

Ensuring a uniform judicial practice by the provisions of the current criminal procedure code

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Abstract:

The current Criminal Procedure Code has brought substantial changes in the matter of judgment by reconfiguring the system of appeals against criminal judgments and by introduction of separate provisions for ensuring a uniform judicial practice: provisions governing the appeal on points of law and governing the new institution of referral to the High Court of Cassation and Justice in a ruling prior to unraveling some points of law.

Keywords: *criminal trial; judgment; appeal; uniformity of judicial practice; legislative changes*

1. Introduction

In the current Criminal Procedure Code [1], due to rethinking the system of review procedures, are regulated four exceptions to the principle of *res judicata* of final criminal judgments: the extraordinary appeal, an appeal in cassation, review and reopening of the criminal trial in case of judgement in the absence of the convicted person.

Regarding the appeal of the annulment, although initially adopted in 2010 in the form of the Code of Criminal Procedure has not been governed under review procedures (as in the Code of Criminal Procedure of 1968), but in a separate chapter of Title III - "Judgement" of Special Part of the Code, this inconsistency was corrected by Law no. 255/2013 for the implementation of the Code of Criminal Procedure [2], the appeal for annulment being reintroduced into the Chapter for review procedures.

A first difference from previous legislation (Criminal Procedure Code from 1968) consists of adding to the system of review procedures, two new institutions; appeal in cassation and reopening of criminal proceedings in case of judgment in the absence of the convicted person.

The appeal in cassation (designed by transforming the former appeal, regulated in the previous legislation as an ordinary appeal for the extraordinary remedy) aims to ensure a uniform practice throughout the country [3], through this extraordinary appeals,

the resolution of which is exclusively the jurisdiction of the High Court of Cassation and Justice, being analyzed the compliance of the contested final decisions with the rules of law, in relation to cases of cassation expressly and exhaustively provided by law.

Also, by Law no. 135 / 2010 it is introduced a new extraordinary remedy, to withdraw, in order to ensure the compatibility of the Romanian legislation with standards set by the European Court of Human Rights - the reopening of criminal proceedings in case of judgement in the absence of the convicted person. Thus, the European Court of Human Rights recognizes the right to reopen proceedings where judgment in default is not the consequence of voluntary renunciation of the right of the accused to be present in court to make defenses. In this regard, the current Romanian Criminal Procedure Code provides the possibility to the person sentenced who was judged in absentia, to request the reopening of criminal proceedings within one month from the day he was informed by any official notification, that was conducted a criminal trial against him.

Another difference from the Code of Criminal Procedure of 1968 is the removal from the system of review procedures, of the appeal on points of law and its rules in a separate chapter (Chapter VI –"Provisions of ensuring a uniform judicial practice") from Title III of the Special Part of this Code. Moreover, although it was provided for in the Code of Criminal Procedure of 1968 in the chapter for review procedures, the appeal on points of law was not considered even then a proper remedy because the solution pronounced after its solution was not affecting the judgment examined or position of the parties in the trial. The reason for which the appeal on points of law was regulated, in previous legislation, along with extraordinary appeals was that, following its declaration, was being triggered the consideration of a final judgment.

So far, the appeal on points of law subject to different regulations in the Code of Criminal Procedure, under the rules of ensuring a uniform judicial practice (art. 471 - 477¹), together with the notification of the High Court of Cassation and Justice to issue a advance rulings for a dispensation of law issues.

2. An appeal on points of law

Regulated for the first time, in the Code of Criminal Procedure of 1936 (art. 497), as steering jurisprudence, the appeal on points of law was not initially taken in the Criminal Procedure Code adopted in 1968, being reintroduced later by Law no. 45 /

1993 amending the Criminal Procedure Code (art. 414² Criminal Procedure Code in 1968).

Subsequently, by Law no. 202 / 2010 on measures to accelerate the settlement of trials [4] , foreshadowing the entry into force of the new Code of Criminal Procedure, have brought substantial changes to the institution's appeal on points of law, in order to improve and boost its settlement, while the system was still regulated in review procedures system. Among the changes made in 2010, it is highlighted:

- broadening the categories of persons who could seize the High Court of Cassation and Justice;
- introduction of a requirement for admissibility, which involved proving that the issues of law forming the object of judgment have been resolved differently by final judgment, attached to the application;
- establishment of regulations detailing the procedure for resolving the appeal on points of law, concerning the composition of the court, at the appointment of judges rapporteurs, at the establishment of the mandatory consultation of relevant case law and doctrine in question, at the possibility of seeking the opinion of specialists in the field, at the preparation of the project report and the proposed solution to be given in the appeal on points of law, at the timely communication of the report to the judges of the High Court of Cassation and Justice and the obligation to motivate the decision in a short period of 30 days from the date of delivery.

