Babeș-Bolyai University

Law School

DOCTORAL THESIS

EXTRAORDINARY APPEALS
IN THE LIGHT OF THE NEW CODE OF CRIMINAL PROCEDURE

Doctoral supervisor

Prof. Univ dr. Gheorghiță MATEUȚ

Doctoral candidate

Otilia GHENICI

Cluj-Napoca

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1. Keywords

Ne bis in idem, challenge for annulment, appeal in cassation, revision of the criminal trial, retrial, reopening of proceedings in cases of trial in absentia, applicants, trial procedure, examination in principle, suspension of sentence.

2. Argument

Practice has shown us often that even after a final judgment has become definitely, situations may arise which call into question the correctness of the judgment given, both for serious errors in fact and in law, thus, regulating the extraordinary appeals that can be brought against the final criminal decision has created legal levers to prevent such a decision from taking effect and to ensure that the truth is restored.

The philosophy of the new Criminal Procedure Code imposing a single ordinary remedy on criminal matters and appeal, respectively, in line with Article 2 of Protocol No 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms and other European legislation, it strengthens the exceptional nature of the appeal.

The new law on criminal procedure proposed substantial changes in the matter of extraordinary appeals, by introducing two extraordinary new appeals, recourse in cassation and reopening of proceedings in cases of trial in absentia, and the modification of the other two extraordinary ways in place and in the previous legislation - the opposition for annulment and revision.

This legislative context was a strong argument, mainly for reconfiguring the appeal.

As regards the other two institutions, the opposition to cancellation and the revision, there are important changes, which make work necessary to deal with one another in the light of the new rules, all extraordinary means of redress in criminal matters, from a theoretical and practical perspective, using a critical and objective approach.

As regards the reopening of the criminal proceedings in the case of a judgment in the absence of the convicted person, this is not an absolute novelty, as it is a case of development of the institution of the extradition retrial governed by the previous Criminal Procedure Code, but under the international legal aid chapter and not the appeals.

Beyond the undeniable practical validity of this subject in criminal proceedings, even in the doctrine prior to 01 February 2014, there was no particular interest in this field, with a relatively small number of specialist works. Moreover, there is no work in the recently published literature dealing with this topic.

It has been argued that in interpreting legal elements taken from old legislation, a serious source of information for the formation of current theory and practice is precisely the solutions envisaged by literature or established by judicial practice prior to the entry into force of the new legislation, a fact which led us to the research of extraordinary appeals in the light of the new Criminal Procedure Code.

This work constitutes a rigorous analysis of the subject matter of extraordinary remedies, by highlighting new legislative guidelines in relation to previous and comparable legislation. The work was also intended to be very practical, by a thorough examination of the case law before 01 February 2014, as well as of the case law that will be formed after that date.

3. Content of the work

Title I of the sentence entitled “General considerations on extraordinary appeals in criminal proceedings” deals briefly, in four sections: The principle of the authority of a final decision in European and international instruments and its exceptions in comparative law. In the final section we also gave a brief historical presentation of the Romanian system of extraordinary appeals.

In extraordinary appeal procedures, the new Criminal Procedure Code regulates four such ways: challenge for annulment, appeal in cassation, revision of the criminal trial and reopening of

proceedings in cases of trial in absentia, the work to see whether they correspond to the reason of extraordinary appeals and whether they cover all judicial errors which may be committed during the trial and settlement of cases in the ordinary course of criminal proceedings.

The second title of the work is dedicated to the challenge for annulment.

The challenge for annulment is not new to our legal system, as it is also stipulated in the previous penal code. This is generally a means of redress for annulment, which is intended to rectify errors in the formal procedure.

There was obviously no clear vision on the opposition for annulment. The failure of the legislator to act is apparent from the fact that it first viewed the appeal in the annulment as an ordinary appeal, then only provided for two cases of appeal in the annulment, after which, by Law No 255/2013, it inserted the appeal in the annulment among the extraordinary appeals. The original view was contrary to the very notion of an extraordinary appeal, as it also concerned the judgments of the first instance, so that the amendments of 2016 made this flagrant error of the legislator corrected.

