

REFLECTIONS ON THE REGULATION OF THE MULTIPLE OFFENCES ACCORDING TO THE NEW CRIMINAL CODE

Tenured Professor **Constantin Duvac**, PhD^{*)}

Abstract

After highlighting the elements of novelty introduced by the legislator in the Criminal Code of 2009, the author attempts to prove that in real terms, formal concurrence of offences would be an assumption of apparent plurality of offences (real unity of crime), aspect which would require a differentiated criminal treatment (a milder one) as compared to the one established for the real concurrence of offences, considering, in particular, the conditions under which the new criminal legislation makes this institution a cause of mandatory aggravation of the criminality.

Additionally, given the large number of special laws containing criminalisation and criminalities, which leads to more frequent cases of concurrence of criminal rules (texts) in the law-enforcement activity, the author explains the content and the assumptions of concurrence of texts, by advocating for its enshrinement and legal discipline, following the model provided by other modern legislation from abroad.

Key-words: *real plurality of offences; apparent plurality of offences; real concurrence of offences; formal concurrence of offences; real unity of crime; concurrence of legal rules (text)*

Introductory notions. With respect to the definition of the two main forms of the concurrence of offences, the legislator from 2009 took over, somewhat amended, the regulation from art. 33 of the effective criminal law.

One must firstly note that the provisions of art. 32 (Forms of plurality) of the effective criminal legislation, which means that the new Criminal Code was located on a position which explicitly accepts a third form of plurality of offences, namely intermediate plurality, besides the concurrence of offences and the recurrence. The border between the two forms of plurality (the concurrence of offences and the recurrence) is the conviction court order, and one deems that a third form between them (an intermediate one) would not be possible (*tertium non datur*), and also not necessary.

Nonetheless, in the case of the forms of the *plurality of offences*, unlike the effective Criminal code, the new criminal law regulates three forms of the plurality of offences preserved by the criminal doctrine and confirmed by the legal practice, namely: the concurrence, the recurrence and the intermediate plurality of offences.

The real concurrence, in its new regulation, is defined more completely¹⁾, the adding of the expression „*through distinct actions or inactions*”, which is meant

^{*)} Associated researcher at the „Acad. Andrei Rădulescu”, Institute for Legal Research within the Romanian Academy; Faculty of Law and Economic Sciences, AGORA University of Oradea.

¹⁾ Ovidiu Predescu, *Concursul de infracțiuni* (Comment), in *Explicații preliminare ale noului Cod criminal* (Articles 1-52), vol. I, by George Antoniu (coordinator and coauthor), Costică Bulai, Constantin Duvac, Ioan Griga, Gheorghe Ivan, Constantin Mitache, Ioan Molnar, Ilie Pascu, Viorel Pașca, Ovidiu Predescu, Universul Juridic Publishing House, Bucharest, 2010, p. 373.

to better differentiate this type of concurrence from the formal (ideal) one. In this conception, *the real concurrence* is defined as the perpetration by the same person of two or more offences through distinct actions or inactions, before being finally convicted for any of them.

The new Criminal Code maintains, while characterising the real concurrence of offences, emphasises the existence of a real concurrence of offences and the perpetration of a crime so as to commit (*etiological connection*) or hide (*consequential connection*) another crime. Such a note was made so as to eliminate any kind of equivocation from the contents of certain incrimination norms from the special part of this code (for instance, in the contents of the third degree murder, provided under art. 192(2) 2nd thesis, or of the injury by negligence, provided under art. 196(5), or fraud provided under art. 244(2) 2nd thesis.

With respect to the other concurrence method explicitly established by the legislator, one can notice that the new Criminal code adopts the solution of the effective Criminal code, treating the formal concurrence of offences as a real plurality of offences and, also, as an apparent unity. There is *a formal concurrence* in this vision, when an action or inaction committed by a person, due to its circumstances *or* of the consequences it has, contributes to the contents of several offences. One must notice that while defining the formal concurrence, there have been certain amendments, namely the replacement of the conjunction „and” with „or” and the use of the term „contents” instead of „elements” (constitutive), although they have the same meaning.

The use of the conjunction „or” was criticised in the recent doctrine²⁾ because the formal concurrence does not include any distinct methods, while the consequences and circumstances must be taken into account simultaneously in relation to their connections, not alternatively, as one might interpret the contents of the ideal combination based on the new Criminal Code.

Unlike the position of a certain part of the modern doctrine, and the provisions of the Criminal Code adopted through Law no. 301/2004 (currently abolished), Law no. 286/2009 no longer provides a differentiated treatment for the two forms of concurrence, so that the importance of the distinction between the real and the formal concurrence was significantly reduced. Therefore the new Criminal Code provided the *same legal treatment* both for the real concurrence, as well as for the formal concurrence of offences, preserving the conception promoted by Professor Vintilă Dongoroz while drafting the Criminal Code from 1968.

Basically, under this aspect, the new criminal legislation has maintained the same mechanism of establishing the punishment in case of a concurrence of offences, but it has introduced certain amendments in relation to the aggravation which can be applied by the judge in such a situation, and with the maximum limit of the punishment applied for a concurrence of offences.

²⁾ Ovidiu Predescu, *Concursul de infracțiuni* (Comment), *cit. supra*, p. 374.

With regard to the main punishment, in the case of a concurrence of offences, one has chosen the absorption system if for one of the concurrent offences, one has applied the life sentence penalty, while for the arithmetic sum, if for the concurrence offences one has given an imprisonment fine, and the other a fine.

If one has established only imprisonment punishes or only fine ones, the cumulative sentencing is to act, the same as in the case of the effective Criminal Code, except for the fact that the heaviest punishment is to be *mandatorily* added to an increase by a third of the total established punishments.

One can notice a *harsher criminal treatment*, but also a more realistic one, *of the concurrence of crimes* as compared to the one established by the effective Criminal Code. The amendment can be justified if taking into account the existing statistics, which proved beyond doubt that, in the overwhelming majority of the cases, the courts do not proceed to the adding of the increase, so that in fact the cumulative sentencing system with an optional increase has functioned in fact as a true accumulation through absorption³⁾.

And not last, the sanctioning of the concurrence now includes an exception provision – art. 39(2) – which allows, in the case of the perpetration of several aggravated deeds, the court to apply the life sentence punishment, even if it is not foreseen for any of the concurrent offences.

1. Moreover, one will try to prove that in the case of the formal concurrence of offences, due to its legal nature, namely of form of the apparent plurality of offences, one should have applied a differentiated legal treatment (a milder one) as compared to the real concurrence of offences, according to the tradition established through the Criminal Code from 1936, and to the pattern of the modern criminal legislation.

Also, one is to make some comments with respect to the difference between it and the concurrence of criminal or texts norms, and to the necessity of a legislative establishment of this institution of criminal law.

2. *The formal (ideal) concurrence of offences* exists, according to art. 38(b), when an action or an inaction, perpetrated by the same person, due to the *circumstances* in which it occurred *or of the consequences* it had, represents the contents of several offences (committed, attempted or even as preparatory acts, on condition that the law also punishes these imperfect forms).

The ideal concurrence can be *homogenous*, when it infringes the same legal provisions several times through a single action (for instance, through a single action one damages several people), or *heterogeneous*, when one infringes different legal provisions (for instance, when the father rapes the daughter).

Subjectively, all the offences in ideal concurrence can be committed with direct intention (for instance, when one drives on public roads an unregistered vehicle or a vehicle with a false registration number). Some are based on direct intentions, while others on indirect intentions or by negligence or all of the offences are by negligence.

³⁾ *Ibidem*, p. 374.

The actual *unique action* or *inaction*, which characterises the formal concurrence of offences is, of course, not to be mistaken neither for the offence, which is an ensemble of objective and subjective elements, nor for its objective side, which, besides the action and the inaction, also implies an immediate consequence, as well as a causality connection between the perpetrated deed and this result⁴⁾.

The existence of an unique activity has even determined some of the authors to claim⁵⁾ that in the case of the ideal concurrence there is no plurality of offences, but a unity of offence. In this situation, only *ideologically*, one could imagine a plurality of deeds, and only in this *formal* way (namely through the relation with the law norms) could one speak of a plurality of offences, but in fact, the deed is *unique*. Therefore, since this is concerned with a unity of action and a plurality of infringed

⁴⁾ George Antoniu, Vasile Papadopol, Mihai Popovici, Bogdan Ștefănescu, *Îndrumările date de plenul Tribunalului Suprem și noua legislație criminală*, Guidance Decisions from the years 1952-1968, the Scientific Publishing House, Bucharest, 1971, p. 29. For the same purpose: Shneur-Zalman Feller, *Unele considerații cu privire la concursul de infracțiuni*, in *Justiția nouă*, no. 6, 1956, p. 939. Feller uses the term *material act*, which he thinks is synonymous with the one of action or inaction, and it ascertains that the actual material act of the offence perpetration must not necessarily be simple, undividable in component material acts. It is essential for one to present that unit of action or inaction, without which the result could not have occurred.

⁵⁾ Ion Tanoviceanu, *Curs de drept penal*, vol. I, Atelierele Grafice „Socec & Co”, Societatea Anonimă, Bucharest, 1912, p. 676. For the same purpose: Cas. II no. 971/1914, *Curierul Judiciar*, no. 12/1915, p. 97; Nicolae T. Buzea, *Principii de drept penal. Infracțiunea criminală*, vol. I, Institutul de Arte Grafice „Albina Românească”, Iași, 1937, p. 511; C.Ap. Brașov, S. a II-a pen., dec. no. 360/1940, in *Pandectele române*, 1941, 3rd part, p. 134; George Antoniu, *Reflecții asupra pluralității de infracțiuni*, in *Revista de drept penal* no. 4/1999, p. 11; George Antoniu, *Reforma criminală și unele aspecte critice ale legislației criminale în vigoare (Examen critic al unor dispoziții din Codul criminal. Partea generală)* in „Reforma legislației criminale” by George Antoniu (coordinator and author), Emilian Dobrescu, Tiberiu Dianu, Gheorghe Stroe, Tudor Avrigeanu, the Publishing House of the Romanian Academy, Bucharest 2003, pp. 124-125; Constantin Duvac, *Concursul ideal (formal) de infracțiuni, pluralitate aparentă sau reală de infracțiuni?*, in *Dreptul* no. 2, 2009, p. 134.

