AN INVENTORY OF SOME CRIMINAL PROVISIONS OF MITIGATING VALUE REGULATED BY THE ROMANIAN CRIMINAL SPECIAL LAWS*

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** This work was supported by the strategic grant POSDRU/159/1.5/S/141699, Project ID 141699, co-financed by the European Social Fund within the Sectorial Operational Program Human Resourses Development 2007-2013*

Abstract: *The purpose of this article is to establish a presentation of several legal provisions of mitigating trend, regulated in the Romanian criminal law, not in the Criminal Code itself, but in some separate laws – generally regarded, in comparison with the Criminal Code, as "special laws". The author realizes not only an inventory of those provisions, but also proposes a classification method for them, based upon the criterion of the reasons on which the mitigating tendencies expressed in those legal dispositions where founded. Also, the article indicates the legal provisions in relation to whom these dispositions reveal their mitigating value, regardless of the (sometimes controversial) juridical nature who can be attributed to them: either mitigated forms of other incrimination norms, or special causes of reduction of punishment in relation to some particular offenses, or autonomously regulated criminal acts, initially developed by modifying (in a mitigated way) some other separate regulated offenses..*
Keywords: *Romanian criminal law; special legislation; provisions and reasons for of punishment; classification.*

INTRODUCTION

At the moment, the Romanian criminal legislation is not composed by a singular, monolithic regulatory act, but by several law sources. As a constitutional rule, criminal provisions are to be regulated in normative acts represented by "laws" (*per se*), meaning a legislative will voted by the Parliament. Furthermore, taking into account the procedure established for adopting them, the laws (*stricto sensu*) are classified, in the present Romanian system, in three types: ordinary laws, organic laws and constitutional laws.

Ordinary laws cannot contain criminal regulations, the legislation in the criminal domain being restricted only to the higher quorum conditions imposed for passing of the organic laws thru the Parliament (art.73 par.3 lett. *h* and *i* from the Romanian Constitution). The most important of these organic laws containing criminal regulation is, of course, the Criminal Code (Law no.286/2009). Separately, there are, though, several other organic laws also containing criminal regulations, either being solely dedicated to this purpose (e.g.: Law no.143/2000, regarding the prevention and deterrence of illegal

trafficking and consumption of drugs), or combining criminal dispositions alongside other law provisions (e.g.: Law no.571/2003, representing the Fiscal/Tax Code, or Law no.46/2008, representing the Forestry Code).

Also, as an exception, the Romanian Constitution allows the executive central authority (the Government, *stricto sensu*), to enact urgent provisions in the domain reserved to organic laws, when there is an extraordinary emergency, and the normal enactment process (carried out by the Parliament) is expected to be to slow to solve the crisis in proper time. That means that, under condition of motivating the emergency, the executive Government may also enact provisions in the criminal domain, by means of a Governmental Emergency Ordinance, which is to be sanctioned or rejected, at a later time, by the Parliament, through an organic law (art.115 par.4-8 from the Romanian Constitution).

The criminal dispositions contained in both the special laws and in the Government Emergency Ordinances (to which we will refer to as "G.E.O." from now on) are referred to - by doctrine [among others, see – Mitrache & Mitrache, 2014: 57, 58, 67, 68; Streteanu & Nițu, 2014: 76] and jurisprudence, in comparison to the provisions regulated in the Criminal Code (which is regarded as the general criminal legislation of Romania) - as "special criminal legislation", or "special criminal provisions".

As well as in the case of many of the offenses regulated by the Criminal Code, some criminal acts described by these special provisions also reveal a mitigating criminal policy tendency, by comparison with certain statutory incriminations provided either by the Criminal Code, or by these special laws themselves. The present article aims to reveal several of these provisions, indicating the relation between them and the dispositions in regard to whom their mitigating value is emphasized, also attempting to classify them based on the criterion of the reason who determined the mitigating stance of the legislator.

