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Conditions regarding the application of the criminal law more favorable to the facts under trial

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Abstract. If one or more criminal laws have intervened from the commission of the crime to the final judgment of the case, the most favorable law shall be applied. When the previous criminal law is more favorable, the complementary punishments that have a counterpart in the new criminal law are applied in the content and limits provided by it, and those that are no longer provided in the new criminal law are no longer applied. The Criminal Code regulates only the situation between the commission of the crime and the final judgment of the case. If a change in the conditions of incrimination or prosecution that would lead to impunity would occur after the final judgment was pronounced, during the execution of the sentence or after execution, when it still produces certain consequences, the respective convicts would not be able to benefit from the application of the criminal law under the legal basis. Understanding the criminal law in a broad sense, as a norm that includes not only the norms that provide for criminalization and punishment, but all kinds of criminal norms, as well as those extra-criminal norms that the criminal law refers to and which have an impact on incrimination, criminal liability or punishment in the sense that they can remove, aggravate or mitigate them. To be justiciable does not only mean to answer before the court for the committed act, but also to benefit from a more favorable criminal law, so that a balance is established between criminal liability and the need to reintegrate into society a suspect/defendant/convict for the smooth running of an open society.

Keywords. criminal law, application, criminal code, criteria, conditions, complementary punishments

1. General considerations regarding the application of the more favorable criminal law

The legal regulation of the principle of more favorable criminal laws is found in the provisions of the Criminal Code. According to which, if one or more criminal laws have intervened from the commission of the crime to the final judgment of the case, the most favorable law is applied. If the previous law is more favorable, the complementary penalties that have a counterpart in the criminal law new applies in the content and limits provided by it, and those that are no longer provided in the new criminal law no longer apply.

The legal provisions cover the succession of several criminal laws from the time of the commission of the crime to the moment of its final judgment. Thus, there is the possibility that the crime is committed under the empire of a criminal law, and the criminal prosecution or trial takes place after the entry into force of a new one criminal laws .

Technium Social Sciences Journal
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In the specialized literature[1] there have been discussions regarding the determination of the applicable criminal law in the situation of the transition of several criminal laws. The difficulty consisted in establishing which of the two laws extraactivates, applying to the crime: the old law which overactivates by applying due to the fact that it was in force on the date of the commission of the crime or the new law which retroactive due to the fact that it is in force on the date of the judgment of the act .

Since both solutions had shortcomings, the principle of applying the criminal law more favorable to the offender (mitior lex) was enshrined in the legislation. When a deed was not criminalized in the past, the old law will be applied even if it will be judged under a new law; the basis is not the application of the more favorable criminal law, but the non-retroactivity of the criminal law. On the other hand, if the new law no longer provides as a crime an act that was sanctioned from the point of view of the old law, the new law will be applied even if the act was committed under the empire of the old law; the solution is not based on the principle of applying the more favorable criminal law, but on the retroactivity of the criminal law.

The Criminal Code regulates only the situation between the commission of the crime and the final judgment of the case. If a change in the conditions of incrimination or prosecution that would lead to impunity would occur after the final judgment was pronounced, during the execution of the sentence or after execution, when it still produces certain consequences, the respective convicts would not be able to benefit from the application of the criminal law under the legal basis.

Consequently, as shown in the doctrine [2], the question of the application of the legal provisions arises only when both successive laws criminalize the act, but in a different way either with regard to the conditions of incrimination, prosecution or trial, or with regard to the mitigating or aggravating circumstances, or with regard to the punishment or other consequences.

2. General criteria for determining the more favorable law

In the application of the more favorable law, we will come from the existence of conditions that we could call general criteria [3] for determining the more favorable law, their existence is necessary for situations in which the question of applying the more favorable criminal law arises, regardless of whether it is a case of acts pending trial or definitively judged, according to concrete but different rules when it comes to an act in progress judgment or definitive judgment.

These criteria are indispensable to this process, in the sense that we will constitute starting points in all situations in which the legal norms are to be applied, they are the following:

a) The foundation of the solutions in the application of the more favorable law lies in the interpretation of the rules of the new law which are retroactive. These rules are those provided in the Criminal Code and the transitional ones provided in the law implementing the Criminal Code. We will never look for solutions in the old repealed law.

b) The identity of the conditions of incrimination and criminal liability from the laws that are required to be applied. This means that the application of the principle of non-retroactivity or retroactivity of criminal law is excluded.

