

JUDICIAL CONTROL OVER THE SOLUTIONS ADOPTED BY THE PROSECUTOR AS REGARDS NON-ARRAIGNMENT- ASPECTS OF JUDICIARY THEORY AND PRACTICE

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ABSTRACT: *Answering to the exigencies of the European Convention on Human Rights and Fundamental Freedoms, which also guarantee among others the right to get access to an independent and impartial court toward the executive power; by the Law nr. 281 from 2003, the art. 278¹ has been introduced in the Criminal Procedure Code which specifically consecrates the right of the injured person to address the court in case he is not satisfied with the solution of his complaint against the solutions of non-arraignment adopted by the prosecutor.*

KEYWORDS: *criminal case; prosecutor court; judicial control.*

JEL CLASSIFICATION: *K 14; K 42.*

In the edition of 1968 (the year of its adoption), The Criminal Procedure Code regulated as the only control of the criminal proceedings developed by the prosecutor, the control within the Public Ministry. This control was started either at the complaint of the concerned person or ex officio. Thus, under the article art. 278 from the Criminal Procedure Code, the person who, dissatisfied with the no ground for prosecution solutions entailed by the prosecutor at the first stage of the criminal case, could complain either to the first prosecutor of the Prosecutor's Office where preparatory inquiries have been done, or to the hierarchically superior magistrate, up to the attorney general of the Prosecutor's Office from The High Court of Cassation and Justice.

According to the formulation of the art. 6 from the European Convention on Human Rights and Fundamental Freedoms which establishes the right to an equitable trial, and through this to the right to get access to a court which would guarantee independence and impartiality against the executive, the issue of the correctness of internal control made exclusively by the Public Ministry have been under debate, concerning the legality of the provisions taken by the prosecutor during proceedings. Following an unconstitutional exception, through the decision nr. 486/1997, The Constitutional Court decided that „art. 278 is constitutional if it does not prevent the person dissatisfied with the solution of his complaint against the prosecutor's acts or provisions or effected in virtue of his dispositions and which do not come in front of courts, from addressing the justice on the legal basis of art. 21 from the Romanian Constitution, which is due to apply directly.”¹

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¹ The decision of the Constitutional Court nr. 486/1997 was published in the Official Gazette nr. 105 from the 6-th of March 1998.

Although the above mentioned decision of unconstitutionality set the possibility for the person dissatisfied with the prosecutor's solution to address the court, the judiciary practice manifested reticence to the concrete application of provisions of the decision, justified by the fact that there are no legal stipulations on the subject.

Following this reality, by the Law no. 281 from 2003 as regards the modification and the completion of the Criminal Procedure Code and certain special laws² the art. 278¹ was introduced and this regulates the judiciary control over the solutions of non-arraignment entailed by the prosecutor, a control that, as motivated by practice, has the juridical nature of a remedy since it refers to the modifications of the prosecutor's acts and provisions.³

Subsequently, by the Law no. 356 from 2006 which modified and completed the Criminal Procedure Code as well as other laws⁴, art. 278¹ underwent several completions, so that we shall analyze the current form of the text as it follows.

1. Solutions that can be appealed in the court

Consequently, the appealed solutions are those by which the prosecutor entailed:

- non filing of the criminal proceedings;
- dismissal of the case;
- removal from the criminal investigations;
- termination of criminal investigations.

Solutioning the appeal in the interest of the law promoted by the attorney general of Romania, the United Sections of the High Court of Cassation and Justice decided that the complaint against the prosecutor's acts or provisions or, against any acts effected in virtue of his dispositions, others than the prosecutor's resolutions and orders of non-arraignment regulated by the art. 278¹ par. 1 from the criminal Procedure Code, is inadmissible⁵.

Consequently, it is also inadmissible the complaint addressed to the court, against other acts of the prosecutor, such as the document by which this one communicates to the petitioner that the complaints⁶ or the memorial⁷ previously formulated have been remitted to another prosecutor's office for solution.

