„BABEŞ-BOLYAI” UNIVERSITY
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THE APPARENT COMPETITION OF CRIMINAL RULES

- Ph. D. Thesis Abstract -

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SUMMARY

The purpose of the present study was to examine in detail the institution known in foreign literature as the "apparent competition of criminal rules" or, in Romanian literature, as the "concurrence of qualifications", although between these notions we appreciated that there is a difference of to genus to species.

The problem of the apparent competition of criminal norms has been the subject of intense and wide-ranging debates in foreign specialized literature since the end of the 20th century, although in the local doctrine the studies that appeared were less concerned with the unitary approach to the concept. Undoubtedly, judicial practice and Romanian literature have known and applied over time some of the principles of solving the apparent contest of criminal rules, in particular the principle of specialty, but in the absence of an overview of all the incident principles, there is the risk of unjustified expanding or restricting the principles.

This is why through the present study we sought to develop and analyze from all perspectives the institution of the apparent competition of criminal norms, focusing on the attempt to provide unity and clarity to a particularly complex concept with significant practical implications, thus deviating sometimes from some majority opinions expressed in foreign literature. In this way, all the forms of classification of the qualifications competition (alternative, incompatible, redundant and equivalent qualifications) were examined, to which we also added the gradual qualifications, as well as all four principles for solving the concurrence of qualifications (principles of specialty, subsidiarity , absorption and alternativity), with the attempt to resuscitate the principle of alternativity which was gradually abandoned in foreign literature.

The theory of the apparent concurrence of criminal rules is by far one of the most controversial subjects in literature and judicial practice due to its vast scope of application, as it is particularly significant both in the field of general and special criminal law, and sometimes even in criminal procedural law. If it is usually possible to deepen the study on some substantive criminal law institutions within the framework of specialised papers dedicated exclusively to them, the in extenso study of the theory of apparent concurrence stands out for the diversity of legal institutions that come “into play” and help to configure the theory. This is not at all surprising if we consider that most legal institutions benefit from a regulation through criminal law rules, and the interaction of rules or, more importantly, the conflict of rules is the main issue brought up by the theory.

Examining the constitutive elements of an offence brings into discussion a matter of interpretation and application of a single indictment rule, which is the object of study of special criminal law. Even if not every offence presents difficulties in terms of understanding and applying the rule, things always get complicated when examining the interaction between the rules and, therefore, the relationship between two

or more offences, as it involves not only identifying the scope of application, but also performing a comparative analysis on the constitutive elements of the offences in order to establish to what extent the rules benefit from a cumulative application or, on the contrary, are mutually exclusive due to an element of opposition or incompatibility as to the effects.

The specialised studies published over time in our criminal doctrine stood out for the diversity of solutions identified either for the delimitation of certain offences, or for the delimitation of the concurrence of offences against the case in which a single indictment rule among those that may be applied can produce effects. However, examining the interaction between certain indictment rules cannot be carried out in the absence of a solid legal construction that allows the substantiation of the solution in consideration of some guiding ideas that can also be applied in the case of the relationship between other similar criminal rules. As such, a one-way approach to the relationship between two offences, centred exclusively on their constituent elements, is not possible; this can be attained only by starting from a general concept that guides the process of the interpretation and application of criminal rules.

This solid legal construction or this general concept made reference to is the theory of the apparent concurrence of criminal rules, which is the object of study of general criminal law. Emerged in German literature about 150 years ago, the theory benefits from a legal regulation in some European states (Italy, Spain) and in several Latin American states (Mexico, Nicaragua, Costa Rica, El Salvador, Honduras, Puerto Rico, Panama, Bolivia, Ecuador).

In our criminal doctrine, the same theory, known under different names (concurrence of rules, concurrence of qualifications, concurrence of texts, etc.), is still in its infancy. An indication in this sense is the lack of a monograph dedicated to the subtleties and depth of the apparent concurrence, coupled with the synthetic analysis of the methods of identification and resolution of the conflict of rules present in some criminal law textbooks. Thus, during the course of the research, we aimed to develop a theory meant to aid both in identifying conflicts between different criminal rules and resolving these conflicts, in an attempt to provide argumentative support to the judicial bodies called to interpret and apply criminal rules. Many a time, the plurality of criminal rules that may be applied has led to erroneous enforcement, either by creating an advantage for the defendant by the prosecution of a single offence to the detriment of the concurrence of offences, or a disadvantage by the wrongful prosecution of the concurrence of offences.

Although our legal system does not regulate the apparent concurrence of criminal rules, we believe that this paper is also for the legislator's use. However, unlike the German system, where the lack of such a regulation is due to the legislator's will that manifested following some controversial discussions on the appropriateness of adopting some legal provisions in this matter, the Romanian legislator's passivity may be due to an insufficient knowledge of all the implications of the theory, which is why it should have started from a constructive analysis of the doctrine.

This is why the theory of the apparent concurrence of criminal rules is among the most complex and controversial subjects that are the object of study of general criminal law, being a real challenge for

any person who tries to unravel its secrets. Therefore, in an attempt to simplify the understanding and application of the theory, we were forced to deviate sometimes from the concepts developed and currently accepted in Romanian or foreign doctrine and in judicial practice, and to create some new concepts, all this in order to eliminate those uncertainties that generally characterise the theory, on the one hand, and the inherent vulnerabilities of any legal concept lacking unity, on the other hand.

Once all the difficulties faced by the theory, as well as the limits of its application in the way shown in this paper are known, the legislator may consider them in the process of drafting the criminal law, avoiding thereafter the creation of rules that allow the emergence of non-unitary judicial practice and give rise to arbitrariness.

Thus, the first part of this paper is dedicated to the study of the theory of the criminal rule, in which it is noted that the criminal rule cannot be understood exclusively in a restrictive sense, in the form of a rule of conduct under the threat of a criminal sanction, but also in an extensive meaning, including, in addition to the rules of conduct permitted by the criminal law, any provisions of criminal law that regulate the creation, modification and termination of criminal legal relations. This meaning allowed the classification of the criminal law into the two most important categories, namely the indictment rules and the integrative rules, which were later used to delimit the scope of the apparent concurrence of rules, which is not limited to the conflict between indictment rules, as is usually treated in the literature, but also includes the conflict between integrative rules (e.g., between amnesty and rehabilitation) or between an integrative rule and an indictment rule (e.g., between general aggravating circumstances and aggravating circumstantial elements).

On the other hand, the analysis of criminal rules could not be carried out without brief considerations on the elaboration and interpretation of the criminal rule. If the first represents the prerogative of the legislator, the second represents the main means available to judicial bodies to identify the will of the legislator. In a system that does not regulate the apparent concurrence of criminal rules, which could not include detailed references of the theory anyway, the task of identifying and resolving the apparent concurrence of rules lies with the judicial bodies, and the interpretation of the criminal rule represents the main means of achieving this goal. Using rule interpretation methods, the person responsible for criminal law enforcement can separate the scope of the theory from the simple cases in which the rules only seem to have a concurrent applicability to the same factual situation, such as the relationship between the offences of rape and incest, which could not give rise to an apparent concurrence, given that the rules are mutually exclusive. Moreover, in situations where conflicting rules are based on a logical-formal relationship which allows the identification of their incompatibility in terms of actual application through a “simple” reading and comparison of the content (e.g., the rules subject to the principle of specialty or legal absorption), the elaboration and interpretation of criminal rules emphasises the communication relationship between the legislative and the judicial power. In these cases, apparent concurrence may be configured and “controlled” by the legislator with the elaboration of the rule; following that, the judge may apply the criminal law in accordance with its will. This is how the theory of the apparent concurrence of rules proves its importance

not only during the criminal trial, at the time of application of the law, but also during the process of drafting the criminal law, the legislator being obliged to consider the conflicting relations that could arise between the different laws and to regulate their content differently if pursuing their cumulative application.

