



SARA Law Research Center

International Journal of Legal and Social Order, <https://www.ccdsara.ro/ijlso>

ISSN 2810-4188, ISSN-L 2810-4188

Nº. 1 (2021), pp. 352-369

THE COMPLIANCE WITH THE RIGHT TO A DOUBLE DEGREE OF JURISDICTION IN THE MATTER OF PLEA AGREEMENT

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Abstract

The expansion of negotiated justice phenomenon has generated and continues to produce profound reverberations in current legal systems. The emergence and development of proprietary forms of manifestation of the concept has led to important structural changes in the procedural architecture of all contemporary jurisdictions, regardless of their origin, continental or common-law. The collision of this new form of accomplishing justice and public safety with the established landmarks of the classic criminal process has led to a paradigm shift in relation to the nature and consistency of the fundamental rights of participants in the criminal process.

One of the most important such rights is the right to a double degree of jurisdiction in criminal matters, a principle widely embraced by all major legal systems. The interference of the landmarks on which representative institutions for the idea of negotiated justice are based on with this principle has caused many controversies regarding its imminent dissolution, discussions found even at local level, with the introduction of the special procedure of the plea agreement in the current Code of Criminal Procedure.

Keywords: *negotiated justice, Code of Criminal Procedure, plea agreement, right to a double degree of jurisdiction, Protocol no.7 to the Convention for the protection of human rights and fundamental freedoms.*

INTRODUCTION

The efforts made over the last decades at the level of the European bloc to set up an area of freedom, security and justice, as required by Article 3 (2) of the Treaty on European Union (*Treaty on European Union, 2016*), have been reflected in a broad and continuous process to diversify and strengthen the mechanisms used to prosecute perpetrators in the Member States, but also to recover the proceeds derived from crimes.

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The abolition of internal borders and the unhindered exercise of the right to free movement has inevitably led to an increase in the number of people involved in criminal proceedings in a Member State other than that of residence, which is why the component of judicial cooperation in criminal matters has experienced unprecedented expansion. For these reasons, the legislative framework envisioned and operationalized by the European institutions involved the design and provision to national judicial bodies of tools capable of generating a prompt and firm response in the fight against crime, now characterized by a transnational dimension, such as the order European Investigation Order, a recently introduced means of cooperation. (*Directive 2014/41/EU, 2014*)

However, the harsh reality shows us that the most spectacular phenomenon generated by the expansion of the European construction was not that related to the development and improvement of common means of investigation and cooperation, but rather that of embracing new legal concepts and principles or the distinct dimensions given to the existing ones.

This legal infusion was not only reflected at the doctrinal level or in terms of enshrining substantial new rights, the mutual transfer of legal principles and concepts involving the creation of subordinate legal institutions, appropriate to the specifics and sensitivities of each legal system.

In the sense of those mentioned above, there was the rise of the phenomenon of negotiated justice, a concept of accusatory inspiration, but which in terms of the advantages it offers in contrast to the classic alternative of attracting criminal liability, found a way to reconcile itself with traditional principles of continental law. The reception of this concept arose rather from a necessity than from the desire to resize the landmarks that govern the criminal process in the continental law system, more precisely, in response to the exponential growth of the volume of activity of judicial bodies, and also in the standards of quality that the act of justice must reflect, in the face of precarious or insufficient budgetary allocations.

The delicate desire for the speedy repression of any form of illicit manifestations, in the context of the widespread adoption high-standard protection of the rights of participants in criminal proceedings also ensuring the effectiveness of the concept of public safety, has created the necessary gap to transplant the concept of negotiated justice. Of course, this translation of procedural vision was by no means rudimentary, but "through the filter of the fundamental principles underlying the continental legal system" (*Váduva, 2018, pg.7*), and its degree of reception and forms of expression were essentially different from one system of national law to another.

The deep reverberations produced to the continental legal edifice have led to a systemic fragmentation that was not anticipated, but which can be found both at the macro-legal level within this large family of law, generally known by the homogeneous legal forms that characterize it, but also within each jurisdiction, by observing the detachment from the classical normative landmarks. (*Langer, 2004, pg. 62*)

In this sense, at present time, we find implemented in the system of continental law both institutions that are based on the concept of negotiated justice in its primary

sense, in *France -Comparution sur reconnaissance préalable de culpabilité (French Code of Criminal Procedure, art. 495-7 – 495-16)*, *Italy -Patteggiamento*(Bârsan and Cardis, 2015, pg.117), *Germany -Verständigung im Strafverfahren*, (Bârsan and Cardis, 2015, p.109) as well as simplified court proceedings based on guilty pleas, which are rather enshrined to the concept of consensual justice.

Although the two concepts are similar in content and effects, there is no identity between them, but rather a *part-whole* relationship. Without carrying out an exhaustive analysis of them, as the approach would go beyond the scientific framework and the objectives set out in this article, it should be noted that the domestic criminal justice system also brings together legal forms subordinated to the concepts above mentioned, respectively the plea agreement and the abbreviated procedure based on guilt recognition.

