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THE ROLE OF THE PROSECUTOR IN ORDINARY APPEALS IN CRIMINAL PROCEEDINGS

PROCURORUL ÎN CĂILE ORDINARE DE ATAC ÎN PROCESUL PENAL

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Abstract: *Research on the prosecutor's participation in the trial stage of criminal proceedings, and on the prosecutor's procedural powers and duties, remains of continuing relevance. This article examines the rules of criminal procedure and the legal doctrine governing the prosecutor's participation, as the prosecuting party, in the trial stage, specifically in ordinary appeal proceedings. The research problem lies in providing a sound theoretical basis for how the prosecutor should participate in ordinary appeals and for the procedural steps the prosecutor is required to take at this stage. To this end, the article also proposes an algorithm of actions, framed as methodological guidance for prosecutors.*

Keywords: *criminal proceedings, ordinary appeals, prosecutor, state prosecution*

Rezumat: *Cercetările științifice privind participarea procurorului la faza judecății în procesul penal, competențele și atribuții procesuale rămân întotdeauna de actualitate. În articol a fost efectuată o cercetare a normelor procesual-penale și doctrinei cu privire la participarea procurorului, ca parte a acuzării în procesul penal, la faza judecății în etapele căilor ordinare de atac. Problema științifică constă în fundamentarea științifică a modului de participare și necesitatea îndeplinirii și desfășurării anumitor pași procesuali de către procuror în căile ordinare de atac, inclusiv constituirea unui algoritm al acțiunilor sub formă de recomandare metodologică pentru procurori.*

Cuvinte-cheie: *proces penal, căi ordinare de atac, procuror, reprezentarea învinuirii de stat*

1. Introduction

Free access to justice in criminal matters is a fundamental guarantee of a fair trial. It means that every individual is entitled to have any criminal charge against them determined by a judge vested by law with the specific powers to do so. The right of access to justice is a core aspect of the right to a court, sometimes referred to as the right to a judge (Poalelungi & Sîrcu, 2013, p. 23).

Where procedural defects or errors of fact or law have occurred, the exercise of a means of appeal makes it possible to set aside the decisions containing them. In such cases, the appeal operates as a remedy that annuls a decision contrary to the law and to the truth, depriving it of legal effect (Păvăleanu, 2002, p. 260).

Tanoviceanu defines means of appeal as follows:

> "Means of appeal are procedural institutions designed to secure a more perfect administration of justice in general. They rest on the idea that, since human justice is not infallible, the law must not close the way to a new trial where certain conditions give reason to believe that such a new trial would serve the proper administration of justice" (Tanoviceanu, 1927, p. 400).

Means of appeal in criminal proceedings are essential safeguards of justice, intended to ensure the review of judicial decisions and the protection of fundamental rights. Their effectiveness depends not only on the coherence of the legislation but also on its uniform application in practice (Osoianu & Ostavciuc, 2025, p. 10), and the relevant provisions are to be interpreted in the interests of the law and of the reform of criminal procedure legislation (Vizdoga et al., 2024, pp. 447–465).

The Constitutional Court of the Republic of Moldova defines means of appeal as the procedural mechanisms that allow a fresh examination of proceedings in which a judicial decision (or, at times, two) has been delivered, with a view to setting it aside in whole or in part where it is wrong in fact or in law. "Thus, the manner in which judicial review by the appellate and cassation courts is regulated creates the conditions for correcting errors committed by the court of

first instance, so that only lawful and well-founded decisions acquire the force of res judicata" (Constitutional Court Judgment No. 10, 2015, § 48). "Means of appeal are procedural mechanisms through which interested parties may seek and obtain the quashing of unfounded or unlawful judicial decisions" (Constitutional Court Judgment No. 16, 2013, § 47).

As regards the functions of the prosecution service exercised by the prosecutor, the following should be noted. In criminal proceedings, the prosecutor performs not one but several functions, which sets the prosecutor apart from the other participants in the proceedings. "The entire activity of the criminal investigation bodies is supervised by the prosecutor, who has the final say on matters on which the proper resolution of criminal cases depends. As a participant in the proceedings, the prosecutor is present at every stage of the criminal process" (Oncioiu, 2013, pp. 13–16).

