

Certain aspects concerning the appeals against enforcement according to the New Criminal Procedure Code

Mihai OLARIU, Ph.D
Romanian-American University, Bucharest, Romania
Lawyer, Bucharest Bar, Romania
avmihaiolariu@yahoo.com

Abstract: *The appeal against enforcement is the procedural means that can be exerted for the settlement of incidents stipulated under the criminal or criminal procedural law, occurred prior to, during, or after the enforcement of the final criminal court order, but related thereto. The former criminal procedure law regarded the appeal against enforcement as an extraordinary judicial remedy, being regulated as such, along with the appeal against the decision (the current petition for annulment). No evidence aiming at questioning matters already set, as res judicata, through a final order can be excepted as part of the appeal against enforcement.*

Keywords: *enforceable criminal decisions; enforcement court; cases of appeal against enforcement; application of the more favourable criminal law provisions.*

Introduction

In order to settle the criminal law conflict occurred pursuant to the perpetration of an offence, the criminal proceedings need to be initiated, hence, the installation of a criminal procedural relation. However, a substantial criminal law conflict is only regarded as settled upon the completion of the criminal proceedings, when the breached legal order is reset, i.e. the perpetrators are criminally punished for their deed.

In order to ensure the proper completion of the criminal proceedings and the criminal punishment of the guilty parties, it is not enough to pass a court order, but actually the provisions herein have to be applied.

The enforcement of the final criminal orders represents the procedural activity performed *ex-officio*, through which the provisions in the final criminal court order are enforced. According to the internal regulation of law courts, at the criminal enforcement offices there is at least one appointed judge who is concretely in charge with the criminal enforcement activity.

The last stage of the criminal proceedings is the translation into practice of the final criminal order and the enforcement of the criminal law purpose and of the criminal procedural law [1]. The enforcement of the criminal proceedings is characterized by own principles, such as: mandatory nature, enforceability, jurisdiction, and continuity [2].

As part of the criminal proceedings, the provisions in the final court order have to be implemented, such provisions stipulating the binding of the convicted party, so that it actually bears the criminal sanctions applied.

In the criminal procedure literature, numerous authors claim that this stage of the proceedings is autonomous [3], but there are opinions according to which the norms on the enforcement of criminal decisions entirely fall under the autonomous discipline of criminal sentence enforcement law [4].

Moreover, it has been shown that only some of the enforcement activities, i.e. the ones determining enforcement initiation are included in the criminal order enforcement procedure, the actual enforcement of the punishment being thus distinct from the enforcement activity [5].

While the criminal decision enforcement regulation is exclusively subjected to criminal procedural law, the actual enforcement of the criminal punishment falls under the incidence of substantial law norms, which are included in the Criminal Law, as well as in the Law no. 254/2013 on the enforcement of punishments and detention orders issued by criminal bodies as part of the criminal proceedings

The enforcement stage is initiated after the criminal court order is declared final and binding and, according to art. 554 from the New Criminal Code, it starts through the first judicial measures taken at the relevant court by the judge in charge with the enforcement.

This procedural stage ends when the sanctions or provisions in the court order are actually enforced.

1. Enforceable criminal law decisions

Enforceable criminal law decisions are court orders that can be put into practice. In principle, a court order becomes enforceable once it is declared final and binding. Decisions that are not final and binding become enforceable when stipulated under the law.

The first court orders remain final, according to art. 551 from the New Criminal Procedure code:

1. when passed, if the decision is not subjected to challenge or appeal;
2. upon the expiry of the term for appeal or for the submission of challenges:
 - a) if the appeal or challenge were not submitted within the set term;
 - b) if the appeal or, as applicable, the submitted challenge was withdrawn within the legal term;
3. as of the appeal or, as applicable, challenge withdrawal date if it occurred after the expiry of the term for appeal or the submission of the challenge;
4. on the date on which the decision rejecting the appeal, or, as applicable, the challenge was denied;

In so far as the declaration as binding and final of the court of appeal decision and of the decision passed in relation to the challenge submitted as judicial remedy, art. 522 paragraph 1 and 2 from the New Criminal Procedure code shows that:

- the decision of the court of appeal remains final when passed, if the appeal was approved and the procedure was completed before the court of appeal.