The first chapter examines the challenge for annulment in terms of the conditions for admissibility. It analyses the judicial decisions which can be challenged, the content of the request for the challenge for annulment, the applicants and the term for lodging the request, compared to the regulation of the 1968 Code of criminal procedure and the case law formed while it was in force.

The second chapter analyzes when final criminal decisions can be disputed by means of a challenge for annulment.

The third chapter presents the trial procedure for the challenge for annulment with its two stages – the examination in principle and the trial itself, the requirements for the suspension of the sentence, the competent court and the decisions it can deliver and the possible remedies.

The study ends with brief conclusions as to whether the current regulation of the challenge for annulment as configured in the present is a progress or a regression compared to the previous Code of criminal procedure. In essence, until the recent amendments made by the Government Order no. 18/2016, the absolute novelty of the new Criminal Procedure Code in the configuration of the appeal for annulment lies in the possibility of appeal against the final decisions at first instance, the power of appeal being conferred on it, this was a rethink of the appeal in annulment as an extraordinary appeal against the very notion of an extraordinary appeal.

The amendments made by Law No 255/2013 to implement Law No 135/2010 on the Criminal Procedure Code created a system of extraordinary ways inconsistent attack both by the aspect revealed above and by the way in which cases of opposition were reassessed in the annulment. In our opinion, it is a serious legislative error to remove the contents of the appeal in cassation and to grant jurisdiction to rule on grounds of invalidity to the same court which issued the decision subject to the winding-up, by appeal in cassation, it is hard to imagine that the same court will not try to maintain its own decision. The arguments in the explanatory memorandum to Law No 255/2013 explaining the transformation into grounds of challenge into annulment, according to the nature of this extraordinary appeal, do not convince. On the contrary, the oscillations of the legislator who initially saw the opposition in cancellation as an ordinary appeal, then only provided for two cases of opposition in annulment, after which, by Law No 255/2013, it was recovered, regulating the appeal in the annulment among extraordinary appeals, by expressly establishing nine cases that can be invoked against the final criminal ruling, it creates the image of the legislator's uncertainty.

Due to the above-mentioned changes the Regulation of the opposition in cancellation slowly regained its coherence, with the combined effort of practice and doctrine.

As regards the comparative right, we stress that this extraordinary remedy, the way it is conceived in our criminal trial system, it doesn't find its correspondent in other legislative systems. However, there are laws, such as the French one, which provide for the extraordinary appeal of the opposition and which show some characters that move it closer to the challenge of annulment in our criminal trial, which we have particularly stopped our attention.

The second most extraordinary appeal procedure regulated in order is the appeal to cassation, which is a novelty for our judicial system, for the criminal trial. Such appeal shall be dealt with in Title III of the sentence. Recourse in cassation is the result of the review of the whole system of ordinary and extraordinary appeals, which is the consequence of the removal of the ordinary appeal on the basis of the laws of the Member States of the European Union, Rules satisfying the requirements of the double degree of jurisdiction referred to in Article 2 (2) Protocol No 7 of the European Convention. The progress of the appeal to the appeal in cassation shall be made in the first chapter of Title III.

Among the reasons for introducing the appeal in cassation as an extraordinary appeal and abolishing the ordinary appeal, were the lack of speed of the conduct of criminal proceedings in

general, the lack of trust of justice users in the act of justice and the significant social and human costs, translated into the high consumption of time and financial resources, according to the explanatory memorandum of the new code. It was also considered that the issues of the length of proceedings and the settlement of competences were the subject of several cases at the European Court of Human Rights, thus making it clear that the shortcomings that led to Romania's conviction have been eliminated.

The provisions of the new Criminal Procedure Code therefore sought to meet requirements arising from judicial practice, such as speeding up the length of criminal proceedings, simplifying them and creating uniform case-law, in line with the case law of the European Court of Human Rights.

