

**TITU MAIORESCU UNIVERSITY
DOCTORAL SCHOOL OF LAW**



**DOCTORAL THESIS
PRINCIPLES AND THEORIES OF THE APPLICATION OF
CRIMINAL LAW OVER TIME
ABSTRACT**

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Traditionally, criminal law is associated with the idea of the state, its punitive power, the imposition of standards of conduct on citizens, and the application of sanctions to those who violate the prohibitions or obligations established by law. In this sense, the law must also meet a series of formal and substantive requirements in order to be considered a 'criminal law.

One topic that should hold paramount importance in these times is the application of criminal law over time. However, under the firm belief held by some that everything has already been said and exhausted on this old matter, it is thought that there is little left to add. Nevertheless, I believe that this topic has not received all the attention it deserves in criminal law literature, which motivates me to undertake this research.

The law is an act of will that does not possess universal and permanent legal effectiveness; rather, it is subject to the will that creates it, being limited in both time and space. The life of a law unfolds between two moments: the moment it comes into existence through promulgation and application, and the moment it ceases through repeal or a declaration of unconstitutionality.

From birth to death, a person is subject to an infinite number of legal norms. It depends solely on the decisions they make at various moments and stages of their short or long life which of these norms will be selected and applied. This issue—of determining the applicable criminal law within a specific time frame—is one of the most debated topics that may arise within the legal system in general, but especially in criminal law, as it represents a coercive instrument of formal social control that can encourage the arbitrary exercise of the *ius puniendi*, as has happened repeatedly throughout the history of civilization

As a result of this dynamism, criminal laws evolve and adapt to politico-criminal demands, by criminalizing or decriminalizing certain acts, or by decreasing or increasing the punitive power of the state. Thus, the legal system does not remain immutable over time—some laws disappear while new ones emerge. However, this succession of laws gives rise to temporal conflicts when two or more criminal norms converge, each claiming to be valid for regulating a particular act or legal situation.

This normative conflict does not arise solely in substantive criminal law. It also emerges in criminal procedure and the execution of sentences. Everything will depend on the point of connection or the temporal reference used to assess the confluence of norms.

This complex issue—of selecting the applicable norm in a specific case in order to subsequently determine its effects—falls within the scope of the study of intertemporal or transitional criminal law. More precisely, the principles that govern and clarify the correct application of criminal law over time are non-retroactivity, retroactivity, and ultra-activity.

When the new law enters into force, the old law ceases to produce effects, which does not seem to create any interference or overlap between these laws at the normative level. However, when it comes to applying a law to acts or legal relationships arising from prior actions, or to situations that occurred before the new law came into force, the succession of norms over time makes their application far from simple.

There may be reasons to determine that certain situations arising before the new law enters into force should continue to be governed by the old law, which, although repealed, would survive with limited effectiveness (*ultra-activity*). This hypothesis suggests that the application of norms to acts committed during their period of validity does not always coincide, leading to a dissociation between the time frame in which the law existed and the temporal scope of its applicability.

To determine the applicable law for legal acts committed during the validity of the old laws that are still in effect when the new regulation comes into force, it is necessary to resolve the transition from the old law to the new one. Thus, the legislator may include provisions in the new law indicating the applicable norm in such legal situations or establish rules for determining the appropriate law through transitional provisions. However, in most cases, the omission of such rules leaves the system with two possibilities: applying the principle of non-retroactivity of the law, based on the principle *tempus regit actum*, or applying the law retroactively within certain limits.

However, as is not uncommon in the world of jurists, this subject is full of doctrinal prejudices which, as they strengthen over time, become practically indestructible. Moreover, the issue underlying the application of criminal law over time is strongly imbued with inflexible premises, such as the unrestricted validity of favorable retroactivity, the immediate application of procedural or enforcement norms, the prevalence or moral superiority of international criminal law, and the impossibility of reconciling the rights of the victim with those of the accused.

Through a systematic and interdisciplinary approach, this work essentially presents itself as a proposal to explain the so-called 'succession of laws' in Romanian criminal law, aiming to clarify the existence and applicability of criminal norms over time. It is important to emphasize the theoretical-hypothetical nature of the proposed endeavor, since the assumed non-ontological perspective excludes the possibility of considering objective reality as an absolute truth. Specifically in the legal field, theories should not be validated based on their correspondence with a supposed immutable reality, but rather on their ability to provide a coherent and functional explanation of the legal phenomena under analysis.