Toward the end of the first part, we chose to examine the notion of concurrence of rules, which, in our literature, is usually reserved for situations where the rules are incompatible in terms of actual application, and cannot be cumulated. However, starting from the notion of concurrence, which expresses the idea of plurality, we chose to treat the subject differently by making a distinction between the genuine (compatible) concurrence of criminal rules and the apparent (incompatible) concurrence of criminal rules, depending on how the rules under discussion could be applied cumulatively or not, the latter notion also justifying the name of this study. Thus, we considered that even the concurrence of offences represents a subcategory of true concurrence, when several indictment rules may apply, preferring the notion of apparent concurrence due to the idea it expresses, like in the Spanish and Italian literature, namely the fact that only one rule will be applied in the end.

No less important, Title I in Part II includes a brief historical foray into the emergence of the theory of apparent concurrence. Although the principle of specialty or other situations in which the rules could not be applied cumulatively were known in judicial practice and the older doctrine, which justified the preference for a single rule in consideration of the ne bis in idem principle, the theory originates from the late 19th century publications of the German author Adolf Merkel, currently considered the father of apparent concurrence. Although the initial proposal was to use only the principle of specialty, a solution that was echoed in Italian law as well, the theory was taken over and further developed by other authors, who preferred the use of several principles for solving apparent concurrence, the latter resonating in Spain and other Latin American countries.

The second chapter, dedicated to the ne bis in idem/double jeopardy principle, examined the jurisprudence of European and American courts in this matter, starting from the idea that the principle represents the foundation of the theory of apparent concurrence, the application of a single rule finding its justification in the prohibition to sanction a person twice for the same deed. The analysis proved extremely useful even for the next Title (Title II), where we tried to substantiate the theory, but it highlighted that, unlike the double jeopardy principle, the ne bis in idem rule, in the manner in which it was developed by the European Court of Human Rights and the Court of Justice of the European Union, cannot by itself substantiate the apparent concurrence of rules. This is because, on the one hand, the principle is regulated in an exclusively procedural manner, prohibiting the cumulative application of the rules during two different criminal trials, and on the other hand, the meaning of the concept idem was focused too much on the factual component, while the theory of the apparent concurrence of rules has an exclusively legal object. In other words, sometimes the ne bis in idem principle can prohibit the conduct of a second criminal trial even when the offence is in formal (ideal) concurrence with the other offence already definitively judged. However, if the offences judged separately would be in a conflicting relationship, European jurisprudence,

too, prevents the further conduct of the second procedure, under the penalty of violation of the principle. On the other hand, the double jeopardy principle, as developed by the Supreme Court of the United States of America, does not have such a limitation, which makes it possible to violate it by wrongfully solving apparent concurrence even within the same criminal trial.

In any case, both legal regulations derive from the general prohibition of capitalising on the same thing twice, which is an expression of the principle of proportionality and feeds the theory of the apparent concurrence of criminal rules both in the case of the commission of a single act and in the case of plurality of acts. The exceptions developed by the European and American courts are equally applicable to apparent concurrence, so that whenever the legislator imposes the acknowledgement of the concurrence of offences through an express clause, usually associated with certain offences (e.g., manslaughter, culpable bodily harm, fraud), the application of the theory is excluded.

In order to understand the apparent concurrence of rules, Title II addresses the definition, legal nature and conditions of existence. In essence, we considered that the theory of apparent concurrence designates the case in which there is a plurality of lato sensu criminal rules that may be applied concurrently in the same time and space conditions, in the case of the commission of a single act or, exceptionally, of several acts, rules between which there is an incompatibility relationship in terms of actual application, so that the application of a criminal rule excludes the application of the other rules, thus avoiding the violation of the ne bis in idem principle or the principle of proportionality. Although, usually, the criminal doctrine limits the applicability of the theory in the case of the commission of a single act, starting from the manner of its development in German literature, by "detachment" from the formal (ideal) concurrence of offences, we preferred to integrate the plurality of acts in the scope of the theory, as it benefits from a similar solution, by appealing to the principle of natural absorption or, as the case may be, of (material) subsidiarity or, exceptionally, of alternativeness.

From a terminological perspective, we expressed our preference for apparent or improper concurrence of rules, and have reserved the restrictive meaning of concurrence of qualifications for the conflict between indictment rules, with the exclusion of the notion of unity of the law commonly used in German doctrine, which does not sufficiently highlight the central element of the theory, i.e., the plurality of criminal rules.

The simultaneous applicability of criminal rules, as well as their incompatibility in terms of actual application are two of the most important requirements of apparent concurrence, as they allow the delimitation not only of the concurrence of qualifications against the concurrence of offences, but also of the apparent concurrence against the cases in which the rules do not benefit from applicability. Thus, the apparent concurrence of rules is effective, since each of the rules under discussion must be applicable to the act or acts committed, even if, in the end, only one will be applied. In this sense, the apparent character falls not on applicability, but on the actual application of the rules, because, otherwise, the rules would be in a relationship of opposition, of mutual exclusion, which would remove any discussion on the analysed

theory in the absence of the requirement regarding the plurality of applicable rules. In this regard, the relationship between the offences of rape against a family member and incest is representative, as it is known that the rules do not apply to the same act, given that rape involves the victim's lack of consent, while the offence of incest can only be committed with the consent of the family member.

Seeing the scope of the apparent concurrence of rules and the connection with other criminal law institutions, we expressed certain reservations regarding its positioning within the general theories of the criminal rule, offence or punishment or alongside the concurrence of offences and, at the same time, we considered the option of the majority doctrine to examine the theory in the chapter on the application of the criminal law over time to be slightly uninspired. In reality, the conflict of rules exceeds the individual study of the criminal rule and allows the examination of the interaction of both the indictment rules, relevant from the perspective of the punishment, the offence or the concurrence of offences, as well as the integrative rules. Therefore, we preferred to study this phenomenon within the subject matter dedicated to the general application of criminal law, the emphasis falling on the method of conflict resolution, and on the identification and application of the priority criminal rule, respectively.

Chapter II of Title II was reserved for the conditions of existence of the apparent concurrence of criminal rules. On that occasion, we saw that the theory finds applicability not only in the case of the unity of the act, as suggested by the majority doctrine, but also in the case of the plurality of acts, a concept that corresponds to the unitary theory of the apparent concurrence, in contrast to the theory of differentiation, which excludes the plurality of acts from its scope. Using both the theory of natural unity of action and the theory of legal unity of action, we established that we are dealing with a single act in a material sense when the perpetrator commits a single action or inaction within the meaning of the theory of natural unity of action, but we remain within the scope of unity of the act, this time in a legal sense, also when the plurality of actions is found in the content of a single indictment rule, as is seen in the case of complex, continued offences and those with alternative content. In all other cases, apparent concurrence can be applied only in the consideration of the plurality of acts.