In the foreign literature, the ideal accumulation is regarded as an offence unit by: Franz von Liszt, *Traité de droit pénal allemand. Introduction – Partie générale*, tome premier, traduit sur la 17^e édition allemande (1908) par M. Rene Lobstein, V. Giard & E. Briere, Paris, 1911, p. 356 a.s.o.; Friedrich Wachenfeld, *Lehrbuch des deutschen Strafrechts*, München, 1914, par. 103; Roger Garraud, *Traité théorique et pratique du droit pénal français*, vol. III, Paris, 1916, p. 193; J. A. Roux, *Cours de droit pénal et de procédure pénale*, Paris, 1920, p. 92; N. F. Iașinova, *O naznaceniei nakazania pri sovokupnosti pestuplenii po sovetскому ugovnomu pravu*, „Ucenie zapinski”, Harskowskovo iuridiceskovo instituta, no. 6, 1955, pp. 16-17; H. Sandor, A. Iatszologos halmazatral (with respect to the formal concurrence of offences), in „Magyar Jog” no. 8/1966, pp. 337-249. Certain authors intend to examine these situations so as to see if, by regarding it from the perspective of the material, legal and moral elements, it can still lead to the idea of a plurality of criminal offences. See, Pol. Delestrée, *Cumul et non cumul des infractions confusion et réductions des peines*, Paris, 1960, p. 37 apud Maria Zolyneak, *Drept penal. Partea generală*, vol. II, the Publishing House of the Chemarea Foundation, Iași, 1993, p. 492; Pierre Bouzat, Jean Pinatel, *Traité de droit criminel et de criminologie*, tome I, 2^e édition, Paris, 1970, p. 725 a.s.o.; Gaston Stefani, Georges Lévassieur, Bernard Bouloc, *Droit pénal général*, 12^e édition, Paris, 1984, p. 577 a.s.o.; Roger Merle, André Vitu, *Traité de droit criminel*, tome I, 5^e, Paris, 1984, p. 945.

provisions, one is to preserve, for sanctioning purposes, the provision which foresees the harshest punishment, also applying the *non bis in idem*⁶⁾ principle.

Also, one claimed that a deed can only produce one single offence, not more. If an action produces several results, the deed is still singular; therefore there is only one offence. Garraud believes that in the case of the ideal concurrence there is, in fact, a single offence. „The concurrence of offences is merely *apparent*. It is more likely a *concurrence of qualifications*”. J. A. Roux believed that „the so-called ideal concurrence of offences” is an offence unit, and that its legal category and criminal treatment is to be solved based on the rules governing the concurrence of texts. The judge must choose between them, and they will prefer, as the case may be: the special provision to the general one, the newer provision to the older one, the harsher provision to the milder one.

According to Ioan I. Tanoviceanu, a true plurality of offences can be ascertained only in the case of real concurrence, since the ideal concurrence is nothing more than a criminal unit generating belonging to plurality. For this purpose, the author claimed that „there is no accumulation of offences with respect to what the criminologists call ideal or intellectual concurrence of offences”⁷⁾. Therefore, the regulation from art. 40 of the Criminal Code from 1864⁸⁾ (a provision which has been taken over, in similar terms, by art. 365 from the French Criminal Code and art. 74 from the German Criminal Code, which was effective at that time) included, as a consequence, in the opinion of Professor Tanoviceanu, only the real concurrence of offences, not the ideal (formal)⁹⁾ one.

⁶⁾ Ion Tanoviceanu, *op. cit.*, vol. I, 1912, p. 676.

⁷⁾ *Ibidem*, p. 676.

⁸⁾ Art. 40 – „If the defendant is prosecuted for several offences or crimes, the harshest punishment is to be applied, if said offences or crimes will be of different types, or punished in a different way; and if they are of the same nature, and punished in the same way, the court is to establish the maximum punishment”.

⁹⁾ For the same purpose: Cas. II, no. 690/1873 *quoted* by George N. Fratostiteanu, *Codicele criminal*, The Leon Alcalay Bookshop Publishing House, Bucharest, 1895, p. 46. In fact, one has maintained a single simple bankruptcy offence perpetrated in several circumstances, without applying Art. 40 Criminal code because it has been the same deed (morally); Alexandru Oprescu, *Necesitatea revizuirii codicelui criminal și principalele modificări ce se impun*, in *Dreptul*, no. 55/1905, p. 453. In the author’s opinion, it is obvious that one can only apply one punishment, not two, to a unique fact which is the result of a single criminal resolution, or of a single mistake. But this plurality of offences, within one and the same deed, must not be indifferent. It reveals, in the case of the agent, a higher guilt that a deed which is a unique offence. A legislation which would see the ideal concurrence of offences as a *legal aggravating circumstance* would deserve to be praised. The law applies this principle in a particular case provided under art. 363 Criminal Code from 1864, „if the fire has caused the death of a person from the incendiated place”; Eugen C. Decusară, *Teoria cumulului ideal de infracțiuni*, in *Cercul juridic*, 1st year, no. 1/1915, pp. 19-42; Paul I. Pastion, Mihail I. Papadopolu, *Codul criminal adnotat*, Socec & Comp. Bookshop Publishing House, Anonymous Society, Bucharest, 1922, p. 72. The two authors claimed that, in our country, the law does not mention the ideal accumulation of offences and the jurisprudence in such cases, and that the offence has sometimes been deemed as continuous, while other times as successive, while the doctrine (M. Ciocărdia, Al. Dem. Oprescu, I. Tanoviceanu, E. C.

According to Nicolae Buzea¹⁰⁾, there is no such thing as concurrence of offences, but a concurrence of qualifications of the same deed, and thus it is said to form a formal accumulation, which can be called *texts accumulation* or *concurrence of criminal texts* or *concurrence of incriminations*, because the texts of law, incrimination texts are concurrent, not the material deeds which remain, as they really are, unique, independent deeds¹¹⁾.

The author's error is not difficult to notice. The unique action of the subject is assimilated to the unique crime, although the ideal concurrence implies a unique action, which has generated a plurality of results, each of them having the features of distinct offences. Therefore, the ideal concurrence cannot be similar to the concurrence of texts or norms, since the latter implies not only a single action, but also a unique result susceptible of being legally included into the category of multiple texts of the criminal law. In the case of the texts concurrence, unlike the ideal one, the perpetrated offence covers only the contents of a single norm, while the others are not incidental¹²⁾.

Following the same line of thought, Maria Zolyneak initially deemed that the name of ideal concurrence does not reflect its actual contents, as its true meaning accredits the idea of an *appearance* of offence plurality. In fact, it represents an offence unit, and for this reason this name was deemed as improper, and it has been assigned with a merely conventional nature¹³⁾.

Decusară, in Revista penitenciară no. 7 and 8/1920) saw, yet very little, to the ideal accumulation of crimes; Traian Pop, *Comentare*, in „Codul criminal Carol al II-lea, adnotat” by Constantin G. Rătescu, H. Aznavorian, Ion Ionescu-Dolj, Traian Pop, I. Grigore Periețeanu, Mihail Papadopolu, Vintilă Dongoroz, Nicolae Pavelescu, vol. I, Socec & Co. Bookshop Publishing House, Bucharest, 1937, p. 247; Eugen Petit, Constantin Gr. Zota, *Codul criminal „Carol al II-lea” adnotat*, The „Universul” Newspaper Publishing House, Bucharest, 1939, p. 118.

Otherwise: Traian Pop, *Drept penal comparat. Partea generală*, vol. II, The „Ardealul” Institute of Graphic Arts, Cluj, 1923, p. 633, 642; Mihail I. Papadopolu, *Codul criminal adnotat*, S. Ciornei National Publishing House, Bucharest, 1930, p. 27.

¹⁰⁾ Nicolae T. Buzea, *Infracțiunea criminală și culpabilitatea*, The Sabin Solomon typography, Alba Iulia, 1944, pp. 694-695. There is a formal concurrence of offences when, through a single action – not an activity – one concomitantly and necessarily infringes several provisions of the law, without these infringements being expressly merged into an exclusive legal qualification, as it is the case of the complex crimes.

¹¹⁾ Nicolae T. Buzea, *Principii de drept penal. Infracțiunea criminală*, *cit. supra*, p. 513.

Such a confusion between the ideal concurrence of offences, and the concurrence of criminal norms also existed in the case of certain foreign criminologists of the time: Roger Garraud, *op. cit.*, pp. 180-181; Franz von Liszt, *op. cit.*, p. 356; J. A. Roux, *Cours de droit pénal et de procédure pénale*, Sirey, Paris, 1920, p. 92; H. Donnedieu de Vabres, *Traité élémentaire de droit criminel et de législation pénale comparée*, Paris, 1947, p. 484; Gaston Stefani, Georges Levasseur, *op. cit.*, p. 359; Roger Merle, André Vitu, *op. cit.*, p. 270.

¹²⁾ Constantin Duvac, *Concursul ideal (formal) de infracțiuni, pluralitate aparentă sau reală de infracțiuni?*, *cit. supra*, p. 127.

¹³⁾ Maria Zolyneak, *Considerații asupra raportului juridic criminal în cazul concursului de infracțiuni*, in the Annals of the „Al. I. Cuza” University, Iași, 1971, p. 89.

According to other authors¹⁴⁾, the ideal concurrence would be a plurality, as there is *one action* and *several results*, or *the infringement of several laws*, and unity, as there is *one single act*. Thus, the ideal concurrence with respect to one matter would be a plurality, while with respect to another, it would be a unity. *Formally*, or actually *fictitiously*, this would be a *plurality*, while *materially*, a *unity*. In other words, in the case of an ideal concurrence (formal), there is no unity or plurality, but *an intermediate criminal form between unity and plurality*. There are also authors stating that the only distinctive criteria between the ideal concurrence and the real one is the *unity of the act*, deemed as natural, not as a legal establishing act. In this sense¹⁵⁾, the ideal concurrence of offences has its own well-defined legal individuality, which separates it from the real concurrence, and which determines a special criminal treatment.

There was a time when Professor Ion Oancea expressed a similar idea, which deemed the ideal concurrence of offences as a distinct legal category, and he said that „from many points of view, it is an artificial legal construction”¹⁶⁾.

Lastly, other authors¹⁷⁾ believed that what is generally called an ideal concurrence of offences is really a *real plurality of offences*, not a formal one. Based on such an opinion, several results can be inevitably generated only through several actions; one cannot imagine more results and a single action. In

¹⁴⁾ Merkel, Van Calker, Haus, Vidal, Prins, Werner, Fayer *citați* de Traian Pop, *Drept penal comparat. Partea generală*, *cit. supra.*, p. 625. *For the same purpose*: Nicolae T. Buzea, *Infrațiunea criminală și culpabilitatea*, *cit. supra.*, p. 694.