GENERAL CLASSIFICATION OF MITIGATING PROVISIONS REGULATED IN THE ROMANIAN SPECIAL CRIMINAL LEGISLATION, BY REASON OF MITIGATION

Although in the Romanian special criminal legislation there can be identified many provisions that can be regarded as carrying a mitigating value, by comparison to some other incriminations (the norms of reference), it can be observed that they present the ability of being categorized in accordance with the criterion of the reason (the motive) that determined the legislature to express such a mitigating tendency. This mitigating tendency is manifested by the provision of a more lenient legal punishment than that of the incrimination of reference, as such: either a punishment of a less severe nature (e.g.: a fine, instead of imprisonment), either a punishment of the same type, but with lower limits (only one of the special limits - either the minimum or the maximum - may be lower than the value of the similar limit of the incrimination of reference, or both limits may be lower, at once).

It is true that some of those legal dispositions have a more difficult (complex) structure, or highlight not one, but several reasons for mitigation of punishment, but even

in such cases, a principal mitigating motive can be (arguably) identified, thus allowing the classification of such dispositions to still take place, under this criterion.

According to our observations, the most obvious categories of incriminating provisions with mitigating value, enacted in the Romanian special criminal legislation of the moment, are based upon the following reasons: the perpetration of the offense with a less intense type of guilt (fault / negligence, instead of intention); the adoption of a certain conduct, by the perpetrator, *post-delictum* (either engaging in a certain behaviour of judicial cooperation and deletion, specially provided by the law, either compensating the victim in a certain way and in a certain period of time); the perpetration of the offense in certain time circumstances (after a certain event or after the passing of a certain period of time since some event has taken place); the type (field) of activity in which the offense was committed.

MITIGATING PROVISIONS REGULATED IN THE ROMANIAN SPECIAL CRIMINAL LEGISLATION, BASED ON THE FORM OF GUILT

The perpetration of the offense with a less intense type of guilt than that legally requested by the incriminating provision of the reference norm is, by far, the most frequent reason for the Romanian legislature to create mitigating dispositions in the special criminal laws (*lato sensu*). In the Romanian criminal law (art.16 par.2-5 of the Criminal Code), there are expressly (legally) recognized three types of guilt: intention, fault / negligence and a mixed form, called exceeded intent (*praeter-intentionem*, in Latin). The latter is composed by combining the initial intention in perpetrating some less severe offense, with fault / negligence in what regards the final result, more severe than the one intended by the perpetrator [for this subject see more in – Michinici, 1996: 80-84; Michinici & Dunea, in Toader et al., 2014: 52; Streteanu & Niţu, 2014: 340-346; Mitrache & Mitrache, 2014: 139]. The rule emphasized by art.16 par.1 of the present Romanian Criminal Code is that the perpetration of an act described by criminal law does not constitute an offense if it is not committed with the form of guilt requested by law. According to art.16 par.6 of the same Criminal Code, the form of guilt usually requested by law in order to transform an act described by the criminal law into an offense is intention. Thus, no such act will be considered as offense when committed by fault / negligence, unless there is a legal provision that indicates that fault / negligence is also a valid form of guilt, able to activate the criminal liability of the perpetrator. Usually, when they exist, such provisions stipulate a lower punishment for the offense committed by fault / negligence, than for the similar offense committed by intent.

In Romanian special criminal legislation there can be identified numerous mitigating provisions based upon this reason. We indicate, for *example*, the following dispositions:

- art.49 par.2 of Law no.17/1990, regarding the legal status of internal waters, territorial waters, contiguous zone and exclusive economic zone of Romania, according to whom, if the offense described in par. 1 of the same article (discharge of pollutants in any of those waters) is committed by fault / negligence, and not with intent, the punishment will only be imprisonment from one month to one year, or the payment of a (smaller) fine, instead

of imprisonment from 3 months to 2 years, or the payment of a (larger) fine. Also, according to par. 4 of the same article, if the act described by par.3 – an aggravated form of the offense in par.1, on the account of the result: a grave deterioration of the water quality or damages to the marine life – is committed by fault / negligence, instead of a punishment between one and 5 years imprisonment, there will be applied only a punishment between 6 months to 3 years imprisonment, or a fine.