[1] C. Bulai, *Handbook of Criminal Law. General part*, Ed. All, Bucharest, 1997
[2] H. Diaconescu, A. Oroveanu – Hanțiu, R. Răducanu, *Time and criminal law, Ed*. C.H. Beck, Bucharest 2007
[3] C. Barbu, *Criminal Law Application in Space and Time,* Scientific Publishing House, Bucharest 1972

Technium Social Sciences Journal
Vol. 54, 165-178, February, 2024
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www.techniumscience.com

c) The inadmissibility of combining provisions from successive laws that have an impact on the concrete report deduced from the judgment.

d) Understanding the criminal law in a broad sense, as a norm that includes not only the norms that provide for criminalization and punishment, but all kinds of criminal norms, as well as those extra-criminal norms that the criminal law refers to and which have an impact on incrimination, criminal liability or punishment in the sense that they can remove, aggravate or mitigate them.

e) The choice of the milder law cannot be left to the judgment of the defendant (convict). His option would create an interference with the right to interpret the laws and to determine the applicable law, which is the attribute of the courts. Being in a field of public order, the defendant's opinion on the applicable law cannot be accepted.

3. The necessary conditions for the application of the more favorable law

In order for the principle of applying the more favorable criminal law to find its application, the cumulative fulfillment of the following conditions is necessary: :

a)the act committed must be prescribed as a crime at the time of its commission and this must not be a temporary law. If the crime was committed before the entry into force of the temporary law, the more favorable law will be applied, as this would mean recognizing the temporary law as retroactive, which our criminal legislation does not allow.

The moment of committing the crime is important for verifying the fulfillment of this condition.

In the case of simple, consequential or dangerous crimes that can be carried out through a single action (inaction), the time of committing the crime is that of the action (inaction).

If this aspect is not clarified by the court, a disadvantageous situation can be created for the defendant who, in this way, does not benefit from the application of the more favorable criminal law or, on the contrary, this benefit is recognized even though the act was committed during a different law later was in force and the more favorable law was not applicable.

Likewise, in the case of progressive crimes, the moment of consummation of the crime is that of the action or inaction and that of the date of its exhaustion, i.e. the date of the production of the definitive final result, since in the sense of "criminal activity" the crime was consummated on the date of the commission of the crime (action or inaction).

It is more difficult to determine the moment of the commission of the act in the case of continuous, continued crimes and usually in the situation where they begin to be committed under a criminal law and are exhausted at a time when another criminal law is in force. In the specialized legal literature, it has been shown that there is no question of applying the more favorable criminal law, but the new criminal law that was in force at the time of the exhaustion of the crime, of the production of the last result, will always be applied. This is the solution whenever acts whose commission extends over time are criminalized by both laws .

If these moments are located during the period of application of a law after which another criminal law came into force, the more favorable law will be applied according to the legal basis.

If, however, the criminal activity started under the old law, but continued under the new law, the new law will be applied mandatorily, because such crimes were committed after the expiration of the old law.

The offense having a unitary character, the acts prior or subsequent to the date of entry into force of the new law cannot be divided or viewed separately.

Technium Social Sciences Journal
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Complex crimes can be presented in their simple form, when at least two crimes are combined in their entirety (for example: robbery or rape) and each of the combined crimes loses its autonomy by the will of the legislator or in the aggravated form, when in the content of the simple crime or complex in its basic form, an action or inaction is absorbed as an aggravating element .[4]

They have a complex legal object (consisting of the main legal object and another secondary one) and are consumed when they have affected the main legal object (for example, robbery, taking the property).

As a result, if the absorbed deed is missing, the complex crime in its simple form no longer exists, and in the case of the complex crime in its aggravated form, only the content of the simple or complex crime in its simple form is realized.

Due to these characteristics of the complex crime, in principle, the more favorable law applies to the complex crime as a whole and not in relation to each action (inaction) that composes it.

Exceptionally, the law on the basis of which the criminal will be punished for the complex crime will also depend on the more favorable law that applies to the facts that make up the complex crime. This is the case of complex crimes that in their content refer to another text of the Criminal Code and this, in turn, may undergo changes in terms of the content or the sanction, through a subsequent law.

