CRIMES AGAINST THE PERSON FROM THE PERSPECTIVE OF THE NEW CRIMINAL CODE AND OF THE APPLICABLE CRIMINAL CODE

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ABSTRACT

The author presents the changes introduced by the new Criminal Code on the matter under consideration in terms of systematic and legal content of various incrimination legal norms, highlighting the positive aspects as well as the debatable ones with regard to formulating de lege ferenda proposals.

Further on, the author makes a comparative study of the incrimination legal norms that have corresponding rules in the criminal law, now in force, a brief examination of the ex novo incriminations, analysis accompanied by several observations and some suggestions (de lege ferenda proposals) to improve the examined texts.

Key words: *Criminal Code, criminal law, crime, punishment, person.*

I. As is commonly known, the new Criminal Code (hereinafter also referred to as the Criminal Code of 2009), adopted by Law no. 286/2009 on the Criminal Code[1], unified legislative work and of great historical significance for Romania, according to art. 246 of Law no. 187/2012 for the enforcement of the Law no. 289/2009 on the Criminal Code[2] will come into force on February 1, 2014, when the Law no. 15/1969 on the Criminal Code of Romania, as republished[3] (hereinafter referred to as the Criminal Code of 1969 or the previous Criminal Code or the previous criminal law) will be repealed.

Law no. 286/2009 was adopted on 25 June 2009, pursuant to Art. 114 para. (3) of the Romanian Constitution, as republished, after the Government of Romania incurred liability (decision taken on 10 June 2009[4]) before the Chamber of Deputies and the Senate.

Offences against the person[5] (art. 188-227[6]) are grouped into nine chapters [head. I - Offences against life (art. 188-192); head. II - Crimes against physical integrity or health

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[1] Published in the Official Gazette no. 510 of 24 July 2009, as subsequently amended and supplemented.

[2] Published in the Official Gazette no. 757 of 12 November 2012.

[3] Republished in the Official Gazette no. 65 of 16 April 1997, as subsequently amended and supplemented.

[4] See, in this regard, the press release given by the Ministry of Justice on 10 June 2009, available at http://www.just.ro/Sections/Comunicate/Comunicateiunie2009/10iunie2009/tabid/1073/Default.aspx

[5] Starting with this issue, the author aims to present several comparative studies dedicated to the amendments to the special part of the new Criminal Code in relation to the provisions of the previous criminal law, for each title, on which occasion the amendments to this matter by the Law no. 187/2012 will be considered, as well. However, this comparative presentation will be accompanied by brief comments of the

(art. 193-198); head. III - Offences committed against a family member (art. 199-200); head. IV - Aggressions on the fetus (art. 201-202); head. V - Offences concerning the obligation to provide assistance to those in distress (art. 203-204); head. VI - Offences against the person's freedom (art. 205-208); head. VII - Trafficking and exploitation of vulnerable persons (art. 209-217); head. VIII - Offences against sexual freedom and integrity (art. 218-223); head. IX - Offences which affect home and private life (art. 224-227)].

As compared to the proposals of the commission[7] on drawing up the draft of the Criminal Code[8] (hereinafter referred to as the Project), the legislator of 2009 observed most of the systematizing considered by it in relation to the incriminations in this title, but it represented a new chapter, Chapter VII - Trafficking and exploitation of vulnerable people - where several incrimination rules were inserted in relation to slavery, subjection to forced or compulsory labor, human and minors trafficking, pandering and prostitution related.

Likewise, in the crimes against sexual freedom and integrity, the legislator has introduced a new text regarding the recruitment of minors for sexual purposes (art. 222), and the crimes which affect home and private life were made several amendments as compared to the texts worked out by the commission.

All the solutions adopted by the legislator, which did not always coincide with those proposed by the commission in the Draft, will be highlighted below, especially the essential differences, whereas the Senate Judiciary Committee and the Committee of the Chamber of Deputies have made numerous and often justified amendments to the originally proposed solutions, their members contributing significantly to the development of the new Criminal Code of 2009.

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novelty items, through the new criminal legislation, and where appropriate, for some suggestions to improve the texts, taking into account how the new regulations were perceived in the recent specialty literature. Not least, the decisions of the Supreme Court for the admittance of certain second appeals in the law interest will be examined, under the influence of the previous criminal law, to determine to what extent they will keep or not, in whole or in part, the validity after the effective date of the new criminal legislation.

[6] For reasons of space, in the content of this study, where the normative papers is not indicated by the number of an article, we consider the Criminal Code adopted by the Law no. 286/2009, as subsequently amended and supplemented.

[7] The commission on drawing up the draft of the Criminal Code (hereinafter referred to as the commission), established at the Ministry of Justice, according to art. 26 of the Law no. 24/2000 on the legislative technique norms for drawing up normative papers, as republished, subsequently amended and supplemented, had the following composition: prosecutor Katalin-Barbara Kibedi, counselor to the Minister of Justice, president of the Commission, Prof. PhD. Valerian Cioclei, Faculty of Law, University of Bucharest; Prof. PhD. Ilie Pascu, Faculty of Law and Administrative Sciences, "Andrei Şaguna" University from Constanţa, Assoc. Prof. PhD. Florin Streteanu, Faculty of Law, "Babeş-Bolyai" University of Cluj-Napoca; Judge Gabriel Ionescu, the High Court of Cassation and Justice; Judge Ana Cristina Lăbuş, a member of the Superior Council of Magistracy; Judge Andreea Stoica, Bucharest Court of Appeal; Judge Mihai Udroiu, Bucharest Tribunal, seconded to the Ministry of Justice; counselor Elena Cismaru, head of sector - The Criminal and contraventional law Sector, the Legislative Council and lawyer Marian Nazat.

During the process of drawing up the draft, the commission has worked and has been supported by renowned experts in the matter such as: Prof. PhD. Jean Pradel, Emeritus Professor at the University of Poitiers, Prof. PhD. George Antoniu - the Director of the "Acad. Andrei Rădulescu" Institute for Legal Researches of the Romanian Academy, Prof. PhD. Costică Bulai and Prof. PhD. Valerian Cioclei, both from the Faculty of Law of the University of Bucharest.

[8] The draft of the new Criminal Code is available at http://www.just.ro/MeniuStanga/Normativepapers/Proiectedeactenormativeaflate% C3%AEndezbatere/tabid/93/Default.aspx, posted on the website of the Ministry of Justice on 24 January 2008 (last accessed on 10 March 2012).

At the same time, the amendments to the rules of indictment of Title I of the special part of the new Criminal Code by Law. 187/2012 will be also presented.

Finally, according to the provisions of the Government Decision no. 1183/2008 for the approval of the preliminary thesis of the draft of the Criminal Code[9] and the Explanatory Memorandum[10] of the Project, the solutions to which the editors of the new general criminal law will be revealed together with the reasons which have founded those solutions or the texts that served as inspiration source.

A. Chapter 1 includes ***offenses against life*** (murder, first degree murder, murder upon request of the victim, causing or aiding suicide and involuntary manslaughter), in relation to which the legislator of 2009 made several amendments as compared to the previous criminal law texts.

1. The homicide (art. 188) is defined as in art. 174 of the previous Criminal Code, maintaining the same range of punishment (imprisonment from 10 to 20 years and deprivation of certain rights)[11], so that it requires no further comment.

2. Instead, the new rules, according to the model of most European legislation (§ 211 of the German Criminal Code, § 75 of the Austrian Criminal Code, art. 139 of the Spanish Criminal Code, art. 132 of the Portuguese Criminal Code, art. 112 of the Swiss Criminal Code) set forth a single aggravated version of the criminal homicide - **first degree murder** (art. 189) - which contained both aggravating circumstantial elements of the first degree murder of the previous criminal law and some of those of the capital murder.

In compliance with the views expressed in the specialty literature[12], a part of the specific aggravating circumstantial elements of the first degree murder or of the capital murder in the previous Criminal Code was resigned, either because they are found in the general aggravating content[13] (murder of a person unable to defend herself or committed by means threatening the life of several people[14]) or because their discipline in other texts (the murder of her husband or a close relative[15]), either because it is not justified (murder committed in public). In the last case, it has been considered that the one who kills the

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[9] Published in the Official Gazette no. 686 of 8 October 2008.

[10] The Explanatory Memorandum of the draft of the new Criminal Code (hereinafter referred to as Explanatory Memorandum) is available at http://www.just.ro/ Proiectedeactenormativeaflate% C3%AEndezbatere/tabid/93/Default.aspx posted on the website of the Ministry of Justice on 24 January 2008.

[11] With regard to these limitations, the doctrine said they were small in relation to the concrete social threat and consequences of the crime and should be increased as in fact to all offenses that result in death of the victim (Gabriel Paraschiv, Daniel-Ştefan Paraschiv, *Noul Cod penal. Infracţiunile contra persoanei. Reflecţii*, RDP nr. 1/2010, p. 52).

[12] George Antoniu*, Ocrotirea penală a vieţii persoanei*, in RDP no. 1/2002, p. 16. 25.

[13] The doctrine pointed out that this goal was not fully fulfilled since the content of the first degree murder kept the aggravating element "cruelty", although it is provided as a general circumstance in art. 77 letter b) thesis I (see, Angela Hărăştăşanu, *Consideraţii referitoare la unele prevederi din partea specială a Codului penal adoptat prin Legea nr. 286/2009*, D. nr. 12/2009, p. 49).

[14] Some authors believe that giving these circumstances is questionable (ungrounded assertion in any way) and we do not agree to this opinion, as the arguments of the commission are relevant and convincing [see George Ivan, *Drept penal. Partea specială. Cu referiri la noul Cod penal (Legea nr. 286/2009)*, 2nd edition, C. H. Beck Publishing House, Bucharest, 2010, p. 57].

[15] The doctrine proposed to introduce as a circumstantial element of aggravated murder of the circumstance in which it is committed on a family member and waiving the indictment of art. 199, and Chapter III should be suppressed (see, to that effect Vasile Păvăleanu, *Comentarii asupra proiectului unui nou Cod penal*, RDP nr. 1/2009, p. 29).

victim in public is not necessarily more dangerous (for example, in a spontaneous conflict in a bar) than the person who kills the victim in this house, and for this reason it is preferably the assessment of injuriousness should be made by the judge when determining the judicial individualization[16].

To note that in the new Criminal Code, the murder committed on a family member results in an increase by a quarter in the maximum punishment set forth by law [art. 199 para. (1)].

The editors of the new general criminal laws have kept in the content of art. 189 only those circumstances that justify - at least *in abstracto* - the possibility to apply the life imprisonment. Actually, of those 16 circumstantial elements of aggravation provided in art. 175 and art. 176 of the Criminal Code of 1969, art. 189 retained only half of them. Moreover, the doctrine expressed grounded criticism regarding the legislative option of aggravation of murder in relation to the special capacities of the perpetrator. Thus, it has been argued for good reason, that the introduction of this aggravated variant was not justified by finding certain cases, much less by a recrudescence phenomenon of acts of murder among judges, prosecutors, policemen, gendarmes and soldiers, and it does happen anyway, but related to the job duties or their public service[17].

Instead, the acts of murder committed on certain categories of persons (civil servant who performs a job involving the exercise of the state authority, police officer, gendarme) were introduced as constitutive pr aggravating elements in the legal content of the offense of assault (article 257) and others (judge or prosecutor performing his job duties, one of their family members, a lawyer in connection with the exercise of profession) in the content of the judiciary assault (art. 279).

Likewise, some of aggravating elements of the first degree murder were reformulated, so that they should be properly defined where they should fall under. For example, not just the actual crime of murder shall constitute an antecedent of the first-degree murder committed by a person who has committed also a murder, but also an attempted homicide[18], stating that for the attempted or committed murder, it is necessary for the defendant to have been convicted definitively. In this way, the existing controversy ended on the offense provided for in art. 176 letter c) of the previous Criminal Code - *the murder committed by a person who has committed a murder*, the legislator of 2009 appropriating the opinion of the prevalent doctrine in the matter.

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[16] See, in this regard, the Explanatory Memorandum. This option was received reluctantly in the specialty literature, without, however, showing which of the circumstantial elements had to be retained in the new regulation [see, to this effect: Petre Dungan, *Omorul calificat (Infracţiuni contra vieţii)*, *in Manual de drept penal. Partea specială*, vol. I de Petre Dungan, Tiberiu Medeanu, Viorel Paşca, Universul Juridic Publishing House, Bucharest, 2010, p. 25; *Idem*, *Omorul calificat (Infracţiuni contra vieţii)*, in *Drept penal. Partea specială*, vol. I, *Prezentare comparativă a noului Cod penal şi a Codului penal din 1968* by Petre Dungan, Tiberiu Medeanu, Viorel Paşca, Universul Juridic Publishing House, Bucharest, 2012, p. 22].

[17] Valerian Cioclei, *Drept penal. Partea specială. Infracţiuni contra persoanei*, Universul Juridic Publishing House, Bucharest, 2007, p. 63-64. For the same purpose: Gheorghe Diaconescu, *Omorul deosebit de grav (Infracţiuni contra vieţii, integrităţii corporale şi sănătăţii)*, in *Tratat de drept penal. Partea specială* by Gheorghe Diaconescu, Constantin Duvac, CH Beck Publishing House, Bucharest, 2009, p. 102.

[18] It was proposed *de lege ferenda* to reformulate this circumstance in the sense "by a person who previously committed a murder or an offense in which content a homicide is entered as an aggravating circumstantial element" (see Vasile Păvăleanu, *op. cit.*, p. 29).

Thus, in relation to the regulation of 1969, an opinion[19] considered that the previous murder had to be still a crime as a committed act, the contrary opinion[20] being that the above-mentioned aggravating circumstantial element can work as well if the offender's antecedent act consists of an attempted homicide. This last view has been taken by the courts[21] by reference to the provisions of art. 144 of the Criminal Code of 1969 relating to the meaning of the phrase "committing a crime".

The courts were inclined to give significance to the above-mentioned explanatory text not only where the legislator made reference to the commission of an *undetermined crime*, but in those cases in which reference was made to a determined crime, provided that it was punished in form of the attempted act.

In the new regulation, it is possible that the incriminated act should pass on the same victim. Practically, he may have been firstly the victim of an attempted murder, and

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[19] Vintilă Dongoroz, Gheorghe Dărângă, Siegfried Kahane, Dumitru Lucinescu, Aurel Nemeş, Mihai Popovici, Petre Sârbulescu, Vasile Stoican, *Noul Cod penal şi Codul penal anterior. Prezentare comparativă*, Politică Publishing House, Bucharest, 1968, p. 114. For the same purpose: Rodica Mihaela Stănoiu, *Omorul deosebit de grav (Infracţiuni contra vieţii, integrităţii corporale şi sănătăţii)*, in *Explicaţii teoretice ale Codului penal român. Partea specială*, by Vintilă Dongoroz, Siegfried Kahane, Ion Oancea, Iosif Fodor, Nicoleta Iliescu, Costică Bulai, Rodica Mihaela Stănoiu, Victor Roşca, vol. III, Academiei Publishing House, Bucharest, 1971, p. 198; Costică Bulai, *Curs de drept penal, Partea specială*, vol. I, Bucharest, 1975, p. 112; Octavian Loghin, *Cu privire la corecta încadrare a unor fapte în dispoziţiile art. 176 lit. c) C. pen.*, in the Annals of "Al. I. Cuza" University of Iasi, 1983, p. 61; Rodica Mihaela Stănoiu, *Omorul deosebit de grav* (Comment), in *Practica judiciară penală. Partea specială*, vol. III by George Antoniu, Costică Bulai, Rodica Mihaela Stănoiu, Avram Filipaş, Constantin Mitrache, Şerban Stănoiu, Vasile Papadopol, Cristina Filişanu, Academiei Române Publishing House, Bucharest, 1992, p. 34-35. According to the author's opinion, the text of art. 144 of the previous Criminal Code had a different function than the one used by the advocates of the contrary opinion. This does not lead to the conclusion that the attempted homicide and the committed crime would be equivalent terms, or in other words that they would be one and the same, so that the objective features that separate them disappear. Costel Niculeanu, *Alte argumente pentru caracterizarea şi sancţionarea infracţiunii de omor deosebit de grav comisă în modalitatea prevăzută în art. 176 lit. c) C. pen.*, D. no. 11/2009, p. 150.

[20] Justin Grigoraş, *Examen teoretic al practicii Tribunalului Suprem în materia unor împrejurări care determină formele calificate sau deosebit de grave ale infracţiunii de omor*, RRD no. 8/1975, p. 39-40. For the same purpose: Octavian Loghin, Tudorel Toader, *Drept penal român. Partea specială*, "Şansa" S.R.L. Publishing and Press House, Bucharest, 1994, p. 89; Gheorghe Diaconescu, *Infracţiunile în Codul penal român*, vol. I, Oscar Print Publishing House, Bucharest, 1997, p. 176; Ovidiu Predescu, Angela Hărăstăşanu, *Drept penal. Partea specială*, the 2nd revised edition, Omnia Uni S.A.S.T. Publishing House, Braşov, 2007, p 65; Valerian Cioclei, *op. cit.*, p. 52; Gheorghiţă Mateuţ, *Omorul deosebit de grav* (Comment), in *Codul penal comentat. Partea specială*, by Matei Basarab, Viorel Paşca, Gheorghiţă Mateuţ, Tiberiu Medeanu, Constantin Butiuc, Mircea Bădilă, Radu Bodea, Petre Dungan, Valentin Mirişan, Ramiro Mancaş, Cristian Miheş, vol. II, Hamangiu Publishing House, 2008, p. 116; Gheorghe Diaconescu, *Omorul deosebit de grav (Infracţiuni contra vieţii, integrităţii corporale şi sănătăţii), cit. supra*, p. 98; Ilie Pascu, Mirela Gorunescu, *Drept penal. Partea specială*, the 2nd edition, Hamangiu Publishing House, Bucharest, 2009, p. 106; Gheorghe Ivan, *Drept penal. Partea specială*, C. H. Beck Publishing House, Bucharest, 2009, p. 46.

[21] S.C., C.7, Decision no. 17/1979, RRD no. 9, 1979, p. 66. For the same purpose: S.C., military section., Decision no. 12/1979, in Vasile Papadopol, Mihai Popovici, *Repertoriu alfabetic de practică judiciară în materie penală pe anii 1976-1980*, Ştiinţifică şi Enciclopedică Publishing House, Bucharest, 1982, p. 288; S.C., criminal section, Decision no. 668/1979, in Vasile Papadopol, Mihai Popovici, *op. cit.*, p. 287-288; S.C., criminal section, Decision no. 2201/1983, CD 1983, p. 224; C. A. Bucharest, 1st criminal section, Decision. No. 552/1999, in *Culegere de practică judiciară penală 1999*, Rosetti Publishing House, Bucharest, 2001, p. 122; S.C.J., criminal section, Decision no. 2369/2000, in *Buletinul jurisprudenţei 2000*, p. 270. The supreme court determined that the previous commission of the attempted homicide by the defendant, even released under amnesty, results in falling within these aggravating circumstances.

subsequently, after a certain period of time the defendant may have succeeded to kill him, in which case the aggravating circumstance provided in Art. 189 letter e) shall be applicable.

However, the circumstance provided in art. 175 letter g) of the previous Criminal Code ("to abscond himself or to abscond the other from prosecution or arrest or from the execution of a sentence") was reformulated by replacing the phrase "from the prosecution or arrest" by "the bringing to criminal liability", this last phrase being much broader and including all activities carried on by the competent judicial bodies from notifying them about a criminal deed until the final resolution of the case. Recently[22] it was argued that for the scope of the circumstances it is not necessary to have been initiated any prosecution in that case.

Although the commission on drawing up the code had introduced in this aggravating circumstance also the assumption according to which the second murder was committed by a person who had committed "an offense which includes also a murder in its content as a constituent or aggravating circumstantial element" [art. 186 letter d) thesis II of the Project], this solution was not explicitly endorsed by the legislator of 2009. However, by way of interpretation we can conclude that the antecedent of the first-degree murder committed by a person who committed another murder will be not just the actual crime of murder, but any offense covering a murder (attempt, act of terrorism etc.)[23].

Likewise, art. 189 has not taken over other three circumstantial elements proposed by the commission anymore, relating to the commission of a murder by a public official who performs a job involving the exercise of the state authority, which is on duty or on a public official who performs a job involving the exercise of the state authority, in relation to the performance of his job duties or by methods or means likely to endanger the lives of other people. The legislator considered that in relation to these circumstances that you may encounter in judicial practice the injuriousness assessment has to be performed by a judge when determining the judicial individualization of the punishment applicable in each case separately.

