THE CRIMINAL RECOURSE

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Résumé

Le recours est une voie ordinaire d'attaque, partiellement dévolutive et exceptionnellement extensive, qui a le but de réparer les erreurs qui peuvent apparaitre dans les décisions prononcées par les juridictions de fond ou celles prononcées par les juridictions d'appel. Dans cette étude, nous allons analyser graduellement les caractéristiques de cette voie d'attaque, les décisions qui peuvent faire l'objet du recours et les cas de recours réglementés par le Code de procédure pénale.

Mots-clés: *recours, voie ordinaire d'attaque, Code de procédure pénale*.

1. Introductory notions

Recourse is a common method of review, partially devolutive and exceptionally extensive[1] meant to repair the mistakes slipped in the decisions pronounced by the courts of first instance or in those pronounced by the courts of appeal.

Recourse is a method of review of French origin. Initially, this method of review was of the competency of the cassation tribunal (section of the legislative body) given in 1804 the name of *Court de Cassation*. The code of 1808, as well as the subsequent laws have developed and established the competency and the procedure of the Court of Cassation.[2]

In our country, The Court of Cassation was set up in the United Principalities by the Law of January 24, 1861 and it started to function from March 15, 1862[3].

The recourse is regulated in Title III, Chapter III, Section II of the Special Part of the Criminal procedure code, Article 385^{1}-385^{19}.

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[1] T. Pop, *Drept procesual penal*, vol. IV, *The special part*, Cluj National Print Shop, 1948, p. 423.

[2] *Ibidem*, p. 426.

[3] *Ibidem*.

2. Features of recourse

The recourse has the following features:

1) *It is a common method of review.* Mainly, it may be promoted only against a decision pronounced in appeal and, in cases expressly provided by the law, against decisions pronounced by the courts of first instance. The promotion deadline of the recourse is, usually, a fixed deadline, of 10 days, and prevents the execution of the decision.
2) *It is, in principle, a method of review in annulment, and exceptionally a mixed method of review, of annulment and reformation.* Mainly, by the promotion of the recourse the annulment of the decision undergoing control is pursued, situation where the outcome is the annulment of the decision. In case the recourse is aimed at a decision not undergoing appeal, the recourse presents itself as a mixed method of review, of annulment and reformation, as the instance also pronounces itself about the essence of the cause. But the same qualification cannot be given to the recourse when the instance admits the recourse, cancelling the decision reviewed and disposes the retrial by the recourse court, because in this situation a single decision is given in the solving of the recourse, which is only a decision of annulment, comprising the deadline for retrial and a second decision which does not concern the recourse (that had been previously admitted) but the retrial of the essence of the cause which is done according to the rules of the court of first instance.[1]
3) **It is a method through which law issues are invoked exclusively.** The recourse brings to discussion only law issues; the state of fact is not submitted to the control of the recourse court.[2] Also it may lead to the annulment of the decision only for essential and form nullities, that is for material or substantial errors.[3]
4) *It is a method of review which does not trigger a new trial of the essential cause*[4]. The recourse court proceeds to a checking of the decision subject to recourse on the basis of the documents and works of the record, as well as of any new documents, handed in for the cause, having the obligation of judging the reasons invoked by the district attorney and the parties.

[1] Gh. Mateuț, *Procedură penală*, vol. II, Lumina Lex, Bucharest, 1998, p. 285.
[2] I. Neagu, *Drept procesual penal*, vol II, Global Lex, Bucharest, 2007, p. 232.
[3] *Ibidem*.
[4] G.Mateuț, *op. cit.*, p. 286.

5) Exceptions from this rule are the situations where the recourse is directed against a decision for which the method of review of the appeal is not provided, only that of the recourse. In this hypothesis, the instance has the obligation of checking the cause under all aspects, not being able to limit itself to the cases of annulment provided by Article 385^9.
6) *It is an irreverent method of review, because it addresses superior courts.* The recourse is always solved by a court superior to the one which pronounced the decision being subject to reviewing.
7) *Is an easily accessible method.* Any person who is not pleased with a decision for which the method of review of recourse is provided may use it, knowing that nobody can make his situation worse in his own method of review.

3. Decisions subject to recourse

According to the dispositions of Article 385^1 of the criminal procedure code, the following may be attacked with recourse:

1) Sentences pronounced by courts of law in the cases provided by the law;
2) Sentences pronounced by military courts in the case of offences against military order and discipline, sanctioned by the law with the punishment of up to 2 years in prison.
3) Sentences pronounced by Courts of Appeal and the Military Court of Appeal;
4) Sentences pronounced by the criminal section of the High Court of Cassation and Justice.
5) Sentences concerning offences for which the triggering of the criminal action is carried out upon the preliminary complaint of the injured person;
6) Decisions pronounced, like instances of appeal, courts of justice, territorial military courts, courts of appeal and the Military Court of Appeal;
7) Sentences pronounced in the matter of the execution of criminal decisions, except the case when the law states differently, as well as the ones concerning rehabilitation;

The conclusions may be attacked with recourse only once with the sentence or decision reviewed, with the exception of the cases when, according to the law, they may be attacked separately with recourse.

