Reduction of Number of Degrees of Jurisdiction through the „Small Reform"

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Abstract: This paper is dedicated to analysis the impact of some dispositions in Law no. 202/2010 regarding the degrees of jurisdiction in criminal cases. Although it is not expressly regulated by the Romanian Criminal Procedure Code, the celerity is required as fundamental principle of the criminal trial, assuming the requirement that the conduct of the criminal trial and the settlement of the criminal cases should take place as soon as possible. The principle of celerity is combined though with the fundamental principle of disclosure of truth in the criminal trial (Art.3 of the Criminal Procedure Code), requiring the insurance of a balance between the need to accelerate the procedures for settlement of the cases in a reasonable time and the need to run through more degrees of jurisdiction for the proper settlement of these cases. The author try to demonstrate that in order to ensure the celerity of the Romanian criminal trial, the latest legislative amendments to the Criminal Procedure Code (by Law no. 202/2010) also lead to the reduction of the number of degrees of jurisdiction in most of the criminal cases, without this to affect, though, the application of principle of disclosure of truth. In order to achieve better results the analysis is based on survey, observation, comparison of various dispositions (Law no. 202/2010, the 1968 Criminal Procedure Code, the new Criminal Procedure Code) and systematization of the available doctrine in this area. The study may be of special interest to academics and members of the judiciary because it presents in detailed and clear the impact of some dispositions in Law no. 202/2010 and the provisions of the new Criminal Procedure Code in the matter of degrees of jurisdiction.

Keywords: celerity; degrees of jurisdiction; criminal case; legislative amendments; new Criminal Procedure Code

1. Introduction

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

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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 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, article 21 paragraph 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[1] 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 article 6 („Right to a fair trial"), according to which „everyone is entitled to a judgment... *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) (Neagu, 1992, pp. 75-76).

The principle of celerity must be though regarded in close connection to the fundamental principle of disclosure of truth in the criminal trial (Art.3 of the Criminal Procedure Code), requiring the insurance of a balance between the need

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

to accelerate the procedures for case settlement in a reasonable time and the need to run through more degrees of jurisdiction for the proper settlement of these cases.

2. The Principle of Double Degree of Jurisdiction

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 (Neagu, 1992, p. 153), 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[1]). There are also 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 (Udroiu & Predescu, 2008, p. 906). 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.

[1] 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.

In the doctrine (Chiriță, 2007, pp. 424-425) 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[1] 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 article 2 paragraph 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.[2]

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

[1]ECHR, decision as of November 30, 2006, in case of Grecu against Romania, para.81 (Udroiu & Predescu, 2008, p. 907).
[2] 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 (Udroiu & Predescu, 2008, p. 907).

Criminal Procedure Code (by Law no. 202/2010[1]), 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 (Mihăescu, 1962, p. 24).

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[2], the appeal and the recourse. (Pop, 1948, p. 381)

By Law no. 345/1947[3], 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 92/1992 on judicial organization[4] 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

[1] Law no. 202/2010 on certain measures to accelerate the settlement process, published in the Official Monitor no. 714/26 October 2010 and entered in force on September 25, 2010.
[2] 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 (Pop, 1948, p. 381).
[3] Law no. 345/1947 amending the Criminal Procedure Code, published in the Official Monitor no. 299 bis as of December 29, 1947.
[4] Law no. 92/1992, republished in the Official Gazette no. 259 as of September 30, 1997, subsequently repealed.

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

3. Legislative Amendments Operated by Law no. 202/2010 in Relation to Degrees of Jurisdiction

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[1];

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.

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[2];

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[3];

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

[1]Art.361 para. 1 letter.a of the Criminal Procedure Code, as amended by Law no. 2022010.
[2]Art.361 para. 1 letter b of the Criminal Procedure Code, as amended by Law no. 202/2010.
[3]Art.361 para. 1 letter d C. of the Criminal Procedure Code, as amended by Law no. 281/2003.

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 paragraph 1 of the Criminal Procedure Code – competence declination sentences)[1].

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 (Theodoru, 1974, p. 12).

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

[1] The legal literature (Antoniu, Volonciu & Zaharia, 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 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.

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[1].

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.

4. The Provisions of the New Criminal Procedure Code in the Matter of Degrees of Jurisdiction

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

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

jurisprudence of the European Court of Human Rights[1], ***Law no. 135/2010 on the new Criminal Procedure Code***[2] 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 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).

According to the European integrity principle, all national and European authorities should make sure their decisions cohere with the past decisions of other European and national authorities that create and implement the law of a complex but single European legal order (Besson, 2004, p. 257).

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 article 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[3]), 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 whole 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

[1]Recitals to draft of Romanian Criminal Procedure Code issued in 2008, www.just.ro.
[2]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.
[3]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.

with the rules of law, by reporting to the cassation cases expressly and restrictively provided by law.

5. Conclusions

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 article 2, paragraph 1 of Protocol 7 to the European Convention are complied with.

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