This new regulation influenced the application of the criminal law more favorably in the transient situations that arose.

b) until the expiration of the old law, the crime has not been definitively judged.

c) until the final settlement of the case, one or more laws have intervened that provide for the same deed as a crime.

Therefore, the criminalization of successive laws must not be a new one. But, if there is only a similar appearance between the criminal acts, the application of the more favorable criminal law is not possible. In judicial practice, the question arose whether the committed deed should be criminalized as the same crime or not, in all successive laws.

The comparison that must be made in order to determine the more favorable law is between all the laws that criminalize the act, even under a different name and not only between those that sanction it under the same name and then, the more favorable is the one that punishes the offender for the crime of fraudulent management.

Also in connection with this condition for the application of the more favorable criminal law, it should be mentioned that, if the old law criminalized the deed in a simple form, and the later law provides for an aggravated form of the crime, but the elements that characterize the objective side are also found in criminalization from the old law, the requirement is met. The comparison for the application of the more favorable law will be made between the simple form of the offense under the old law and the aggravated form under the new law.

d) among the successive laws intervened during the settlement of the criminal report, one of them should contain different provisions and contain more favorable provisions in relation to the others in terms of criminalization and punishment or the way of regulating some autonomous institutions of substantive law .

4. The criteria for establishing the more favorable law

In general, when establishing the more favorable criminal law, the criteria provided for in the Criminal Code are taken into account, taking into account first the legal

[4] Buzescu Gheorghe, *Police Law - university course,* Sitech Publishing House, Craiova, 2019

Technium Social Sciences Journal
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www.techniumscience.com

individualization. The judicial individualization is made in relation to each successive law, taking into account, in the case when, according to both laws, the limits of the punishment are equal, the law according to which the mitigating circumstances noted allows the punishment to be reduced to a greater extent below its special minimum, and in in the case of aggravating circumstances, the law that provides for a lesser aggravation. [5]

It will also be considered the possibility of applying the conditional suspension of the execution of the sentence, of the suspension of the execution of the sentence under supervision which is allowed by the more favorable law, but only when the court deems it necessary to order it.

The application of the more favorable criminal law was not and is not without a series of difficulties in practice, even if some authors claimed that the proposed solutions solve the problem .[6]

There are no provisions in the Criminal Code stipulating how the more favourable law is determined in the case of their succession over time, and for this reason the question has arisen of knowing what are the criteria by which this result can be reached.

Criminal norms, like all legal norms, as they arise and are extinguished: they cease to be in force.

The extinction of a criminal norm does not have special characteristics, because the ways in which they can be verified are the same as other legal norms and are subject to identical rules, according to some principles mentioned by law in general, which keep present the norms of the Constitution in case of lack of laws that cannot be adopted, laws belonging to decrees issued by the head of state in extraordinary cases of necessity and force majeure and on his declaration of illegitimacy delivered by the Constitutional Court.

When one rule dies out and another comes into force, replacing it, if there is a succession of criminal laws in the code.

That succession is verified even if an act that was not previously forbidden is prohibited, because any conduct that is not prohibited must remain legally lawful, and this is because freedom of fact is also allowed in our legal system.

As we all know, the sequence of laws is established by the principle: "The law disposes only for the future: it has no retroactive effect." This is the principle of retroactivity of criminal law, in which the important thing is that the legal norm does not apply to facts or relationships before the first comes out and the second enters into force.

The principle, in concrete terms, is not the only one governing the sequence of legal norms. It is complemented by the principle of non-ultraactivity of the law, for which the law does not apply to acts committed after its termination.

The two principles of non-retroactivity and non-ultraactivity delimit the validity of criminal law in time and agree to ascend to a higher principle indicated by a Latin motto: "tempus regit actum", which implies the effectiveness of the law circumscribed to the time in which it is in force.

Not infrequently, the legislator issues special transitional rules to facilitate the transition from the old law to the new law, with the intention of avoiding conflicts and removing uncertainties. There may even be the occasion for a code to enter into force, for which particular rules inspired by reasons of expediency and fairness are drawn up.

