SOME CONSIDERATIONS ON THE OFFENSE OF FAVORING THE OFFENDER IN THE ROMANIAN CRIMINAL LAW

Assistant professor **Ioana RUSU**[1]

Abstract

In this paper we have considered the offense of favoring the perpetrator in terms of constitutive content, the cause of non-punishment, some legislative precedents and the transitional situation in which we are with the entry into force of the Criminal Code. Also, on the occasion of the examination, we have formulated some critical comments, supplemented by appropriate de lege ferenda proposals regarding the legal content of the text of incrimination, namely the use of the terms of criminal prosecution, the prosecution and the execution of a custodial measure. The novelty of the paper consists in the analysis carried out, as well as in the critical opinions and the de lege ferenda proposals. The present work is part of the examinations carried out in order to promote a university course of criminal law. The work may be useful to students and master students of law faculties, as well as to practitioners in the field and to the legislator from the point of view of operating the mentioned modifications and additions.

Keywords: *Constitutive content; cause of non-punishment, legislative precedents, de lege ferenda proposals*

JEL Classification*:* K14

1. Introduction

Provided in the provisions of art. 269 of Criminal Code, *favoring the offender* consists of the help given by a person to the perpetrator, in order to prevent or hinder the investigation in a criminal case, the criminal prosecution, the execution of a punishment or a measure of deprivation of liberty.

Regarding the reason of incrimination and the protected social value, in the recent Romanian doctrine it was argued that "The favoring offense aims at sanctioning any "interference" of third parties in the act of criminal justice or in the full exercise of the right of the state to punish (*ius puniendi*).

Conceptually, favoritism can be assimilated to posterior complicity, which, however, in the view of the theory of participation in the Romanian criminal law (which allows the act of participation in the form of complicity to be achieved only previously or concurrently with committing the act - art. 48, par. (1) and (2) of the New Criminal Code), the legislator sanctions it as a distinct offense under the name of *favoring the perpetrator*.

This approach to legal nature of the favoring offense produces effects on the active subject of the offense. Although, in principle, the offense is one with a generally active subject, we believe that the author of the favoring act cannot be also the author of favoritism at his own deed.

Since, conceptually, favoring is a form of later complicity, as we know, there can be no contest between the forms of participation with whom a person commits a deed. Thus, a possible previous and/or posterior complicity will/will be absorbed by the author's act. If the legislator wanted the sanction to be a distinct offense of the subsequent complicity committed by the perpetrator of the main deed, he could do so by expressly providing for such a derogatory rule. In conclusion, we believe that only a third party to the main deed can "favor" an offender, "self-help" is being incriminated in the text of art. 269 New Criminal Code".[2]

[1] Ioana Rusu - Christian University "Dimitrie Cantemir", Romania, oanarusu_86@yahoo.com.

[2] Sergiu Bogdan (coord.), Doris Alina Șerban, George Zlati, *Noul Cod penal, Partea specială, Analize, explicații, comentarii, Perspectiva clujeană/The New Criminal Code, Special part, Analyzes, explanations, comments, Cluj Perspective*, Ed. Universul Juridic, Bucharest, 2014, p. 336.

2. The constitutive content of the offense

2.1. The objective side

The *material element* of the objective side consists in *the help given by the perpetrator* to prevent or hinder investigations in a criminal case, criminal prosecution, execution of a custodial sentence or deprivation of liberty without the existence of a prior or simultaneous agreement to commit the deed.

Helping "a perpetrator to prevent or hinder investigations in a criminal case, criminal prosecution, execution of a custodial sentence or deprivation of liberty measure, giving any support to delay or hinder investigations in a criminal case, prosecution criminal proceedings, trial or execution of the penalty or other measure depriving them of liberty. This is a personal favoritism, *in personam*.

