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**Legal Nature of Criminal Proceedings
Regarding the Length of the Appeal**

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Abstract: The appeal regarding length of criminal proceedings represents a new institution of Romanian criminal procedure system, born from the need to align the procedural rules to the constitutional requirements and other internal rules, but especially from the need for harmonization with European Community rules, namely the Convention for the Protection of Human Rights and Fundamental Freedoms. To the same extent, it was aimed at forming a legal institution in line with the jurisprudence of the European Court of Human Rights. The new institution has its registered matter in art. 4881-4886 Criminal Procedure Code., Introduced by Law implementing the Code under Title IV – “Special Procedures” which recommends it from the beginning as a derogation from the common procedure. Nevertheless, given the position of remedy for excessive and unjustified extension of the criminal proceedings, as well as the judicial review, which it triggers in this regard, it raises the question of the legal nature of the appeal regarding the length of criminal proceedings. The answer to this question may affect the correct application of the institution and the improvement of judicial practice.

Keywords: new institutions of the criminal proceedings; appeal; Convention for the Protection of Human Rights and Fundamental Freedoms

1. Introduction

The celerity of the criminal proceedings, reducing the length of the case settlement and streamlining the procedures of criminal judicial trial were the core elements of the objectives taken into account by the authors of the Criminal Procedure Code. (Explanatory memorandum ...) In achieving this, there have been introduced new institutions and new guarantees, while the ones kept from the old regulatory were redefined, reshaped, upgraded and adapted to new realities.

In this regard we must note the provisions of art. 8 Criminal Procedure Code, which have value of principle, regarding the need for criminal proceedings within a reasonable time limit. (Neagu & Damaschin, 2015, p. 493) The introduction of this new principle has been driven by the need to align the procedural rules to the constitutional requirements and to other internal regulations targeting the issue of criminal proceedings within a reasonable time limit, and especially the need for harmonization with the European Community legislation and the jurisprudence of the Court of Strasbourg. Therefore, art. 21 paragraph (3) of the Constitution provides that the parties are entitled to a fair trial and to settlement of cases within a reasonable period. The same regulation is found in art. 10 of Law no.

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304/2004 regarding the judicial organization¹, and art. 91 paragraph (1) from Law n. 303/2004 concerning the statute of judges and prosecutors² imposes judges and prosecutors the obligation to solve the cases within the given timescales and to resolve cases within a reasonable time.

Art. 6 paragraph 1 from the Convention for the Protection of Human Rights and Fundamental Freedoms states that everyone has the right to a fair trial, publicly and within a reasonable timeframe of its cause (...).

While establishing the legal framework to ensure the speed and effectiveness of the criminal proceedings took first place in the intentions of upgrading the new regulations, When it came to the time of implementation of Law no. 135/2010 on the Code of Criminal Procedure³ it was found that the text of the new law did not contain sufficient rules to guarantee the achievement of such an objective. As a result, by Law no. 255/2013 for the implementation of Law no. 135/2010 on the Code of Criminal Procedure and for modifying and completing certain normative acts which should contain provisions regarding the criminal procedure law⁴ there were inserted six articles, namely art. 488¹-488⁶, which constitute Chapter 1 of Title IV – “Special Procedures”, entitled “The appeal concerning the length of criminal proceedings.”

The new provisions represent the guarantees of deployment and completion of the criminal proceedings within a reasonable time limit, which is the principle enshrined in art. 8 Criminal Procedure Code. - "Fair and reasonable term and nature of criminal proceedings. “In equal measure, those provisions constitute the procedural means at the hands of the parties, of the main procedure subjects and, in certain circumstances, of the prosecutor, through which they can determine judicial bodies to complete the prosecution or trial within a reasonable time limit. In other words, through the appeal concerning the length of criminal proceedings, the persons concerned, by law, can induce a limited judicial control while verifying the extent of criminal proceedings, which is on the work from this point of view, of the prosecuting authorities and the courts, as appropriate. At this point adding the denomination (*nomen juris*) of appeal, the question arises whether it can be considered a remedy, in other words, what is the legal nature of the institution in question.

Including the appeal about the length of the criminal proceedings among special procedures is justified only by way of exercise and solving subsequently regulated by the path of exceptions to the ordinary procedure. But this does not spell out fully the issue of its legal nature. Besides the fact that it takes place according to a special procedure, the procedure in question generates a genuine judicial control, and this one goes quite close to the area of appeals.