The choice of this topic was motivated by the conflict of opinions that arose between the High Court of Cassation and Justice and the Constitutional Court of Romania. In this regard, the High Court of Cassation and Justice ruled, through Decision no. 2 of April 14, 2014, in favor of applying the more favorable criminal law to autonomous institutions, considering the prescription of criminal liability as an autonomous institution in relation to that of the penalty. Subsequently, the Constitutional Court of Romania overturned, through Decision no. 265 of May 6, 2014, the possibility of applying the more favorable criminal law by combining legal norms from two or more successive laws.

The relevance of the subject is supported by the opposing perspectives that have emerged in the doctrine regarding the application of criminal law over time. There are many voices advocating for the application of criminal law over time on autonomous institutions, invoking multiple theories in this regard.

The central hypothesis of the thesis starts from the premise that a rigorous analysis of the succession of criminal norms necessarily requires a prior investigation of the general principles governing the succession of legal norms, since these principles operate through mechanisms common to all branches of law.

First and foremost, the research aimed to analyze the extent to which the lack of clarity in identifying and explaining the mechanisms of normative succession, combined with the overlapping of theoretical and practical levels of analysis, has led to unsatisfactory doctrinal and legislative solutions and has further complicated the effort to coherently substantiate the legal regime applicable to the succession of criminal norms.

An essential objective of the present research is the analysis of relevant case law, by examining the decisions handed down by national and international courts, particularly the Constitutional Court of Romania, the High Court of Cassation and Justice, and the European Court of Human Rights, with the aim of identifying the criteria for determining the more favorable criminal law.

This analysis has made it possible to highlight jurisprudential divergences, dysfunctions in identifying the more favorable criminal norm, as well as doctrinal inconsistencies, thereby contributing to the clarification of issues of major interest for judicial practice.

To ensure a comparative perspective, the research also included an evaluation of the regulations, case law, and legal doctrine concerning the application of the more favorable criminal law in other European and international legal systems, with the aim of identifying the criteria for determining the more favorable criminal law.

Since this paper was conceived from a critical perspective, another objective of the research is the identification of regulations, court decisions, and doctrinal opinions that support or oppose the application of the more favorable criminal law to autonomous institutions.

To clarify the manner of applying the more favorable criminal law, I employed the logical method, which allows for a coherent analysis of normative structures in correlation with the general principles of criminal law, the determination of the applicability of the principles of the European Convention on Human Rights in domestic law—by reference to the case law of the European Court of Human Rights regarding the identification of the more favorable criminal law—as well as the formulation of well-founded legal conclusions and the critical, reasoned support or challenge of divergent jurisprudential opinions.

For a better understanding of the evolution of the institution of the application of criminal law over time, I employed the historical method. In this regard, I analyzed the normative transformations, starting from the earliest regulations in the field up to the current Criminal Code. This approach allowed for the correlation of legislative changes with the political and socio-cultural context specific to each era, as well as the assessment of the adequacy of the normative framework in addressing contemporary challenges related to the protection of legal values.

To support the legal analysis with concrete data, I employed the quantitative method. This allowed me to examine official statistics regarding the application of criminal law over time to autonomous institutions, to systematize the case law of the European Court of Human Rights and national courts, and to assess the potential impact of applying the more favorable criminal law to autonomous institutions. This method provides a solid factual basis, facilitating the formulation of objective conclusions regarding the manner in which criminal law is applied over time.

To integrate the research into a broader analytical framework, I employed the comparative method, through which I analyzed the differences and similarities in the application of criminal law over time between Romania and other legal systems. This method helped me identify the relevant criterion for determining the more favorable criminal law, correlate national provisions with trends found in European and international law, and formulate reform proposals inspired by legal models that have adopted more effective solutions regarding the application of the law over time.

The structure of the research is built upon a systematic approach to the issue of the application of criminal law over time, focusing both on the analysis of the legal foundations

of the more favorable criminal law and on the examination of the evolution and applicability of specific criminal regulations. The paper is structured into six chapters, each playing a decisive role in substantiating the conclusions.

The development of the present analysis involves the use of an integrated methodology, based on a wide range of analytical techniques, each playing an essential role in the rigorous investigation of the issue of the application of criminal law over time. The methodological approach is grounded in the principle of complementarity of research methods, ensuring a nuanced interpretation and a critical evaluation of the legal regulations relevant to this field.