The help to cumber or hinder criminal investigation or criminal prosecution may be given to the offender from the time the offense is committed and until it is given the final decision on the conviction, waiving of punishment, deferment of punishment, acquittal or termination of the criminal process. It does not matter if the prosecution has begun or not, or whether or not the criminal action has been brought against the offender. Aid may also be given to the perpetrator throughout the trial and may be aimed at preventing or hampering any act of procedure that takes place during this phase of the criminal proceedings. Aid given to the offender to prevent or hinder the execution of a custodial sentence or custodial measure after the conviction is final or enforceable may concern the delay in the execution or the removal of the offender from the execution of the main or supplementary punishment or the measure of medical hospitalization; admission to an educational or detention center (e.g. concealment or facilitation of concealment or escape).[3]

According to the recent doctrine, "for the existence of the favoritism it is required, first of all, to give help, and it is irrelevant whether the favored is an author, accomplice or instigator, or whether the favored act is in consumed form or in the form of punishable attempt or even in the event that it is not a criminal offense. The essential condition, however, is that the deed is provided for by the criminal law, that is, at least fulfilling the conditions of the objective type. Also, the nature of the deed is irrelevant. As the law makes no mention of it, the act provided for by the criminal law committed by the favored offender may be any of the deeds set forth in our criminal law, regardless of the form of guilt in which it is committed. It does not matter whether the aid given to the perpetrator relates to all the criminal acts committed by him or to some of them. The act constitutes the offense of favoring the perpetrator, even if the favored perpetrator is later acquitted. By favoring the perpetrator as an autonomous act, distinct from that committed by the favored offender, the favored person may be convicted even if the person to whom he was assisted has not been sued for the committed act."[4]

As regards the aid, it may "be granted through commissive acts or through omissions and may be material or moral. Also, help can be given directly or indirectly through another person.

The jurisprudence has held that there is favoritism when the perpetrator, being in the execution of a custodial sentence with long duration, notify the prosecution, saying that he is the author of a certain crime which he did not commit, in order to prevent criminal proceedings against the real culprits, whom he knew[5], or when the offender has drawn the unreal statement on behalf of the father of the injured party indicating that he had withdrawn the prior complaint against the favored person, having subsequently decided, based on this statement, the ranking.[6]

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[3] Vasile Dobrinoiu in Vasile Dobrinoiu, Ilie Pascu, Mihai Adrian Hotca, Ioan Chiș, Mirela Gorunescu, Costică Păun, Maxim Dobrinoiu, Norel Neagu, Mircea Constantin Sinescu, *Noul Cod penal comentat, Partea specială, Ediția a III-a, revăzută și adăugită/The New Criminal Code commented, The special part, 3rd edition, revised and added*, Ed. Universul Juridic, Bucharest, 2016, p. 412.

[4] *Ibidem*, p. 411.

[5] C. Ap. Bucharest, Criminal Sanction, Decision no. 216/1996, in RDP no. 4/1996, p. 146.

[6] I.C.C.J., Criminal Sanction, Decision no. 1431/2005, on www.ctce.ro.

It does not matter the means used by the person who favored. When the used means by the facilitator constitutes a crime itself, the rules on the offense in contest shall apply.

However, there is no offense in favor of the perpetrator if the facilitator did not commit actual acts of assistance, but only gave false statements to the criminal prosecution body, stating that he was unaware of the offense. In this case it will be retained only the offense of false witness.[7]

For the existence of the act we are considering, it is also required that the aid to be given to a person who has previously committed a crime prescribed by the criminal law.

As we have said, aid must be given to the perpetrator without a prior understanding established before or during the act of committing the deed. If the aid is granted to the perpetrator after committing the act, but on the basis of an agreement established before or during the commission of the deed, the provisions of art. 48 or art. 52 Criminal Code regarding complicity or improper participation are applicable".[8]

To complete the material element of the objective side it is necessary to ascertain the cumulative fulfillment of the following essential requirements:

(i) a favored person who has been guilty of having committed an offense under the Criminal Law, and against it to conduct investigations, or, against a person in favor of a custodial measure or a conviction to imprisonment (with execution) which has remained definitive. In this respect, in the judicial practice it was decided that "The act of warning by phone the person who has the capacity to commit the bribe crime to leave the place where he would have been caught by the judicial bodies in the flagrant, receiving the amount money claimed as a bribe, meets the constitutive elements of the crime of favoring the perpetrator."[9]

(ii) the aid is given to prevent or hinder investigate into a criminal case, criminal prosecution, execution of a custodial sentence or measure involving deprivation of liberty.