The assertion of the aforementioned legislative view has only been possible with the help of the European Court of Human Rights, which ruled that the express or tacit waiver (*Kwiatkowska v. Italy, 2000*) of a number of guarantees specific to the right to a fair trial by means of a simplified procedure is not incompatible with Article 6 of the Convention, as long as the procedure as a whole is fair. (*Scoppola v. Italy, 2000*). Nevertheless, proceedings subject to the concept of negotiated justice must not be regarded as interfering only with the rights or guarantees strictly associated with the idea of a fair trial, as regulated in Article 6 of the European Convention on Human Rights, but also with other guarantees placed in a complementarity report with those mentioned above, such as the right to a double degree of jurisdiction in criminal matters.

I. THE ORIGINS AND THE IMPORTANCE OF THE RIGHT TO A DOUBLE DEGREE OF JURISDICTION IN CRIMINAL MATTERS

1.1 The right to a double degree of jurisdiction in criminal matters in the context of the emergence of negotiated forms of justice

The diversification and systematization of investigative means used to investigate criminal cases but also of the forms of attracting criminal liability, have inherently led to the increase of the oppressive force of law enforcement institutions, called to carry out the criminal policy of the states.

In recent decades, there have been extensive discussions about the "americanization" (*Langer, 2004, pg.1*) phenomenon of the continental legal system. The meaning of this term designates the alteration of procedures and landmarks traditionally grounded in the jurisdictions that compose it and the integration of adversarial influences and concepts, in various forms. Some doctrinaires have gone so far as to anticipate a merger between the two systems, a legal form in the architecture of which the dominant weight would return to common-law principles (*Kelemen and Sibbit, 2002, pg.272*), while the position of others has been a nuanced one, emphasizing that metamorphosis only entails a partial reception of the Anglo-Saxon precepts (*Wiegand, 1996, pg.137*). In what concerns us, the contact of *plea-bargaining*, but also of other specific Anglo-Saxon principles with the hard

core of the continental procedural architecture produced at most a fragmentation of it, not a contamination that would generate its redefinition.

The emergence of heterogeneous manifestation forms of negotiated justice on continental grounds has only supplemented the pressure on national legal systems to ensure an adequate standard of protection of the rights of all participants in criminal proceedings. As the proceedings based on pleadings eminently involve the waiver of a number of rights and guarantees concerning the fair trial, the manner in which they are regulated must ensure a fair balance that justifies the disadvantages arising from such a manifestation of will.

The assessment of the fairness of procedures in the case of institutions based on the idea of negotiated justice involves a distinct specificity, generated by the reason for their establishment, the form chosen for their operationalization, but also the degree of influence exerted on specific rights and guarantees. We therefore consider that the analysis of the fairness of proceedings in the context set out above must be guided by inevitably stricter benchmarks than those underlying the assessment of this characteristic in the case of traditional criminal proceedings.

In the anglo-saxon realm, the main criticism brought to the institutions subordinated to the concept of negotiated justice stems from their inability to respond effectively to fundamental procedural needs. Ensuring a legal balance between defense and prosecution, strengthening the legal aid mechanism, integrating the interests of all parties involved, especially victims and civilly liable parties in the procedural mechanisms, reconfiguring the role of the judge by expanding its analytical capacity and responsibilities in connection with the plea agreement, are often considered priorities for strengthening and modernizing the proceedings.

In the civil law system, failure of negotiated justice institutions in some jurisdictions is due to other, higher reasons, which are more related to vision and legal tradition, but also to the lack of a comprehensive procedural reform to organically integrate the concept, in line with established international standards regarding procedural rights.

In the category of procedural rights directly affected by the particularities of alternative criminal prosecution procedures, must be included as we started earlier, the right to double degree of jurisdiction in criminal matters.

Interestingly, although the European Court of Human Rights gives a generous dimension to the right to a fair trial through all its case law examples, the requirement of a double degree of jurisdiction is considered a guarantee of the aforementioned principle, but strictly in criminal matters, and not for the civil limb.(Ciucă, 2008, pg. 21)

1.2 The legal establishment and the particularities concerning the right to a double degree of jurisdiction in criminal matters

Colloquially known as *the right to appeal*(Arangüena Fanego, 2012, p.167), the right to a double degree of jurisdiction is enshrined in Article 2 of the Additional Protocol to the European Convention on Human Rights No.7, which entered into force on November 22, 1984(*Additional Protocol to the Convention no.7, 1984*). The

special importance of the principle is reflected by the fact that its establishment at conceptual level is not singular, a similar form being found in the content of Article 14 paragraph 5 of the International Covenant on Civil and Political Rights (*International Covenant, 1976*).