The research is structured into six chapters, which contributes to understanding the evolution of the application of criminal law over time. The first two chapters are dedicated to the analysis of the fundamental concepts of normative succession, from the perspective of legal theory. Both the scope of application and the causes of changes in legal norms are explained, with a particular focus on criminal law. This approach is followed by an examination of the concept of retroactivity, which required an investigation of the theory of legal norms and the theory of legal dynamics, as well as their points of convergence.

The following four chapters focus on outlining the different levels that, through their combined functioning, govern normative succession in criminal law: the constitutional level, where the basis and scope of the non-retroactivity principle were analyzed, as well as the constitutional foundation of the retroactivity of the more favorable criminal law; the dogmatic level, which allowed for the delimitation of its scope of application in this area; and finally, the normative level, where the requirements resulting from the previous levels are transposed into the Romanian legal order.

Chapter I provides the conceptual framework necessary for understanding how criminal law operates over time. The research begins with an exploration of normative change, which has become a highly significant legal issue in our society. In Romanian criminal law, this change is driven both by the need to adapt criminal legislation to the constitutional order and societal development, as well as by the increasing bureaucratization and symbolic use of criminal law—phenomena common to the entire European criminal justice system.

Chapter II focuses on a theoretical reconstruction of retroactivity by drawing on the tools offered by the general theory of law, such as the theory of legal norms and the theory of normative system dynamics, given the lack of a rigorous conceptual delineation of this notion.

Following the analysis of the temporal dimension of the legal norm, it was found that

any norm inherently possesses both a prospective and a retrospective character. Based on this observation, an initial definition of retroactivity was outlined. Thus, a norm is retroactive when it produces effects solely by virtue of its retrospective character, acting only as an evaluative criterion applicable to legal situations that occurred prior to its entry into force.

Chapter III addresses the connection between non-retroactivity and the principle of legality, which is, at least within our legal order, indisputable. It was concluded that the prohibition of retroactivity represents a principle formulated with sufficient clarity in the Constitution.

Following the analysis of the various foundations of the principle of non-retroactivity—namely guilt, legal certainty understood as foreseeability, and the prohibition of extending the state's *ius puniendi*—it was concluded that the most reasonable interpretation is that the principle of non-retroactivity protects not only the foreseeability of the state's repressive intervention, but also its neutrality.

Chapter IV built upon this foundation and aimed to define the scope of the constitutional prohibition of retroactivity in relation to issues under doctrinal and jurisprudential debate. The analysis focused primarily on two areas: security measures and rules of criminal procedure. Regarding the former, their protection under the principle of non-retroactivity is justified by their repressive nature, particularly inferred from their coercive character and interference with the exercise of individual liberty. As for procedural rules, the need to include them under the scope of the retroactivity prohibition arises from the understanding of criminal proceedings as a limitation imposed on the state's *ius puniendi*—a limitation which, in turn, may be retroactively expanded through the amendment of these rules.

The issue of 'the retroactivity of case law' was also addressed separately, since its inclusion within the scope of the constitutional principle of non-retroactivity follows from the concept of norm upheld in this paper, as well as from a more realistic interpretation of the principle of legality. This approach allowed for the formulation of an opinion (*de lege ferenda* proposal) according to which the practical resolution of the numerous issues generated by jurisprudential changes requires, on the one hand, the establishment by the Constitutional Court of a standard of foreseeability, and on the other hand, the creation of a court competent to unify case law.

Chapter V establishes that the influence of legal dogmatics on the elements governing normative succession in criminal law has proven to be limited. The interpretation supported in this paper places the purposes of punishment within the sphere of negative general prevention

and the limitation of social violence. Based on these objectives, it becomes difficult to justify certain aspects related to normative succession, such as the retroactive application of temporary criminal laws.

On the other hand, the elements of the theory of the offense also do not provide a solid foundation for use in the field of normative succession, since unlawfulness depends on the applicable norm and therefore has a dynamic character, just like the norm itself. The only element tied to a specific moment in time is the awareness of the illicit nature of the act, which must exist at the time the act is committed.

Ultimately, the theory of the offense does not provide adequate solutions for determining the applicable norm in cases where it undergoes changes during the period in which the act is committed, although it may be relevant for establishing the duration and the exact moment of the commission of the offense.