In order to understand this requirement, it is necessary to establish what a given help means in each of the four situations expressly nominated by the legislator and what is meant by a criminal case, criminal liability, execution of a sentence or execution of a custodial measure.

If the meaning of the phrase of execution of a punishment is quite clear, it cannot give rise other interpretations, we appreciate that the other three phrases provided in the text must be explained. However, we believe that the legislator referred to a final sentence of deprivation of liberty, meaning that the aid in question may consist of concealing, hosting or helping in any way a convicted person who is engaged in operative activities for the purpose of incarceration or catching him after escape.

Regarding the term of *criminal prosecution*, we make it clear that according to the *Explanatory Dictionary of Romanian Language* (DEX), the word cause, in the legal sense, is meant "trial, motive".[10]

The term *criminal cause* in a strictly legal sense (*criminal litigation, criminal motive*) means "the name given to the object of the criminal proceeding, that is to say the criminal act committed or presumed to have been committed (the material object, of the trial or the legal relationship of the conflict arising as a result of committing the offense (legal object of the criminal proceeding)"[11].

Starting from this definition, and given the phases of the criminal process, we may observe that the assistance given to the perpetrator in order to prevent or hinder the investigation in a

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[7] H. Diaconescu, Posibilitatea comiterii infracțiunii de favorizare a infractorului de către persoana vătămată prin infracțiune/The possibility of committing the crime of favoring the offender by the person injured by the offense. *Dreptul/The Law* no. 5/2001, pp. 177-185. In another opinion it is considered that the injured party who makes false statements before the judicial bodies commits the crime of favoring the offender. See, in this regard, C. Turianu, Posibilitatea comiterii infracțiunii de favorizarea infractorului de către persoana vătămată prin infracțiune/ The possibility of committing the crime of favoring the offender by the person injured by the offense. *Dreptul/The Law* no. 5/2001, pp. 185-189.

[8] Vasile Dobrinoiu in, Vasile Dobrinoiu, Ilie Pascu, Mihai Adrian Hotca, Ioan Chiș, Mirela Gorunescu, Costică Păun, Maxim Dobrinoiu, Norel Neagu, Mircea Constantin Sinescu, *op. cit.* pp. 411-412.

[9] I.C.C.J., Criminal Section, decision no. 1978/2009, in B.J. 2009, p. 760, in Mihail Udroiu, *op. cit.* (2016), p. 347.

[10] Romanian Academy, Institute of Linguistics "IORGU IORDAN", DEX - Dicționarul Explicativ al Limbii Române/Explanatory Dictionary of Romanian Language, Univers Enciclopedic, 2nd Edition, Bucharest, 1996, p. 146.

[11] George Antoniu, Costică Bulai, *Dicționar de drept penal și procedură penală (cuprinde inclusiv termeni din noul Cod penal și noul Cod de procedură penală)/Dictionary of Criminal Law and Criminal Procedure (including the terms of the new Criminal Code and the new Criminal Procedure Code*), Ed. Hamangiu, Bucharest, 2011, p. 116.

criminal case can only concern three phases of the criminal trial, namely, the criminal investigation phase, the preliminary proceedings procedure, the trial phase, without the execution of the criminal law sanction.

Therefore, any aid given outside these phases does not meet the typical conditions of the offense under examination. We consider here the situation where a perpetrator is surprised by a police patrol while scrambling goods from a car, and trying to escape, he takes refuge in the yard of a home, in which case his owner helps the perpetrator. We consider that in such a situation, even if the facilitator knows that the perpetrator was surprised while he stole goods from a motor vehicle, his deed does not meet the objectively typical conditions of the crime of favoring the perpetrator, because at the time of committing the act, a criminal case was not registered on the role of the judiciary bodies as a criminal case. Undoubtedly, in such a situation, the perpetrator will be held responsible for committing the crime of complicity to theft.

In view of the above, we consider that, for the existence of the offense, at the moment of granting the aid, there must be registered on the role of the criminal bodies (prosecutor's office or court).

In the judicial practice, as a rule, in the criminal prosecution phase, the *phrase criminal case* is associated with *a file*, so a file is registered as a judicial body.

The phrase "*criminal liability*" is extremely complex because, in our opinion, it can be associated with a whole range of activities that fall within the responsibility and responsibility of the criminal justice bodies.