- art.64 par.2 of Law no.94/1992, regarding the organization and function of the Court of Auditors, according to whom, the lack of recovery of the prejudice, because the management of the audited entity did not follow the measures disposed by the Court of Auditors, if this is committed by fault / negligence, and not with intent, will be punished only by criminal fine, instead of imprisonment between 3 months and one year, or the payment of a (larger) fine (as par. 1 provides for the intentional act).
- There are many other similar mitigating dispositions that we identified in the Romanian special criminal legislation (and, probably, some other ones, for our study did not include any special criminal laws enacted in 2015), that – for concern of space – we will only indicate by number of article and number / year of the law containing them, without further specifying their substance. They are as follows: art.49 par.2 of the Government Ordinance (we will refer to this type of normative act as "G.O." from now on) no.39/1996 (regarding the establishment and functioning of the Deposit Guarantee Fund in the Banking System), by comparison to par. 1 of the same act (a note is necessary here: a G.O. is not a valid normative act for the enactment of criminal provisions, in Romanian law system; nevertheless, after its enactment, a G.O. may be subject to additions and alterations by normative acts able to enact criminal provisions, and thus, such dispositions may be sometimes found even in normative acts that normally do not have the capability of being sources of criminal law; this is the case here, as well, as the dispositions of art.49 from G.O. no.39/1996 where modified in their current form by art.62 of Law no.187/2012, a organic law, able to contain criminal provisions, being the law enacted in order to secure the insertion into action of the new Romanian Criminal Code and the transition between the former code and the current one); art.45 par.2 of Law no.111/1996 (regarding the safe deployment, regulation, authorization and control of nuclear activities), by comparison to par. 1 of the same article; art. 98 par. 2 of the G.O. no.29/1997 (the Civil Air Code; art. 98 was modified by Law no. 187/2012), by comparison to par. 1 of the same article; art. 32 par. 2 of the G.O. no. 43/2000 (on the protection of the archaeological heritage; art. 32 was modified by Law no. 187/2012), by comparison to par. 1; art. 25 par. 5 of Law no. 78/2000 (on preventing, discovering and sanctioning of corruption), by comparison to par. 4 of the same article; art. 31 par. 2 of Law no. 656/2002 (on preventing and sanctioning money laundering, and the establishment of measures to prevent and combat terrorist financing), by comparison to par. 1 of the same article; art. 10 par. 2 of Law no. 191/2003 (on the regime of offenses committed in shipping – naval transport), by comparison to par. 1; art.23 par.2 of Law no.64/2008 (regarding the safe operation of pressure vessels, lifting equipment and fuel-consuming devices), by comparison to par.1 of the same article; art.11 of Law no.101/2011 (on preventing and punishing some acts who produce environmental degradation), in relation to art. 52 par. 1 lett. *c* and *d* of the G.E.O. no. 57/2007 (on the

regime of protected natural areas, conservation of natural habitats, wild flora and fauna); art. 16 par. 2 of Law no. 194/2011 (on combating operations with products likely to have psychoactive effects, other than those stipulated by already applicable laws), by comparison to par. 1 of the same article (in this case, there is to say that the legal phrasing of the text is extremely questionable; thus, the norm speaks about persons who "should OR could" have predicted that certain substances have psychoactive effects; this is in contradiction with the legal definition of fault / negligence, prescribed by art. 16 par. 4 of the Romanian Criminal Code; according to this text: "An action is committed with fault / negligence, when the perpetrator: a) foresees the outcome of his / hers actions, but does not accept it, believing without reason that such outcome will not occur; b) does not foresee the outcome of his / hers actions, though he / she should AND could have done so").