Chapter VI, being the final chapter of the study, addresses the issues related to the application of criminal law over time that have arisen in the Romanian legal system, particularly after the entry into force of the new Criminal Code. The chapter analyzes the conflicting decisions of the Constitutional Court and the High Court of Cassation and Justice, and puts forward a *lex ferenda* proposal aimed at preventing future inequities between defendants regarding the application of the more favorable criminal law, as occurred during the year 2014.

The work concludes with a synthesis of the main conclusions drawn from the conducted analysis, highlighting the essential directions identified through the research on the application of criminal law over time.

The present research has highlighted that the prohibition of retroactivity of criminal norms is an essential part of the principle of legality, and its traditional meaning consists in the impossibility of applying criminal norms that were not in force at the time the act was committed—provisions that expand the categories of incriminated acts or aggravate the penalties applicable to those already existing.

The research on the prohibition of non-retroactivity has had a primarily practical interest, aiming to establish a motivated and coherent delimitation of the object of protection. The basis is perceived as the fundamental justification for the prohibition of retroactivity, representing the main reason and support point for this guarantee. Thus, it is a discourse that, while focused on the constitutional legal framework, extends beyond this domain.

Regarding the principle of legality, it can be understood as a minimal but insurmountable barrier against the *ius puniendi* of the state, for the benefit of citizens, even

though this impossibility of violation cannot be guaranteed for all its safeguards. However, this is possible in the case of non-retroactivity, since if its notion is well defined, determining the retroactive character of a norm is, in most cases, a matter of objective ascertainment, further benefiting from its nature as a formal guarantee that does not limit the future development of the legislator's criminal policy. Thus, the tension between *ius puniendi* and the principle of non-retroactivity essentially centers on the scope of its application.

The examination of the scope of the prohibition of retroactivity in the analyzed countries—France, Germany, Italy, and Spain—revealed that the only clearly regulated area concerns crimes and their punishments, as well as provisions in the general part of the criminal codes. In other areas, on the contrary, controversies persist and, with the exception of France, these are generally not subject to the retroactivity prohibition regime. The most intense debates focus on the application of the retroactivity prohibition in relation to security measures and criminal procedure rules. Regarding the issue of the retroactivity of case law, this is addressed almost exclusively in Germany, where there is extensive specialized literature. From the analysis, it emerges that there are deeply divergent positions; however, the majority conclusion is to reject the inclusion of case law under the protection offered by the prohibition of retroactivity.

The prohibition of the retroactive application of the law does not solely aim to ensure the predictability of state interventions within the sphere of individual liberty, but also seeks to guarantee the neutrality of the exercise of the state's repressive power. This neutrality constitutes an essential safeguard of the rule of law, which is susceptible to being violated not only through the modification of incriminating norms or criminal sanctions but also through other legislative or judicial mechanisms that may affect the balance and impartiality in the application of criminal law.

Regarding the application of criminal law over time within the territory of Romania, it has been established that the rule is the principle of non-retroactivity of criminal law, while the application of the more favorable criminal law represents the exception.

The principle of retroactivity of the more favorable criminal law is regulated both by the Constitution of Romania and by the Criminal Code, being of immediate application in our legal system.

A disruptive moment for the entire Romanian legal system was constituted by the diametrically opposed decisions issued by the High Court of Cassation and Justice and the Constitutional Court. Thus, the High Court ruled in favor of applying the more favorable criminal law on autonomous institutions, while the Constitutional Court interpreted Article 5

of the Criminal Code as applicable only in the case of applying the law itself and not more favorable provisions. In this regard, the more favorable criminal law will be applied in its entirety, and it is not permissible to combine the milder norms from two or more consecutive laws.

However, in Romania, there was a short period during which the more favorable criminal law on autonomous institutions was applied, as a result of Decision no. 2 of April 14, 2014. Thus, according to the Constitutional Court's Decision no. 624 of October 8, 2015, the solution pronounced by the High Court could be invoked in criminal trials until the publication of Decision no. 265 of May 6, 2014, issued by the Constitutional Court.

From the analysis of the doctrine and national jurisprudence prior to this moment, as well as from the examination of the legislation, doctrine, and jurisprudence of other European legal systems such as France, Italy, Germany, and Spain, I have not identified support for the opinion of the High Court of Cassation and Justice.

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