2. Purpose of the Institution and Conditions of Exercise

As noted in the scientific literature, the appeal concerning the length of criminal proceedings is a procedural tool by which the parties and the subjects of the main proceedings, and the prosecutor, in certain circumstances, can submit to the control of the court, the unreasonable nature of the process in terms of the behavior of the judicial bodies. (Neagu & Damaschin, 2015, p. 494) In the same respect was the view that the institution in question aims to protect persons involved in criminal proceedings against its excessive slowness. (Udroiu, 2015, p. 581) Paragraph (1) of art. 488¹ Penal Procedure Code provides that if the work of prosecution and judgment is not met within a reasonable time, an appeal

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²Republished in the Official Gazette of Romania, Part I, n. 826 from September 13, 2005.

³Published in the Official Gazette of Romania, Part I, n. 486 from July 15, 2010.

⁴Published in the Official Gazette of Romania, Part I, n. 515 from August 14, 2013.

can be made, requesting acceleration of the procedure. Therefore, the goal of this institution, as it is clear from text of the legislation, is to avoid delays in the prosecution or trial and to expedite proceedings.

Naturally, the assessment of the duration of proceedings will be reported within a certain period. The text of the law cited above uses the expression of reasonable duration, which led the Romanian doctrine to resort to the jurisprudence of the Strasbourg Court (CEDO) in the application of art. 6 paragraph 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms, which provides the right to trial within a reasonable time limit of the causes. Thus, it admitted that the concrete assessment of the reasonable period envisaged mainly four criteria: conduct of the parties, the importance for the parties of the object of the procedure, the conduct of the authorities and the complexity of the case. (Udroiu, 2015, pp. 583-585) Some authors considered that, of those criteria, the conduct of judicial bodies is the main cause of delay in administration of justice and, therefore, would substantially influence the reasonableness of criminal proceedings. (Neagu & Damaschin, 2015, p. 494)

Paragraph (3) of art. 488¹Penal Procedure Code sets deadlines on reasonable length of criminal prosecution and trial, in which, in our opinion, a trial court vested with such challenges, it is dispensed to assess the reasonableness of the length.

According to procedural law provisions, an appeal can be formulated as follows:

a) at least one year from the opening of criminal investigations, for the cases existing during criminal investigations;

The law does not distinguish whether the prosecution was begun *in rem* or *in personam*, which is why we consider that the one year period begins to run from the opening of criminal investigations even if it was only triggered *in rem*. In practice frequently arise situations when the offender is not identified, being necessary to identify him time periods greater than one year, sometimes the offender remaining unknown until the expiry of limitation for criminal liability. The appeal concerning the length of criminal proceedings may be exercised under such circumstances; the court with jurisdiction can dispose in relation to the facts.

b) after at least one year from the indictment, for proceedings pending the first instance judgment;

The moment of prosecuting coincides with the date of registration of the case in court, including the procedure for preliminary chamber thus because it is a procedural stage preparatory to judgment at first instance (Neagu & Damaschin, 2015, pp. 494-496) at the end of which the decision is to start the trial and not the prosecution.

c) at least 6 months from the notification of the court of appeal for proceedings pending ordinary or extraordinary remedies.

Since the declaration of appeal must occur within 10 days from the notification of the copy of the minutes (art. 410 paragraph(1) Penal Procedure Code), and the judgment shall be drafted within 30 days from the pronouncement (art. 406 paragraph (1) Penal Procedure Code) and only after this time the file is submitted to the court of appeals, the question is referring a case to appeal. As it appreciated in the scientific literature (Neagu & Damaschin, 2015, p. 497), the period of six months shall run from the date of registration of the case on appeal. Such reasoning is true for all the other legal remedies.

According to art. 488¹paragraph (2) Penal Procedure Code, the appeal may be lodged by the suspect, defendant, injured party, civil party and civilly responsible party. During the trial, the appeal may also

be entered by the prosecutor. From the economy of the text, it results that during the prosecution the appeal may be exercised by the parties (accused, civil party and civilly responsible party) by the subjects of the main proceedings, (suspect and the injured party). In the trial phase, together with these active subjects comes the prosecutor in his capacity as representative of the general interests of society and the defender of the rule of law, rights and freedoms of citizens (art. 131 par. (1) of the Romanian Constitution).

