The ordinary means of appeal in criminal law, from the perspective of the provisions of Law no. 202/2010 ("the small reform") and of the new Code of Criminal Procedure

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Abstract

Aiming to ensure the celerity of the Romanian criminal trial, the legislative changes of the present Code of Criminal Procedure through Law no. 202/2010 have impacted also the matter of appeals, leading to fewer degrees of jurisdiction in most criminal cases.

The actual Romanian Code of Criminal Procedure governs, as a general rule, the triple level of jurisdiction in criminal matters, dedicating two ordinary means of attack: the appeal and the recourse; consequently to the legislative changes of the present Code of Criminal Procedure (through Law no.202/2010), only the cases that are first trialed in a court can still undergo both ordinary means of attack.

Also, Law no.135/2010 regarding the new Code of Criminal Procedure brings changes with regard to ordinary means of attack, and, implicitly, with regard to the levels of jurisdiction.

Thus, with the purpose of ensuring the celerity of the criminal trial and the acceleration of the settlement of the criminal cases, under the circumstances in which there will be an increase of guarantees in the criminal prosecution phase and in the first instance trial, in the matter of means of attack the new code stipulates the ordinary means of attack of appeal, fully devolutive. Regarding the recourse, this will become an extraordinary means of attack (under the name of recourse in cassation), exercised only in exceptional cases and only for reasons of illegality.

Keywords: *celerity; ordinary means of attack; criminal case; legislative changes; the new Code of Criminal Procedure.*

JEL Classification: *K14, K41*

Since it is not expressly regulated in our criminal proceedings legislation, ***the celerity*** (efficacy or rapidity) is required, as fundamental principle of the criminal trial, because it assumes the desire that the conduct of the criminal trial and implicitly, the settlement of the criminal cases, should take place as soon as possible, in a moment as closest to the one when the offence was committed.

Although it is not legally consecrated together with other fundamental principles of the criminal trial, the principle of efficacy results from other proceedings provisions, first of all even from the content of Art. 1 paragraph 1 of the Criminal Procedure Code (the aim of the criminal trial): „The aim of the criminal trial is to acknowledge *in due time* and completely the deeds that represent

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offences, so that any person who has perpetrated an offence is punished according to his/her guilt, and no innocent person is held criminally responsible".

Also, after reviewing the Constitution, Art. 21 para.3 of the fundamental law provides that the parties are entitled to the settlement of the case *within a reasonable time.*

Art. 10 of Law no. 304/2004 on judicial organization[2] also provides that all persons are entitled to the settlement of the case *within a reasonable time.*

In the European Convention for the Protection of Human Rights and Fundamental Freedoms, the requirement of celerity results from paragraph 1 of Art.6 („Right to a fair trial"), according to which „everyone is entitled to a judgement ... *within a reasonable time* of his/her case".

The principle of efficacy assumes both the quick settlement of the criminal cases and the simplification, when possible, of the criminal proceedings activity. In such a case, the efficacy is prefigured by a series of regulations included in the provisions of the current Criminal Procedure Code such as: the institution of due times in the criminal trial (Art. 185-188 of the Criminal Procedure Code), extension of the criminal action and extension of the criminal trial, during the trial (Art. 335-337 of the Criminal Procedure Code), extension of competence of criminal investigation bodies in emergency cases (Art. 213 of the Criminal Procedure Code), the severance of civil action and postponement of the trial for another session, in case the settlement of the civil claims would lead to a delay in settling the criminal action (Art. 347 of the Criminal Procedure Code) etc[3].

The trial as a stage in the criminal trial may be performed in more *degrees of jurisdiction*. In order to disclose the truth in a criminal case – starting from the acceptance of the idea that in the activity of justice enforcement, just as in any human activity, errors might occur – a certain judicial control must be insured, following which these potential judicial errors are removed; such a judicial control is possible due to the regulation of more degrees of jurisdiction, so that the trial of a criminal case takes place in more steps, under the form of a ladder system[4], each step being performed in front of instances of different degrees.