The two normative texts pursue the same desideratum, that of ensuring a fair trial for the defendant, in terms of giving the possibility to submit the case for re-examination before a higher court, whose decision is either to give weight and fix definitively the issues retained in the first conviction, making it easier for the defendant to accept the legal situation, or to dismantle the entire evidentiary and legal edifice on which it was based, because inherently there may be isolated situations in which a decision is the result of assessment or procedural errors, due to the fallible nature of human actions.

A thorough analysis carried on the content of the two normative texts establishing this principle, reflects a number of differences in terms of their scope. Thus, *prima facie*, from the terminology¹ used to outline the scope, it seems that the legal text enshrined in the Convention, gives a broader meaning to the scope of the principle, by using the autonomous notion of *offence*, which may include not only the actions that are qualified so by the national legislations.. However, the scope of the principle is limited in conventional matters by two factors, the first of which is of a legislative nature and the second derives from the meaning of a notion which constitutes a *sine qua non condition* for the incidence of the principle.

Thus, on the one hand, article 2, paragraph 2, of Protocol No. 7 to the Convention expressly and exhaustively enshrines a number of exceptions² outside the scope of the principle, and on the other hand, its content reveals that right is applicable only to facts which are brought in front of a "court", a term used to exclude from the scope of the principle the sanctions imposed by those judicial bodies which do not meet the requirements of independence and impartiality in order to be qualified so.

Another interesting aspect is the fact that this principle is not expressly regulated in the Charter of Fundamental Rights of the European Union (*Charter of Fundamental Rights, 2010*), the doctrinal opinions (*Arangüena Fanego, 2012, pg.167*) being in the sense that it would be implicitly enshrined in Article 47 of the Charter, which regulates the right to a fair trial and an effective remedy. On the other hand, the settled case-law of the European Court of Human Rights has ruled that the right to an effective remedy states both a right of individuals, a remedy

¹ Article 2 of the Protocol no.7 to the Convention uses the phrase "all criminal offences" while art.14. par. 5 of the Covenant preferred the use of the term "crimes", aspect which implies the conclusion that the latter is more likely targeted to actions which are strictly qualified as offences by the national provisions.

² "This right may be subject to exceptions in regard to offences of a minor character, as prescribed by law, or in cases in which the person concerned was tried in the first instance by the highest tribunal or was convicted following an appeal against acquittal." - art.2 par.2 of the Protocolul no.7 to the European Convention on Human Rights, available on <http://ier.gov.ro/wp-content/uploads/2018/11/Protocolul-nr-7.pdf>, accessed on 20.11.2021

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made available to them and a means of ensuring compliance with the other provisions of the Convention, which in principle, can only be invoked in relation to another right recognized by the other conventional provisions (*Zavoloka v. Latvia, 2009*). In other words, the right to an internal remedy does not enjoy an autonomous, independent character. Moreover, even national practice (*sentences no.413/S/2008 and no. 414/S/2008 in Macavei, 2013*) embraces this view, the courts constantly referring to Article 13 of the Convention as an accessory in relation to other rights effectively regulated and safeguarded at the conventional level, including the relation with the right to a double degree of jurisdiction in criminal matters. Therefore, we consider doubtful the approach regarding the implicit consecration of the principle and of the right that fills it with substance in the content of art. 47 of the Charter of Fundamental Rights of the European Union.

In essence, the right to a double degree of jurisdiction in criminal matters entails the possibility that the legal situation brought before the court may be the subject of a dual analysis, carried out successively and by different level courts of law, to rule on the merits of the case, and at the end of this process the second decision will prevail. (*Montero Aroca, 1990, pg. 1272-1273*).

1.3 The relationship and the interference of the right to a double degree of jurisdiction in criminal matters with the rights and guarantees enshrined at international level

Although regulated separately in the Convention, the principle of a double degree of jurisdiction should not be isolatedly viewed, dissociated from the principle of ensuring the right to a fair trial, because, dare we say, there is a relationship of complementarity between them, because in the process of re-examining the case, all the prerogatives and guarantees that fill the right to a fair trial are exercised, and in the same time, the absence of a second degree of jurisdiction in criminal matters does not allow the manifestation of the first principle in its full attributes.

Moreover, the recent national jurisprudence³ (*Decision no.445/P, 2015*) itself has been concerned with this aspect, of the indissoluble link between the two

³ "According to art. 351 of the Code of Criminal Procedure, the trial of the case takes place in session, orally, directly and in contradiction. These principles governing the trial phase find their application in the regulation of the trial of the case in the first instance. Thus, the court has the obligation to proceed to the hearing of the defendant and the witnesses, thus respecting the principles of directness and adversariality.

The manner in which the first instance proceeded cannot be equivalent to an effective settlement of the case, the trial having a purely formal character, which does not correspond to the requirements of the basic rules of the criminal process, so that the retrial of the case is required by the first instance. At the same time, given that the criminal procedural law provides for two degrees of jurisdiction, it is necessary for the court to go through all the procedural stages, in order not to deprive the defendant of a degree of jurisdiction, by resolving the case directly by the appellate court. .