¹⁵⁾ A. Prins, *Science pénale et droit positif*, Bruxelles, 1899, pp. 317-318; Georges Vidal, Joseph Magnol, *Cours de droit criminel et de science pénitentiaire*, Paris, 1935, p. 381 și urm.; Nicolae T. Buzea, *Infrațiunea criminală și culpabilitatea*, *cit. supra.*, p. 694 a.s.o. H. Donnedieu de Vabres, *op. cit.*, p. 185; Pierre Bouzat, Jean Pinatel, *Traité de droit pénal et de criminologie*, vol. I, Paris, 1963, p. 598 a.s.o.; A. Marchal, J. P. Jaspard, *Droit criminel*, 2nd edition, vol. I, Bruxelles, 1965, pp. 132-133.

¹⁶⁾ Ion Oancea, *Drept penal. Partea generală*, The Didactical and Pedagogical Publishing House, Bucharest, 1965, p. 226. Subsequently, the author renounces to this idea, which he no longer reproduces in the course from 1971, or in the treaty from 1994 (Ion Oancea, *Drept penal. Partea generală*, The Didactical and Pedagogical Publishing House, Bucharest, 1971, pp. 231-236, 243-244; Ion Oancea, *Tratat de drept penal. Partea generală*, All Publishing House, Bucharest, 1994, pp. 147-150, 155-156).

¹⁷⁾ Kostlin, *System des Strafrechts*, Tuningen, 1855, p. 559; Habrmaas, *Die ideale Konkurrenz der Delikte*, Stuttgart, 1882; G. B. Impallomeni, *Concurrenza reale e formale dei reati*, Catania, 1884, p. 200; Karl Binding, *Handbuch des Strafrechts*, Leipzig, 1885, p. 349; Halschner, *Das gemeine dut. Strafrechts*, vol. I, Bonn, 1887, p. 268; Klein, Feuerbach, Fraudenthal, *citați* de Frantz von Liszt, *op. cit.*, p. 356; John, Schnierer, Baumgarten, Finkey, Vambery, Angyal, *citați* de Traian Pop, *Drept penal comparat. Partea generală*, vol. II, *cit. supra.*, pp. 627-628; Ad. Braas, *Précis de droit pénal*, 3rd edition, Bruxelles, 1946, p. 288 a.s.o.; Francesco Allimena, *Diritto criminale*, vol. I, Neapole, 1910, p. 420; Jean Constant, *Manuel de droit pénal. Principes généraux de droit pénal positif belge*, 1959, p. 335 a.s.o.; Mayer, *Questions de cumul*; Grav, *Das kommende deutsche Strafecht*, p. 147; Freisler, *Grundzüge eines allgemeinen deutschen Strafrechts*, p. 135, *quoted* by Roger Merle, André Vitu, *op. cit.*, p. 270; A. M. Iakovlev, *Sovokupnosti prestuplenii po soveskomu ngolovnomu pravu*, Moskva, 1960 *apud* Maria Zolyneak, *Drept penal. Partea generală*, *cit. supra.*, p. 492.

this case there is a real concurrence of offences, namely more results and more actions. Therefore, the notion of ideal concurrence is not necessary, since all the cases belong to the real concurrence, a sufficient notion for all the sides of the plurality of offences.

Professor Vintilă Dongoroz¹⁸⁾ believed that one would need to eliminate the theory of the ideal concurrence and to recognize a *real plurality* in this case. If, in theory, one can separate the ideal accumulation from the real one, it has no influence on the punishment because, according to the effective regulation, both the ideal accumulation, as well as the real one always receive the harshest punishment, in the first case, and the offence is prosecuted based on the most serious qualification, while in the second case one is to apply the principle of absorption provided under Art. 40 of the Criminal Code from 1864.

The same idea, but with different arguments, is also present in the case of Traian Pop¹⁹⁾, who claimed that the infringement of several criminal laws through a single act, therefore the ideal concurrence, was a true, *real plurality*, the same as the real concurrence. The author also deemed that one does not need the notion of ideal concurrence, because it is not an essential distinctive form of the plurality of crimes, but it is identical to the real concurrence of offences.

¹⁸⁾ Vintilă Dongoroz, in Ion Tanoviceanu, *Tratat de drept și procedură criminală*, the second edition, revised and completed by Vintilă Dongoroz (doctrine), Corneliu Chiseliță, Ștefan Laday (references to the legislations from Bucovina and Ardeal), Eugen Decusară (jurisprudence), „Curierul Judiciar” Typography, Bucharest, 1925, p. 281, 285, 290 și 342. For the same purpose: Traian Pop, *Drept penal comparat. Partea generală*, cit. supra., p. 628; Traian Pop, *Comentare*, cit. supra., p. 249; Vintilă Dongoroz, *Drept penal*, Bucharest, 1939, pp. 332-333; Grigore Răpeanu, *Câteva observații pe marginea unor hotărâri judecătorești în legătură cu pluralitatea și unitatea de infracțiuni*, in *Legalitatea populară*, no. 1/1956, p. 25 a.s.o.; Ludovic Biro, in *Curs de drept penal al R.P.R. Partea generală* de Ludovic Biro, Matei Basarab, The Didactical and Pedagogical Publishing House, Bucharest, 1963, p. 248; Berthold Braunstein, *Cu privire la tratamentul juridic al concursului de infracțiuni*, in the Annals of the „Alexandru Ioan Cuza” University, Iași, 1967, p. 175 a.s.o.; Vasile Papadopol, *Efectele amnistiei și grațierii asupra pedepsei aplicate în caz de concurs ideal de infracțiuni*, in *Revista română de drept* no. 2/1968, pp. 110-111; Maria Zolyneak, *Considerații asupra concursului formal de infracțiuni în lumina noului Cod criminal*, in the Annals of the „Alexandru Ioan Cuza” University, Iași, 1969, p. 115 a.s.o.; Costică Bulai, *Manual de drept penal. Partea generală*, All Publishing House, Bucharest, 1997, p. 495; Costică Bulai, Bogdan N. Bulai, *Manual de drept penal. Partea generală*, Universul Juridic Publishing House, Bucharest, 2007, p. 525.

¹⁹⁾ Traian Pop, *Drept penal comparat. Partea generală*, cit. supra., p. 629 a.s.o. For this purpose, the author quotes: Kohler, Bar, Allfeld, Olshausen, Binding. For the same purpose: Traian Pop, *Comentare*, cit. supra., p. 249. The same idea is also present with Ludovic Biro, *op. cit.*, p. 250; Shneur-Zalman Feller, *op. cit.*, p. 939. The author underlines the fact the analysis related to the distinction between the real concurrence of offences and the ideal one was conducted only because the effective legislation (the Criminal Code of Carol II) provides a differentiated legal regime for the two concurrences, not because of the quality differences, while the differentiated legal regime would be justified.

For the same purpose, Maria Zolyneak²⁰⁾, calling back on her opinion from 1971, claimed that, in the case of the formal concurrence of offences, the plurality of offences is equally real, the same as in the case of the real concurrence, and it has proposed the elimination of the name of ideal concurrence, since it does not properly send to a *rea* plurality.

The idea of a real, not apparent, plurality of offences, in the case of the ideal concurrence (apparent unity²¹⁾) has been justified by Vintilă Dongoroz²²⁾ through the fact that the unique action or inaction contains, *compressed* within it, the

²⁰⁾ Maria Zolyneak, *Considerații asupra concursului formal de infracțiuni...*, *cit. supra.*, p. 113, 115, 119. The author writes, starting from the fact that there are no essential differences between the two categories of the concurrence, which represent true forms of real plurality, and that before the adopting of the Criminal Code from 1968 (Berthold Braunstein, *op. cit.*, p. 176; Vasile Papadopol, *op. cit.*, pp. 154-155) some has made proposal of *de lege ferenda* for the unification of their legal treatment.

²¹⁾ There is an *apparent unit* of offences, according to Professor Dongoroz, when there are several infringements of the law, which seem to be due to a unique physical activity, perpetrated with a single crime resolution. This apparent unit is known under the name of *ideal concurrence*. *The ideal or formal concurrence* of offences exists when it seems that a single material activity, perpetrated with a single criminal resolution, produced two or more consequences, which have either infringed more criminal law provisions, or the same provision several times.

²²⁾ Vintilă Dongoroz, *Drept penal* (Trearta), the re-publishing of the edition from 1939, The Romanian Association for Criminal Sciences, Bucharest, 2000, p. 268. The origin of this idea relies in Vintilă Dongoroz's comment to the Treaty of Professor Ion Tanoviceanu (Vintilă Dongoroz, *cit. supra.*, vol. II, 1925, pp. 287-288). On this occasion, the author claimed that several illicit deed can be perpetrated also through a *compressed* execution, the same as a unique document (convention) can include (*compress*) several conventions (for instance, a sale, a loan and a lease. For the same purpose: Grigore Râpeanu, *op. cit.*, pp. 28-29; Ludovic Biro, *op. cit.*, p. 248; Ion Oancea, *Drept penal. Partea generală*, *cit. supra.*, p. 226. The author, although he recognizes in the structure of the formal concurrence the existence of a real plurality of offences, taking into account the specificity of the formal concurrence, claims that „from a technical-legislative perspective, this situation can be solved also by creating a unique offence, as a qualified offence, namely every time an action or an inaction causes, besides the first result, a second one, the deed becomes a qualified offence, for which a harsher punishment is applied”. By proposing this legal solving of the ideal concurrence, the author shows that „this would put an end to the discussion regarding the existence of the formal concurrence, which from several points of view is an artificial legal construction”. Berthold Braunstein, *op. cit.*, p. 176; Virgil Rămureanu, *Concursul de infracțiuni în reglementarea noului Cod criminal*, in *Revista română de drept* no. 9/1968, p. 21-22; Virgil Rămureanu, *Concursul de infracțiuni (comentariu)*, in „Codul criminal comentat și adnotat. Partea generală” by Teodor Vasiliu, George Antoniu, Ștefan Daneș, Gheorghe Dărăngă, Dumitru Lucinescu, Vasile Papadopol, Doru Pavel, Dumitru Popescu, Virgil Rămureanu, The Scientific Publishing House, Bucharest, 1972, p. 226; Costică Bulai, *Drept penal. Partea generală. Infracțiunea*, vol. II, Bucharest, 1981, p. 167; Costică Bulai, *op. cit.*, 1997, p. 494; Costică Bulai, Bogdan N. Bulai, *op. cit.*, 2007, p. 525. The authors deem that the notions of real concurrence and ideal concurrence are improper, but that they are used because they have entered into the current legal vocabulary; Rodica Mihaela Stănoiu, Ioan Griga, Tiberiu Dianu, *Drept penal. Partea generală* (note de curs), Hyperion XXI Publishing House, Bucharest, 1992, pp. 111-112.