Our criminal proceedings system currently knows *three degrees of jurisdiction:* the trial in first instance, the trial in appeal and the trial in recourse. One must realize though the distinction between the degrees of jurisdiction of the proceedings systems and the degrees of jurisdiction that a certain criminal case may run through; therefore, there are cases, provided by the law on purpose, when some cases run only through two degrees of jurisdiction (for example, the cases whose object is offences tried in first instance at the first instance court or at the court of appeal and which can be afterwards tried only in recourse[5]). There are also

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[2] Law no.304/2004 on judicial organization, republished in the Official Gazette no.827/13 September 2005, as further amended and completed

[3] Ion Neagu, *Criminal Proceedings Law, General Part,* vol. I, Euro-Trading, Bucharest, 1992, pp. 75-76.

[4] *Ibidem*, p. 153.

[5] The cases that may still run through three degrees of jurisdiction are the ones whose object is offences tried in first instance at the court.

cases when decisions that can not be attacked by appeal or recourse are pronounced (such as sentences depriving one of a certain authority), such as, even when the law allows running through more degrees of jurisdiction, this is not obligatory, being possible that the decision might remain final after the trial in first instance (when none of the entitled persons attacks the respective decision).

The right to two degrees of jurisdiction in criminal matter is one of the principles consecrated in the European jurisprudence[6]. Therefore, Art. 2 paragraph 1 of Protocol 7 consecrates the right of the person declared guilty of a crime by a court to ask for the examination of the „statement of guilt" or of the conviction by a higher instance.

In the doctrine[7] was estimated that that the provisions of Art. 2 paragraph 1 of Protocol 7 cover the omission of Art. 6 of the European Convention that does not provide this guarantee, requiring a double degree of jurisdiction in criminal matter, field which, due to the severe consequences that a conviction may produce, requires a more careful approach, in view of reducing the risk that judicial errors might occur.

The regulation included in Art. 2 paragraph 1 of Protocol 7 establishes the need that a double degree of jurisdiction should exist not only when a conviction decision was pronounced, but also in the event an instance pronounces a decision which includes a „statement of guilt". To this purpose, the European Court of Human Rights estimated[8] that the decision by which the court rejects the complaint formulated against the prosecutor's ordinance by which it was decided the release from criminal prosecution on the ground that the deed does not present the social danger of an offence (Art. 10 para.1 letter b^1 of the Criminal Procedure Code) confirms the legality of the prosecutor's ordinance and reiterates, in fact, the finding of the prosecutor's office according to which the claimant was made guilty of having committed with guilt a deed provided by the criminal law (non-declaration of the foreign currency held in his/her bank account abroad). By follow, the European Court considered that the object of such a court decision may be equivalent with a „statement of guilt", to the purpose of Art. 2 para.1 of Protocol 7.

At the same time, guaranteeing the double degree of jurisdiction must be effective; the second degree of jurisdiction must satisfy the impartiality exigencies of a court, being required that the proceedings remedy should be independent from any discretionary power of the authorities and should be directly accessible to the parties concerned.[9]

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[6] Mihail Udroiu, Ovidiu Predescu, *European Protection of the Human Rights and the Romanian Criminal Trial*, Publishing House C.H. Beck, Bucharest, 2008, p. 906.

[7] Radu Chiriţă, *European Convention on Human Rights, Comments and Explanations, vol. II*, Publishing House C.H. Beck, Bucharest, 2007, p. 424-425.

[8] ECHR, decision as of November 30, 2006, in case of Grecu against Romania, para. 81, *apud* Mihail Udroiu, Ovidiu Predescu, *work cited*, p. 907.

[9] ECHR, decision as of September 6, 2005, in case of Gurepka against Ukraine, para.59; ECHR, decision as of May 4, 1999, in case of Kucherenko against Ukraine, *apud* Mihail Udroiu, Ovidiu Predescu, *work cited*, p. 907.

The Romanian Criminal Procedure Code in force regulates, as a general rule, the triple degree of jurisdiction in criminal matter, the defendant being entitled to benefit both from a trial in first instance and ***the ordinary ways of attack***: appeal and recourse; following the latest legislative amendments brought to the current Criminal Procedure Code (by Law no. 202/2010[10]), this right was restrained, to the purpose that only the cases tried in first instance at the court may still run through both ordinary ways of attack.