The recourse declared against the sentence or decision is considered also made against the conclusions, even if they were given after the pronunciation of the decision.

4. Persons who may resort to recourse

In Article 385^2 it is provided that the persons shown in Article 362 of the Criminal procedure code may resort to recourse, namely:

1) The district attorney, concerning the criminal and civil side, when the civil action was exercised ex officio or when the district attorney's appeal declared in favour of the civil party adheres to the appeal declared by the latter.
2) The defendant, concerning the criminal and civil side.
3) The injured party, concerning the criminal side;
4) The civil party and the party responsible from the civil point of view, concerning the criminal and civil side;
5) The witness, the expert, the interpreter and the defender, concerning the legal expenses owed to them;
6) Any person whose legitimate interests have been harmed by a measure or an action of the court.

The same way as the appeal, the recourse can be declared for the other persons, with the exception of the district attorney, by the legal representative and defender, and for the defendant also by his/her spouse.

The sentences concerning the persons provided in Article 362 have not used the method of the appeal or when the appeal was withdrawn, if the law provides this method of review, it cannot be attacked with recourse. Article 385^1, which institutes this rule, provides the following exception: the bearers of the recourse may use this method against the decision pronounced in appeal, even if they have not used the appeal, when by the decision pronounced in appeal the solution from the sentence was modified and only concerning this modification.

5. Recourse deadline

According to the dispositions of Article $385^{3,}$ par. 1 of the Criminal Procedure Code, the recourse deadline is of 10 days, if the law does not provide differently.

This is a general deadline, with applicability for all the situations when no other deadline is provided. Upon reading the dispositions of the criminal procedure code, it can be noticed, that in a large number of cases, for justified or easily inferable reasons, the legislator has also established other deadlines, usually shorter, of 24 hours or 3 days. Such deadlines have been established for situations where the solving of the recourse is urgent, most of them being found as preventive measures.

The same way as in the case of the appeal, the recourse deadline starts at the pronunciation or the communication of the decision subject to the review, the dispositions of Article 363-365, concerning the date when the deadline period starts, the reassessing of the deadline and the declaration after the deadline of the method of review are applied accordingly.

6. The declaring, the waiver and the withdrawal of the recourse

The recourse is declared by a written request, signed by the person making the statement or attested in accordance with the dispositions of Article 366, when the person is unable to sign.

The recourse may also be declared orally, in the hearing where the decision was pronounced. In this situation, the court shall acknowledge the fact that the district attorney or the parties present are declaring recourse and shall record it in a protocol. The recourse request is handed in to the court whose decision is being attacked.

The same way as in the case of the appeal, the person in state of detention may hand in the request of appeal also to the administration of the place of detention which, after registration, forwards the request to the court whose decision is being attacked.

The parties may waiver the recourse or may withdraw the recourse in the conditions of Article 368 and 369 of the Criminal Procedure Code.

7. Effects of the recourse

The effects of the recourse are provided by Article 385^5-385^8 and are the following:

1) it is suspensive of execution;
2) it is devolutive;

3) it is extensive;
4) it cannot lead to the aggravation of the party's situation in its own method of review.

7. 1. *The suspensive effect of the recourse*

The recourse is suspensive of execution both concerning the criminal side, and the civil side, except for the case when the law provides differently.

7. 2. *The devolutive effect and its limits*

The court judges the recourse only concerning the person who declared it and the person the recourse declaration refers to and only with reference to the quality the person declaring it has in the process. Also, the court examines the case only within the limits of the cassation reasons provided by Article 385^9.

The recourse declared against a decision which, according to the law, may not be attacked with appeal, is not limited to the cassation reasons provided in Article 385^9, the instance is obliged, besides the reasons invoked and the requests formulated by the person declaring recourse, to examine the cause under all aspects.

7. 3. *The extensive effect and its limits*

The recourse court examines the cause by extension also concerning the parties who have not declared recourse or whom it does not refer to, being allowed to decide also concerning them, without being allowed to create a more difficult situation for these parties.

The district attorney, even after the expiry of the recourse deadline, can ask for the extension of the recourse declared by him before the deadline also towards other persons than the one it referred to, without being able to create a more difficult situation for them.

7. 4. *The non-aggravation of the situation in one's own recourse*

Solving the cause, the court cannot create a more difficult situation for the person who has declared recourse. Also, in the recourse declared by the district attorney in favour of one part, the recourse court cannot aggravate its situation.