Although he shows that from this point of view it does not avoid criticism, Narcis Giurgiu does not make any statements with respect to these critiques (Narcis Giurgiu, *Legea criminală și infracțiunea*, Gama Publishing House, Iași, 1994, p. 305; Narcis Giurgiu, *Drept penal general, doctrină, legislație, jurisprudență*, 2nd edition revised and completed, Cantes Publishing House, Iași, 2000, p. 333).

objective and subjective elements of several crimes. Therefore, in a unique activity, one can compress the elements of several offences, the same as a single deed can compress several conventions. In both cases the plurality is real, not ideal. From the point of view of the legal treatment, the criminal law can provide a special regime for this plurality, but this does not mean that there is no plurality. Therefore, the ideal concurrence is a mere *compressed* plurality of interactions as opposed to the real concurrence from which plurality is *dissociated*. Thus, Vintilă Dongoroz believes that, in the case of an *ideal concurrence*, there is a *real plurality* behind the *apparent unit*.

This thesis has been stated by Professor Dongoroz as an explicit critique of the provisions of art. 103 of the Criminal Code from 1937, according to which the formal accumulated was a fictitious interaction plurality, while the perpetrator is to be connected only to the crime, for which the harshest punishment is to be provided.

To support this opinion, Vasile Papadopol showed²³⁾ that the material deed, namely the action or inaction actually committed by the subject; its unit characterises the ideal concurrence of offences, it cannot be mistaken neither for the offence, which is a complex of objective and subjective elements, which besides the material act, implies a socially dangerous result and a causality connection between the perpetrated deed and the occurred consequences. Isolated from the actual conditions in which it has been perpetrated, from the damaging result it caused and from the subjective position of the perpetrator in relation to it, the material act does not lack criminal relevance. It acquires such relevance by becoming the element of an offence, only if it is related to the other constitutive features of its objective side, and also to the mental attitude of the perpetrator in relation to the consequences caused by its perpetration. But, through its union with the various circumstances in which it has been perpetrated, with the subjective elements accompanying the perpetration of the deed, the actual material deed, although unique, it can become a part – as a sort of common factor – of several distinct offences, with a contents and a special legal categorisation. For instance: A wants B's clothes which, at night, in winter, lies drunk on the street. A undresses B, and takes their clothes. B dies frozen. In this example, A committed one material activity: they took B's clothes, by undressing them. But this unique, material act, if united to a series of circumstances (the clothes were in B's possession, and they have been taken from them without approval), with one of the generated results (B's dispossession), and with A's subjective position to this result (direct intention), it becomes a component of the contents of an offence, namely theft. Also, it is united with other circumstances (the deed was perpetrated during winter, it was cold outside, and B was left to lie in the snow, drunk, fully naked), with the other result (B's death, who froze), and with the subjective

²³⁾ Vasile Papadopol, *Note* to the penal case no. 2522/1964 of the Court of Law from Cluj, in *Justiția nouă* no. 7/1965, pp. 152-153.

position of the perpetrator to this result (direct intention), becomes part of the contents of another offence, namely murder. In this example, due to the context that some of the essential circumstances in which the material act was perpetrated, as well as one of the generated results, characterises a certain offence, while other essential circumstances and the other result characterises another offence, the same material act – as it is associated to one of the categories of circumstances and results, including the mental position, appropriate – it presents the legal configuration of some special offences, with a contents and an autonomous legal categorisation. These crimes have their *own materiality and individuality*, which the circumstances created by the perpetration of a unique material act cannot affect. These discoveries are valid for all the cases of ideal concurrence of offences. In such conditions, for the shown considerations, the ideal concurrence appears as a *plurality* of offences, not formal or ideal, as much *material* and *real* as the ones forming the real concurrence²⁴⁾.

The effective Romanian criminal law, under the influence of the ideas expressed by Professor Dongoroz, established the ideal concurrence as a real plurality of offences, a solution which subsequently adhered to the entire doctrine²⁵⁾ and

²⁴⁾ Vasile Papadopol, *Efectele amnistiei și grațierii asupra pedepsei aplicate în caz de concurs ideal de infracțiuni*, cit. supra, p. 111.

²⁵⁾ Grigore Râpeanu, *op. cit.*, in *Legalitatea populară* no. 1, 1956, pp. 28-29; Ion Pohonțu, *Infracțiunea continuă și infracțiunea continuată*, PhD thesis, defended at the Faculty of Law from the University of Bucharest, under the coordination of Professor Grigore Râpeanu, PhD, Bucharest, 1967, p. 18. According to the same author, the ideal concurrence is, from the formal perspective, a plurality and, from the material perspective, a unity. But the unity is apparent. In the case of the ideal concurrence, although the deed is unique, but since several texts of the criminal law have been infringed, one will have to deal with a plurality of offences. Virgil Rămureanu, *op. cit.*, in *Revista română de drept* no. 9, 1968, p. 21; Maria Zolyneak, *op. cit.*, *The Scientific Annals of the „Al. I. Cuza” University, Iași*, 1969, p. 113; Iosif Fodor, in Vintilă Dongoroz, Iosif Fodor, Siegfried Kahane, Nicoleta Iliescu, Ion Oancea, Constantin Bulai, Rodica-Mihaela Stănoiu, *Explicații teoretice ale Codului criminal român*, vol. I, The Academy Publishing House, Bucharest, 1969, p. 266; George Antoniu, Vasile Papadopol, Mihai Popovici, Bogdan Ștefănescu, *op. cit.*, 1971, p. 29; Ion Oancea, *op. cit.*, 1971, p. 233; Maria Zolyneak, *note to dec. no. 1097/1971 of the Supreme Court, Penal Department*, in *Revista română de drept* no. 5, 1972, p. 141; Maria Zolyneak, *Concursul ideal de infracțiuni*, in *Revista română de drept* no. 5, 1972, p. 143; Maria Zolyneak, *op. cit.*, vol. II, 1993, p. 494, 496 and 497; Ion Oancea, *op. cit.*, 1994, p. 156; Lidia Barac, *Drept penal. Partea generală*, vol. I, „Eftimie Murgu” University, Reșița, 1994, p. 137; Augustin Ungureanu, *Drept penal român. Partea generală*, Lumina Lex Publishing House, Bucharest, 1995, pp. 168-174; Costică Bulai, *op. cit.*, 1997, p. 494; Constantin Mitrache, *Drept penal român, parte generală*, 4th edition, Șansa SRL Publishing House, Bucharest, 1997, p. 217; Matei Basarab, *Drept penal. Partea generală*, vol. II, Lumina Lex Publishing House, Bucharest, 1997, p. 6, 13; Ilie Pascu, in Vasile Dobrinou, Gheorghe Nistoreanu, Ilie Pascu, Alexandru Boroi, Ioan Molnar, Valerică Lazăr, *Drept penal. Partea generală*, 4th edition, revised and completed with the provisions of Law no. 140/1996 for the amendment and completion of the Criminal Code Europa Nova Publishing House, Bucharest, 1997, pp. 264-265; Florin Streteanu, *Concursul de infracțiuni* (PhD thesis defended in 1998 at the Faculty of Law of the „Babeș-Bolyai” University from Cluj Napoca under the coordination of Professor Matei Basarab, PhD), Lumina Lex, 1999, p. 130 a.s.o.; Narcis Giurgiu, *Drept penal general, doctrină, legislație, jurisprudență*, 2nd edition revised and completed, Cantes Publishing House, Iași,

jurisprudence²⁶⁾, while, as one will show that the *Criminal Code* adopted through Law no. 301/2004 adopted the contrary solution, the ideal concurrence as an apparent plurality of offences (offence unity). Therefore, the characterisation of the ideal concurrence of offences depends on the legislator's option, since in this case there is no generally valid solution.

Nonetheless, Professor's Dongoroz thesis, that there is a real plurality (*compressed*) of offences in the case of the ideal concurrence, remained isolated, and most of the Romanian authors deemed that the perpetrator actually commits only one action or inaction²⁷⁾, which means that it would be more suitable to

2000, p. 332-333; Iancu Tănăsescu, Gabriel Tănăsescu, Camil Tănăsescu, *Tratat de drept penal*, Sitech Publishing House, Craiova, 2000, p. 301-303; Alexandru Boroi, *Drept penal. Partea generală*, 2nd edition, All Beck Publishing House, Bucharest, 2000, p. 167; Ovidiu Predescu, *Dreptul criminal al afacerilor*, Continent XXI Publishing House, Bucharest, 2000, p. 72, 75-76; Gheorghe Nistoreanu, Alexandru Boroi, *Drept penal. Partea generală*, All Beck Publishing House, Bucharest, 2002, p. 152; Viorel Pașca, în Viorel Pașca, Ramiro Mancaș, *Drept penal, parte generală*, Universitas Timisiensis Publishing House, Timișoara, 2002, p. 315; Alexandru Boroi, Gheorghe Nistoreanu, *Drept penal. Partea generală*, 4th edition, revised according to the new Criminal Code, All Beck Publishing House, Bucharest, 2004, p. 239; Traian Dima, *Drept penal. Partea generală. Infraacțiunea*, vol. I, Lumina Lex Publishing House, Bucharest, 2004, p. 348 a.s.o.; Matei Basarab, *Drept penal. Partea generală (Tratat)*, vol. II, 2005, p. 3, 9; Alexandru Boroi, *Drept penal. Partea generală*, C.H. Beck Publishing House, Bucharest, 2006, pp. 180-181; Constantin Mitrache, in Costică Bulai, Avram Filipaș, Constantin Mitrache, *Instituții de drept penal*, Selective course for the faculty graduation exam, 3rd edition revised and completed, Trei Publishing House, Bucharest, 2006, pp. 123-129; Costică Bulai, Bogdan N. Bulai, *op. cit.*, 2007, p. 525; Constantin Mitrache, Cristian Mitrache, *Drept penal român. Partea generală*, 4th edition revised and completed, Universul Juridic Publishing House, Bucharest, 2007, pp. 274-275; Traian Dima, *Drept penal. Partea generală*, 2nd edition revised and completed, Hamangiu Publishing House, 2007, p. 273 a.s.o.; Gheorghe Alecu, *Drept penal. Partea generală*, university course, 2nd edition revised and completed, Europolis Publishing House, Constanța, 2007, pp. 318-319; Emil Derșidan, *Codul criminal, comentat și adnotat*, Proteus Publishing House, Bucharest, 2008, p. 58.