The circumstance of committing murder against two or more persons has been maintained and taken as such from art. 176 letter b) of the Criminal Code of 1969 in art. 189 letter f) of the new Criminal Code, without making any further clarification, which helps the controversy in this matter subsists on the execution of the material, circumstantial element of the crime.

Thus, according to the first view[24] it is argued that the aggravating element may be upheld in the alternative case of murder of two or more people only *"by the same action"* (explosion, putting poison in food intended to be eaten by more people).

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[22] Vasile Dobrinoiu, Norel Neagu, *Drept penal. Partea specială (Teorie şi practică judiciară)*, Universul Juridic Publishing House, Bucharest, 2011, p. 27.

[23] Constantin Duvac, *Observaţii asupra infracţiunilor contra persoanei, contra patrimoniului, privind autoritatea şi forntiera de stat, precum şi contra înfăptuirii justiţiei*, in *Noua legislaţie penală: tradiţie, recodificare, reformă, progres juridic*, vol. I, Universul Juridic Publishing House, Bucharest, 2012, p. 103. For the same purpose: Vasile Dobrinoiu, *Omorul calificat* (Comment), in *Noul Cod penal comentat*, *partea specială*, vol. II, by Vasile Dobrinoiu, Ilie Pascu, Mihai Adrian Hotca, Ioan Chiş, Mirela Gorunescu, Costică Păun, Maxim Dobrinoiu, Norel Neagu, Mircea Constantin Sinescu, Universul Juridic Publishing House, Bucharest, 2012, p. 22; Angela Hărăştăşanu, *op. cit.*, p. 50-51.

[24] Vintilă Dongoroz, Gheorghe Dărângă, Siegfried Kahane, Dumitru Lucinescu, Aurel Nemeş, Mihai Popovici, Petre Sârbulescu, Vasile Stoican, *op. cit.*, p. 114. For the same purpose: Rodica Mihaela Stănoiu,

Contrary to the aforementioned opinion, the Supreme Court[25], consistently ruled that "it is not necessary that the act should have been committed by a single action, however, it is sufficient to have been committed *under the same circumstance* or even *successively by different actions*". Most of the Romanian authors have agreed to this fair solution[26].

Omorul deosebit de grav (Infracţiuni contra vieţii, integrităţii corporale şi sănătăţii), cit. supra, p. 198; Octavian Loghin, *Cu privire la omorul deosebit de grav prevăzut de art. 176 lit. b şi c C. pen.*, in the Scientific Annals of "Alexandru Ioan Cuza" University of Iaşi, 1975, p. 77-78; Octavian Loghin, *Omorul deosebit de grav (Infracţiuni contra vieţii)*, in *Drept penal român. Partea specială*, by Octavian Loghin, Avram Filipaş, Didactică şi Pedagogică Publishing House, Bucharest, 1983, p. 41; Octavian Loghin, *Omorul deosebit de grav (Infracţiuni contra vieţii)*, in *Drept penal român. Partea specială*, by Octavian Loghin, Avram Filipaş, "Şansa" S.R.L. Publishing and Press House, Bucharest, 1992, p. 42. The author believes that not taking over the phrase "once or by different actions" provided in art. 464 para. 2 of the Criminal Code from 1937, the legislator of 1969 wished that the concerned aggravating element should subsist if only performed by a single action. Octavian Loghin, Tudorel Toader, *Drept penal român. Partea specială*, "Şansa" S.R.L. Publishing and Press House, Bucharest, 1994, p. 87; Octavian Loghin, Tudorel Toader, *Drept penal român. Partea specială*, the 4th revised and supplemented edition, "Şansa" S.R.L. Publishing and Press House, Bucharest, 2001, p. 106; Costică Bulai, *Omorul deosebit de grav (Infracţiuni contra persoanei)*, in *Instituţii de drept penal. Curs selectiv pentru examenul de licenţă*, the 3rd edition revised and supplemented by Costică Bulai, Avram Filipaş, Constantin Mitrache, Trei Publishing House, Bucharest, 2006, p. 297; Ovidiu Predescu, Angela Hărăstăşanu, *op. cit.*, p. 65.

[25] S.C., criminal section, decision no. 2539/1969, CD 1969, p. 321; RRD no. 12/1969, p. 182. For the same purpose: Plenum of the S.C., Decision of guidance no. 4/1970, CD 1970, p. 54; RRD no. 7/1970, p. 130, S.C., criminal section, Decision. No. 318/1989, D. no. 1-2/1990, p 141, Bucharest Tribunal, judgment in criminal matters No. 48/1990, in *Tribunalul Municipiului Bucureşti. Culegere de practică judiciară 1990*, by Vasile Papadopol, "Şansa" SRL Publishing and Press House, Bucharest, 1990, p. 112, SCJ, criminal section, Decision. No. 2939/1995, D. No. 9/1996, p 136; H.C.C.J., criminal section, Decision no. 338/2007, in *Buletinul jurisprudenţei 2007*, p. 27.

[26] George Antoniu, *Omorul deosebit de grav* (Comment), in *Codul penal comentat şi adnotat*, vol. I by Teodor Vasiliu, Doru Pavel, George Antoniu, Dumitru Lucinescu, Vasile Papadopol, Virgil Rămureanu, Ştiinţifică şi Enciclopedică Publishing House, Bucharest, 1975, p. 93. For the same purpose: Oliviu Augustin Stoica, *Drept penal, partea specială*, Didactică şi Pedagogică Publishing House, Bucharest, 1976, p. 75; Emilian Stancu, *Câteva consideraţii privind elementele circumstanţiale ale conţinutului infracţiunii de omor deosebit de grav*, in „Analele Universităţii Bucureşti", 1979, p. 76; Matei Basarab, *Omorul deosebit de grav (Infracţiuni contra vieţii)*, in *Drept penal. Partea specială*, vol. I by Matei Basarab, Lucia Moldovan, Valer Suian, Cluj-Napoca, 1985, p. 61-62; Ion Dobrinescu, *Infracţiuni contra vieţii persoanei*, Academiei Publishing House, Bucharest, 1987, p. 85-87; Ion Gheorghiu-Brădet, *Drept penal român. Partea specială*, vol. I, Europa Nova Publishing House, Bucharest, 1994, p. 83; Gheorghe Diaconescu, *Drept penal. Partea specială*, lecture held during the academic year 1992-1993, re-editing, "*Dimitrie Cantemir*" Christian University, The Faculty of Judicial and Administrative Sciences, Bucharest, 1995, p. 121-122; Vasile Dobrinoiu and his collaborators, *Drept penal. Partea specială*, Continent XXI Publishing House, Bucharest, 1996, p. 103; Gheorghe Diaconescu, *Infracţiunile în Codul penal român*, vol. I, Oscar Print Publishing House, Bucharest, 1997, p. 174; Ioana Vasiu, *Drept penal român, partea specială*, vol. I, Albastră Publishing House, Cluj Napoca, 1997, p. 118; Iancu Tănăsescu, Gabriel Tănăsescu, Constantin Tănăsescu, *Tratat de drept penal*, Sitech Publishing House, Craiova, Fundaţiei România de Mâine Publishing House, Bucharest, 2000, p. 726; Gheorghe Diaconescu, *Drept penal. Partea specială*, vol. I, Fundaţiei România de Mâine Publishing House, Bucharest, 2003, p. 193; Vasile Dobrinoiu, *Drept penal. Partea specială*, vol. I, lecture, Lumina Lex Publishing House, Bucharest, 2004, p. 31; Ilie Pascu, *Omorul deosebit de grav (Infracţiuni contra vieţii, integrităţii corporale şi sănătăţii)*, in *Dreptul penal. Partea specială*, by Ilie Pascu, Valerică Lazăr, Lumina Lex Publishing House, Bucharest, 2004, p. 94; Horia Diaconescu, *Drept penal. Partea specială*, vol. I, 2nd edition, All Beck Publishing House, Bucharest, 2005, p. 78; Gheorghe Diaconescu, *Omorul calificat (Crime şi delicte contra vieţii persoanei)*, in *Drept penal. Partea specială. Noul Cod penal*, vol. I, lecture held by Gheorghe Diaconescu, Constantin Duvac, Fundaţiei România de Mâine Publishing House, Bucharest, 2006, p. 40; Gheorghe Diaconescu, *Omorul deosebit de grav (Infracţiuni contra vieţii, integrităţii corporale şi sănătăţii)*, in *Drept penal. Partea specială*, vol. I, by Gheorghe Diaconescu, Constantin Duvac, Fundaţiei România de Mâine Publishing House, Bucharest, 2006, p. 97;

Assuming that only one victim is killed, for the unification of the judicial practice in the matter, under the decision no. V/2006 for the admittance of an appeal in the interest of law, the supreme court ruled that the acts of violence with the intent to kill, committed in the same circumstance on two persons, one of whom died, represent both simple, first-degree, capital murder - committed on one person and simple, first-degree, capital attempted murder, as appropriate, in concurrence[27]. In this case, the aggravating element provided in art. 176 para. (1) letter b) of the Criminal Code of 1969 was not applicable for the aforementioned acts, the solution maintaining its validity in relation to the new regulation.

In relation to committing cruel murder provided in art. 189 letter h) it should be noted that in this case, as an effect of the principle of specialty and to avoid a double aggravation of the punishment applicable to the offender for the same event, the general aggravating circumstance provided for in art. 77 letter c) thesis I is not applicable.

To be noted that the attainment of several circumstantial elements contemplated in art. 189 of the new Criminal Code by the same person through her killing action does not determine a plurality of crimes, the act of first-degree murder remaining unique.

This commission and intentional attempted offense is possible and shall be punished.

According to art. 153 para. 2 letter b) of the new Criminal Code as set by the Law. No. 27/2012 amending and supplementing the Criminal Code of Romania and of the Law no. 286/2009 on the Criminal Code[28], the limitation does not preclude criminal liability for the offenses referred to in art. 188 and art. 189, and in case of the intentional offenses resulting in the death of the victim.

De lege ferenda it was proposed to introduce the circumstance of committing murder "of a minor or of a person unable to defend herself" in the content of art. 189[29].

The special limits of the punishment provided for in art. 189 are identical to those in art. 176 of the previous criminal law, namely life imprisonment or imprisonment from 15 to 25 years and the interdiction to exercise some rights.

3. *Euthanasia* has been defined in the specialty literature as "murder committed under the impulse of a sense of mercy, for the purpose of ending the physical pains of a person suffering from an incurable disease, and whose death is, therefore, inevitable"[30].

Gheorghe Diaconescu, *Omorul deosebit de grav (Infracţiuni contra vieţii, integrităţii corporale şi sănătăţii)*, in *Drept penal. Partea specială*, by Gheorghe Diaconescu, Mioara Ketty-Guiu, Constantin Duvac, Fundaţiei România de Mâine Publishing House, Bucharest, 2007, p. 66; Valerian Cioclei, *op. cit.*, p. 49; Avram Filipaş, *Drept penal român. Partea specială*, Universul Juridic Publishing House, Bucharest, 2008, p. 179-180; Constantin Duvac, *Pluralitatea aparentă de infracţiuni*, Universul Juridic Publishing House, Bucharest, 2008, p. 215; Gheorghe Diaconescu, *Omorul deosebit de grav (Infracţiuni contra vieţii, integrităţii corporale şi sănătăţii), cit. supra*, p. 96; Ilie Pascu, Mirela Gorunescu, *op. cit.*, p. 105; Gheorghe Ivan, *Drept penal. Partea specială*, *cit. supra*, p. 43; Ovidiu Predescu, Angela Hărăştăşanu, *Drept penal. Partea specială*, Universul Juridic Publishing House, Bucharest, 2012, p. 77.

[27] H.C.C.J. (SU), decision no. V/2006, published in the Official Gazette no. 492 of 7 June 2006. For the same purpose: Gheorghe Diaconescu, *Omorul deosebit de grav (Infracţiuni contra vieţii, integrităţii corporale şi sănătăţii), cit. supra*, p. 97.

[28] Published in the Official Gazette no. 180 of 20 March 2012.

[29] Gavril Paraschiv, Daniel-Ştefan Paraschiv, *op. cit.*, p. 52.

[30] George Antoniu, Costică Bulai, Gheorghe Chivulescu, *Dicţionar juridic penal*, Ştiinţifică şi Enciclopedică Publishing House, Bucharest, 1976, p. 107; George Antoniu, Costică Bulai, *Dicţionar de drept penal şi procedură penală*, Hamangiu Publishing House, Bucharest, 2011, p. 327.

The acceptance or rejection of murder in such a context has been the subject of numerous and important sociological, medical, religious and last but not least, legal studies[31].

But beyond the consistency or the ability to convince of the pros and cons of euthanasia, the criminal laws of the modern states, including the Romanian criminal law does not release from criminal liability the authors of the crime of murder committed in these circumstances.

The legislator in 2009 specifically regulated such an assumption, proposed by some authors[32], incriminating **the murder upon request of the victim** as a stand-alone offense (art. 190), as an attenuated version of the murder, thus re-entering the regulation in the tradition existing in our law (art. 468 of the Criminal Code of 1937), but also in compliance with some European codes [§ 216 of the German Criminal Code, § 77 of the Austrian Criminal Code, art. 143 para. (4) of the Spanish Criminal Code, art. 134 of the Portuguese Criminal Code, art. 114 of the Swiss Criminal Code, § 235 of the Norwegian Criminal Code].

The text incriminates the murder committed upon the explicit, serious, conscious and repeated request of the victim who was suffering from an incurable disease or severe disability attested from the medical point of view, causing permanent and unbearable suffering punishable by imprisonment of one to 5 years.

In the commission's view, the reintroduction of this text was required, first of all, due to the new regime of the mitigating circumstances established in the general part. Indeed, if in the previous regulation, the fact envisaged in art. 190 can be improved as a mitigating legal circumstance, thereby imposing a punishment below the special minimum period, in the new regulation, even if retaining a legal mitigating circumstance, the punishment will not be applied compulsorily below this minimum period. Therefore, to allow the application of a punishment corresponding to the degree of social danger of this deed, a distinct legal provision was necessary. The marginal term of *killing upon the request of the victim* was preferred, and not that of murder upon the request of the victim, in order to exclude the offense from the antecedents of the first-degree murder provided in art. 189 letter e).

The act provided for in art. 190 is a deliberate indictment (direct or indirect intention[33]) and with closed content since the legal content of this crime includes several essential

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[31] Alexandru Boroi, *Euthanasia - concept, controverse şi reglementare*, RDP no. 2/1995, p. 78-82; Horia Diaconescu, *Eutanasia. Provocări şi perspective*, D. no. 9/2006, p. 179-196; Ovidiu Predescu, Nicolae Grofu, *Dreptul la viaţă şi eutanasia în lumina Convenţiei (europene) pentru apărarea drepturilor omului şi a libertăţilor fundamentale, a practicii Curţii Europene a Drepturilor Omului şi a dreptului penal român*, in *Noua legislaţie penală: tradiţie, recodificare, reformă, progres juridic*, vol. I, Universul Juridic Publishing House, Bucharest, 2012, p. 168-179. *De lege ferenda*, the authors believe that a deeper analysis should be required on the right of the patient to refuse any medical therapy or to request a certain behavior from the physician or the nurse aimed at putting an end to the suffering, with implicit consequences in the criminal regulation. The advocacy for the purpose of lack of the criminal nature of the euthanasia practices, exclusively in strictly determined conditions, is supported by the fact that a separation line will be thus drawn between the private and public life, subject to the state recognizing a stronger control on the individual's body and life.

[32] Tudor Avrigeanu, *Examen critic al unor dispoziţii din Codul penal. Partea specială (Reforma penală şi unele aspecte critice ale legislaţiei penale în vigoare)*, in *Reforma legislaţiei penale*, by George Antoniu, Emilian Dobrescu, Tiberiu Dianu, Gheorghe Stroe, Tudor Avrigeanu, Academiei Române Publishing House, Bucharest, 2003, p. 200.

[33] To the contrary: Teodor-Viorel Gheorghe, *Noul Cod penal - elemente de noutate la infracţiunile contra vieţii*, D. no. 11/2011, p. 115. The author considers that the offense is committed with direct intent, which

cumulative requirements, and the lack of one of these leads to the legal classification of the concrete deed, in relation to the circumstances in which it is committed, in art . 188 or art. 189.

The specialty literature has proposed to give up this text on the grounds that no such situations have been met in the judicial practice and that it would be unwise to regulate a wholly exceptional circumstance only to comply with the foreign models[34].

It was also claimed that after the indictment, the regulations relating to infanticide and involuntary manslaughter should have been introduced, and then the regulations on causing or aiding suicide. This last act is not deemed as murder (either intentionally or negligently) whereas suicide does not reflect upon another person *(relatio ad alterum)*, but on the person herself. Consequently, neither causing nor aiding suicide are acts of murder itself, but are treated as murder[35].

Murder upon request of the victim shall be punished with imprisonment from one to 5 years, as in case of involuntary manslaughter, as provided in art. 192 para. (2). In our opinion, we should not overlook the fact that the murder upon request of the victim, even if committed under certain restrictive conditions imposed by the text, is and remains an intentional murder, which would justify its punishment more severely than in the case that the same act is committed negligently[36]. As such, *de lege ferenda* increasing the special limits of imprisonment provided for this offense would be required, from one to 5 years to 2 to 7 years.

4. Regarding **causing or aiding suicide** (art. 191), several differences have been introduced in its legal content. Thus, a distinct provision between the act that was followed only by a suicide attempt [para. (4)] and the one that led to the suicide of the victim [para. (1) - (3)] was consecrated. Equally, the punitive treatment was provided differentially according to the manner of committing the acts on a person with unaltered judgment (imprisonment from 3 to 7 years) as compared to a person with diminished judgment (imprisonment from 5 to 10 years) or relating to a person lacking in judgment, and in this last case it cannot be about a decision made by the person concerned, and the deed is punished in the same way as the crime of murder (imprisonment from 10 to 20 years and the interdiction to exercise some rights). The regulation is similar to that found in art. 580 of the Italian Criminal Code, art. 135 of the Portuguese Criminal Code and § 235 of the

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includes the unselfish purpose of removing the victim's unbearable suffering, even at the risk of exposure of a criminal sanction. For lack of an essential requirement regarding the purpose (in the sense of finality) or its equivalent notions, in our opinion, it could not be asserted without being safe from criticism, that a particular offense is committed only direct intention.

[34] George Antoniu, *Observaţii cu privire la anteproiectul unui al doilea nou Cod penal (II)*, RDP no. 1/2008, p. 9. The author reminds that in 1969 the regulation existing in the Criminal Code of 1937 was eliminated, arguing that the aforementioned fact will constitute a serious mitigating circumstance that the judges must take into consideration. For the same purpose, see Teodor-Viorel Gheorghe, *op. cit.*, p. 116-117. To the contrary: Petre Dungan, *Uciderea la cererea victimei (Infracţiuni contra vieţii)*, in *Manual de drept penal. Partea specială*, vol. I, by Petre Dungan, Tiberiu Medeanu, Viorel Paşca, Universul Juridic Publishing House, Bucharest, 2010, p. 45. The author believes that the legislator "was on the right side of the hedge incriminating this offense in the new Criminal Code; Idem, *Uciderea la cererea victimei (Infracţiuni contra vieţii)*, in *Drept penal. Partea specială*, vol. I, *Prezentare comparativă a noului Cod penal şi a Codului penal din 1968*, by Petre Dungan, Tiberiu Medeanu, Viorel Paşca, Universul Juridic Publishing House, Bucharest, 2012, p. 45.

[35] George Antoniu, *Observaţii cu privire la anteproiectul unui al doilea nou Cod penal (II)*, *cit. supra*, p. 9.

[36] For the same purpose, Angela Hărăstăşanu, *op. cit.*, p. 50.

Norwegian Criminal Code. If the acts being alternatively incriminated were due a suicide attempt, the aforementioned special limits of punishment are reduced by half.

Some authors[37] consider that the text reformulation does not meet any relevant requirement in the doctrine or in judicial practice and that the different treatments of par. (2) and (4) are not justified. Such cases are extremely rare in judicial practice, making all the restrictions in the text appear exaggerated and without utility. In this context, it was also stated that one could not consider a person's suicide even caused or facilitated by other person and the crime of murder as being equal[38]. Recognizing this distinction correctly, the new Criminal Code removed the victim's suicide as the immediate death alternative.