Sometimes, the mitigating effect is not expressed as in the above indicated cases, but by the specific legal stipulation of a certain fraction or percent of reduction which is to be applied to the sanction indicated by law for the offense of reference, in order to determine the legal punishment for the mitigated criminal act. As a result, the legal sanction is not directly indicated by the legislature; it is to be strictly determined thru a mathematical calculation, applying all the data that the law puts at the interpreter's disposal, thus indirectly prescribing the penalty (procedure thought to be in accordance with the principle of legality of criminal sanctions). For example:

- art.31 par.1 of Law no.10/1995, on construction quality, provides that the design, verification, evaluation, development of a building or the performance of changes to a building, without the observance of technical regulations on stability and strength, if in this way is endangered the life or bodily integrity of one or more persons (act committed with intent), will be punishable by imprisonment from one to 5 years; par. 3 indicates that, if this act is committed by fault / negligence, the limits of punishment will be reduced by half.
- Because this type of provision is no exception, as well, we will proceed as we already deed above, and indicate other similar cases we discovered only by number of article and number / year of the normative act including them, without further presentation of their substance. They are as follows: art. 92 par.4 of Law no.107/1996 (the "water's law"), by comparison to par.2 of the same article, and also art.93 par.3 by comparison to par. 1 and 2, and art.95 par.3 by comparison to par.1 and 2; art.23 par. 2 of the G.E.O. no.244/2000 (on the safety of dams), by comparison to par. 1 of the same article; art.9 par.1 of Law no.101/2011 (on preventing and punishing some acts who produce environmental degradation), by comparison to art.3, 7 and 8 of the same normative act, and also art.10 of the same law, in relation to art.271 of Law no.86/2006 (Customs Code).

In some cases, the mitigation tendency expressed by the legislature is not so obvious, and can only be determined by corroboration of multiple provisions from separate laws. Such is the case of the disposition inserted in art.12 par.3 of the G.E.O. no.55/2002, on the regime of holding dangerous or aggressive dogs. Thus, according to par. 1 of the indicated article, failure - by the owner of the dog or its temporary holder - to take the necessary measures in order to prevent canine attack on a person (...) if the attack occurred, is punishable by imprisonment between 6 months to 3 years, or by

payment of a fine. According to par. 3, if this act is committed by fault / negligence, there are to be applied the provisions of art.192 or 196 of the Criminal Code. Art.192 of the Criminal Code refers to manslaughter (homicide committed by fault / negligence), and the punishment is higher (at least imprisonment between one to 5 years, and higher for the aggravated forms) [for more details regarding manslaughter, see – Toader, in Toader *et al.*, 2014: 337-339]. On the other hand, art. 196 of the Criminal Code regulates the offense of involuntary bodily injuries, for which the first two paragraphs provide a less severe punishment than that indicated by art. 12 par. 1 of the G.E.O. no. 55/2002 (namely: imprisonment between 3 months and one year, or payment of a fine – for the act described by par. 1 of art. 196 of the Criminal Code; imprisonment between 6 months and 2 years, or the payment of a fine – for the act described by par. 2 of the same article). Thus, in situations were the act provided by art. 12 par. 3 of the G.E.O. no. 55/2002 is to be found, in some particular cases, as suitable with the provisions of art. 196 par. 1 or 2 of the Criminal Code, there is to be retained a mitigation effect in comparison with art. 12 par. 1 of the G.E.O. no. 55/2002 (there is to say, however, that the juridical nature of the provision does not appear to us to be extremely clear), based on committing the same act not with intent, but by fault / negligence.

MITIGATING PROVISIONS REGULATED IN THE ROMANIAN SPECIAL CRIMINAL LEGISLATION, BASED ON THE ADOPTION OF A CERTAIN CONDUCT, BY THE PERPETRATOR, FOLLOWING THE COMMISSION OF THE OFFENSE

Although not as numerous as the previously described mitigation provisions, there are certainly some legal norms in the Romanian special criminal legislation that emphasize a mitigating trend of criminal policy conditioned by the adoption of a certain legally required conduct, by the perpetrator of some offenses, into a predetermined post-delictual period of time. Usually, the lawmaker aims to secure, by the promise of a more lenient criminal treatment, the cooperation of the perpetrators, in order to better and faster solve the social and juridical repressive relation born by the act of committing the offense. In other occasions, the law tends to be concerned by the victims situation, and provides a mitigated criminal responsibility for the offenders who take due measures in order to compensate, with celerity, the persons to whom they produced some damage by committing the criminal act.