The difference between the unity and the plurality of acts, also the second and most important condition of apparent concurrence – the incompatibility of the rules, is relevant from the perspective of delimiting the concurrence of qualifications from the concurrence of offences, an approach that was the subject of discussions in Title III. Both institutions presuppose the simultaneity of indictment rules, the difference materialising exclusively in terms of application. Thus, if in the case of the concurrence of qualifications, the rules are incompatible in terms of actual application, as only one of them could produce effects, the concurrence of offences designates the exact opposite situation, where indictment rules are compatible and benefit from a cumulative application. Accordingly, we wanted to emphasise that the institutions represent two mirrored "regulations", or "two sides of the same coin" built around indictment rules.

Starting from here, the qualification of the relationship between the criminal rules according to the concurrence of qualifications or offences is not without any theoretical and practical consequences, especially from the perspective of the sanctioning treatment that we focused on in Title IV, along with other effects of apparent concurrence. In the case of committing a single act, discussions are held between the concurrence of qualifications and the formal concurrence of offences, while the plurality of acts brings into discussion the relationship with the actual concurrence of offences. The analysis carried out in Title III proved to be particularly relevant, since, on the one hand, it served as one of the criteria for classifying the forms of the concurrence of qualifications (found in Part III, Title II), and on the other hand, demonstrated that the exclusion of the formal concurrence of offences was possible according to any of the four principles for solving the concurrence of qualifications, while the exclusion of actual concurrence required the application of only certain principles (according to those highlighted in Part IV, Title I, Chapter I).

At the same time, the delimitation of the two expressions of concurrence (apparent/genuine) of indictment rules allowed us to formulate a principle with general applicability, which later guided the interpretation and application of the rules in the direction their compatibility or incompatibility. In essence, following the guideline established in the doctrine, to the extent that a single indictment rule among the applicable ones fully covers the negative value of the perpetrator's conduct, we are dealing with the concurrence of qualifications, otherwise the rules of the concurrence of offences will be applicable. The principle is also applicable in the relationship of the plurality of acts with the actual concurrence of offences, since, sometimes, a single rule could be sufficient to integrate guilt in the general sense and criminal offence, so as to consider that one of the committed acts cannot bring a new accusation to the perpetrator, as happens in the case of stealing an asset (the offence of theft) and its subsequent destruction (the offence of destruction). We have chosen to include this distinction with principle value in the legislator's idea of tacit will, since, in addition to what is shown in the doctrine, we consider that we can also talk about an express will, in consideration of which it is possible to delimit the concurrence of qualifications against the concurrence of offences when the legislator establishes through an express clause, usually associated with an indictment rule, the compatibility or incompatibility of the rules in terms of actual application. For the first hypothesis, the legislator usually resorts to the formula "the rules on the concurrence of offences shall apply" [e.g., Art. 192 (2), 196 (5), 244 (2), 264 (1), 272 (1), 367 (3) of the Criminal Code], and for the second hypothesis, the rule is applied "unless the act represents a more serious offence" [e.g., Art. 208 (2), 216, 2161, 288 (1) of the Criminal Code].

Also for the first hypothesis above, in the last part of the previous title (Title II) we focused on the correspondence of such a clause with the provisions of the fundamental law, on which occasion we found that, although the clause to consider the concurrence of offences should remain the exclusive prerogative of the legislator, who, by virtue of being the sole legislative authority of the country, can establish the type and limits of punishment, discussions occurring maybe on the proportionality of the sanction provided for by law, the Constitutional Court of Romania seems to limit its constitutional prerogatives in relation to the

necessity and proportionality of indictment and punishment in contrast with the jurisprudence developed in this regard by the Supreme Court of the United States of America, which we analysed in Chapter II (section 2) of Title I.

In Title IV of Part II, we addressed the general importance of the apparent concurrence of rules, starting from the idea that, usually, the resolution of the conflict in favour of the priority rule determines the suppressed rule's exclusion from application, with all its effects. If German criminal law admits the so-called principle of the combination of rules, which allows the removed rule to continue to produce some so-called residual effects, in the absence of a well-crystallised jurisprudence in this sense and a favourable historical evolution, we have followed the opposite solution in our legal system, namely the rule of exclusivity of the prevailing criminal rule. That is why, once the suppressed rule is removed, it can no longer produce its specific effects, meaning all the legal consequences and the provisions set out in law attached to the removed rule. By way of exception, we considered that the removed criminal rule can still produce certain effects when, concretely, it supplements the priority rule in terms of provision, sanction or their elements, by way of the regulatory technique of rules referenced, however not any effects, but only the intrinsic ones, which are closely related to the hypothesis or sanction. On the other hand, the suppressed rule also produces effects in full when the priority rule regulates an offence assimilated to the removed one.

Following the rule established above, we could note the importance of the apparent concurrence of rules both in terms of substantive law and criminal procedural law. Thus, the effects removed with the suppressed rule include sanctions, causes for the removal of criminal liability or execution of the punishment, and the competence to investigate and judge offences related to or associated with this rule, which "survive" and apply to the priority rule including only to the extent of the exceptions mentioned above.

Starting with Part III and continuing with Part IV, we approached what constitutes the core or quintessence of the apparent concurrence of criminal rules, within which we tried to establish when exactly two or more rules are in a conflict relationship, as well as what is the way to solve the conflict or identify the prevailing criminal rule. Although divided into two parts, the scope of the apparent concurrence of rules (Part III) and its solution (Part IV) are interconnected, leading ultimately to the formulation of common conclusions.

If usually the discussions on apparent concurrence are carried out in terms of indictment rules due to their importance, we chose not to exclude the integrative rules from its scope, which could be in conflict both with each other and with the indictment rules. Therefore, Title I of Part III started with the interaction of integrative rules, which can be in conflict when the legislator expressly establishes their incompatibility, as well as when the will of the legislator is only tacit, deduced from the perfect overlap in terms of scope or the production of similar or identical effects or effects which cannot be reconciled. For example, the legal mitigating circumstance provided for by the Criminal Code and the cause provided for by Art. 10 (1) of Law no. 241/2005, both regarding the full coverage of the damage, could not be applied cumulatively in

the case of the offence of tax evasion, as they capitalise on the same circumstance that mitigates criminal liability. Unlike the concurrence of qualifications, the cases that are the object of the apparent concurrence of integrative rules could be identified from the very beginning, once the scope was defined in Title I, without having to resort to the principles of solving the apparent concurrence, these being used, as they were laid out in Part IV, Title II, Chapter II, exclusively for identifying the priority rule. In the previous example, the provisions of Art. 10 (1) of Law no. 241/2005 will apply with priority, having a special character compared to the general mitigating circumstance.

The conflict between an indictment rule and an integrative rule, which was the subject of Chapter IV, Title I, Part III, presented some particularities in this matter. The relationship of incompatibility in terms of the actual application of the rules must be analysed unilaterally, starting from the integrative rule. In other words, one must check only if the integrative rule covers exactly the same elements of fact that are the object of the constitutive elements of the offence, in which case it will be removed from application; otherwise, it will be effectively applied alongside the indictment rule, without the indictment rule having the same fate. Thus, the integrative rule can never be qualified as prevailing, in the sense of removing the indictment rule from application, but can only be applied when the rules are compatible or can be inapplicable when the rules are incompatible. The situation is atypical for the theory of the apparent concurrence of criminal rules, as only the integrative rule may be in conflict with the indictment rule, in which case it will no longer be applied, and not the other way around.

