

# THE SOME REGARDS CONCERNING THE TERM OF DECIDING THE APPEAL IN CRIMINAL PROCEEDING

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## Abstract

*The right to exercise the Appeal is not absolute, it is being confined from several points of view. An Appeal limit is time. The requirements of legal certainty require time conditioning of the exercise for the appeal. The possibility of the unlimited Appeal can be exercised over time would lead to the establishment of a legal uncertainties and to disseminating a continuing tension among both acquitted defendants in first instance, similar to that of Mr. K. the main character from the novel The Process by Franz Kafka.*

*The meaning of the matter is given by art. 410 from NCPP, stating that the Appeal may be exercised within 10 days. The preamble o the analysis for the Appeal term should stop on its legal nature.*

*The term of Appeal is a legal term, procedurally, peremptory/ adjournment (depending on your perspective). The term is one that is lawfully prescribed expressis verbis by the legislator, not allowed by the judge to set another term. Furthermore, we appreciate that the wrong words of the judgment of the Court regarding the duration of the term of appeal does not affect the length of time within which the attack of appeal may be exercised.*

**Keywords:** legal term, procedural term, peremptory/adjourning, instating time, belatedly.

## 1. Introduction

The time limit for the appeal is one of procedure, given that its mission is to organize the work of the Court<sup>1</sup>. Instating the term-limits in the category of peremptory terms or, as the case may be, or of the

adjournment, differ in relation to the perspective of the situation.<sup>2</sup>

The term is an unanswerable when it is viewed from the standpoint of the exercise of the Appeal by the person entitled, and adjourning, when viewed from the standpoint of the implementation of the execution of the judgment. This dichotomizing of the deadline

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<sup>1</sup> The older doctrine of procedural terms were defined conceptually in a particularly suggestive manner, as follows: "the procedural time-limits may be defined as (n.i.) all those terms that are dictated solely by the need to systematize the repressive action, the limitations imposed by these terms without having any other role than to insure promptness in repression. The reason of this policy lies in its repressive activity and discipline that they are modeled on the intrinsic penal considerations", I. Tanoviceanu, *Tratat de drept și procedură penală*, ed. a II-a, vol. IV, Curierul Judiciar, București, 1924, p. 469.

<sup>2</sup> See in this respect I. Neagu, *Tratat de procedură penală*, Editura PRO, București, 1997, pp. 546-547.

for the peremptory-adjourning appeal is of major importance in the appreciation of sanctions in case of non-compliance incidents of the period. Therefore, failure to appeal within the person's appeal limit draws him from the exercise right and if he still wants to exercise over the term, the Court will reject the Appeal as being tardy. On the other hand, the execution of a warrant of arrest of the person convicted at first instance within the time in which the appeal can be said draws against the mandate arrest and the procedural act of arrest with nullity.

Given the procedural nature of the appeals term, the calculation will follow the rules set out under art. 269 from NCPP<sup>3</sup>.

In relation to the period of declaring the appeal there is the interest: the time of beginning for the term (*dies quo*) and the moment of fulfillment of the term (*dies a quem*).

## 2. Content

Regarding the time of the beginning of the term, we must distinguish relative to individuals carrying the appeal. Thus, art. 410 paragraph (1) provides that for the Prosecutor, any person aggrieved, and also the parts of the process (the accused, the civil party and the person civil responsible) the term of appeal flows from the communication of the copy of the minute, stating that according to art. 407 paragraph (1) of NCPP in a given sentence after a copy of the minute of the judgment should be communicated *ex officio* to the parties, to the Prosecutor, to the

injured person and, if the defendant is arrested, to the administration of the place of imprisonment. It should be noted the indication that the time limit for appeal will begin to run from the date of communication of the copy of the minute only to the extent that the communication has been made lawfully.