8. Cases where recourse can be made

The decisions are subject to recourse in the following situations:

1) The dispositions concerning competency according to matter or the quality of the person have not been respected (Article 385 par. 1 point 1);

As it is known, failure to observe the dispositions concerning competency according to matter or the quality of the person, is sanctioned, according to Article 197 par. 2 with absolute nullity. In this case, the control court shall annul the decision and shall dispose the retrial of the cause by the competent court.

2) The court was not legally apprised (Article 385^9 par.1 point 2);

The law refers to all modalities of notification. Both to primary notification, which is made by indictment, and to the additional one, which is made in the case of the extension of the criminal action for other deeds or concerning other persons, as well as to the derivative notification which operates in the case of the reversal or annulment with referral, declining of competency, of the competency regulator and in case of displacement.

3) The court was not composed in accordance with the law or the provisions of Article 292 par. 2 were breached or there was a case of incompatibility (Article 385^9 par. 1 point 3);

This case of incompatibility incorporates the following aspects:

1. The legal composition of the panel;
2. The continuity of the panel, which must stay the same all during the trial of the case. When this is not possible, the panel may change until the beginning of the debates, after this moment, any change coming about in the composition of the panel entails the resuming from the start of the debates.
3. The existence of a case of incompatibility. The legal text refers to all the cases of incompatibility provided by Article 46, 47, 48, 49 and 54.

Related to this reason of annulment, one specification must be made: According to the dispositions of Article 389^9 par. 3, this case is part of those cases taken into consideration ex officio and its finding has as a consequence the annulment of the decision and its sending to retrial. In the conditions where, the incompatibility is

sanctioned with relative nullity,[1] the ex officio discussion of this reason for annulment supposes, in fact, the application of the treatment applied to absolute nullities and not to the relative ones as the court must verify if there is a case of incompatibility.

4) **The court hearing was not public, except for the cases when the law provides differently (Article 385 par. 1 point 4);**

Considered an important warranty meant to insure the objectivity and impartiality of the trial, the publicity of the court hearing must be insured in all situations, with the exception of the case where the law allows derogation from this principle (Article 262 par. 2 of the Criminal Procedure Code). Failure to respect the dispositions concerning the publicity of the court hearing is sanctioned with absolute nullity.

5) **The trial took place without the participation of the district attorney or of the defendant, when it is mandatory, according to the law (Article 385^9 par.1 point 5);**

As shown, the participation of the district attorney to the court hearings of the courts of law is mandatory in all the situations provided by Article 315 of the criminal procedure code, and in appeal and recourse the participation is mandatory in all situations. The absence of the district attorney is sanctioned with the absolute nullity and the consequence is the annulment of the decision and the sending of the case for retrial.

The same sanction is operational when the trial took place in the absence of the defendant when his/her presence is mandatory according to the law. In this sense, Article 314 of the Criminal Procedure Code provides that the trial can only take place in the

[1] In jurisprudence and case-low there is the majority opinion according to which failure to observe the dispositions referring to incompatibilities is sanctioned with relative nullity. See in this sense, I. Neagu, *op. cit.*, p. 241 and Gh. Mateuț, *op. cit.*, p. 307. The problem is not without consequences because if we consider that we are in the presence of a relative nullity, then it must be invoked within a certain deadline by the person who was injured and the injury must be proved. Not invoked in appeal by the interested party, this injury becomes object of checking by the recourse court, forced to find *ex officio* if there was any case of incompatibility and to dispose, sometimes over the will of the parties, the sending of the cause for retrial. We believe that this reason for annulment should be eliminated from the reasons for annulment discussed *ex officio*.

presence of the defendant, when he/she is in a state of detention and Article 484 provides that the trial of the cause concerning an offence committed by a minor takes place in is/her presence, with the exception of the case when the minor evaded trial.

6) **The criminal pursuit or the trial took place in the absence of the defender, when his/her presence was mandatory (Article 385[9] par. 1, point 6)**

Failure to observe the dispositions referring to defence, when according to the law legal defence is mandatory, is sanctioned with absolute nullity.

According to the dispositions of Article 171 par. 2 of the Criminal procedure code, legal assistance is mandatory when the defendant or indictee is a minor, is institutionalised in a re-education centre or in a medical educative institute, when he/she is retained or arrested, even in a different cause, when the security measure of medical institutionalisation or the obligation of medical treatment has been disposed, even in a different cause or when the criminal pursuit body or the court appreciates that the defendant or indictee could not defend him(/her)self, as well as in other cases provided by the law.

During the trial, legal assistance is also mandatory in the causes where the law provides for the offence committed the punishment of life detention or the punishment of 5 or more years in prison.