In the Romanian criminal proceedings legislation the degrees of jurisdiction and implicitly, the system of ordinary ways of attack have known a certain *evolution in time*. Therefore, the Court of Cassation which had three sections was created in 1861, the second section dealing with the criminal appeals[11].

Subsequently, the Criminal Procedure Codices as of 1864 (strongly inspired by the provisions of the French Code of Criminal Instruction) made the first mentions as regards the degrees of jurisdiction, regulating the possibility to attack the decisions and sentences.

Carol the Second Criminal Procedure Code as of 1936, restates the existence of degrees of jurisdiction, providing as ordinary ways of attack: the opposition[12], the appeal and the recourse.

By Law no.345/1947[13], by which the so-called justice reform was carried out, the opposition and appeal were dissolved, the only ordinary way of attack remaining the recourse; following this amendment it was also required a reconsideration of the recourse institution which had to substitute the lack of appeal, being thus transformed into a way of attack both as to fact and law.

The Criminal Procedure Code that entered in force in 1969 maintained the system of the two degrees of jurisdiction: trial in first instance and recourse.

By Law no.92/1992 on judicial organization[14] the appeal was reintroduced in our judicial system, the trial in appeal representing the second degree of jurisdiction, after the trial in first instance and before the trial in recourse. The regulation of the appeal in the matter of criminal proceedings was carried out by Law no. 45/1993 for the amendment and completion of the Criminal Procedure Code.

The regulation of the three degrees of jurisdiction is also maintained in the current Law no.304/2004 on judicial organization.

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[10] Law no.202/2010 on certain measures to accelerate the settlement process, published in the Official Gazette no.714/26 October 2010 and entered in force on September 25, 2010.

[11] Dumitru Valeriu Mihăescu, *Criminal recourse*, Scientific Publishing House, Bucharest, 1962, p. 24.

[12] Opposition was a way of attack addressed to the same trial court in order to retract the prior decision issued in default, to call into question and issue a new decision - Traian Pop, *Criminal Proceedings Law, Special Part, vol. IV*, National Printing House, Cluj, 1948, p. 381.

[13] Law no. 345/1947 amending the Criminal Procedure Code, published in the Official Gazette no. 299 bis as of December 29, 1947.

[14] Law no. 92/1992, republished in the Official Gazette no. 259 as of September 30, 1997, subsequently repealed.

As mentioned above, in order to insure the celerity of the criminal trial, a series of amendments were brought to the current Criminal Procedure Code by ***Law no. 202/2010 on certain measure to accelerate the trial settlement***. In fact, Law no. 202/2010 was adopted both in order to insure the celerity of criminal proceedings and to prepare the implementation of the new codes, this law including some of the regulations included in the new Criminal Procedure Code (Law no. 135/2010).

This is why, its initiator, the Ministry of Justice, named this law from the very stage of public debates, „*the small reform*", thus delimitating it from the „big reform" of the criminal and criminal proceedings legislation which is meant to take place by enforcement of the new codes.

To this purpose, in the recitals to this law it was shown that: „among the major malfunctions of the Romanian justice, the most harshly criticized was the lack of celerity in case settlement. Since the judicial proceedings often turned out to be drudging, formalist, expensive and time-consuming, one became aware of the fact that the efficacy of administration of justice act also consists to a great extent in the celerity with which the rights and obligations laid down by court decisions enter the legal circuit, insuring thus the stability of the judicial relationships inferred to the trial.

By reforming the procedure codes (…) one meant, as essential purpose, to create in the matter of judicial proceedings a modern legislative framework able to fully answer the requirements related to the functioning of a modern justice, adapted to the social expectations, as well as to the need to increase the quality of this public service.

Considering the term foreseen for the entry in force of the new procedure codes (...), it is required to create some proceedings norms with immediate effects – in the preparation of implementation of codes and according to the legislative solutions consecrated by them – liable to facilitate the efficiency of judicial proceedings and settlement of the trials with celerity."

Therefore, the reduction of the number of degrees of jurisdiction is among the legislative amendments brought by Law no. 202/2010. Despite the fact that our criminal proceedings system still maintains the regulation of the triple degree of jurisdiction, running through these three degrees is not a rule anymore, only some of the cases still being able to be tried in first instance, in appeal and in recourse.