[5] Buzescu Gheorghe, *Comparative Systems of Public Order – university course I,* Sitech Publishing House, Craiova, 2020

[6] C. Barbu, *Criminal Law Application in Space and Time,* Scientific Publishing House, Bucharest, 1972

Technium Social Sciences Journal
Vol. 54, 165-178, February, 2024
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The Criminal Code designates the general principle of retroactivity of the law. It does not respect it exclusively because it introduces notable exceptions that are also inspired by another principle, which for some time has been affirmed in the field of criminal law, this is the principle of retroactivity of the criminal law more favorable to the offender. This principle, as is evident, implies a derogation from the canon tempus regit actum, which extends the effectiveness of the law of facts or relationships arising before the same came into force.

The two principles of retroactivity of law and retroactivity of more favorable law of crime in the criminal code system complement each other and result in a complex situation.

After the new norm arises the need to distinguish three hypotheses:

a) an act that was not previously considered such an offence (new incriminations) is an offence

b) to remove the criminal character of an act he had in the previous one (abrogation of previous incriminations)

c) maintaining the criminal character of the act, but establishing for it a diverse treatment (new amending provisions).

In this last hypothesis, as we can see, it is necessary to distinguish two cases: whether the new provision is less favorable to the offender than the previous one.

Then, once these criteria have been established, the question arises whether they are still sufficient or whether it is necessary to take into account other legal provisions that can contribute to the resolution of the criminal report, regarding complementary penalties, accessories, mitigating or aggravating circumstances, recidivism, etc.[7]

In connection with the determination of criteria for determining the more favorable criminal law, several opinions have been expressed in the doctrine.

Some authors[8] argued that the principle of more favourable criminal law finds application when successive laws differ in punishment.

In their opinion, when an act that does not meet the conditions required by a successive law, in the case of criminalization of conditions of place, time, etc., there is no question of applying the more favorable law, since the situation is equivalent to a new criminalization.

If, on the contrary, the law providing for more severe conditions for criminalisation is a new law, in the case of committing the offence under the old law, it is considered to have been decriminalised and also the 'mitior lex' principle no longer finds application in this case.

In the same way, the application of the more favorable law is regarded where successive laws contain different conditions for criminal liability.

These conditions, liable to impede criminal prosecution or trial or to the removal of the application of punishment, have, in the opinion shown, the effect of removing from the criminal law the act committed, with the effects implied by decriminalization.

If the act can no longer attract criminal liability, it means that it has been decriminalized. According to another majority opinion[9], Given that the differences between successive criminal laws in a transitional situation concern either the conditions under which the act is criminalized and entails criminal liability, or the conditions for punishing it, in order to determine the more favorable law, it is necessary to examine these conditions and to establish,

[7]V. Dongoroz, S. Kahane, I. Oancea, I. Fodor, N. Iliescu, C. Bulai, R. Stănoiu, *Theoretical explanations of the Romanian Penal Code. Part general., vol. I.,* Ed. Academiei, Bucharest, 1969

[8] G. Antony, C. Bulai, *Criminal judicial practice. General part.* Ed. Academiei, Bucharest, 1989

[9] I. Oancea, *Criminal Law Treaty. General part,* Ed. ALL, Bucharest, 1995

Technium Social Sciences Journal
Vol. 54, 165-178, February, 2024
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www.techniumscience.com

on this basis, the law which, applied to the given case, allows a lighter sanction of the perpetrator or even a defense of liability.

The principle of applying the criminal law more favourable to non-judgmental offences takes into account the situation in which one or more successive criminal laws intervene between the commission of the crime and the final judgment of the case, when the law more favourable to the offender will be chosen from among them.

In determining the criminal law more favorable to the offender, criminal doctrine focused on three criteria:

1. the conditions for criminalisation
2. the conditions for criminal liability
3. criminal sanctions (penalty)

The criteria for determining the more favourable criminal law must lead to finding out which law will allow, in the concrete case, a milder solution for the offender and not a general assessment of the more favourable criminal law. In order to determine the more favourable criminal law, successive criminal laws must be compared with the norms and institutions influencing criminal liability in the specific case brought to trial. By comparing laws and determining which one is most favourable to the offender, one must not end up combining the more favourable provisions of successive laws – a so-called lex tertia.

The more favourable law, in its entirety, must be chosen to be applied to the offender from among successive criminal laws. The use of criteria for determining the more favourable criminal law must lead to finding that law which offers the most favourable solution for the offender, but not because the act is not a crime, but because the conditions are not met, in the concrete case of criminalisation or criminal liability of the perpetrator[10]. The most commonly used criterion for determining the more favourable criminal law is that of the main penalties.