²⁶⁾ Supreme Court, Penal Department, dec. no. 315/1974, in Vasile Papadopol, Mihai Popovici, *Repertoriu alfabetic de practică judiciară în materie criminală pe anii 1969-1975*, Scientific and Encyclopedical Publishing House, 1977, p. 219; Supreme Court, Penal Department, dec. no. 1475/1979, in *Revista română de drept* no. 3, 1980, p. 74; Supreme Court, Penal Department, dec. no. 2463/1982, in Vasile Papadopol, Ștefan Daneș, *Repertoriu alfabetic de practică judiciară în materie criminală pe anii 1981-1985*, Bucharest, Scientific and Encyclopedical Publishing House, 1988, p. 278; Supreme Court, Penal Department, dec. no. 1101/1986, in *Revista română de drept* no. 2, 1987, p. 73; Emil Derșidan, *Codul criminal, comentat și adnotat*, Proteus Publishing House, Bucharest, 2008, p. 58.

²⁷⁾ Traian Pop, *Drept penal comparat. Partea generală, cit. supra.*, p. 629; Traian Pop, *Comentare, cit. supra.*, p. 249; Nicolae T. Buzea, *Infraacțiunea criminală și culpabilitatea*, *cit. supra.*, p. 694; Grigore Rîpeanu, *op. cit.*, in *Legalitatea populară* no. 1, 1956, p. 25 a.s.o.; Ludovic Biro, *op. cit.*, 1963, p. 248; Berthold Braunstein, *op. cit.*, p. 175 a.s.o.; Ion Pohonțu, *op. cit.*, p. 18; Vasile Papadopol, *Efectele amnistiei și grațierii asupra pedepsei aplicate în caz de concurs ideal de infracțiuni*, in *Revista română de drept* no. 2, 1968, p. 110-111; Maria Zolyneak, *Considerații asupra concursului formal în lumina noului cod criminal*, *The Annals of the „Alexandru Ioan Cuza” University, Iași*, 1969, p. 115; Iosif Fodor, *op. cit.*, vol. I, p. 265; Maria Zolyneak, *Concursul de infracțiuni în dreptul criminal român*, PhD thesis defended within the Faculty of Law of the „Al. I.

regard the ideal concurrence as a hypothesis of the apparent plurality of offences (plurality which hides a real unity of offence), as provided, for instance, by the

Cuza” University from Iași, under the coordination of Professor Grigore Theodoru, PhD 1970, p. 60. In this context, it is significant that the author proposes to call this formal concurrence „*concurrence through a single action*”. Ion Oancea, *op. cit.*, 1971, p. 243-244; Maria Zolyneak, *note* for dec. no. 1097/1971 of the Supreme Court, Penal Department, in *Revista română de drept* no. 5, 1972, p. 141; Maria Zolyneak, *Concursul ideal de infracțiuni*, in *Revista română de drept* no. 5, 1972, p. 143; Virgil Rămureanu, *Concursul de infracțiuni (comentariu)*, *cit. supra*, p. 226; Aurel Dincu, *Drept penal*, vol. I, Bucharest, 1975, p. 310; Maria Zolyneak, *op. cit.*, vol. II, p. 495; Ion Oancea, *op. cit.*, 1994, p. 155-156; Narcis Giurgiu, *Legea criminală și infracțiunea*, *cit. supra*, p. 304; Augustin Ungureanu, *Drept penal român. Partea generală*, Lumina Lex Publishing House, Bucharest, 1995, p. 174; Matei Basarab, *Drept penal. Partea generală*, vol. II, Lumina Lex Publishing House, Bucharest, 1997, p. 13; Ilie Pascu, in Vasile Dobrinoiu, Gheorghe Nistoreanu, Ilie Pascu, Alexandru Boroi, Ioan Molnar, Valerică Lazăr, *Drept penal. Partea generală*, 4th edition, revised and completed with the provisions of Law no. 140/1996 for the amendment and completion of the Criminal Code, Europa Nova Publishing House, Bucharest, 1997, p. 265; Florin Streteanu, *Concursul de infracțiuni*, *cit. supra*, p. 134; Constantin Mitrache, *Drept penal român, parte generală*, 4th edition, Șansa SRL Publishing House, Bucharest, 2000, p. 217; Narcis Giurgiu, *Drept penal general, doctrină, legislație, jurisprudență*, *cit. supra*, p. 333. The author states that the position expressed by Vintilă Dongoroz is susceptible to critiques, but without clearly mentioning them. Iancu Tănăsescu, Gabriel Tănăsescu, Camil Tănăsescu, *Tratat de drept penal*, Sitech Publishing House, Craiova, 2000, p. 303; Alexandru Boroi, *Drept penal. Partea generală*, 2nd edition, All Beck Publishing House, Bucharest, 2000, p. 167; Ovidiu Predescu, *Dreptul criminal al afacerilor*, Continent XXI Publishing House, Bucharest, 2000, p. 75; Ilie Pascu, *Drept penal. Partea generală*, vol. I, Europa Nova Publishing House, Bucharest, 2001, p. 327; Lidia Barac, *Constantele și variabilele dreptului criminal*, All Beck Publishing House, Bucharest, 2001, p. 86; Gheorghe Nistoreanu, Alexandru Boroi, *Drept penal. Partea generală*, All Beck Publishing House, Bucharest, 2002, p. 152; Viorel Pașca, in Viorel Pașca, Ramiro Mancaș, *Drept penal, parte generală*, Universitas Timisiensis Publishing House, Timișoara, 2002, pp. 313-315; Alexandru Boroi, Gheorghe Nistoreanu, *Drept penal. Partea generală*, 4th edition, revised according to the new Criminal Code, All Beck Publishing House, Bucharest, 2004, p. 239; Traian Dima, *Drept penal. Partea generală. Infracțiunea*, vol. I, Lumina Lex Publishing House, Bucharest, 2004, p. 351; Matei Basarab, *Drept penal. Partea generală. Tratat*, vol. II, Lumina Lex Publishing House, Bucharest, 2005, p. 9; Vasile Păvăleanu, *Drept penal general* (according to the new Criminal Code), university code, Lumina Lex Publishing House, Bucharest, 2005, p. 228; Alexandru Boroi, *Drept penal. Partea generală*, C.H. Beck Publishing House, Bucharest, 2006, p. 180; Constantin Mitrache, în Costică Bulai, Avram Filipaș, Constantin Mitrache, *Instituții de drept penal*, Selective course for the university graduation exam, 3rd edition revised and completed, Trei Publishing House, Bucharest, 2006, p. 128; Ilie Pascu, *Drept penal. Partea generală*, Hamangiu Publishing House, Bucharest, 2007, p. 288; Constantin Mitrache, Cristian Mitrache, *Drept penal român. Partea generală*, 4th edition revised and completed, Universul Juridic Publishing House, Bucharest, 2007, p. 274; Matei Basarab, in Matei Basarab, Viorel Pașca, Gheorghită Mateuț, Constantin Butiuc, *Codul criminal comentat. Partea generală*, vol. I, Hamangiu Publishing House, Bucharest, 2007, p. 198; Traian Dima, *Drept penal. Partea generală*, 2nd edition revised and completed, Hamangiu Publishing House, 2007, p. 279; Mihai Adrian Hotca, *Codul criminal, comentat și explicat*, C.H. Beck Publishing House, Bucharest, 2007, p. 388-389; Mihai Adrian Hotca, *Drept penal. Partea generală*, C.H. Beck Publishing House, Bucharest, 2007, p. 496 a.s.o.; Georgina Bodoroncea, Irina Kuglay, Lavinia Lefterache, Ionuț Matei, Iuliana Nedelcu, Francisca Vasile, *Codul criminal adnotat*, C.H. Beck Publishing House, Bucharest, 2007, p. 124; Emil Derșidan, *Codul criminal, comentat și adnotat*, Proteus Publishing House, Bucharest, 2008, p. 61.

Italian or German criminal law, not as an apparent offence unit (in fact it is only a real plurality of offences) as regulated, through a legal fiction, by the effective Romanian Criminal Code²⁸⁾.

Recently, in relation to the thesis of the real plurality in the case of the formal concurrence of offences, and with good reason, Professor George Antoniu expressed certain reserves²⁹⁾. It is difficult to accept the compressing of the contents of an action (inaction) of the objective and subjective elements of several offences (which implies an assessment of the existence of these elements from the moment the offence decision is made and it is manifested in the outside), and one acknowledges the fact that only subsequently, due to the *circumstances* in which the deeds are perpetrated and of the generated *result*, there is the possibility for the unique action to match the features of several offences. The idea of compressing several offences in a single action appears as a legal construction, a *legal fiction*. In fact, the author perpetrates a single action or inaction, but since the means he uses are appropriate, in their nature, and they can have multiple consequences (for instance, a moving vehicle can hit a person, destroy goods, endanger the safety of the traffic, etc.). The person who uses such an object generating multiple consequences does not mean that they have committed an equal number of deeds and results, but only that they have used a means which, through its nature, is susceptible of producing such consequences. Also, the person who does not undertake the measures imposed by the law for labour protection, and who is not cautious in relation to these activities, which through their nature, can also cause other consequences, except for a state of endangerment for the factors involved in the labour process. The married man, who has sexual relations, by means of violence, with his sister will commit the offences of incest, rape and adultery (currently abolished), but not because he has committed multiple actions, but due to the special *qualities* of the active and passive subject, *the unique deed* represents concomitant infringements of several legal norms with appropriate results for each of these incriminations.

One must also notice the fact that the legal bodies do not make a distinct analysis of the psychological position of the subject in relation to each of the multiple consequences of the unique action (unique inaction); it suffices for the latter to have been perpetrated with the form of violence requested by the law. In fact, such an analysis would not even be possible when the incidence of several incrimination provisions is drawn to the active or passive subject, since the author

²⁸⁾ Constantin Duvac, *op. cit.*, pp. 111-112.