We consider that the following provisions from Romanian special criminal laws can be found compliant with the first category thus indicated:

- art.143^1 par.2 of Law no.8/1996 (on copyright and related rights); according to this text, the person who committed one of the offenses stipulated in art. 139^1 of this law, and who, during the criminal investigation by the prosecutor's office, *denounces and facilitates the identification and the engagement of criminal liability* of other persons who have committed crimes related to pirated merchandise or pirate access control devices, benefits from a reduction by half of the penalty limits provided by law for the offense he / she committed (it is interesting to observe that the acts subject to the denunciation are not required to be part of the same criminal enterprise committed by the beneficiary of the

mitigation treatment, but any other criminal infringements of the provisions of the copyright law, related to pirated merchandise or pirate access control devices, no matter how the denunciator became aware of them);
- similar provisions can be found in: art.63 par.3 of Law no.21/1996 (the Competition Law), in relation to the dispositions in par. 1 of the same article; art.15 of Law no.143/2000 (on the prevention and deterrence of illegal trafficking and consumption of drugs), in relation to the provisions of art.2-9 from the same Law; art.30 of Law no.656/2002 (on preventing and sanctioning money laundering, and the establishment of measures to prevent and combat terrorist financing), in relation to art.29 from the same Law; art.22 of Law no.104/2008 (on preventing and combating illicit production and trafficking of doping substances with high risk), in relation to art. 19 of the same normative act;
- a slightly different formulation can be encountered in art. 3 par. 4 of the G.E.O. no. 31/2002 (regarding the ban of organizations, symbols and acts who have a fascist, legionnaire, racist or xenophobic character and the ban of worship of persons guilty of crimes of genocide, crimes against humanity and war crimes); the text indicates that the person who committed any of the offenses provided by par. 1 and 2 of the same article will benefit from the reduction by half of the penalty limits, if it facilitates, during the criminal investigation by the prosecutor's office, *the pursuit of truth* and the engagement of criminal liability of one or more persons who are members of a organized criminal group (although the text does not indicate this expressly, we assume, in a rational manner of interpretation, that it has to be a organized criminal group whose activity is tied to the criminal acts incriminated by this particular normative act, and not just any other criminal organization).

For what concerns the second category of mitigating provisions based on adoption, by the perpetrator, of a certain conduct, after committing the offense, we refer to the following legal dispositions:
- art.143^1 par.3 of Law no.8/1996 (already indicated above); the text stipulates that if the persons who have committed any of the offenses regulated by this Law have remedied the injury (compensated the damage) produced to the rights holders, until the end of judicial investigation in front of the first court, than, the special limits of the penalty will be reduced by half;
- art. 10 of Law no. 241/2005 (on preventing and combating tax evasion), who provides that if a person who committed one of the offenses described by art. 8 or 9 of this Law, fully covers the claims of the person constituted as civil party in the judicial process, during the criminal investigation by the prosecutor's office, or after this period, but before the first hearing in front of the court, than he / she will benefit from a reduction by half of the penalty's limits prescribed by law for those offenses.

MITIGATING PROVISIONS REGULATED IN THE ROMANIAN SPECIAL CRIMINAL LEGISLATION, BASED ON THE PERPETRATION OF THE OFFENSE IN CERTAIN TIME CIRCUMSTANCES

This type of provision, who allows a legal deviation of punishment from the statutory limits ordinarily prescribed for a certain genre of criminal conduct, based on the fact of committing the offense after a certain event has taken place, or after the passing of a certain period of time since some event has taken place, is usually encountered more often when it comes to aggravating the criminal liability of some perpetrators. Nevertheless, we identified in the Romanian special criminal legislation at least one legal disposition who takes into account this reason, in order to create a cause of mitigation of the penalty prescribed by law for a certain offensive behaviour.

We refer to the provision of art.11 par.2 of Law no.78/2000 (on preventing, discovering and sanctioning of corruption). Thus, according to art.11 par.1 of this Law, any person who, with task of supervision, control, reorganization or liquidation of a private economic operator, fulfills for it any task, intermediates or facilitates the conducting of commercial or financial operations, or participates with capital to such an economic operator, if the act is likely to bring to him / her an undue advantage, directly or indirectly, commits an offense punishable by imprisonment between one and 5 years and the interdiction of some rights. Par.2 of the same article states that if the act described by par. 1 is committed within a period of 5 years from the termination of entrusting with such a task (supervision, control, reorganization or liquidation of a private economic operator), the penalty will be (only) imprisonment between 6 months to 3 years, or even only the payment of a criminal fine.