De lege ferenda, it would be required that the age limit of the underage child provided in this text, respectively 13 years should be correlated with the age limit set forth in art. 113 (14), even if it relates to the limits of the criminal liability. This legal inconsistency is due to the lack of harmony between the change of the minimum age limit at which a person can be held criminally responsible (initially, under the Draft, it had been established at 13 years) with various provisions in the special part relating to the minor being 13 years old (I mentioned as an example the indictments of articles 220, 221 and 222, as well).

5. Involuntary manslaughter (art. 192). The content of the involuntary manslaughter was simplified, in an inspired manner[39], giving up some of the aggravated variants that may be integrated, as appropriate, as practical means of the typical action or replaced without problems by the application of rules for sanctioning the concurrence of several offences in one action even if it was argued[40] that the waiver of paragraph (4) of art. 178 of the previous Criminal Code is not justified.

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[37] George Antoniu, *Observaţii cu privire la anteproiectul unui al doilea nou Cod penal (II)*, *cit. supra*, p. 9-10. For the same purpose, Petre Dungan, *Determinarea sau înlesnirea sinuciderii (Infracţiuni contra vieţii)*, in *Manual de drept penal. Partea specială*, vol. I, by Petre Dungan, Tiberiu Medeanu, Viorel Paşca, Universul Juridic Publishing House, Bucharest, 2010, p. 52-53. The author believes that, given the lack of case law in the matter, as in fact the lack of interest in the theoretical treatment of this indictment, the amendments of the indictment rule are devoid of theoretical and practical interest, even unjustified if we consider the sanctioning regime too severe provided for this offense as compared to other crimes in relation to which the punishments were significantly reduced in an unjustified manner in the new criminal law, although the case law and the degree of social danger imposed more severe penalties. He expresses, however, his consent in relation to the indictment supposition paragraph (3). Subsequently, the author gives up these reviews [See, to this end Petre Dungan, *Determinarea sau înlesnirea sinuciderii (Infracţiuni contra vieţii)*, in *Drept penal. Partea specială*, vol. I, *Prezentare comparativă a noului Cod penal şi a Codului penal din 1968*, by Petre Dungan, Tiberiu Medeanu, Viorel Paşca, Universul Juridic Publishing House, Bucharest, 2012, p. 51].

[38] To the contrary, Angela Hărăştăşanu, *op. cit.*, p. 52; Teodor-Viorel Gheorghe, *op. cit.*, p. 119. The author argues that the way of punishment provided by this text is the correct since, if in thew situation of the crime of murder, the victim was physically unable to oppose to the offender's action, in case of the offence of suicide determination or facilitation the victim had not the mental capacity to resist, and the consequence was similar in both cases - death of a person intentionally produced; Petre Dungan, *Determinarea sau înlesnirea sinuciderii (Infracţiuni contra vieţii), cit. supra*, p. 53.

[39] For the same purpose: Petre Dungan, *Uciderea din culpă (Infracţiuni contra vieţii)*, in *Manual de drept penal. Partea specială*, vol. I, by Petre Dungan, Tiberiu Medeanu, Viorel Paşca, Universul Juridic Publishing House, Bucharest, 2010, p. 58; Idem, *Uciderea din culpă (Infracţiuni contra vieţii)*, in *Drept penal. Partea specială*, vol. I, *Prezentare comparativă a noului Cod penal şi a Codului penal din 1968*, by Petre Dungan, Tiberiu Medeanu, Viorel Paşca, Universul Juridic Publishing House, Bucharest, 2012, p. 56-57.

[40] George Antoniu, *Observaţii cu privire la anteproiectul unui al doilea nou Cod penal (II), cit. supra*, p. 10. The author also argues that the penalty increase provided for in art. 192 paragraph (3) is excessive, and that such changes have not been suggested by the doctrine or the case law.

In the basic version, the incriminated deed has the same principle and sanction as those provided in art. 178 paragraph (1) of the previous Criminal Code.

In the first aggravated variant provided in paragraph (2) the involuntary manslaughter is incriminated as a result of the non-compliance of the legal provisions or of the provisional measures for the exercise of a profession or a job or to perform a certain activity, this action being punished with imprisonment from 2 to 7 years.

According to the Criminal Code of 1969, one of the liveliest disputes[41] existed in relation to the legal classification of the crime of involuntary manslaughter, committed when driving a motor vehicle or a tram on public roads by a person who has a blood alcohol concentration over 0.80 g / l of pure alcohol in the blood or a concentration exceeding 0.40 g / l of pure alcohol in the breath, outlining the two sentences: one of the complex crime of involuntary manslaughter, adopted by a decision of guidance[42], namely through an appeal on a point of law[43], these solutions being appropriated by some Romanian authors[44] and the other, of the concurrence of several offences in one action, defended by the Romanian majority doctrine[45] and by certain courts[46].

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[41] For details, Constantin Duvac, *Uciderea din culpă, infracţiune complexă?*, RDP no. 1/2010, p. 116-126.

[42] S.C., Decision of guidance no. 2/1975, CD 1975, p. 50; RRD no. 10/1975, p. 33-35.

[43] H.C.C.J. (SU), Decision. No. I of 15 January 2007, published in the Official Gazette. no. 81 of 1 February 2008.

[44] Vasile Pătulea, *Structura obiectivă şi subiectivă a pluralităţii de infracţiuni*, RRD no. 11/1979, p. 29. For the same purpose, Maria Zolyneak, *Unele aspecte teoretice şi practice ale recidivei*, RRD no. 6/1983, p. 10; Mihai Petrovici, G. Laczko-David, *Unele consideraţii în legătură cu structura infracţiunii prevăzută de articolul 178 alineatul 3 din Codul penal*, RRD no. 6/1986, p. 41-44; Gheorghiţă Mateuţ, *Unele consideraţii în legătură cu structura infracţiunii prevăzută de articolul 178 alineatul 3 din Codul penal*, RRD no. 6/1986, p. 45-46; Aurel Oprea, *Unele consideraţii de „lege ferenda" în legătură cu infracţiunea de ucidere din culpă*, Decision no. 1/1992, p. 60-62; Viorel Siserman, *Uciderea din culpă. Conducător auto în stare de ebrietate*, Decision no. 1/1996, p. 123-125; Eugen Mimi Gacea, *Investigarea criminalistică a accidentului de trafic rutier*, Ministerului de Interne Publishing House, Bucharest, 2003, p. 43; Valerian Cioclei, *op. cit.*, p. 86; Avram Filipaş, *Drept penal român. Partea specială*, Universul Juridic Publishing House, Bucharest, 2008, p. 219.

[45] George Antoniu, *Uciderea din culpă* (Comment), in *Codul penal comentat şi adnotat*, vol. I by Teodor Vasiliu, Doru Pavel, George Antoniu, Dumitru Lucinescu, Vasile Papadopol, Virgil Rămureanu, Ştiinţifică şi Enciclopedică Publishing House, Bucharest, 1975, p. 111. For the same purpose: Octavian Loghin, *Drept penal. Partea specială*, vol. I, Iaşi, 1975, p. 160; Costică Bulai, *Curs de drept penal. Partea specială*, Bucharest, 1975, p. 158; Oliviu Augustin Stoica, *op. cit.*, p. 83; Octavian Loghin, *Uciderea din culpă* (*Infracţiuni contra vieţii*), in *Drept penal. Partea specială*, by Octavian Loghin, Avram Filipaş, Didactică şi Pedagogică Publishing House, Bucharest, 1983, p. 46; Corneliu Turianu, Valeriu Stoica, *Unele consideraţii în legătură cu structura infracţiunii prevăzută de articolul 178 alineatul 3 din Codul penal*, RRD no. 6/1986, p. 50; Ion Dobrinescu, *op. cit.*, p. 148-149; Corneliu Turianu, *Legislaţia rutieră comentată şi adnotată*, Ştiinţifică şi Enciclopedică Publishing House, Bucharest, 1988, p. 311; Avram Filipaş, *Unitatea infracţiunii continuate şi a celei complexe* (Comment 26), in *Practica judiciară penală. Partea specială*, vol. I, (articles 1-51 of the Criminal Code) by George Antoniu, Constantin Bulai, Rodica Mihaela Stănoiu, Avram Filipaş, Constantin Mitrache, Vasile Papadopol, Cristiana Filişanu, Academiei Publishing House, Bucharest, 1988, p. 207-208; Corneliu Turianu, *Discuţii despre natura juridică şi structura infracţiunii prevăzute de art. 178 alin. (3) C.pen.*, Decision no. 4-5/1991, p. 61-70; Ion Gheorghiu-Brădet, *Drept penal român. Partea specială*, vol. I, Europa Nova Publishing House, Bucharest, 1994, p. 88; Gavril Paraschiv, *Uciderea din culpă - infracţiune complexă?*, RDP no. 4/1999, p. 59-60; Octavian Loghin, *Uciderea din culpă* (*Infracţiuni contra vieţii*), in *Drept penal. Partea specială*, edition revised by Octavian Loghin, Avram Filipaş, Şansa SRL Publishing and Press House, Bucharest, 1992, p. 47; Gheorghe Diaconescu, *Infracţiunile în legi speciale şi legi extrapenale*, All Publishing House, Bucharest, 1996, p. 199. The famous criminal law expert has proposed *de lege ferenda* the establishment of the existence of the plurality of

The main argument in support of the sentence of the concurrence of several offences in one action consists in the impossibility of absorption of an intentional crime in a crime by guilt.

On the other hand, the involuntary manslaughter is an instantaneous crime, which is consumed in a single moment, which cannot absorb a continuous crime, as that set forth in art. 336.

Along the same line of thought, regarding the administration of the justice act, it was stated that the decision ruled by the supreme court lead in this case to an injustice in the legal treatment. Thus, the offense against traffic safety on the public roads, losing its individuality due to the effect of the absorption, may not be any term of recidivism and the absorbing crime provided in art. 178 of the Criminal Code in 1969, being committed by negligence, is not susceptible, according art. 38 paragraph (1) letter a[1]) of the Criminal Code of 1969 to generate relapse. Or, if the same driver would only commit the act of driving a motor vehicle on public roads under the influence of alcohol - without causing the death of a person under these circumstances- in this case, although the degree of danger of the offense is undoubtedly lower than that of the previous assumption, the legal provisions regarding the relapse and its consequences would be applicable.[47].

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crimes in such cases according to law, this proposal being appropriated both by the criminal law legislator of 2004 and by that of 2009, Alexandru Boroi, *Infracţiuni contra vieţii*, Naţional Publishing House, Bucharest, 1996, p. 208; Vasile Dobrinoiu, *Uciderea din culpă* (*Infracţiuni contra vieţii, integrităţii corporale şi sănătăţii*), in *Drept penal. Partea specială*, by Gheorghe Nistoreanu, Vasile Dobrinoiu, Ilie Pascu, Alexandru Boroi, Ioan Molnar, Valerică Lazăr, Europa Nova Publishing House, Bucharest, 1997, p. 120; Gheorghe Diaconescu, *Infracţiunile în Codul penal român, cit. supra*, p. 190; Constantin Butiuc, *Infracţiunea complexă*, All Beck Publishing House, Bucharest, 1999, p. 155-156; Mioara-Ketty Guiu, *Elementul subiectiv şi structura infracţiunii*, Juridică Publishing House, Bucharest, 2002, p. 110. The author considers that the indirect danger-related crimes can never be absorbed in the subsequent result crime; Gheorghe Diaconescu, *Drept penal. Partea specială. Lecture, cit. supra*, p. 214-215; Gigel Potrivitu, Alexandru Sibinovici, *Consideraţii privind infracţiunea prevăzută de art. 184 din Codul penal şi cea prevăzută de art. 79 din Ordonanţa de Urgenţă a Guvernului nr. 195/2002. Privire comparativă*, D. no. 1/2004, p. 154; Ion Tomescu, Cristian Aninaru, Darius Stănescu, Toma Dobre, Petre Stancu, Ciprian Dogaru, *Drept penal. Note de curs*, vol. I, Zappy's Typography, Câmpina, 2006, p. 161; Valerică Lazăr, *Drept penal. Partea specială*, Universitară Publishing House, Bucharest, 2006, p. 113; Marian Bratiş, *Formele agravate ale infracţiunii de ucidere din culpă*, RDP no. 4/2006, p. 100; Sergiu Bogdan, *Drept penal. Partea specială*, vol. I, Sfera Publishing House, the 2nd revised and supplemented edition, Cluj-Napoca, 1997, p. 68; Ovidiu Predescu, Angela Hărăstăşanu, *Drept penal. Partea specială*, the 2nd revised edition, *cit. supra*, p. 70; Constantin Duvac, *Problematica legăturii de cauzalitate şi a activităţii ilicite cu prilejul investigării accidentelor de circulaţie care au avut ca urmare moartea victimei*, in the collective paper *Investigarea criminalistică a accidentelor de circulaţie rutiere, contribuţia mass-media în prevenirea acestora*, published under the aegis of the Romanian Criminalists' Association, Bucharest, 2008, p. 366; Constantin Duvac, *Pluralitatea aparentă de infracţiuni, cit. supra*, p. 192; Gheorghe Diaconescu, *Uciderea din culpă (Infracţiuni contra vieţii, integrităţii corporale şi sănătăţii)*, in *Tratat de drept penal. Partea specială* (Treaty), by Gheorghe Diaconescu, Constantin Duvac, C. H. Beck Publishing House, Bucharest, 2009, p. 113; Constantin Duvac, *Uciderea din culpă, infracţiune complexă, cit. supra*, p. 121; Constantin Duvac, *Drept penal. Partea specială*, vol. I, C. H. Beck Publishing House, Bucharest, 2010, p. 97-99.

[46] S.C., criminal section, decision no. 1041/1964, JN no. 2/1965, p. 173. For the same purpose: Iaşi Tribunal, decision no. 222/1965, JN no. 8/1965, p. 163; Bucharest Court of Appeal, the 2nd criminal section, decision no. 909/2002, cited by Gheorghe Ivan, *Drept penal. Partea specială*, *cit. supra*, p. 75.

[47] See Gheorghe Diaconescu, *Infracţiunile în Codul penal român, cit. supra*, p. 190; Idem, *Drept penal. Partea specială*, *cit. supra*, p. 215; Idem, *Uciderea din culpă (Infracţiuni contra vieţii, integrităţii corporale şi sănătăţii) – Tratat, cit. supra*, p. 113-114.

The Romanian legislator in 2004, at the same time with the adoption of the Law no. 301/2004 (Criminal Code)[48], under the influence of the doctrine[49], had removed the controversy that he had solved for the purpose of the existence of the concurrence of several offences in one action[50].

The new Criminal Code of 2009[51] cleared up this controversy, giving correct[52], efficiency to the position of the majority doctrine, with beneficial consequences in terms of the uniform enforcement of the criminal law. As such, after the entry into force of the new Criminal Code (1 February 2014), the decision no. I/2007 of the High Court of Cassation and Justice becomes invalid (remaining void), as well as the binding effect that the courts enjoy under art. 414^5 the last paragraph of the Code of Criminal Procedure of 1969.

Consequently, the crime of involuntary manslaughter committed when driving a motor vehicle or a tram on the public roads by a person who has a blood alcohol concentration over 0.80 g/l of pure alcohol in the blood or a concentration exceeding 0.40 g/l of pure alcohol in the breath, shall come under art. 192 paragraph (2), and under art. 336, together with the enforcement of the rules governing the actual concurrence of several offences in one action. A similar rule in case of involuntary manslaughter is met in art. 589 of the Italian Criminal Code while most European laws do not provide for any aggravated variants of this crime (§ 222 of the German Criminal Code, art. 142 of the Spanish Criminal Code, art. 117 of the Swiss Criminal Code, § 239 of the Norwegian Criminal Code).

Some authors[53] criticize the reduction of the punishment limits for involuntary manslaughter as a result of a person driving a vehicle with an alcohol concentration in the blood or as a result of exercising a profession under the influence of alcohol, the previous criminal law setting forth the punishment of imprisonment from 5 to 15 years in this case.

If the involuntary manslaughter caused the death of two or more persons, the special limits of the punishment provided in paragraphs (1) and (2) shall be increased by half, unlike the previous regulation which provided the possibility of applying an increase of up to 3 years to the maximum punishment provided for in other incrimination assumptions.

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[48] Published in the Official Gazette no. 575 of 29 June 2004. Its entry into force was however postponed successively by: the G.E.O. no. 58/2005, published in the Official Gazette no. 552 of 28 June 2005; G.E.O. no. 50/2006, published in the Official Gazette no. 566 of 30 June 2006 and the G.E.O. no. 73/2008, published in the Official Gazette no. 440 of 12 June 2008, until 1 September 2009. Pursuant to art. 446 paragraph (1) and (2) of the Law no. 286/2009, the Law no. 301/2004 was repealed without having ever entered into force.

[49] George Antoniu, *Noul Cod penal. Codul penal anterior. Studiu comparativ*, All Beck Publishing House, Bucharest, 2004, p. 61.

[50] "If the act that caused the involuntary manslaughter is itself a crime, the rules on the concurrence of several offences in one action shall apply" [Art. 181 paragraph (6) of the Criminal Code of 2004].

[51] "When the breach of the legal provisions or of the provisional measures represents an offense by itself, the rules on the concurrence of several offences in one action shall apply" [art. 192 paragraph (2) of the 2nd sentence]. To remove any doubt in this regard, the legislator removed the normative assumption into question from the aggravated contents of the involuntary manslaughter.

[52] Constantin Duvac, *Uciderea din culpă, infracțiune complexă, cit. supra*, p. 125. For the same purpose: Angela Hărăștășanu, *op. cit.*, p. 52; Teodor-Viorel Gheorghe, *op. cit.*, p. 121-124. To the contrary, Gavril Paraschiv, Daniel-Ştefan Paraschiv, *op. cit.* p. 53. The authors argue that actually in this case, a complex praeter-intentional crime is committed (composed of an intentional criminal easier activity, resulting in the death of the victim), thus adopting a different incrimination technique as compared to that used in case of other complex crimes formed in the same way (robbery, rape followed by the death of the victim).

[53] Teodor-Viorel Gheorghe, *op. cit.*, p. 125.

This way of aggravating the punishment for a plurality of victims is deemed[54] to result from the finding that the increasing of the maximum penalty only by law, often did not produce any effects, as the courts applied punishments below the special maximum limit. On the other hand, it expresses a lack of confidence in the ability of the judge to make a proper individualization of the punishment and restricts the scope of its consideration.

By analyzing certain decisions of the courts ruled in this matter by which an imprisonment with conditional suspension of execution of punishment applies, the public reaction to these decisions, the frequency of the traffic accidents that result in death of the victim, the importance of the right to life, certain provisions were was proposed[55] for introduction in this text which should limit the release of the persons committing crimes of involuntary manslaughter. For example, the interdiction of the enforcement of the provisions of articles 83 and 91 might be introduced, in case of this crime.

B. The legal content of the ***crimes against physical integrity or health*** has been simplified, the acts of hitting or other violent acts, bodily injury and serious bodily injury, provided in articles 180-182 of the previous criminal law being regulated in relation to the nature of the consequences produced in two texts, respectively article 193 (hitting or other violence acts) and art. 194 (bodily injury).

From a certain point of view, the new systematization of such incriminations has no justification, except replacing the archaic word "deformation" by the phrase "severe and permanent aesthetic injury", thus the issue being resolved whether the injury of the front teeth is a simple or serious injury[56].

The offenses of child maltreatment and the brawling were approached in this chapter, although in the previous regulation they were part of the crimes against the family, respectively of other offenses which prejudice the social cohabitation relationships, both groups of incriminations are subdivisions under Title IX - Offenses prejudicing certain social cohabitation relationships - of the special part of the Criminal Code of 1969.

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[54] Angela Hărăstăşanu, *op. cit.*, p. 52.