The Criminal Procedure Code expressly provides for the purpose of the appeal in cassation, Which is intended to make the High Court of Cassation and Justice judge, under the terms of the law, whether the contested judgment is in conformity with the rules of law applicable. In addition, the use of cassation was established to ensure a uniform practice throughout the country. It is expressly provided for decisions subject to appeal in cassation and for decisions not subject to such extraordinary appeal. In addition to the specific nature of this extraordinary appeal, the Code imposes strict conditions on the content of the appeal in cassation, the holders and the time limit within which it may be lodged, which are set out in Chapter II of the title, and all legislative changes to date have been followed. And

The appeal is an extraordinary appeal, exercised only in exceptional cases, exclusively for the legality of the judgment. Chapter III, the most extensive of this title, analyzes the cases of appeals in cassation and their evolution.

In the explanatory memorandum to Law No 255/2013, It is shown that the legislative solution conferring upon the criminal section of the High Court of Cassation and Justice the power to prosecute all appeals against decisions of the appellate courts implies a substantial increase in the jurisdiction of the criminal section of the High Court of Cassation and Justice, this will lead to an overloading of the role of the supreme court.

The legislator's intention to regulate a limited number of cases of recourse to cassation, in extraordinary circumstances, given the new set of appeals, is natural and welcome, but not at any cost, how was it that the case of misapplication of the law was sacrificed. It was thus considered that the removal of some grounds for appeal would have the effect of relieving the High Court of

Cassation and Justice from certain tasks which are not in line with its role, as provided for by the Constitution, i.e. the unification of judicial practice, and European recommendations were therefore envisaged.

Chapter IV deals with matters relating to the procedure for the trial of an appeal in cassation, which involves two stages: admissibility in principle, which acts as a filter of appeals in cassation and the trial of the appeal in cassation after admission in principle.

The effects of the appeal and the solutions which may be given in its judgment shall be presented, highlighting their non-compliance with the cases of appeal in cassation, where appropriate, in the light of the decisions of the High Court of Cassation and Justice.

Also, The decisions of the Constitutional Court and legislative changes to date are taken into account in a special section entitled "Criticism of the new appeal in cassation in the light of the decisions of the Constitutional Court".

During the research of the appeal in cassation, we have taken a comparative approach to the institutions with similar ones in other legislations. Thus, I highlighted one of the most serious and intolerable errors in connection with the use of recourse in cassation as currently regulated in the Criminal Procedure Code, namely the non-regulation of cases of misapplication of the law. We note that similar reasons for disposal are also found in the criminal court laws of other European countries, such as Italy, France, etc. Given that it is the French legal system that has developed the concept of "cassation" best, the emphasis in examining the comparative law was on the regulation of the use of the use of the use of cassation in French law.

In summary, the regulation of the appeal in cassation is perfect, based on the five articles declared unconstitutional so far, and these decisions of unconstitutionality offer the prospect of changes, many of which have already been made, with a view to the proper application of this new institution.

The best conclusion is given by the explanatory memorandum of the draft law PL-x no. 373/2018. In accordance with Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings. It is proposed to amend Article 438 to bring an appeal to the court of cassation in favor of the conviction and following judgments of the European Court of Human Rights which found that fundamental rights had been infringed.

It was noted that over time the appeal proved ineffective. Despite these considerations, which are sensible in some places, the proposed amendments are inconsistent. Moreover, in the form submitted for promulgation there is no interference on the text of the law which provides for appeals in cassation. Without any changes, the recourse in cassation remains an extraordinary ineffective way, we could say almost non-existent.

Title IV deals with the revision of the criminal trial. The revision is the extraordinary remedy for errors of judgment in respect of the facts retained by the final judgment, due to the lack of knowledge by the courts which gave the final judgment of facts and circumstances which, if known, would have led to a different solution.

Chapter I of this title consists of three sections: ”Short history”, ”Legal nature” and ”Characteristics”.

The new Criminal Procedure Code forgave up the pre-trial phase of the review procedure and the role of the prosecutor in resolving this appeal. As a novelty, the application for review will be made directly to the first instance and will have to include, under the sanction of rejection as inadmissible, the indication of the case for review, the pleas in law and in fact and the evidence proposed in the proof of its merits.