Likewise, prosecutors must respect the independence of the courts and of the judiciary as a whole. They may challenge judicial decisions only through the means of appeal provided for by law, and must take all measures within their competence to protect the independence of the courts (CCPE, 2018, § 38).

"Prosecutors and judges must ensure, at every stage of the proceedings, that individual rights and freedoms are guaranteed and that public order is protected. This entails full respect for the rights of the accused and of victims" (Bordeaux Declaration, 2009, § 38).

2. State of Research and Aim of the Study

Means of appeal in criminal proceedings – the mechanisms by which judicial review is set in motion at the request of the prosecutor or of other persons authorised by law – have been the subject of continuous research. This has driven the development of the relevant procedural institutions and changes in procedure, and both these institutions and the prosecutor's position at the trial stage are constantly being interpreted and applied. Less attention, however, has been paid to the steps the prosecutor must take in order to perform the prosecuting function at the appeal stage. The aim of this study is to determine the sequence of steps to be taken by the prosecutor participating in the hearing of a case through the ordinary means of

appeal, and to devise an algorithm for the prosecutor's actions. To this end, the following objectives were set: to identify and compare the ordinary means of appeal in Romania and the Republic of Moldova; to examine the structure of the courts and prosecution offices that ensure the administration of justice at the ordinary appeal stage; and to analyse the prosecutor's powers at that stage.

3. Materials and Methods

The methodological basis of the research rests on the general principles of logic, the general theory of state and law, and the theory of criminal procedure law. Both general and specific scientific methods were used, including the formal-logical, systemic and analytical methods and the comparative method, alongside other methods of inquiry and interpretation.

The theoretical basis of the study draws on a range of scholarly works on criminal procedure law by both Romanian and Moldovan authors concerning means of appeal and, in particular, the appeal in cassation. The legislation of Romania and the Republic of Moldova relating to ordinary means of appeal and to the prosecutor was also analysed and compared.

In preparing this article, the authors reviewed the relevant legal doctrine, selected and analysed the case law of the European Court of Human Rights, and examined the criminal procedure legislation currently in force.

4. Results and Discussion

Judicial review through means of appeal is established out of the need to prevent and remedy possible judicial errors, in order to ensure the highest possible quality of justice, to correct any errors that may find their way into court decisions, and to ensure that all courts apply the law uniformly.

Means of appeal are "procedural remedies against errors that may arise, through the fault of the parties or of the judges, in the administration of justice". Review by a court ranking above the one that delivered the contested decision is a means of preventing breaches of the law and judicial errors by trial judges, so as to avoid abuses resulting from disregard of procedural and substantive provisions (Văleanu,

2007, pp. 1–2; Theodoru, 2007, p. 11; Neagu & Damaschin, 2021, pp. 308–309; Theodoru & Chiș, 2020, pp. 837–838).

Ordinary means of appeal have developed along different lines, and the appeal, the appeal in cassation and the challenge have not always existed as stable institutions of criminal procedure.

Strogovich observes that, in Western criminal procedure, the appeal is a form of challenging and re-examining decisions that have not yet become final. On appeal, the appellate (higher) court, at the request of one of the parties, re-examines the case exactly as it was examined at first instance: it conducts a new judicial inquiry, hears the witnesses again and so on, and then delivers a new judgment. Cassation, by contrast, involves challenging and re-examining decisions on formal grounds only, that is, as regards compliance with procedural rules and the application of substantive law, without the court of cassation entering into the merits or reviewing whether the case was correctly decided on the merits. Socialist legislation, having abandoned the appeal, did not adopt Western cassation with its formal character either; instead, it established cassation as an institution of socialist criminal procedure law (Strogovich, 1958, p. 474).