Of course, it can be argued that by this provision, the Romanian legislature extends the time frame in which the perpetrator of such an act has criminal significance, which can hardly be appreciated as a less drastic situation for the perpetrator, in comparison to the reference norm, as a mitigating provision should be. By this point of view, the disposition in case is not at all a mitigating provision (it can be argued even that it is an aggravated one). But, looking only from the point of view of the sanction prescribed by law for a certain conduct, it comes out that if the exact behaviour described in par. 1 of the article is adopted under the terms indicated by par. 2, then the penalty is less severe. Personally, we are reserved in approaching such a situation upon this latter process of thought, regarding it as a proper legal mitigated provision. But, nevertheless, we are aware that such a perspective exists, and it was even given credit by the binding jurisprudence of the supreme Court of Romania, when it pronounced a mandatory decision (decision no.1/2015 of the panel of judges able to solve some law issues in criminal matters, of the High Court of Cassation and Justice), regarding the interpretation of provisions contained by art.308 from the Criminal Code; the question of law in that case was not similar, per se, with the one we presented here, but one line of the argumentation – of the process of thought – was basically the same (for more on this topic, see – Dunea, 2015).

MITIGATING PROVISIONS REGULATED IN THE ROMANIAN SPECIAL CRIMINAL LEGISLATION, BASED ON THE TYPE (FIELD) OF ACTIVITY IN WHICH THE OFFENSE WAS COMMITTED

Under this category, we only found one provision during our research. The situation is, as well as in the case of the previous category, more often used by the legislature in order to aggravate, and not to mitigate criminal liability. Thus, sometimes, the particular circumstances of enactment of a certain activity may present into a more lenient manner, or, on the contrary, in a more drastic manner, some type of behavior, who has or has not a (more potent) criminal value outside the boundaries of that particular genre of activity.

We take into consideration, at this point, the provision of art.23 par.1 of the G.E.O. no.77/2009, on the organization and operation of gambling, in relation to art.348 from the Criminal Code. The latter text describes as a criminal offense the exercise, without legal right, of any profession or activity for which some special law requires a permit or the exercise of such a profession or activity in any other conditions than the legal imposed ones, if some special law provides that committing such acts are punishable under criminal law. The punishment prescribed for such an act is imprisonment between 3 months to one year, or the payment of a criminal fine.

Numerous special laws contain provisions who refer to this disposition and to the penalty thus stated; e.g., the laws regulating the exercise of some professions or activities such as that of lawyer (art. 26 of Law no. 51/1995), architect (art. 17 of Law no. 184/2001), private detective (art. 17 of Law no. 329/2003) and many others.

In this context, art. 23 par. 1 of the G.E.O. no. 77/2009 provides that the carrying out, without any license or authorization, of any activity of gambling, constitutes an offense and it is punishable by imprisonment between one month to one year, or by payment of a criminal fine. It is easy to observe that the special minimum limit of the penalty is lower in this provision than in the one regulated by art. 348 of the Criminal Code; thus, we are in the presence of a mitigated incrimination norm, by comparison with the (more) general text included in the Criminal Code. It is possible that the legislature took into consideration, in order to enact this mitigated disposition, the popularity of gambling in some social environments, or the fact that, by comparison to the other types of activity where this conduct is also criminalized, in this case the damage to others is somewhat minimal (there is not at stake neither one's life, nor one's freedom or bodily integrity), and that the potential victims are also somewhat to blame (for accepting to enter into such type of relations with another). But, regardless of the real motivation behind this legislative's choice, the indisputable fact is that the provision in question marks a mitigated stance by comparison to the related article from the Criminal Code, and that the formal reason for this resides in the particular type of activity in the exercise of which the offense is committed.

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