The conditions with which the request for review has to comply have been set out in Chapter II of this title, in four different sections, in which we examined the conditions for the exercise of the review in criminal proceedings, namely the decisions subject to review, the category of persons who may exercise it, the deadlines for the declaration, the form in which the application is to be made and its content.

And in the case of this extraordinary appeal, the law sets out the situations in which it can be promoted. The review cases provided for in the previous Criminal Procedure Code have been maintained, making some changes that make them consistent, arising from previous practice, which we have examined in Chapter III of this Title.

Unlike the French lawmaker, who in the year 2014 proposes a real reform of review, our lawmaker remained loyal to the traditional vision consecrated over tens of years. Thus, old review cases are also resumed in the New Criminal Procedure Code with certain supplementations, but without restricting them. We further encounter the review case relying on new deeds and circumstances, review cases relying on distorted evidence and the review case relying on declaring unconstitutional a legal provision that underpinned the decision. The paper comprises an analysis

of such review cases by reference to the Romanian case-law in the field before and after the effective date of the New Criminal Procedure Code.

Thus, the old cases of revision are also reflected in the new Criminal Procedure Code, with certain additions, but without restricting them. We still find the case for review based on new facts and circumstances, the cases of review based on distorted evidence and the review case based on the unconstitutional declaration of a legal provision on which the judgment was based.

Furthermore is also considered the Law Draft for the amendment and supplementation of the Criminal Procedure Code adopted in the summer of the year 2018, aiming inter alia to supplement review cases. Although many of its provisions have not passed the constitutionality control, we considered a presentation thereof would be useful, as such represent a fair reflection of the current enactment method. The unconstitutionality criticisms and the arguments of the Constitutional Court are concurrently additional elements contributing to a better understanding of the review institution.

Besides the common review cases, the New Criminal Procedure Code, in terms similar to the previous one, also regulates a special case, i.e. the review relying on a decision of the European Court of Human Rights (ECHR) - art. 465 Criminal Procedure Code.

There is a case of review when assessing - by an ECHR decision for conviction or dismissal of the case, further to an amicable settlement of the dispute between the state and the plaintiffs - that the provisions of the European Convention or the additional protocols, which are part of the Convention, have been infringed, in the criminal case the review of which is required, if such infringements continue to have consequences and if the removal of such consequences can only be performed by reviewing the ruled criminal decision.

The paper follows the evolution of the regulation, analyzes the conditions of exerting the review request and the trial procedure, by reference to the national case-law.

Between these chapters, we have inserted Chapter IV on the procedure for judging the review in case of recourse to common cases, divided into five sections dealing with issues such as the competent court, the procedure of admissibility in principle, the measures which may be taken with or after acceptance in principle and the retrial of the case.

A novelty in Romanian law, and not only, compared to other European legislation, is the waiver of the system of review of the direct and separate civil side before the criminal court, the competence in this case resting with the civil court, which judges according to civil law. This

change was made by the criminal procedural legislator, being appreciated by the recent doctrine, at least in terms of ensuring access to a specialized court. The legislator, on the other hand, does not offer any explanation for this change, nor does it reveal the source of inspiration. None of the legislations indicated as a source of inspiration according to the explanatory memorandum of the New Code of Criminal Procedure adopts this solution and, moreover, none of the European Criminal Procedure Codes to which we referred in the content of this paper contains references to the revision of judgments that rule on civil action. To this issue and possible practical difficulties, we dedicated a subsection " Revision of the criminal judgment on the civil side".

Title V of the sentence is devoted to the last extraordinary appeal in the order of the Criminal Procedure Code, the reopening of proceedings in cases of trial in absentia.

The new Code of Criminal Procedure establishes an extraordinary new course of appeal, in order to remove the difficulties created in practice by the previous provisions, regarding the retrial of those tried in absentia in case of extradition, and to ensure compatibility of Romanian law with the standards imposed by the case law European Convention on Human Rights.

Reopening of criminal proceedings in the event of a judgment in the absence of the convicted person is intended to guarantee the right of the person who has been tried and convicted in absentia, to a fair trial and, in particular, to exercise his right of defense in a new procedural cycle.