We can have the following situations:

a. Among the laws which provide for the act as a crime, if the punishments are of a different nature, the law providing for the punishment of imprisonment will be more favorable. If in one law the punishment is imprisonment, and in another law, the prescribed penalty is a fine, then, as a rule, the law providing for the penalty of a fine is milder. The exception would be where mitigating circumstances have been found in the case and the law providing for imprisonment allows, on the basis of mitigating circumstances, the imposition of a fine of an amount lower than that which would be reached when the law providing for the penalty of the fine were applied.

b. When between successive laws punishments are of the same nature, but with different special limits, it will be more favorable, in a case when the minimum is the same but the different maximum, the law providing for a lower maximum, and if the special maximum of punishment is the same, but the different minimum will be more favorable, the law providing for a lower minimum will be more favorable.

In case of asymmetric punishments, the more favorable criminal law will be determined concretely by the judge and depending on the circumstances that mitigate or aggravate the punishment, so that if there are aggravating circumstances in the case – the judge must apply a punishment to the special maximum and then the law providing for a penalty with a lower special maximum is more favorable, and if the act was committed in mitigating circumstances, the judge must impose a penalty towards or below the special minimum, and the

[10] Buzescu Gheorghe, *Place and role of the civil servant in the state apparatus,* Sitech Publishing House, Craiova, 2017

Technium Social Sciences Journal
Vol. 54, 165-178, February, 2024
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www.techniumscience.com

more favorable law is the one that has a lower special minimum penalty. The more favourable criminal law is not determined according to complimentary punishments – the latter being applied according to the principle of the law more in line with the interests of social defence. If the old law is more favorable and it provides for complimentary punishments for the offense committed, their application is made within the content and limits provided for in the new law, and if the new law no longer provides for these penalties, they are no longer applied. The principle of "mitior poena" refers only to the seriousness of the punishment and in this case is insufficient. These criteria are general in nature for determining the more favourable criminal law during the criminal relationship between the date of commission of the crime and the date of final conviction of the defendant. In the later stages of solving the criminal report, the rules will be different, determined by the scope of application of the principle of more favorable criminal law and the concrete institution to which it is applicable.

A. Criterion of conditions for criminal liability

According to this criterion, when determining the more favourable criminal law, it is necessary to examine in comparison all successive laws, the conditions for promoting criminal proceedings from the point of view of the existence of the condition of prior complaint and the authorizations required by law for its exercise.

The problem also arises in the case of finding the existence of causes preventing the exercise of criminal proceedings or of causes of immunity.

Criminal proceedings cannot continue if the parties have reconciled, the aggrieved person has withdrawn his prior complaint or there is a cause for non-punishment.

Before concluding the question of the effectiveness of criminal law in time, it must be stated when an offence is considered to have been committed (tempus commissi delicti).

The specification is of notable interest, because, having a change of legislation after the beginning of the activity of executing the crime, it is the first to certify the external result (the event) that perfects the crime itself, resulting in it being possible to verify at a subsequent notable moment, which corresponds to the code of the offense, at a distance establishing which of the two laws should apply.

But determination during the time when the crime was committed is also of interest in other directions: for the relative problems of the subjective element of the crime, incapacitations, circumstances of the prescribed crime.

In the deficiency of a norm of positive law, various theories are stated in the doctrine:

a) theory of activity, which must take into account the time during which the act or omission was committed;

b) the theory of the event, considers that the crime was committed during the time when the external result in human behavior occurred;

c) mixed theory, to which conduct and event are indifferent, in the sense that the crime is considered to have been committed, both at the moment when it was committed for the first time and at the moment when it was committed the second.

In our opinion that the theory of the event cannot be used, considering that it does not adapt to crimes in which an event does not recur (crimes of pure conduct), the same theory could, among other things, apply retroactively to the law in the case of new incriminations when the crime was committed under the old law and the result occurred after the entry into force of the new law.

The offender, in this way, would have been punished for purely casual act, rather than for his conduct which took place when a law came into force, and would have had that

Technium Social Sciences Journal
Vol. 54, 165-178, February, 2024
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www.techniumscience.com

uncertainty over legality or at least over human conduct, for the elimination of which our legislature adopted the principle of criminal retroactivity.

