show that repression is still necessary for the past "[43]. In practice, the Constitutional Council is of the opinion that it does not violate the principle of retroactivity of the milder criminal law, but only hinders its distributive application.

3. Italy

In the Italian criminal law, criminal laws within the time succession arise where a provision shall be extinguished as a result of the entry into force of any other laws.

The institution of the penal laws in succession is governed by articles 25 of the Italian Constitution and art. 2 of the Italian penal code[44], which enshrines the principle of criminal law and non-retroactivity more severe.

---

[40] Law no. 2005-882 of August 2nd, 2005, the document is available at www.legifrance.gouv .fr/affichTexte.do?cidTexte=JORFT EXT000000452052, accessed on 06.11.2017.

[41] Loss of resale is legally constituted when a merchant sells a product below the purchase threshold.

[42] The Decision 74/2010 QPC on December 3rd, 2010 of the Constitutional Council, the document is available at http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions /acces-par-date/decisions-depuis-1959/2010/2010-74-qpc/decision-n-2010-74-qpc-du-3-decembre-2010.51020.html, accessed on 06.11.2017.

[43] X. Pin, *op. cit.* p. 105.

[44] Italian Criminal Code. Last amended on 3 march 2016, the document is available online at http://www.anvu.it/wp-content/uploads /2016/03/codice-penale-navigabile-4-marzo-2016.pdf, accessed on 02.11.2017.

Article 2 of the Italian penal code stipulates procedures for solving problems which may take place as a result of the succession of two or more criminal laws.

Therefore, the first problem that can arise as a result of the entry into force of the new criminal code is when the new criminal law provides that an offence is a feat which was not incriminated in the old criminal law. In this case, finds the application of the principle of non-retroactivity of the criminal law more stringent. In this sense, art. 2 par. (1) states that no person may be held liable for a criminal offence which the committal of her was not provided by the criminal law as a criminal offence.

Non-retroactivity of the penal law finds application when new criminal law establishes new offences and when changing the constitutive elements of pre-existing offences criminalize acts which in the old criminal law were not covered[45].

The prohibition of the application of more stringent criminal law is justified by the principles of the favor libertatis[46], a review of the penalty and incriminated things and it is complementary to the work of the principle of the criminal law.

In Italy it was discovered a hidden mode[47] breach of rule non-retroactivity of the criminal law. In this regard, an example is foreign exchange provisions. Currently repealed, they were stipulated in art. 2 of Law no. 159/30.04.1976[48], as amended by art. 3 of Law no. 689/8.10.1976[49], which provided that, on 19th November 1976 has abroad, directly or indirectly, the availability of any currency which was formed prior to March 6, 1976 in violation foreign exchange regulations in force at the time the fact is required to submit a statement to the Italian Exchange Office. Therefore, under the guise of a criminal offence committed by penalize omission principle was infringed the principle of non-retroactivity, because at the time of its happening, it was not prosecuted criminally.

Another situation governed by the Italian penal code criminal is decriminalization. Therefore, when the new criminal law no longer provides a deed which in the old Criminal Code offence was consecrated as the Italian will apply the principle of non-retroactivity of the new law. In this sense, art. 2 par. (2) stipulates that no one may be punished for an act which, by law, does not constitute

---

[45] *Compendio di Diritto Penale, Parte generale e speciale*, VIII Edizione, Gruppo Editoriale Esselibri – Simone, Napoli, 2004, p. 27.

[46] The Decision from 18th of july 2013 in the case Maktouf and Damjanović v. Bosniei and Herţegovina, The European Court of Human Rights, Strasbourg, p.8, the document is available online at http://hudoc.echr.coe.int/eng?i=001-141906, accessed on 02.11.2017.

[47] G. Fiandaca, E. Musco, *Diritto penale, Parte generale*, Settima edizione, Zanichelli Editore, Torino, 2014, p. 96.