Thus, any irregularity that affects the communication procedure of the copy of the minute to extend the lead at the moment of the term starts to run. For example, to the extent that the procedural agent finds in the house of the accused a minor under 14 years of age and decide to give them a copy of the minute, its communication is affected by a case of relative nullity based on violation of the provisions of art. 261 para. (1) of NCPP. In these cases, of wrong summoning the defendant's appeal filed irregularly over the period will be reviewed by the Court of appeal, considered as made on time. In this regard, the jurisprudence decided that where the communication of the copy of the minute it was done at a different address than that known as the address where the defendant resides, the appeal of the defender of the defendant, after more than 10 days after such communication was made, should be considered as filed within term<sup>4</sup>. The situation of the exercise of the appeal over the period in case of unauthorized communication of citation should not be confused with the situation of the reactivation of the person within the period, because in the latter case the communication of the copy of the minute was done in compliance with all legal

<sup>3</sup> Art. 269 from NCPP, entitled *Calculation of procedural terms*, provides for the following:

“(1) in calculating the procedural terms starting from the time, day, month or year as set out in the Act which caused the relevant, unless the law provides otherwise. (2) The calculation of time limits on hours or days does not count the hour or day on which time starts to run, nor the time or the day on which it is fulfilled. (3) Time limits on Months counted or years expire, as appropriate, at the end of the day corresponding to the last month of the time at the end of the day and the corresponding month of last year. If this day falls within a month that has no corresponding day, the period shall expire on the last day of that month. (4) When the last day of a period falls on a working day, the period shall expire at the end of the first working day that follows.”

<sup>4</sup> See C. Apel București, s.a. II., pen., dec. 857/1997, quoted after I. Neagu, , M. Damaschin, *Tratat de procedură penală. Partea specială*, Universul Juridic, București 2015, p. 293.

requirements, but the part was an accidental impossibility of exercising the appeal within. Non-communicating in any way a copy of the minute equals irregular communication and produce the same legal effects.

With respect to appeal triggered by a witness, an interpreter, expert or advocate, the legislature has been more permissive, stipulating that they may exercise the appeal *immediately after the conclusion of the willing on the trial expenses, allowances and judicial fines and not later than within 10 days of the pronouncement of the sentence which has settled the case*. We note that in this case the legislature has not established a fixed term, as well as in the other two situations covered under art. 410, limited to only a limit to determine objectively the extent to which appeal may be exercised. Having regard to the provisions of art. 284 paragraph (2) of the NCPP<sup>5</sup>, in legal literature has been the question of whether and to what extent persons who have pursued the appeal provided for in art. 284 paragraph (2) in the NCPP the following may exercise subsequently the appeal on the same object. There are arguments for both admissibility of the two remedies, and for the admissibility of a single appeal in this hypothesis. An argument in support of the possibility of exercising both successive remedies is that they provide for provisions which are stipulated in favor of parties, and the suppression of a litigation about the interpretation should represent an altogether exceptional situation. The argument that opposes the latter opinion is judged with the power of judged action which is equipped by a judgment of the initial application for annulment or reduction of the fine applied. As far as we are concerned, we opt for the admissibility of both successive means of applying solutions for implementing judicial

fines, at least until the next legislator's intervention.

We believe that the particulars relating to the regularity of the procedure are applicable to communications in respect of witnesses, experts, interpreters and lawyers.

In the sequence of things, art. 410 paragraph (3) regulated even for outsider of the process a term within which the appeal must be declared. Thus, external persons to the process who have suffered damage as a result of procedural acts or measures ordered by the Court may declare the appeal within 10 days of the date on which they become aware of the act or measure which caused the injury. The term is certain only in respect of its duration, time of start and end-of which is placed under the sign of uncertainty. We say that the start and end-moments of the term are uncertain because it relates to a situation where subjective, i.e. the date on which the people have learned about the procedural act or measure for deleterious assessing, relative assertion, eminently. However, it is desirable that at the time of analysis of the Appeal application, the Court to check conditions and evidence attesting to the circumstances in which it was aware and to avoid as far as possible, the acceptance of applications submitted from an appeal duration of time from the delivery of the sentence. For example, to the extent that it was willing the seizure extended with regard to the assets owned by a person of the criminal process, we appreciate that the time limit at which time starts to run the appeal might be the moment in which it is communicated to the person concerned the measure or the moment when the procedure of enforcement began with respect to those goods.