The appellate court could not fully replace the trial phase that should have taken place in the first instance, because such a solution would lead to the artificial elimination of a degree of jurisdiction, to the detriment of the procedural interests of the defendant, for which the procedural law provides of two degrees of jurisdiction.

principles, emphasizing the importance of going through two distinct procedural stages before the conviction becomes final, so that the requirements of a fair trial are met. In other words, in order to ensure the effectiveness of the principle of dual degree of jurisdiction, each procedural phase must be followed in compliance with the principles of orality, directness and adversarial proceedings, manifested in the form of a real and concrete analysis of the evidence.

1.4 Controversial aspects regarding the effectiveness of the right to a double degree of jurisdiction according to the national case-law

The importance of this principle can also be inferred from the fact that Article 2 of Protocol no.7 to the European Convention on Human Rights establishes only a limited number of situations that are exempted from the application of the double degree of jurisdiction in criminal matters, as for reasons regarding the minor

The irregularity found by the Court is not found among those provided by art. 281 C. pr. pen. which, according to art. 421 point 2 lit. b C. Pr. Pen, allow the case to be sent for retrial to the first instance. However, given that there was no actual trial before the first instance, in order not to deprive the defendant of a degree of jurisdiction by judging the case by the appellate court, after re-administration of all evidence, it is necessary to overturn the criminal sentence and the retrial of the case by the first instance, in order to resolve the merits of the case in compliance with the procedural guarantees conferred on the parties by the Code of Criminal Procedure. The decision of the appellate court is final, according to art. 552 Code of Criminal Procedure and therefore there is no other court that can examine the legality and validity of the judgment handed down by the appellate court that administered and interpreted the evidence administered directly for the first time, provided that the court of first instance did not directly administer all necessary evidence.

The double degree of jurisdiction is a right recognized in criminal matters by Protocol no. 7 of the European Convention on Human Rights. It presupposes that any person convicted of a crime by a court has the right to request an examination of the judgment establishing his guilt by a hierarchically superior court. The double degree of jurisdiction aims at a devolving judgment of the case before two courts, one of substance, and the second, of judicial control. In the first instance there was no trial with respect to all procedural guarantees, so that in this case the first degree of jurisdiction cannot be taken into account, therefore for the respect of the right to a fair trial and the effective assurance of two degrees of jurisdiction, according to art. 2 of Protocol no. 7 of the European Convention on Human Rights, it is justified to send the case for retrial.

Moreover, the provisions of art. 421 point 2 lit. a C. Pr. Pen. obliges the appellate court to give a new judgment and to proceed in accordance with the provisions on the trial on the merits, which leads to the conclusion that the new judgment of the appellate court can be pronounced only to replace the previous judgment of the first instance, but which was pronounced after conducting a trial that complied with the provisions of art. 349 et seq. Code of Criminal Procedure. The decision of the first instance did not follow the mentioned rules, which is why it would be contrary to the spirit of the law to require the court of judicial control to judge directly on appeal a case that did not go through all stages of the trial in the first instance. The Court finds that the non-existence of a second degree of jurisdiction in terms of the interpretation and direct administration of evidence infringes the right to a fair trial of the defendant prev. of Article 6 para. 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms, the right to a fair trial being closely related to the right to double jurisdiction in criminal matters.

In view of these considerations, the court notes that the first instance court must resolve the case according to the common law procedure, respecting the principles of orality, directness and adversariality, including as evidence."

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gravity of the offence, the rank of the jurisdiction that ruled on the case in the first instance, and also the nature of the pronounced solution⁴.

In connection with the first exception, the issue of applying an administrative sanction pursuant to art.91 of the old Criminal Code of Romania is interesting, when according to art.18¹ of the same normative act, a solution of non-prosecution was ordered. In order to clarify the meaning of the notion of minor offence, the Committee of Ministers of the Council of Europe, meeting at its 375th meeting in September 1984, ruled that the determination of this character of the act will be assessed mainly by the possibility of imprisonment or not. (*Explanatory Report, 1984, pg. 5*)

Returning to the issue found in domestic law and above presented, an interpretation was actually given by the European Court of Human Rights, which ruled that a court decision confirming the legality of the prosecutor's order, but at the same time finding the accused guilty, *must be considered a declaration of guilt and attracts the applicability of Article 2 of Protocol No. 7 to the Convention (Greco v. Romania, 2007)*. The Court also rejected the Government's arguments that the offense was of a minor nature, as long as the act could be punishable by imprisonment, disregarding the fact that it lacked the degree of social danger necessary to meet the specific elements of objective typicality, as they were drawn by virtue of the psychological conception about the offence. Moreover, another argument invoked by the Court was that at the time of pronouncing the respective solutions, the prosecutors were not independent from the executive, not being "courts" within the meaning of Article 6 par. 1 of the Convention.