[55] Marcel Sandu, *Infracţiunea de ucidere din culpă şi sancţionarea acesteia din perspectiva dispoziţiilor de drept penal şi a jurisprudenţei naţionale în domeniu*, Decision no. 3/2012, p. 133, 136

[56] George Antoniu, *Observaţii cu privire la anteproiectul unui al doilea nou Cod penal (II), cit. supra*, p. 10. The author believes that the periods of medical care cannot be unified because the seriousness of the acts differ as up to 20 days of medical care are needed (there could be even 2 days of medical care) or more than 60 days (there could be 180 days of medical care). The word "affected" is not appropriate, the author claiming that the phrase "or is endangered" is more correct. For the same purpose and with a similar reasoning, see Vasile Păvăleanu, *Comentarii asupra proiectului unui nou Cod penal, cit. supra*, p. 29. The author advocates for an incrimination of these acts according to the pattern used by the legislator of 1969. To the contrary: Petre Dungan, *Lovirea sau alte violenţe (Infracţiuni contra integrităţii corporale sau sănătăţii)*, in *Manual de drept penal. Partea specială*, vol. I, by Petre Dungan, Tiberiu Medeanu, Viorel Paşca, Universul Juridic Publishing House, Bucharest, 2010, p. 66-67. The author states that, as compared to the prior criminal rule, the new rule of incrimination is much simplified and more accessible to the recipients of the criminal law in all respects both theoretically and practically. Increasing the threshold to 90 days of medical care is justified considering the very long court proceedings, during which the number of days of medical care frequently changes to the direction of their growth, a circumstance that led from one stage to another, to various changes in the legal classifications. He agrees as well, to the aggravation of the sanctioning regime provided for the common assault; Idem, *Lovirea sau alte violenţe (Infracţiuni contra integrităţii corporale sau sănătăţii)*, in *Drept penal. Partea specială*, vol. I, *Prezentare comparativă a noului Cod penal şi a Codului penal din 1968*, by Petre Dungan, Tiberiu Medeanu, Viorel Paşca, Universul Juridic Publishing House, Bucharest, 2012, p. 66-67.

1. The common assault (art. 193) shall be incident if the offense caused physical suffering [paragraph (1)] or traumatic injury or damage to health of a person, whose seriousness is measured by days of medical care of maximum 90 days [paragraph (2)].

The Commission, by its formulation given to this text, tried to give the criterion of days of medical care in delimiting the variants of these crimes of violence as this criterion is imprecise, and the doctrine and the case law were given it different interpretations. The legislator has not appropriated this solution and kept as a distinctive criterion between those two incriminations - the common assault - the number of days of medical care, with a threshold increased to 90 days, inclusive.

For the typical offense, the special limits of the punishment were increased as compared to the previous regulation (imprisonment from one month to three months or a fine) reaching the imprisonment from 3 months to 2 years or a fine.

In case of the aggravated variant, the penalty prescribed by law (imprisonment from 6 months to 5 years) is equivalent to that provided in art. 181 (bodily injury) of the Criminal Code in 1969, although the maximum number of days of medical care is larger in the new law than in the previous one (90 days versus 60 days), so in this case the criminal liability was not aggravated corresponding to the injured caused.

The criminal proceedings are initiated upon the prior complaint of the injured person.

2. The bodily injury (art. 194) is an aggravated form of the offense of common assault, which it absorbs, and this deed received a stand-alone incrimination, for reasons of legal technique.

First, unlike the previous regulation, in order for this offense to exist, the concrete deed must have caused trauma injuries or damage to a person's health, requiring, for healing maximum 90 days of medical care, accompanied by the production of any consequences among those provided in art. 194 paragraph (1) letter a), c)-e) or longer than 90 days of medical care [art. 194 paragraph (1) letter b)].

The contents of this incrimination removed the consequences related to the loss of a sense or organ, the cessation of their function and the deformation and causing infirmity leads to the text incidence without the need for it to be permanent and without any importance for the existence of the crime no matter if it is physical or mental.

However, the production of one of the following consequences leads to the text incidence: a disability, trauma injuries or damage to a person's health, requiring, for healing, for more than 90 days of medical care; an aesthetic severe and permanent damage; abortion and endangering a person's life, consequences causing a punishment of imprisonment from 2 to 7 years.

A highly controversial issue in this matter has been[57] and will likely[58] continue to be that on the subjective element of this crime.

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[57] For more details, in this respect, see Constantin Duvac, *Drept penal. Partea specială*, vol. I, C. H. Publishing House, Bucharest, 2010, p. 116-117.

[58] In the specialty literature, published subsequent to the enactment of the Law no. 286/2009, divergent views were issued regarding the form of guilt by which the crime of bodily injury may be committed.

One view stated that the crime of bodily injury was committed with direct or indirect intent and with praeter intentionem (outside the moral intention) [Petre Dungan, *Vătămarea corporală (Infracțiuni contra integrității corporale sau sănătății)*, in *Manual de drept penal. Partea specială*, vol. I, by Petre Dungan, Tiberiu Medeanu, Viorel Paşca, Universul Juridic Publishing House, Bucharest, 2010, p. 79].

In our opinion, the act provided for in art. 194 paragraph (1) can only be committed *outside the moral intention* since, on the one hand, the consequences provided there are no more than follow the praeter-intentional elements of the typical crime provided in art. 193 (note that this time, in order to emphasize the relationship between the two offenses - the absorption - the legislator in defining the bodily injury uses the words "act stipulated in art. 193") and, on the other hand, in art. 194 paragraph (2) the act is incriminated when committed *with (direct or oblique) intention* in relation to certain assumptions of incrimination [paragraph (1) letters a)-c)].

The term "purpose" is used in art. 194 paragraph (2) not to qualify the intention, but to distinguish the assumption of the consequences generation outside the moral intention from the consequences caused intentionally. It makes an improper sense of result (not of finality), and it is required to be achieved for committing the offense. Accepting the reverse idea according to which the purpose provided for in art. 194 paragraph (2) makes sense of finality qualifying the intent which thus becomes direct, would mean that in this normative method, the examined crime would turn from a result crime into a crime of danger, which is hard to admit, knowing the fact that when the purpose has such a meaning, for committing the offense is not necessary that it should be done, being sufficient for the perpetrator to have followed the generation of such consequences.

The deliberate form of bodily injury, punishable by imprisonment from 3 to 10 years, refers only to the first three aggravating assumptions of paragraph (1), whereas in other cases in the Commission's opinion, to which we subscribe, the assault will be upheld in concurrence with the crime of interruption of pregnancy [(letter d)], respectively it shall be introduced in the contents of the attempt of murder [letter e)], this regulation is similar to that found in articles 143-144 of the Portuguese Criminal Code, articles 122-123 of the Swiss Criminal Code, § 6 chapter 3 of the Swedish Criminal Code and § 226 of the German Criminal Code.

The attempt of the act provided in paragraph (2) is punishable. The act provided in paragraph (1) being committed only outside the moral intention, the legislator did not provide any method of sanctioning the attempt of this act.

3. Article 195 - **assaults or injuries causing death** - has a similar wording to that in the previous criminal law so it requires no additional details, except for special limits of

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Another view considers that the bodily injury, provided in art. 194 paragraph (1) is committed with oblique intent or outside the moral intention and the crime set forth in paragraph (2) is committed with direct intent qualified by its purpose [see Gheorghe Ivan, *Drept penal. Partea specială. Cu referiri la noul Cod penal (Legea nr. 286/2009), cit. supra*, p. 102. The author considers that the crime is only committed outside the moral intention in the manner of menacing the person's life, and in case of abortion the crime may be committed also with direct intent. For the same purpose: Angela Hărăştăşanu, *op. cit.*, p. 54 (the author considers that the purpose qualifies the intention, and she does not express her opinion in relation to the form of guilt specific to the typical offense and to the first aggravated version); Alexandru Boroi, *Drept penal. Partea specială. Conform noului Cod penal*, C. H. Beck Publishing House, Bucharest, 2011, p. 71; Vasile Dobrinoiu, Norel Neagu, *op. cit.*, p. 51-52; Vasile Dobrinoiu, *Vătămarea corporală gravă* (Comment), in *Noul Cod penal comentat*, *partea specială*, vol. II, by Vasile Dobrinoiu, Ilie Pascu, Mihai Adrian Hotca, Ioan Chiş, Mirela Gorunescu, Costică Păun, Maxim Dobrinoiu, Norel Neagu, Mircea Constantin Sinescu, Universul Juridic Publishing House, Bucharest, 2012, p. 51-52; Petre Dungan, *Vătămarea corporală (Infracţiuni contra integrităţii corporale sau sănătăţii)*, in *Drept penal. Partea specială*, vol. I, *Prezentare comparativă a noului Cod penal şi a Codului penal din 1968*, by Petre Dungan, Tiberiu Medeanu, Viorel Paşca, Universul Juridic Publishing House, Bucharest, 2012, p. 77. Depending on the manner in which he expresses himself about the offense set forth in paragraph (2) the author seems to adhere to this sentence].

punishment (imprisonment from 6[59] to 12[60] years) that have been modified without being correlated with the punishment limits of the other offenses having as praeter-intentional result the victim's death [for example, to: the illegal restraint that resulted in the death of the victim, provided in art. 205 paragraph (4); the sexual assault that resulted in the death of the victim, provided in art. 219 paragraph (3), the punishment shall be imprisonment from 7 to 15 years and the deprivation of certain rights, and the rape that resulted in the death of the victim, referred to in art. 218 paragraph (4), the punishment shall be imprisonment from 7 to 18 years and the deprivation of certain rights]. As in all cases the praeter-intentional death of the passive subject occurs, we might consider to increase the special maximum limit of the punishment provided for this crime from 12 to 15 years.

4. The unintentional bodily injury (art. 196) received a regulation which can give rise to controversy as, for example, the case referred to in paragraph (1) introduced a circumstantial evidence of the direct active subject unnecessarily, that will significantly reduce the text incidence, even if the minimum number of days of medical care has no importance (it can be one day, but not more than 90 days). He/She must be a person under the influence of alcohol or a psychoactive substance or developing an activity that is itself a crime. *Per a contrario*, if the unintentional bodily injury is committed by a person who is not in any of the three cases listed exhaustively in the text, the act does not constitute a crime even if the victim suffered trauma injuries or damage to a person's health that required 90 days of medical care for healing.

In the aggravated variant provided in paragraph (2) when the direct active subject is not circumstantiated, it is necessary for the concrete act to produce any of the consequences shown in art. 194 paragraph (1), which means that the intensity of the bodily injuries requires maximum 90 days (inclusive) for healing, and the act is not an offense, this solution being criticized[61], rightly, in the specialty literature. In this regard, a return would be required to the wording of art. 184 paragraph (1) of the previous Criminal Code, even if the minimum number of days of medical care increased to attract the scope of art. 196 paragraph (2) from 11 to 21 days.

Regarding the reference to the subjective element in the legal content of the unintentional bodily injury, the correct solution and in accordance with the rule prescribed by art. 16 paragraph (6) of the 2nd sentence, the doctrine advanced the idea which we do not agree to, that it was not necessary that the incrimination rule prescribe the form of guilt

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[59] The increase of the special minimum limit of the punishment from 5 to 6 years was considered unjustified as long as the doctrine and the judicial practice have not asked it [See: Petre Dungan, *Lovirile sau vătămările cauzatoare de moarte (Infracțiuni contra integrității corporale sau sănătății)*, in *Manual de drept penal. Partea specială*, vol. I, by Petre Dungan, Tiberiu Medeanu, Viorel Paşca, Universul Juridic Publishing House, Bucharest, 2010, p. 85; Idem, *Lovirile sau vătămările cauzatoare de moarte (Infracțiuni contra integrității corporale sau sănătății)*, in *Drept penal. Partea specială*, vol. I, *Prezentare comparativă a noului Cod penal şi a Codului penal din 1968*, by Petre Dungan, Tiberiu Medeanu, Viorel Paşca, Universul Juridic Publishing House, Bucharest, 2012, p. 83].

[60] Reducing the maximum limit of the imprisonment punishment from 15 to 12 years was considered questionable, since sometimes assault is limited to those specific to murder [Gheorghe Ivan, *Drept penal. Partea specială. Cu referiri la noul Cod penal (Legea nr. 286/2009), cit. supra*, p. 128].

[61] Gavril Paraschiv, Daniel-Ştefan Paraschiv, *op. cit.*, p. 54; Gheorghe Ivan, *Drept penal. Partea specială. Cu referiri la noul Cod penal (Legea nr. 286/2009), cit. supra*, p. 134. In this respect, the author shows, any conditions shall be established for the exacerbation of negligent and dangerous conduct for the persons' physical safety, and it is sufficient for us to imagine multiplying traffic accidents.

as long as it was contained in the marginal name[62]. Such a position is contrary to the provision of art. 16 paragraph (6) the 2nd sentence and ignores the option of the Romanian traditional doctrine that considers, rightly, that *rubrica legis non est lex*.

The contents of article 196 introduced a complex incident incrimination when two or more persons were injured, thus eliminating the inconsistency of the previous criminal law that established a crime unit when two or several persons were killed involuntarily and a plurality of crimes when they were only injured. Properly, the Explanatory memorandum pointed out that under the system of sanctioning the concurrence of several offenses in one action, maintaining this inconsistency could have resulted in the more severe punishment of the author of the unintentional injury of several persons comparing to the case of the perpetrator of an involuntary manslaughter committed under similar conditions[63].

Likewise, it has been faithfully provided that if the non-compliance of the legal provisions or of the provisional measures or the development of the activity that led to the commission of the acts provided in paragraphs (1) and (3) constitutes itself an offense, the rules on the concurrence of several offenses in one action shall be enforced in full compliance with the position taken by the Supreme Court in a decision on the admission of an appeal on points of law[64], in order to unify the judicial practice in the matter. Consequently, this criminal deed will be in concurrence of several offenses in one action such as: driving a vehicle without driving license (art. 335); driving a vehicle under the influence of alcohol or other substances (art. 336); the unrightful exercise of a profession or activity (art. 348), not taking any occupational health and safety legal steps (art. 349); non-observance of the occupational health and safety legal steps (art. 350) and others.

The special punishment limits were slightly modified and the fine was provided in all variants alternating with the imprisonment punishment within certain limits.

The criminal proceedings are initiated upon the prior complaint of the injured person.

5. The child maltreatment (art. 197) represent an assumption without significant changes of the precept of the rule set forth in art. 306 of the previous Criminal Code, the special limits of punishment being, however reduced[65] (imprisonment from 3 to 7 years and deprivation of certain rights, as compared to the imprisonment from 3 to 15 years and deprivation of certain rights). In the contents of this incrimination, the phrase "any person to whom the child has been entrusted to the growth or education" was replaced by the words "any person in whose care the child is", a procedure by which the framework of the persons

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[62] Petre Dungan, *Vătămarea corporală din culpă (Infracţiuni contra integrităţii corporale sau sănătăţii)*, in *Manual de drept penal. Partea specială*, vol. I, by Petre Dungan, Tiberiu Medeanu, Viorel Paşca, Universul Juridic Publishing House, Bucharest, 2010, p. 86. The author considers to be right for the form of guilt of the fault to pass expressly in the incrimination rule only when it does not appear in the name of the offense as in the case of the offense provided for in art. 298 (negligence in the performance of work duties); Idem, *Vătămarea corporală din culpă (Infracţiuni contra integrităţii corporale sau sănătăţii)*, in *Drept penal. Partea specială*, vol. I, *Prezentare comparativă a noului Cod penal şi a Codului penal din 1968*, by Petre Dungan, Tiberiu Medeanu, Viorel Paşca, Universul Juridic Publishing House, Bucharest, 2012, p. 84.

[63] For the same purpose, Petre Dungan, *Vătămarea corporală din culpă (Infracţiuni contra integrităţii corporale sau sănătăţii), cit. supra*, p. 86-87; Idem, *Vătămarea corporală din culpă (Infracţiuni contra integrităţii corporale sau sănătăţii), cit. supra*, 2012, p. 84-85.

[64] H.C.C.J. (SU) Decision. No. 26/2009, published in the Official Gazette. No. 284 of 30 April 2010.

[65] Some authors believe that the new limits of punishment are adequate and more appropriate to the social danger that such acts contain than those provided in the previous criminal law (Ion Ifrim, *Unele observaţii asupra infracţiunii de rele tratamente aplicate minorului*, D. no. 10/2012, p. 203].

being able to commit this criminal act was extended (for example, nannies, housekeepers, neighbours, friends, etc.).

In case of the act committed by the parent or the person in whose care the child is, who misuses his authority and contrary to the interests of the child, exercises any acts of violence or deprivation of liberty against it, with the intention of causing him suffering, physical or moral injuries, and which menaced seriously the physical, intellectual or moral development of the child, the common assault or other violent offenses set forth in art. 193, bodily injury set forth in art. 194 and unlawful deprivation of liberty provided for in art. 205, as appropriate, will be upheld in an ideal concurrence with the child maltreatment, decision no. 37/2008 of the Supreme Court for the admission of an appeal on a point of law, maintaining its validity in relation to the new regulation, as well[66].

Besides, in this formulation, the examined incrimination rule is simple and does not absorb in its content as a constituent or circumstantial element, any other criminal offense, as we have stated on other occasions, as well[67].

Bringing this act of child maltreatment in this chapter has been justified by the commission[68] in that it endangers first of all the physical integrity or the health of the person and hardly on the side the family relations, a solution which, even if it is still found in the same form or in a similar form, in this category of crimes and in certain foreign criminal codes (art. 152 of the Portuguese Criminal Code, § 225 of the German Criminal Code, § 92-93 of the Austrian Criminal Code), was received with reservations in the criminal doctrine.

Some authors[69] consider that the place of this offense is still within the family relationships because its main legal object is represented by the social relations that are

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[66] H.C.C.J. (SU) Decision. No. 37/2008, published in the Official Gazette. No. 177 of 23 March 2009. For the same purpose, Ion Ifrim, *op. cit.*, p. 203. The author argues, inter alia, that the examined act is in concurrence with the crime of bodily injury. To the contrary, Vasile Dobrinoiu, Norel Neagu, *op. cit.*, p. 63-64. The authors consider that the offense under consideration is complex and absorbs naturally the mentioned offenses, due to the degree of social danger of this deed provided for in art. 197 and of the social value which is prejudiced (physical, intellectual or moral development of the child, which, according to the authors' opinion, includes physical integrity, health, the freedom of the person). Holding the concurrence of several offences in one action would be a *bis in Idem* (double punishment for the same offense). From this point of view, the act of child maltreatment cannot be in concurrence with the illegal deprivation of freedom as they are mutually exclusive (the parent has a certain right over the child), unless the deprivation of freedom would be achieved by kidnapping, and in this case only the deed referred to in art. 205 would be upheld; Vasile Dobrinoiu, *Relele tratamente aplicate minorului* (Comment), in *Noul Cod penal comentat*, *partea specială*, vol. II, by Vasile Dobrinoiu, Ilie Pascu, Mihai Adrian Hotca, Ioan Chiş, Mirela Gorunescu, Costică Păun, Maxim Dobrinoiu, Norel Neagu, Mircea Constantin Sinescu, Universul Juridic Publishing House, Bucharest, 2012, p. 64-65.

[67] Constantin Duvac, *Relele tratamente aplicate minorului (Infracțiuni contra familiei)*, in *Drept penal. Partea specială*, vol. II, by Gheorghe Diaconescu, Constantin Duvac, Fundației România de Mâine Publishing House, Bucharest, 2007, p. 226.

[68] In the Commission's view, another argument in positioning this text in chapter II of Title I of the special part of the new Criminal Code was that the offense of child maltreatment has never been one having a special active subject, as it can be committed not only by or against any family member, but also to children admitted to foster care centers or to other forms of protection.

[69] George Antoniu, *Observații cu privire la anteproiectul unui al doilea nou Cod penal (II), cit. supra*, p. 10. For the same purpose: Ion Ifrim, *op. cit.*, p. 195; Gheorghe Ivan, Mari-Claudia Ivan, *Unele inovații discutabile ale noului Cod penal*, Decision no. 11/2012, p. 106. To the contrary: Petre Dungan, *Relele tratamente aplicate minorului (Infracțiuni contra integrității corporale sau sănătății)*, in *Manual de drept penal. Partea specială*, vol. I, by Petre Dungan, Tiberiu Medeanu, Viorel Pașca, Universul Juridic Publishing House,

created and developed in relation to the family and to the manner in which the child is raised and educated and the social relations which refer to the physical integrity and health of the child are protected only subsidiarily.

6. The brawling (art. 198) was systematized in this group of criminal offenses by the editors of the new general criminal law as it endangers primarily the physical integrity or health of the person and the social life relationships only subsidiarily, and on the other hand the brawling is governed by numerous laws in the category of crimes affecting or threatening physical integrity (§ 231 of the German Criminal Code, § 91 of the Austrian Criminal Code, art. 154 of the Spanish Criminal Code, art. 151 of the Portuguese Criminal Code, art. 133 of the Swiss Criminal Code).