In this connection, a series of activities can be associated with: the initiation of a criminal action, the provision of a preventive measure, the provision of special or extended confiscation, the taking of the preventive arrest measure, etc.

In this context, in the judicial practice, the given aid will be retained in order to prevent or hinder the provision or taking of one of the measures by which the author of a criminal act is criminally liable.

The concept of deprivation of liberty can be interpreted restrictively or extensively.

A restrictive interpretation by deprivation of liberty means one of the preventive measures provided for in the provisions of Chapter I (Preventive Measures) of Title V of the Code of Criminal Procedure, namely detention, home arrest or preventive arrest. Extensive interpretation implies the inclusion in the syntax of deprived measures of both the preventive measures mentioned above (detention, home arrest and preventive arrest), and of the two educational deprivation measures, namely admission to an educational center and admission to - a detention center.

We believe that the legislator wanted an extensive interpretation, although it may be questionable in our opinion.

In court practice it was decided that: "The fact that the defendant E.G. asked the defendant S.I. not to speak to anyone on the phone, it can not constitute an unlawful act that falls within the notion of favoring the perpetrator, since in the present case he has not asked the other defendant, who was his brother-in-law, only to remain passive, to not discuss with anyone any issues that may give rise to interpretations, or this cannot constitute a hindrance or denial of the prosecution, especially as it is alleged that the prosecution was made difficult in the sense that it prevented the defendant SI to commit a crime, the bribe. Moreover, even if the defendant intended to commit the offense of bribery in the sense of remission of bribes, this did not happen, not because of the defendant's activity, but because the defendant expressed the suspicion that he was bribed on November 1, 2013, when he spoke with witness C., therefore, the idea of giving bribes at a later date is excluded. The aid must be given to a perpetrator, that is, to a person who has previously committed a crime prescribed by the criminal law, and in this case the criminal file in which the defendant S.I was investigated is not discussed, to commit the abuse of trust, since the help referred to has nothing to do with the quality that the defendant had in that case, being no novelty for the defendant S.I. the existence of that file, but only the criminal file dealing with the offense of bribery, but the mere assertion that the defendant S.I. would have a criminal case file that the case prosecutor himself accepts as a suspect of EG, since he does not impute to anyone that his duties

have been violated and that he has provided the information unlawfully, in the present case, DC witness, chief of the IPJ Constanţa, this act cannot be categorized as a help given to a platform to hinder the prosecution. It cannot be accepted from the indictment that it is irrelevant that the defendant E.G. has obtained the information from official subjects or if the disclosure is a personal conclusion as long as the defendant knew the circumstance that his interlocutor was the subject of criminal investigations and the purpose of the communication represented the difficulty of prosecution because the simple conclusion of a person passed through the filter of his own thought or experience and passed on to another person, being supervised and intercepted, without other concrete and proven elements, it cannot lead to the idea of committing a crime of favoring another person suspected of being prosecuted. The fact that the indictment suggests that that information could be obtained from witness D.C. is inadequate and cannot be taken into account since the prosecutor has merely made some remarks in the indictment relating to this matter, without ultimately unduly detaining the breach of service duties of a person. The communication made by the defendant E.G. to the defendant S.I. on 7 November 2013, cannot constitute a specific aid measure intended to impede the prosecution of the defendant, and the lack of the concrete character if the aid act is equivalent with the inexistence of the material element of the offense of favoring the offender".[12]

We believe that the use of the three phrases referred to above represents a regression in relation to the provisions of art. 264 of the Criminal Code of 1969, where the phrases are used: criminal prosecution, trial and execution of a punishment, the time legislator taking into account the three phases of the Romanian criminal trial at that time.

De lege ferenda we propose replacing the criticized syntax with the existing law in the legal content of the offense, to which the specific phase of the preliminary camera procedure is added.