7) **The trial was made without the drawing up of the evaluation report in the causes with minor offenders (Article 385[9] par. 1, point 7)**

In the causes with minor offenders, the criminal pursuit body or the court of law has the obligation to dispose the drawing up of the evaluation report by the Protection service of victims and social reintegration of offenders from the minor's domicile, according to the law[1].

[1] The dispositions of Article 482 of the Penal Procedure Code, concerning the mandatory character of the evaluation report by the Protection Service of Victims and Social Reintegration of Offenders in the causes with minor offenders, and those of Article 484 par. 2 of the Criminal Procedure Code, concerning the mandatory citation of the Protection Service of Victims and Social Reintegration of Offenders in the trial of the causes with minors have been introduced by the Law 356/2006 and applied since March 31, 2007. Until that date, in the causes with minor offenders social investigations were

The absence of the report in the causes with minors is sanctioned with absolute nullity.

8) The psychiatric evaluation of the defendant has not been made in the cases and conditions provided by Article 117 par. 1 and 2 (Article 385[9] par. 1, point 8);

The text of Article 117 par 1 and 2 to which reference is being made provides the mandatory character of the carrying out of the psychiatric evaluation in case of first degree murder, as well as when the legal body has doubts about the mental state of the defendant.

9) The decision does not contain the reasons the solution is based on or the motivation of the solution contradicts the dispositions of the decision or it is not understandable (Article 385[9] par. 1, point 9);

From the content of the legal text mentioned above it results that this reason of annulment refers to two distinct situations which, together or each on its own, may lead to the annulment of the decision.

The first has in view the lack of motivation of the solution, in the sense that it does not contain all the elements of fact or law which have been had in view upon the adoption of the solution.

So, the simple affirmation of the court concerning the fact that the guilt of the defendant results from the evidence in the file, without this evidence being analysed so as it results how this conclusion has been reached, is equivalent to the lack of motivation of the decision. The same way, the simple mention of the court with reference to the fact that the appeal of the civil party is insubstantial, without showing why, is equivalent to the lack of motivation of the decision.

Nevertheless in this solution, excessive formalism must not be reached. The fact that, in the considerations of the decision the name of the defendant is not inserted, when the trial had in view a single defendant or, when there are more defendants in the same situation, the name of one of them was omitted from the considerations of the decision, we are not in the situation shown above because from the content of the decision the motives had in view for the adoption of the solution result clearly and the considerations are in agreement

carried out by the persons designated by the tutelary authority of the local council where the minor had its domicile, and in the trial of causes with minor offenders the citation of the Protection Service of Victims and Social Reintegration of Offenders was optional.

with the dispositions.

The obligation of motivation is imposed under the sanction of relative nullity.[1]

The second has in view the situations where the motivation of the solution contradicts the dispositions. For example, in the consideration of the decision the reasons had in view for the conviction of the defendant are shown, and the dispositions contain a solution of acquittal.

10) The court has not pronounced itself on an action retained in charge of the defendant in the notification document or concerning some of the evidence presented or on some requests essential for the parties, of the nature to guarantee the rights and influence the solution (Article 385^9 par. 1, point 10);

This case of annulment contains several hypotheses:

The first one refers to the situation where the court omits to pronounce itself on some deeds retained in the charge of the defendant by the act of accusation. This omission presupposes that the trial concerning that deed did not take place.

The second situation refers to the omission of the instance to pronounce itself on evidence presented and which is of the nature to influence the solution.

This obligation of the court results from the content of Article 356, letter c of the Criminal Procedure Code, which provides that the exposition must contain, among other things, the analysis of the evidence which served as grounds for the solving of the criminal side, as well as of the ones that were eliminated. For example, the court's omission to show the reason why it has not taken into consideration the testimony of a witness who pretended to be present at the incident taking place between the parties. Of course, the reasons may be various: the impossibility to notice what happened, given the distance between the witness and the place of the incident, or the circumstance that the witness only perceived part of the dispute between the parties. The analysis of the evidence eliminated must be made when the parties based their defence on this evidence.

In order to be able to invoke the annulment reason provided by Article 385^9 par. 1 point 10 of the Criminal Procedure Code, the condition is

[1] I. Neagu, *op. cit.*, p. 242. In the same sense, Gh. Mateuț, *op. cit.*, p. 309.

necessary for the evidence to have been requested and the court to have not pronounced itself, in the sense of its admission or rejection, or for it not to have been presented and for the court not to have evaluated it.[1]

The third hypothesis refers to the situation where, during the trial, the court omits to pronounce itself about certain requests, that the party considers essential and that they invoke in the method of review. The court's omission to pronounce itself on these requests or to show the reasons why it has done this hinders the control court from checking the considerations had in view by it, if the requests were formulated with the observing of the legal conditions and to what extent they could have led the panel to a different conclusion.