Although the text is very clear and only refers to non-arraignment solutions explicitly, the judiciary practice recorded different situations when, on the basis of the same text, other solutions entailed by the prosecutor had been impugned.

Thus, there has been appreciated as legally inadmissible the complaint addressed to the judge under the stipulations of the art. 278¹ from the Criminal Procedure Code, against the order by which the hierarchically superior prosecutor resolved the objection complaint of the prosecutor who made the preparatory inquiries during the criminal proceedings.⁸

² Published in the Official Gazette nr. 468 from the 1-st of July 2003.

³ The Appellate Court Timișoara, Criminal Dpt., decision nr. 28 from the 2-nd of July 2003, Collection of Judiciary Practice 2004, Publishing house Lumina Lex, București, 2005, p. 440.

⁴ Published in the Official Gazette nr. 677 from the 7-th of August 2006.

⁵ The High Court of Cassation and Justice, United Sections, Decision nr. LVII (57) from the 24-th of September 2007.

⁶ The High Court of Cassation and Justice, Criminal Dpt., decision nr. 6879 from the 17-th of December 2004, The Bulletin of Jurisprudence, Collection of decisions in 2004, Publishing house All Beck, București, 2005, p. 863.

⁷ The High Court of Cassation and Justice, the chamber of 9 judges, decision nr. 10 from the 23-rd of January 2006, The Bulletin of Cassation nr. 3/2006, p. 58.

⁸ The High Court of Cassation and Justice, Criminal Dpt., decision nr. 459 from the 27-th of June 2007, set nr. 3/2007.

2. The object of the complaint addressed to the court

Before addressing the court, the person dissatisfied with the non-arraignment solution entailed by the prosecutor who made the preparatory inquiries, must undergo an obligatory procedure. Thus, according to the art. 275-278 from the Criminal procedure Code, the dissatisfied person must address to the first prosecutor of the prosecutor's office or, if necessary, to the attorney general of the appellate court, to the prosecutor head of department of the Prosecutor's Office of the High Court of Cassation and Justice or to the hierarchically superior prosecutor. The person qualified to resolve the complaint must do it within a term of at most 20 days from the reception and to communicate the solution to the person who made the complaint with no delay. Only in the case of repealing the complaint also by the superior of the prosecutor who entailed the non-arraignment solution, one can resort to the stipulations of the art. 278¹ from the Criminal Procedure Code.

As regards the limits of solution the complaint formulated under the art. 278¹ par. 1 from the Criminal procedure Code by the judge, we must mention the fact that the object of complaint is represented only by the prosecutor's resolution or order of non-arraignment, and not by the act through which the head of the prosecutor's office or the hierarchically superior prosecutor resolved the complaint formulated according to the art. 275 - art. 278 from the Criminal Procedure Code. Consequently, The High Court of Cassation and Justice decided as illegitimate the decision by which, in the retrial after the cassation with arraignment, the judge brought the verdict only on the act by which the head of the prosecutor's office or the hierarchically superior prosecutor solution the complaint lodged according to the art. 275 - art. 278 from the Criminal Procedure Code, considering himself invested only within these limits by the decision of the appellate court. The fact that by the decision of the appellate court, verifications were entailed only regarding the act by which the head of the prosecutor's office or the hierarchically superior prosecutor resolved the complaint formulated according to the art. 275 - art. 278 from the Criminal Procedure Code do not modify the limits within the judge is invested to resolve the complaint formulated under the art. 278¹ par. 1 from the Criminal Procedure Code, restricting them to the act of the head of the prosecutor's office or of the hierarchically superior prosecutor, or the object of complaint, which is the resolution or the prosecutor's order of non-arraignment.⁹

3. Filing parties of the complaint addressed to the court

The filing parties that have the right to complain against the prosecutor's solutions of non-arraignment are:

- the injured person; the complaint addressed to the judge can be formulated personally or through an attorney-in-fact appointed by a special power of attorney. Consequently, the complaint made by the spouse of the injured person or of any other person whose legitimate interests are injured, on the basis of a special power of attorney by which he was authorized to act in another cause or on the basis of a warrant subsequent of the date of the registration of the complaint, is inadmissible, as it had not been filed by a person having the necessary legal quality.¹⁰

⁹ The High Court of Cassation and Justice, Criminal Dpt., decision nr. 2446 from the 7-of May 2007, set nr. 3/2007.