(iii) the given aid (including the understanding of such aid, if any) must take place after the offender has committed a criminal offense. In this respect, it was decided in the judicial practice that the aid which may consist of an action or inaction, given to the perpetrator "can interfere with committing the deed stipulated by the criminal law (temptation, consummation or exhaustion) before the criminal prosecution, or throughout the course prosecution (*in rem* or *in personam*) during the preliminary phase or trial at first instance or in appeal or after the final judgment has been passed until the execution or consideration of the punishment/educational measure has been enforced; if the aid is given earlier or concomitantly with the commission of the offense provided for by the criminal law, it shall be taken into account the existence of an act of complicity in the offense, and not the activity of favoring."[13]

(iv) this aid should not be the result of an agreement between the two (the perpetrator and the facilitator) that had occurred prior to committing the favored offense. The immediate consequence is a state of danger for the work of justice. The *causal link* results from the materiality of the act, because, as it has been argued in doctrine[14], this offense is an abstract danger.

2.2. The subjective side

The form of guilt with which this offense can be committed is the *intention*, in both ways, *direct* and indirect.

We appreciate that the first condition on which the subjective characteristic of the offense depends on the fact that the active subject knows that the favored person has committed an act under the criminal law and the second that it acts in order to prevent or hinder the investigation in a criminal case, criminal responsibility, execution of a custodial sentence or measure involving deprivation of liberty.

These two conditions must be met cumulatively.

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[12] Constanţa Court, Criminal Section, sentence no. 186/2014, in Mihail Udroiu, *Drept penal, Partea specială, sinteze și grile, Ediția 3/Criminal Law, Special part, syntheses and grids, 3rd Ed.*, C.H. Beck, Bucharest, 2016, pp. 345-346.
[13] Mihail Udroiu, *op.cit*., 2016, pp. 345.
[14] *Ibidem*, p. 349.

In this respect, it was decided in judicial practice that it meets the elements of subjective type, "the act of the defendant M.C., who knew the legal situation of the escaped BC, that he escaped from the arrest of I.P.J. Cluj on January 15, 2015, granted him material and moral support by offering accommodation to his escape at his home in Cluj-Napoca between 20-22 January 2015, after which he gave him a place to hide, at the defendant's home, and later facilitated the escape to Alba-Iulia, taking the link with the defendant BD, who came to Cluj-Napoca, transported him to BCA while M.C. was pre-eminent to avoid police filters and did not notify police officers of the escaped person in order to make it more difficult to detect and prevent the execution of the preventive arrest warrant issued in the name of B.C.A. as of 08.01.2015"[15].

If the facilitator does not know that the favored person has committed an act under the criminal law or has acted in one of the purposes expressly stated in the text of the incrimination, the act does not meet the conditions of objective nature of the offense under consideration.

Thus, in the judicial practice, it was decided that the conditions of subjective typology were not met in the hypothesis in which "S.G. defendant was convinced that the check issued by I.A. is valid and has cover in the account, and the defendant T.M. after having operated the account surcharge, immediately informed the branch office of B.R.D., Slobozia, and immediately took the necessary measures in the sense that it announced the management of the bank about the issuance of C.E.C. without coverage and withdrew the checkbook from the defendant S.G."[16]

According to the doctrine, "The offender must have a representation of the deed committed by the favored person and provide for and aim at favoring it, or at least accept that by its activity it favors the perpetrator"[17].

In the same vein, another author considers that "the facilitator must act in order to prevent or hinder the investigation in a criminal case, criminal prosecution, execution of a custodial sentence or deprivation of liberty (preventive custodial measures (pre-trial detention or arrest at home) or educational deprivation of liberty (admission to an educational center or admission to a detention center)]; the aim pursued is essentially an element of the subjective nature of the deed and, in the alternative, a condition relating to the material element of the offense."[18]

For the existence of the offense, the motive and the purpose have no relevance, but they present a major interest in the process of individualizing the criminal law sanction to be applied to the active subject of the offense.

3. Special case of non-punishment

According to the provisions of art. 269, par. (3) Criminal Code, *the favoring by a family member is not punished.*

The phrase "family member" should be interpreted in accordance with the provisions of art. 177 Criminal Code.[19]

According to the recent doctrine, "favoring the perpetrator is not punished, according to art. 269 par. (3) Criminal Code, when it is committed by a family member. This is a case of non-

[15] C. Ap. Cluj, Criminal Section, decision no. 524/2016, available on www.rolii.ro. Georgiana Bodoroncea in Georgiana Bodoroncea, Valerian Cioclei, Irina Kuglay, Lavinia Valeria Lefterache, Teodor Manea, Iuliana Nedelcu, Francisca-Maria Vasile, *Codul penal, Comentariu pe articole, art. 1-446, Ediția 2, revizuită și adăugită/Criminal Code, Comment on articles, art. 1-446, 2nd Ed., revised and added*, Ed. C.H. Beck, Bucharest. 2016, p. 783.

