REVIEW OF IRRECONCILABLE DECISIONS

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Abstract

This article proposes a theoretical and practical approach of the review case which refers to the hypothesis in which two final decisions cannot be reconciled. The author is making an analysis even by the reference to two specific practical situations in which two courts of appeal have given radical solutions in two cases which were ruled in an erroneous manner by the merits court. In the given situations, the two panels of appeal invalidated each other's reasoning through their rulings. By reference to these hypotheses, which were not generalized so that a ruling by means of a second appeal in the interest of the law could be opportune, the author proposes an extension of the invoked review case also with respect thereto.

Keywords: *review; extraordinary means of challenge; irreconcilable decisions; criminal lawsuit; final decisions*

1. General Issues

The review is one of the extraordinary means of challenge regulated by the Criminal Procedure Code under Art. 453, para. 1 letter e). In terms of the doctrine, it is shown that the review is the extraordinary means of challenge "through the use of which can be removed the judicial errors regarding the deeds retained under a final Court decision or the continuous violations of the rights guaranteed by the European Convention or the breaches of the constitutional provisions in case the Constitutional Court admitted a non-constitutionality plea after the decision remained final."[1]

It is admitted that some Court decisions which contain judicial errors may fall under the power of *res judicata*, although they fail to reflect the truth in reference to the case in which they were issued, and – in this case- they are confronted with the principle of finding out the facts and with that of the authority of *res judicata*.[2]

At the same time, the jurisprudence notes that: "The review represents an extraordinary means of challenge which can be exerted against the final Court decisions issued by the criminal courts of law, having the character of a withdrawing means of challenge, which allows the criminal court of law to re-analyze its own decision and, at the same time, the character of a *de facto* means of challenge, by means of which judicial errors which occurred in the ruling on criminal cases are found and removed. The review is filed versus a decision that obtained the authority of *res judicata*, on the strength of certain facts or circumstances which were not known to the court of law when they ruled on the case, which were found after the trial and represent proof that such trial is based on a judicial error."[3]

The judicial error is identified as consisting in the fact that the court of law maintains a factual state which does not match the true facts and can be generated by certain causes: „failure by the court of law to know certain facts or essential circumstances; use of distorted evidence (through the mediation of criminal activities); corruption of the judicial bodies which investigated or judged the case; the existence of contradictory (irreconcilable) decisions[4].

Being an extraordinary means of challenge, it may be exerted solely with respect to the decisions established under Art. 452 of the Criminal Procedure Code and only for the cases provided under Art. 453 of the Criminal Procedure Code and Art. 465 of the Criminal Procedure Code, the only articles that might cause a *de facto* reexamination of the criminal case.

2. Review of Irreconcilable Decisions

In accordance with Art. 453 of the Criminal Procedure Code, "the review of final Court decisions, with respect to their criminal side, may be required when: **a) they found out facts or circumstances which** were unknown when a ruling was made on the case and which prove the lack of grounds of the decision issued in the case; **b) the decision required to be reviewed was based on the statement made by a witness**, on the opinion issued by an expert or on the situations to which an interpreter drew attention, who committed the crime of false testimony in the case required to be reviewed, thus influencing the ruling made; **c)** a writ which served as grounds for the decision required to be reviewed was declared as false

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[1] M. Udroiu, Procedură penală partea specială, 4th edition, C.H. Beck Publishing House, Bucharest, 2017, p. 430.

[2] I. Neagu, M. Damaschin, Tratat de procedură penală, Partea specială, Universul Juridic Publishing House, Bucharest, 2018, p. 413.

[3] HCCJ (CD) Dec. No. 101/A/2017, https://www.universuljuridic.ro/conditiile-de-admisibilitate-ale-revizuirii-apel-ncpp/

[4] V. Dongoroz, comment to Decision No. 2793/1943 of the Court of Cassation, IInd Division in "Pandectele române" I.1944, pg.41 – 46, quoted in A. Olteanu, Analiza cazurilor de revizuire, available at http://old.mpublic.ro/jurisprudenta/publicatii/analiza_ cazurilor_de_revizuire.pdf

during the judgment or after the ruling was made, which circumstance influenced the ruling made in the case; **d)** a member of the Court panel, the prosecutor or the person who carried out acts of criminal prosecution committed a crime in connection with the case which is required to be reviewed, which circumstance influenced the ruling made in the case; **e) when two or several final Court decisions cannot be reconciled**;f) the decision was grounded on a legal provision which, after the decision became final, was declared as unconstitutional as a result of the admission of a non-constitutionality plea raised in that case, if the consequences of the breach of the constitutional provision keep occurring and can only be remedied through a review of the decision issued".