11) The court has admitted a method of review not provided by the law or introduced tardily (Article 385^9 par. 1, point 11);

The text of the law refers to two situations, namely:

- a method not provided by the law was admitted. For example, the court of appeal has admitted the appeal declared by one of the parties, in the conditions where the decision of the court of first instance could not be attacked with appeal, only with recourse.
- a request of appeal formulated tardily or any other request for which a formulation deadline is provided and it was exceeded was admitted, and the decision by which these requests were admitted is subject to the method of review of recourse.

12) **When the court has pronounced a decision of conviction for another deed than the one for which the convicted person was sent to trial, with the exception of the cases provided by Article 334-337 (Article 385^9 par. 1, letter 12);**

Having in view the fact that the investment of the instance is carried out *in rem* and *in personam* this reason for recourse has in view the situation where the court has pronounced a decision of conviction for another deed than the one for which the convicted person was sent to trial. The text of the law has in view another deed, not another legal classification, than the one resulting from the notification document, because a different legal classification of the

[1] The Bucharest Court of Appeal, 2nd criminal section, d. p. 136/1999, *apud* I. Neagu, *op. cit.*, p. 243.

same deed is allowed. As a consequence, exceptions are the situations where the changing of the legal classification was disposed, the extension of the criminal action for other material actions or other deeds or when the criminal trial was extended to other persons.

13) **When the defendant was convicted for a deed which is not provided by the criminal law (Article 385[9] par. 1, point 13);**

As we can see, not only the wrongful conviction, but also the conviction for a deed which is not provided in criminal law, hence is not an offence, constitutes a reason for annulment.

14) **When erroneously individualised punishments were applied as compared to the provisions of Article 72 of the criminal code or in other limits than the ones provided by the law (Article 385[9] par. 1, point 14);**

This case of annulment refers to the situations where the court has applied punishments which, from the legal point of view, were erroneously individualised.

For example, punishments under the general minimum or maximum or under the special minimum and maximum, without attenuating or aggravating circumstances being retained in the charge of the defendant.

15) **When the person convicted was tried before definitively, for the same deed or if there is a cause of elimination of the criminal responsibility, the punishment was pardoned or the death of the perpetrator has intervened (Article 385 par. 1, point 15);**

From the content of this text of law it results that the decision by which the conviction of the defendant was disposed shall be annulled in the following situations:

- the person was previously tried definitively for the same deed;
- there is a cause of elimination of the criminal responsibility. As it is known, amnesty, prescription, the absence of the preliminary complaint, the withdrawal of the complaint and the reconciliation of the parties eliminate criminal responsibility.
- the punishment was pardoned. According to the dispositions of Article 120 Criminal Code, pardon has as an effect the total or partial elimination of the execution of the punishment or its commutation into a lighter one. As a consequence, if during the

trial, pardon has intervened, and this was not found by the court whose decision was appealed to, the recourse court is obliged to do this if the conditions provided by the law are fulfilled.

- the death of the perpetrator has intervened: In this situation the recourse court shall annul the decision and shall dispose the ceasing of the criminal trial.

16) **When erroneously the defendant was acquitted for the reason that the deed committed by him/her is not provided by criminal law or when, erroneously, the termination of the criminal trial was disposed for the reason that there is authority of tried thing or there is a cause for the elimination of criminal responsibility or that the death of the defendant has intervened or the punishment was pardoned (Article 385[9] par. 1, point 16).**

If in the previous situation, presented at point 15, the annulment operates for the reason that the court omitted to find the termination of the criminal trial for the reason that there is authority of tried thing or there is a cause for the elimination of criminal responsibility or that the death of the defendant has intervened or the punishment was pardoned, in this case the annulment operates precisely on the grounds that the court whose decision is subject to control has retained, erroneously, the existence of these circumstances. In short, if in the previous case, their finding was omitted, in the case in attention, they were retained erroneously.

17) When the deed committed was given the wrong legal classification (Article 385[9] par. 1, point 17).

The notion of legal classification includes all the legal texts reference is made to when they proceed to the arranging of the deed in a legal form, that is not only to the legal texts defining the offence but also to the ones adjacent referring to the state of second offence, concurrence of offences, circumstances, attempt, etc.[1]

We believe that, related to this reason of annulment, a specification is necessary, considered by us to be extremely important. The mere omission to insert in the legal classification one of the adjacent texts, such as the ones referring to the state of second offence, concurrence

[1] See G. Marcov, *Despre încadrarea juridică în dreptul penal*, in RRD, no. 2/1967, p. 109-8.

of offences, circumstances,[1] the more favourable criminal law, does not constitute reason for annulment as long as the court has applied these legal texts. Moreover, there are situations when, in our opinion, not even the mistakes defining the offence do not attract the annulment of the decision. For example, if in the dispositions of the decision, there is the mention that the court disposes the conviction of the defendant for the infraction of breach of trust, provided by Article 113 Criminal Code, the annulment of the decision for the reason that the correct text is 213 Criminal Code, denotes excessive formalism, especially that the text of Article 113 refers to a security measure.