[16] C.S.J., Criminal Section, Decision no. 1491 of March 25, 2003, available at www.scj.ro, in Georgiana Bodoroncea, in Georgiana Bodoroncea, Valerian Cioclei, Irina Kuglay, Lavinia Valeria Lefterache, Teodor Manea, Iuliana Nedelcu, Francisca-Maria Vasile, *op. cit.*, p. 783.

[17] Avram Filipaș, *Infracțiuni contra înfăptuirii justiției/ Offenses against justice*, Ed. Academiei Române, Bucharest, 1985, p. 123. The author points out that, "from a subjective point of view, it is not mandatory to be a concordance between the guilt with which it is committed the favoring offense. The latter may also be committed at fault or by virtue of the law, when, of course, the law allows it".

[18] Mihail Udroiu, *op. cit.* (2016), p. 349.

[19] Article 177. Family member: 1. A family member refers to: a) Ascendants and descendants, brothers and sisters, their children, and persons who have been adopted according to the law, such relatives; b) the husband; c) persons who have established relationships similar to those of the spouses or between parents and children, if they live together; (2) The provisions of the criminal law concerning a family member, within the limits provided in paragraph (1) lit. a) applies, in case of adoption, also to the adopted person or his/her descendants in relation to the natural relatives.

punishment that the benefactor enjoys as a family member in relation to the favored perpetrator. They do not benefit from the provisions of art. 264, par. (3) Criminal Code of 1969 (favoring those who are close relatives), the favoring persons whom, although ate close relatives among them, are not such relatives with the favoring offender[20]. The Supreme Court ruled that in order to benefit from this legal provision, the perpetrator must be a close relative (to be a family member under article 177 of the Criminal Code, under the new rule – our note) with all offenders (the perpetrators - our note), otherwise the non-punishment provision is not applicable" (CSJ, Criminal Section, Decision no. 1922/1992)[21].

Regarding this interpretation, another author considers that "in the jurisprudence of the Supreme Court (CSJ, Criminal Division, Decision no. 1922/1992) it was considered that, if the offense provided for by the criminal law is committed by several perpetrators, the cause of non-punishment is retained only when the favored person is a family member with all offenders; we believe that this case-law solution should be abandoned to the nature of the case of non-punishment; we therefore appreciate that the intention of the legislator was to create an impediment to the punishment of the person seeking to favor only the family member of whom he knows that he committed an act provided by the criminal law, whether he acted as an author or participant in the commission of the deed and the quality of the other participants; the cause of non-punishment will not be taken into consideration when it was not intended to favor only the family member, but all the participants in committing the crime provided by the criminal law."[22]

As far as we are concerned, we believe that the last opinion is the correct one, considering that if the active subject pursues only the favor of the perpetrator who is a family member, and not the other participants, he will benefit from the cause of non-punishment; he will not benefit from the cause of non-punishment, the active subject who is a family member with one or some of the perpetrators (not all), through his deed, seeking to favor all participants (including those who are not members of the family).

4. Legislative and transitional situations

4.1. Legislative precedents

The incrimination of the act of favoring the perpetrator (the offender) is a tradition of Romanian law, as the act itself, without a marginal name, is incriminated even in the Criminal Code from 1864, in art. 52, 197 and 285.

According to the provisions of art. 52 of the Criminal Code of 1864 "Those who, knowing the guilty conduct of the perpetrators of wrongdoing, robberies or violence against the State security, public peace, persons or property, grant them a place to escape or meet will be punished as accomplices of those evil doers."[23]

From the examination of the text it reveals that there were incriminated the deeds of the persons providing accommodation to the persons they knew were dealing with the offenses incriminated in the text of the law. In fact, even the doctrine of the time points out that "*the host is not punished as an accomplice except for the crimes committed by the evildoer during the time he hosts him, and for the other acts committed before or after, we must refer to the complicity in common law."*[24]

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[20] O. Loghin, T. Toader, *Drept penal român. Partea special/Romanian criminal law. The special part*, 4th edition, Casa de editură şi presă Şansa SRL, Bucharest, 2001, p. 380, with reference to the Supreme Court, Criminal Section, Decision no. 3704/1972.