The review case provided under Art. 453 para. 1 letter e of the Criminal Procedure Code is relevant for this work; for the occurrence of such review case, the doctrine maintained that the fulfillment of certain conditions must be ascertained.

The first condition is the existence of two final criminal decisions, by which the courts could have ruled on the criminal law conflict of substance. The doctrine notes that the review cannot be exerted against a final decision ruling on the merits of the case and against an order to take no further action, because the latter is not a final decision ruling on the merits of the case[5].

More recent practice accepted the occurrence of this review case in the field of the application of the more favorable criminal law on the basis of Art. 6 of the Criminal Code[6], but not also if the irreconcilability affects a final decision which relates to the merits of a case and a ruling made within a second appeal in cassation or in the solving of a matter of law.

The second condition contemplates that the irreconcilable decisions should be the contents of the two final decisions. The doctrine shows that such irreconcilable character is maintained when the two rulings exclude each other and may envisage: the same deed, but different perpetrators, the same perpetrator and different deeds, different fact and circumstances if such are correlative. The plea determined by the hypotheses which envisage the application of the more favorable criminal law is also recognized, where the irreconcilable character may also envisage different factual situations, grounded on the same factual basis[7].

The third condition requires that decisions should not have been challenged concomitantly through the intermediary of other extraordinary means of challenge[8].

The judicial case law maintained that there is such a review case when: due to the data and provisions contained thereby, they exclude each other in the sense that there are different deeds committed in the same day, at the same time, but in different localities, by the same person[9]; in case that, for the deed with regard to which a person was convicted they were subsequently referred to another person for trial purposes[10];

We believe that such review case should be extended with regard to situations in which two decisions issued in different cases, but having the same specific [*nature*], are solved in a radically different manner. Please note that we are not referring to the hypotheses in which they ascertain that in the judicial practice there are two categories of solutions for the same matters of law which would have claimed the initiation of a second appeal in the interest of the law (Arts. 471 – 474[1] of the Criminal Procedure Code), but to those situations in which two isolated decisions would receive a radically different ruling, which circumstance would impair the principle of juridical security.

For exemplification purposes, we would like to refer to two specific rulings from recent judicial practice.

We are contemplating Criminal Sentence No. 115 of June 23, 2016 issued by the Bucharest Court of Appeal, I[st] Criminal Division, which remained final through Decision No. 266/A/2017 issued by the Criminal Division of the High Court of Cassation and Justice, on one hand, and Criminal Sentence No. 104 issued on June 9, 2016 by the Bucharest Court of Appeal, I[st] Criminal Division, subject to jurisdictional control by Decision No. 362/A/2017 issued by the Criminal Division within the High Court of Cassation and Justice, on the other hand.

The two sentences which ruled on the merits of the cases, issued by the same panel within the Bucharest Court of Appeal, I[st] Criminal Division, as a merits court, received different rulings within the means to challenge the appeal, based on the fact that they were examined by two different panels within the High Court of Cassation and Justice, although the manner in which the merits court proceeded was identical in both [*sentences*].

Thus, a first common point of the two sentences was the solution chosen by the merits judge to severe the civil side of the case and to leave it unsolved.

In the first decision, which we identify as Criminal Sentence No. 115 of June 23, 2016[11], the merits court, with regard to the civil side of the case, maintained that it has the legal obligation to propose the civil action in the case having as its object the recovery of the prejudice, there is the constitution as a civil party by means of which they intend to restore the situation previous to the perpetration of the deed, appreciating that the solving of the civil action, through the complex

[5] B. Micu, A.G. Păun, R. Slăvoiu, Procedură penală, Curs pentru admiterea în magistratură, Hamangiu Publishing House, Bucharest, 2017, p. 551.
[6] I.P. Chiș, Inconciliabilitate sau încălcarea autorității de lucru judecat?, in Dreptul No. 11/2015, p. 180-187.
[7] M. Udroiu, Op. cit., p. 440.
[8] G. Bodoroncea, in M. Udroiu coord., Codul de procedură penală, Comentariu pe articole, C.H. Beck Publishing House, Bucharest, 2015, p. 1132.
[9] HCCJ, Criminal Division, Decision No. 468/2015, www.scj.ro
[10] HCCJ, Criminal Division, Decision No. 2041/2002, www.scj.ro
[11] Final through HCCJ Decision No. 266/A/2017.

matters of the criminal case,…..their solving would lead to an excess of the reasonable term for solving the criminal case, a reason for which they severed the civil action from the criminal action" (pages 125-126 of HCCJ Decision No. 266/A/2017)

On the strength of the provisions of Art. 25 para. 2 of the Criminal Procedure Code, related to Art. 397 para. 5 of the Criminal Procedure Code, they ordered that the civil side should be left unsolved, and the case was severed from this perspective. (page 129 of HCCJ Decision).