Therefore, according to Art.361 para.1 Section II of the Criminal Procedure Code it may be attacked by appeal, except for the following:

a) the sentences pronounced by first instance courts[15].

In the context of the latest legislative amendments operated in order to accelerate the trial settlement, the courts no longer try in appeal so that all the sentences pronounced by the first instance courts were excepted from this way of attack.

[15] Art. 361 para. 1 letter. a of the Criminal Procedure Code, as amended by Law no. 2022010.

The exception of these sentences from appeal does not remove the possibility to attack them in recourse; therefore, the recourse represents the only ordinary way of attack in these cases.

b) sentences pronounced by military courts[16].

The reason for the exception of these sentences from appeal is the same as in the abovementioned case (the one regarding Art. 361 para. 1 letter a).

c) the sentences pronounced by courts of appeal and Military Court of Appeal.

Exception of these sentences from the way of attack of appeal is explained by the fact that they are pronounced at the last but one level of the hierarchy of court instances above which there is only a single step – High Court of Cassation and Justice which never tries in appeal. On the other hand, the legislator considered that the level of professional competence of the judges from instances insuring, in these cases, the two degrees of jurisdiction (they try in first instance and in recourse) represents real guarantees for the legality and solidity of the solutions given.

d) sentences pronounced by the criminal department of the High Court of Cassation and Justice[17].

This exception is also justified by the same arguments as the ones above mentioned; the supreme instance represents the last level in the hierarchy of court instances, beyond which there is no other instance to try a potential ordinary way of attack against a decision pronounced by the High Court of Cassation and Justice. The sentences pronounced in first instance by the High Court of Cassation and Justice may be attacked by recourse still at the High Court of Cassation and Justice but their trial shall be made subject to another structure of the panel of judges (Panel of 5 judges).

e) sentences depriving one of a certain authority.

Sentences depriving one of a certain authority may be classified in sentences that may not be attacked in appeal but they may be attacked in recourse (such as sentences depriving one of a certain authority by which the instance is disseizined and returns the case to the prosecutor in accordance with Art. 332 para.1 of the Criminal Procedure Code) and sentences that may not be attacked by any ordinary way of attack (such as sentences depriving one of a certain authority by which the instance declines its competence to another instance according to Art. 42 para.1 of the Criminal Procedure Code – competence declination sentences)[18].

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[16] Art. 361 para. 1 letter b of the Criminal Procedure Code, as amended by Law no. 202/2010.

[17] Art. 361 para. 1 letter d of the Criminal Procedure Code, as amended by Law no. 281/2003.

[18] The legal literature (George Antoniu, Nicolae Volonciu, Nicolae Zaharia, *Dictionary of criminal proceedings*, Scientific and Encyclopaedic Publishing House, Bucharest, 1988, pp. 11-12) makes the distinction between the act of disseizing and the act of depriving one of a certain authority. The act of disseizing is the act by which the judicial body seized, finding that the seize is not made according to the law, or it is not competent to settle the case, returns the file to the body that drew out the act of seize in order to be remade or sends the file to the competent body; during the trial, the instance disseizes itself and returns the file to the competent instance or to the prosecutor, if the criminal investigation was performed by another body than the competent one (Art. 332 of the

When regulating the declination of competence (Art. 42 of the Criminal Procedure Code) and return of the case to the prosecutor (Art. 332 of the Criminal Procedure Code), the legislator uses the term of disseizin of instance and not the term of depriving one of a certain authority. This distinction of terminology does not infirm though, the nature of depriving one of a certain authority that the respective decisions have in reality; in the intention of the legislator the name of depriving one of a certain authority used in Art.361 of the Criminal Procedure Code is equivalent to the name of disseizin used by Art. 42 and 332 of the Criminal Procedure Code because, by disseizining itself, the instance, at the same time, deprives itself of a certain authority[19].

