

BRIEF CONSIDERATIONS REGARDING DECISION NO. 26/2021 OF THE CONSTITUTIONAL COURT REGARDING THE CONSTITUTIONALITY OF THE PROVISIONS OF THE ART. 4881 PARAGRAPH 2 OF THE CODE OF CRIMINAL PROCEDURE

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Abstract

In the present study, the author analyzes the provisions of art. 4881 of the Code of Criminal Procedure which, until now, have been the subject of multiple exceptions of unconstitutionality examined by the Constitutional Court.

Mainly, the study focuses on the considerations set out in Decision no. 26/2021 pronounced by Constitutional Court in which was statued the constitutionality of the provisions of art. 4881 paragraph 2 and 3 of the Code of Criminal Procedure.

In his approach, the author makes additional arguments in support of the unconstitutionality of the rule by reference to national and European provisions enshrining the principle of equality of citizens before the law.

Keywords: *the appeal regarding the duration of the criminal trial; celerity; discrimination; perpetrator; suspect; defendant; Decision no. 26/2021 of the Constitutional Court*

I. Preliminary considerations

In order to be in line with international regulations¹, in establishing the new configuration of the Code of Criminal Procedure it was decided to introduce the special procedure of the Appeal concerning the duration of the criminal proceedings, which is found in Title IV, Chapter I¹, Article 488¹-488⁶.

The considerations to be set out below mainly concern the provisions of Article 488¹ paragraph (2) of the Code of Criminal Procedure according to which *“the appeal may be lodged by the suspect, the defendant, the aggrieved party, the civil party and*

¹ C. Brumar, *Durata procedurilor judiciare și dreptul la un recurs efectiv: Schiță pentru un remediu compensatoriu*, in *Revista Transilvană de Științe Administrative* no. 2(29)/2011, pp. 46-47. The study refers to the Report on the Effectiveness of National Remedies for the Excessive Length of Procedures adopted by the Venice Commission in December 2006, which provided that States signatories to the European Convention on Human Rights and Freedoms have an obligation to design their legislation so as to prevent the reasonable length of proceedings from being exceeded.

the party incurring civil liability. During the trial, the appeal may also be lodged by the prosecutor”.

To date, the aforementioned provisions have been the subject of numerous complaints pending before the review of the Constitutional Court, all of which have been rejected so far, thus establishing the constitutionality of the rules in question.

We are of the opinion that the arguments put forward in the petitions to the Constitutional Court have not exhausted; these arguments tend to lead to the conclusion that the provisions of Article 488¹ paragraph (2) contravene the imperatives laid down in the Fundamental Law, which is why, hereinafter, we will briefly present the last judgment delivered by the Constitutional Court, namely Decision No. 26/2021² which analyses the constitutionality of the rules governing the holders of the right to lodge an appeal regarding the duration of the criminal proceedings. Further on, we will refer to additional arguments, not analysed so far by the Constitutional Court, which, in our view, converge towards the conclusion that the legislative solution regarding the non-inclusion of the “perpetrator” among the holders of the right to lodge the appeal regarding the duration of the criminal proceedings remains open to criticism from the perspective of its constitutionality.

II. The Constitutional Court's perspective on the constitutionality of the provisions of Article 488¹ paragraph (2) of the Code of Criminal Procedure

The provisions under review in this study have been the subject of several exceptions of unconstitutionality raised before the Constitutional Court of Romania. In fact, there are currently six files pending before the review of the Constitutional Court, at the report stage, which deal with the provisions of Article 488¹ paragraph (2) of the Code of Criminal Procedure³.

The most recent case in which the Constitutional Court examined the constitutionality of the provisions in question is file case no. 717D/2018, formed as a result of the invocation of an exception of unconstitutionality raised by Marcor Gold S.R.L. of Alba Iulia in the criminal case no. 2204/99/2018/94/2017 pending before Iași Court – Criminal Section.

Essentially, the author of the exception criticised the legal provision on the ground of infringement of Article 16 paragraph (1) of the Constitution – *equality in rights* and Article 21 of the Constitution – *the right of access to justice*. In the context of criticisms of unconstitutionality, it was argued that the manner of regulating the

² Published in the Official Gazette Part 1, No. 328 dated March 31, 2021.

³ File No. 1152D/2019 registered on May 2, 2019; file no. 2612D/2019 registered on October 4, 2019; file no. 286D/2020 registered on September 19, 2020; file no. 1237D/2020 registered on August 6, 2020; file no. 1422D/2020 registered on September 7, 2020; file no. 2121D/2020 registered on December 14, 2020. Information is available at: www.ccr.ro.