Mixed theory cannot be used either, since it does not seem logical to consider an act committed at the same time under two different laws.

The first theory remains: that of activity, which for us, as for much of doctrine, is more founded.

The moment of the result, because in it is materialized that rebellion of the individual against the law that characterizes the criminal offense.

Only at certain moments can one explain the intimidating effectiveness inherent in the norm. The crime must be considered committed during the time when the subject has engaged in conduct prohibited by the norm and therefore, in the case of succession of laws, the one that was at the same time in force applies.

This rule, normally not traceable at several times, was produced partly under an earlier law and elsewhere under a successive law.

In such cases, the posterior law will be applied, even if it is less favorable to the offender, because under its empire not only was the result produced, but a fraction of the activity performed was carried out.

B. Criterion of the content of the offence

The concrete content of the crime, as shown in[11] the legal literature, includes, besides all the specific, typical and essential features of its four elements (legal, abstract content) and other characteristics that are not legally relevant to the consideration of the act as a crime (example, state of health, amount of damage, etc.), with the help of which the court establishes the concrete danger of the act Committed.

From this perspective, when establishing the more favourable criminal law, it is necessary to take into account, when examining successive laws, all circumstances relating to the conditions for criminalising the act and other elements which make it a criminal offence.

Thus, the law that provides more conditions for the act to constitute a crime or that provides fewer circumstances leading to the legal classification of the act in an aggravated crime, punished more severely than the basic crime, is more favorable.

In order to hold criminals criminally liable, the acts shall be legally framed in the simple form of the respective offences, provided by the previous law.

Also, if successive laws require the application of any case which removes the criminal character of the act referring to the guilt of the defendant or to the social danger of the act, they shall be examined in relation to the manner in which each of them regulates this matter;.

Thus, when a minor under the age of 14 has been sent to trial under the old criminal law, for committing the crime with discernment, and is to be judged according to the new law, according to which the minority constitutes a cause that removes the criminal character of the act, in judicial practice it has been decided that the favorable law is the new law because under it, his/her act does not constitute a crime and the minor is not criminally liable.

Similarly, if the new law has adopted a more advantageous way of assessing the damage caused by the crime, it is necessary to apply this law because the amount of damage is one of the criteria that the court must take into account when individualizing the criminal liability of the perpetratori.

C. Criterion of differences in sanctioning conditions

Technium Social Sciences Journal
Vol. 54, 165-178, February, 2024
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In relation to the conditions of punishment, in general, the more favorable law is the law that provides for a lighter penalty.

In determining the lighter penalty, account shall first be taken of the nature of the penalty. For example, life imprisonment is heavier than limited imprisonment or a fine.

When punishments are of the same nature, account shall be taken of their duration, i.e. of the maximum and minimum limits laid down by law, and not of their name.

In an attempt to establish certain rules for determining the more favourable law according to this criterion, different systems have been proposed taking into account:

a. Maximum punishment. After this, only the maximum penalties provided for by law must be taken into account when determining the more favourable law. It was argued[12] that the special minimum punishment should not be of concern to the examiner, since it may be reduced as a result of the retention of mitigating circumstances. The law providing for a lower special maximum for punishment will therefore be milder.

b. minimum punishment. Authors who supported this criterion[13] showed that the more favourable law is determined according to the special minimum of punishment independently of its maximum.

Those who support the maximum criterion criticized this system on the grounds that although the judge has the possibility to impose on the defendant under the old law a punishment below the minimum fixed by the new law, the same judge, based on the same law, can apply a punishment that must exceed the maximum limit established in the new law, which irretrievably compromises the very notion of a more favorable law.

c. proportional calculation. According to this system, the problem is solved based on an arithmetic calculation[14]. If the difference between the minimum limit of punishments prescribed by successive laws is less than that between the maximum of punishment in the laws being compared, it follows, according to this conception, that the old law is more serious.

These ways of establishing the more favourable criminal law were abstract in nature, based on objective criteria, related to crime and punishment, without taking into account the offender and the concrete conditions in which the act was committed. They do not allow a fair individualization of punishment and lead to results that are difficult to admit.

If the defendant had committed the crime under conditions of particular gravity, the court focusing on the special maximum, it could impose a punishment that exceeded that of the theoretically more severe law.

If the maximum criterion had been adopted, the second law could not have been more favorable (1-3 years).