-the decision passed as to the challenge as judicial remedy remains final on the passing date thereof, if such challenge was approved and the procedure was completed before the competent court;

2. Procedure at the enforcement court

The procedure at the enforcement court represents the joint procedure for all cases occurred during the enforcement of the punishment.

Similarly to the Criminal procedure code of 1968, the decision of the criminal court declared final and binding by the first law court or by the upper court or the court of appeals is enforced by the first law court. The decisions passed in first instance by the High Court of Cassation and Justice are enforced, as applicable, by Bucharest Tribunal or by the military tribunal.

If the competence for the settlement of the situation stipulated in the enforcement title is granted to the enforcement court, the chairman of the panel of judges orders the summoning of the interested parties and, in the cases stipulated in art. 90, takes measures for the appointment of a lawyer *ex-officio*.

Convicts in detention or educational centres are brought to trial. The session ruling on the appeal against enforcement or on the other types of cases related to the enforcement is public.

According to art. 597 paragraph 5 from the New Criminal Code, the provisions in the 3rd title of the special part on trials adequately apply, unless contrary to the provisions herein. Concerning this aspect, art. 353 paragraph 6 from the New Criminal Code shows that, throughout the trial, the prejudiced party and the

other parties may request, either orally or in writing, the trialling *in absentia*, in which case the parties are no longer summoned for the subsequent court dates. Consequently, the trialling *in absentia* is also possible in the case of challenges, if a petition is lodged to this end.

The judicial remedy against orders passed in the field of enforcement is the challenge submitted with the higher court, within 3 days from communication (art. 597 paragraph 7 from the New Criminal Procedure Code).

The challenge against the first instance court decision is trialled in public session, with the summoning of the convicted party, the panel being made of one judge only. Convicts in detention or educational centres are brought to trial, with the compulsory participation of the prosecutor. The court decision settling the complaint is final.

3. Cases of appeal against enforcement

The appeal against enforcement is the procedural means that can be exerted for the settlement of incidents stipulated under the criminal or criminal procedural law, occurred prior to, during, or after the enforcement of the final criminal court order, but related thereto.

The former criminal procedure law regarded the appeal against enforcement as an extraordinary judicial remedy, being regulated as such, along with the appeal against the decision (the current petition for annulment).

Specialised literature defines the appeal against enforcement as a jurisdictional process for the settlement of requests or complaints triggered by the enforcement of criminal decisions [6].

No evidence aiming at questioning matters already set, as *res judicata*, through a final order can be excepted as part of the appeal against enforcement [7].

The cases of appeal against enforcement stipulated in art. 598 paragraph 1 letters a), b), and c) are identical to the ones in art. 461 paragraph 1 letters a), b), and c) from the Criminal procedure code of 1968.

The appeal against the enforcement of the criminal decision may be submitted, according to art. 598 paragraph 1 from the New Criminal Procedure Code, in the following cases:

a) if a non-final decision was enforced. According to the legal provisions, only court orders acquiring the authority of *res judicata* can be enforced. This does not apply in the case of decisions that are enforceable according to the law, even if they did not remain final.

b) if the enforcement is against another person than the one stipulated in the conviction order. If, pursuant to an error of judicial bodies, another person than the convicted one is subjected to the enforcement, the law court may remedy such error through the appeal against enforcement (e.g., in the case of common names and identical residences, the police body executing the enforcement warrant might erroneously arrest another person than the one in the decision).

c) if misunderstandings as to or obstacles against the enforcement of the decision occur. Such misunderstanding concerns the extent to which the decision is enforced, and not the validity thereof as to the applied legal texts and principles [8]. To this end, the equivocal nature of the decision, the lack of accuracy can represent sufficient grounds for the lodging of an appeal against enforcement (e.g., the existence of doubt as to the detention period part set pursuant to the criminal proceedings or the generic mention as to the seizure of assets used to perpetrate the crime, without, however, clearly identifying such assets). The High Court of Cassation and Justice, the erroneous application of preventive arrest, in that, pursuant to the decision passed by the first court, a longer period than the one of the actual preventive arrest term was stipulated, leads to the application of the appeal against enforcement stipulated in art. 461 paragraph 1 lett. c) from the Criminal Procedure Code of 1968 [this case of appeal against enforcement being similar to the one stipulated

in art. 598 paragraph 1 lett. c) of the New Criminal Procedure Code]; the appeal against enforcement can be used to solve certain aspects related to the enforcement of a decision, such as the one concerning the erroneous application of preventive arrest, without reassessing the matters on the merits settled with the authority of *res judicata* [9].