Currently the appeal in the interest of law is regulated by the art. 471 – 474¹ Criminal Procedure Code.

As shown in the content of art. 471 Criminal Procedure Code, the purpose of the appeal on points of law is to ensure the unitary interpretation and application of the law by all courts.

Holders of the appeal on points of law are: the general prosecutor attached to the High Court of Cassation and Justice (ex officio or at the request of the Minister of Justice), the leading board of the High Court of Cassation and Justice, leading boards of the courts of appeal and the Ombudsman; they have the duty to ask the High Court of Cassation and Justice to rule on matters of law which have been resolved differently by the courts.

The court competent to hear the application is only the High Court of Cassation and Justice, and through appeal on points of law may trigger the examination of the judgments of any court.

An appeal on points of law must contain different solutions as problem data and motivate them, the Constitutional Court's jurisprudence, of the High Court of Cassation and Justice, of the European Court of Human Rights or, where appropriate, of the Court of Justice of the European Union, the views expressed in relevant doctrine and the solution that is proposed to be rendered in the appeal on points of law.

The application must be accompanied, under the sanction of rejection as inadmissible, by the copies of final judgments to the effect that the legal issues that are subject of judgment were handled differently by the courts.

An appeal on points of law is admissible only if it is established that the legal issues that are subject of judgment have been resolved differently by final judgments, which are attached to the application (art. 472 Criminal Procedure Code).

Judging the appeal on points of law takes place in a panel whose composition is provided in art. 473 Criminal Procedure Code: President of the High Court of Cassation and Justice or, in his absence, Deputy of the High Court of Cassation and Justice, presidents of sections within it, a total of 14 judges from the section which is responsible for legal issue which was resolved differently by the courts and by 2 judges in the other sections. The president of the panel is the president of the High Court of Cassation and Justice or, in his absence, Deputy of the High Court of Cassation and Justice.

If the question of law presents interest to two or more sections, the president of the High Court of Cassation and Justice finds the sections from which judges will form the panel.

After notification of the High Court of Cassation and Justice, its president will take the necessary steps for the appointment of judges in the polling random in whose jurisdiction falls the point of law that has been resolved differently by the courts and judges in other sections falling within composition of the panel.

Upon receiving the request, the president of the panel will appoint a judge of the section in which is responsible in the point of law that has been resolved differently by the courts, to draw up a report on the appeal on points of law; if the question of law

presents interest to two or more sections, the president will appoint three judges in these sections to prepare the report. The law expressly provides that these rapporteurs are not incompatible, meaning that they do not become incompatible to hear the appeal on points of law.

However, in order to prepare the report, the president may ask the written opinion of recognized specialists on different points of law.

The report will include different solutions given to the problem of law and arguments on which are based, relevant jurisprudence of the Constitutional Court, of the High Court of Cassation and Justice, of the European Court of Human Rights, of the Court of Justice of the European Union and the specialists' opinion if appropriate and in doctrine.

Also, the judge or, where appropriate, judges rapporteurs will prepare and motivate the project that is proposed to be the solution to every appeal on points of law.

The meeting of the panel is convened by its Chairman at least 20 days before its deployment; with the convocation, each judge will receive a copy of the report and the proposed solution.

At the meeting in which is heard the appeal on points of law shall be required to attend all judges of the panel; if there are objective reasons, judges who are unable to attend may be replaced, but with the same rules for random designation.

An appeal on points of law is submitted to the panel, where appropriate, by the general prosecutor attached to the High Court of Cassation and Justice or the prosecutor appointed by him, by the judge appointed by the board of directors of the High Court of Cassation and Justice, respectively the Court of Appeals, or the Ombudsman or his representative.

An appeal on points of law shall be heard within 3 months from the date of referral to the court, and the solution adopted at least two thirds of the judges, without admitting abstentions from voting.

On the appeal on points of law, the panel of the High Court of Cassation and Justice is pronounced by decision, whose effects are set out in article 474 Criminal Procedure Code [5].

The decision rules only on points of law and has no effect on judgments examined or on the state of the parties from those proceedings.

The decision is motivated in no later than 30 days from the pronouncement and is published within 15 days of the motivation in the Official Gazette of Romania, Part I. The settlement of issues is mandatory for courts judged from the publication date of the decision in the Romanian Official Gazette.

According to article 474¹ Criminal Procedure Code [6], the effects of the decision lapse repeal or amend the legal provision unconstitutional finding that has generated the problem as solved, unless it remains in the new regulation.