The literature has argued that the brawl is not adequate to be introduced in this chapter, since only its secondary legal object refers to relations regarding a person's physical integrity, and this offense primarily undermines the relations concerning the public peace or social coexistence[70].

Several changes were made to the content of this crime, except the offense provided in paragraph (1) for which the punishment was increased (imprisonment from three months to one year or a fine, as compared to the imprisonment from one month to six months or fine).

In this regard, some authors have argued to remove the phrase "except the victim, who is liable according to paragraph (1) of paragraph (2)", the assumption of this text is that all participants are co-authors and victims, as they have produced the injuries each other and consequently, the victim must endure the same criminal treatment as that applicable to all participants[71].

The removal of the assumption of paragraph 2 of art. 322 of the previous Criminal Code consecrating a perfectly reasoned solution is not justified, namely that the production of bodily injuries in a brawl with the known author is a milder punishment ground given the state of challenge that any brawl supposes. By eliminating this assumption the legislator aggravates the condition of the perpetrator of a bodily injury committed in a brawl[72].

Bucharest, 2010, p. 92; Idem, *Relele tratamente aplicate minorului (Infracţiuni contra integrităţii corporale sau sănătăţii)*, in *Drept penal. Partea specială*, vol. I, *Prezentare comparativă a noului Cod penal şi a Codului penal din 1968*, by Petre Dungan, Tiberiu Medeanu, Viorel Paşca, Universul Juridic Publishing House, Bucharest, 2012, p. 90.

[70] George Antoniu, *Observaţii cu privire la anteproiectul unui al doilea nou Cod penal (II), cit. supra*, p. 11. For the same purpose, but with a different ground, see Petre Dungan, *Încăierarea (Infracţiuni contra integrităţii corporale sau sănătăţii)*, in *Manual de drept penal. Partea specială*, vol. I, by Petre Dungan, Tiberiu Medeanu, Viorel Paşca, Universul Juridic Publishing House, Bucharest, 2010, p. 97-98. The statement that the brawling is regulated by numerous laws within the category of those crimes affecting or threatening the physical integrity does not seem justified at all from the academic point of view of the author. Subsequently, the author gives up this critique [see Petre Dungan, *Încăierarea (Infracţiuni contra integrităţii corporale sau sănătăţii)*, in *Drept penal. Partea specială*, vol. I, *Prezentare comparativă a noului Cod penal şi a Codului penal din 1968*, by Petre Dungan, Tiberiu Medeanu, Viorel Paşca, Universul Juridic Publishing House, Bucharest, 2012, p. 95].

[71] George Antoniu, *Observaţii cu privire la anteproiectul unui al doilea nou Cod penal (II), cit. supra*, p. 11. The author argues that the increase of the punishment limits is not justified for the typical offense. To the contrary: Petre Dungan, *Încăierarea (Infracţiuni contra integrităţii corporale sau sănătăţii), cit. supra*, p. 100. The phrase "except the victim who is liable according to paragraph (1)" of paragraph (2) of the text, in the opinion of this author, is clearer than the provisions of the previous criminal law; *Idem*, *Încăierarea (Infracţiuni contra integrităţii corporale sau sănătăţii), cit. supra*, 2012, p. 98.

[72] George Antoniu, *Observaţii cu privire la anteproiectul unui al doilea nou Cod penal (II), cit. supra*, p. 11.

A new aggravated variant was introduced in the content of the incrimination - paragraph - (3) with two sub-modalities determined by the number of the deceased persons (one, or two or more persons, respectively). When the death of a person has been caused, the punishment shall be imprisonment from 6 to 12 years, and in case the death of two or more persons has been caused, the special limits of the punishment shall be increased by one third.

The last paragraph of art. 198 should be supplemented with the mention "reject an attack or defend another" as there is no reason to reduce the scope of this special reason of non-punishment. Some authors consider that these circumstances may be invoked by way of self-defence[73], but the existence of this supporting cause, and the state of emergency, are conditioned by the fulfillment of the other conditions provided in art. 19 and art. 20, respectively.

C. Chapter III – *"Crimes committed against a family membe"* - includes two incriminations, respectively that of domestic violence and the offense of murder or injury of the newborn committed by the mother.

Note that the new criminal law assigns a more general meaning to the notion of "family member"[74], as defined in art. 177, the text represents a fusion of the provisions of art. 149 (close relatives[75]) and of art. 149[1] (family member) of the previous criminal law, as amended, to which those persons who have established relationships similar to those between spouses or between parents and children were added, in case of cohabitation.

1. Domestic violence (art. 199). Committing the crimes of murder, first-degree murder, assault and battery or other injury, bodily injury and common assault or other injuries causing death of a family member represents a circumstantial element of their aggravation, where the maximum special limit of the punishment provided by law for the essential crime shall be increased by a quarter.

The doctrine[76] rightly drew attention to the fact that with this increase can lead to the special maximum limit of 31 years and three months in case of the first-degree murder, exceeding the general maximum limit of punishment provided for in art. 60 (prison regime).

Note that the limitation imposed by paragraph (3) of art. 2 refers to the penalty established and applied concretely by the judge in its judicial individualization process and

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[73] Petre Dungan, *Încăierarea (Infracțiuni contra integrității corporale sau sănătății), cit. supra*, p. 97; *Idem*, *Încăierarea (Infracțiuni contra integrității corporale sau sănătății), cit. supra*, 2012, p. 95.

[74] For details on the meaning of this contextual explanatory rule, see: Constantin Duvac, *Membru de familie* (Comments), in *Explicații preliminare ale noului Cod penal*, vol. II, articles 53-187 by George Antoniu (coordinator), Alexandru Boroi, Bogdan-Nicolae Bulai, Costică Bulai, Ştefan Daneş, Constantin Duvac, Mioara-Ketty Guiu, Constantin Mitrache, Cristian Mitrache, Ioan Molnar, Ion Ristea, Constantin Sima, Vasile Teodorescu, Ioana Vasiu, Adina Vlăsceanu, Universul Juridic Publishing House, Bucharest, 2011, p. 538-542; Ilie Pascu, *Membru de familie* (Comment), in *Noul Cod penal comentat. Partea generală*, vol. I, by Ilie Pascu, Vasile Dobrinoiu, Traian Dima, Mihai Adrian Hotca, Costică Păun, Ioan Chiş, Mirela Gorunescu, Maxim Dobrinoiu, Universul Juridic Publishing House, Bucharest, 2012, p. 824-826.

[75] This solution was criticized in the doctrine, as these two notions do not have the same meaning, so that any distinct texts would be required [See, to this end George Antoniu, *Observații cu privire la anteproiectul unui al doilea nou Cod penal (I)*, RDP no. 4/2007, p. 34].

[76] George Antoniu, *Observații cu privire la anteproiectul unui al doilea nou Cod penal (II), cit. supra*, p. 11. To the contrary, Teodor-Viorel Gheorghe, *op. cit.*, p. 104. The author believes, arguably, that in this case the maximum special limit of the imprisonment punishment shall be of 30 years, which is the general maximum limit set forth in art. 60 and which cannot be exceeded.

not to the special limits of the punishment set forth for a particular offense or certain crimes, which through a special rule derogating from the general scheme of penalties established by the new Criminal Code may exceed the general limits of the imprisonment penalty (from 15 days to 30 years)

The distinct regulation of these crimes, which represents only the aggravated variants of certain crimes against life or physical integrity, has been imposed, in the opinion of the commission, to fill the gaps and inconsistencies[77] due to successive amendments to the previous Criminal Code.

2. The offense of murder or injury of the newborn committed by the mother (art. 200) is an assumption, under another name and with another legal content, of the crime of infanticide, provided in art. 177 of the previous criminal law, though the editors of the draft had proposed, in agreement with some authors[78], the waiver to this regulation (in the current formulation of the Criminal Code of 1969), due to the controversy and to non-unitary solutions existing in the matter of criminal participation and according to the model of certain European laws (the French, Spanish, German criminal law by repealing § 217 of the Criminal Code of this country).

Upon recommendation of the doctrine[79], the legislator in 2009 kept the requirement "immediately after birth" in the contents of this criminal act, which the editors of the Draft had given up and to remove any inconsistent application of the text, it introduced a period within which the incriminated offense may be committed, respectively 24 hours of birth. In this way, the legislator made an end of any controversy regarding the meaning of the phrases "newborn" and "immediately after birth".

Regarding the condition that the mother should be in a state of "mental disorder" (as compared to the "disorder caused by birth" as set forth in the previous criminal law[80]), it might be stated, in case of this crime, that the legal solution is subordinated to the medical solution, in relation to which the act shall be included in this text or in the text on the homicide.

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[77] For example, committing a crime of assault against a family member appeared in the previous criminal law as an aggravating circumstance to the common assault or other violence and bodily injury, it was present in a similar form to the murder, but it did not exist in case of serious bodily injury and of injuries causing death. To the contrary, Petre Dungan, *Considerații asupra incriminării sau neincriminării pruncuciderii*, Decision no. 8/2009, p. 160. The author criticizes the creation of a chapter with only two crimes, as any injury caused to a family member (homicide or injury) prejudices firstly the social relations regarding his life, integrity or health and only subsidiarily the family, its members may be injured. On the other hand, this option does not comply with the principles of systematization of the offenses depending on the criterion of the legal object of criminal protection; Petre Dungan, *Pruncucidere. Reflecții*, RDP no. 1/2009, p. 49. The author finds it difficult to accept that the examined offense should be systematized in another section than that which relates to the protection of human life.

[78] George Antoniu, *Ocrotirea penală a vieții persoanei, cit. supra*, p. 26. The author has proposed such a solution under the influence of the regulations in France, Spain, Germany, and in this case, he will operate the general provisions of the incrimination of the act of murder. For the same purpose, Petre Dungan, *Considerații asupra incriminării sau neincriminării pruncuciderii, cit. supra*, p. 162-163. The author considers that if the incrimination is held, the requirement "immediately after birth" should be missing. However, a different sanctioning regime would be required as the child's life born out of wedlock or a child born during the marriage is suppressed.

[79] George Antoniu, *Observații cu privire la anteproiectul unui al doilea nou Cod penal (II), cit. supra*, p. 11.

[80] This substitution does no longer justify, according to some authors, the milder sanctioning of the active subject of this crime, as in the case of the assumption provided for in art. 200 paragraph (2). See Angela Hărăstăşanu, *op. cit.*, p. 52-53.

The specialty literature has proposed to waive this essential requirement, the court will examine the circumstances under which the offense was committed, including the degree of responsibility of the mother at the time of committing the crime and to render the legal solution. The act could be committed for social reasons or ethical, eugenics reasons as well, not only because of the mental disorder (for example, due to the pregnant woman's banishment from the parental home, the social opprobrium, the loss of job, the removal from school, the existence of a rape or incest etc.)[81].

A novelty affirmatively accepted in the doctrine[82], is represented by the creation of an attenuated variant determined by the commission by the mother in a state of mental disorder of the offenses set forth in art. 193-195 of the newborn baby immediately after birth, but no later than 24 hours, in which case the special limits of the punishment are of one month and 3 years, respectively. The attenuation was not provided for acts committed by negligence, as according to the traditional view in our law, the state of disorder caused by birth is associated with the spontaneous intention. If, however, under the rule of the respective state, a crime of homicide or negligent injury is committed, it can be harnessed as a mitigating legal circumstance, under art. 75 paragraph (2), letter b), and the solution promoted by the Commission in this respect is correct.

In the standard form, based upon the explanatory statement on the occasion of the examination of the murder upon the victim's request, we consider that the increase of the limits of the imprisonment penalty provided for this offense would be required, from one to 5 years to 2 to 7 years.

D. Regarding ***the aggressions against the fetus***, the termination of pregnancy and fetal injury are incriminated (*incriminatio ex novo*).

1. The termination of pregnancy (art. 201) represents the taking up of the contents of the offense of causing unlawful abortion with minor amendments, provided in art. 185 of the previous criminal law, at the same time with its renaming.

First, in the case of the second normative way of the simple fact, some clarification has been brought regarding the capacity of the author who can only be a person who is not a specialist physician in obstetrics and gynecology and is not entitled to free medical practice in this specialty.

Regarding the aggravated variant set forth in paragraph (3) the phrase "serious bodily injury" was replaced by "bodily injury".

Unlike the previous regulation, it has been legitimately expected that this attempted offense is punishable only when it is committed intentionally [paragraphs (1) and (2)], but not outside the moral intention [paragraph (3)].

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[81] George Antoniu, *Observaţii cu privire la anteproiectul unui al doilea nou Cod penal (II), cit. supra*, p. 11-12. The author considers that the word "infanticide" has to be kept in the marginal designation, which is also established in the previous Romanian laws.

[82] Petre Dungan, *Uciderea ori vătămarea nou-născutului săvârşită de către mamă (Infracţiuni săvârşite asupra unui membru de familie)*, in *Manual de drept penal. Partea specială*, vol. I, by Petre Dungan, Tiberiu Medeanu, Viorel Paşca, Universul Juridic Publishing House, Bucharest, 2010, p. 103, 107. Instead, the author criticizes, but without arguments, the solution of the legislator "to build a section with only two crimes", claiming that it will not lead to the reduction of the domestic violence phenomenon and especially not to its eradication. Subsequently, the author gives up this critique [Petre Dungan, *Uciderea ori vătămarea nou-născutului săvârşită de către mamă (Infracţiuni săvârşite asupra unui membru de familie)*, in *Drept penal. Partea specială*, vol. I, *Prezentare comparativă a noului Cod penal şi a Codului penal din 1968*, by Petre Dungan, Tiberiu Medeanu, Viorel Paşca, Universul Juridic Publishing House, Bucharest, 2012, p. 100].

Rightfully, in paragraph (6) it was formulated "is not a crime" instead of "is not punishable" correcting the error of the paragraph (6) of art. 185 of the previous criminal law, and in this case the offense has been committed in a state of necessity, because the justification cause operates *in rem*. The justification cause operating in all circumstances proposed[83] to remove the words "performed by a specialist physician in obstetrics and gynecology".

The new regulation stated explicitly the non-punishment of the pregnant woman who commits this act, thus putting an end to those discussions of the doctrine around this problem, a solution inspired by § 245 of the Norwegian Criminal Code. Therefore, the act committed by a pregnant woman is a crime, with all the consequences resulting in terms of criminal participation, waiving only its sanctioning.

In paragraph (1), the legislator has provided for the penalty of fine and the deprivation of rights together with the punishment of imprisonment, within the same limits as those stated in the previous criminal law. The other limits of the imprisonment punishment were not changed, unless the act resulted in the death of the pregnant woman, the punishment of imprisonment being from 6 to 12 years (as compared to 5 to 15 years) and the deprivation of certain rights.

2. The framework of the incriminations in this matter was supplemented by the crime of **fetal injury** (art. 202), in a formulation changed from that proposed by the Draft.

This text incriminated the crime of fetal injury[84] during birth, that: prevented the adaptation to extrauterine life (imprisonment from 3 to 7 years) or that subsequently caused bodily injury to the child (imprisonment from one to five years), or causing the child's death (imprisonment from 2 to 7 years) - paragraphs (1) and (2). The fetal injury committed during birth by the mother who is in a state of mental disorder is sanctioned with the punishment provided in paragraphs (1) and (2), whose limits are reduced by half - paragraph (4).

In the commission's opinion, this incrimination (inspired by the provisions of art. 157-158 of the Spanish Criminal Code) comes to protect life in the making, during a period uncovered in the previous criminal law, as regards the interval between the starting time of the birth process, at which point you can no longer talk about a crime of interruption of pregnancy, and the time of the conclusion of this process, at which time we have a person who can be the passive subject of the crimes set forth in the previous chapters. Experience has shown that within this time interval many crimes may be committed against the fetus, from the cases of medical negligence when attending the birth of the child, resulting in death or fetal injury and up to intentional offenses.

At the same time, the acts of violence committed on the mother during the pregnancy, which have not been committed with the intent to cause the termination of the pregnancy and did not have this result, but led to fetal injury and eventually to bodily injury (imprisonment from 3 months to 2 years) or even the child's death (imprisonment from 6 months to 3 years) after his birth.

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[83] George Antoniu, *Observaţii cu privire la anteproiectul unui al doilea nou Cod penal (II), cit. supra*, p. 12.

[84] Because of the confusion that may arise in relation to the meaning of this term, the doctrine proposed either to be defined by the legislator (along with the words "during pregnancy" and "during childbirth"), or to be replaced by the phrase "product of conception" (Mihaela Rotaru, *Unele consideraţii asupra infracţiunii de vătămare a fătului, prevăzută în art. 202 din noul Cod penal, cu specială referire la înţelesul noţiunii de „făt" şi al sintagmelor „în timpul naşterii" şi „în timpul sarcinii"*, in Decision no. 7/2012, p. 92-93).

If the offense provided for in art. 202 is committed by negligence, the special limits of the penalty are reduced by half.

The deeds provided in paragraphs (1)-(3) committed by a physician or a person authorized to witness the birth or to follow the pregnancy shall not be deemed as offenses if they were committed in the course of the medical care act, in compliance with the provisions specific to their profession and were made in the interests of the pregnant woman or of the fetus because of the inherent risk in the exercise of the medical care act.

The fetal injury by a pregnant woman during the pregnancy period is not punishable.

Some authors have proposed the elimination of this text as it was not required either in the doctrine or in the case law, and the killing of the fetus cannot be conceived independently of the crime of abortion or the mother's intentional or negligent bodily injury, which is also the solution of the French, Italian, German criminal law[85].

E. The contents of ***the crimes on the duty to assist people in distress*** is amended from the previous regulation, these being grouped only into two texts: art. 203 (leaving a person in distress without aid) and art. 204 (preventing aid).

The legislator of 2009 waived the incrimination of art. 314 (endangering a person unable to take care of herself) of the previous criminal law, establishing the proposal of the commission[86] to consider that it is covered by the definition of the offense committed by omission (art. 17), as well as that of art. 316 (leaving without aid by failure to notice) of the Criminal Code of 1969, this solution being accepted reticently in the criminal doctrine[87].

1. Leaving a person in distress without aid (art. 203) lies in the failure to provide the necessary assistance or to inform the authorities immediately by the individual who found a person whose life, physical integrity or health is in danger and is unable to save herself.

In the previous regulation, the incrimination was called "leaving without aid" and its text was taken up in the new Criminal Code, with some refinements (for example, the following words were replaced: the term "to inform" by "to announce"; "the authority" by "the authorities" or the phrase "and who is unable to save himself" by "and who has not the

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[85] George Antoniu, *Observaţii cu privire la anteproiectul unui al doilea nou Cod penal (II), cit. supra*, p. 12. To the contrary: Vasile Dobrinoiu, Norel Neagu, *op. cit.*, p. 83. The authors assimilate the statement and the option of the commission on drawing up the new Criminal Code; Mihaela Rotaru, *op. cit.*, p. 90, 93.

[86] For the same purpose: Petre Dungan, *Lăsarea fără ajutor a unei persoane aflate în dificultate (Infracţiuni privind obligaţia de asistenţă a celor în primejdie)*, in *Manual de drept penal. Partea specială*, vol. I, by Petre Dungan, Tiberiu Medeanu, Viorel Paşca, Universul Juridic Publishing House, Bucharest, 2010, p. 125.

[87] George Antoniu, *Observaţii cu privire la anteproiectul unui al doilea nou Cod penal (II), cit. supra*, p. 12-13. The author considers that there is no ground for the failure to reproduce the provisions of art. 314 and art. 316, both of the previous Criminal Code, the facts being subject to incrimination and placing in the group of the offenses relating to the breach of rules on the social cohabitation. For the same purpose, Petre Dungan, *Obligaţia de asistenţă a celor în primejdie potrivit noului Cod penal*, Decision no. 11/2011, p. 78-80, 91. Introducing the cause of non-existence of the crime of art. 203 paragraph (2) is not justified in this opinion, due to the fact that by advising the authorities it is difficult to conceive that the author endangers his own life, physical integrity or health. However, the author expresses a contrary opinion to the position of Professor Antoniu regarding the systematization of these offenses in Title I, considering that the two offenses have as the main legal object the social relations regarding the life, the bodily integrity or the health of a person in distress because by committing any of these offenses, such values of the person are mainly harmed, and only afterwards, secondarily, the social cohabitation relations regarding the assistance of people in distress are prejudiced. Putting in danger a person unable to save herself" from the previous criminal law should be taken up in the new Criminal Code.

ability to save himself" or the term "distress" was replaced by "danger") or changes (the term "immediately" was introduced; the form of guilt became exclusively the intent; a special cause of incidental not-imputableness was introduced "if by granting the aid, author would expose to a serious danger to the life, physical integrity or his health").