With regard to the sentence invoked, the High Court of Cassation and Justice indicates in Decision No. 266/A/2017 that among the reasons of appeal claimed by defendants and which – in their opinion – would justify the solution of referring to the merits court the case for re-judgment purposes, since the judge from the merits court – they did not motivate the sentence *de facto* and *de jure*; – they copied the indictment; - they did not deliberate; - they did not establish the factual situation and the guilt; - they ordered the conviction for the crime of qualified abuse of office without individualizing and analyzing each material act which enters into the composition of the continued form; - they did not establish the quantum of the prejudice, a condition indispensable for the realization of the constitutive elements of the indicated crime; - they did not analyze the defenses filed by all the parties and by the defendants; - they left the civil action unsolved and also severed it, therefore they did not rule on the civil action joined with the criminal action; - they ordered the severance of the civil action, directly through a sentence, an order appreciated as unlawful by the defense because such a solution could only be ordered through a ruling issued under contradictoriality conditions." [*sic!*]

The appeal court noted in this case that: all the criticism is subsumed to the breach of the right to a fair trial stated also in the jurisprudence of the ECHR, the breach of the double rank of jurisdiction, because the judicial control court does not have the possibility to analyze the reasons for the unlawfulness or for the groundlessness of the sentence, such sentence is virtually inexistent, although it has more than 284 pages, therefore the judgment of the case would only go through the stage of appeal, Art. 13 of the Convention being –thus- breached as well.

The High Court appreciated in Decision No. 266/A/2017 that such criticism, as reasons for appeal, is not grounded.

The court noted that all the indicated criticism was virtually classified by the defense under the hypotheses provided by Art. 421 item 2 letter b of the Criminal Procedure Code; however, none of this criticism is grounded because referring the case to the same court for re-judgment purposes can be ordered, according to the text, only if the judgment of the case at that court of law occurred in the absence of a party which was unduly summoned or which, being duly summoned, found it impossible to appear in court and to announce the court of such impossibility, invoked by that party, when the court did not rule on a deed maintained as the defendant's fault through the notification act or on the civil action, or when there is any of the cases of absolute nullity, except for the case of lack of competence, when the re-judgment by a competent court is ordered, therefore, the three situations are provided in a limitative and express manner as grounds for a solution to cancel the sentence and, in a correlative manner, to refer the case to the merits court for re-judgment purposes.

The statements made by the defense in the sense that the sentence is not motivated, that the merits judge did not deliberate, that the so-called motivation means the copying of the indictment by the merits court, were also appreciated by the High Court as ungrounded for the following reasons:

The content of the sentence is the content provided by Arts. 402-404 of the Criminal Procedure Code, even if the content of the exposition part is not always systematized, however, as Opinion No. 11(2008) issued by the Consultative Council of European Judges to the attention of the Committee of Ministers of the Council of Europe maintained, the court's obligation to motivate its decision should not be understood as requiring a detailed response to each argument invoked to support an invoked defense argument.

The jurisprudence of ECHR indicated that, in order to respond to the requirements of a fair trial, motivation should highlight that the judge truly examined the essential matters which were submitted to him/her (ECHR – Case Helle versus Finland of February 19, 1997, case Perez versus France, Hotvan der Hurk versus The Netherlands of April 19, 1994, case Boldea versus Romania of February 15, 2007). In the spirit of Art. 6 of the Convention, ECHR indicated in numerous decisions that "the motivation of the decisions should not be interpreted as imposing a detailed response to all the arguments made by the parties. Court decisions must be motivated so as to indicated in a sufficient manner the reasons on which they are based" (ECHR, Ist Division, Decision [*in case*] Driemond Bouw versus The Netherlands, February 2, 1999, ECHR, Grand Chamber, Garcia Ruiz versus Spain, 21.01.1999).

In the respective case, the appeal court found that the merits judge maintained that the factual situation established further to the judicial investigation, through the direct production of evidence, is the situation described in the notification act, while the arguments made, even if they are not summarizing, pertain to the manner in which the judge systematized his/her decision, the involvement of each defendant being related to the factual situation and to the indicting texts correlative thereto.