The appeal in cassation fulfils the objectives of means of appeal: where breaches of the law or errors of fact are found, the reviewing court, by quashing the contested decision, can deliver a lawful and well-founded decision. The appeal in cassation thus has both an annulling and a remedial effect, making it an important safeguard both for the State and for those with an interest in the lawful and sound resolution of criminal cases (Văleanu, 2007, p. 2).

In Romania today, unlike the appeal, the challenge (contestație) is an institution newly introduced into Romanian criminal procedure by Law No. 135/2010. In the Romanian Code of Criminal Procedure, the legislature abolished the appeal in cassation as an ordinary means of appeal, which made it necessary to introduce a new means of appeal to take over its function (Crișu, 2025, p. 312).

Accordingly, the challenge was introduced as the means of appeal against decisions of the judge for rights and liberties, the preliminary chamber judge or the trial court when ruling on matters ancillary to the merits. Under Article 425¹(1) CCP RO, the challenge is a means of appeal that may be lodged against non-final criminal decisions delivered by

the judge for rights and liberties, the preliminary chamber judge or the trial court, but only where the law expressly so provides. This ordinary means of appeal is reformatory in nature: it may set aside the contested decision where errors of fact or law are found and replace it with a new one. In the circumstances provided for by law, it operates as a remedy of annulment (Neagu & Damaschin, 2021, pp. 368–369).

Romanian criminal procedure law thus currently provides for two ordinary means of appeal, so as to ensure differentiated judicial review that meets the varied demands of practice.

Article 6 CCP RM defines ordinary means of appeal as the remedies provided by law for challenging judicial decisions that are not yet final (the appeal) or, as the case may be, not yet irrevocable (the appeal in cassation).

Under Chapters III and IV of Title III of the Special Part of the Romanian Code of Criminal Procedure, the ordinary means of appeal are the appeal and the application for annulment (contestație în anulare), in accordance with Articles 408 and 426.

Under Article 420(3) CCP RO, the prosecutor's participation in the hearing of an appeal is mandatory.

Under Romanian law, the admissibility of an application for annulment is examined without summoning the parties. If the application is admitted in principle, the court orders the parties to be summoned, in accordance with Article 431 CCP RO.

Moldovan law contains the same provisions: under Article 412(7) CCP RM, an appeal is heard with the mandatory participation of the prosecutor.

An appeal in cassation is heard without the parties being present, as provided for in Articles 433(3) and 447(1) CCP RM.

As regards the functions of the prosecution service exercised by the prosecutor, the following should be noted. In criminal proceedings, the prosecutor performs not one but several functions, which sets the prosecutor apart from the other participants in the proceedings. "The entire activity of the criminal investigation bodies is supervised by the prosecutor, who has the final say on matters on which the proper resolution of criminal cases depends. As a participant in the proceedings, the prosecutor is present at every stage of the criminal process" (Oncioiu, 2013, pp. 13–16).

Likewise, prosecutors must respect the independence of the courts and of the judiciary as a whole. They may challenge judicial decisions only through the means of appeal provided for by law, and must take all measures within their competence to protect the independence of the courts (CCPE, 2018, § 38).

The appeal, the appeal in cassation and the challenge differ considerably, which leads us to conclude that they are separate stages of criminal proceedings. First, each stage has its own subject matter, tasks and legal relationships.

The appeal is a review of the lawfulness and soundness of a non-final judgment delivered by the trial court. The Moldovan appeal in cassation is a review of the lawfulness and soundness of decisions delivered by district courts in cases concerning offences not punishable by imprisonment, of decisions delivered by the Supreme Court of Justice at first instance, and of decisions of the appellate courts. The subject matter of the Romanian challenge consists of interlocutory rulings delivered in the course of criminal proceedings, prosecutors' orders and judgments of the enforcement court.

Second, the procedures for hearing cases on appeal themselves differ. The appeal is a fresh hearing of the case, with a new judicial examination of the evidence, closing arguments, the defendant's last word and the delivery of a decision. Proceedings before the court of cassation and on an application for annulment are not divided into these stages but follow a structure of their own.