¹⁰ The High Court of Cassation and Justice, Criminal Dpt., decision nr. 5338 from the 18-th of September 2006, set nr. 1/2007.

- any other persons whose legitimate interests are injured by the prosecutor's decision of non-arraignment. The judiciary practice¹¹ decided that the category of "any other persons whose legitimate interests are injured", includes both natural as well as legal persons of private law, such as institutions, if the injury of their legitimate interests is proved. The dismissal as inadmissible of the complaint against the prosecutor's solution of non-arraignment, formulated by an institution which develops its activity in the domain of preventing human rights' violation, with the motivation that such institution does not belong to the category of persons stipulated by the art. 278¹ from the Criminal Procedure Code, having the right to formulate a complaint and contravenes to the art. 13 from the European Convention on Human Rights and Fundamental Freedoms.¹² Consequently, the judiciary control on the prosecutor's solutions of non-arraignment are carried out according to the following procedure described in the art. 278¹ Criminal Procedure Code.

4. The competent court to try the complaint filed under the art. 278¹

After the dismissal of the complaint made against the prosecutor's resolution of discharge of the proceedings or of the order, or in case of the dismissal resolution, of removal from the criminal investigation or termination of criminal investigations (dismissal entailed by the hierarchically superior prosecutor to the prosecutor who gave one of this solutions), the injured person as well as any other persons whose legitimate interests are injured can file a new complaint to the judge from the competent court to judge the case at first instance.

The complaint can be also filed against the non-arraignment disposition included in the charge.

In this direction, the judiciary practice decided that in case when there are accused persons sent to court through the charge and also the same charge entails the non-arraignment of other defendants, the competence of judging the complaint made according to the art. 278¹ from the Criminal Procedure Code belongs to the competent court in relation to the offence and to the quality of the person towards which the non-arraignment had been entailed and not to the competent court, qualified to try the defendants sent to court.¹³

5. The term for filing the complaint

The complaint to the court should be filed within 20 days from the date of communicating the resolution of the complaint by the qualified prosecutor.

In case when the qualified person, respectively, the first prosecutor of the prosecutor's office or, the attorney general of the prosecutor's office of the appellate court, the prosecutor head of department of the prosecutor's office of the High Court of Cassation and Justice or the hierarchically superior prosecutor did not resolve the case within the term of 20 days stipulated by law, the term of addressing to the judge of the competent court to try the case at first instance according to the law, starts from the date of expiry of the 20 days during which, the qualified prosecutor had to resolve the filed complaint through internal control.¹⁴

¹¹The High Court of Cassation and Justice, Criminal Dpt., decision nr. 3838 from the 15-th of June 2006, The Bulletin of Cassation nr. 4/2006, p. 64.

¹² Art. 13 entitled „The right to an effective appeal” stipulates: Any person whose rights and liberties admitted by the present convention have been infringed, has the right to address to a national court, even when the infringement is due to persons who acted in the exercise of official attributions.”

¹³ He High Court of Cassation and Justice, Criminal Dpt., decision nr. 2503 from the 14-th of April 2005, The Bulletin of Cassation nr./2005, Publishing house All Beck, București 2005, p. 54.

¹⁴ The High Court of Cassation and Justice, The bench of 9 judges, decision nr. 209 from the 19-th of September 2005, The Bulletin of Cassation nr. 2/2006, p. 71.