Some authors have considered inadmissible the appeal formulation solutions complaint procedure against filing in meeting a request for merger or an execution appeal procedures that exceed limits criminal trial or procedure for preliminary chamber. (Udroiu, 2015, p. 591)

Paragraph (4) of art. 488¹ Penal Procedure Code provides that until settlement, the appeal may be withdrawn at any time and cannot be repeated during the same procedural phases in which has been withdrawn.

3. Jurisdiction and Procedure for Settlement

According to art. 488² Penal Procedure Code, the jurisdiction to settle the appeal belongs to:

- a) in criminal cases during criminal investigations, the judge of rights and liberties from the court that would receive the authority to hear the case at first instance;
- b) in criminal cases during trial or appeal, ordinary or extraordinary, the higher court before which the case is pending;
- c) when judicial proceedings, which are formulated on appeal is pending in the High Court of Cassation and Justice competence to settle the appeal completely belongs to another judge within the same divisions.

The appeal is filed in written and must include the identification of the individual or of the entity who completed it, the quality involved, the identification of the representative (if lawyer, he must also indicate the address of his professional office), mailing address, information regarding the prosecutor or the court file number of factual and legal grounds on which the appeal is based, date and signature.

To settle the appeal, the judge of rights and liberties or the court order the following preliminary measures:

- a) inform the prosecutor supervising or conducting the criminal investigation or the court before which the case is pending, on the objection raised, mentioning the possibility of formulating an opinion on this;

This measure, referred by art. 488⁴ paragraph (1) lit. a) Penal Procedure Code, shows that the notification containing appealing against the length of criminal proceedings directly addresses to the rights and freedoms judge or to the competent court and no to the court before which the case is pending.

- b) Request the file or request a certified copy thereof, the prosecutor or the court has the obligation to send it within 5 days of receipt of the request;
- c) informing the other parties to the proceedings and, where appropriate, of other subjects of the main proceedings, on the objection raised and the right to express their views within the time granted for this purpose by the judge of rights and liberties or the court;

Contrary to some solutions adopted in judicial practice, we consider that the perpetrators (individuals indicated as authors of the crime, but against which the authorities did not start prosecution *in personam*) should not be informed of the appeal, since they are not parties in the proceedings, or primary procedure subjects.

If the suspect or accused person is deprived of liberty in the case or in another case, information will be made both to him and to the lawyer chosen or appointed *ex officio*. Failure to transmit the point of view by the prosecutor or court, the suspect, defendant or by the injured party, as applicable, shall not preclude the solving of the complaint. The judge of rights and liberties or the court shall examine the appeal not later than 20 days after the registration, the term is one of recommendation, for its overcoming not being provided any sanction.

To resolve the appeal, the judge of rights and liberties or the court verifies the length of the proceedings on the material and the work of the file and the views presented by the prosecutor, the court, the parties and the main procedure subject as appropriate. On the appeal, the judge of rights and liberties or the court decides by the closing statement.

In assessing the reasonableness of the length of judicial proceedings are taken into account the following elements:

- a) nature and object of the cause;
- b) complexity of the case, including by considering the number of participants and the difficulties of taking evidence;
- c) extraneous elements of the case;
- d) stage of the proceedings in which the case is pending and during earlier stages;
- e) the behavior of the appellant in the analyzed judicial process, including in terms of its procedural rights and procedural exercise and with regard to meeting its obligations in the process;
- f) behavior of other participants involved, including of the authorities involved;
- g) interference of applicable legislative amendments in question;
- h) other factors likely to influence the length of proceedings.

If the judge of rights and liberties or the court considers the appeal to be well founded, admit it and the period within which the prosecutor will have to solve it, respectively the court entitled to settle. It also will establish the term within which an appeal could be lodged. Naturally this second term will be longer than the first and an appeal cannot be made before the expiry date.