If, in relation to the circumstances, the defendant had to be imposed a minimum sentence, which could not be lowered below one year because the other law was harsher, moreover, the defendant could not benefit from mitigating circumstances, if the law did not allow them.

The argument that the minimum penalty can be reduced by playing on mitigating circumstances backfires proponents of this criterion because it would compel the judge to acknowledge those circumstances, even when this is not the case or the law does not allow it.

d) The criterion of a specific assessment of the more favourable criminal law.

[12] P. Bouzat, J. Pinatel, *Traité de droit pénal et criminologie*, Paris, 1963
[13] E. Garcon, *Code penal adnnote*, Paris, 1901
[14] I. Tanoviceanu, V. Dongoroz, *Treatise on Criminal Law and Criminal Procedure*, Bucharest, 1924

Technium Social Sciences Journal
Vol. 54, 165-178, February, 2024
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www.techniumscience.com

According to this criterion, the milder law is not established a priori, but is determined in relation to the concrete case, submitted to trial, being more favorable the law that leads to a more advantageous situation for the defendant[15].

When comparing successive laws, the court must take into account all the legal provisions applicable to the crime in concrete terms and apply that law which permits the imposition of a lighter penalty. This criterion has established itself in judicial doctrine and practice because it offers the most judicious solutions for the application of the more favorable criminal law.

D. Determining the more favorable criminal law in relation to the concrete sanctioning conditions

a) The case of principal penalties

In applying this system of establishing the more favorable criminal law, the court will rely on the principle of legality of criminalization and punishment and the principle of individualization of penalties.

The judge is obliged to determine a punishment in relation to each of the successive limits, having to be assessed between certain limits, starting from the lowest minimum in one law to the lowest maximum in the other laws[16].

In this logical process of establishing the more favourable criminal law, the criteria provided by the Criminal Code will be taken into account, taking into account first the legal individualization and then the judicial one in relation to each successive law.

By assessing in concrete terms, the court moves towards a more severe or a lighter sentence.

In this sense, if both limits of custodial sentence provided for by the new law lower than those provided by the old law, the new law is more favorable.

If the minimum penalty prescribed by successive laws is identical, the law providing for a lower special maximum will be more favourable, and if the special maximum is identical, the law providing for a lower special penalty minimum will be more favourable.

If the limit of punishment in successive laws varies asymmetrically, when the court turns to a milder punishment, the law with a lower special minimum of punishment will be more favorable, and if it turns to a harsher punishment, the more favorable law will be that which has the lower special maximum.

When one law provides for alternative punishments (imprisonment or fine) and the other does not, the law providing for alternate fine and imprisonment will be more favorable only if the court is to impose the fine on the defendant, and if it decides to stop at a prison sentence, more favorable will be the law that has a lower special maximum penalty.

If alternative punishments are provided for by both laws and it has been decided to impose a fine, the law according to which a smaller fine can be imposed on the defendant will be more favorable, and if the court has decided to impose the prison sentence, the law with a reduced special minimum punishment will be more favorable.

If, from the commission of the offence until the final judgment of the case, the limits of the administrative fine are increased[17], The previous law applies as a more favourable criminal law.

[15] I. Oancea, op. cit.
[16] C. Barbu, op. Cit.
[17] Buzescu Gheorghe, *Particularities of contravention law,* Sitech Publishing House, Craiova, 2017

Technium Social Sciences Journal
Vol. 54, 165-178, February, 2024
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Therefore, in determining the more favourable criminal law, account must be taken of all criminal rules that may be applicable in the case, including those fixing the amount of administrative penalties, and the court is obliged to apply the criminal law which is more favourable to the defendant with regard to all measures likely to be taken in the case.

When applying the more favourable criminal law, in particular, mitigating or aggravating circumstances, the quality in which the perpetrator participated in committing the crime, the competition of offences, recidivism, the possibility of individualizing the execution of the sentence when the main penalties are equal or the main punishments are not equal but the provisions governing the respective institutions are identical, will also be taken into account.

For example, if they are held in favor of the defendant[18] Mitigating circumstances and both successive laws permitting this, and the limits of the main penalty are equal, the law that the circumstances retained have a greater effect on reducing the sentence below the special minimum will be more favorable, and in the case of aggravating circumstances, it is the milder law that allows for less aggravation.

b) The case of complementary punishments

Different opinions have been expressed in the legal literature on whether complementary punishments can be a criterion for determining the more favourable criminal law.