Third, the scope of review on appeal, in cassation and on an application for annulment is similar and is tied to the arguments set out in the applications lodged; this does not, however, mean that these proceedings form a single procedural stage.

Fourth, there are substantial differences in the scope of the court's powers, including in the assessment of evidence and in the decisions it may reach. Unlike the court of cassation, the appellate court may reassess the evidence and deliver a new decision on that basis; in other words, it may examine the merits of the case. The court of cassation does not examine the merits. When hearing a challenge, the court must retry the matter, since the challenge is a reformatory remedy. Only where it is found that the contested decision was delivered in breach of the rules on summoning does the challenge take on

the character of a remedy of annulment, in which case the matter is retried by the court that delivered the contested decision.

The prosecutor's role also differs from one appellate court to another.

Before the appellate court, the prosecutor acts first and foremost as public prosecutor and upholds the charge. Before the court of cassation, the prosecutor does not act as public prosecutor and does not uphold the charge, but supports the cassation appeal or submits a written response to the cassation appeal lodged. The appeal is therefore a separate stage of criminal proceedings. At every stage of the trial, the prosecution service performs the function of public prosecution, much as it does during the criminal investigation, while certain elements of its oversight or supervisory function are retained before the second-tier court as well. Moreover, one of the prosecutor's priorities is to protect the rights and freedoms of the individual.

The prosecutor's procedural status is not the same at every stage of criminal proceedings; it depends on the functions and powers conferred and on the procedural means employed. The prosecutor's role and status before the court of cassation differ from those before the trial court or the appellate court. In exercising the duty to oversee legality before the court of cassation, the prosecutor not only defends the conviction or supports the prosecution's own ordinary cassation appeal – for example, on the ground that the sentence is unduly lenient – but may also ask the court to discontinue the criminal proceedings, to mitigate the sentence or to reclassify the defendant's conduct under a more lenient provision of the Criminal Code. None of these steps necessarily implies that the prosecutor is acting as public prosecutor.

Before both the appellate court and the court of cassation, the prosecutor participates as a party to the proceedings, exercising the prosecuting function, while also performing the duties conferred by ordinary law and by the Code of Criminal Procedure. As a party on the side of the prosecution, the prosecutor has the same rights as the defence but bears more obligations. Before the appellate court, where the criminal case may be retried in fact and in law, the prosecutor acts as public prosecutor and upholds the charge by all means available under the law. Before the court of cassation, and in review proceed-

ings on an application for annulment, where the merits of the case are not examined, the prosecutor does not uphold the charge. At both of these stages, the prosecutor acts as a guarantor of the rights and obligations of the defendant, as well as of the other participants in the proceedings and of the citizens involved in them, thereby performing the function of protecting individual rights (Jitariuc & Calendari, 2024, pp. 96–97).

We now turn to the organisation of the courts and of the prosecution service at the ordinary appeal stage.

In Romania, justice is administered by the following courts: (a) the High Court of Cassation and Justice; (b) the courts of appeal; (c) the county courts (tribunale); (d) the specialised county courts; (e) the military courts; and (f) the local courts (judecătorii).

The High Court of Cassation and Justice is the supreme court, which ensures the uniform interpretation and application of the law by the other courts. It is organised into four divisions: the Civil and Intellectual Property Division, the Criminal Division, the Commercial Division, and the Administrative and Tax Litigation Division. The Criminal Division of the High Court of Cassation and Justice hears: (a) at first instance, cases and applications assigned by law to the first-instance jurisdiction of the High Court of Cassation and Justice; and (b) appeals in cassation, under the conditions laid down by law.

The courts of appeal are courts within whose territorial jurisdiction several county courts and specialised county courts operate. They comprise divisions or, where appropriate, specialised panels for civil, criminal, commercial, juvenile and family, administrative and tax, and labour and social security cases, as well as, depending on the nature and number of cases, maritime and river divisions or divisions for other matters.