Finally arriving at the concurrence of qualifications (the apparent concurrence of indictment rules), we chose to treat the issue of the incompatibility of the rules and the resolution of the conflict or identification of the priority rule in a slightly different manner. Thus, there are two major systems commonly used to resolve the apparent concurrence of criminal rules. The first is the French system, which involves verifying the relationship between two or more offences by referring to the classification forms of the concurrence of qualifications. To the extent that the offences can be classified in one of the four forms (alternative, incompatible, redundant and equivalent qualifications), the indictment rules are in a relationship of incompatibility in terms of actual application, and depending on the applicable classification, it is also possible to identify the prevailing criminal rule, that is, the rule that will be effectively applied in the end. Within this system, the classification forms serve both the function of identifying the concurrence of qualifications and the function of identifying the prevailing criminal rule. The second is the system that uses one or more principles to resolve the apparent concurrence of rules, preferred and commonly used in most states, such as Germany, Italy, Switzerland, Spain, Brazil, Latin American states, etc. In this case, too, the system of principles allows both the identification of the relationship of incompatibility of the rules in terms of actual application, as well as of the prevailing criminal rule. To the extent that none of the accepted or recognised principles is applicable, the concurrence of offences will be considered. However, unlike the French system, establishing the applicability of one of the concurrence resolution principles automatically involves the resolution of the conflict between the rules. For example, we saw that in French criminal law

the redundant qualifications cover both the situation in which a rule has a special character in relation to another (general) rule, as well as the situation in which an offence represents a constitutive or aggravating circumstance element of another offence. Thus, it would not be sufficient to establish the fact that two offences are subject to redundant qualifications, but, concretely, the relationship between the applicable offences must fall into one of the two categories to ensure the identification of the prevailing criminal rule. Therefore, in this case, too, the principles serve both the function of identifying the concurrence of qualifications and the function of identifying the prevailing criminal rule, although the emphasis falls more on the latter.

Although we understood to give greater importance to the system of principles, the forms of classification of the concurrence of qualifications are not without relevance either. Thus, in our opinion, the classification forms should be maintained and should continue to be relevant, but only in the context of identifying the scope of the theory of the concurrence of qualifications. This is because it is difficult for us to accept that the French system could be used exclusively to capitalise on the theory of the apparent concurrence of rules. In addition to the fact that the alternative qualifications also included the relationships between offences that present elements of opposition and are mutually exclusive, relationships that do not have any theoretical or practical importance in this matter, and the four forms are not sufficient to make the theory of apparent concurrence fully applicable, we consider that the theory that underpins the forms of classification is less developed than the system of principles. Thus, we have already seen that the relations between a general qualification and a special one and between two qualifications, one of which constitutes an element or circumstance of the other, were included in the category of redundant qualifications, which did not benefit from a generally valid theory and, in addition, at least one condition of existence (i.e., the difference in sanctioning treatment) was relevant only in the context of legal absorption, not of specialty. In these conditions and in particular due to the fact that the said requirement could not be generally associated with redundant qualifications, the latter lacks a unitary approach.

As such, without necessarily aiming to raise the level of complexity of the theory of the apparent concurrence of criminal rules, but to offer a unitary character, we approached the conflict of rules from the perspective of a mixed system, that is, a system that involves the valorisation of both concepts. First, the relation between the applicable offences must be passed through the filter of the classification forms of the concurrence of qualifications, and then the principles of resolution will intervene. To the extent that the offences fall within the scope of the forms of the concurrence of qualifications, the next step consists in checking the conditions of application. In case of non-fulfilment of these conditions, the indictment rules are in a relationship of compatibility and, therefore, the offences will be considered to be concurrent. When, on the contrary, the application conditions are met, the system of classification forms is not sufficient to identify the prevailing criminal rule and, in some cases, not even to identify the incompatibility of the rules in terms of actual application. This is because the forms of classification of the concurrence of qualifications

can only exclude the concurrence of offences, which is why, further, it is necessary that the relation between said offences be passed through the filter of the principles of solving apparent concurrence.

Therefore, in Title II of Part III, we examined in extenso the four forms proposed in the French doctrine, namely the alternative, incompatible, redundant and equivalent qualifications. Noting their incomplete nature, we designed and added a new form of classification, which we called gradual qualifications, intended to cover the hypotheses known in our doctrine within the natural absorption that arises from the commission of a single act.

Only in this way does the application of the mixed system become possible, since each form of classification corresponds to one or more conflict resolution principles, which we analysed in Part IV, Title I of this study. Thus, the concurrence of alternative qualifications can only be resolved by applying the principle of formal subsidiarity, the concurrence of incompatible qualifications by applying the principle of material subsidiarity or, as the case may be, the principle of natural absorption, the concurrence of redundant qualifications by applying the principle of specialty or, as the case may be, the principle of legal absorption, the concurrence of gradual qualifications by applying the principle of natural absorption, and the concurrence of equivalent qualifications by applying the principle of alternativeness.

In our view, alternative qualifications describe the situation in which, by the express will of the legislator, an indictment rule is removed from actual application when another indictment rule is applicable, and not when the rules are in a relationship of opposition, of mutual exclusion, as the French doctrine suggests. Most of the time, the legislator uses the formula "unless the act represents a more serious offence" to emphasise the relationship of incompatibility; however, the field of alternative qualifications cannot be restricted to this formula, but to any other situations in which two rules have concurrent applicability, and one of them benefits from priority exclusively by considering the will of the legislator expressed in a more or less explicit form through a clause associated with the indictment rule, called subsidiarity clause. An example in this sense are Art. 34 (2) and 51 (2) of the Criminal Code, which allow the application of a different indictment rule than the one that would have had priority in the absence of withdrawal or precluding of consummation, as well as Art. 219 (4) of the Criminal Code, which allows the exclusive consideration of the offence of rape when it is followed or preceded by the offence of sexual assault.

However, unlike the Italian judicial practice, which limits the applicability of the subsidiarity clause to the indictment rules that ensure the protection of the same social values, we considered that such a limitation is not justified, as it would be in line with a contra legem interpretation. The importance of alternative qualifications was emphasised at the end of Chapter II of Title II, Part III, as they can exclude not only the formal (ideal) concurrence, but also the actual concurrence of offences, to the extent that the legislator's will is clearly expressed in this regard.

Another form of classification of the concurrence of qualifications, which we examined in Chapter III of Title II (Part III), are the incompatible qualifications, which are applicable exclusively in the case of a plurality of acts. Unlike the French doctrine, which includes here only the situation where an offence is a

logical and somewhat natural consequence of another offence, we chose to expand the scope, given that the theory of incompatible qualifications also covers the relationship between two offences, the first of which naturally implies the commission of the second. This is why, in our view, the incompatible qualifications cover what the German, Spanish and Italian doctrines call the theory of previous or subsequent acts sanctioned implicitly. In essence, an offence is considered implicitly sanctioned when it has a natural character in relation to another offence, qualified as the main one.

The theory of subsequent acts sanctioned implicitly follows in the literature certain general conditions of application in all situations where the offence committed subsequently is in a natural connection to the first, such as: the natural relationship between offences, the subsequent act must not lead to the amplification of the consequence caused by the previous act, the identity of the protected or damaged legal object, the unity of active and passive subject. For example, the offence of perjury committed in the way of improper declaration of the truth, in the sense that the witness has no knowledge of the criminal act directed against life in respect of which he is being heard, is in a natural relationship with the offence of failure to report, when the witness is the person who has become aware of the said act and did not report it to the authorities.