18) When a severe fact error was committed, having as a consequence the pronunciation of an erroneous acquittal or conviction decision (Article 385^9 par. 1, point 18).

This annulment reason has in view the state of fact retained by the court, more precisely the fact that due to a serious error a solution of acquittal or conviction has been pronounced. For example, erroneously retaining the date of committing the infraction, the court found that at the respective date the deed imputed to the defendant was not incriminated as an offence.

19) When the first instance judges have committed an excess of power, in the sense that they have passed in the domain of another power within the state (Article 385 par. 1, point 19);

In the specialised legal literature it was shown that, by excess of power, the situation is understood where the first instance judges, in the exercising of the legal power, enter in the responsibilities of another power constituted in the state and that, the excess of power, violates the principle of the separation of powers in the state, and may have an administrative or legislative character, as the case may be. It is the case of the civil servant convicted by the court for an offence and whose employment contract has been terminated.[2]

20) When a law more favourable to the convicted person has intervened (Article 385 par.1, point 20).

As it is known, every time, since the committing of an offence and until the conviction decision becomes final, one or more laws have

[1] Gh. Mateuț, *op. cit.*, p. 320.
[2] G. Mateuț, *op. cit.*, p. 325.

intervened, the more favourable criminal law is applied. This presupposes that, if the recourse was introduced on time, the conviction decision is not final and the more favourable criminal law can be applied.

21) When the trial in first instance or in appeal took place without the legal citation of one of the parties, or who, legally cited, was in the impossibility of appearing and of notifying the court about this impossibility (Article 385^9 par.1, point 12)

From the content of the above cited text, it results that the following are reasons for annulment:

- the absence from the trial in first instance and appeal of one of the parties who wasn't legally cited;
- the absence from the trial in first instance and appeal of one of the parties who was in the impossibility of appearing and of notifying the court about this impossibility.

The annulment cases shown above may be invoked both concerning the solving of the criminal side, as well as the civil side of the cause.

The causes provided in par. 1 points 1-7, 10, 13, 14, 19, 20, are always discussed ex officio, and the ones from points 11, 12, 15, 17 and 18 are taken into consideration ex officio only when they influenced the decision in favour of the defendant.

When the court takes into consideration the annulment reasons ex officio, it must put them in the discussion of the parties.

9. Motivation of the recourse

The recourse must be motivated. The reasons for the recourse are formulated in writing through the recourse request or a separate statement, which must be handed in at the recourse court at least 5 days before the first hearing date.

In case the recourse was not motivated or the reasons for the recourse have not been handed in on time, the court takes into consideration only the cases of annulment which, according to Article 385^9 par. 3, are taken into consideration *ex officio*.

When for a decision only the method of review of recourse is provided, without appeal, the dispositions referring to the motivation and the handing in of the reasons for recourse, 5 days before the first hearing date, do

not apply. In this case, the recourse may also be orally motivated on the day of the hearing.

10. Trial of the recourse

The recourse is tried according to the general dispositions regulating the trial, completed by the special ones provided by Article 385^{11}-385^{14} of the Penal procedure code.

As a consequence, the trial in recourse presents the following structure: preliminary measures; trial hearing; deliberation and pronunciation of the decision.

1. Preliminary measures

The president of the recourse court, receiving the file, sets a date for the recourse hearing and may delegate, in the same time, one of the judges making up the panel to draw up a written report about the recourse. At the High Court of Cassation and Justice the report may be drawn up by a judge or an assistant-magistrate.

The report must contain, in short, the object of the trial, the solutions pronounced by the court and the facts retained by the court of last instance, insofar as they are necessary for the solving.

The report must also contain observations with references, if it is the case, to the internal jurisprudence, as well as to the jurisprudence of the European Court of Human Rights, without showing the opinion of the person drawing it up.

In the report the annulment cases provided by Article 385^{9} par. 2 are also signalled ex officio. The report is added to the case file at least 5 days before the first hearing date.

Having in view the dispositions of Article 385^{11} of the Criminal Procedure Code, which provide that the trying of the recourse is done with the citation of the parties, the necessary measures are taken for their citation.

The trying of the recourse can only take place in the presence of the defendant, when he or she is in a state of detention.

The presence of the district attorney at the trying of the recourse is mandatory in all cases.

2. Trial hearing

Before disposing the reading of the report, upon request of the parties or *ex officio*, the exceptions and requests are discussed.