The special minimum limit of punishment was increased from one month to 3 months[88], as the crime is sanctioned by imprisonment from 3 months to one year or fine).

2. Preventing aid[89] (art. 204) is a new incrimination, inspired by the provisions of art. 223-5 of the French Criminal Code, which aims to sanction a series of acts that were not covered by the previous regulation, not being in the scope of any legal text, although their nuisance value to the life or physical integrity of a person in distress is obvious.

The text incriminates the prevention of aid intervention to rescue people from an imminent and serious danger to their life, physical integrity or health, a deed which is punished by imprisonment from one to 3 years or a fine.

F. The framework of the ***crimes against personal freedom*** has been enriched with a new incrimination, harassment, a group of incriminations that includes also the illegal deprivation of freedom, the threat and blackmail, these being acts with their legal content subject to certain amendments as compared to the content established by the previous criminal law.

Certain incriminations introduced express subsidiarity clauses, using the words "if the deed does not constitute a more serious offense" [art. 208 paragraph (2) - harassment, art. 216 - using the services of an exploited person] which get over the specialty principle and under which the main criminal rule provided in these texts becomes subsidiary if another rule, regardless of its position (Criminal Code, special criminal laws, special laws with criminal provisions), punishes the concrete deed more seriously.

1. The illegal deprivation of freedom (art. 205) was adjusted by removing certain aggravating circumstantial elements which were not justified, and the introduction of other elements, intended to fill in the gaps in the regulation, at the same time when adjusting the special limits of punishment.

Thus, the incidental aggravating factor was waived if in exchange for the release a benefit is required, and in this case the rules of the concurrence of several offences in one action shall operate between deprivation of freedom and blackmail. Likewise, when a person's life is in danger there will be a concurrence of several offences in one action, without the need to maintain an aggravating element with this content.

The waiver of certain of the aggravated variants of this crime was accepted reticently by some authors[90].

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[88] Petre Dungan, *Obligația de asistență a celor în primejdie potrivit noului Cod penal, cit. supra*, p. 81. The increase of the special minimum limit is deemed to be unjustified as one of the outstanding features of the new Criminal Code is just the reduction of the limits of punishment regarding a considerable part of the incriminations.

[89] The criminal doctrine proposed to waive this new incrimination which is not requested by the doctrine or the judicial practice in our country. The proposed solution is found in art. 195 paragraph (2) of the Spanish Criminal Code, however it is much more restrictive and provided with a very reduced punishment (days-fine from 3 to 12 months) - see, to this end, George Antoniu, *Observații cu privire la anteproiectul unui al doilea nou Cod penal (II), cit. supra*, p. 13.

[90] Ion Rusu, Minodora-Ioana Rusu-Bălan, *Aspecte comparative şi de drept comparat în legătură cu infracțiunea de lipsire de libertate în mod ilegal în noul Cod penal*, Decision no. 1/2011, p. 140, 149. In the authors' opinion, maintaining the circumstances in which the offense is committed by simulating any formal

The illegal deprivation of liberty of a person is punishable by imprisonment from one to 7 years.

The kidnapping of a person being unable to express her will or to defend herself has been assimilated with the deprivation of liberty, since in the case of these people the existence of this crime might be stated only by analogy at the disadvantage of the defendant until the introduction of this text - paragraph (2) - (for example, kidnapping a newborn in a maternity).

The deed is punished more severely (imprisonment from 3 to 10 years) if committed: by an armed person, of a minor; endangering the health or life of the victim.

If the act resulted in the death of the victim, the punishment is the imprisonment from 7 to 15 years and the deprivation of certain rights.

The attempt shall be punished for the acts provided in paragraphs (1)-(3), and the act set forth in paragraph (4) is praeter-intentional.

The preparatory deeds provided in art. 189 paragraph (8) of the previous Criminal Code were decriminalized by the legislator of 2009.

2. In case of the offense of **threat** (art. 206), we opted[91] for an open scope of the persons covered by the act which is threatening with, so the court should be able to appreciate in each concrete case if the act was likely to alarm the threatened person. Reality has shown that this state of alarm can be caused not only by a harm aimed at the spouse or a close relative of the threatened person, but also by a possible offense against a friend, or other person to whom the threatened person is affectively related.

This solution is not entirely new for the Romanian legislator, as it was established in art. 494 (the threat) of the Criminal Code of 1937, and the art. 495 (the blackmail) of the same regulation explicitly used the words "for a person who is bound by a sound affection".

The incriminating text, as compared to the text proposed by the Draft (except this) has been significantly amended since the legislator of 2009 preferred the wording of art. 193 of the previous criminal law.

Based on the suggestions of the doctrine[92], the legislator has kept the phrase "prejudicial act" in the content of the incriminating text, instead of the wording proposed by

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capacities or by two or more people together, if in exchange for the release a material benefit is required or any other advantage; the victim is subject to any physical or mental sufferings or his health or his life is in danger, is absolutely necessary in relation to the predisposition to criminality in Romania and to their provision in other European criminal laws. The authors agree with reducing the special limits of punishment for this crime. For the same purpose (regarding the kidnapping), see Gheorghe Ivan, *Drept penal. Partea specială. Cu referiri la noul Cod penal (Legea nr. 286/2009), cit. supra*, p. 149.

[91] This option has been criticized claiming that the threat cannot be admitted to incur the criminal liability when it is directed against a foreign person (not just against a spouse or close relative). It is difficult for such a threat to alarm anyone so much as to justify the criminal liability of the author of the threat. Even the Spanish Criminal Code, one of the sources of inspiration of the commission, refers to the threat of other people to whom the passive subject is intimately bound [George Antoniu, *Observații cu privire la anteproiectul unui al doilea nou Cod penal (II), cit. supra*, p. 13]. A close view was expressed in another work coordinated by Professor Antoniu which stated that the solution of the previous Criminal Code to reduce the number of the the subjects of crime or harmful act that is threatening with is a regression as compared to the solution of the Criminal Code of 1937, and is it advisable to include also the people to whom the threatened person is bound by a sound affection in the incriminating text (Tudor Avrigeanu, *op. cit.*, p. 202).

[92] George Antoniu, *Observații cu privire la anteproiectul unui al doilea nou Cod penal (II), cit. supra*, p. 13. To the contrary, Tudor Avrigeanu, *op. cit.*, p. 202. The author acknowledges the idea that the inclusion in the scope of the threat, in addition to committing a crime and a damaging act that would nor be a crime is fair, but in

the draft "unjust prejudices of a right or legitimate interest" which would have unnecessarily complicated matter.

However, instead of the phrase "likely to alarm" it was introduced the phrase "likely to produce a state of fear" even though they mean the same thing[93], respectively the potentiality of producing a state of fear.

At the request of the doctrine[94], the limit attached to the penalty provided for that offense (imprisonment from three months to one year or a fine) - "the imposed penalty without exceeding the penalty provided by law for the offense which was the object of the threat" - was kept by the legislator, even if the editors of the Draft had given up this limit. Keeping this limitation is correct because, otherwise, it would have been created the possibility that the author of the threat to be punished with a greater penalty than that provided for the offense which is the object of the threat. In other words, in such a situation, the perpetrator would be punished more severely than if he committed the offense which is the object of the threat - in which case according to the Romanian doctrine, the threat is absorbed in the committed offense - which would require an additional unjustified punishment by reference to the social danger of the concrete deed.

The criminal proceedings are initiated upon the prior complaint of the injured person.

3. The blackmail (art. 207) unlike the previous regulation, is configured as the benefit is non-patrimonial (the variant of type and species - imprisonment from one to five years) or patrimonial (the aggravated variant - imprisonment from 2 to 7 years).

Regarding the judicious observations of the doctrine[95], in defining this offense, the legislator waived the mention "by violence or threatening" considering that the term "coercion" is sufficient. Therefore, in the new form, the blackmail, in the standard variant represents coercing a person to give, to do, not to do or suffer anything in order to acquire a non-patrimonial benefit unjustly for himself or for another.

4. The harassment (art. 208) was created to respond to certain cases arising in practice in which different people - especially women - are expected and followed in the street or other public places, or are teased through phone messages or other similar messages, and all these can create a state of fear or worry to the concerned person. The text was inspired by the provisions of art. 222-16 of the French Criminal Code, art. 179^{septies} of the Swiss Criminal Code, § 390a of the Norwegian Criminal Code and those of the English law (especially the Public Order Act of 1986 and Protection from Harassment Act of 1997).

In the standard variant, the act of harassment is the deed committed by the individual who repeatedly chases a person or watches her dwelling, workplace or other places

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terms of terminology it suggests the replacement of the phrase "damaging act" by "unjust damage" or "damage of certain interests" to remove the possibility of an interpretation for the purpose of referring only to property damage; likewise, the requirement of the special anti judiciary nature, given by the word "unfair" would be likely to bring more clarity to the incrimination text.

[93] For the same purpose: Gheorghe Ivan, *Drept penal. Partea specială. Cu referiri la noul Cod penal (Legea nr. 286/2009), cit. supra*, p. 161.

[94] George Antoniu, *Observaţii cu privire la anteproiectul unui al doilea nou Cod penal (II), cit. supra*, p. 13.

[95] *IbIdem*. The author stated as well, that the concept of equity has multiple meanings, and for this reason the expression of the previous criminal law seems to be clearer, but it agrees with the change of the penalty limits set forth in paragraphs (1) and (2) of the text. In this conception, paragraph (3) of the text should be limited to paragraph (2) as compared to paragraph (1) it is unnecessary since being included in the contents of this paragraph.

frequented by her without any right or without a legitimate interest, thus causing her a state of fear and is punishable by imprisonment from 3 to 6 months or a fine.

The deed is punished more gently (imprisonment from one month to 3 months or a fine, if the act does not represent a more serious offense) when consisting in making phone calls or communications by means of distance communication, which by frequency or content, causes her a state of fear.

The criminal proceedings are initiated upon the prior complaint of the injured person.

The text was accepted reticently by some authors[96], who, according to the German, Italian and Spanish model[97], proposed to waive this incrimination.

G. In the group of the ***offenses of trafficking and exploitation of vulnerable people*** together with traditional incriminations such as: slavery (art. 209), putting on forced or compulsory labor (art. 212) and pandering (art. 213), the legislator of 2009 brought several provisions of the special legislation with incriminations and criminal penalties such as human trafficking (art. 210) and trafficking of minors (art. 211) and from a single text on begging (art. 328 of the previous Criminal Code), that the legislator waived[98], creating three incriminations related to it: exploitation of begging (art. 214), using a minor for purposes of begging (art. 215) and using the services of an exploited person (art. 216).

1. The slavery (art. 209) has the same legal content as that provided in art. 190 of the previous criminal law. The only difference concerns the manner in which the sanction of the attempt is set forth, respectively by a distinct text, at the end of this chapter (art. 217).

2. Human trafficking (art. 210). According to art. 2 of the Law no. 678/2001 on preventing and combating human trafficking[99], as amended by art. 94 paragraph 1 of the Law no. 187/2012, in the contents of this regulation,

a) the human trafficking shall mean the deeds set forth in art. 210 and 211;

b) the exploitation of a person shall mean the activities referred to in art. 182;

c) the victim of human trafficking shall be the natural person, a passive subject of the acts set forth in art. 210, 211, 264 and 374 or of the attempt of one of these acts, no matter whether they participate or not in the criminal proceedings as the injured party.

The offense provided for in art. 210 has no corresponding meaning in the previous Criminal Code, being taken up with some amendments and supplements of art. 12 of the Law no. 678/2001.

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[96] *IbIdem*, p. 14. The author shows that although neither the doctrine nor the case law recognized that such acts would represent a problem in relation to the realities of our country, unlike other countries, this matter is artificially developed by creating the offense of harassment. It would be interesting to see in the judicial statistics how many criminal trials for sexual harassment were introduced in 2001, when this incrimination was created and so far or how many complaints were made to the police bodies about the offenses of harassment not related to the sexual act, in order to verify the extent to which these crimes respond to the realities of our country. To the contrary: Petre Dungan, *Hărțuirea (Infracțiuni contra libertății persoanei)*, in *Manual de drept penal. Partea specială*, vol. I, by Petre Dungan, Tiberiu Medeanu, Viorel Paşca, Universul Juridic Publishing House, Bucharest, 2010, p. 156; Idem, *Hărțuirea (Infracțiuni contra libertății persoanei)*, in *Drept penal. Partea specială*, vol. I, *Prezentare comparativă a noului Cod penal şi a Codului penal din 1968*, by Petre Dungan, Tiberiu Medeanu, Viorel Paşca, Universul Juridic Publishing House, Bucharest, 2012, p. 159.

[97] The Spanish criminal law incriminates only the sexual harassment in the art. 184, in a form similar to the Romanian criminal law.

[98] The members of the commission on drawing up the Draft of the new Criminal Code had proposed under art. 389 (Prostitution) to maintain this incrimination.

[99] Published in the Official Gazette. No. 783 of 11 December 2001, as subsequently amended and supplemented.

In the content of the typical act: the word "accommodation" was replaced by "sheltering" the latter having a wider meaning than the first; the mention "mood of obvious vulnerability of that person" was introduced; the phrase "misleading" is used instead of the mention "fraud or cheating".

The typical act established as such shall be punished with imprisonment from 3 to 10 years and the deprivation of certain rights.

The legislator, being consistent with the option expressed by the commission in the prior sentences and in the explanatory memorandum, removed the circumstance of committing the offense by two or more people together from the aggravated contents of the human trafficking. The same solution was adopted in the trafficking of minors.

Likewise, neither the method of paragraph (2) letter b), nor the variant of paragraph (3) were taken up, both of the art. 12 of the Law no. 678/2001, and in the event in which such results are produced, the rules of the concurrence of several offences in one action shall apply.

According to art. 245 item 21 of the Law no. 187/2012, the assumption in which the offense is committed by a civil servant in the performance of his job duties was reintroduced as the aggravated variant in the contents of this incrimination, this unequivocal aggravating circumstance being provided as well, in art. 12 paragraph (2) letter c) of the Law no. 678/2001 and punishable with imprisonment from 5 to 12 years. *De lege ferenda*, in relation to the limits of punishment established and the author's capacity, also the additional punishment of the prevention of exercising certain rights should be enclosed.

Correctly, the consent of the person being a victim of trafficking shall not be a supporting cause [art. 210 paragraph (2), art. 211 paragraph (3)], which is a more favorable provision than that provided for in art. 16 of the Law no. 678/2001.

3. Trafficking of minors (art. 211) is taken up, with amendments, of art. 13^{100} of the Law no. 678/2001, being sanctioned as the human trafficking, as well.

And in this case, the aggravating assumptions were waived set forth in art. 13 paragraphs (2), (3) and (4) were waived, and these circumstances will be recovered in the criminal trial either upon the judicial individualization of the punishment or by applying the rules of the concurrence of several offences in one action.

According to art. 245 item 22 of the Law no. 187/2012, the circumstance in which the offense is committed by a civil servant in the performance of his job duties was introduced in the contents of this incrimination as a normative sub-modality of the aggravated variant provided in paragraph (2).

In drawing art. 210 and art. 211 the provisions of the Framework Decision of the Council of the European Union no. 2002/629/JAI on the fight against human trafficking were considered.

The texts relating to human trafficking and trafficking of minors are similar to those of the art. 169 and art. 176 of the Portuguese Criminal Code, and familiar to the provisions of § 217 of the Austrian Criminal Code in respect of human trafficking.

[100] For a critical review of this incrimination and of the other provisions of the Law no. 678/2001, see Ion Rusu, *Observații critice referitoare la infracțiunea de trafic de minori*, Decision no. 4/2012, p. 174-180.

The legislator did not maintain the proposal of the commission[101] (made under the influence of a questionable decisions on the admission of an appeal on points of law[102]) to build a legal unity of crime when the human trafficking or trafficking of minors was committed against two or more persons at the same time [art. 361 paragraph (2) and art. 362 paragraph (3), both of the Draft], although in this way the uncertainties that would arise about the existence of the unity or plurality of offenses in case of different victims would have been avoided, while the offense was committed under the same circumstances. If these deeds are committed by a single action or by several actions, at different time intervals, on two or more persons, the rules of the concurrence of several offences in one action are applicable.

4. Putting on forced or compulsory labor (art. 212). The text reproduces the provisions of art. 191 of the previous Criminal Code, stating that the term "versus" was replaced by "against", and the minimum limit of the penalty was increased from six months to one year, and the maximum limit shall continue to be established for three years.

5. The pandering (art. 213) reproduces art. 329 of the previous Criminal Code, with some amendments, considered by the specialty literature[103].

The first change refers to *verbum regens*, and the word "inducement" was replaced by "determination", and this procedure restricts the scope of the text that does not operate in the situations in which the person on whom the incriminated action is exerted, does not consent to prostitution.

If the "inducement", an action that represents less than a "determination" (in this case, the abetted person consents to practice prostitution) is achieved by coercion, it may incur the criminal liability of the perpetrator for the offense of attempted pandering, set forth in art. 33 in relation to art. 217 correlated with art. 213 paragraph (2).

However, the word "draw" was replaced by "getting" and the nature of such benefits was restricted only to those of "patrimonial" nature and the use of the phrase "material benefit" is considered more appropriate[104].

The first aggravated variant waived the sub-modality of "recruiting a person for prostitution or human trafficking for this purpose", but the sub-modality of the "constraint" was maintained.

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[101] Note that editors of the Draft had adjusted the human trafficking, the trafficking of minors, the explanatory rule "exploitation of a person", the pandering, the exploitation of begging, using a minor for purposes of begging. Using the services of an exploited person in chapter I ("Trafficking and exploitation of vulnerable persons") of the Title VIII ("Crimes prejudicing certain relationships on social cohabitation") of the special part of the Draft of the new Criminal Code.

[102] H.C.C.J. (SU), Decision no. XLIX/2007, published in the Official Gazette. No. 775 of 15 November 2007. The supreme court arguably ruled that the human trafficking committed on several passive subjects, in the same place and time, represents a single offense repeatedly, but not a concurrence of several offenses in one action. For a grounded critique of this decision, see George Antoniu, *Recursul în interesul legii. Contribuţii la interpretarea şi aplicarea corectă a dispoziţiilor din partea generală a Codului penal*, RDP no. 1/2011, p. 13-15.

[103] Petre Dungan, *Proxenetismul (Traficul şi exploatarea persoanelor vulnerabile)*, in *Manual de drept penal. Partea specială*, vol. I, by Petre Dungan, Tiberiu Medeanu, Viorel Paşca, Universul Juridic Publishing House, Bucharest, 2010, p. 179; Idem, *Proxenetismul (Traficul şi exploatarea persoanelor vulnerabile)*, in *Drept penal. Partea specială*, vol. I, *Prezentare comparativă a noului Cod penal şi a Codului penal din 1968*, by Petre Dungan, Tiberiu Medeanu, Viorel Paşca, Universul Juridic Publishing House, Bucharest, 2012, p. 182-183.

[104] George Antoniu, *Observaţii cu privire la anteproiectul unui al doilea nou Cod penal (II), cit. supra*, p. 31.

The second aggravated variant is incident when the deeds incriminated in this text are committed against a minor, and the equivocal wording "presents another serious nature" was removed, in which case the special limits of the punishment shall be increased by half.

The explanatory rule of paragraph (3) defined the term "practicing prostitution" which means the maintenance of sex with different people in order to obtain patrimonial benefits for oneself or for another.

Unlike the previous regulation, this attempted offense is not sanctioned anymore, but for the act set forth in paragraph (2) of art. 213 (punishable by imprisonment from 3 to 10 years and the deprivation of certain rights), although the limits of punishment provided for the offense of basic intent committed (imprisonment from 2-7 years) are high enough to sanction also the attempted deed, all the more so as the legislator, in similar cases, incriminated the act of execution interrupted or having no effect (for example, the attempted crime of illegal deprivation of liberty, in the simple version, for which the punishment of imprisonment from one to 7 years is provided, or the attempted crime of the termination of pregnancy, in the standard the variant, although the punishment provided for this crime is the imprisonment from 6 months to 3 years.).