County courts are organised in each county and in the Municipality of Bucharest; the territorial jurisdiction of each covers all the local courts in the county or, as the case may be, in the Municipality of Bucharest. County courts comprise divisions or, where appropriate, specialised panels.

Local courts have no legal personality and are organised in the counties and in the sectors of the Municipality of Bucharest.

Under Articles 2, 35–38 and 56–61 of Romanian Law No.

304/2004, the military courts are: (a) the military tribunals; (b) the Territorial Military Tribunals of Bucharest, Cluj-Napoca, Iași and Timișoara; and (c) the Military Court of Appeal of Bucharest, the only court of its kind.

Under Article 38 of the Romanian Code of Criminal Procedure, the courts of appeal, in addition to trying certain categories of offences at first instance as provided for by criminal procedure law, hear appeals against criminal decisions delivered at first instance by the local courts and county courts.

In Romania, the prosecution service is organised within the Public Ministry, which forms part of the judicial authority. The Public Ministry comprises the Prosecutor's Office attached to the High Court of Cassation and Justice, the prosecutor's offices attached to the courts of appeal, to the county courts, to the specialised juvenile and family courts and to the local courts, and the military prosecutor's offices. The military prosecutor's offices are organised as follows: the Military Prosecutors' Section within the Prosecutor's Office attached to the High Court of Cassation and Justice, the Military Prosecutor's Office attached to the Military Court of Appeal of Bucharest, and the military prosecutor's offices attached to the military tribunals (Law No. 304/2004, Articles 62–102).

The prosecutor's offices attached to the courts of appeal comprise the following prosecutorial posts: (a) chief prosecutor; (b) deputy chief prosecutor; (c) head of section; and (d) prosecutor. Their structure is as follows: A. the Criminal Investigation Section; B. the Judicial Section; C. the Economic, Financial and Administrative Department. The Prosecutor's Office attached to the Bucharest Court of Appeal comprises: A. the Criminal Investigation Section; B. the Special Proceedings Section; C. the Criminal Judicial Section; D. the Civil Judicial Section; E. the Economic, Financial and Administrative Department. These offices are headed by a chief prosecutor, assisted by one or two deputy chief prosecutors.

Prosecutors in the Judicial Section have the following duties: (a) to take part in the hearing of criminal and civil cases, in accordance with the law; (b) to lodge appeals against judicial decisions delivered by the court of appeal, in accordance with the law; (c) to examine instances of inconsistent application of the law and make reasoned

proposals for an appeal in the interests of the law; (d) to review cases in which the courts have delivered final decisions ordering acquittal, the return of the case to the prosecutor or its referral to the prosecutor; and (e) to perform any other duties provided for by law and regulations or assigned by the superior prosecutor (Regulation No. 2632/C/2014).

In the Republic of Moldova, justice is administered by the following courts: (a) the Supreme Court of Justice; (b) the courts of appeal (North, Centre and South); and (c) the district courts (judecătorii).

The Supreme Court of Justice, acting as a court of cassation, hears appeals in cassation against decisions delivered by the courts of appeal and against judgments delivered by the Supreme Court of Justice at first instance.

Under Articles 38–39 CCP RM, the Court of Appeal, acting as an appellate court, hears appeals against decisions delivered at first instance by the district courts and, acting as a court of cassation, hears appeals in cassation against decisions of the district courts that, by law, are not subject to appeal. Appeals and appeals in cassation against decisions delivered at first instance by the Specialised Anti-Corruption Panel of the Chișinău District Court are heard by the specialised anti-corruption panel of the Centre Court of Appeal.

The current structure of the prosecution service allows the prosecution case to be presented before the trial courts (the district courts) by the territorial prosecutor's offices, and before the Supreme Court of Justice by a specialised section of the Prosecutor General's Office – the Section for Representing the Prosecution before the Supreme Court of Justice.

The North, Centre and South Circuit Prosecutor's Offices, which have the status of territorial prosecutor's offices and form part of the prosecution service, operate within the territorial jurisdiction of the corresponding courts: the North Court of Appeal, the Centre Court of Appeal and the South Court of Appeal (Regulation 24/28/2016).