However, we noted that there are other offences subsumed to the theory of subsequent acts sanctioned implicitly that do not follow the general conditions above, such as destruction of stolen property, which leads to the amplification of the originally caused consequence. Therefore, we preferred to approach this theory differently, from the perspective of the particular situation, when the second offence can be seen as a way of exercising the attributes of the property right or from the perspective of the other situations subsumed by subsequent acts sanctioned implicitly, which requires the fulfilment of the conditions previously listed. This means that the main offence represents a way of (illegally) acquiring goods, and the subsequent offence an exercise of possession, use or disposal of the goods. In this sense, for the application of the particular situation, we proposed the use of a single criterion, following to establish whether in the case of a previous, alternative and illegal conduct, the second offence would have been considered. If the answer is affirmative, the rules of the concurrence of offences become applicable, and if negative, we are dealing with concurrence of qualifications. For example, the destruction of the previously stolen property constitutes an exercise of the material disposal, because to the extent that the perpetrator would have legally taken possession of the property (e.g., by purchase), the offence of destruction could no longer be considered. On the other hand, if the object of the theft is a vehicle, and the act is committed for the purpose of unlawful use, the destruction of the vehicle would have allowed the consideration of the offence of destruction, given that in the case of an alternative and lawful conduct, such as renting the vehicle, the perpetrator would not have had the right to dispose of the property.

In turn, the theory of previous acts sanctioned implicitly describes the situation in which the previous offence is in abstracto an autonomous indictment of the acts of preparation or execution of the subsequent offence, as well as the one in which the offence can only be considered in concreto, i.e.,

depending on the modality of commission, an indictment of the acts of preparation or execution of the main offence. Like the theory of subsequent acts, this time, too, the concurrence of qualifications follows specific conditions of application, such as: the natural relationship between offences, the identity of the legal and material object, and the unity of active and passive subject. For example, the offence of possession of instruments for the purpose of falsifying securities is an act of preparation in abstracto of the offence of forgery of coins, so it does not allow both to be considered in concurrence. Also, the partial destruction of an asset for the purpose of theft constitutes an act of preparation in concreto of the offence of theft, so that the appropriation of the property does not allow the consideration of the offence of destruction in concurrence. Contrary to the general approach of the literature which does not make such a distinction, we considered that in all these situations it is necessary that the offences be committed in the same circumstance; given that the offences are committed through two different acts, the legislator understood to expressly indict certain acts of preparation, and in the absence of spatial and temporal unity, such an autonomous indictment would lose its usefulness if the rules of the concurrence of qualifications were always applicable.

The distinction between the in abstracto and the in concreto approach is important, since in the first case the natural relationship is presumed, while in the second case it must result from the concrete manner of execution.

Furthermore, in Chapter IV of Title II (Part III), we examined what the French doctrine calls redundant qualifications, when an offence covers exactly the same elements included in another offence, with reference to the conflict between a general and a special qualification, as well as the conflict between two qualifications, one of which is a constitutive or circumstantial element of the other. In the absence of a generally valid theory that properly capitalises on the two hypotheses, we have resorted to the common law theory, developed in the jurisprudence of the American courts, given that all the constitutive elements of an offence must be found in abstracto among the constitutive elements of the other offence, also resulting that the offences must relate to the same legal object. Instead, the difference in sanctioning treatment does not represent a condition for the existence of redundant qualifications, but a condition for the application of the corresponding principles. In this case, unlike the incompatible qualifications, which exclude the actual concurrence of offences, the redundant qualifications have the ability to exclude only the formal (ideal) concurrence.

In the absence of a form of the concurrence of qualifications in French literature that would cover the hypotheses of natural absorption (in the case of the unity of the act), we developed a new such form, which we called gradual qualifications. Like the theory of previous acts sanctioned implicitly, gradual qualifications are applicable when the previous offence is on a lower level in relation to the other offence, but, unlike the first, only offences committed by the same act are considered. For example, plucking a flower from the injured person's garden, along with its appropriation, constitutes a single act that gives rise

to the applicability of the offences of destruction and theft, but which cannot be considered in concurrence, since the destruction is on a lower level, being committed during the offence of theft.

Among the conditions for the application of gradual qualifications we find the natural relationship between offences, the identity or inherent connection of social values, the unity of active and passive subject, and the different degree of damage to social values. Among these, the natural relationship between offences has a special significance. Thus, in order to assess the natural character in addition to the subjective criterion developed in the foreign literature, which assumes that the offence on the upper level usually involves, according to general experience, the commission of the offence on the lower level, we added another criterion, objective this time, starting from the jurisprudence of American courts applying the double jeopardy principle. In this sense, we considered that, in order to establish whether two offences are in a natural relationship from an objective point of view, one must check whether each applicable offence requires the proof of an additional element of fact that the other does not claim, but the way of committing it concretely proves it. For example, stabbing the victim in the chest area and cutting the clothes constitute both the offence of murder and that of destruction, and according to general experience, murder usually involves the destruction of clothing belonging to the victim as well. If murder requires proof of the act of killing and death, and destruction requires proof of the cutting of clothes, proving murder in this manner of commission also provides proof of destruction. In any case, according to the last condition regarding the different degree of damage to social values, if the rules have totally different legal objects, the offence on the lower level must bring a minimal impact on the social value. As such, if the victim's clothing has a very high value, the offences must be considered in the concurrence. The condition proves to be useless when the offences protect the same generic social value (e.g., the person), as it happens in the case of killing a person by acts of violence, in which case the murder cannot be held concurrently with the offence of assault or other violence or bodily injury, regardless of the severity of the injuries suffered by the victim.

The last form of the concurrence of qualifications examined in Chapter VI of Title II (Part III) is represented by equivalent qualifications, namely incidents when the same act is the object of several identical indictment rules, whether we are talking about total or just relative identity. The central idea is that the legislative system contains a duplication of indictments, which excludes the rules of concurrence of offences. Like redundant qualifications, in this case, too, the offences are in a logical-formal relationship, the protected social value being identical at an abstract level, but, unlike the first ones, we considered that the equivalence also exists when the perpetrator concretely affects the same social value (identity in concreto). An example in this sense are the attempt at the offence of abortion and the offence of harming the foetus in Spanish criminal law, which protect different but closely related social values.

With regard to the principles necessary for solving the concurrence of qualifications, two major concepts have been adopted in the literature over time: the monistic theory, according to which a single principle, that of specialty, is sufficient for solving concurrence, and the pluralist theory, which opposes the first, given that the person responsible for the interpretation and application of the criminal law must resort

to two or more such principles. The pluralist thesis was already accepted in the majority doctrine, but further, opinions were divided again as no agreement could be reached on the content and the number of principles that find their application within the theory of the apparent concurrence of criminal rules. As far as we are concerned, we followed the pluralist theory without any hesitation, since the exclusive recourse to the principle of specialty in all situations that can be subsumed to the concurrence of qualifications would unjustifiably expand its scope, would defeat its unitary character and the purpose we followed, that is to make the theory of the apparent concurrence fully understood.

Thus, in Part IV, we considered that all four principles are necessary, referring here to specialty, subsidiarity, absorption and alternativeness, which we have seen that can sometimes be in conflict, in which case they must be applied in this order.