On the occasion of the trying of the recourse, the court must proceed to the listening of the defendant present, according to the dispositions contained in the Special part, title II, chapter II, when he/she has not been listened to by the courts of first instance and of appeal, as well as when these courts have not pronounced against the defendant a decision of conviction.

After the reading of the report, when its drawing up was disposed, the president of the panel gives to word to the person who declared the recourse, then to the respondent and in the end to the district attorney. If the recourse of the district attorney is among the recourses, then it is he who has the first word.

The district attorney and the parties have the right to reply concerning the new issues which emerged on the occasion of the debates.

The defendant has the last word.

As it can be noticed, the trial in recourse presents two particularities: the absence of court research and the existence of the written report, which is read in public hearing before the start of the debates.

3. Deliberation and pronunciation of the decision

The court checks the decision reviewed on the basis of the works and of the material in the cause file and of any new documentation, presented to the court. The panel deliberates in secret, in the deliberation room, with a view to the adopting of one of the solutions provided by Article 385^{15} Criminal Procedure Code. The reviewed decision is checked under three aspects:

- in terms of the annulment reasons discussed *ex officio* (Article 385 par. 1 points 1-7, 10, 13, 14, 19 and 20);
- in terms of the reasons invoked, when the recourse was motivated;
- in terms of the reasons taken into consideration *ex officio* only if they prejudiced the decision against the defendant (Article 385 par.1 points 11, 12, 15, 17 and 18).

11. Solutions that can be pronounced by the recourse court

Trying the recourse, the court can pronounce a solution of rejection or admission of the recourse.

11. 1. Rejection of the recourse

According to the dispositions of Article 385^{15} of the Criminal Procedure Code, the court rejects the recourse, maintaining the decision reviewed, if the recourse is tardy, inadmissible or unfounded.

The recourse is tardy when it was not formulated within the general delay of 10 days provided by the law.[1]

The recourse deadline is peremptory, so that the court must reject the recourse, without proceeding to the examination of the decision, with the exception of the situations where the recourse was admitted after the deadline or the extension of the deadline.

The recourse is inadmissible, when it was declared by a person who does not have the quality to declare recourse or when it was declared against a decision which is not susceptible of recourse.

The recourse is unfounded when it is groundless.

Having in view the fact that the legislator has not provided a certain solution for the variant where the recourse has not been motivated, in specialised legal literature the opinion[2] has been expressed according to which the recourse shall be rejected as unmotivated and that such a solution is imposed as the law provides that the motivation of the recourse is mandatory and regulates a special motivation procedure.

As for us, we consider that the rejection of the recourse as unmotivated represents a solution which is not provided by the law and cannot be adopted, even if, technically speaking, its introduction in the criminal procedure code would be beneficial. As long as the court must take into consideration *ex officio* some cases, expressly provided by the law, the checking of these cases must be reflected in the solution, which can only be admission or rejection, according to whether the existence of any or more of these cases is found or not.

[1] Every time the law provides that a decision is subject to recourse, without specifying a deadline, it is of 10 days. The Criminal Procedure Code provides numerous situation, which have been discussed at the right moment, for which other deadlines have been established (24 hours, 48 hours, 3 days).
[2] I. Neagu, *op. cit.*, p. 264. Also G. Mateuț, *op. cit.*, p. 349.

11. 2. Admission of the recourse

Article 385^{15} of the criminal procedure code provides that, in case of admission of the recourse, the court annuls the decision and pronounces one of the following solutions:

Maintains the decision of the court of first instance, when the appeal was erroneously admitted.

Such a solution is imposed when the court of appeal has admitted an unfounded, tardy or inadmissible appeal.

Acquits the defendant or disposes the termination of the criminal trial in the cases provided by Article 11.

The acquittal or the termination of the criminal trial in recourse is disposed when the court finds the existence of one of the cases provided by Article 10. In these situations, the court shall admit the recourse and shall annul the decision by which, erroneously, the defendant was convicted or by which the acquittal or the termination of the trial was disposed but for other grounds than the ones retained in the recourse.

Disposes the retrial by the court whose decision has been cancelled, in the following situations:

- the court was not composed in accordance with the law or the provisions of Article 292 par. 2 were breached or there was a case of incompatibility;
- the hearing was not public, except for the cases when the law provided differently;
- the trial took place without the participation of the district attorney or the defendant, when it is mandatory according to the law;
- the trial took place in the absence of the defender, when its presence is mandatory;
- the trial took place without the drawing up of the evaluation report in the causes with minor offenders;
- when the psychiatric evaluation of the defendant was not carried out in the cases and conditions provided by Article 117 par. 1 and 2;
- the decision does not contain the reasons the solution is based on or the motivation of the solution contradicts the dispositions of the decision or it is not understandable;

- the court has not pronounced itself on a deed retained in the charge of the defendant by the notification document or concerning some evidence presented or on a request essential for the parties, of the nature to guarantee their rights ad to influence the solution of the trial;
- when the trial in first instance or in appeal took place without the legal citation of one of the parties, or who, legally cited was in the impossibility of appearing or of notifying about this impossibility.