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holders lodging the appeal regarding the duration of the criminal proceedings is contrary to the constitutional provisions because it results in a differential treatment of the persons against whom evidence is adduced during the criminal investigations but against whom no further criminal proceedings have been ordered and who do not have the right to lodge an appeal regarding the duration of the criminal proceedings, although the evidence adduced at this stage also produces effects regarding them. At the same time, in view of the reason for introducing the special procedure for lodging an appeal regarding the duration of the criminal proceedings, *i.e.* to ensure the speed of the criminal proceedings, it was argued that the removal of the person against whom the criminal investigation is conducted *in rem* from the right to lodge an appeal contravenes the provisions of Article 53 of the Constitution.

By Decision No. 26 of January 19, 2021, the Constitutional Court dismissed as unfounded the exception of unconstitutionality raised.

In the reasoning of the constitutionality of the challenged provisions, the Constitutional Court basically reiterated the recitals set out in Decision No. 640 dated October 17, 2017⁴ and Decision No. 131 dated March 20, 2018⁵. Essentially, it has been re(ruled) that the legal solution excluding the 'perpetrator' or other persons who have a legitimate interest from the category of the holders of the right to lodge an appeal regarding the duration of the criminal proceedings but who have not acquired an official capacity in the criminal investigation phase, is justified in view of the new configuration of the criminal investigation phase which involves a staged process in which the criminal investigation bodies must prove the guilt of the person under investigation and which results in *"creating a state of legal uncertainty for the participants in the criminal proceedings, which evolves with the stages of the criminal proceedings, an uncertainty likely to affect their existence and to influence the content of the legal relationships that they enter into with other legal subjects, which is why it is necessary to be limited in time, so as not to irreversibly affect the existence of the persons concerned"*. However, the passivity of the prosecution authorities which do not take the necessary steps and do not order the necessary measures in the case cannot be sanctioned by using the special procedure.

Moreover, this passivity operates in favour of the person who committed the alleged offence under investigation by reference to the provisions on the prescription of criminal liability.

The Court also held that the "perpetrator" is not in a position of inferiority to the aggrieved party, thereby infringing his/her right to a fair trial, since, in the course of the criminal investigation, the appeal may be lodged after a period of one year has elapsed since the commencement of the criminal investigation, which is why the

⁴ Published in the Official Gazette, Part 1, No. 161 dated February 2, 2018.

⁵ Published in the Official Gazette, Part 1, No. 569 dated July 6, 2018.

inclusion of the “perpetrator” among those entitled to lodge the appeal concerning the duration of the criminal proceedings is without legal reason.

Finally, it was concluded that the solution adopted by the Romanian legislator which, with the exception of the main parties to the proceedings and the parties to the criminal proceedings, excludes the remaining categories of persons as being entitled to lodge an appeal concerning the duration of the criminal proceedings is also consistent with the benchmarks set out in the case law of the European Court of Human Rights.

III. Perpetrator – aggrieved party: discrimination?

We further consider that the wording of Article 488¹ paragraph (2) creates situations of manifest discrimination in the relations concerning the aggrieved party – the perpetrator – the suspect, thus violating Article 16 paragraph (1) of the Romanian Constitution according to which “*Citizens are equal before the law and public authorities, without privileges and without discrimination*”.

Thus, after a brief analysis of the provisions of Article 289 paragraph (2), Article 290 paragraph (2), Article 295 paragraph (3) Code of Criminal Procedure, we can find that the three texts provide that, at the time when the three methods of referral to the criminal prosecution authorities are substantiated, the “perpetrator” may be indicated if known to the person lodging the criminal complaint, the denunciation or the preliminary complaint.

In this regard, we stress that, by reference to the provisions of Article 488¹ paragraph (2), in these cases, a situation of clear difference in treatment between the aggrieved party and the alleged “perpetrator” is created as soon as the criminal proceedings begin. This argument is reinforced by the fact that the aggrieved party is recognised as having the rights provided for in Article 81 of the Code of Criminal Procedure from the time when the referral is lodged and can exercise them in their entirety from the early stage of the criminal proceedings.