Although the status of prosecutors was consolidated as a result of the adoption of Laws no. 303/2004 and 304/2004, aiming to detach them from the title of executive agents, however, the Decision of the Constitutional Court no. 358 of 30 May 2018 brings this issue to the forefront again, especially by the lights of the provisions found in art. 132 paragraph 1 of the fundamental law. According to this text of law, *prosecutors carry out their activity according to the principle of legality, impartiality and hierarchical control, under the authority of the Minister of Justice*. The Court ruled that the Public Ministry, *"although not part of the executive or executive authority, does not have a position of institutional independence from it, as the text of the Constitution is very clear, the activity of prosecutors being under the authority of the Minister of Justice"* (Decision no. 358/2018), the argumentation used by the court of constitutional contentious continuing with expressions and phrases⁵ that call into question the independence requirements prescribed by

⁴ "This right may be subject to exceptions in regard to offences of a minor character, as prescribed by law, or in cases in which the person concerned was tried in the first instance by the highest tribunal or was convicted following an appeal against acquittal."

⁵ "Prosecutors may not invoke a position of independence, like judges, in respect of which Article 124 paragraph (3) expressly provides that "Judges are independent and subject only to the law", since their activity is carried out under hierarchical control and under the authority of the Minister of Justice "," This policy must be executed by Government agents, namely prosecutors, so that the requirements regarding the complete independence of judges are not equally applicable to prosecutors "," The Court also notes , that

art. 6 par. 1 of the Convention, required for the inclusion of prosecutors in the sphere of the autonomous notion of “court”.

As such, the decision of the Constitutional Court previously evoked sheds new light on the status of Romanian prosecutors, with legal consequences for some fundamental criminal procedure institutions.

First of all, it should be noted that the issue of compliance with the double degree of jurisdiction when applying an administrative sanction in case of a non-prosecution solution did not disappear with the repeal of the old Codes, but remains relevant to acts committed under the previous Criminal Code. Thus, according to art. 19 of Law 255/2013, the prosecutor may order the dismissal of a case, as a new solution introduced by the current Code of Criminal Procedure, when he finds that a deed committed before its entry into force lacks the degree of social danger specific to an offence, by reference to art.18¹ of the Criminal Code of 1968. Recent jurisprudence⁶ has confirmed the possibility of applying an administrative sanction together with the disposition of this solution, given the indissoluble link between art. 18¹ of the Criminal Code of 1968 and art. 91 of the same normative act, so that the issue of double degree of jurisdiction compliance on the occasion of formulating a complaint against the dismissal solution according to art. 339 and art. 340 of the current Code of Criminal Procedure still remains topical.

The new valences promoted by the previously evoked decision of the Constitutional Court of Romania also influence the institution of “*Renunțarea la urmărirea penală - waiving the criminal prosecution*” enshrined in the current Code of Criminal Procedure, an institution with strong accents of consensual justice, at least in the case where one or more obligations provided in art.318 par.6 C.proc.pen is imposed. Provided that through this solution, the guilt of a person who has the quality of suspect or defendant can be ascertained, we appreciate that the provisions of art.2 of Protocol no.7 to the European Convention on Human Rights find their full applicability, so that the solution promoted by the current Code of Criminal Procedure, in the sense of the finality of the court’s decision confirming the solution of waiving the criminal investigation, can be criticized by reference to the conventional requirements regarding the double degree of jurisdiction in criminal matters.

the authority of the Minister of Justice is not an administrative one, on the contrary, he has full competence in terms of authority over prosecutors "and that" the notion of authority has a very strong meaning, it is defined as the power to give orders or impose on someone obedience, however, in the given constitutional context, it refers to a decision-making power regarding the management of the prosecutors' career."

⁶ Pro Lege Law Review. “*Fapte care nu prezintă pericolul social al unor infracțiuni. Sancțiunile și cheltuielile judiciare avansate de stat în cazul aplicării dispozițiilor art. 19 din Legea nr. 255/2013. Aplicarea prin analogie a dispozițiilor Codului de procedură penală anterior*” article available on <http://revistaprolege.ro/fapte-care-nu-prezinta-pericolul-social-al-unor-infracțiuni-sanctiunile-si-cheltuielile-judiciare-avansate-de-stat-cazul-aplicării-dispozițiilor-art-19-din-legea-nr-2552013-aplicarea-prin-anal/>, accessed on 04.11.2021

**II. THE PARTICULARITIES OF THE RIGHT TO A DOUBLE DEGREE OF JURISDICTION IN
CRIMINAL MATTERS REGARDING NEGOTIATED JUSTICE**

***II.1 The right to a double degree of jurisdiction in criminal matters in the
context of the procedural logic imagined by the current Romanian Code of
Criminal Procedure***

As we have pointed out in the preceding paragraphs, the right to a double degree of jurisdiction in criminal matters presupposes the possibility of an examination of the merits of the case, in two different stages, by different courts of law. *Ab initio*, it should be noted that this right is granted only to the convicted person and not to the one who was acquitted in the first instance or to the participants who have an active role in carrying out the proceedings (for example, the Public Ministry). (*Arangüena Fanego, 2012, pg. 168*)

The double examination of the case that this principle inevitably implies, raises a question mark upon its nature and scope, but also upon the margin of appreciation that the national legislator has, when it outlines the system of appeals in criminal matters.