Starting from the contribution of the German author Ulrich Klug on the relations between the rules, the concurrence of qualifications can arise in the following situations: a) heterogeneity, when an act that can be qualified according to indictment rule A cannot be qualified at the same time according to indictment rule B, and vice versa; b) identity, when an act can be qualified equally according to indictment rule A and indictment rule B, and vice versa; c) subordination, when an act can be qualified according to indictment rule A and rule B, but not every act that could be qualified according to rule B could be simultaneously qualified according to rule A; d) interference, when at least one element fits both concept A and concept B, and at least one element that fits concept A does not fit concept B, and vice versa.

The first and most important principle for solving the concurrence of qualifications, which we examined in Chapter II of Title I (Part IV), is the principle of specialty, which represents one of the two ways of identifying the priority rule in the case of redundant qualifications based on the subordination relationship of the rules. Compared to the general rule, the special rule indicts the same act, but in a narrower manner, so whenever the special rule is applicable, the general rule will also acquire applicability, but will be removed from actual application. In this sense, the narrowing of the scope of the special rule occurs exclusively in the consideration of the elements of typicality or the subjective side of the offence, regulating only a part of the general rule. As such, the sanctioning treatment is also irrelevant, which is why the special rule may sanction the act more severely or more mildly than the general rule, or it may sanction it identically. The penalty provided by the general rule is relevant during the legislative process of drafting and adopting the special rule, since the occurrence of the latter is determined by the excessive or insufficient character of the general rule, as it is not able to capitalise, from a sanctioning point of view, the elements highlighted by the special rule, also called elements of specialisation.

In order to identify the special rule, we preferred the approach of the Italian doctrine, which distinguishes between the specialty through a specific element and the specialty through an additional element. The first of these consists in the actual particularisation of an element that the general rule expressly provides for, in which case the special rule takes over in a first phase all the constituent elements of the general rule that compose the abstract act described by the legislator, and then narrows the scope so

that they become elements of specialisation. An example in this regard is the relationship between the offence of illegal access to an IT system [Art. 360 (1) of the Criminal Code] and the offence of electronic voting fraud (Art. 388 of the Criminal Code) in the form of fraudulent access to the electronic voting system. The special rule (electronic voting fraud) contains all the elements of the general rule, of which the element regarding the IT system is specified by reference to a narrower category, that of the electronic voting system. In contrast, specialty through an additional element designates the situation where the special rule takes over all the elements of the general rule, furthermore adding an element that the general rule does not expressly provide, but tacitly recognises. For example, the general offence of breaking seals [Art. 260 (1) of the Criminal Code] involves the destruction of a seal applied to any asset, while the special offence provided for by Art. 48 of Law no. 325/2006 involves the destruction of the seal applied to a limited group of goods, namely the thermal energy metering group. Although the general rule does not expressly provide for the object bearing the seal, it tacitly recognises that the seal can be applied to any goods.

Therefore, we have excluded from the scope of the principle of specialty the hypotheses known in the doctrine as delictum sui generis, in the form of the complex offence, given that the complex offence always provides elements that the absorbed rule does not expressly or tacitly regulate. Along with this, we also excluded bilateral specialised situations, which designate the situation in which each of the rules in conflict represent both a general rule and a special rule, having only a common core. For example, though our supreme court has held otherwise, we have held that favouritism and perjury do not stand in a genus-to-species relationship, because favouritism can be committed by any action, but with the specific purpose of favouring, while perjury can be carried out through a specific action, but with any purpose, both to favour and to unjustly indict a certain person.

In turn, the principle of subsidiarity, which we examined in Chapter III of Title I (Part IV), represents a way to resolve the apparent concurrence between two indictment rules, when the actual application of a rule is conditioned the other rule's lack of applicability, according to the Latin phrase lex primaria derogat legi subsidiariae, and it can be more easily understood through its two forms: formal (express) subsidiarity and material (tacit) subsidiarity.

If the theory of alternative qualifications represents the form of classification of the concurrence of qualifications, the resolution of this concurrence takes place according to the criterion of formal subsidiarity, which gives preference to the primary rule to the detriment of the subsidiary rule. We have already seen that formal subsidiarity can take several forms: determined (relative and special), when the subsidiary rule is removed from application by another rule to which the first refers, either by indicating the text of the law or by indicating the name of the offence; indeterminate (absolute), when the subsidiary rule refers to any other rule that could apply in the matter, without naming it or indicating the group of offences to which it belongs; relatively determined (relative and general), when the subsidiary rule does not refer to specific offences identified by name or legal text, but to a more or less broad category of offences.

Contrary to some opinions expressed in the doctrine, we believe that the legislator's express reference to another indictment rule, determined, indeterminate or relatively determined, cannot place formal subsidiarity outside the theory of the concurrence of qualifications. The simple fact that the legislator is the one that establishes the incompatibility of the rules through a residual clause does not place the relationship between the offences on an equal footing with the offences between which there is an essential element of opposition, which excludes the concurrence of qualifications and offences, since the subsidiarity clause does not represent a constitutive element of the offence, but a normative element. On the other hand, the respective clause can be "activated" only to the extent that it is established that the subsidiary and the primary rule may be applied, an aspect that brings discussions on the concurrence of rules from the very beginning. Furthermore, the incompatibility established by the legislator is the one that determines the withholding of the concurrence of qualifications to the detriment of the concurrence of offences.

Material (tacit) subsidiarity follows the same construction, however, unlike formal subsidiarity. The incompatibility of rules in terms of actual application is not due to the express will of the legislator, but to the tacit will, deduced through interpretation, the most important method being teleological interpretation.

Although, usually, in our literature, subsidiarity is also discussed in the case of the commission of a single act, as is the case of the relationship between the offence of abuse of office and other offences (e.g., embezzlement, intellectual forgery, etc.), our analysis revealed that it is not possible to conceive a theory of material subsidiarity applicable when the perpetrator commits a single act. Trying to identify such a general theory, which can also be applied in the case of offences other than abuse of office, such as favouring the perpetrator, we ran into certain obstacles which make it impossible, at least from our point of view, to conceive this theory. This does not mean that abuse of office or favouring the perpetrator will always be held in concurrence with other offences, as other principles for solving the concurrence of qualifications can sometimes be applied.

Therefore, we believe that material subsidiarity is applicable only in the case of plurality of acts. In this case, too, the primary rule, which is the first offence committed, removes the subsidiary rule, i.e. the second offence, from actual application. However, in contrast to the position of the majority foreign doctrine, which holds that the scope of material subsidiarity includes acts of preparation sanctioned implicitly, offences of danger and those of result, forms of participation, culpable and intentional offences, omission and commission offences, we considered that all these hypotheses which could be the subject of the theory of previous acts sanctioned implicitly attract the applicability of the principle of natural absorption, and not of subsidiarity. The explanation is that the theory of previous acts sanctioned implicitly has the same conceptual source that we find within the gradual qualifications, and the latter are definitely resolved according to the principle of (natural) absorption, as the majority of the literature recognises.

This is how, in our opinion, material subsidiarity represents a principle for resolving incompatible qualifications in the manner of subsequent acts sanctioned implicitly. This means that, to the extent that the previously examined conditions are met, the rules are incompatible in terms of actual application, and based

on material subsidiarity, the main rule, which regulates the first offence committed, to the detriment of the subsidiary rule, which regulates the subsequent offence, is to receive priority.