²⁹⁾ George Antoniu, *Reflecții asupra pluralității de infracțiuni*, in *Revista de drept penal* no. 4/1999, p. 11; George Antoniu, *Reforma criminală și unele aspecte critice ale legislației criminale în vigoare (Examen critic al unor dispoziții din Codul criminal. Partea generală)* in *Reforma legislației criminale* by George Antoniu a.o., The Romanian Academy Publishing House, Bucharest, 2003, pp. 124-125. *For the same purpose*: Constantin Duvac, *Concursul ideal (formal) de infracțiuni, pluralitate aparentă sau reală de infracțiuni?*, *cit. supra*, p. 134.

of the offence cannot represent the result of the deed in relation to their various qualities. But even when using means susceptible of causing multiple consequences, the legal bodies are concerned with establishing the mental position of the author in relation to the most serious deed; the other consequences being deemed as having occurred based on the same mental position. Under these circumstances, it is questionable whether one can claim that the unique action is an appearance of unity and that, in reality, it is a real plurality.

Since it is a single action (inaction), not a real plurality of offences, the criminal treatment identical to the one of the material concurrence is *excessive*³⁰⁾. Even if the court, on occasion of the actual individualisation of the punishment, would take into account the indicated circumstances, not less, the legal sanctioning limits of the material concurrence even allow the summing up of the punishments (Art. 34, final paragraph, Criminal Code excludes only the *exceeding* of the total punishments established in court), which is exaggerated if compared to the specificity of the formal concurrence (the existence of a unique action or inaction).

One must notice that the doctrine and Romanian legislation, in the context of the Criminal Code adopted by Law no. 301/2004, were inspired, based on a new solution, by the Italian criminal legislation and doctrine. For a long period of time, the Italian criminal law (Art. 81) sanctioned the ideal concurrence based on the same rules as the real concurrence. It was only subsequently, through a law from 1974, amending the Criminal Code, that this regulation has been amended, replacing this treatment with that of the offence unity. One withholds the existence of the crime, which received the harshest punishment, which can be increased up to its triple value (without exceeding the total punishment, which would have been applied, if one would have used the treatment of the real concurrence). The excessive treatment of the ideal concurrence deemed as a real plurality of offences, has determined the Italian legislator to renounce to the assimilation of the formal concurrence of offences to the real one, by reserving a specific treatment to the first method of concurrence³¹⁾.

Also, the very Professor Dongoroz rightfully claimed that one must not omit the fact that „the criminal law, by excellence, must take realities into account”³²⁾ and that „nothing can be more absurd in law, especially in criminal law, than fictions”³³⁾. Yet, reality proves that the perpetrator has only committed one

³⁰⁾ *For the same purpose*: Constantin Duvac, *Rewiew* on the paper *Reforma legislației criminale*, The Romanian Academy Publishing House, Bucharest, 2003, 339 p. by George Antoniu a.o., in *Revista de drept penal* no. 1/2004, p. 159. A similar idea is also that of Florin Streteanu, *op. cit.*, pp. 267-268. The author believes that the system of absorption is much more adequate for the sanctioning of the ideal concurrence, because this hypothesis eliminates the danger of encouraging the perpetrator, who has committed a serious offence, to commit other less serious offences.

³¹⁾ George Antoniu, *Examen critic al unor dispoziții din Codul criminal. Partea generală*, *cit. supra*, pp. 124-125.

³²⁾ Vintilă Dongoroz, *Drept penal* (re-publishing), *cit. supra*, p. 399.

³³⁾ *Ibidem*, p. 413.

incriminated action or inaction, and thus we believe that it would be natural for them to receive just one punishment.

The preliminary project drafted by the law and criminal procedure team at the „Andrei Rădulescu” Institute of Legal Research of the Romanian Academy, in 2002, under the influence of the ideas expressed by Professor George Antoniu³⁴⁾, unlike the solution of the effective criminal law (apparent unity and real plurality), promotes a new concept with respect to the formal sanctioning of crimes, which is to be treated as a real unit (apparent plurality of offences).

This position of the newer doctrine seems to have also influenced the Romanian legislator who, in the *Criminal Code from 2004*, adopted by Law no. 301/2004³⁵⁾, by taking into account the reality according to which the perpetrator only commits a single action or inaction, and for interests of criminal policy, one has introduced the rule according to which „in the case of the formal concurrence of offences, the deed is to be sanctioned with the punishment provided by the law for the most serious offence” (art. 47(3)). Thus, the formal concurrence appears as an apparent plurality of offences, not as a real plurality from the effective Criminal Code and, also, as a real unity of offences.

Besides the fact that it has also been adopted by the *Romania Criminal Code from 1936*³⁶⁾, this solution approves the position of the recent Romanian doctrine, and it is currently accepted by all modern legislations³⁷⁾.

The Criminal Code adopted by Law no. 301/2004, returning to the traditional solution of our legislation (the formal concurrent has a special criminal treatment from the one of the real concurrence), *occupied a more realistic position*, by admitting the existence, in this case, of a unique criminal manifestation and of a delictual unique resolution (decisive uniqueness for the establishing of the criminal treatment of this concurrence method), even if due to certain circumstances, one has infringed several criminal provisions³⁸⁾.

³⁴⁾ George Antoniu, *Reflecții asupra pluralității de infracțiuni*, cit. supra., p. 11 a.s.o.

³⁵⁾ Published in the Official Gazette no. 575 from 29 June 2004. But its entry into force has been successively postponed (GEO no. 58/2005, published in the Official Gazette no. 552 from 28 June 2005; GEO no. 50/2006, Official Gazette no. 566 from 30 June 2006 and GEO no. 73/2008, Official Gazette no. 440 from 12 June 2008), up to 1 September 2009. Based on Art. 446(1) and (2) from no. 286/2009 regarding the Criminal Code, Official Gazette no. 510 from 24 July 2009, Law no. 301/2004 was abolished.

³⁶⁾ „When one and the same deed infringes more provisions of the criminal law is applied to the provision stipulating the harshest punishment” (Art. 103 of the Criminal Code from 1936). The legislator’s means of expression (one and the same deed) determined some of the Romanian authors (Nicolae Buzea) to mistake the ideal concurrence for the texts concurrence.

³⁷⁾ George Antoniu, *Noul Cod criminal. Codul criminal anterior. Studiu comparativ*, cit. supra., p. 20.

³⁸⁾ Matei Basarab, *Concursul de infracțiuni (comentariu)* in „Noul Cod criminal comentat, vol. I (art.1-56)” by George Antoniu (coordinator) a.o., CH Beck Publishing House, Bucharest, 2006, p. 521. In fact, if before the adoption of the new Criminal Code (on occasion of the symposio on the theme „Noua legislație criminală română din perspectivă europeană”, organised in Timișoara between 17-18 Oct. 2003), the famous criminologist stated that the solution of sanctioning the formal concurrence of

This solution is contradicted even by Matei Basarab, when he claims that the application of a *global sanction* in the case of the formal concurrence of offences within the special limits provided by the law for the most serious offence does not satisfy the requirements of the legal order, since the seriousness of the perpetrated deeds is reflected not only in the legal punishment limits for the offence deemed as serious, but also in the actual punishment applied to the perpetrator. It is possible, within the legal limits of the punishment for the more serious offences, to apply an actual milder punishment than the perpetrator would have deserved in relation to the offence, which had smaller legal limits, within which one has applied a harsher actual punishment. On the other hand, a global punishment results in the *dissolution* of the other offences into the most serious one and, therefore, in the impossibility to apply certain *acts of mercy* for any of the offences forming the plurality. Also, one would not take into account the individuality of each composing offence, and one's own incrimination conditions and criminal liability. For instance, for some of the offences composing plurality, the law might foresee the necessity of a previous complaint of the injured person or of an authorization or another condition for the initiation of the criminal action. If these conditions are not fulfilled, the criminal prosecution body will order the termination of the criminal prosecution, solutions which could not be pronounced if the offence for which the law provides the harshest punishment would dissolve the other offences³⁹⁾.

Unfortunately, the new Criminal Code adopted through Law no. 286/2009 eliminates the solution established through Law no. 301/2004, and it suggests the return to the idea expressed by Vintilă Dongoroz in his treaty from 1939, maintaining the same criminal treatment for both concurrence methods (real and ideal), namely the legal accumulation (Art. 39), an identical solution from the one from Art. 34 of the effective Criminal Code.

3. The effective criminal law does not include an explicit provision defining the principles based on which one determines the applicable law in the case of the texts concurrence. But in the legal practice, one frequently applies the principle of specialty when the special norm is the *species* in relation to the general norm, namely the *type*; this reasoning is but the application of the logical-formal scheme dating back to Aristotle⁴⁰⁾.

offences with the punishment provided by the law for the most serious offence seems more natural as compared to the one provided by the Criminal Code from 1968. For this purpose, see Matei Basarab, *Partea generală a Codului penal român într-o perspectivă europeană*, in *Revista de drept penal* no. 1/2004, p. 27. A similar idea is that of Professor George Antoniu in his work *Noul Cod penal. Codul penal anterior. Studiu comparativ*, cit. supra., p. 20 and in the article *Noul Cod penal și Codul penal anterior, privire comparativă. Partea generală*, in *Revista de drept penal* no. 4/2004, p. 17.

Otherwise, with respect to the identical solution adopted by the Criminal Code Carol II, Shneur-Zalman Feller, *op. cit.*, pp. 938-939; 950-951.

³⁹⁾ Matei Basarab, *Comentariu*, cit. supra., 2006, p. 522.

⁴⁰⁾ George Antoniu, *Unitatea de infracțiune. Contribuții*, R.D.P. no. 3, 1999, p. 37; George Antoniu, in George Antoniu, Emilian Dobrescu, Tiberiu Dianu, Gheorghe Stroe, Tudor Avrigeanu,

Therefore, the legal doctrine and practice came to demarcate the inclusion sphere of the concurrence of criminal norms, to draft the distinctive criteria with respect to the formal concurrence (in this case it is the offences that are concurrent, not incriminations), and to identify the principles governing it, since it is well known that the reason on which its solving is based so as to avoid a person's double criminal liability for the same deed (*non bis in idem*).

4. In the Romanian criminal doctrine, also mainly due to its legal non-specialization, there is no unanimity of opinions with respect to the used terminology so as to express the concurrence of criminal norms. Most authors, under the influence of the German and Italian doctrine, use the name of „concurrency of the criminal laws”⁴¹⁾ or „concurrency of criminal laws”⁴²⁾ or

Reforma legislației criminale, The Romanian Academy Publishing House, Bucharest, 2003, p. 117; Gavril Paraschiv, *Unitatea naturală de infracțiune* (PhD thesis defended at the Romanian Academy, the „Andrei Rădulescu” Institute of Legal Research, under the coordination of Professor George Antoniu, PhD), Bucharest, 2004, p. 73. The author states that the interdiction of plurality of legal contexts for a single offence, in the case of the concurrence of criminal norms, is to be deduced from the regulations regarding the offence and the criminal liability.