The current Code of Criminal Procedure (*Code of Criminal Procedure, 2010*) departs from the procedural logic of the three degrees of jurisdiction promoted by the old regulation on appeals, the appeal remaining the only ordinary remedy, with a reformatory effect, through which a new trial on the merits of the case is conducted. Moreover, at the level of continental jurisdictions, the appeal is the common ordinary remedy, generally fully devolutive, which implies bringing the case before a higher jurisdiction, where it is again examined on points of facts and law. (*Ninu, 2020, pg. 8*)

With regard to the devolutive effect of the appeal, this particular feature is the one that most intensely interferes with the right to a double degree of jurisdiction in criminal matters, because, in essence, it presupposes an independent trial, which deals with the elements of fact and law that prior received an illegal or erroneous release on the merits.

In the case of the ordinary trial procedure, followed by the introduction of an appeal, we consider that there are no special problems related to the incompatibility of the procedural architecture imagined by the Romanian legislator with the requirements of art. 2 Protocol no.7 to the European Convention on Human Rights. The only hypothesis that could contradict the principle mentioned above is when the first instance judgment or the one following the introduction of an appeal has a purely formal character, thus violating the essential rules on orality, adversariality and mediation in the administration of evidence (*Cutean v. Romania, 2014*). Such situations can be imagined when the court of first instance does not directly re-administer the evidence from the criminal investigation phase even though the defendant expressly requests it, or when the different procedural stages of the trial phase are completed by different judges, in violation of the fundamental principles stated above. (*Decision no.1176/2017*)

A special situation, however, arises when we assess the compatibility of the principle of double degree of jurisdiction with the system of remedies established in proceedings based on guilty pleas.

Undoubtedly, the task of drawing up a system of remedies in criminal matters lies with the national legislator, which has the difficult task of conciliating the requirements of legality and truth-finding with the requirements of celerity in the criminal process, but also to ensure the stability of final judgments, by imagining an appropriate system of remedies. (*Macavei, 2013*)

Like other rights enshrined at conventional level, the right to benefit from two degrees of jurisdiction must be asserted and effectively guaranteed (*Chiriță, 2007, p. 424-428*). The attribute of effectiveness is manifested at two levels, a legislative one – providing for the state to create a system of remedies to challenge the conviction in a higher court with full jurisdiction, and another one, a jurisprudential one – providing for judicial bodies vested with the settlement of the case to perform a real judicial assessment, and not a formal one.

As a result, we must recognize the difficult task of the legislator, regardless of the jurisdiction to which we refer, to create legal institutions based on guilty pleas, which meet the operational requirements arising from their nature, but at the same time being able to ensure the full exercise of the rights enshrined at the conventional level.

II.2 The compatibility of the plea agreement with the full exercise of the right to a double degree of jurisdiction in criminal matters

In our domestic criminal system, the only exponent of negotiated justice concept, in its primary form, is the plea agreement, whilst the other institutions that allow the accused to alter the outcome of the sentence through his manifestation of will, are subordinated, in our view, to the concept of consensual justice, a notion with a broader content.

The plea agreement has been imagined as a special procedure with a well-defined area of impact, and whose enforcement mechanism reveals a set of rules that constitute derogations from the ordinary trial procedure (*Neagu, 2010, pg. 573*), justified by its functional autonomy and the specificity of adversarial elements, which involve the waiver of the benefits regarding the presumption of innocence, the right to silence and the benefit against self-incrimination, guaranteed by Article 6 of the European Convention on Human Rights.

In essence, it implies a convention (*Lupou, 2016, pg. 115*) between the prosecutor and the defendant, in the material sense, based on the admission of guilt regarding the charge against the latter, in exchange for a more favorable legal situation to be agreed upon by means of negotiation. Once it takes the procedural form prescribed by art.482 of the Code of Criminal Procedure and is endorsed by the hierarchically superior prosecutor, it becomes an official indictment which is afterwards presented to the court.

In the event the court accepts the plea agreement, it is not within its remit to assess and decide on the treatment of the sanction to be imposed on the

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defendant, „as long as before the court isn't brought the legal conflict between the defendant and the state, but the validation of the agreement through which the involved parties decided to end it”⁷. The only aspect that is subject to the judge's analysis is the adequacy of the agreed punishment in relation to the gravity of the charge and the danger of the offender, but the court cannot establish another sanctionatory treatment, as it would interfere with the will of the parties of the agreement, in which case, a rejection of the plea agreement is stipulated.