The principle of absorption, which we examined in Chapter IV of Title I (Part IV), represents a way of resolving the apparent concurrence between two indictment rules, when a more serious offence integrates either in its normative content or in its natural content the entire negative value of another less serious offence with which the first one is in a strictly necessary or strictly functional relationship, exhausting the impulse to satisfy the rule quot delicta, all poenae. Similar to the principle of subsidiarity, absorption has two main forms of manifestation: legal and natural.

Coming closest to the principle of specialty structurally, with which it can be easily confused in some cases, legal absorption represents a form of the principle of absorption and involves the existence of two or more indictment rules applicable simultaneously, one of which has a more extensive normative content that integrates the narrower normative content of the other rule(s) to such an extent that it "consumes" its entire negative value, the most well-known phrases being complex offence and progressive offence.

In this case, too, the rules are in a subordination relationship, within which the absorbed rule is fully included in the abstract content of the absorbing rule, and the legal absorption, together with the specialty principle, represents a way of resolving the concurrence of redundant qualifications, so that, in addition to the logical-formal relationship, the rules must protect the same social value. However, unlike the principle of specialty, an important condition of legal absorption is the difference in the sanctioning treatment, because it is necessary for the absorbing rule to sanction the committed act more seriously than the absorbed rule, otherwise the rules of the concurrence of offences are applicable. This is because the absorbing rule always arises by taking over the content of the absorbed rule, to which additional elements are added, which give additional gravity to the committed act, which the latter does not expressly provide for or tacitly recognise. Furthermore, this is the very crucial difference from specialty through an additional element, a case in which the additional elements are at least tacitly recognised. For example, the offence of battery in murder and the offence of murder are in a relationship of absorption, because, although battery particularises the passive subject (a public official who performs a function that involves the exercise of state authority), time (in the exercise of official duties) and motive (in relation to the exercise of duties), elements that become specialty elements, it additionally regulates a passive subject that the absorbed offence does not protect: society.

The subordination relationship can be graphically represented by two concentric circles, of which the smaller circle represents the special/absorbed rule, and the larger circle represents the general/absorbing rule, thus allowing the difference in content between the special and the absorbing rule to be observed.

If normally, the absorbing rule must contain all the elements of the absorbed rule, the concept and regulation of the complex offence expands the scope of legal absorption, becoming applicable also when the content of the absorbing offence includes, as a constitutive element or aggravating circumstantial

element, only an action or an inaction that constitutes by itself the absorbed offence. In any case, legal absorption broadly follows the construction of the complex offence, because the verification of the subordination relationship of the rules requires the fulfilment of the condition regarding the necessary character of the absorption; this can be manifested only if the absorbed offence has a determined or determinable character, and the difference in sanctioning treatment, as already shown, is a consequence of the foundation of absorption.

However, the majority doctrine does not distinctly examine legal absorption, given that the complex offence and its relationship with the absorbed offence is the subject of the principle of specialty, an opinion to which we could not adhere.

In turn, the principle of natural absorption has a different approach in foreign literature, given that it covers the typical concurrent or accompanying acts, i.e., the hypotheses examined within the gradual qualifications, and the theory of subsequent acts sanctioned implicitly. Since we have shown that this latter theory falls under the scope material subsidiarity, we consider that the principle of natural absorption is a way of resolving gradual qualifications (in the case of the unity of the act) and incompatible qualifications in the version of the previous acts sanctioned implicitly (in the case of the plurality of acts).

Thus, we chose to treat the two forms of the concurrence of qualifications together, given that they fit perfectly into the concept of natural absorption, which represents a form of the principle of absorption that allows the resolution of the apparent concurrence between two indictment rules when a more serious offence integrates into its content, according to its commission, the entire negative value of another less serious offence, with which the first one is in a natural or usual relationship, exhausting the impulse to satisfy the rule quot delicta, all poenae. The offences are in a natural connection and in different stages of the development of the criminal conduct or prosecution, so that the capitalisation of the natural absorption allows the exclusive consideration of only the last offence committed (absorbing), which represents the most advanced stage of criminal conduct, excluding all other offences (absorbed), the relation between them being characterised by progressiveness.

In the case of intentional offences, we saw that the central element is represented by the criminal process iter criminis, since the absorbed offence is committed during the internal or external phase of the absorbing offence, the resolution being previously adopted, and the facts are committed in a unit of circumstance. On the other hand, in the case of culpable offences, the central element that allows natural absorption is the causality relation, as it is necessary to establish the fact that the more advanced offence is a consequence of the less serious offence, with the same solution to be applied also in the case of the relationship between a culpable offence and an intentional one.

As such, natural absorption involves the fulfilment of the conditions of gradual qualifications or of the theory of previous acts sanctioned implicitly, and only insofar as these conditions are met can we claim that the principle of natural absorption gives exclusive preference to the application of the most advanced offence. Also, if the difference in sanctioning treatment is not a condition for the application of gradual or

incompatible qualifications, this time, the sanctioning treatment has a special meaning within the principle of natural absorption, because the absorbing offence must be able to integrate the negative value of the absorbed offence. However, the difference in severity can be assessed through the lens of the sanctioning treatment only in the case of the absorption relationship in abstracto, where the legislator has distinctly criminalised the acts of preparation of the absorbing offence, having from the legislative process the possibility to legally individualise the punishment so as to ensure or invalidate the absorption. Instead, where the absorption works in concreto, depending on the manner of committing the offences, the difference in gravity cannot be evaluated by reference to the sanctioning treatment. In this case, the degree of damage to social values will be considered.

The last and most controversial principle, which we examined in Chapter V of Title I (Part IV), is the principle of alternativeness, which fell into decline from its emergence, to the point where the majority doctrine has now abandoned its application. Starting from the need to identify a rule to resolve the conflict between several offences that regulate exactly the same act, but from different perspectives, the principle of alternativeness was designed in such a way as to be applied when the indictment rules had identical content, as well as when offences behaved like "two intersecting circles". However, as time passed, the principle received different meanings in the literature, from offences with alternative content to offences in a relationship of mutual exclusion, of opposition, with the fact that it would aim to remedy legislative errors being criticised; and such an error cannot substantiate the birth of a theory.

As far as we are concerned, seeing the somewhat restrictive manner in which we approached the principles of specialty, subsidiarity and absorption, the principle of alternativeness brings more clarity regarding the development of the theory of the concurrence of qualifications. As such, we defined the principle of alternativeness as a means of resolving apparent concurrence where the same act can be qualified according to two or more identical or equivalent indictment rules, when the other principles do not find their applicability, the essential features of alternativeness being: the identity or equivalence of the rules, the unity of the act and, exceptionally, the plurality of acts, the subsidiary character and the difference in sanctioning treatment.

The application of the principle of alternativeness implies, as a rule, giving preference to the rule that sanctions more seriously the committed act, although the literature has proposed to use the principle in dubio mitius or in dubio pro reo and consider the milder offence, an opinion with which we cannot agree.

Similarly to the other principles, alternativeness represents a way of resolving a form of concurrence of qualifications, namely equivalent qualifications, but, unlike these, alternativeness has not only its own scope, but also a subsidiary field of application. Thus, within the proper scope, it is necessary that the offences in conflict comply with the conditions for applying the equivalent qualifications, the rule that sanctions the committed act more seriously being applied with priority.