Some authors[19] maintain that when determining the more favourable criminal law, depending on the penalties provided for by law, no account is taken of complementary penalties, but only of the main penalties.

It has been argued that, with regard to complementary penalties, the principle of the more favourable criminal law does not apply, but that of the law more in line with the interests of social defence.

As the new criminal law is more in line with the interests of social defence, by their preventive effect, its provisions always apply in transitional situations.

Alţi author[20], on the contrary, I am of the opinion that complementary penalties may constitute a criterion for determining the more favourable criminal law;.

Thus, if successive laws provide for the same principal penalties, the law that does not provide for complementary punishments will be more favorable, and if successive laws provide equal conditions for principal and complementary penalties, the law containing more restrictive conditions of application (for example, a higher penalty in addition to which they can be applied) or a shorter duration is more favorable.

We share the latter opinion, with the specification that when establishing the milder law, the provisions contained in the Romanian Constitution must be taken into account, so that, when the new law is more favorable taking into account the main penalty, the complementary penalties will be applied according to this law, only if within the limits and content they are more favorable than those provided by the previous law.

If the old law is more favorable, the complementary punishments that are not provided for by the new law no longer apply, and those that have a counterpart in this new law apply within the content and limits provided by it, if they are more favorable.

[18] Buzescu Gheorghe, *Internal and international police cooperation – university course,* Sitech Publishing House, Craiova, 2020
[19] C. Mitrache, op. cit.
[20] G. Antoniu, C. Bulai , op. cit

Technium Social Sciences Journal
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In other situations, for example when successive laws provide for identical complementary punishments but differ in terms of the main punishment, the more favourable law will be determined according to the milder main punishment.

Conclusions:

In applying the principle of the more favourable criminal law, the rule according to which, from two or more successive laws, one must be chosen which proves to be more advantageous for the defendant must be chosen and applied exclusively, disregarding the other laws.

In this context, we consider that if the defendant was sent to trial for an offence legally classified by the indictment under the provisions of the amended Criminal Code, although the act was committed before the entry into force of this law, the court should not, when applying the more favourable criminal law, first when changing the legal classification according to the previous law.

Therefore, we consider that the court must convict the defendant directly on the basis of the provisions of the previous law, established more favourably because its application is binding (ope legis) on the court and there is no question of a wrong legal classification of the act.

This is all the more so because, in some cases, the act receives the same legal classification according to all successive laws, but the penalties they provide for the crime committed are different.

According to the abovementioned rule, it is forbidden to combine the more favourable provisions contained in successive laws and thereby create a new law (lex tertia) applicable in transitional situations. For example, it is not possible, as has been done in judicial practice, for the legal classification of the act to be done according to one law and the application of punishment according to another law.

The main argument in favour of this rule is based on the fact that, if the contrary were admitted, it would mean that this would actually lead to the application of a new law (lex tertia), i.e. a law diferită de any of those between which the comparison took place, created by the judicial body, called upon to apply the law, not to make a new one.

Although the thesis of the inadmissibility of achieving a "lex tertia" is accepted in judicial literature and practice, there is no point of view on the concept of combining provisions in such a "law".

In a more restrictive conception, it is considered that the law that is more favorable in terms of legal classification and sanctioning of the act should not apply to other law institutions such as: recidivism, competition of offenses, even if it is more favorable in these aspects[21].

In another conception[22] The application of the more favourable criminal law must be made in relation to each institution that has an independent character, such as: conditional suspension, competition of offences, recidivism, participation and rehabilitation. If, for example, the legal classification of the act and the punishment were made according to one of the laws that was more favorable, it is not excluded to apply the provisions of the other law, regarding competition of offences, recidivism, prescription, rehabilitation, when they are more favorable because in this case a "lex tertia" is not achieved, the law stopping only the combination of provisions that cannot be applied autonomously. Judicial practice has also embraced this view, sometimes driven by the lack of more favourable regulation of the law for

[21]V. Dongoroz şi colab., op. cit., op. cit., vol. I.

[22] G. Antoniu şi C.Bulai, op. cit.

Technium Social Sciences Journal
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www.techniumscience.com

certain institutions (e.g. ancillary penalties) or by the need for the correct application of the principle of the more favourable law.

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