HCCJ Decision No. 266/A/2017 interpreted that, with respect to the civil side of the case, the solution ordered by the merits court is that it ordered the

severance of the civil action, for this conclusion being invoked the following *de jure* arguments:

According to Art. 19, para. 4 of the Criminal Procedure Code, the civil action is settled within the criminal lawsuit, if the reasonable duration of the lawsuit is exceeded thereby.

Art. 26, para. 1 of the Criminal Procedure Code provides that the court may order the severance of the civil action when its ruling determines the excess of the reasonable term for solving the criminal action. Solving of a civil action remains under the competence of the criminal court, para. 2 of the text providing that the severance is imposed by the court, *ex officio*, or at the demand of the prosecutor or of the parties, para. 5 of Art. 26 of the Criminal Procedure Code provides that the decision for the severance of the civil action is final.

Invoking the Case Tonchev versus Bulgaria of November 19, 2009 ECHR, the appeal court reiterated the states' obligation which, in case the internal legislation provides the right of the injured party to claim damages through the exercise of the civil action in the criminal lawsuit, this request should be settled even if the criminal lawsuit ceased through the intervention of the time-bar of the criminal liability, and it should not remain unsolved so that the court should not be obligated thereby to initiate a new judicial procedure with the civil court.

Interpreting the invoked procedural provisions, HCCJ Decision No. 266/A/2017 indicates that it results that the severance solution ordered by the merits court by its sentence is not only lawful, but it is also correctly justified in terms of the fulfillment of the conditions provided under the law, there being a perspective that the solving of the civil claims should cause a delayed solving of the civil action.

The examination of the wording of Art. 26, para. 5 of the Criminal Procedure Code, which refers to "order", does not lead to the conclusion that the court cannot order the severance of the civil action by a sentence, but it is only provided that "the severance of the civil action" can be made at any time during the judgment, even at the terms prior to debates, the lawmaker establishing, however, expressly that the order is final, this being also a concern of the lawmaker to not postpone the judgment of the criminal case through the filing of an appeal/a separate challenge against the severance order.

In the criminal case, solved on the merits through Criminal Sentence No. 115 of June 23, 2016, none of the defendants involved in the criminal activity was acquitted, so that the insertion in the wording of the decision of the wording of Art. 25 para. 5 of the Criminal Procedure Code is a mere material error, which is also proven also by the fact that the civil side of this case, being severed, is pending for judicial investigation with the competent merits court …. in which case the mentioning in the order of the maintaining of precautionary measures was made in order to avoid the concealment, destruction, disposal or absconding from prosecution of the assets which may be subject, *inter alia*, to the recovery of damages.

In reference to the defendants' criticism in connection with the erroneous option of the severance of the civil side, the High Court, taking into account the charges of abuse of office had as an immediate result a material impairment, the causing of a prejudice, and according to the expert appraisal report prepared in the case the value exceeded the limit provided under Art. 146 of the 1969 Criminal Code or by that provided by Art. 183 of the 2009 Criminal Code, which represents particularly severe consequences ….

Consequently, the appeal court rejected as ungrounded the appeals submitted by the defendants and ordered their conviction by HCCJ Decision No. 266/A/2017.

Another appeal panel within the High Court of Cassation and Justice proceeded in a different manner, its statements being radically different from those invoked at a previous time.

We are considering Criminal Sentence No. 104 of June 9, 2016 of the Bucharest Court of Appeal, Ist Criminal Division (the same panel)[12] which indicates, *inter alia*, that: "On the basis of Art. 25 item 5, para. 1 letter f) of the Criminal Procedure Code the civil action of the criminal lawsuit was left unsolved, and on the basis of Art. 26 of the Criminal Procedure Code the civil action was severed on the basis of Art. 26 item 3 of the Criminal Procedure Code…"

In terms of the civil side of the case, the first court, on the basis of the provisions of Art. 26 of the Criminal Procedure Code, the severance of the civil action, without motivating the order and without raising it for the discussion of the parties.

The defendants were convicted for the perpetration of the crime of fraud ….in case of which: "the establishment of the damage caused by the actions of the perpetrators …is decisive for the existence of this fraud."

All the more, in case of the crime of fraud with particularly severe consequences and without the exact establishment of the quantum of the damage incumbent on each defendant, no solution regarding the criminal side of the case can be ordered.

Or, the merits court, without raising the matter for the discussion of the parties, severed the civil action, which was to be solved within a criminal file.