Likewise, the failure of the legislator to punish the attempted crime of pandering when committed against a minor is more difficult to understand, given that for the committed act set forth in paragraph (1) or (2), the special limits of punishment shall be increased by half.

De lege ferenda, the incrimination of the attempted crime of pandering would be required, in all its variants of incrimination.

6. The exploitation of begging (art. 214) consists in the offense of the person who causes a minor or a person with physical or mental disabilities to use repeatedly the public charity asking for material aid or is provided with patrimonial benefits from such activity which is punishable by imprisonment from 6 months to 3 years or a fine. The incriminated action in the commission's opinion, presents an obvious danger since it seriously prejudices the human dignity, as the child came to be used as props and endangers the health or even the life of the minor, given the conditions in which it is held during begging (very cold or very high temperatures, rain etc.).

The act is more serious (imprisonment from one to 5 years) when it is committed by a parent, guardian or the person who takes care of the beggar or by constraint.

In the compared law, the exploitation of minors or of other vulnerable persons for the purpose of practicing begging is incriminated in art. 671 of the Italian Criminal Code, art. 296 of the Portuguese Criminal Code, art. 232 of the Spanish Criminal Code, § 236 of the German Criminal Code.

7. Using a minor for purposes of begging (art. 215) is the act of an adult who, having the capacity to work, repeatedly asks the public charity for material aid, using the presence of a minor for this purpose. The penalty provided by law for this offense is the imprisonment from 3 months to 2 years alternating with a fine.

The doctrine has proposed the exclusion of this text because, on the one hand, a similar act is incriminated in art. 214, and on the other hand, if a minor is used for begging purposes, it is beside the point whether or not the active subject has ability to work, since in both cases the act is illegal[105].

[105] *IbIdem*, p. 32. To the contrary, see Petre Dungan, *Folosirea unui minor în scop de cerşetorie (Traficul şi exploatarea persoanelor vulnerabile)*, in *Manual de drept penal. Partea specială*, vol. I, by Petre Dungan,

8. Using the services of an exploited person (art. 216) was introduced following the enactment by the Romanian Parliament of the Law no. 300/2006 for ratifying the Council of Europe Convention on Action against Trafficking in Human Beings[106], adopted on 5 May 2005 (this incrimination is required by art. 19 of the Convention). Article 216 incriminates the use of services provided in art. 182 (exploitation of a person[107]), rendered by a person about whom the beneficiary knows that he is a victim of trafficking or of trafficking in minors. For example, in the commission's opinion, the text will be applicable if the person agrees to receive an organ transplant, knowing that it is illegally taken from a victim of human trafficking or for the person accepting to use the forced labor imposed on these victims.

Using the services of an exploited person shall be punished with imprisonment from 6 months to 3 years or with a fine, if the act does not constitute a more serious offense.

H. The matter ***of crimes against sexual freedom and integrity*** is completely revised based on a new concept, in agreement with the solutions of other systems of comparative law on relations between the offenses listed in this category.

The legislator in 2009, upon the recommendation of the doctrine[108], decriminalized the seduction (art. 199 of the Criminal Code of 1969). The act of sexual perversion (art. 201 of the previous criminal law) was repealed, but some of its means can be found in art. 219 and 220 and respectively in art. 375 (indecent exposure). The incest (art. 203 of the previous Criminal Code) was maintained in the new Criminal Code, however having been systematized among offenses against the family (Chapter II) in the crimes affecting the social cohabitation relationships (Title VIII).

1. The rape (art. 218) is configured starting from the idea of the act of penetration, so the contents of such offenses include the sexual intercourse - having the meaning traditionally known in the Romanian criminal law, that of the conjunction of the male sexual organ with the female organ - oral sex and anal intercourse, no matter if in these latter cases a heterosexual or homosexual act is carried or if the direct active subject is male or female.

Tiberiu Medeanu, Viorel Paşca, Universul Juridic Publishing House, Bucharest, 2010, p. 188. The author adopts the reasoning of the commission, presented in the *Explanatory Memorandum to the New Criminal Code* and considers that the incrimination is meant to respond to some frequent situations in recent years.

[106] Published in the Official Gazette no. 622 of 19 July 2006.

[107] For details on the meaning of this contextual explanatory rule, see: Constantin Duvac, *Exploatarea unei persoane* (Comments), in *Explicații preliminare ale noului Cod penal*, vol. II, art. 53-187 by George Antoniu (coordinator), Alexandru Boroi, Bogdan-Nicolae Bulai, Costică Bulai, Ştefan Daneş, Constantin Duvac, Mioara-Ketty Guiu, Constantin Mitrache, Cristian Mitrache, Ioan Molnar, Ion Ristea, Constantin Sima, Vasile Teodorescu, Ioana Vasiu, Adina Vlăsceanu, Universul Juridic Publishing House, Bucharest, 2011, p. 564-572; Ilie Pascu, *Exploatarea unei persoane* (Comment), in *Noul Cod penal comentat. Partea generală*, vol. I, by Ilie Pascu, Vasile Dobrinoiu, Traian Dima, Mihai Adrian Hotca, Costică Păun, Ioan Chiş, Mirela Gorunescu, Maxim Dobrinoiu, Universul Juridic Publishing House, Bucharest, 2012, p. 841-845.

[108] Valerian Cioclei, *op. cit.*, p. 218. To the contrary: Gheorghe Ivan, *Drept penal. Partea specială. Cu referiri la noul Cod penal (Legea nr. 286/2009), cit. supra*, p. 207; Gheorghe Ivan, Mari-Claudia Ivan, *op. cit.*, p. 100. The authors consider that the decriminalization of seduction left the social relationships on sexual freedom of females under the age of 18 years out of the criminal protection, with a significant impact on the personality development (psychological and moral) thereof. According to the opinion of these authors the text should be enunciated as follows: "The act of the one who, by promises of marriage, determines a female person under 18 years to have sexual intercourse with him, oral or anal intercourse, and any sexual act, shall be punished with imprisonment from 1 to 5 years. The parties' reconciliation eliminates criminal liability"

Therefore, the rape is the sexual intercourse, oral or anal intercourse with a person committed under duress, rendering unable to defend or express willingness or taking advantage of this state. Likewise, the legal contents of rape include, as a variant of species, acts of vaginal or anal penetration as well, made under the circumstances provided for the typical deed. Both the typical and species acts shall be punished with imprisonment from 3 to 10 years and the deprivation of certain rights.

Thus defined, the rape covers, in the commission's opinion, all the acts of penetration, whether committed by the aggressor on the victim or if the victim was forced to do so. The incrimination of art. 218 was designed considering the regulations of the Spanish Criminal Code (art. 179), Portuguese Criminal Code (art. 164), German (§ 177), Austrian (§ 201), French (art. 222-23), and the issues highlighted in the doctrine and the case law of these states in applying the texts cited.

This descriptive way of drawing up the rape (and the sexual intercourse with a minor) was criticized[109], considering that a synthetic formulation is more adequate, as the French legislator does, for example, in art. 222-23 "sexual penetration of any kind".

For the most part, the aggravated variants of the crime of rape have been rethought and reformulated. These variants increased from four to six and are punished with imprisonment from 5 to 12 years and the deprivation of certain rights. Thus, the aggravating circumstance caused by the capacity of member of the family of the victim was waived, but the assumption of the victim being a kin in direct line, brother or sister of the perpetrator was introduced as circumstantial element of aggravation[110], in order to clearly indicate that this act absorbs the incest, as the editors of the new criminal laws intend to put an end to the uncertainties of the judicial practice on this issue. This option was defeated[111] by the legislator in 2009, which maintained the incest - which the commission had waived in the Draft - which he incriminated in art. 377. Consequently, the decisions no. II/2005[112] and

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[109] George Antoniu, *Observaţii cu privire la anteproiectul unui al doilea nou Cod penal (II), cit. supra*, p. 14. The author believes that the reference to oral sex can give rise to multiple controversies; for instance, about the situation of lesbians because these relationships lack a vaginal, anal, oral penetration. To the contrary: Viorel Paşca, *Violul (Infracţiuni contra libertăţii şi integrităţii sexuale)*, in *Manual de drept penal. Partea specială*, vol. I, by Petre Dungan, Tiberiu Medeanu, Viorel Paşca, Universul Juridic Publishing House, Bucharest, 2010, p. 200. The author argues that the enunciation used by the legislator is likely to better define the material element of the objective side of the crime of rape; Viorel Paşca, *Unele consideraţii în legătură cu incriminarea infracţiunii de viol în noul Cod penal*, D. nr. 10/2010, p. 26; Gheorghe Ivan, *Drept penal. Partea specială. Cu referiri la noul Cod penal (Legea nr. 286/2009), cit. supra*, p. 195; Viorel Paşca, *Violul (Infracţiuni contra libertăţii şi integrităţii sexuale)*, in *Drept penal. Partea specială*, vol. I, *Prezentare comparativă a noului Cod penal şi a Codului penal din 1968*, by Petre Dungan, Tiberiu Medeanu, Viorel Paşca, Universul Juridic Publishing House, Bucharest, 2012, p. 203.

[110] Some authors are against this substitution, arguing that this can create potential confusion with the crime of incest. Likewise, it is suggested to eliminate the assumption of letter d) because the rape exists in the concept of the Romanian doctrine regardless of purpose. Moreover, worse purposes of the rape than the production of pornographic materials could be imagined and which are not capitalized as such [George Antoniu, *Observaţii cu privire la anteproiectul unui al doilea nou Cod penal (II), cit. supra*, p. 14].

[111] For the same purpose: Viorel Paşca, *Violul (Infracţiuni contra libertăţii şi integrităţii sexuale), cit. supra*, p. 204; Idem, *Violul (Infracţiuni contra libertăţii şi integrităţii sexuale), cit. supra*, 2012, p. 206.

[112] H.C.C.J. (SU), Decision. No. II/2005, published in the Official Gazette. No. 867 of 27 September 2005. For the same purpose, George Antoniu, *Recursul în interesul legii. Contribuţii la interpretarea şi aplicarea corectă a dispoziţiilor din partea generală a Codului penal, cit. supra*, p. 11. To support the solution of the ideal concurrence, the author reveals rightly, the particulars of the crime of incest: the incrimination aims at the protection of the mixture of blood and not merely, the sexual inviolability; the incest involving violence could

no. 17/2008[113] of the Supreme Court shall remain valid under the rule of the new Criminal Code, but with a different motivation based on the different legal subject matter of the two indictments.

However, no one could argue that we are in the presence of concurrence of criminal provisions as the ideal concurrence creates more specific legal consequences of separate crimes, as compared to the concurrence of texts when the single deed produces an unique immediate result specific to a particular crime.

Others think that under the rule of the new Criminal Code it is impossible to uphold the concurrence between the rape and incest because of the antagonistic terms under which the two crimes are enunciated. Thus, if the rape is a sexual act performed by vitiating the consent of the victim, the incest is a consented sexual intercourse[114]. This view might be challenged that just because of these "incompatible" conditions of incrimination (lack of consent/existence of the consent), the rape cannot absorb the incest, which would involve a total integration of the two offenses in the first crime. Actually, due to this aggravating circumstances, the solution of the ideal concurrence of offenses in one action is correct, all the more so as this time the two incriminations protect different social relations.

In conclusion, in our opinion, where the rape is performed through sexual intercourse on a person who is a kin in direct line, brother or sister of the perpetrator, the crime of rape shall be upheld in an ideal concurrence with the crime of incest[115]. In the other normative ways, the rape will not enter into concurrence with the incest. The same solution is required as well, with respect to the relationship between the sexual intercourse with a minor and

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incur the criminal liability of the aggressor, while the incest without violence incurs the criminal liability of both partners. The incest involves a normal sexual intercourse, which may be the only source of mixed blood, when committing the crime, while the rape is a sexual act that may be committed in other ways, these particulars confer a certain specific crime of incest, deserving to be treated as an autonomous offense even if it is committed in the same action with other offenses that meet the characteristics of other crimes.

[113] H.C.C.J. (SU), Decision No. 17/2008, published in the Official Gazette. No. 866 of 22 December 2008. For the same purpose, George Antoniu, *Recursul în interesul legii. Contribuţii la interpretarea şi aplicarea corectă a dispoziţiilor din partea generală a Codului penal*, RDP no. 2/2011, p. 21-23. According to the author's conception, to which we adhere, in so far as the repeated rape victim has any of the capacities listed in the legal content of incest, it is necessary that the deed be classified (in addition to the repeated rape offense) in the continued offense of incest, as well.

[114] Vasile Dobrinoiu, Norel Neagu, *op. cit.*, p. 139. The authors note, rightly, the difference in treatment introduced by the legislator in 2009 for the rape, between different categories of people entering into the concept of family member for the purposes of art. 177. For the same purpose, Vasile Dobrinoiu, *Violul* (Comment), in *Noul Cod penal comentat*, *partea specială*, vol. II, by Vasile Dobrinoiu, Ilie Pascu, Mihai Adrian Hotca, Ioan Chiş, Mirela Gorunescu, Costică Păun, Maxim Dobrinoiu, Norel Neagu, Mircea Constantin Sinescu, Universul Juridic Publishing House, Bucharest, 2012, p. 163-164.

[115] For the same purpose: Viorel Paşca, *Violul (Infracţiuni contra libertăţii şi integrităţii sexuale), cit. supra*, p. 204; Idem, *Unele consideraţii în legătură cu incriminarea infracţiunii de viol în noul Cod penal, cit. supra*, p. 31-32; Idem, *Violul (Infracţiuni contra libertăţii şi integrităţii sexuale), cit. supra*, 2012, p. 207. According to the author, if the consented sexual intercourse between kins in direct line or between siblings affected the relations of consanguinity, altering the family relationships as it might explain the fact that the act of sexual abuse by force or threat or by putting the victim in the impossibility to defend or to express willingness or taking advantage of this condition, would affect these relationships to a lower extent. To the contrary: Gheorghe Ivan, *Drept penal. Partea specială. Cu referiri la noul Cod penal (Legea nr. 286/2009), cit. supra*, p. 195. In this case, in the author's opinion, the aggravated form of the incestuous rape becomes a complex crime, absorbing the incest; Alexandru Boroi, *Drept penal. Partea specială. Conform noului Cod penal, cit. supra*, p. 126. The author considers that this case retains only the crime of rape provided in art. 218 paragraphs (1) and (3) letter b).

incest, the more so as the offense provided for in art. 220 requires, among other things, a consented sexual intercourse.

To ensure equal criminal protection of all categories of persons covered by the term "family member", it would be better to reflect whether its reinstatement is required or not instead of the term "kin in a direct line, brother or sister".

However, the victim's age was increased from 15 to 16, and the deed will be punished as harshly when it was committed for the purpose of producing pornography.

Although the commission waived the aggravating circumstance when the act was committed by two or more persons jointly, the legislator of 2009 reinstated it, both in the contents of the crime of rape and in the contents of the sexual assault.

If the act resulted in the death of the victim, the punishment is the imprisonment from 7 to 18 years and the deprivation of certain rights. Note that in the contents of this aggravated variant, the victim's suicide does not appear as a factor which causes a more severe criminal treatment.

The attempted rape that resulted in the death of the victim is no longer incriminated and this solution is criticized by some authors[116]. Instead, in the contents of the offenses set forth in paragraphs (1) - (3) it is incriminated and therefore punishable.

The criminal proceedings against the typical and the assimilated act are initiated upon the prior complaint of the injured person.

2. The sexual assault[117] (art. 219), which is incidental to the rape and punishable by imprisonment from 2 to 7 years and the deprivation of certain rights, was created to incriminate any sexual acts other than those that fall within the contents of the offenses of rape committed under the influence of constraint or its related conditions, that is acts which do not involve penetration.

The incrimination of art. 219 presents the same aggravating circumstantial elements as those provided in case of rape, however sanctioned more gently, respectively with imprisonment from 3 to 10 years and the deprivation of certain rights.

If the act resulted in the death of the victim, the punishment is the imprisonment from 7 to 15 years and the deprivation of certain rights.

By the will of the legislator, whether the acts of sexual assault were preceded or followed by committing the sexual acts referred to in art. 218 paragraphs (1) and. (2) the act is deemed as a rape without applying the rules of concurrence of several offenses in one action.

Except the praeter-intentional method, the legislator sanctions the attempted sexual assault as well, in the situations in which it is committed intentionally.

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[116] Viorel Paşca, *Violul (Infracţiuni contra libertăţii şi integrităţii sexuale), cit. supra*, p. 207; Idem, *Unele consideraţii în legătură cu incriminarea infracţiunii de viol în noul Cod penal, cit. supra*, p. 34-35; Idem, *Violul (Infracţiuni contra libertăţii şi integrităţii sexuale), cit. supra*, 2012, p. 210.

[117] The name of this crime, which is substituted to the offense of sexual perversion provided in art. 201 of the previous criminal law is questionable. The perversion does not involve a sexual assault as sexual satisfaction is achieved by other means than by using sex or action on sex as, for example, through acts of coercion on himself/herself or on the partner, through gazing of other people's sexual intercourse, through touching the woman's underwear, or by other methods. In these cases, the sexual appetite is satisfied by any means different from any sexual penetration, even if they were followed or concomitant with these acts. See, to this end: George Antoniu, *Observaţii cu privire la anteproiectul unui al doilea nou Cod penal (II), cit. supra*, p. 15.

The criminal proceedings for the simple (basic) offense are initiated upon the prior complaint of the injured person.

3. Sexual intercourse with a minor (art. 220). The criterion of distinction between rape and sexual assault in terms of the material element is found as well, in case of the sexual offenses with a minor and the sexual corruption of minors, respectively. Thus, if the act involves penetration, we are in the presence of a sexual intercourse with a minor, and if it comes to other sexual acts, the deed will fall within scope of art. 221.

Regarding the age of the minor, the commission considered, as in other European laws (see § 174 and § 176 of the German Criminal Code) that the age of the passive subject had to be differentiated as it was about protecting the sexual integrity of minors in relation to an adult or another minor, but the manner of drawing up the text as compared to the text worked out by the commission underwent many changes introduced by the legislator in 2009.

In the standard variant set forth in paragraph (1) the minor's age must be between 13 and 15 years at the time of the commission of the crime. If the minor, at the time of the offense, has not reached the age of 13, the deed will be punished more severely [paragraph (2)], respectively with the imprisonment from 2 to 7 years and the deprivation of certain rights, as compared to the penalty of imprisonment from one to 5 years, as provided for the simple act.

If the basic act is committed by an adult and a minor whose age is between 13 and 18 years, where the adult misused his authority or influence on the victim, the punishment is the imprisonment from 2 to 7 years and the deprivation of certain rights.

And this offense is punished more severely (imprisonment from 3 to 10 years and the deprivation of certain rights) when the minor is a kin in direct line, brother or sister of the perpetrator, in which case it is upheld in an ideal concurrence with the incest. This circumstance represents an aggravation circumstantial element in the variant set forth in paragraph (4) along with the assumptions that the minor is in the care, protection, education, protection and treatment of the perpetrator or the offense was committed for the purpose of producing pornography.

The acts set forth in paragraphs (1) and (2) are not punishable if the age difference between the two subjects of the offense does not exceed three years, and this solution is considered to be questionable by some authors[118].

The failure to take up the provision of art. 198 paragraph (3) of the previous criminal law and of the assumption that the victim suffered bodily injury, in the text of the new criminal law is considered as an unreasonable solution, as it represents frequent ways of committing this crime, and the injuries are possible in case of the examined offense[119].

4. The sexual corruption of minors (art. 221) involves the commission of a sexual act other than that referred to in art. 220, against a minor who has not attained the age of 13

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[118] Gheorghe Ivan, *Drept penal. Partea specială. Cu referiri la noul Cod penal (Legea nr. 286/2009), cit. supra*, p. 203.

[119] Viorel Paşca, *Actul sexual cu un minor (Infracţiuni contra libertăţii şi integrităţii sexuale)*, in *Manual de drept penal. Partea specială*, vol. I, by Petre Dungan, Tiberiu Medeanu, Viorel Paşca, Universul Juridic Publishing House, Bucharest, 2010, p. 215; Idem, *Actul sexual cu un minor (Infracţiuni contra libertăţii şi integrităţii sexuale)*, in *Drept penal. Partea specială*, vol. I, *Prezentare comparativă a noului Cod penal şi a Codului penal din 1968*, by Petre Dungan, Tiberiu Medeanu, Viorel Paşca, Universul Juridic Publishing House, Bucharest, 2012, p. 218.

years (as opposed to the previous regulation which did not require a limit of the minor's age), as well as the minor's determination to bear or carry out such an act, both alternative actions being punishable with imprisonment from one to 5 years.