Given that the different ways of qualifying the above mentioned terms, in solutioning an appeal in the interest of the law, promoted by the attorney general of Romania, the United Sections of the High Court of Cassation and Justice decided¹⁵, subject to the legal aspect of terms, that these are terms of the decline.

Consequently, the non-exercise within the stipulated term of the procedural right to bring forward a complaint against the prosecutor's acts, leads to its decline, and a subsequent exercise over the stipulated term leads to a dismissal of the complaint as undue.

6. The development of the trial

On the occasion of solutioning by the judge of the complaint against the resolutions or orders of non-arraignment, the person towards whom the non-arraignment, the removal from the criminal investigation or termination of criminal investigations have been entailed, as well as the person who filed the complaint are summoned before court. The default of the persons legally summoned, does not prevent the solutioning of the case. When the judge considers that the person in default should be present, he can take provisions to bring the person before the court. The practice of the supreme court decided that any complaint based on the dispositions of the art. 278¹ can be tried only if the parties are legally summoned and the procedure is fulfilled, regardless that the complaint is, in principle inadmissible. In case when the defendant is detained, his presence before court is obligatory.¹⁶

In view of solutioning the complaint, the court requires the whole file from the prosecutor's office where the prosecutor who entailed the appealed solution belongs. The file will be sent from the prosecutor's office within 5 days from the reception of the request.

The presence of the prosecutor is obligatory at the trial. The court hears the person who filed the complaint, the person towards whom the non-arraignment, the removal from the criminal investigation or termination of criminal investigations have been entailed and then the prosecutor. Accordingly, the sentence is subjected to cassation, under the art. 385⁵ par. 1 pt. 5 from the Criminal Procedure Code, if the trial took place without the participation of the prosecutor, and the situation when the prosecutor is present before court but he is not heard, is equal to a default of appearance.¹⁷

The judge, solutioning the complaint, verifies the appealed resolution or order, on the basis of the documents from the file of the case and any other newly attached documents. Consequently, in the judicial procedure of the complaint formulated under the art. 278¹ from the Criminal Procedure Code, the court cannot administer legally the deponent proof.¹⁸

The judiciary practice brought under debate the question of the obligatory legal assistance for the appellees or the appellants during the judicial procedure of the complaint against anon-arraignment solution of the prosecutor. Unfortunately, the criminal jurisprudence recorded two directions on this subject:

- On one hand, certain courts considered that legal assistance is obligatory if the punishment stipulated by the law for the offence which was the object of the non-arraignment

¹⁵ By the decision nr. 15 from the 6-th of April 2009.

¹⁶ The High Court of Cassation and Justice, Criminal Dpt., decision nr. 5256 from the 14-th of October 2004, The Bulletin of Cassation nr. 2/2005, Publishing house All Beck, București 2005, p. 82.

¹⁷ The High Court of Cassation and Justice, Criminal Dpt., decision nr. 2683 from the 22-nd of April 2005, The Bulletin of Cassation nr. 4/2005, Publishing house All Beck, București 2005, p. 55

¹⁸ The High Court of Cassation and Justice, Criminal Dpt., decision nr. 6534 from the 18-th of November 2005, The Bulletin of Cassation nr. 2/2006, Publishing house C.H. Beck, București 2006, p. 69.

solution is of 5 years imprisonment or more, such a solution being motivated by the fact that the provisions of the art. 171 par. 3 and 4 Criminal Procedure Code., which state the obligation of the legal assistance during procedures, would not condition this obligation with a certain quality of the person who is involved in the trial;

- On the other hand other courts considered that the legal assistance is not obligatory, having in view that the legal disposition under debate consecrates the obligation of the legal assistance only during the trial, and the court trying the complaint, verifies the appealed resolution or the order on a basis of the documents from the file of the case.

The non-unitary practice in the domain was resolved on the occasion of the solutioning of an appeal in the interest of the law declared by the attorney general of Romania, when the High Court of Cassation and Justice decided that legal assistance is not obligatory for the appellees or the appellants, in cases having as objects complaints filed under the art. 278¹ from the Criminal Procedure Code.¹⁹

The judge is obliged to solve the complaint within a term of at most 30 days from its reception.