[48] Ordinary Law no. 159/30.04.1976, published in Oficial Magazine of European Union no. 116 from the 4th of may 1976, document is available online at https://www.blia.it/leggiditalia/ ?a=1976&id=159, accessed on 01.11.2017.

[49] Law no. 689 from 8th of October 1976, published in Oficial Magazine of European Union no. 276 from the 9th of october 1976, document is available online at www.gazzettaufficiale.it/atto/ serie_generale/caricaDettaglioAtto/originario?atto.dataPubblicazione Gazzetta=1976-10-09&atto. codiceRedazionale=076U0689&elenco30giorni=false, accessed on 02.11.2017.

a criminal offence. However, if there is a conviction, it will not be run and will not have a criminal record.

The last issue that may arise as a result of the entry into force of the new criminal law is when the new regulation provides for the same offence, but modifies the sanctioning regime. In this sense, the new penal law may contain a more severe sanctioning regime, in this case by applying the criminal law more lenient punishments earlier or to apply the new criminal code. This rule is enshrined in art. 2 par. (3) of the penal code of the Italian Republic and provides that in the case of successive criminal law shall apply to criminal law which contains provisions more favourable to the accused.

In order to determine which of the two successive criminal law is more favourable to the accused it is required to compare the results that would occur as a result of the application of any of the two laws. So, the most favourable law which will be applied to the Act of judgment will have to be deducted from the mildest results. Once the more favourable criminal law identified it will be applied in full, not being possible to apply legal norms of two or more criminal laws.

Determination of favorable character or less favourably of some criminal laws must be established by comparing the treatment of sanctioning concrete laws in part with regard to the infringement inferred judgment.

Untransformed-laws or decrees converted with amendments into law and declaring unconstitutional the criminal laws have left the place at numerous interpretations in Italian doctrine.

With respect to decrees-laws, the Constitutional Court of the Italian Republic declared unconstitutional[50] par. (6) article. 2 of the Criminal Code so far as it ensures the application of par. (2) and (3) of the same article in which cases the offences were committed before entry into force thereof. Thus, the result obtained by the unconstitutional Declaration of this paragraph is to ensure that, through decrees-laws, Government to grant total or partial immunity with respect to an offence committed before entry into force of it. No court has decided on the application of the more favourable criminal law offences committed over the period in which the Decree was in force, with changes from previous periods processing or by failing to process it. Regarding this aspect, a part of the Italian doctrine[51] establishes that the principle of non-retroactivity should be applied to the criminal law more stringent.

As regards criminal law declared unconstitutional, art. 136 Italian provides that from the Constitution when the Constitutional Court declared the constitutional illegitimacy of a legal norm or an act of law, the effectiveness of the norm shall cease the day the successive publication of the decision. In this sense, art. 30 par. (3) of Law no. 87/11.03.1953[52] stipulates that the provisions declared

[50] The Decision no. 51/19.02.1985 of Constitutional Court of the Italian Republic, available online at www.corte costituzionale.it/ actionPronuncia.do, accessed on 03.11.2017.

[51] G. Fiandaca, E. Musco, *op. cit*. p. 112.

[52] Law no. 87/11th of march 1953, document is available online at www.cortecostituzionale.it /documenti/istituzione/LEGGE_11_ marzo _1953.pdf, accessed on 03.11.2017.

unconstitutional cannot be applied from the day following publication of the decision. Paragraph (4) of the same article stipulates that the irrevocable sentence pronounced and on the basis of the norm declared unconstitutional will be lacking criminal effects. However, where it was declared unconstitutional a law deemed to be more favourable in relation to the offence committed during the period it was in effect shall apply to the provisions of art. 2 par. (3) of the Criminal Code[53], because, otherwise, it would violate the principle of the criminal law more stringent non-retroactivity[54] .

In conclusion, the legal regime of the institution more favourable criminal law enforcement before judging definitively the case governed in Italy is similar to the one in Romania, with the distinction that the Italian criminal system took action against possible slippage of the Government. In this connection, the Italian Government cannot issue decrees-laws with the purpose of granting full or partial immunity with respect to certain offences that have been committed by its members. However, in Romania, according to art. 5 par. (2) may give rise to more favourable criminal law and regulatory acts of the time provisions of which had been declared unconstitutional, and ordinances approved by the Parliament with changes or additions, if the times rejected while they were in force they contained more favourable criminal law provision.