In order to guarantee the right to a double degree of jurisdiction in criminal matters, art. 488 par. 1 C.proc.pen. establishes that “*against the sentence pronounced according to art. 485 and 486, the prosecutor, the defendant, the other parties and the victim may declare an appeal, within 10 days upon communication*”, the appeal being the only remedy against the sentence by which the court resolves the plea agreement. The normative text regulating the appeal in the case of these proceedings has a character of novelty, its initial form providing only the right of the prosecutor and the defendant to appeal, and only against the type and amount of the sentence or the form of its execution. The changes occurred as a result of the intervention of the Romanian Constitutional Court, which held that “*the provisions of Article 488 paragraph (1) of the Code of Criminal Procedure create unequal treatment between the injured person, the civil party and the civilly responsible party, on the one hand, and the defendant, on the other hand*” (Decision nr. 235/2015), and that the legislative solution that enshrines only the right of the defendant and the prosecutor to file an appeal, excluding victims, civil parties and civilly liable parties is unconstitutional, violating the right to access to justice as it is provided by art. 21 par. 2 and 3 of the Basic Law, as well as the provisions of Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, but also the right to defense, regulated by Article 24 paragraph 1 of the Constitution. Therefore, the decision of the constitutional court opened the way for legislative changes that enshrined the right of victims, civil parties and civilly liable parties to appeal such a decision.

The court entitled with constitutional assessment has not limited its decision to criticizing the way in which the legislator chose to limit the spectrum of holders who could file the appeal against the sentence by which the court ruled on the agreement, extending *ex officio* its control on the provisions of art. 488 par. 3 and 4 of the Criminal Procedure Code, which regulated the procedure before the appellate court and the solutions that the latter could pronounce on the occasion of the resolution of the appeal. On the one hand, we must take notice that art. 488 paragraph 2 of the Criminal Procedure Code, in the form prior to the amendments operated by Emergency Ordinance no. 18/2016, apparently allowed the formulation of the appeal for any reason, in case the agreement had been rejected. However, by reference to the restrictive manner in which the solutions of the appellate court were established in art. 488 par. 4 C.proc.pen., the legislator left

⁷ <https://www.juridice.ro/351877/aspecte-de-practica-neunitara-in-materia-dreptului-penal-si-procesual-penal-minuta-intalnirii-reprezentantilor-csm-cu-presedintele-sectiilor-penale-de-la-iccj-si-curtile-de-apel.html> , accesat la data de 15.11.2021

unregulated the situation when the decision of the court of first instance was vitiated by aspects of illegality, regardless of whether they were subsumed to cases of absolute or relative nullity. The situation was even more precarious regarding the decision by which the court of first instance accepted the agreement, in this situation, the object of the appeal was limited to the manner, amount and form of execution of the sentence, leaving unsanctioned aspects such as the lack of material competence, vitiation of the defendant's consent, legal violations regarding the agreement itself or the settlement of civil claims, circumstances that flagrantly contravened the provisions of art. 21 and 24 of the Constitution.

The changes operated by Emergency Ordinance no.18 / 2016 were meant to reconcile the aforementioned provisions with the constitutional requirements (*Udroiu, 2017, pg. 555*), currently the appeal being open to the victim of the offence, to the civil party and to the civilly liable party, both regarding the criminal limb and also the civil limb, but even more importantly, the solutions of the appellate court are no longer limited to the previously regulated cases. However, it is inexplicable the omission of the legislator to modify the solutions that the appellate court may adopt, when the agreement was rejected on the merits of the case, the current solutions provided by art.488 paragraph 4 letters a and c C.proc.pen. leaving unregulated the situations when the judgment of the court of first instance was given in violation of the provisions on relative or absolute nullity. (*Decision nr. 235/2015*)

Symmetrically with the procedure in the first instance, art. 488 paragraph 3 of the Criminal Procedure Code has been modified in the sense of establishing a contradictory procedure, in which the parties and the victim are cited.

Regardless of the holder of the appeal, the deadline for filing is set at 10 days, which runs from the communication of a copy after the minutes of the court. In accordance to the ordinary trial proceeding, the term has a procedural, peremptory and successive nature. (*Ştefan, 2014, pg. 218*)

Effectiveness of the right to a double degree of jurisdiction, established by art. 2 of Protocol no.7 to the Convention, presupposes that the hierarchically superior courts vested with the resolution of the case, have full jurisdiction and also use it, in the sense of examining the case in all aspects, both factual and legal.

However, the case-law of the European Court shows us that national jurisdictions have an extremely generous margin to ensure full compliance with this principle (*Krombach v. France, 2001*), given the possibility that domestic courts have been granted with, not to analyse legal and factual aspects in a single step, in the form of a single procedure; It was held that there was no violation of the article under review when legal issues could be the subject of an appeal, and the amount of the penalty and other matters of fact could be the subject of another appeal before another body, as long as the convict was able to submit to superior courts all the points of fact of the case, as they are found in the content of the conviction that was appealed (*Pesti and Frodl v. Austria, 2000*).