7. The solutioning of the complaint

The judge can adjudicate the following solutions²⁰:

a) *repeals the complaint by a sentence, as undue, inadmissible or groundless or where applicable maintains the appealed resolution or order; In this situation, the person who was the subject of non-arraignment or non-suit following the judge's definitive sentence cannot be followed for the same offence²¹, except for the case when new facts or circumstances have been discovered, unknown to the criminal investigation authority and none of the cases stipulated by the art. 10 from the Criminal Procedure Code appeared.*

b) *admits the complaint by sentence, quashes the appealed resolution or order and remits the case to the prosecutor in view of the filing or reopening the procedure, where appropriate. The judge is obliged to show the reasons for which he remitted the case to the prosecutor, indicating also the facts and circumstances which are to be revealed and by which means of probation – aspects which will be mentioned only in the grounds of the judgment, and not in the disposition.²² The situation when a criminal complaint has been solutioned by the prosecutor without the administration of the proofs necessary for the finding of truth, involves the reopening of the procedures.²³*

Since the practice recorded situations when the person subject to non-arraignment solicited the change of the merits of the case of the solution given by the resolution or the order from the prosecutor's demand, the united sections of the High Court of Cassation and Justice, referred by a solutioning of an appeal in the interest of the law, decided that in case of such a complaint filed under art. 278¹ from the Criminal Procedure Code, on the assumption of a complete administration of the substantiation, the court can entail the change of the merits of the solution given by the prosecutor under the conditions of the art. 278¹ par. 8 let.

¹⁹ The High Court of Cassation and Justice , United Sections, decision nr. LXIV (64) from the 15-th of October 2007.

²⁰ The article 278¹ par. 8 from the Criminal Procedure Code.

²¹ According to the art. 278¹ par. 11 from the Criminal Procedure Code.

²² The High Court of Cassation and Justice, The United Sections , decision nr. 26 from the 2-nd of June 2008.

²³ The Appellate Court, Criminal Dpt., decision nr. 183/P from the 12-th of March 2004, Collection of Judiciary Practice 2004, Publishing house Lumina Lex, București 2005, p. 342.

b from the Criminal Procedure Code.²⁴ Consequently, art. 278^a par. 8 let. b from the Criminal Procedure Code includes also the hypothesis of a complete substantiation when the case is not remitted to the prosecutor with a view to file or reopen the procedures, the judge having the possibility to change the merits of the solution entailed by the prosecutor.

In the case when the solution transfers the case to the prosecutor with a view to file or to reopen the proceedings, it is necessary to consider the prosecutor from the competent prosecutor's office, materially or after the person's quality, even if the initial solution has been given by another prosecutor, with the infringement of the dispositions regarding competence.²⁵

c) admits the complaint, by a conclusion, quashes the appealed resolution or order and in case the existing proof are sufficient retains the case for trial, in a legally assigned judge panel, establishes the dispositions regarding the trial at first instance and the remedies applying appropriately. In this case the act of intimation of the court, is represented by the complaint of the person who addressed to the court.

As concerns the compatibility of the judge who applied the art. 278¹ par. 8 let. c) from the Criminal Procedure Code to resolve the substance of the case, after the admission of the complaint, the practice of the courts proved to be non-unitary, in the sense that there were solutions which established that the respective judge is not compatible to participate at the trial of the substance of the case, with the motivation that admission of complaint is equal to the opinion regarding the solution of the substance, this fact being an assumption of lack of impartiality of the judge, but also solutions through which it had been settled that the judge is compatible to try the case hereinafter since, by conclusion, this one pronounced over a erroneous appreciation of proof by the criminal accusation authority and not on matters of substance. Finally, in the solutioning of an appeal in the interest of the law, the High Court of Cassation and Justice decided that the judge who, by conclusion, admits the complaint, *quashes the appealed resolution or order and retains the case for trial*, appreciating that the existing proof are sufficient for the trial of the case, becomes incompatible to resolve the substance of the respective case.²⁶