In the doctrine was no question which is the solution to the incident where the appeal is filed earlier to communication of the copy

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<sup>5</sup> The text of law provides: "The person fined may request the cancellation or the reduction of the fine. The request for cancellation or reduction can be made within 10 days of the notification of the Ordinance or of the completion of the Amendment".

of the minute. In the existing jurisprudence under the old Code of criminal procedure but which retains its topicality of *lege lata*, the question was cut using a logic and a reason without blemish, for this reason we consider it opportune to partial rendering of this judgment: “*provisions of the article 363 para. (1) and (3) of the Cod of Criminal Procedure in 1968, relating to the term for the appeal and the date on which it has as its purpose the intention of the legislator, sanctioning the party, which was not diligent to exercise appeal within a certain time. How the civil side (valid for other holders of the appeal-n.n.) has expressed this expeditiously prior to the date at which the term of appeal flows, cannot be dealt with rejection as inadmissible of the appeal, the procedural provisions in force, showing no sanction for such situations*”<sup>6</sup>.

It should be noted that the mere flow of the term of Appeal determines a suspensive effect of enforcement of the judgment of the Court, which means that at the time of the beginning and until the expiry of any enforcement of the provisions of the appeal of the Court will be halted. Exception are the decisions or provisions of a judgment which are enforceable in law.

The holder of the Appeal is in a time of favor under art. 411 from NCPP governing the reinstatement within the time limit. To be susceptible of relief, it is necessary to fulfil the following conditions:

- the appellant to declare appeal later to the expiry of appeal;

- the delay in submission of the appeal may have been determined by a thorough foreclosure;

- the application for an appeal to be filed not later than 10 days following the end of preventing;

- by request of the Appeal, the appellant should solicit the relief within the appeal.

Two issues need to be resolved in the matter of the reactivation of the appeal term, i.e. what it means *thorough cause of foreclosure is the legal nature of the period of 10 days*.

Regarding the first aspect, the specialized doctrine<sup>7</sup> took the opinion of the judicial practice according to which it is considered that it is necessary that the person has to be found out in a fortuitous case or force majeure, i.e. to be an event occurred which prevented an Act, event that could not be fitted or removed. In line with this review, it was determined to be a cause of foreclosure that warrants a thorough restoration of the person within the appeal term: the loss of mental faculties for the period of time during which it had declared the appeal, a flood, a fire or another calamity<sup>8</sup>. Going on the same reason, it was held that there is no justification reinstatement within the time limit for appeal, disagreeing about a profound cause of the appeal foreclosure which was declared over the period of a foreign citizen, with the reasoning that, not knowing the Romanian language he did not know that there are appeal, since the Court was assisted by defender and interpreter.<sup>9</sup>

<sup>6</sup> The Court of Appeal Iasi, The Criminal Section, and for causes with minors, the criminal decision no. 209/2001, in the journal *Studii de practică judiciară 1994-2006*, ediție îngrijită de G. Antoniu, Editura Hamangiu, București, 2006, p. 103-104, citat după D. Grădinaru în M. Udroui (coordonator), *Codul de procedură penală. Comentariu pe articole*, Ed. C.H.Beck, 2015, p. 1054.

<sup>7</sup> D. Grădinaru in M. Udroui (coordonator), *op. cit.*, p. 1055.

<sup>8</sup> I. Neagu, M. Damaschin, *Tratat de procedură penală. Partea specială*, Editura Universul Juridic, București 2015, p. 297.

<sup>9</sup> The Supreme Court of Justice, The Criminal Section, the decision No. 858/2003, [www.legalis.ro](http://www.legalis.ro), quoted after M. Udroui, *op. cit.*, p. 253.

As far as we are concerned, we consider that the thorough question of foreclosure we must understand all those circumstances that begin where the perpetrator's guilt ends. We believe that the analysis in the determination of the cause of foreclosure must be made on a case by case basis, specifically in relation to the case data, the courts not lingering from the assumptions of fortuitous and force majeure case. In our opinion, even a relative impossibility to act may constitute a solid foundation for the admissibility of the request for reinstatement within the time limit.

We appreciate the correct opinion expressed in the literature<sup>10</sup> whereby the Declaration requesting reinstatement within the time limit of the appeal may be included in the request for appeal, and may constitute an annex to the appeal or it can be made even oral in the Court of Appeal.