Such a procedure triggers the impossibility of the appeal court to rule on the criminal side of the case, since it cannot establish whether any damages were caused through the misleading actions. Also, the applicability of the provisions referring to the particularly severe consequences cannot be verified, as long as it is not known whether the damage is in excess of Lei 200,000. Therefore, the criminal action is indissolubly linked to the civil action and it cannot be solved separately.

[12] Verified within the appeal through HCCJ Decision No. 362/A/2017.

Also differently from the first hypothesis presented, HCCJ Decision No. 362/A/2017 also indicates the fact that the motivation of the solution issued by the court of law constitutes a duty which removes any discretionary aspect in the service of justice, giving the lawsuit parties a possibility to form their opinion with regard to the lawful and grounded nature of the solution adopted, while providing to the appeal courts the elements required for the exercise of the judicial control.

The right to a fair trial guaranteed by Art. 6 paragraph 1 of the Convention means, *inter alia*, the lawsuit parties' right to submit the observations they deem to be relevant for their case.

This right can only be considered effective if such observations are thoroughly analyzed by the notified court.

Art. 6 of the Convention entails as the court's duty the obligation to make an effective analysis of the parties' evidentiary means, arguments and proposals.

In addition, the notion of fair trial presupposes that a court which motivated its decision only briefly, by taking over the motivation made by the lower court or otherwise, should have actually analyzed the essential matters which were submitted to its judgment and should not have been satisfied by approving the conclusions made by a lower court, as the European Court stated in its jurisprudence.

With regard to the material acts of the stated crimes, it is found within the appeal that there is no description of such crimes, no mention of the perpetration date and circumstances, the evidence which proved the perpetration of each crime, being included only general references to all the defendants.

Thus, the appeal court cannot substantiate the adoption of any decision on the merits of the case, being unable to censor the defendants' criticism from this point of view.

On the other hand, it is remarked that the decision issued by the merits court is in fact a reproduction of the indictment and represents in fact a copy of the notification document, which is obviously and incontestably revealed by a comparison between the two procedural documents (the indictment and the sentence of the Bucharest Court of Appeal).

Thus, the conviction decision (pages 12-257) maintains the factual situation maintained in the indictment, and the court notification document was entirely copied (pages 16-296), being added the mention that the factual situation established by the prosecutor's office and evidenced is entirely maintained by the court and meets as of right the constitutive elements of the crimes for which the defendants were referred to judgment.

Such a formal mention does not constitute a motivation of the decision in the sense of the provisions of Art. 403 para. 1 letter c of the Criminal Procedure Code and Art. 6 paragraph 1 of the Convention, which entail an analysis of the evidence that served as grounds for the solving of the criminal side of the case, as well as for those which were removed, as required by the legal provisions.

Also, the description of the deeds perpetrated by defendants, the form and degree of their guilt are entirely copied from the indictment, the first court limiting itself virtually to confirming the notification document.

It is true that Art. 421 item 2 letter b) of the Criminal Procedure Code does not provide the cancellation of the sentence issued by the first court and the re-judgment [*of the case*] because the decision does not include the reasons on which the solution is based.

However, in the case Dumitru Popescu versus Romania (No. 2) – paragraphs 103, 104, the European Court of Human Rights consecrated that the status granted to the Convention in the internal law allows national courts to remove *ex officio* or at the parties' request – the provisions of the internal law that they consider as incompatible with the Convention and its additional protocols. This issue entails the national judge's obligation to ensure a full effect of its norms (the Convention) ensuring their preeminence versus any other contrary provision of the national legislation.

Therefore, Art. 6 paragraph 1 of the Convention is directly applicable in the case; this article imposes as the duty of the court examining the case in all of its *de facto* and *de jure* issues, the obligation to make an actual analysis of the evidentiary means, arguments and proposals invoked by the parties, which obviously the first court failed to do since it strictly reproduced the indictment.

Out of the presented reasons, HCCJ Decision No. 362/A/2017 maintains that re-judgment is required, and both the criminal side and the civil side of the case are to be solved jointly – the basis being Art. 421 item 1 letter b the Criminal Procedure Code, related to Art. 6 of ECHR.

Conclusion

Here are, therefore, two rulings made in the judicial case law which have obvious elements of contradiction and which severely shake the trust in the system of criminal justice through the very fact that they were made by three judges who were all functioning within the Criminal Division of the High Court of Cassation and Justice. Through an extension of the review case, they might reconcile such rulings which are based on the same factual situation and yet exclude each other.

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