d) if amnesty, prescription, exoneration or any other punishment extinction or reduction provisions are invoked. A cause for the extinction of the punishment is the intervention of the decriminalization laws after the court decision remains final and binding. This can be invoked through the appeal against enforcement, because upon the enforcement of punishments (main, accessory, or complimentary), of the security measures, the educational measures passed based on the former law and on all criminal consequences of legal decisions concerning such deeds (interdictions, incapacities, and loss of rights) ceases as of the entry into force of the decriminalization law. A cause for the decrease of punishment is the intervention of a more favourable criminal law after the court decision is declared final and binding, and such cause can be invoked pursuant to the provisions in art. 6 from the New Criminal Code. Concerning this case of appeal against enforcement, the New Criminal Procedure Code eliminated the text concerning “any other incidents occurred during enforcement”. To this end, art. 461 paragraph 1 letter d) from the Criminal Procedure Code of 1968 showed that an appeal against the enforcement of the criminal decision may be lodged “if amnesty, prescription, exoneration or any other punishment extinction or reduction provisions are invoked, as well as in the case of any other incidents occurred during enforcement”; thus, matters regarded as incidents occurred during enforcement are to be settled by the judge appointed for the enforcement according to the provisions in the Law no. 253/2013 on the enforcement of punishments, educational measures, and measures other than detention, ordered by legal bodies during the criminal procedures. According to the decision of the High Court of Cassation and Justice passed in second appeal to the interest of the law [10], “final decisions stating that a person perpetrated a crime and fraudulently made use of another person’s identity or of the identity of a fictitious person was convicted under false identity fall under the appeal against enforcement stipulated in art. 461 letter d) thesis 2 from the Criminal Procedure Code, concerning any other incidents occurred during enforcement”. Since the legal provision concerning “any incidents occurred during enforcement” was eliminated, the higher court decision no longer is applicable; however, we believe that the aforementioned final decisions could fall under the case of appeal against enforcement in art. 598 paragraph 1 lett. b) from the New Criminal Code (“if enforcement is directed against another person than the one in the conviction order”). Moreover, the decision no. 8/2007 of the High Court of Cassation and Justice according to which the court, authorised pursuant to art. 461 paragraph 1 letter d) last but one thesis of the Criminal Procedure Code of 1968, may not, as part of the appeal against enforcement invoking the amendment of the meaning of the “extremely severe consequences” phrase, change the legal classification of the deed according to the final order, and then reduce the sanction applied in the case, as the amendment of the notion of “extremely severe consequences” is not identical to the requirement as to the intervention of a law stipulating a much lighter sanction [11].

4. Procedural aspects

If the appeal against enforcement relies on any of the cases stipulated in art. 598 paragraph 1 letters a), b), and d) from the New Criminal Procedure Code, the settlement competency rests with the enforcement court (if the convicted person was not detained) or to the corresponding enforcement authority court on the territory whereof the detention site is located (if the convicted person is detained), according to art. 598 paragraph 2 from the New Criminal Procedure Code.

Moreover, if the appeal against enforcement invokes misunderstandings as to the content of the decision enforced or that cannot be enforced [art. 598 paragraph 1 letter c) from the New Criminal Procedure

Code], the settlement competency exclusively belongs to the court that passed the decision being enforced. Similarly, the law expressly stipulates that if the misunderstanding concerns a provision in a decision passed pursuant to an appeal or second appeal in cassation, the competency rests, as applicable, with the court of appeal or with the High Court of Cassation and justice.

5. Challenge against the application of the more favourable criminal law after the enforcement of the New Criminal Procedure Law

According to art. 23 paragraph 1 of the Law no. 255/2013 for the application of the Law no. 135/2010 on the Criminal Procedure Code and for the amendment and supplementation of norms including criminal procedure provisions, the requests, challenges, and notifications submitted within 6 months from the enforcement of the Law no. 286/2009, as amended and supplemented, having as subject the application of art. 4 and 6 therein in the case of the decisions declared final prior to enforcement, are settled following the procedure herein, supplemented with the provisions in the Criminal Procedure Code.