Given that, according to art. 551 point 2 (a), the judgment of the Court shall become final upon expiry of the appeal when the appeal was not concerned, art. 411 para. (2) provides naturally that the decision is final until such time as the Court of Appeal recognizes the request for relief. At the same time, until the dilatory reinstatement period for appeal, the Court of Appeal is conferred by the faculty to suspend the execution of the judgment appealed against. The legislature does not provide guidance on the criteria that the Court might use the appropriate character of suspension of execution of the sentence of the Court. We appreciate that in the latter case the Court decision must not be arbitrary, suspended by imposing on it only in those situations where, at an initial cursory, the request for relief would be admissible.

As regards the time-limit within which the request should be exercised for relief, it is 10 days long and runs from the time when he ceased because of foreclosure. The term is one legal, procedural and preemptory, so non-application or revocation of the person within

making a request for reinstatement within the time limit, and any application submitted subsequent to the expiration of this time limit is to be rejected as being belatedly introduced.

To the extent of these, the Court considers that the request of the appellant for relief is unfounded, and there is no cause of thorough foreclosure, will reject and will find the appeal to be tardy, the solution of the first instance being consolidation and definite character.

Art. 411 final para. covers a unconciliating between the reactivation of proceedings within the time limit of the appeal and the procedure for reopening the criminal trial resulting from the lack of the person convicted. Thus, whenever the person concerned satisfies the conditions for eligibility for both procedures, he will have to use only the procedure for reopening the criminal process. What A final statement will be made in connection with the equivalence cases governed by article 270 of NCPP. Making an application to the case of the text of the law, the application of appeal filed within the period prescribed by law, the administration of the place of holding times at military unit or at the post office by registered mail shall be deemed to have been filed on time. The registration or attestation made by the administration of the place of possession on the request, receipt or postal office, and the registration or attestation made by the military unit on the application for appeal filed serve as proof of filing.

Regarding the Attorney, the general rule is that the act is deemed to be made in term if the date on which it was placed on the register of the Office of exit is within the time limit required by law to carry out the act. To this rule, the legislature has provided for an exception in the matter of the appeal. Thus, with regard to the request for the appeal submitted by the Prosecutor, it will be deemed to have been entered into if the date

<sup>10</sup> M. Udroi, Procedură penală. Partea specială. Sinteze și grile, Ediția 3, Ed. C.H.Beck, București, 2016 p. 309.

on which the period was registered at the court registry is within the interval of time provided for the filing of appeals.

### 3. Conclusions

What must be emphasized is that it is irrelevant whether the injured party or parties were present at the declaring or debate, if they were represented by a lawyer or not chosen or appointed *ex officio*, if there are underage or major parties, or whether or not deprived of liberty, the term of appeal is an imperative procedural legal term<sup>11</sup>, which runs from the date of service of a copy of a legal sentence the minute both Criminal Prosecutor and the injured party or parties.

Also, the term of appeal runs from the date of service of the judgment of the grounds therefor, except in the meantime that the judgment was not enforced when the term will run from the time of the execution of the mandate, if the first court did not legally copy the minute of the sentence.

However, the date of service for a copy of the criminal sentence motivated it is irrelevant for the time of the beginning of the appeal term, unless the judgment is made on the very day of the solution and communicated together with the copy of the minute.

There is a possibility that on the proof of delivery and from the minutes of the copy on the sentence does not result to be noted that this act has been delivered to the addressee or one of the persons referred to in art. 261 NCCP<sup>12</sup> nor any indications of the existence of procedural about the impossibility of the communication of the copy of the minute, and the time limit for the appeal is not going to run from the date of receipt and proof of the

minutes of instruction, whereas communication was carried out in the illegal manner.

Where the display notification does not equate with the communication of the minute, but the term of appeal is presumed to flow only from the date of fulfilment of the first instance in which it was supposed to be present at the seat of the Court or the subject of the procedure for picking up a copy on the minute. We emphasize that in this case there are 2 options: first, when the subject of the proceeding or part shall be presented in the Court within the time set by it, and the time limit for appeal will run from that date, and the second, when the subject of the proceeding or part fails to appear or are submitted after expiry of the period set by the Court for removal of the copy of the minute, in this case the term for the declaration of the appeal will flow from the expiry of the term settled by the Court.