I consider that to be implemented a similar measure taken by the Italian State to us no longer face possible emergency ordinances of Government [55] for the purpose of granting immunity total or partial.

4. Spain

In Spain, like in other countries, when there is a collision between two criminal laws, whose activity over time is different, existing the possibility of applying any of them, the one that is more favorable to the defendant must be applied. This assertion is a basic principle of criminal law and has different legal applications.

Applying the more favorable law is closely related to the principle of non-retroactivity. In the Spanish legal system, the rule is the principle of non-retroactivity, and the exception to the rule is the retroactivity of the more favorable law. In this sense, the principle of retroactivity of the more favorable law does not contradict the Spanish Constitution, because by interpreting "*per a contrario*" of art. 9 par. (3)[56] it is understood that the fundamental law of Spain guarantees the application of the more favorable law. The criminal code stipulates in art. 2 par. (2) that the criminal laws that favor the defendant have retroactive effect, even if

---

[53] A. Pagliaro, *Principi di diritto penale, Parte generale*, Ottava Edizione, giuffre Editore, Milano, 2003, p. 132.

[54] G. Fiandaca, E. Musco, *op. cit.* p. 113.

[55] The Emergency Ordinance of Government of Romania no. 13/2017.

[56] The Sentence no. 8/30.03.1981 of the Constitutional Court of Spain, document is available online at http://hj.Tribunal constitucional.es/es/Resolucion/Show/8, accessed on 01.11.2017.

before its entry into force, a final judgment was pronounced and the defendant executed a part of the sentence. If there is any doubt about establishing the more favorable criminal law, then the defendant will be asked. The acts committed under the influence of a temporary law will be judged in accordance with it, unless the contrary is expressly provided.

In accordance with the principle of the lawfulness of incrimination and punishment, a punishment may be applied when it was committed an act incriminated by a law, the punishment can be established only on the basis of the law in force, at the time of the offense. These principles form the basis of the rule of law, and society must know what is lawful and what is not, without the legislator being able to criminalize certain actions retroactively.

The principle of applying the more favorable criminal law meets the need to apply a coherent Spanish legal system, so that facts that are no longer prescribed by the legislator as offenses or that are penalized with smaller penalties cannot be executed by citizens under an older law which is believed to no longer meet the social requirements.

This exception to the principle of non-retroactivity when the new law is more favorable has been promoted in all Spanish criminal codes since 1848.

The more favorable criminal law occurs during the transition period between two criminal codes. With the entry into force of a new criminal code, the previous one is abrogated, creating legal conflicts that are settled by applying rules of transitional law and the more favorable criminal law.

So, with the entry into force of the current Spanish Penal Code in 1995 there have arisen three situations[57], in which the more favorable criminal law is applicable.

The first situation occurs when the offense is committed under the old Criminal Code, and the new Criminal Code enters into force until the case is heard. So, between the moment of the offense and the moment of its trial, there are two different criminal laws.

The second situation arises after the conviction of the defendant on the basis of the provisions of the old law, which have been modified by the entry into force of the new Criminal Code during the execution of the punishment. This situation affects the execution of the punishment.

The last situation arises when the sentence by which the defendant was convicted is susceptible to appeal or contestation in annulment, the new criminal law entering into force before resuming the trial.