Thus, pursuant to art. 23 of the Law no. 255/2013 and with the application of the procedure stipulated in the text of the law, the court of law can be notified within 6 months from the coming into force of the Law no. 286/2009. After the 6-month term elapses, the requests will be reviewed following the common procedure for appeals against enforcement.

The petitions, challenges, and notifications concerning the persons who are executing the punishments and educational measures involving detention, as well as the petitions, challenges, and notifications concerning persons who postponed or interrupted the enforcement of punishments or educational measures are settled (urgently, and as a priority) by the court holding an authority level similar to the one of the enforcement court in the jurisdiction whereof the detention site or, as applicable, the educational or re-education centre is located, according to art.23 paragraph 2 of the Law no. 255/2013.

The procedure before the enforcement court is carried out without the participation of the prosecutor, the convict, who is informed on the settlement term and on the right to lodge written objections, and without the participation of the convicted party's lawyer. The decision is communicated to the prosecutor and the convicted party on the passing date. The court rules through a sentence, in public session.

Concerning the judicial remedy, the law expressly stipulates that the court order can be challenged at the higher court, within 3 days from communication (the law stipulating the communication of the entire decision); the challenge is settled by a panel made up of one judge, with the prosecutor's participation and summoning of the convicted party, in public session.

The decision of the enforcement court shall be final if the intervention of the more favourable decriminalization or criminal law is acknowledged, and if such legal provisions order the release of the convicted person; thus, according to art. 23 paragraph 11 from the Law no. 255/2013, the decision is enforceable only if release is ordered.

Conclusions

The appeal against enforcement is the procedural means that can be exerted for the settlement of incidents stipulated under the criminal or criminal procedural law, occurred prior to, during, or after the enforcement of the final criminal court order, but related thereto.

The former criminal procedure law regarded the appeal against enforcement as an extraordinary judicial remedy, being regulated as such, along with the appeal against the decision (the current petition for annulment).

Specialised literature defines the appeal against enforcement as a jurisdictional process for the settlement of requests or complaints triggered by the enforcement of criminal decisions [6].

No evidence aiming at questioning matters already set, as *res judicata*, through a final order can be excepted as part of the appeal against enforcement [7].

The cases of appeal against enforcement stipulated in art. 598 paragraph 1 letters a), b), and c) are identical to the ones in art. 461 paragraph 1 letters a), b), and c) from the Criminal procedure code of 1968.

References

- [1] Neagu I., *Tratat de procedură penală, Partea generală*, “Universul Juridic” Publishing House, Bucharest, 2010, p. 27.
- [2] Volonciu N., *Tratat de procedură penală, Parte specială, vol. II*, “Paideia” Publishing House, Bucharest, pp. 379-380.
- [3] Kahane S., *Drept procesual penal*, Bucharest, “Didactică și Pedagogică” Publishing House, 1963, p. 314.
- [4] Pop Tr., *Drept procesual penal, vol. IV*, “Tipografia Națională” Publishing House, Cluj, 1948, p. 3.
- [5] Neagu I., *Tratat de procedură penală, Partea specială*, “Universul Juridic” Publishing House, Bucharest, p. 473.
- [6] Antoniu G., Volonciu N., Zaharia N., *Dicționar de procedură penală*, “Științifică și enciclopedică” Publishing House, Bucharest, 1988, p. 379.
- [7] Bucharest Court of Appeal, 1st Criminal Division, decision no. 166/2003, Constantinescu M., *Executarea hotărârilor penale. Practică judiciară*, “Hamangiu” Publishing House, Bucharest, 2006, p. 187.
- [8] *Idem* [2], p. 434.
- [9] High Court of Cassation and Justice, Criminal Law Division, decision no. 167/2006, www.legalis.ro.
- [10] High Court of Cassation and Justice, RIL panel, decision no. 9/2011, scj.ro.
- [11] High Court of Cassation and Justice, United Divisions, Decision no. 8/2007, www.legalis.ro.