Although the provisions of art. 488⁶ Criminal Procedure Code not expressly provide other solutions, from economy of the text in question and the other from the chapter II of Title IV, results that the rights and freedoms judge or court may adopt the following solutions:

-dismisses the complaint as unfounded; the solution resulting from the *a contrario* interpretation of the provisions of paragraph (1) of art. 488⁶ Criminal Procedure Code; in the scientific literature it was appreciated that after rejecting an appeal a new appeal may be filed anytime; (Udroiu, 2015, p. 595); according to art. 275 paragraph (2) Criminal Procedure Code, following the rejection of the appeal, the person who made it will be liable for legal expenses to the state;

- rejects the appeal as inadmissible; the solution can occur when the appeal was made which did not have *locus standi* or by exercising the appeal was not pursued solve the problem of lack of expeditious trial, or has been made on criminal trials started before the date of February 1, 2014;

- Notes withdrawing the appeal; solution resulting from the provisions of art. 4881 par. (4) Criminal Procedure Code; in that case, the appeal cannot be repeated during the same procedural phases in which has been withdrawn.

The law penalizes abuse of rights consisting of the formulation in bad faith of the appeal with a judicial fine from 1,000 lei to 7,000 lei and legal costs incurred to pay.

The conclusion after making a decision on the appeal shall be communicated to the appellant and forwarded for information to all interested parties or persons concerned, it is not subject to appeal.

Whichever solution is adopted, the judge of rights and liberties or that the court that settle the appeal cannot give advice nor dispensations on certain issues of fact or law to anticipate how to handle the process, or to bring any prejudice to the freedom of the judge to decide the case according to law, on the solution to be given.

4. Legal Nature of Criminal Proceedings on Appeal

As already underlined, the inclusion of the claim of length of criminal proceedings among special procedures does not clarify the issue of its legal nature. Besides the fact that institution name (*nomen juris*) places it in the same category with the complaint - as an ordinary appeal (art. 425¹Criminal Procedure Code), the appeal regarding length of criminal proceedings, like appeals or complaint against the measures or acts of criminal investigation involves checking the activity of the prosecution or the courts in terms of the length of proceedings, in other words, judicial review in this regard.

This judicial review brings it closer to remedies, but it cannot give this quality because remedies are means provided by law which promote judicial review in which court rulings are verified, in order to dismantle those that contain errors of fact and law and their replacement with lawful judgment and truth. (Theodoru, 2007, p. 715) The appeal concerning the length of criminal proceedings, although requires judicial review, it cannot be equated to appeals because, according to art. 129 of the Romanian Constitution, they can be exercised *only against judgments* (s.n.)

But among the remedies regulated by law as such, meet the complaint, as an ordinary appeal that, in the matter of precautionary measures imposed during criminal investigations can be exercised against decision of a prosecutor which was provided for the measure or on the record of fulfilling the measures ordered by the prosecutor. (Udroiu, 2015, p. 302-303) We have therefore an appeal provided for by law, which is not exercised solely in connection with judgment. From this perspective, we can say that the complaint concerning the length of criminal proceedings, although it is not considering a judgment, since it triggers a judicial review, takes the appearance of appeal.

But, besides these similarities, between the complaint concerning the length of criminal proceedings and appeals there are essential differences. Thus, through the appeal concerning the length of criminal proceedings is not intended or abolished any law or any measure emanating from a judicial body (the prosecution or trial). Also, if admission the appeal concerning the length of criminal proceedings takes place a retrial nor imposes a solution, but only set a reasonable deadline by which you have to complete the prosecution or judgment, where appropriate.

Considering these aspects, the appeal concerning the length of criminal proceedings appears as an instrument of judicial control over the activity of judicial bodies in terms of reasonable time of completion of a phase or phases of the criminal proceedings. Nevertheless, it cannot be treated as appeal, since it is not exercised against a judgment or exercise of any measure ordered by the court.

Consequently, the legal nature of the appeal concerning the length of criminal proceedings is special that can be called as *a tool for judicial review sui generis*.

5. Conclusions

The appeal concerning the length of criminal proceedings is a new institution, useful to carry out the activity of judicial bodies (the prosecution and judgment) at the disposal of the parties and participants in the process, without targeting any given solution. This is, moreover, the essential feature, which distinguishes means of appeal, giving it its own judicial nature. Therefore, we consider that the name of appeal appears to be inadequate, generating confusion among others and that it is not disputed by something, but rather requested for making the process faster. A name like *speeding application* or *notification regarding length of criminal proceedings* would certainly avoid any uncertainty.

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