Like in Romania, in Spain, the identification of the more favorable criminal law to the facts in trial raises several issues. Establishing the more favorable criminal law does not pose difficulties when a particular deed is decriminalized or when punishments of the same species are compared, such as

[57] Aplicación de la norma más favorable, Wolters Kluwer, document is available online at http://guiasjuridicas.Wolterskluwer.es/ Content/Documento.aspx?params=H4sIAAAAAAAEAMtMSbF1jTAAAUNDUwsLtbLUouLM_DxbIwMDCwNzA7BAZlqlS35ySGVBqm1aYk5xKgBuXMY5NQAAAA==WKE, accessed on 01.11.2017.

custodial sentences. Problems arise when punishments of different species are compared. In this context, arises the question whether it is more harmful for the defendant an imprisonment from six months to two years (which may be conditionally suspended) or the absolute prohibition of exercising a public function or profession (from six to twenty years).

In the first instance, the decision on this issue will be taken by the Tribunal and it is not left to the defendant's free choice, even if art. 2 par. (2) of the Spanish Penal Code stipulates that in case of doubt the defendant will be heard.

As we can see art. 2 par. (2) not only says that the defendant should be heard, but also confirms that the criminal laws favoring the defendant have retroactive effect. This article is not the only one referring to the obligation of the courts to listen to the accused. In this sense, there is also the second transitional provision of the Criminal Code which stipulates that the defendant will be heard in all the cases.

The second transitional provision also stipulates that, in order to identify the more favorable criminal law, the penalties corresponding to the incriminated offense established by the application of the conditions of the two Criminal Codes must be considered. The provisions on community service[58] reimbursement sanctions apply only to persons convicted under the Criminal Code of 1973 and not to those to whom the provisions of the new Criminal Code apply.

The exception to the retroactivity of criminal law is allowed only in the cases where it favors the offender, so this must be determined according to its concrete circumstances. In this sense, the transitional provisions establish series of rules on the review[59] of convictions and the identification of the more favorable criminal law.

Another problem that may arise is when the new law contains both beneficial and, at the same time, severe aspects. For example, reducing the penalty provided for the offense, but also determining the aggravating circumstances applicable to the case. This situation needs to be resolved by comparing the concrete consequences of the two successive laws, and the criminal law that stipulates the least severe rules for the defendant is fully enforced.

Like Romania, Spain does not allow the application of more favorable criminal law to autonomous institutions, meaning the combination of the more favorable provisions of two successive criminal laws, because the judge would create a new legal norm, the judge having no legislative powers[60].

---

[58] Article 100 of the Spanish Penal Code of 1973, document is available online at https://www.boe.es /buscar/doc.php?id=BOE-A-1973-1715, accessed on 01.11.2017.

[59] Circular 3/2015 of the State Attorney General's Office, establishing criteria in relation to the transitional regime established by the reform of the Penal Code, the document is available online at http://noticias.juridicas.com/actualidad/noticias/10306-circular-3-2015-de-la-fiscalia-general-del-estado-por-la-que-se-establecen-criterios-en-relacion-con-el-regimen-transitorio-establecido-por-la-reforma -del-codigo-penal/, accessed on 31.10.2017.

[60] The Sentence no. 15/11.01.2017 of the Supreme Court of Spain, page 14, the document is available online at http://webcache. googleusercontent.com/search?q=cache:QEho0pluARcJ: www. poderjudicial.es/stfls/TRIBUNAL%2520SUPREMO/DOCUMENTOS%2520DE%2520INTER%25C3%2589S/TS%2520Penal%252011%2520enero%25202017.pdf+&cd=3&hl=ro&ct=clnk&gl=es accessed on 31.10.2017.

So if the more favorable criminal law enters into force after the offense has been committed, but before it is judged, the new law will be compulsorily enforced.

5. The Federal Republic of Germany

Like the Romanian Criminal Code, the German criminal law includes the principle of applying more favorable criminal law. Therefore, in the content of the art. 2 par. (3) is stipulated the way of the retroactive application of the more favorable criminal law. In this sense, if the law in force at the time of the exhaustion of the deed changes before the pronunciation of the sentence, the more favorable criminal law will be applied. However, it should be noted that the German legislature refers to the time of exhaustion, not to the time when the act was committed. Similarly to the article 5 of the Romanian Criminal Code, the retroactive nature of the more favorable criminal law is conditioned by the adoption and efficiency of the more favorable law until the date of a sentence.