[21] Georgiana Bodoroncea in, Georgiana Bodoroncea, Valerian Cioclei, Irina Kuglay, Lavinia Valeria Lefterache, Teodor Manea, Iuliana Nedelcu, Francisca-Maria Vasile, *op. cit.*, p. 788.

[22] Mihail Udroiu, *op. cit.*, p. 350.

[23] George St. Badulescu, George T. Ionescu, *Codul penal adnotat cu jurisprudență și doctrină română și franceză*/*Criminal Code suplimented with the Romanian and French jurisprudence and doctrine, with a preface by I. Tanoviceanu, Professor of Criminal Law at the University of Bucharest*, Ed. Tip. ziarului Curierul Judiciar, Bucharest, 1911, pp. 79-80.

[24] *Ibidem*, p. 80.

Therefore, the text in question required the sanction of the person who housed another person, knowing that the latter was committing certain types of offense during the hostage, respectively, by the robbery or the violence against State security, public peace, properties.

The person concerned was not criminally liable for the given aid, for crimes committed prior to hosting or after the author was not hosted.

In the Romanian criminal law in force this deed is considered to be a form of concomitant or posterior complicity.

The incrimination of the act of favoring the perpetrator is provided in a manner similar to the current regulation in the provisions of art. 197, as amended and supplemented by the Law of 17 February 1874.

According to the provisions of this text, "*Those who will be hiding, or will be creating the means to hide people they know of committing crimes, will be punished by imprisonment from 1 month to 1 year. And if the hiding, or the intercession of hiding, has been made to share the results, the punishment will be 2 years in prison. But they will be defended by the chastisement of this article, the relatives from the top and bottom, the husband or wife, and even if they are divorced, sisters and brothers of the culpable of the concealed person, and relatives of the same line"*[25].

A first element to be retained is the resemblance of the text with that of the present law, with some small differences.

The second aspect concerns the cause of non-punishment that is topical, being kept by the Romanian legislator and in the current text.

Referring to the French jurisprudence of the times, the authors stated that "By a decision of 1 May 1897 (Dalloz 1898, 1, 253) the Cassation Court Fr. returned to the decision of 1867, and decided that the concealment referred to in art. 248, can only be understood as a shelter given to the offender or acts which have the object of sheltering him from the action of justice."[26]

Finally, in Art. 285 is punished the act of hiding the body of a person "killed or death after receiving blows or injuries"[27].

In the Carol II Criminal Code the act of favoring the offender was incriminated in several texts, namely: art. 284 and art. 286.

According to the provisions of art. 284 of the Carol II Criminal Code, "*It commits an offense of favoring the offender the one who: 1. without having had a prior understanding with the author or accomplice, provides assistance or protection to them before committing the offense, in order to circumvent or thwart the investigations or other procedural acts of the authorities or to evade them, or from the execution of the punishment; 2. Any person who, under the preceding paragraph, gives assistance to the author or the accomplice in order to secure the benefit or the proceeds of the offense; 3. hides the body of a person who is the victim of a crime or a misdemeanor."*[28]

The penalties provided by the law are different in relation to the crime, misdemeanor or contravention committed by the offender, namely: "*The offense of favoring the offender is punished by 3 months to 2 years of imprisonment and a fine of 2,000 to 10,000 lei when the offender favored committing a crime, with correctional imprisonment from one month to one year when he committed a crime and a fine of up to 5,000 lei when the favored offense is a contravention*."[29]

In a brief comparative analysis, in the doctrine of the time, it was appreciated that "The offense of favoring offenders, although known by the Code of 1864, nevertheless received two new characterizations in the new code: first, a new name of offenders' favor, recommended by the doctrine as a better synthesis of the illicit activity of helping and defending the offenders, a name used both by the new Italian code (§ 378 and 379) and the German one (§ 257) and *the second*, that it was given a unique concept, in the sense that it is no longer a *common offense*, but a simple crime