On the other side, the alleged person who committed the offence provided by the criminal law can be informed about the criminal prosecution conducted and of his/her capacity of suspect and, further on, the defendant, only later, after performing the essential acts that tip the balance against him/her and is unable to propose the adduction of evidence. A hypothetical situation may be the one in which the person lodging a complaint is also a civil party who subsequently exercises the right to ask for the adduction of evidence and to make any requests related to the resolution of the criminal and civil matters of the case, and the decision to continue the criminal investigation is taken at a distant time, after most or all the evidence has been adduced in the stage of the criminal investigation *in rem*. In such a case, we consider that the guarantees of the right to a fair trial are not only limited, but almost

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suppressed in relation to the person concerned by the referral of by criminal investigation authorities, since, under the pretext that the person does not acquire a traditional procedural status (suspect, defendant), the person is denied any participation in the criminal trial.

At the same time, we recall that in the Code of Criminal Procedure, in its current form, regulates in Article 308 the *procedure of early hearing*. However, in this context, it is conceivable that during the criminal investigation these provisions could become incidental before the criminal proceedings continue, meaning that it would be necessary to hear a witness as there is a risk that the witness could longer be heard during the trial. It is clear that in such a situation, the aggrieved party and the perpetrator are expected to face a situation of procedural inequality, the former having the possibility to participate in the pre-trial proceedings of the witness and to question the witness about the circumstances of the alleged offence.

As such, in our opinion, the non-inclusion of the “perpetrator” in the category of persons entitled to lodge an appeal regarding the duration of the trial, but the legislator's acceptance that the aggrieved party may resort to this remedy is in flagrant breach of the principle of non-discrimination set forth in Article 16 paragraph (1) of the Romanian Constitution, and 14 of the European Convention on Human Rights.

We therefore stress that, in order to be able to discuss discrimination, two cumulative conditions should be met: the existence of a difference in treatment and the lack of an objective and reasonable justification for this difference in treatment⁶.

In order to determine **whether or not there is an inequality of treatment**, a comparison should be made between the procedural situation of the two persons in question. In this regard, we point out that, both *in abstracto* and *in concreto*, **there is absolutely no difference between the person who initiates the criminal proceedings by lodging or introducing the act which takes the form of a referral to the prosecution authorities and the person indicated as the “offender” in terms of the level at which he or she is placed in the criminal proceedings**. Conceptually, although they are on opposite sides, they have a similar role in the criminal process. However, with regard to the possibility of appealing against the duration of the criminal proceedings, the aggrieved party is granted a procedural right to do so, whereas the person who is suspected of having committed a crime does not. The difference in treatment thus arising is therefore undeniable.

In relation to the second condition, it should be emphasised that the difference in treatment constitutes discrimination only **if it lacks objective and reasonable justification**. In examining this aspect in relation to the present case, we firmly consider that the limitation of the scope of persons entitled to lodge an appeal concerning the length of the criminal proceedings should have a legitimate aim and be proportionate. In this regard, **we believe that the reason for the regulation lies**

⁶ R. Chiriță, *Convenția europeană a drepturilor omului. Comentarii și explicații*, 2nd edition, C.H. Beck Publishing House, Bucharest, 2008, p. 610.

precisely in providing an effective remedy against the frequent situations that have led to the unfortunate spread of the phenomenon of “delayed justice” in the Romanian judicial system and the finding by the European Court of Human Rights of the violation of the reasonable time limit of the criminal trial in numerous cases pending before the national courts, noting that another 500 similar cases are pending before the Court of Strasbourg. Inequality of treatment therefore constitutes in itself a diversion from the purpose for which *ab initio* the institution of the appeal concerning the length of the criminal proceedings was introduced in the Code of Criminal Procedure.

IV. Conclusions

In conclusion of the foregoing, we appreciate that, between the limits of flexibility and rigidity of the law, there are still sufficient arguments to conclude that the unconstitutionality of the provisions of Article 488¹ paragraph (2) of the Code of Criminal Procedure resides in a regrettable inadvertence of the legislator, which is why it is necessary to sanction it by the only judicial body entitled to do so, namely the Constitutional Court.

Thus, as the Constitutional Court itself has repeatedly pointed out in its case-law, even if *“the defence by means of criminal law of the constitutional order falls within the competence of the Parliament (...) it is within the powers of the Constitutional Court to verify how criminal policy set up by the legislator is reflected on the fundamental rights and freedoms of the person, in order to respect a fair balance in relation to the social value protected”*⁷.

⁷ Decision No. 368 of May 30, 2017, published in the Official Gazette, Part 1, No. 566 dated July 17, 2017, par. 12.