We reiterate that the provisions of art. 270 para. 3 NCCP regarding the consideration of that act/appeal request is made within the Prosecutor if the date on which it was placed on the register of the exit office is within the time limit required by law to carry out the act, does not apply in the matter of the appeal.<sup>13</sup>

A statement will be made regarding the impossibility of formulating the appeal over the term of the party who has not applied for the judgment in that lacked both at all court deadlines and the decision (regardless of the reason for absence)<sup>14</sup>, NCCP not granting this possibility, without compensation in such a case, and may use only the path of reopening the criminal trial resulting from the lack of the person convicted provided by art. 466 and the following. The NCCP respectively which

<sup>11</sup> M. Udriou, *op.cit.*, p.308.

<sup>12</sup> *Ibidem*.

<sup>13</sup> *Idem*, p.310.

<sup>14</sup> *Idem*, p.312.

were ordered out of the application of the death penalty or postpone the application of the death penalty.<sup>15</sup>

Therefore, the call represents a non-mandatory way in the espionage mechanics process through which the judicial control is carried out, aiming to ensure a balance between the need to commence a legal ruling and thorough and to respect the right of the parties to the trial subjects and to a fair trial.<sup>16</sup>

Also, fixing a time limit for appeal by the legislator is justified by the need to ensure the principle of achieving the alacrity of the criminal repression.

In this way, it removes the possibility of avoiding the execution of the judgment, but the judgment is ensured by the verification before bringing it into force<sup>17</sup>.

The appeal is known since the Roman criminal processes called “*provocatio ad populum*”, through which the convicted have the right to appeal against the sentence handed down to the people.<sup>18</sup>

In most European countries’ laws, the Appeal appears as a second degree of jurisdiction over the cause fund, but also as that last ordinary appeal, an appeal is considered an extraordinary remedy.<sup>19</sup>

## References

- Antoniu, George, *Studii de practică judiciară 1994-2006*, Editura Hamangiu, București, 2006.
- Gheorghe, Dumitru, *Drept procesual penal*, Ed. Universul juridic, 2011
- Neagu, I., *Drept procesual penal, Tratat*, Ed. Global Lex, București, 2002.
- Neagu, I., *Tratat de procedură penală*, Editura PRO, București, 1997.
- Neagu, Ion, Damaschin, Mircea, *Tratat de procedură penală. Partea specială*, Editura Universul Juridic, București 2015.
- Tanoviceanu, I., *Tratat de drept și procedură penală*, ed. a II-a, vol. IV, Curierul Judiciar, București, 1924.
- Udroi, M., (coordinator), *Codul de procedură penală. Comertariu pe articole*, C.H. Beck, București, 2015.
- Udroi, M., *Procedură penală. Partea specială. Sinteze și grile*, Ediția 3, Ed. C.H. Beck, București, 2016.
- Volonciu, Nicolae, Uzläu, Andreea Simona, s.a., *Noul Cod de procedură penală comentat*, Ed. Hamangiu, București, 2014.
- [www.legalis.ro](http://www.legalis.ro).

<sup>15</sup> *Ibidem*.

<sup>16</sup> N. Volonciu, A.S. Uzläu s.a., *Noul Cod de procedură penală comentat*, Hamangiu, București, 20014, p.999.

<sup>17</sup> Dumitru Gheorghe, *Drept procesual penal*, Universul juridic, 2011, p.433.

<sup>18</sup> I. Neagu, *Drept procesual penal, Tratat*, Global Lex, București, 2002, p.657.

<sup>19</sup> In the French Law, the appeal has a detailed regulation regarding the decisions in criminal matter. (art. 496-510). The institution of the appeal is seriously regulated in the German Law, as well, and it distinguish among the appeals of fact and the appeals of law, the conditions of carrying out, the effects, etc. (part III art. 296-358). In this systems of law we meet the „opposition” which is of the Court that had the Decision.