As shown above, a case of depriving one of a certain authority is represented by the sentences returning the case to the prosecutor. According to Art. 332 of the Criminal Procedure Code, the return of the case to the prosecutor, in order to remake the criminal prosecution, is decided by decision, if the instance, finds, before the end of the court investigation, that in the case subject to trial the criminal investigation was performed by a body other than the competent one; also, the instance disseizines itself and returns the case to the prosecutor in order to remake the criminal prosecution in the event of failure to comply with the provisions regarding the seize of the instance, the presence of the defendant or of respondent and its assistance by the defender.

Another case of depriving of a certain authority is represented by the competence declination sentences which are an exception to appeal and to recourse (Art. 42 para.4 of the Criminal Procedure Code). The legislator considered that, since they are not pronounced following the settlement on the merits of the case, the competence declination sentences do not aim the rights and interests of the parties and, this is why, there is no reason for which the exercise of the ways of attack should be accepted in their case.

f) sentences pronounced in the matter of execution of criminal decisions, such as those regarding rehabilitation[20].

This last exception was expressly regulated at the same time with the amendments brought to the Criminal Procedure Code in 2006, the legislator considering that, in order to simplify the procedures and to emphasize the efficacy, both if the execution instance pronounces itself upon some issues regarding the execution of decisions and in case of rehabilitation, it is no longer needed to run through the three degrees of jurisdiction.

It is noticed that in all these cases when the trial can be made only in two degrees of jurisdiction, the parties and the prosecutor benefit only from the way of attack in recourse but this is fully devolutive, the instance being obliged, besides the grounds invoked and the requests formulated by the appellant, to also examine the whole case under all aspects.

Criminal Procedure Code). The act of depriving one of a certain authority is the act by which the instance legally seized finds that it is not competent to try the case, sending the file to the competent body.

[19] Grigore Theodoru, *Criminal Proceedings Law. General Part,* vol. II, „Alexandru Ioan Cuza"University, Iaşi, 1974, p. 12.

[20] Art. 361 para. 1 letter.f of the Criminal Procedure Code, introduced by Law no. 356/2006.

In conclusion, in the current Romanian criminal proceedings system (even after the amendments occurring through „the small reform") there is no case in which the trial on the merits is limited to a single degree of jurisdiction, not being possible the pronouncing in first and last instance of a conviction decision or which contains a „statement of guilt", which means that the requirements of Art. 2 para.1 of Protocol 7 to the European Convention are complied with.

Establishing the principle of the double level of jurisdiction for most criminal cases, Law no. 202/2010 operates changes also in the **matters of appeal and recourse**.

Thus, subjects to appeal are: the sentences pronounced by courts and by the territorial court of law that decided for the conviction, the acquittal or the ceasing of the criminal trial (and/or where the civil action was settled), as well as the closings given in a first instance trial by the courts (the territorial military court).

The recourse being, in certain cases, the third level of jurisdiction (consequent to the appeal) or, in other cases, the second level of jurisdiction (following the first instance trial), that means that decisions pronounced in appeal, but also sentences excepted from appeal by law, can be attacked with a recourse.

According to Art. 385^1 para. 1 from the Code of Criminal Procedure[21], can be attacked in recourse the following judging decisions:

a) sentences pronounced by judicatures;

b) sentences pronounced by military courts;

c) sentences pronounced by the Courts of Appeal and by the Military Court of Appeal;

d) sentences pronounced by the criminal department of the High Court of Cassation and Justice;

e) decisions pronounced, as appeal instances, by courts of appeal and by the Military Court of Appeal;

f) sentences pronounced in matter of criminal decision execution, except for the case when the law stipulates otherwise, as well as those regarding rehabilitation.

Closings can also be attacked with a recourse; according to Art. 385^1 para. 2 from the Code of Criminal Procedure, closings can be attacked with a recourse only once with the sentence or with the recurred decision, except for the cases when, according to the law, they can be attacked separately with a recourse. The recourse declared against the sentence or the decision is deemed taken also against closings, even if those were given after pronouncing the decision.

