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Considerations Regarding the Calculation of the Rehabilitation Period in Light of the Precepts of the Principle of the More Favorable Criminal Law

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Abstract: *This article aims to clarify the issues that may arise when assessing the length of the rehabilitation period in order to determine whether or not the person on trial is in a state of post-execution recidivism.*
The issue analyzed in this article lies in the limits of application of the more favorable criminal law in pending cases, in situations where the more favorable criminal law regarding the duration of the rehabilitation period for the defendant's prior record is the new criminal law, and the more favorable criminal law regarding the special limits of punishment is the old criminal law, under which the offense was committed, which prohibits de plano the creation of a third criminal law.
This article proposes several arguments in support of finding a solution to these situations in accordance with the binding case law on the matter issued by the Constitutional Court of Romania on the establishment of the more favorable criminal law for transitional situations.

Keywords: *mitior lex; post-execution recidivism; autonomous institutions; rehabilitation period.*

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Introduction

According to the recent case law of the Constitutional Court of Romania, represented by Decision No. 265 of May 6, 2014, it was established that the provisions of Article 5 of the Criminal Code are constitutional insofar as they do not allow the combination of provisions from successive laws in establishing and applying the more favorable criminal law, thus being interpreted by the specialized doctrine as excluding the application of the more favorable criminal law on autonomous institutions (Curtea Constituțională a României, 1997). Although at first glance the reference decision of the Constitutional Court of Romania is categorical and clear, there are situations in which the application of the imperative of the constitutional court cannot be achieved without reservations.

One such situation is the transitional situation consisting of the rehabilitation period applicable to convictions under the Old Criminal Code, which came into force in 1969, in order to determine whether or not the state of post-execution recidivism applies to an offense committed under the New Penal Code, which came into force in 2014.

More specifically, we can identify a situation in which defendant X is prosecuted for committing a series of offenses on October 30, 2010, after previously being sentenced to three years' imprisonment, which was considered to have been served on June 16, 2005.

Since the date of the offense, Law No. 286/2009 on the Criminal Code (Parlamentul României, 2009), Law No. 187/2012 for the implementation of the New Criminal Code (Parlamentul României, 2012), and Government Emergency Ordinance No. 18/2016 amending and supplementing Law No. 286/2009 on the Criminal Code have entered into force. (Guvernul României, 2016)

According to the provisions of Article 166(1)(a) of the new Criminal Code, in the case of a sentence of more than two years but not exceeding five years, the rehabilitation period is four years. Thus, the rehabilitation period expired on June 15, 2009. Since the acts attributed to the defendant are alleged to have been committed on October 30, 2010, it is clear that they took place after the expiry of the rehabilitation period.

On the other hand, if the rehabilitation period for the aforementioned convictions is determined and calculated in accordance with the rules set out in Article 135(1)(a) of the 1969 Criminal Code, we note that the rehabilitation period would be 4 years plus half of the sentence imposed, which would lead to a rehabilitation period of 4 years plus 2 years. As the acts attributed to the defendant are alleged to have been committed on

October 30, 2010, it is clear that they occurred before the expiry of the rehabilitation period. Since the acts attributed to the defendant are alleged to have been committed on October 30, 2010, it is clear that they took place before the expiry of the rehabilitation period.

Thus, compared to the provisions of the New Criminal Code, it is a more favorable criminal law, given the shorter rehabilitation periods, but compared to the rules established for punishing concurrent offenses, it contains harsher penalties based on the charges brought against the defendant X.

Discussions and proposed solutions

From the analysis of the case law identified as relevant in this matter, we found that there are two opposing opinions on this issue, which is related to the resolution of the problem of the more favorable criminal law applicable to the situation described above.

The first opinion held that, by virtue of Constitutional Court Decision No. 265/2014, in order to avoid the creation of a *"lex tertia,"* in order to establish the incidence of post-conviction recidivism for crimes committed prior to February 1, 2014, and which are currently being tried, the more favorable criminal law cannot be established separately from the more favorable criminal law applicable to the crimes that are the subject of the current case, and a single criminal law deemed to be more favorable shall be applied globally **(**Curtea de Apel Suceava, 2021**).**

In a second opinion, it was considered that, by virtue of Constitutional Court Decision No. 214/1997, in order to determine the incidence of post-execution recidivism for offenses committed prior to February 1, 2014, the more favorable criminal law can be determined in a distinct manner from the more favorable criminal law applicable to the crimes that are the subject of the current case, with a single criminal law deemed to be more favorable being applied globally (Curtea de Apel Craiova, 2014).