⁴¹⁾ Traian Pop, *Drept penal comparat. Partea generală*, cit. supra, p. 621; Traian Pop, *Comentare*, cit. supra, p. 249; Matei Basarab, *Drept penal. Partea generală*, vol. I, Lumina Lex Publishing House, Bucharest, 1997, p. 92; Florea Ivan, *Aplicarea legii criminale în timp*, Lumina Lex Publishing House, Bucharest, 2000, p. 109; Matei Basarab, *Drept penal. Partea generală. Tratat*, vol. I, Lumina Lex Publishing House, Bucharest, 2005, p. 59.

⁴²⁾ Vintilă Dongoroz, *Drept penal* (Treaty), re-publishing of the edition from 1939, The Romanian Association for Criminal Sciences, Bucharest, 2000, p. 101; Nicolae T. Buzea, *Principii de drept penal. Infracțiunea criminală*, cit. supra, p. 514; Vintilă Dongoroz, *Aplicațiunea legii criminale*, Bucharest, p. 84; Nicolae T. Buzea, *Infracțiunea criminală și culpabilitatea*, cit. supra, p. 694; Siegfried Kahane, in Ion Oancea, Siegfried Kahane, *Curs de drept penal general*, Bucharest, 1950-1951, p. 292; Ludovic Biro, in Ludovic Biro, Matei Basarab, *Curs de drept penal. Partea generală*, The Didactical and Pedagogical Publishing House, Bucharest, 1963, p. 53. The author also calls the concurrence of criminal laws the *ideal apparent concurrence* – Ludovic Biro, p. 248. Iosif Fodor, *op. cit.*, p. 257; Constantin Barbu, *Aplicarea legii criminale în spațiu și timp*, The Scientific Publishing House, Bucharest, 1972, p. 167, Rodica Mihaela Stănoiu, Ioan Griga, Tiberiu Dianu, *Drept penal. Partea generală* (course notes), Hyperion XXI Publishing House, Bucharest, 1992, p. 51; Costică Bulai, *Manual de drept penal. Partea generală*, cit. supra, p. 126; Gheorghe Nistoreanu, in Vasile Dobrinou, Gheorghe Nistoreanu, Ilie Pascu, Alexandru Boroi, Ioan Molnar, Valerică Lazăr, *Drept penal. Partea generală*, 4th edition revised and completed, Europa Nova Publishing House, Bucharest, 1997, p. 73; Alexandru Boroi, *Drept penal. Partea generală*, 2nd edition, All Beck Publishing House, Bucharest, 2000, p. 65; Viorel Pașca, *Prolegomene în studiul dreptului criminal*, Lumina Lex Publishing House, Bucharest, 2000, p. 153; Ovidiu Predescu, *Dreptul criminal al afacerilor*, Continent XXI Publishing House, Bucharest, 2000, p. 184, 191; Iancu Tănăsescu, Gabriel Tănăsescu, Camil Tănăsescu, *op. cit.*, p. 119; Ilie Pascu, *Drept penal, partea generală*, vol. I, Europa Nova Publishing House, Bucharest, 2001, p. 90; Gheorghe Nistoreanu, Alexandru Boroi, *Drept penal. Partea generală*, All Beck Publishing House, Bucharest, 2002, p. 57; Viorel Pașca, *op. cit.*, 2002, p. 160; Florin Streteanu, *Drept penal. Partea generală*, vol. I, Rosetti Publishing House, Bucharest, 2003, p. 278; Alexandru Boroi, Gheorghe Nistoreanu, *Drept penal. Partea generală*, 4th edition, revised according to the new Criminal Code, All Beck Publishing House, Bucharest, 2004, p. 40; Traian Dima, *Drept penal. Partea generală. Infracțiunea*, vol. I, Lumina Lex Publishing House,

„concurrency of the criminal norms”⁴³⁾, while others prefer „concurrency of texts”⁴⁴⁾ or they use, under the influence of the French doctrine, the expression „concurrency of qualifications”⁴⁵⁾. There are also prestigious authors, who express this entity through the name „apparent concurrency of offences”⁴⁶⁾.

Bucharest, 2004, p. 107. The author deems this situation as a concurrency of *active* criminal laws, although in our opinion this addition can be omitted as one cannot bring into discussion the existence of a concurrency of norms outside the two effective (active) texts. Matei Basarab, in George Antoniu, Constantin Mitrache, Avram Filipaș, Rodica Mihaela Stănoiu, Iosif Ionescu, Ioan Molnar, Nicoleta Iliescu, Viorel Pașca, Matei Basarab, *Noul Cod criminal comentat*, vol. I Aart. 1-56), C.H. Beck Publishing House, Bucharest, 2006, p. 510; Costică Bulai, Bogdan N. Bulai, *op. cit.*, p. 126; Constantin Mitrache, Cristian Mitrache, *Drept penal român. Partea generală*, 4th edition revised and completed, Universul Juridic Publishing House, Bucharest, 2007, p. 93; Viorel Pașca, in Matei Basarab, Viorel Pașca, Gheorghită Mateuț, Constantin Butiuc, *Codul criminal comentat. Partea generală*, vol. I, Hamangiu Publishing House, Bucharest, 2007, p. 42; Ilie Pascu, *Drept penal. Partea generală*, Hamangiu Publishing House, Bucharest, 2007, p. 94; Traian Dima, *Drept penal. Partea generală*, 2nd edition revised and completed, Hamangiu, Publishing House, 2007, p. 112; Gheorghe Alecu, *Drept penal. Partea generală*, university course, 2nd edition revised and completed, Europolis Publishing House, Constanța, 2007, pp. 82-83; Mihai Adrian Hotca, *Codul criminal, comentat și explicat*, C.H. Beck Publishing House, Bucharest, 2007, pp. 147-148; Mihai Adrian Hotca, *Drept penal. Partea generală*, C.H. Beck Publishing House, Bucharest, 2007, pp. 106-107.

⁴³⁾ Virgil Rămureanu, *Concursul de infracțiuni (comentariu)*, *cit. supra*, p. 229; George Antoniu, *op. cit.*, Revista de drept penal no. 3, 1999, p. 37; George Antoniu, *op. cit.*, 2003, p. 117; Florin Streteanu, *Drept penal. Partea generală*, vol. I, Rosetti Publishing House, Bucharest, 2003, p. 278.

⁴⁴⁾ Vintilă Dongoroz, in Ioan I. Tanoviceanu, *Tratat de drept și procedură criminală*, vol. II, 2nd edition, revised and completed by Vintilă Dongoroz (doctrine), Corneliu Chiseliță and Ștefan Laday (references and legislations from Bucovina and Ardeal), Eugen Decusară (jurisprudence), „Curierul Judiciar” Typography, Bucharest, 1925, p. 296; Shneur-Zalman Feller, *O pluralitate aparentă de infracțiuni și rezolvarea ei*, J.N., no. 2, 1960, p. 309; Iosif Fodor, *op. cit.*, vol. I, 1969, p. 257; The author uses both the expression „concurrency of criminal laws”, as well as „concurrency of texts”. Maria Zolyneak, *Concursul de infracțiuni în dreptul criminal român*, PhD thesis defended at the Faculty of Law of the „Al. I. Cuza” University from Iași under the coordination of Professor Grigore Theodoru, PhD, 1970, p. 211; Constantin Bulai, in George Antoniu, Constantin Bulai, Rodica Mihaela Stănoiu, Avram Filipaș, Constantin Mitrache, Vasile Papadopol, Cristiana Filișanu, *Practica judiciară criminală. Partea generală* (Art. 1-51 Criminal Code), vol. I, The Academy Publishing House, Bucharest, 1988, p. 201; Maria Zolyneak, *Drept penal. Partea generală*, vol. II, The Chemarea Foundation Publishing House, Iași, 1993, p. 492-494; George Antoniu, *Reflecții asupra pluralității de infracțiuni*, R.D.P., no. 4, 1999, p. 21-22.

⁴⁵⁾ Florin Streteanu, *Concursul de infracțiuni*, *cit. supra*, p. 142 a.s.o.; Florin Streteanu, *Drept penal. Partea generală*, vol. I, Rosetti Publishing House, Bucharest, 2003, p. 278. The author uses the expression „concurrency of criminal norms”, as a synonym of the expression „concurrency of qualifications”, the last name being the preferred one; with respect to the various names existing in the Romanian criminal doctrine, the author believes it is a simple terminological difference, with no implications on the background of the issue. Vasile Păvăleanu, *Drept penal general, potrivit Noului Cod criminal*, curs universitar, Lumina Lex Publishing House, București, 2005, p. 229; Alexandru Boroi, *Drept penal. Partea generală*, C.H. Beck Publishing House, Bucharest, 2006, p. 68; Florin Streteanu, *Tratat de drept penal. Partea generală*, vol. I, C.H. Beck Publishing House, Bucharest, 2008, p. 318.

⁴⁶⁾ George Antoniu, Constantin Bulai, Gheorghe Chivulescu, *Dicționar juridic criminal*, The Scientific and Encyclopedical Publishing House, Bucharest, 1976, p. 72. The authors deem this

5. One should also notice that the *place* where the concurrence of criminal norms in the Romanian doctrine is not unitary. Some authors approach this matter within the offence unit⁴⁷⁾ or of a plurality of offences⁴⁸⁾, while others treat it within the classification of the criminal norms⁴⁹⁾. There are also authors treating his notion with respect to the regulation of the application of the criminal law in time⁵⁰⁾.

6. The *concurrence of criminal norms or texts* describes the situation in which the legislator incriminates certain deeds, both in the provisions of the Criminal Code, as well as in the case of the special laws with incriminations and punishments⁵¹⁾. This phenomenon is most frequent where, although there is a general incrimination, which would operate also with respect to a particular determined case, the legislator feels the need to draft and a special incrimination for the particular case, so as to insist more on the necessity to observe particular rules. Other times, the legislator drafts a new provision without taking into account the fact that there is an older provision identical or similar. This intends to restore in the memory of the criminal law certain provisions deemed as obsolete or ineffective after a long period of non-application. The repetition of the

legal construction as a synonym of the concurrence of texts, norms, laws or qualifications. George Antoniu, Costică Bulai, *Dicționar de drept penal și procedură criminală*, Hamangiu Publishing House, Bucharest, 2011, p. 183.