6. Portugal

Par. (2) of art. 2 stipulates that an act incriminated by the law in force at the time of its execution ceases to be punished if a new law removes it from the scope of the offenses. Therefore, if there was a conviction as a result of a final sentence, its execution ceases together with all its criminal effects. In this sense, par. 4 comes with the explanation that when the criminal provisions in force at the time of committing the offense differ from those stipulated in the subsequent laws, the concrete law that proves to be more favorable to the defendant will always be applied. These provisions do not contravene the Portuguese Constitution as the principle of retroactivity of the more favorable criminal law is enshrined in art. 29 par. (4) of the basic law.

7. Conclusions

Romania has rallied to the criminal policies of other European states by the overall application of more favorable criminal law. All the states listed in the article have stipulated in their Criminal Codes the global application and not the application on autonomous institutions. So if the Constitutional Court did not issue Decision 265/2014, then our country would have made a discordant note by allowing the judge to legislate.

Bibliography

I. Books

Compendio di Diritto Penale, Parte generale e speciale, VIII Edizione, Gruppo Editoriale Esselibri – Simone, Napoli, 2004.

Desportes, F, Le Gunehec F., *Droit penal general*, 16e ed. Economica, 2009.

Fiandaca, G., Musco, E., *Diritto penale, Parte generale*, Settima edizione, Zanichelli Editore, Torino, 2014.

Pagliaro, A.: *Principi di diritto penale, Parte generale*, Ottava Edizione, giuffre Editore, Milano, 2003.

Pin, X., *Droit penal general*, 5e edition, Dalloz, Paris, 2012.

II. Jurisprudence

- ***France***

The Decision no. 80-127 DC January 20th, 1981 of the Constitutional Council;

The Decision from June 28th, 2002 of the Court of Cassation, Criminal Chamber;

The Decision from January 6th, 2004 of the Court of Cassation, Criminal Chamber;

The Decision from December 16th, 2009 of the Court of Cassation, Criminal Chamber;

The Decision from March 22th, 2011 of the Court of Cassation, Criminal Chamber;

The Decision from September 5th, 2000 of the Court of Cassation, Criminal Chamber;

The Decision from June 28th, 1995 of the Court of Cassation, Criminal Chamber;

The Decision from December 17th, 1997 of the Court of Cassation, Criminal Chamber;

The Decision from June 6th,1974 of the Court of Cassation, Criminal Chamber;

The Decision from June 23th, 2009 of the Court of Cassation, Criminal Chamber;

The Decision from August 22th, 1981 of the Court of Cassation, Criminal Chamber;

The Decision from April 21th, 1982 of the Court of Cassation, Criminal Chamber;

The Decision from May 6th, 1942 of the Court of Cassation, Criminal Chamber;

The Decision from June 5th, 1971 of the Court of Cassation, Criminal Chamber;

The Decision from May 3rd, 1974 of the Cour of Cassation, Criminal Chambre;

The Decision from June 1st, 1981 of the Court of Cassation, Criminal Chamber;

The Decision from Octobre 6th, 2004 of the Court of Cassation, Criminal Chamber;

Cochet v. France Cause, Communication No. 1760/2008 of International Covenant on Civil and Political Rights;

The Decision from February 8th, 1988 of the Court of Cassation, Criminal Chamber;

The Decision from January 28th, 2004 of the Court of Cassation, Criminal Chamber;

The Decision from February 16th, 1987 of the Court of Cassation, Criminal Chamber;
The Decision no. 2010-74 QPC on December 3rd, 2010 of the Constitutional Council;

• ***Italy***

1. The decision no. 51/19.02.1985 of the Constitutional Court of Italian Republic.

• ***Spain***

1. The Decision no. 8/30.03.1981 of the Constitutional Court of Spain;
2. The Sentence no. 15/11.01.2017 of the Supreme Court of Spain.

• ***European Court of Human Rights***

1. The case of Maktouf and Damjanović v. Bosnia and Herzegovina.