Disposes the retrial of the cause by the competent court, in the case provided in Article 385[9] par. 1 point 1, when the dispositions concerning the competency in the matter or the quality of the person have not been observed;

When the recourse concerns both the decision of the first instance and that of the court of appeal, in case of admission and disposition of the retrial by the instance whose decision was annulled, the cause is sent to the first instance, if both decisions were annulled, and to the court of appeal, if only its decision was annulled.

In case it admits the recourse formulated against the decision pronounced in appeal, the recourse court also annuls the decision of the first instance, if the same breaches of the law are found as in the decision reviewed.

The High Court of Cassation and Justice, if it admits the recourse, when the administration of evidence is necessary, disposes retrial by the instance whose decision was annulled.

Disposes the retrial by the recourse court in the cases provided in Article 385[9] par. 1 points 11-20, as well as in the case provided in Article 385[6] par. 3, namely in the following situations:

- the court admitted a method of review not provided by the law or introduced tardily;
- when the court pronounced a decision of conviction for another deed than the one for which the person convicted was sent to trial, with the exception of the cases where the change of the classification was disposed or when the criminal action was extended for other material actions, for other deeds or concerning other persons;
- when the defendant was convicted for a deed which is not provided in the criminal law;
- when erroneously individualised punishments were applied according

to the provisions of Article 72 of the criminal code or in other limits than the ones provided by the law;

- when the person condemned definitively was tried before definitively for the same deed or if there is a cause for the elimination of criminal responsibility, the punishment was pardoned or the death of the defendant intervened;
- when erroneously the defendant was acquitted for the reason that the deed committed by him is not provided in criminal law or when, erroneously, the termination of the criminal trial was disposed for the reason that there is authority of tried thing or a cause of elimination of criminal responsibility or that the death of the defendant intervened or the punishment was pardoned;
- when the deed committed was given a wrong classification;
- when a severe fact error was committed, having as a consequence the pronunciation of an erroneous acquittal or conviction decision;
- when the first instance judges have committed an excess of power, in the sense that they have passed in the domain of another power within the state
- when a law more favourable to the convicted person has intervened;
- when the court analyses the recourse declared against a decision which, according to the law, cannot be reviewed by appeal. In this situation the recourse is not limited to the annulment reasons provided by Article 385^9, and the court is obliged, outside the grounds invoked and the requests formulated by the party declaring the recourse, to examine the cause under all aspects.

When the recourse court annuls the decision and retains the cause for retrial according to 385^{15} point 2 letter d, it pronounces itself by decision also on the evidence to be administered, setting a hearing date for retrial. On the hearing date set for retrial, the court must proceed to the listening of the defendant present, according to the dispositions contained in the Special part, title II, chapter II, when he/she was not listened to at the first instance or appeal, as well as when these courts have not pronounced against the defendant a decision of conviction. The dispositions of Articles 380 and 381 are applied adequately.

12. Content of decision

The court pronounces itself on the recourse by a decision.

The decision of the recourse court presents the following structure:

- **the introductory part**, which must contain the mentions provided in Article 355.
- **the exposition**, must contain the factual and legal grounds which have led, as the case may be, to the rejection or the admission of the recourse, as well as the grounds which have led to the adoption of the solutions provided in Article 385^{15} point 2.
- **the dispositions,** must contain the solution given by the recourse court, the date of pronunciation of the decision and the mention that the pronunciation was done in public hearing.

In case the defendant is in a state of detention, in the exposition and the dispositions the time that is deducted from the sentence must be shown.

When retrial was disposed, the decision must indicate the last procedural act which remains valid, from which the criminal trial must continue its course.

The part of the decision which has not been annulled remains final and becomes enforceable on the pronunciation date of the recourse court.

13. Retrial of the cause after annulment

The retrial of the cause is carried out in three variants:

- retrial of the cause by the recourse court;
- retrial of the cause by the courts whose decision was annulled;
- retrial of the cause by the competent court, when the annulment was pronounced on the grounds that the dispositions concerning the competency according to the matter or the quality of the person were not respected;

The retrial court must conform to the decision of the recourse court, to the extent to which the factual situation remains the one had in view upon the solving of the recourse.

When the decision is annulled only concerning some facts or persons, or only concerning the criminal or the civil side, the retrial court pronounces

itself within the limits where the decision has been annulled.

The retrial of the cause after the annulment of the reviewed decision takes place according to the dispositions contained in the Special part, title II, chapter II, which is applied adequately.