The first chapter deals with the origin and evolution of proceedings at international level, sections 2-4 are devoted to the trial in absentia and the retrial of cases in European law, American law and before the Special Court for Lebanon.

Chapter II deals with the trial in recent national law, with a focus on outlining the notion of a "missing person", the phrase in which the key to legislating a criminal trial in absentia in accordance with conventional rules lies.

Chapter III concerns the request for reopening of the criminal proceedings with specific sections: "The object of the application"; "The form and content of the application", "Applicants of the request", "Term lodging the request" and " Preparatory measures ".

Finally, Chapter IV deals with the trial itself, with reference to the competent court and the complete trial composition, the conditions for the admission of the application, solutions and appeals.

We felt that the new rules on retrial were a step forward from the previous provisions, in particular by removing the inequality of legal treatment between the convicted in absentia who has

been extradited or handed over to the Romanian authorities under a European arrest warrant and the sentenced in absentia for which extradition has not been requested or a European arrest warrant has not been executed, however. There are also some regulatory inadequacies highlighted in the sentence.

However, in court practice it can often be observed that this institution is diverted from its purpose. Therefore, the point we would like to underline is the suggestion to amend the law so that abusive behavior by convicted and, in particular, detained persons, who make such requests only to leave prison, is prevented as far as possible. Frequently at the first trial the applications are misappropriated or withdrawn. On the one hand, they are unacceptably loading the role of the courts and, on the other, a permissive attitude on the part of the judiciary encourages this conduct contrary to the purpose for which the extraordinary remedy was provided.

Even if they are so, in some places, we believe that the legal provisions are fit to achieve their purpose.

4. Conclusions

At the end of the work we reserved for the conclusions and de lege ferenda proposals. Beyond critical analysis, we propose legal remedies to overcome the procedural impediments that are generated by the adoption of the law, we hope, effective.

The explanatory memorandum of the Criminal Procedure Code and the implementing law affirmed the desire to unify the practice. Clear Regulation is the prerequisite for a uniform practice, by explicitly framing the concepts used in the new legislation, to ensure that they are properly understood and to avoid misinterpretation.

Starting from the doctrinal concerns outlined in time by which a number of issues had to be improved in the new regulations, the legislator had the extraordinary chance and the undeniable role to correct the errors found in judicial practice formed under the 1968 Code and to clarify controversial issues underlined in the literature. However, there are still many aspects concerning the annulment appeal that leaves room for interpretations, on which the legislator did not intervene by drafting clear legal texts that would resolve the doctrinal and jurisprudential disputes existing under the rule of the Code of Criminal Procedure of 1968 , by imposing a single solution. On the contrary, due to the poor wording, the number of ambiguities has increased, often requiring the

application of the analog supplement. Although there are drafting deficiencies, with the effort of practice and doctrine, as well as the legislator, such as the changes made so far by the Government Orders no. 18/2016 and no. 70/2016, the system of extraordinary remedies can be reconfigured into a coherent mechanism.

In addition, with the example of other European legislation, particular attention is needed to cover material and moral damage caused by an unfair conviction.

As for the question to which we believe the PHD-thesis should be answered, if these extraordinary appeals studied cover all possible judicial errors in the ordinary cycle of criminal proceedings. The answer is twofold. A positive one, in which we see the system of extraordinary paths, even in relation to other legislation, because it covers a wide range of grounds, for legal errors and factual errors. However, this side is overshadowed by the great missing case in cases of appeal in cassation, namely the misapplication of the law, extraordinary remedy on which changes are to be made immediately.

The subject is certainly dynamic, so that errors can be rectified and positive aspects consolidated so that judgments containing defects, in law or in fact, are not allowed to remain definitive. Although during the course of the work we reproached the legislator that it did not resolve through the new Criminal Procedure Code the issues which received different and controversial solutions under previous legislation, we concluded in an optimistic tone because we believe that from doctrinal debates and case law-making over time, the appropriate formula for applying and interpreting all extraordinary appeals will be re-established.