The following quotation reflects the reasoning adopted by the Craiova Court of Appeal in a similar criminal case regarding the calculation of the rehabilitation period for the removal of the status of recidivism.

"*Analyzing the appeal in light of the grounds invoked in relation to the documents and proceedings in the case file, the Court finds that it is well-founded.*

The defendant was previously sentenced to 8 years in prison, by decision no. 32 of February 10, 1997, of the Dolj Tribunal, which became final by criminal decision no. 140 of May 29, 1997, of the Craiova Court of Appeal.

By decision no. 45 of February 9, 1998, of the Dolj Tribunal, this sentence was combined with the sentence of 1.2 years' imprisonment imposed by decision no. 279 of May 22, 1997, of the Calafat Court, and was to serve the more severe sentence of 8 years' imprisonment. He was arrested on November 18, 1996, and was released on parole on January 23, 2002, with 1,029 days remaining.

According to the provisions of Article 166(1)(b) of the Criminal Code, the rehabilitation period is five years in the case of a prison sentence of more than five years but not exceeding ten years.

By applying the provisions of Article 5 of the Criminal Code in conjunction with the provisions of Article 166(1)(b) of the Criminal Code, the rehabilitation period expired on November 17, 2009.

However, the act that is the subject of this case was committed on September 19, 2012, the date on which the rehabilitation period expired.

Thus, applying the provisions of Article 5 of the Criminal Code in relation to the provisions of Article 38(2) of the previous Criminal Code, the defendant is no longer in a state of post-execution recidivism, as the rehabilitation period has expired.

With regard to the legal classification of the offense, with reference to Article 5 of the Criminal Code, the Court considers that no change in the legal classification is required, given that the offense is currently provided for in Article 335 of the Criminal Code and the penalty is the same, namely imprisonment for a term of between 1 and 5 years. (...)" (Curtea de Apel Craiova, 2014).

We consider this interpretation to be sound and lawful, given that, in earlier case law of the Constitutional Court of Romania, namely Decision 214/1997, relevant reasoning was given regarding transitional situations for applications for conditional release, which would be applicable mutatis mutandis to the calculation of the rehabilitation period, since both legal institutions concern the consequences of final criminal convictions, the only difference between them being that conditional release is a form of mitigation of the main prison sentence for reasons related to the rehabilitation of the convicted person, while the rehabilitation period is a period of time considered by the legislator to be sufficiently long to presume with absolute certainty that the defendant no longer poses a criminal danger typical of a repeat offender and therefore acquires the legislative right to benefit from a more lenient punishment. This difference is only formal, not substantive, in which case the applicability of analogy would be permitted.

According to the reasoning on which the decision of the constitutional court was based, as mentioned above, we emphasize the following aspects:

"A transitional situation in the succession of criminal laws arises if, from the date of the commission of the offense, when the criminal legal conflict arises, until the

termination or extinction of this relationship through the execution or consideration as executed of the punishment imposed, and sometimes until the consequences of the conviction are removed through rehabilitation, one or more criminal laws have intervened. The applicable law is always the most favorable law. In the case of conditional release, the transitional situation also arises on the date of the commission of the offense and lasts until the execution or deemed execution of the life sentence or prison sentence. The intervention, during this period, of a criminal law that modifies the institution of conditional release, as is the case with Law No. 140/1996, means that the applicable law is determined in accordance with the rules set out in Article 15(2) of the Constitution and Article 13(1) of the Criminal Code, regardless of the date on which the conviction became final. (2) of the Constitution and Article 13(1) of the Criminal Code, regardless of the date on which the conviction became final." **(**Curtea Constituțională a României, 1997).

As the expiry of the rehabilitation period is a transitional situation from the perspective of the more favorable criminal law in the case of successive criminal laws between the time of the commission of the offense and the actual rehabilitation, it is clear that the criminal law to be applied to determine the duration of the rehabilitation period will always be the most favorable criminal law, as expressed by the Constitutional Court in Decision 214/1997.