Within the subsidiary scope, the principle comes into play when the other principles are not applicable. However, it is obvious that alternativeness cannot intervene in all cases where the other

principles do not find their applicability, otherwise, the concurrence of offences would no longer be justified, which is why we limited the subsidiary scope of alternativeness according to the principle to which refers to. Thus, the principle of specialty did not prove sufficient to resolve the conflict between two rules in a bilateral or reciprocal specialty relationship, in which each of the rules has a general character and at the same time special in relation to the other, which is why alternativeness makes possible the resolution of the conflict in favour of the more serious sanctioning rule. In turn, the principle of formal subsidiarity has not proven sufficient when both rules in conflict regulate subsidiarity clauses, based on which each of them gives preference to the other. However, in this case, too, alternativeness makes it possible to overcome this obstacle and exclusively consider the more serious offence. Instead, in relation to material subsidiarity and legal absorption, the principle of alternativeness does not act in a subsidiary manner.

The main utility of the residual character of the principle of alternativeness remains to be observed in relation to situations where natural absorption cannot be applied. If the natural absorption could be applied in the case of offences that regulate different stages of development of the criminal conduct or the prosecution, to the extent that the second offence committed remains in the form of an attempt, natural absorption is excluded, the offences being in the same stage. As such, once again the principle of alternativeness saves the concurrence of qualifications, but only to the extent that, if the absorbing offence had been consummated, the principle of natural absorption would have produced effects. For example, murder naturally absorbs the offence of bodily harm, but if the victim does not die, attempted murder is at the same stage as bodily harm, only with a different purpose. The same is the solution in the case of the relationship between the attempted rape and the sexual assault committed, the first being only a sexual assault committed for the purpose of committing the specific act of rape. However, in the case of attempted murder by someone exercising their duties, through acts of violence, although it attracts the applicability of attempted murder and abusive behaviour, alternativeness cannot be applied, since, to the extent that the victim would have died, the murder and abusive behaviour would have been considered in concurrence.

Even if the principle of alternativeness does not benefit from a regulation in our legal system, we considered that it could be applied in the consideration of some logical reasonings.

If in Title I of Part IV we analysed the principles for resolving the concurrence of qualifications, in Title II we proceeded to examine the principles for resolving the apparent concurrence between integrative rules, between an integrative rule and an indictment rule, as well as between the forms of criminal participation. On that occasion, we noted in Chapter I that any of the four principles can be applied in the case of a conflict between an integrative rule and an indictment rule, with the exception of the principle of alternativeness.

We have dedicated an entire chapter (Chapter II of Title II, Part IV) to the relationship between the forms of criminal participation, which represents nothing more than an apparent concurrence between two integrative rules or, as the case may be, an integrative rule and two indictment rules, due to the importance

of this subject. Thus, the issue of the apparent concurrence of rules can arise in this matter only when the same person meets two or more participant qualities, when he acts both as a (co)perpetrator and as an accomplice and /or instigator, which can happen in relation to different indictment rules or in relation to the same indictment rule.

In relation to the different indictment rules, the conflict arises in the case of participation acts sanctioned autonomously, given that the perpetrator acts as an instigator/accomplice in the commission of an offence, the act of participation being in itself an offence performed as a perpetrator. For example, in the matter of complicity, any act of facilitating escape, which constitutes a distinct offence, also attracts the applicability of the offence of escape in the form of complicity if the perpetrator's activity reaches the point of an attempt. In this case, the principle of specialty is applicable, because the integrative rule that regulates complicity has a wider scope of applicability; complicity can be considered for any offence, except for offences that are the object of established plurality. This is how the offences that autonomously indict acts of complicity are, in principle, special rules that remove from application the general rule of complicity to the offence in question, removal that actually takes place only when the perpetrator's activity reaches the point of a punishable attempt, until then the integrative rule not being applicable.

However, the principle of legal absorption cannot be excluded in this matter, as it is necessary to note that the priority rule regulates additional elements that the removed rule does not provide for, as natural absorption could be applied when the act of participation sanctioned autonomously regulates a less advanced stage of the criminal activity as opposed to the offence to which the perpetrator contributed. For example, the attempt to cause the commission of an offence is at a less advanced stage than the instigation to commit said offence, the former indicting only the attempt to cause the perpetrator, while the instigation involves actually causing the perpetrator to do.

Formal subsidiarity could find its application, but the use of express clauses relatively determined by subsidiarity (in the formula "unless the act represents a more serious offence") would be rather uninteresting, given that, on the one hand, subsidiarity has no priority over the principle of specialty, and on the other hand, offences that sanction acts of complicity autonomously are usually built to aggravate criminal liability, a solution that is also attained by applying the principle of specialty or, as the case may be, legal absorption.

On the other hand, the principle of alternativeness cannot be applied in the main way, because the rules in conflict exclude the identical or equivalent character. However, we have seen that it could be applied in the subsidiary way when the rules are in a bilateral specialty relationship or the conditions of natural absorption are not met.

In turn, the conflict between forms of participation in the same offence can be resolved exclusively by applying the principle of material subsidiarity or natural absorption, since we are dealing with a plurality of acts. The relationship between forms of participation and the applicable conflict resolution principle must be examined starting from the place that each participant occupies in the conduct of the activity

criminal, while considering the existing hierarchy between the forms of participation. Thus, usually, the instigator intervenes before the perpetrator resorts to committing an offence, and the accomplice intervenes (as a rule) after the decision is made, before or simultaneously with the commission of the act, while the co-perpetrators intervene at the moment of committing the offence. In relation to these, the conflict between instigation and complicity is subject to the principle of material subsidiarity, being resolved in favour of the instigation. Instead, complicity or instigation is naturally absorbed into co-authorship, being a less serious previous act.

Finally, in the context of the conflict between two integrative rules, examined in Chapter II of Title II (Part IV), the most important principles are specialty and alternativeness. If in the case of the concurrence of qualifications, the principle of specialty denotes the situation where the special rule takes over all the elements of the general rule, particularising some of them; in the case of the apparent concurrence of integrative rules, the principle of specialty involves making a comparison in terms of the scope of the rule, having the quality of special rule that has a narrower scope. The principle of alternativeness has a rather exclusively subsidiary applicability this time, since the identity of the rules in terms of their content is almost excluded in legislative practice. If in the case of the concurrence of qualifications, the identification of the priority rule took place by reference to the more severe criminal rule, this time the integrative rule that will benefit from priority is the one that produces more extensive effects, as we saw in the case of the conflict between rehabilitation and amnesty, the latter producing more extensive effects, while also removing criminal liability and the execution of the punishment or educational measure.

In turn, formal subsidiarity could be applied to the extent that the legislator expressly establishes the priority of one rule in relation to the other, and material subsidiarity presupposes the existence of two or more criminal rules which do not present any quantitative difference in terms of scope, when the application of one of them is conditioned by the lack of applicability of the other, rules that cannot be applied cumulatively due to identical, similar or irreconcilable effects.

Starting from the idea of the non-existence of a quantitative difference between the scopes of conflicting rules, the principle of legal absorption implies a focus on the content of the rules, one of which has a more extensive content, which integrates the narrower content of the other rule in such a way that it consumes its entire value. And from the perspective of natural absorption, we imagined different cases in which the rules regulate different stages of the same conduct or situations in a progressive relationship, this principle not being excluded either.