De lege ferenda, the age limit of the minor should be excluded or at least correlated with the minimum limit of the criminal capacity (14 years).

Paragraph (2) provides for an aggravated variant (in this case, the punishment is imprisonment from 2 to 7 years and the deprivation of certain rights) caused by the commission of the typical offense in the following circumstances: the minor is a kin in direct line, brother or sister; the minor is in the care, protection, education, protection and treatment of the perpetrator; the offense was committed for the purpose of producing pornography. The first and last normative ways have correspondent in the previous criminal law, and the second is an innovation of the legislator in 2009.

The text does not incriminate anymore the obscene act unless it is of a sexual nature (for instance, the palpation of sex organs of the passive subject) and is committed against a minor.

The sexual act of any nature committed by an adult in the presence of a minor who has not yet reached the age of 13 years, shall be punished with imprisonment from 6 months to 2 years or with a fine.

The incrimination rule was supplemented by a new assumption consisting in the determination by an adult or a minor who has not yet reached the age of 13 to assist in the commission of exhibitionist acts[120] or in performances in which they commit sexual acts of any kind, and making available to the latter any pornographic material, inspired by some texts of the Law. 196/2003 on preventing and combating pornography, as republished[121]. These alternative acts are sanctioned by imprisonment from 3 months to one year or fine).

The components of the basic deed are not punishable if the age difference does not exceed 3 years.

5. The recruitment of minors for sexual purposes (art. 222) is the deed of an adult who proposes a minor who has not yet reached the age of 13, to meet in order to commit one of the offenses provided for in art. 220 or art. 221, including when the proposal was made by means of distance communication. In this case the penalty provided by law is imprisonment from one month to one year with a fine alternatively.

The incrimination is a consequence of the obligations assumed by Romania in 2007 when signing the Council of Europe Convention for the Protection of Children against Sexual Exploitation and Sexual Abuse at Lanzarote (Spain).

6. The sexual harassment (art. 223), as compared to the enunciation of the previous criminal law[122] was subject to a new systematization, by the creation of two texts. The first

[120]The doctrine stated that the meaning of the exhibitionist acts should have been explained (Spanish criminal law, art. 185, uses the notion of acts of exhibitionism in the presence of the minor or of the incapable person but refers to obscene acts, not to any act of exhibitionism). The Spanish Criminal Code as well (art. 186) incriminates the deed of broadcasting, selling, exhibiting pornographic material to the minors referred to in paragraph (4) of the text [see, to this end: George Antoniu, *Observaţii cu privire la anteproiectul unui al doilea nou Cod penal (II), cit. supra*, p. 16]. In relation to these takings-up, Professor Antoniu finds it more clear the enunciation of art. 202 of the previous criminal law.

[121] Republished in the Official Gazette. no. 87 of 4 February 2008.

[122] For a detailed analysis of this incrimination, in the previous drafting and in that of the new Criminal Code, see Daniel Nițu, *Unele consideraţii privind infracţiunea de hărţuire introdusă de noul Cod penal*, CDP nr. 1/2011, p. 124-138.

text includes the harassment itself, committed by repeated acts which creates an intimidating or humiliating situation for the victim and was included in this chapter (art. 222). The other text, on the deeds involving the so-called vertical harassment, due to the abuse of authority, was included in the category of workplace offenses (art. 299). Thus, the editors of the new Criminal Code intended to put an end to the disputes in the doctrine and practice on the usual character of the crime (this character existing in the case of art. 222, but absent in the case of art. 299), as well as to all the mismatches between text incriminating sexual harassment in the previous criminal law and other crimes, such as blackmail.

In the new wording, the sexual harassment is the repeated demanding of sexual favors in an employment relationship or a similar relationship, if the victim was intimidated or put in a humiliating situation due to this act. In this case, the incriminated act is sanctioned by imprisonment from 3 months to one year or fine and, unlike the previous regulation, it shall not be achieved by threat or constraint.

This incrimination (more extensive than in art. 203^1 of the previous criminal law) in relation to the excessively indecent manifestation of certain persons at present, despite some concerns expressed in the criminal doctrine[123], we believe it is necessary to penalize such behaviors that can give rise to more serious offenses against sexual freedom and integrity.

I. In the ***crimes affecting home and private life*** there are introduced some new incriminations intended to cover a regulatory gap and to protect all social values representing the subject matter of this chapter, as well as the violation of the professional office and the invasion of privacy, together with the breach of domicile and disclosure of the professional secrecy and these offenses are set forth in the previous criminal law, as well.

For all the offenses comprised in this chapter, except the deed set forth in art. 226 paragraph (5), the criminal proceedings are initiated upon the prior complaint of the injured person.

Arguably, the legislator in 2009 did not keep within this group of incriminations, the art. 215 of the Draft regarding the *violation of personal data confidentiality,* the text aiming at protecting such data and their handling or disclosure may, according to the case law[124] of the European Court of Human Rights, prejudice the right to privacy protected by art. 8.

Article 215 of the Draft proposed by the commission was similar to the regulations found in § 9c chapter 4 of the Swedish Criminal Code, art. 197 paragraph (2) of the Spanish Criminal Code, art. 193 of the Portuguese Criminal Code, art. 226-16 et seq. of the French Criminal Code, art. 179^{novies} of the Swiss Criminal Code, § 202a of the German Criminal

[123] The text was considered too excessive as compared to the previous regulation that limited the offense only to the situations where the sexual gratification is obtained only by coercion or threat and only by a person abusing the position held at work (not in any other similar relationships). Bringing a person to criminal account just because he intimidated or put the victim in a humiliating situation due to his obscene proposals, in the above-mentioned situations, would lead to excesses and controversy. The criminal liability cannot be conditional on the somewhat exaggerated subjectivity of the victim due to her sensitiveness [see, to this end, George Antoniu, *Observaţii cu privire la anteproiectul unui al doilea nou Cod penal (II), cit. supra*, p. 16]. Professor Antoniu points out that the notions of "intimidation", "humiliating conditions", "relations similar to the employment relations" have to be defined, which will give rise to controversy.

[124] See the case Rotaru v. Romania, the ECHR Judgment of 29 March 2000, published in the Official Gazette. No. 19 of 11 January 2001; Beatrice Ramaşcanu, *Jurisprudenţa CEDO în cauzele împotriva României*, 2nd edition, Hamangiu Publishing House, Bucharest, 2009, p. 76-98.

Code, § 118a of the Austrian Criminal Code and represented a consecration of the obligations assumed by Romania under the Law no. 682/2001 on the ratification of the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, adopted in Strasbourg on 28 January 1981[125].

De lege ferenda, the incrimination of such an act would be required.

Likewise, the legislator in 2009 did not take up, arguably, in this chapter, the art. 217 of the Draft *("Illegal possession of technical means of interception")* perhaps considering that it was not worth being sanctioned with criminal penalties, although it should be incriminated, as well.

1. The breach of domicile (art. 224) kept its typical content established by the previous criminal law and among the traditional aggravating circumstantial elements, only the circumstance of committing the offense by two or more people together was waived, this option being accepted reticently by some authors[126].

The criminal treatment, in both incriminating variants, is not unique, but alternative (imprisonment or fine), both limits of the imprisonment punishment being significantly reduced and the amount of the fine, implicitly.

Both for the simple act, punishable by imprisonment from 3 months to 2 years or a fine, and for the aggravated act, sanctioned with imprisonment from 6 months to 3 years or a fine, the criminal proceedings shall be initiated upon prior complaint from the injured person.

2. The breach of the business office (art. 225) was incriminated as a separate offense, as according to the case law of the European Court of Human Rights, the registered office of the legal entity or the business office of the natural person benefits from the protection conferred by art. 8 of the European Convention on human rights and fundamental freedoms[127].

This criminal deed is found in most of the European laws (art. 191 of the Portuguese Criminal Code, art. 203 of the Spanish Criminal Code, § 123 of the German Criminal Code, § 109 of the Austrian Criminal Code, § 6 chapter 4 of the Swedish Criminal Code, § 355 of the Norwegian Criminal Code).

According to art. 225 paragraph (1), the unauthorized access in any way, to any premises where a legal entity or a natural person carries on the professional activity or the refusal to leave them at the request of the person entitled shall be punished with imprisonment from three months to two years or with fine.

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[125] Published in the Official Gazette. No. 830 of 21 December 2001.

[126] Petre Dungan, *Violarea de domiciliu (Infracţiuni ce aduc atingere domiciliului şi vieţii private)*, in *Manual de drept penal. Partea specială*, vol. I, by Petre Dungan, Tiberiu Medeanu, Viorel Paşca, Universul Juridic Publishing House, Bucharest, 2010, p. 234. In this respect, the author stated that this circumstance cannot be found even among the aggravating circumstances provided for in art. 77, a situation that is not beneficial to the establishment of the rule of law in society. Subsequently, the author gives up this critique [see Petre Dungan, *Violarea de domiciliu (Infracţiuni ce aduc atingere domiciliului şi vieţii private)*, in *Drept penal. Partea specială*, vol. I, *Prezentare comparativă a noului Cod penal şi a Codului penal din 1968*, by Petre Dungan, Tiberiu Medeanu, Viorel Paşca, Universul Juridic Publishing House, Bucharest, 2012, p. 236. This time, the author believes that in this case, the incrimination by the punishment individualization can be given an aggravating effect under art. 77]

[127] For more details: Corneliu Bârsan, *Convenţia europeană a drepturilor omului. Comentariu pe articole, vol. I. Drepturi şi libertăţi*, All Beck Publishing House, Bucharest, 2005, p. 657-695; Mihail Udroiu, Ovidiu Predescu, *Protecţia europeană a drepturilor omului şi procesul penal român (Tratat)*, C. H. Beck Publishing House, Bucharest, 2008, p. 177-220.

If the offense is committed by an armed person during the night or by using false capacities, the penalty shall be imprisonment from six months to three years or a fine - paragraph (2).

To a certain concept, the text is objectionable because it embraces distinct realities under the same enunciation: one is to protect the office of the natural person as a manifestation of his freedom to have a profession and thus, a place where to exercise his profession undisturbed by other people and the other is to protect the registered office of the legal entity including the authorities, institutions, political parties etc. which are all legal entities. If the premises of the legal entities of private law were assimilated to the business offices of the natural person, the registered offices of the legal entities of public law could not be treated as offices of the legal persons of private law. Their protection (being also business offices) should be made elsewhere, namely in the chapter on the deeds which disturb public order[128].

The criminal proceedings are initiated upon the prior complaint of the injured person.

3. The invasion of privacy (art. 226), in the standard variant is undermining privacy, without any right, by photographing, capturing or recording images, listening by technical means or audio recording of a person in a house or room or its outbuilding or a private conversation. In this case, the punishment is the imprisonment from one month to 6 months or a fine.

The text should be supplemented by the requirement "without the consent of the person concerned" because only the negative condition "without any right" is not sufficiently expressive to mark the boundaries of the interdiction of the respective offenses[129].

The disclosure, dissemination, presentation or transmission, without any right, of the sounds, conversations or images provided for in paragraph (1) to another person or to the public, shall be punished with imprisonment from 3 months to 2 years or a fine - paragraph (2).

The criminal proceedings are initiated upon the prior complaint of the injured person.

The act committed by the following persons is not a crime: by the person who attended the meeting with the injured person and during which the sounds, conversations or images were captured, if a legitimate interest is justified; if the injured person acted explicitly with the intent to be seen or heard by the perpetrator; if the perpetrator captures the commission of a crime or contributes to prove the commission of an offense; or if he captures deeds of public interest which are significant for the community life and their public disclosure has any larger public advantages than the prejudice caused to the injured party.

Furthermore, the text incriminates the placing, without any right, of technical means of audio or video recording, for the purpose of committing the acts provided in paragraphs (1)

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[128] George Antoniu, *Observații cu privire la anteproiectul unui al doilea nou Cod penal (II), cit. supra*, p. 15-17. On this occasion, the professor criticizes the excessive subdivisions of the incriminations against the person under the influence of the Spanish criminal law, contrary to the systematization of their data by the Criminal Codes of 1937 and 1969, the protection of personal freedom is necessary to be made in relation to the various guises under which this freedom is presented (physical freedom, mental freedom and the freedom to choose a residence, the freedom of communication, the freedom of assigning certain professional secrets, etc.). Therefore, the creation of some separate chapters (Chapter 6 and 9) in this matter is ungrounded and susceptible of controversy. As such, the breach of domicile and the violation of the secrecy of correspondence should have been systematized in the group of the crimes against freedom.

[129] George Antoniu, *Observații cu privire la anteproiectul unui al doilea nou Cod penal (II), cit. supra*, p. 17.

and (2), this offense being punishable by imprisonment from one to 5 years and for which the criminal proceedings are initiated ex officio.

4. The disclosure of professional secrecy (art. 227) was reformulated. Therefore, the disclosure, without any right, of certain data or information regarding the privacy of a person represents an offense and is punishable by imprisonment from 3 months to 3 years or a fine, which is likely to harm a person, by that person who became aware of this by virtue of her profession or position and who shall be obliged to keep the confidentiality of such data.

On the recommendation of the doctrine[130], the legislator in 2009 maintained in the contents of incrimination, the condition that the act should be "likely to harm a person", although the authors of the Draft had given up to it.

The incidence of the text was restricted to only those cases where the object of the disclosure is represented by any "data or information regarding the privacy of a person".

The deliberate disclosure of other data (information being deemed as state secrets or professional secrets or nonpublic information) represents the subject matter of some distinct incriminations (art. 303 and 304), being in a specialty relation with that of art. 227, in chapter II - Professional crimes - of Title V (Corruption offenses and professional offenses) of the special part of the new Criminal Code. This chapter has treated also the offense of violation of secrecy of correspondence (art. 302), which the commission[131] had systematized in the last chapter of Title I of the special part of the new Criminal Code, as well.

Likewise, the contents of the incrimination introduced also one of its integral conditions related to the "duty of keeping the confidentiality on the data" and this solution was considered correct by some theorists[132].

The criminal proceedings are initiated upon the prior complaint of the injured person.

J. *De lege ferenda*, in a final chapter of Title I of the special part of the new Criminal Code, ***the offenses against dignity*** should be reintroduced: insult, defamation and proof of truth, these acts being incriminated in a traditional manner in the Romanian criminal law.

Note that articles 205, 206 and 207 of the previous Criminal Code were repealed by art. I, item 56 of the Law no. 278/2006 to amend the Criminal Code, as well as to amend and supplement other laws[133].

According to the decision no. 62/2007[134], the Constitutional Court admitted the plea of non-compliance with the constitution and found that the *provisions of art. I, item 56 of the Law no. 278/2006,* the part related to art. 205, 206 and 207 of the Criminal Code of 1969 *are unconstitutional,* ruling that the cited legal provisions set forth that there is no incompatibility between the principle of freedom of expression and the incrimination of insult and defamation, which forces the decriminalization of these offenses.

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[130] *IbIdem*. The author highlighted that there may be any cases of minor disclosures which should not incur criminal liability.

[131] For the same purpose, Ion Ifrim, *Reflecţii asupra infracţiunii de violare a secretului corespondenţei*, in RDP no. 1/2012, p. 128.

[132] Petre Dungan, *Divulgarea secretului profesional (Infracţiuni ce aduc atingere domiciliului şi vieţii private)*, in *Manual de drept penal. Partea specială*, vol. I, by Petre Dungan, Tiberiu Medeanu, Viorel Paşca, Universul Juridic Publishing House, Bucharest, 2010, p. 255; *Idem*, *Divulgarea secretului profesional (Infracţiuni ce aduc atingere domiciliului şi vieţii private)*, in *Drept penal. Partea specială*, vol. I, *Prezentare comparativă a noului Cod penal şi a Codului penal din 1968*, by Petre Dungan, Tiberiu Medeanu, Viorel Paşca, Universul Juridic Publishing House, Bucharest, 2012, p. 257.

[133] Published in the Official Gazette no. 601 of 12 July 2006.

[134] Published in the Official Gazette no. 104 of 12 February 2007.

Consequently, the texts of art. 205, 206 and 207 of the Criminal Code of 1969 were "*reactivated*" following the decision no. 62/2007 of the Constitutional Court[135]. In fact this is the dominant view[136] in our specialized literature, although some opinions have been expressed to the contrary[137].

Regarding this decision, it was said that its effect could not be subject to subsequent behavior of the legislative body. Therefore, the decision takes effect regardless of the subsequent refusal of the legislator to act[138].

In spite of these grounded arguments, according to the decision no. 8/2010 of the High Court of Cassation and Justice, United Sections, as regards the second appeal on a point of law regarding the decriminalization of the offenses of insult and defamation[139], it was established that art. 205, 206 and 207 of the Criminal Code of 1969 were not applicable.

II. *Conclusions.* In our opinion, the manner in which the texts were drawn up regarding the offenses against the person, except the formulated observations, is consistent with the principles of criminal policy which led to the drafting of a new criminal legislation and with the techniques of drafting the regulations, such regulations formulated ensuring adequate protection of social values aimed under these incriminations and of the relationships which are established and developed around them.

These texts have settled some disputes existing in the specialty literature and in the judicial practice in relation to the previous regulation. Although sometimes the chosen method or solution is not out of the critique, the legislator's merit of 2009 cannot be denied and implicitly, the merit of the commission on drawing up the Draft, as well as the merit of the legislator of 2012 to try to settle as many controversial cases as possible, so that the new criminal legislation might provide an unitary enforcement of the criminal law by the judicial bodies.

For more crimes against the person, the limits of the punishment were reduced, and the principle of availability in terms of initiating the criminal proceedings has been extended.

Traducator: DICU CRISTINA LOREDANA

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[135] Constantin Duvac, *Aspecte generale şi comune (Infracţiuni contra demnităţii)*, in *Tratat de drept penal. Partea specială,* by Gheorghe Diaconescu, Constantin Duvac, C. H. Beck Publishing House, Bucharest, 2009, p. VII, 221.

[136] Sorin Popescu, Cătălin Ciora, *Implicaţii care rezultă ca urmare a declarării neconstituţionalităţii unei dispoziţii având caracter abrogator, în lumina Deciziei nr. 62/2007 a Curţii Constituţionale*, Decision no. 4/2007, p. 49-55; Valerică Dabu, Remus Borza, *Constituţionalitatea abrogării dispoziţiilor care incriminează insulta şi calomnia*, Decision no. 6/2007, p. 188; Ion Imbrescu, *Aplicaţii practice ale efectelor declarării neconstituţionalităţii unor dispoziţii legale prin decizii ale Curţii Constituţionale*, Decision no. 2/2008, p. 149; Florin Streteanu, *Tratat de drept penal. Partea generală,* vol. I, C. H. Beck Publishing House, Bucharest, 2008, p. 308-311; Costică Bulai, Avram Filipaş, Constantin Mitrache, Bogdan N. Bulai, Cristian Mitrache, *Instituţii de drept penal. Curs selectiv pentru examenul de licenţă 2008-2009, cu ultimele modificări ale Codului penal*, Trei Publishing House, Bucharest, 2009, p. 395; Ilie Pascu, Mirela Gorunescu, *op. cit.*, p. 219; Tudorel Toader, *Drept penal. Partea specială*, Hamangiu Publishing House, Bucharest, 2009, p. 219; Vasile Păvăleanu, *Comentarii asupra proiectului unui nou Cod penal, cit. supra*, p. 29-30; Dumitru Rebegea, *Efectele juridice ale Deciziei Curţii Constituţionale nr. 62/2007 asupra răspunderii penale a persoanelor pentru săvârşirea insultei şi calomniei*, Decision no. 11/2009, p. 145-148.

[137] Costel Cristinel Ghigheci, *Dacă sunt sau nu incriminate faptele de insultă sau calomnie. Reflecţii*, RDP no. 1/2010, p. 105-110.

[138] George Antoniu, *the editor's note* to the article *Efectele constatării neconstituţionalităţii unor dispoziţii legale*, worked out by Dorin Ciuncan, Vasile Luncean, published in RDP no. 4/2007, p. 178. For the same purpose: Cornel Liviu Popescu, *Legea penală neconstituţională. Reflecţii*, RDP no. 4/1996, p. 64-65. To the contrary: Costel Cristinel Ghigheci, *op. cit.*, p. 105-110.

[139] Published in the Official Gazette no. 416 of 14 June 2011.