[25] *Ibidem*, p. 269.
[26] *Ibidem*, pp. 269 and 270.
[27] *Ibidem*, p. 390.
[28] Const. G. Rătescu, I. Ionescu-Dolj, I. Gr. Periețeanu, Vintilă Dongoroz, H. Aznavorian, Traian Pop, Mihail I. Papadopolu, N. Pavelescu, *Codul penal Carol al II-lea, Adnotat, vol. II, Partea specială I, art. 184-442/ Carol II Criminal Code, Added, vol. II, special Part I, art. 184-442*, Ed. Librăriei SOCEC & Co., S.A., Bucharest, 1937, pp. 209.
[29] *Ibidem*, p. 209.

of hosting without the element of habit, as it was in the Code of 1864. In the future, the act that it will be punished in one form, that of favoring criminals, for which it will suffice a single host or hiding, of a wanted person. The element of habit will be a real aggravating circumstance (article 21 Criminal Code) or legal"[30].

Referring strictly to the material element of the objective side, the quoted author claims that: "The material element of the favoritism and the terms used by art. 284, may consist of any action or inaction that has the purpose of preventing police or judicial investigations to the benefit of a prosecuted person. Thus, the favoring offense can only result from having purchased or served food where it was hidden, although it did not actually host it, etc."[31]

In the provisions of art. 286 it is punished the act of a civil servant who "does not denounce or delays to denounce to the judicial authorities or other authority, who was obliged to inform, the offense of which he or she became acquainted in the exercise of the office or by virtue of it"[32].

In par. (2) there is an aggravated normative way for the judicial police official.

We should mention the similarity between the legal content of the offense provided for in art. 284 of the Carol II Criminal Code, with the provisions of art. 264 of the Criminal Code of 1969, as well as those of the law in force.

Also noteworthy is the consistency of the Romanian legislator for the incrimination of such facts that affect the activity of law enforcement.

4.2. Transitional situations. Applying the more favorable criminal law

If we consider that the new law also provides for the sanction of fine, and the court considers that it will apply this criminal law sanction, the more favorable criminal law will be the new law.

If the court is guided by a penalty for imprisonment (regardless of the way of enforcement) targeted at the minimum prescribed by the law, the more favorable criminal law will be the old law that provides for a lower minimum (3 months compared to one year).

If the court seeks to impose a penalty of imprisonment oriented towards the maximum prescribed by the law, the more favorable criminal law will be the new law, as it provides for a special lower maximum compared to the old law (5 years, compared to 7 years).

If one or more attenuating circumstances are incident, the more favorable criminal law will be the old law.

Finally, if a criminal contest is retained, the more favorable criminal law will be the old law.

5. Conclusions

From the analysis of the incrimination of this fact, it follows that in the tradition of the Romanian law, the act of favoring the perpetrator has always stood in the attention of the Romanian legislator and this was incriminated for the first time in the modern age, with the adoption of the 1864 Criminal Code.

Even if, with the first incrimination, the offense did not even have a specific marginal name, subsequently, as the time passed and the modernization of the Romanian law, it was called first *favoring criminals* (in the Carol II Criminal Code), after which *favoring the perpetrator* (in the 1969 Criminal Code), and ultimately *favoring the offender* (in the Criminal Code in force).

We appreciate that the marginal name adopted by the current Criminal Code is the correct one, constituting an objective reality, namely that in fact a person (or more) who has committed an act provided for by the criminal law is favored, irrespective of the solution adopted by the judicial bodies towards the author of the favored offense.

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[30] I. Ionescu-Dolj in Const. G. Rătescu, I. Ionescu-Dolj, I. Gr. Perieţeanu, Vintilă Dongoroz, H. Aznavorian, Traian Pop, Mihail I. Papadopolu, N. Pavelescu, *op. cit.*, p. 211.
[31] *Idem*, pp. 211-212.
[32] *Ibidem*, p. 214.

Although, from this point of view, evolution can be noticed, the construction of the text of incrimination seems to be rather deficient due to the use of the criticisms in the paper, which we consider that they need to be replaced in the perspective of modifying and completing the concerned text.

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