The practice of the Supreme Court decided that the solution stipulated in the art. 278¹ par. 8 let. c) from the Criminal Procedure Code, of admission of the complaint, quashing the appealed resolution or order and retention of the case for trial can be entailed only in the case of non-suit or abatement of proceedings and not in the case of not filing the proceedings, since the mention to the existing proof in the file, from the art. 278¹ par. 8 let. c) from the Criminal Procedure Code implies the fact that the proceedings have been started.²⁷

Given that the practice is non-unitary at the national level as regards the interpretation of the provisions of the art. 278¹ par. (8) let. c) from the Criminal Procedure Code, in the hypothesis that the object of complaint is a prosecutor's non-arraignment act based exclusively on previous documents, The High Court of Cassation and Justice deciding on the appeal in the interest of the law promoted by the attorney general of Romania decided that, in case of

²⁴ The High Court of Cassation and Justice, United Sections, decision nr. 44 from the 13-th of October 2008.

²⁵ The High Court of Cassation and Justice, Criminal Dpt., sentence nr. 487 from the 30-th of October 2006, set nr. 1/2007.

²⁶ The High Court of Cassation and Justice, United Sections, decision nr. XV from the 22-nd of May 2006 published in the Official Gazette nr. 509 from the 13-th of June 2006.

²⁷ The High Court of Cassation and Justice, Criminal Dpt., decision nr. 1260 from the 7-th of March 2007, set nr. 3/2007.

the complaint formulated against the resolution, order or disposition from the charge by which the non-filing of the proceedings or the dismissal have been entailed, the invested court cannot pronounce the solution stipulated by the art. 278¹ par. (8) let. c) from the Criminal Procedure Code.²⁸

The complaint wrongly directed is remitted to the competent judiciary body. Thus, if the complaint against the non-arraignment resolutions or orders of the prosecutor was addressed directly to the court, this is remitted by sentence to the competent prosecutor's office. The sentence by which the court waives its competence to judge can be attacked by appeal.²⁹

The High Court of Cassation and Justice decided in the solution to an appeal in the interest of the law that in case of the withdrawal of the complaint filed under the art. 278¹ Criminal Procedure Code by the injured person or by the person whose legitimate interests have been injured, the court is going to take note of this manifestation of will. The sentence given as such cannot be the subject of a remedy.³⁰

8. The remedy against the solution given by first instance

The sentence of the judge *given* according to the letter. a) and b) can be attacked by appeal.

The filing parties of the appeal are:

- The prosecutor,
- The person who lodged the complaint,
- The person towards whom the non filing, the removal from criminal investigation or the termination of criminal investigation have been entailed,
- Any other person whose legitimate interests have been injured.

The term of appeal is of 10 days, according to the art. 385³ par. 1 from the Criminal Procedure Code and starts from the adjudication for the party present at the debates or at the adjudication, according to the art. 385³ par. 2 related to the art. 363 par. 3 from the Criminal Procedure Code. Consequently, in the absence of derogatory provisions in the procedure regulated by the art. 278¹ from the Criminal Procedure Code, general provisions regarding the term of appeal and the date it starts are applied.³¹

²⁸ The High Court of Cassation and Justice, United Sections, decision nr. 48 from the 4-th of June 2007.

²⁹ The High Court of Cassation and Justice, Criminal Dpt., sentence nr. 467 from the 19-th of October 2006, set nr. 1/2007.

³⁰ The High Court of Cassation and Justice, United Sections, decision nr. 27 from the 2-nd of June 2008.

³¹ The High Court of Cassation and Justice, Criminal Dpt., decision nr. 5948 from the 11-th of November 2004, The Bulletin of Cassation nr. 1/2005, Publishing house All Beck, București 2005, p. 64.