The 2014 Criminal Code establishes shorter rehabilitation periods than those provided for in the 1969 Criminal Code. We consider that the more favorable criminal law is the Criminal Code in force, which is why the provisions of Article 166 et seq. of the Criminal Code are to be applied as the more favorable criminal law with regard to the calculation of the rehabilitation period, and this will not constitute the creation of a tertiary criminal law, the establishment of the rehabilitation period for definitively judged acts, for which a conviction was handed down, is not subject to the judgment in the case for which the defendant was brought to trial and which could represent the second term of post-execution recidivism depending on whether or not the rehabilitation period is calculated in accordance with the provisions of the 1968 Criminal Code.

The same considerations were taken into account in relation to a related institution (conditional release) and in the minutes of the meeting of the presidents of the criminal divisions of the High Court of Cassation and Justice and the courts of appeal with the chief prosecutors of the judicial division of the Prosecutor's Office attached to the High Court of Cassation and Justice and the prosecutor's offices attached to the courts of appeal on November 21-22, 2016, on this issue.

According to point 13 of *the minutes of the meeting between the presidents of the criminal divisions of the ICCJ and the courts of appeal and the chief prosecutors of the judicial division of the Prosecutor's Office attached to the High Court of Cassation and*

Justice and the prosecutor's offices attached to the courts of appeal (Înalta Curte de Casaţie şi Justiţie 2016), it was unanimously agreed by the participants in the discussion that:

"in the opinion of the participants, considering Decision No. XXV/2007 issued by the ICCJ in resolving an appeal in the interest of the law and Decision No. 214/1997 of the CCR, the transitional situation in the succession of criminal laws arises if, from the date of the commission of the offense, when the criminal legal conflict arises, and until the termination or extinction of this relationship through the execution or consideration as executed of the sentence imposed, and sometimes until the removal of the consequences of the conviction through rehabilitation, one or more criminal laws have intervened.

In the case of conditional release, the transitional situation also arises on the date of the commission of the offense and lasts until the execution or deemed execution of the life imprisonment or prison sentence. The intervention, during this period, of a criminal law that modifies the institution of conditional release means that the determination of the applicable law is carried out in accordance with the rules set out in Article 15(2) of the Constitution, regardless of the date on which the conviction became final or the date on which the convicted person began serving their sentence.

This point of view, also expressed at the meeting of the presidents of the criminal divisions in June 2015 in Braşov, was unanimously shared by the participants at the meeting.

In this case, the institution of parole retains its autonomy with regard to the assessment of the mo In this case, the institution of conditional release retains its autonomous character with regard to the assessment of the more favorable criminal law, as emphasized in the older case law of the Constitutional Court, as well as of the High Court of Cassation and Justice in this matter.

Given that Decision No. 214/1997 of the Constitutional Court of Romania refers to both conditional release and rehabilitation in the context of explaining that the more favorable criminal law will always apply to these two elements that remove the consequences of conviction, regardless of how many legislative changes occur between the time the offense was committed and the time of rehabilitation, it is justified to apply "mutatis mutandis" the same conclusion unanimously accepted at that meeting to clarify the legal issues mentioned above.

Conclusions

After studying the issue of clarifying whether the more favorable criminal law should be established in terms of determining the provisions of successive criminal laws that are more favorable with regard to the length of the rehabilitation period, we consider that we are not in a situation where a third law is created, because there is no accumulation of provisions for the offences that are the subject of the case, the legal provisions being

established in relation to distinct objects, namely: the rehabilitation period for a conviction handed down by a final judgment and the offences brought to trial in the pending case, so that the two issues are mutually independent, which leads to the conclusion that such a course of action is in line with both the reasoning behind the considerations of Constitutional Court Decision No. 265 of May 6, 2014, and the considerations of Constitutional Court Decision No. 214 of 1997, thus preserving the line of Romanian criminal doctrine dating back to the interwar period.

AI tools use statement | No AI-assisted technologies were used in the writing, editing, or data analysis for this manuscript. All work is original and completed solely by the listed authors.

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