The closings that can be attacked separately with recourse are classified as such:

- closings that can be attacked separately with a recourse which is trialed prior to pronouncing the recurred sentence or decision (the closings through which is disposed the taking, revoking, replacing, ceasing or maintaining of a preventive measure, the closing through which the court decided upon prolonging the preventive arrest of the defendant during the criminal prosecution, the closing

[21] Art. 385^1 para. 1 Code of Criminal Procedure, as changed by Law no. 281/2003, Law no. 356/2006 and Law no. 202/2010.

through which is decided the suspension of the first instance trial, the closing through which is confirmed the measure of a medical interning etc);

- closings that can be attacked in a separate recourse, recourse that will be trialed only after pronouncing the sentence or the decision (the closings through which was decided upon judicial expenses due to the witness, the interpreter or the defender).

The following judging decisions are not subjects to recourse:

- sentences for which the law also stipulates the means of appeal, if the persons with a right to appeal have not used the means of appeal or if the appeal was withdrawn;
- sentences of disinvestment which cannot be attacked through any ordinary means of attack (the sentences of competence declined);
- decisions of the recourse instance;
- decisions through which the recourse was settled in the interest of the law;
- decisions through which was settled a litigation in annulment by the competence of the recourse instance;
- closings for which the law specifically stipulates that they cannot be attacked with a recourse (the closing through which was admitted or rejected the request for abstention, the closing through which was admitted the request for challenge, the closings given in criminal cases in which were pronounced sentences or decisions unsusceptible to be attacked with a recourse).

According to Law no. 202/2010, the recourse declared against certain decisions which, based on law, cannot be attacked through an appeal (sentences pronounced by judicators, by the court of law or by the High Court of Cassation and Justice, or those pronounced by courts for misdemeanors to which the prosecution is started due to a preliminary complaint of the person injured), is not limited to cases of cassation specifically foreseen by the law, the instance being obliged, aside the invoked grounds and the requests formulated by the recurrent, to examine the legality and the validity of the judgment in order to eliminate the errors of fact or of law; in these circumstances, the court of recourse may administrate new evidence or re-administrate the evidence in the situation when it is necessary to ensure the right of parties to a fair trial.

Trying to answer the requirements to reduce the time of the criminal procedures and to simplify them and to create a unitary jurisprudence, according to the jurisprudence of the European Court of Human Rights[22], ***Law no. 135/2010 on the new Criminal Procedure Code***[23] also brings amendments as regards the degrees of jurisdiction.

Therefore, in order to insure the celerity of the criminal trial and to accelerate to settlement of the criminal cases, under the conditions in which the

[22] Recitals to draft of Romanian Criminal Procedure Code issued in 2008, www.just.ro

[23] Law no. 135/2010 on the new Criminal Procedure Code, published in the Official Gazette no. 486/15 July 2010; in accordance with Art. 603 of Law no.135/2010, this code enters in force on the date to be established in the law for its application and within 12 months as of the date of publication of this code in the Official Gazette of Romania, the Government shall send for adoption by the Parliament the draft law for the application of the Criminal Procedure Code.

guaranties in the stage of criminal prosecution and the trial in first instance will increase, in the matter of ways of attack, the new code provides the ordinary way of attack of the appeal, fully devolutive.

The instance of appeal will be able to administer again the evidences administered in first instance and it will be able to administer new evidences, being obliged, besides the grounds invoked and the requests formulated by the appellant, to examine the case and to check the decision of the first instance under all aspects as to fact or law (Art. 417 para. 2 of the new Criminal Procedure Code).

Therefore, the new Criminal Procedure Code maintains only *one ordinary way of attack*, offering efficiency to the principle of double degree of jurisdiction, provided by Art. 2 para. 1 of Protocol 7 to the European Convention for the Prevention of Human Rights and Fundamental Liberties.

As regards the recourse, it will become an extraordinary way of appeal (under the name of recourse in cassation[24]), exercised only in exceptional cases and only for grounds of illegality. The recourse in cassation shall pursue the insurance of a unitary practice at the level of the while country, through this extraordinary way of attack, whose settlement is exclusively in the competence of the High Court of Cassation and Justice, being analyzed the compliance of final decisions attacked with the rules of law, by reporting to the cassation cases expressly and restrictively provided by law.

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[24] It is made, therefore, the distinction between „recourse in cassation" –extraordinary way of attack that may have as effect cassation (abrogation) of the decision attacked and „recourse in law interest" – extraordinary way of attack that does not have effects upon the reexamined decision and upon the situation of the parties to the trial.