⁴⁷⁾ Vintilă Dongoroz, *op. cit.* (reeditare), 2000, pp. 269-270; George Antoniu, *op. cit.*, 2003, p. 117.

⁴⁸⁾ Traian Pop, *op. cit.*, vol. II, 1923, pp. 621-624; Vintilă Dongoroz, *op. cit.*, vol. II, 1925, p. 296; Nicolae T. Buzea, *op. cit.*, vol. I, 1937, p. 514 a.s.o.; Nicolae T. Buzea, *op. cit.*, 1944, p. 694 a.s.o.; Siegfried Kahane, *op. cit.*, 1950-1951, p. 292; Virgil Rămureanu, *op. cit.*, 1972, p. 229; Vasile Păvăleanu, *op. cit.*, 2005, pp. 229-230; Matei Basarab, *op. cit.*, vol. I (art.1-56), 2006, p. 510.

⁴⁹⁾ Maria Zolyneak, *Drept penal. Partea generală*, vol. I, „Chemarea” Foundation Publishing House, Iași, 1994, p. 51.

⁵⁰⁾ Ludovic Biro, *op. cit.*, 1963, p. 53. The author makes some comments with respect to the concept of concurrence of criminal laws, and within the chapter on the classifications of the criminal norms; Matei Basarab, *op. cit.*, vol. I, 1997, p. 92; Rodica Mihaela Stănoiu, Ioan Griga, Tiberiu Dianu, *op. cit.*, 1992, p. 51; Gheorghe Nistoreanu, *op. cit.*, 1997, p. 73; Viorel Pașca, *op. cit.*, 2000, pp. 153-155; Iancu Tănăsescu, Gabriel Tănăsescu, Camil Tănăsescu, *op. cit.*, 2000, p. 119; Constantin Mitrache, *Drept penal român, parte generală*, 4th edition, Șansa SRL Publishing House, Bucharest, 2000, p. 64; Viorel Pașca, *op. cit.*, 2002, p. 160-162; Florin Streteanu, *op. cit.*, vol. I, 2003, p. 278-285; Traian Dima, *op. cit.*, 2004, p. 107; Matei Basarab, *op. cit.*, vol. I, 2005, pp. 59-60; Constantin Mitrache, Cristian Mitrache, *op. cit.*, 2007, p. 93; Viorel Pașca, *op. cit.*, 2007, p. 42; Ilie Pascu, *op. cit.*, 2007, p. 95 a.s.o.; Traian Dima, *op. cit.*, 2007, p. 112; Mihai Adrian Hotca, *Codul criminal ...*, *op. cit.*, 2007, pp. 147-148. The author has a mixed approach of this matter: in the chapter referring to the application of the criminal law while examining the concurrence of criminal norms, while in the previous chapter referring to the plurality of offences, as opposed to the ideal concurrence of offences, they deal with the concurrence of qualifications (in the sense established by Florin Streteanu in his PhD thesis from 1998, published in 1999), which he deems as an apparent ideal concurrence – Mihai Adrian Hotca, p. 389-390; Mihai Adrian Hotca, *Drept penal ...*, *op. cit.*, 2007, pp. 106-107; Gheorghe Alecu, *op. cit.*, 2007, p. 82-83; Florin Streteanu, *op. cit.*, vol. I, 2008, pp. 318-324.

⁵¹⁾ Constantin Duvac, *Pluralitatea aparentă de infracțiuni*, *cit. supra*, pp. 53-54.

incrimination provision within another law can also be due to the legislator's intention to amend, through the new enunciation, the sanctions regime. In the last years, there has been a tendency of artificial increase of the concurrence of criminal texts, which reveals a faulty legislative technique⁵²⁾ susceptible to controversies and difficulties, while applying the criminal law.

It has been rightfully said⁵³⁾, that the excess of concurrent criminal norms, prevents the well-functioning of the criminal legal system, which generates confusions in the legal practice, and it is one of the means of „legal pollution” through excessive incrimination, a phenomenon also manifested in the positive Romanian law⁵⁴⁾.

The central matter within which the interpreter is confronted in the case of the concurrence of norms is that of the criteria (principles) used to select the applicable norm from the concurrent norms. Although they regulate the same issue, between the concurrent norms there can be objective differentiations; for instance, a concurrent norm is more recent than another (chronological criteria) or a concurrent norm with a more general, also including the regulating particular hypothesis through another norm (the criteria of the specialty), or a concurrent norm providing a sanction harsher than another (the criteria of subsidiarity), or a concurrent norm might be in such relations with a concurrent norm so as to become applicable, etc. Such differentiations not only allow the individualisation of the applicable concurrent norm, but it also contributes to the underlining of the appearance to the entire concurrence.

In the case of the concurrence of texts, apparently there is a plurality of offences since to the same criminal act there are more provisions of the criminal law, which seem to be infringed by perpetrating the same deed. The plurality is only apparent since, in reality, only one offence has been perpetrated, and not more. This will mean that from the concurrent incrimination norm, only one is to be applied and to sanction the deed.

7. From our point of view, besides other authors⁵⁵⁾ we believe that *four* principles are necessary for its solving (of the specialty, of the subsidiarity, of the consumption, of the alternativity).

⁵²⁾ The rules of legislative technique are provided in Law no. 24/2000, re-published (Official Gazette no. 777 from 25.08.2004), regarding the norms of legislative techniques for the drafting of the normative acts.

⁵³⁾ Sofia Popescu, *Statul de drept în dezbaterile contemporane*, The Romanian Academy Publishing House, Bucharest, 1998, pp. 150-152. *For the same purpose*: Andreea Alexandra Popa, *Contrafacerea obiectului unui brevet de invenție*, in *Revista română de dreptul proprietății intelectuale* no. 3, 2008, p. 133.

⁵⁴⁾ Gheorghe Diaconescu, *Infracțiunile în legi speciale și legi extracriminale*, All Publishing House, Bucharest, 1996, p. 76, 180. The author expresses the idea that this meganormativism is a legislative abuse, and that in some cases it doubles the incriminative norms existing in the Criminal Code in a useless manner. *For the same purpose*: Andreea Alexandra Popa, *op. cit.*, p. 133.

⁵⁵⁾ Traian Pop, *Drept penal comparat. Partea generală*, vol. II, The „Ardealul” Institute for Graphic Arts, Cluj, 1923, pp. 622-623; Andreea Alexandra Popa, *op. cit.*, p. 134.

Without initiating a detailed analysis of these principles⁵⁶⁾, one recalls that there are important controversies also with respect to their area of inclusion and to the application order, which would claim a legal discipline of these matters.

Conclusions and proposals *de lege ferenda*: 1. The initiated analysis highlights the existence of important controversies with respect to considering either the ideal concurrence of offences, or a real plurality of offences, or an apparent plurality of offences (unity of offences). These multiple opinions on the ideal concurrence of offences, in our opinion, have an objective basis since this concurrence presents both unity elements (unique action, unique sanction), as well as the elements of plurality (more results, each of them gathering the features of certain distinct offences or of the same offence). The theories emphasising the unity of action will deem the ideal concurrence as an appearance of plurality, in fact being a unique interaction. The theories emphasising the multiple unique result will deem the ideal concurrence as a real plurality of offences, not an apparent plurality.

From these considerations, certain legislations discipline the ideal concurrence as an apparent plurality of offences (for instance, the German criminal law), while others regulate the ideal accumulation as a real plurality of offences (for instance, the Romanian criminal law). There are also legislations which only mention the real concurrence of offences (for instance, the French criminal law), leaving the matter of the ideal concurrence of crime to the doctrine and to the jurisprudence. And not last, certain legislations have successively known both solutions (for instance, the Italian criminal law has passed from the ideal concurrence as plurality of offences to the ideal concurrence as a unity of offences).

2. *De lege ferenda*, besides other authors⁵⁷⁾, we deem that it would be more appropriate to renounce the fiction of real plurality in the case of the ideal concurrence of crimes, which should be replaced with the acknowledgment that, in this case, the active subject has committed a single action, not more, and that the criminal treatment should take this reality into account. Therefore, in a future regulation, one should impose, in the case of the formal concurrence, the adoption of the *sanctioning system established by art. 47(3) of the Criminal Code from 2004*.

3. This „interpretative chaos”, in the issue of the concurrence of criminal norms (texts), could only be moderated through the legislator’s intervention, which would better state the incrimination contents making it easier both for the law application body and for the interpreter of these norms to better delimitate the

⁵⁶⁾ For details on the analysis of these principles, see: Constantin Duvac, *Pluralitatea aparentă de infracțiuni*, cit. supra, p. 53-110; Constantin Duvac, *Concursul de norme criminale (concurș de texte). Reflecții*, in Revista de drept penal no. 2, 2009, pp. 61-95; Constantin Duvac, *Concursul de norme criminale. Concept și principii de soluționare*, in the collective paper „Conferința internațională bienală 2008”, Universitatea de Vest from Timișoara, Faculty of Law, Wolters Kluwer Publishing House, Bucharest, 2010, pp. 447-466.

⁵⁷⁾ George Antoniu, *Unitatea de infracțiune. Contribuții*, cit. supra., p. 43; Constantin Duvac, *Concursul ideal (formal) de infracțiuni, pluralitate aparentă sau reală de infracțiuni?*, cit. supra, p. 150.

concurrency of criminal norms from the ideal concurrence of offences, with all the consequences included in such a delimitation.

Unfortunately, the new Criminal Code, adopted by Law no. 286/2009, does not regulate this extremely delicate issue of the concurrence of criminal norms or texts, with important consequences in relation to the criminal treatment applicable to the perpetrator, as its illicit activity is deemed as a unity of offences or a plurality of offences, although the legislator explicitly admits the existence of certain pluralities of incrimination norms with respect to the same actual deed⁵⁸⁾.

The reasoning on which the solving of the concurrence of criminal norms is based, through the application of the indicated principles, is avoiding the cases in which a person is criminally liable twice for the same deed (*non bis in idem*). This should be included in the Romanian law the same as in the foreign ones, so as to regulate in the future the solving methods of the concurrence of norms.

4. Therefore, *de lege ferenda*, we believe that the law should, based on the Spanish pattern, define both the fundamental criteria of the identification of the apparent plurality (of the specialty, of the subsidiarity, of the consumption, of the alternativity) and their application norm, so as to render the real unity of offence more easy to identify.

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⁵⁸⁾ GD no. 1183/2008 for the approval of the previous recitals of the Criminal Code project, published in the Official Gazette no. 686 from 8 October 2008.

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