Based on these considerations, we can strongly affirm that the current regulation of the plea agreement does not raise issues of conventionality regarding

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the system of remedies designed by the legislator to serve against the decision by which the court of first instance rules on the agreement. The fact that the fundamental principles and guarantees that fill the right to a fair trial with content are strongly diluted, does not mean that the procedure as a whole is not fair. First, there is nothing to prevent a person who is the subject to criminal proceedings from disposing of certain procedural rights (*Navalnyy and Ofitserov v. Russia, 2016*), as an expression of his freedom of will. On the other hand, the validity of the waiver is conditioned by a number of conditions such as full acknowledgement of the factual situation and the legal consequences to which the accused person is exposed, but also by a sufficient judicial assessment of the agreement between the parties to the agreement. (*Natsvlishvili and Togonidze v. Georgia, 2014*)

The waiver of a series of guarantees specially designed to ensure the right to a fair trial and the alteration of the content of classic criminal trial principles can by no means lead to the conclusion that the assessment of plea agreements, both in first instance and following an appeal, is just formal. The aforementioned specificity is only the result of the nature and the role of the procedure, finalized with the ratification of the agreement between the prosecutor and the defendant, after an assessment of the evidence administered in the criminal investigation phase, according to the standard of evidence required for conviction, so in accordance with art. 396 par. 2 C.proc.pen.

Consequently, it can be concluded that the current system of remedies imagined by the legislator in the area of plea agreement does not raise any issues regarding the compatibility with the standard provided by Article 2 of Protocol 7 to the European Convention on Human Rights, as long as both available degrees of jurisdiction make it possible to completely analyze the circumstances of the case, even if in a scenario characterised by renunciations to essential guarantees of a fair trial.

Moreover, even in the case of the primordial form of regulation of the institution, the compatibility with the requirements of the double degree of jurisdiction was a false problem. Thus, although the defendant's appeal against the judgment by which the court ruled on the agreement was limited to the manner and amount of the sentence or the form of execution, errors of law could have been corrected through a cassation appeal, the European Court of Human Rights also admitting the hypotheses of fulfilling the double degree of jurisdiction requirements through different procedures.

Another interesting topic that deserves to be addressed in the end of this article and which, moreover, is inconceivable for the domestic legal system, is the possibility that accused persons have in different jurisdictions, of trading the right to appeal against the judgment on the agreement, in exchange for a milder sanctionatory treatment.

Indeed, the issue is controversial because it involves the direct impairment of the right to a double degree of jurisdiction, as it is provided for in Article 2 of Protocol No. 7 to the Convention. However, we consider that the right we have referred to is not an absolute one, so that there is no impediment to giving it up,

provided that the waiver is voluntary and in full knowledge of the facts, excluding any forms of pressure or dolosive maneuvers.

These practices are well-spread in jurisdictions such as Spain – *conformidades* (Della Torre, 2018, pg. 205), Germany - *Absprachen*, later explicitly prohibited by law (Schmitt, 2016, pg. 143-144), and in Italy it is also allowed to trade the actual outcome of the appeal - *patteggiamento in appello* (Catalano, 2001, pg. 7).

Unsurprisingly, the anglo-saxon legal system has been more permissive in relation to this subject, the application of a milder sanctioning treatment being in some particular cases the result of the express waiver of the defendant's right to appeal against the sentence (Miller, 2007, pg. 1115-1116). This perspective is a reflection of the *common-law* inspired criminal philosophy, which promotes the purely liberal conception of procedural rights, any of which may be the subject of an act of disposition in exchange for favorable legal treatment. (Reimelt, 2010, pg. 871)

CONCLUSIONS

The widespread dispersion of means of manifestations derived from the concept of negotiated justice has made it difficult for national legislators to reconcile the established principles regarding fundamental rights with the newly adopted references together with this novel procedural vision. However, a careful analysis of the effects concerning this legal translation, rather enhances the waivable nature of procedural rights and guarantees, rather than their possible dissolution. The limitations found, including to the right to a double degree of jurisdiction in criminal matters, are not the result of the metamorphosis suffered by the modern criminal procedure architecture, but the effect of capitalizing on the right of disposal that benefits the holders, which further highlights the relative nature of fundamental rights, in the absence of which the idea of negotiation and judicial concessions would have been illusory.

Undoubtedly, both at the macro-legal level but also in the domestic field, the plea agreement has gained a decisive role in the administration of justice, contributing to the achievement of the goal of ensuring a safe public climate. The need for rapid and effective repression against any form of criminality would have been impossible without the existence of this instrument, which was accompanied by a much looser view on the quantitative requirements for the effectiveness of fundamental rights and guarantees specific to the criminal process.

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