Therefore, a number of decisions of the High Court of Cassation and Justice which were upheld appeals on points of law under the rule of the Criminal Procedure Code from 1968 and that have not stopped working since the entry into force of the present Code of Criminal Procedural, while solved the problem subsist in the new regulation. For instance, remain valid:

- Decision no. 1/2005 (published in the Official Gazette no. 503 of June 14th 2005) that "the insurance company participates in criminal proceedings as civil liability insurer";
- Decision no. 3/2010 (published in the Official Gazette no. 866 of December 23rd 2010) whereby the High Court of Cassation and Justice has held that "in criminal proceedings, Street Victims Protection Fund is a party civilly liable and can be ordered alone and not jointly with the defendant to pay civil damages to persons injured by uninsured vehicle accidents";
- Decision no. 9 / 2008 (published in the Official Gazette no. 831 of December 10th 2008) by which it was decided that "the indictment must contain the words «verified in terms of legality and merits», without this indication will attract irregularity of the act referral";
- Decision no. 57/2007 (published in the Official Gazette no. 283 of April 11th 2008) by which the Supreme Court upheld the appeal in the interest of law filed by the Attorney General's Office attached to the High Court of Cassation and Justice in connection with the problem if it is admissible, brought against other measures and acts of prosecutor than not to indict and determined that "the complaint against measures taken and acts performed by the prosecutor or on the basis of this data, other than not to indict solutions, is inadmissible";

- Decision no. 1/2009 (published in the Official Gazette no. 418 of June 18th 2009) by the High Court of Cassation and Justice has established that "the competent judicial body to settle the complaint against the prime prosecutor solution, by which was refuted the resolution or order of the public prosecutor not to indict and gave the same times not to indict another solution or for other reasons or for some of the reasons cited by the complainant, is the superior prosecutor";
- Decision no. 15/2009 (published in the Official Gazette no.735 of October 29th 2009) by which was upheld in the interest of law filed by the general prosecutor attached to the High Court of Cassation and Justice, provided that "within the 20 days in which must be made the complaint at the superior prosecutor, against the solution not to indict [7], is the limitation period";
- Decision no. 13/2011 (published in the Official Gazette no.794 of October 09th 2011) by which the Supreme Court stated that "the National Integrity Agency has no locus standi to appeal the solutions not to prosecute or not to prosecute ordered by the prosecutor, made such complaints to be dismissed as inadmissible";
- Decision no. 82/2007 (published in the Official Gazette no.780 of November 21st 2008) that, admitting the appeal on points of law, the High Court of Cassation and Justice decided that "in case of rejection of the complaint, under article 278¹ Criminal Procedure Code. in 1968 [8] against the resolution or order of the prosecutor not to indict or not to indict the provision contained in the indictment, trial court expenses incurred would be met by the person to whom the complaint was dismissed";
- Decision no. 17 / 2007 (published in the Official Gazette no. 542 of July 17th 2008) by which the High Court of Cassation and Justice has established that "the request for review against a final judgment rendered under art. 278¹ paragraph 8, letter a) and b) of the Criminal Procedure Code from 1968 [9] is inadmissible". Compared to the current regulation (art. 341 paragraph 6 and 7 of the Criminal Procedure Code.), the application for revision is inadmissible brought against the final decisions whereby both where the prosecution was conducted without the initiation of criminal proceedings, and where criminal proceedings were set in motion during the prosecution:
 - o the complaint was rejected as belated, inadmissible or, if appropriate, unfounded;

o it was ordered the admission of a complaint, the abolition of the solution reasoned appeal and refer the file to the prosecutor to begin or complete the criminal investigation or, where appropriate, to bring criminal action and full prosecution [10].

3. Referral to the High Court of Cassation and Justice in a ruling prior to unraveling law issues

The current provisions of the Criminal Procedure Code introduce a new institution – referral to the High Court of Cassation and Justice in a ruling prior to unraveling some points of law. Along with the appeal on points of law, by this institution it is wanted to be ensured the unification of the judicial practice and to be created a predictable jurisprudence, leading to shortened trial [11].

According to article 475 Criminal Procedure Code, if, during the trial, a panel of judges of the High Court of Cassation and Justice, of the court of appeal or the court, hearing the case ultimately, finding that there is an issue of law, the settlement of which depends the explanation of the cause in question and on which the High Court of Cassation and Justice has ruled in a judgment prior or through an appeal on points of law and not subject to appeal on points of law in pending, may request the High Court of Cassation and Justice to give a ruling by which to be given principle solving of the issue of law brought before it.

Referral to the High Court of Cassation and Justice is done by the panel after adversarial proceedings, by conclusion which is not subject to appeal.

By closing referral, the cause may be suspended until judgment prior to unraveling the question of law; if not ordering the suspension with referral and judicial investigation is completed before the High Court of Cassation and Justice to rule on the complaint, the court suspends the debate to the decision.

After registering the case to the High Court of Cassation and Justice, closing referral is published on the website of this court. Similar cases pending before courts may be suspended pending resolution of the referral.

The appeal shall be heard by a panel formed by the president of the corresponding section of the High Court of Cassation and Justice or a judge designated by him and eight judges from the respective section.

The president of the panel will designate a judge to report back on the issue of law subject to judgment; Judge appointed rapporteur does not become incompatible.

When the question of law concerns the activity of several sections of the High Court of Cassation and Justice, the President or, in his absence, one of the Vice Presidents of the High Court of Cassation and Justice departments concerned will send notification to presidents in resolving the issue of law; In this case, the panel will be composed of the Chairman or, in his absence, the Vice President of the High Court of Cassation and Justice, who will chair the panel, from the presidents interested in resolving the issue of law and by 5 judges from the respective sections, randomly assigned by the president; after compiling the panel for drafting the report, the president of the panel will appoint one judge at each section (rapporteurs are not incompatible).

The report will be communicated to the parties, who, within 15 days from the communication may, in writing, by attorney or, if necessary, through legal counsel, present their views on the question of law subject to judgment.

The appeal shall be judged without summoning the parties, within 3 months from the date of investment, and the solution adopted at least two thirds of the judges; not allowed abstentions from voting.

Upon notification, the panel unraveling of points of law is pronounced by the decision, only on the question of law subject to absolution.

Unravelling the points of law is binding for courts from the decision of its publication in the Official Gazette of Romania, Part I. Therefore, to ensure the effectiveness of this new mechanism, the decision of the High Court of Cassation and Justice, published in the Official Gazette, will be binding both requesting court rulings that addressed the issue of law and for all other courts [12].

As in the appeal on points of law, the effects of the decision lapse in repeal, finding unconstitutionality or amend the legal provision that generated the problem as solved, unless it remain in the new regulation (art. 477¹ Criminal Procedure Code [13]).

It can be said that, unlike the appeal on points of law, the referral institution of the High Court of Cassation and Justice in a ruling prior to unraveling questions of law has a "preventive role" in the sense that the court (panel) invested with the proceedings, avoiding to give a solution which would conflict with different solutions given by other

courts on a question of law, it shall first obtain the High Court of Cassation and Justice to rule on that matters by an interpretation (dispensation) which becomes mandatory for all courts.

4. Conclusions

Although, in terms of legislative technique, some of the provisions of the actual Romanian Code of Criminal Procedure which ensure a uniform judicial practice are open to criticism, because of brevity and clarity do not meet the legal text (for instance, art. 475 on the subject of referral the High Court of Cassation and Justice in a ruling prior to unraveling questions of law), the new provisions represent real progress of our criminal procedural legislation to the previous regulation.

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[2] Law no. 255/2013 for the implementation of the Code of Criminal Procedure, published in the Official Gazette no. 515 of August 14th 2013

[3] The explanatory memorandum to the draft of the new Code of Criminal Procedure, www.just.ro

[4] Law no. 202/2010 on measures to accelerate the settlement of trials, published in Official Gazette no. 714 of October 26th 2010

[5] Although the marginal name of art. 474 Criminal Procedure Code. is "The judgment and its effects", this article contains provisions only on the effects of motivation and publication of the decision.

[6] Text introduced in the Criminal Procedure Code by Law no. 255/2013 and amended by Ordinance no. 3/2014 for the necessary implementing measures of implementation of Law no. 135/2013 on the Code of Criminal Procedure and other laws for implementation published in Official Gazette no. 98 of February 7th 2014

[7] Term previously provided in art. 278 paragraph 3 Criminal Procedure Code 1968 and now in paragraph 4 art. 339 Criminal Procedure Code.

[8] In the current Code of Criminal Procedure, this complaint is regulated by art. 340

[9] Judgments by which was being order the complaint late dismiss, inadmissible or unfounded and its admission to refer the case to the prosecutor to start criminal prosecution or reopening

[10] C. Voicu, A.S. Uzlău, G. Tudor, V. Widow, New Code of Criminal Procedure. Application guide for practitioners, Hamangiu Publishing House, Bucharest, 2014, p. 390-391

[11] The explanatory memorandum to the draft of the new Code of Criminal Procedure, www.just.ro

[12] Ibidem

[13] Text introduced in the Criminal Procedure Code by Law no. 255/2013 and amended by Ordinance no. 3 / 2014