Under Article 320(1) CCP RM, the prosecution case at first instance is presented by the prosecutors who directed the criminal investigation or, as the case may be, conducted it themselves and sent the case for trial, whether from territorial or specialised prosecutor's offices (the Anti-Corruption Prosecutor's Office or the Prosecutor's

Office for Combating Organised Crime and Special Cases).

As regards the steps the prosecutor must take when a criminal case is heard through the ordinary means of appeal, we highlight the following.

The prosecutor's involvement before the court hearing an ordinary appeal begins upon receipt of the summons issued by the court, which must meet certain statutory requirements.

Having received the summons, the prosecutor begins preparing to take part in the hearing, starting with a study of the case file.

Verifying that the appellate court has been properly seised means that the court must ascertain whether the contested judgment is subject to appeal by law, whether the application was lodged by a person legally entitled to bring the appeal, and whether it was lodged within the statutory time limit. If the application is inadmissible or out of time, no hearing takes place, since the court has not been seised in accordance with the law.

The court may dismiss an appeal, an appeal in cassation or a challenge as inadmissible in certain circumstances.

Inadmissibility in this context is regarded as a procedural sanction directed against a step that the law does not provide for or expressly excludes.

In such cases, the prosecutor, as part of the preparatory measures for the hearing, must file an application asking the court to examine whether the appeal was lodged out of time.

Whether the court hearing the ordinary appeal has been properly seised can be verified by studying the case file before the first hearing.

The prosecutor must check whether the appeal, appeal in cassation or challenge was lodged by a person legally entitled to bring it. The right to appeal against a judgment belongs to the persons specified in criminal procedure law.

An important part of the prosecutor's preparation for the hearing is checking that the appeal was lodged within the statutory time limit.

According to Neagu,

> "the absence of a time limit for appeal could lead either to the immediate enforcement of a criminal judgment or to the possibility of appealing against such judgments at any time. The

existence of a time limit for appeal meets both the need to ensure judicial review of decisions before they are enforced and the need to ensure expedition in criminal proceedings" (Neagu, 1997, p. 546).

Other authors propose, de lege ferenda, that lodging an appeal after the statutory time limit has expired should not result in forfeiture of the right, but at most in the loss of the appeal's suspensive effect (Paraschiv, 2002, p. 66).

Where a person has lodged an appeal out of time, an application should be filed asking the court to examine this issue and to dismiss the appeal as lodged out of time, without examining it on the merits or reviewing the whole case on appeal, since the court has not been seised in accordance with the law.

An appeal lodged out of time may be heard only if the appellant has applied for reinstatement of the time limit and the court has ruled on that application. Reinstatement of the time limit is the procedural mechanism whereby a person entitled to appeal, who was unable to do so for reasons beyond their control, is restored to the right that lapsed when the time limit expired.

A fair and thorough hearing of the case depends on the correct resolution of the application for reinstatement of the time limit. The court must examine the reasons for the delay and, if it finds that the delay was due to good cause, reinstate the time limit and proceed to hear the appeal on the merits.

Each person entitled to appeal may challenge a given judicial decision only once.

A repeated appeal against the same decision does not seise the court with a fresh examination of that decision. In such circumstances, the new appeal is inadmissible (Pamfil et al., 2008, pp. 102–103) and no hearing takes place, since the court has not been seised in accordance with the law.

As regards the summoning of the parties, the following should be noted.

The prosecutor must check whether the parties and other interested persons have been duly and lawfully summoned. Checking the arrangements for the hearing involves verifying that the parties have been summoned, that a defendant held in custody will be present, and

that state-guaranteed legal aid has been provided. If a party has not been lawfully summoned and fails to appear, if a defendant in custody has not been brought to court, or if defence counsel whose presence is mandatory fails to appear, the hearing of the appeal is adjourned to another date and the statutory requirements must be complied with anew.

As guarantor of compliance with the law, the prosecutor must verify that the court hearing the appeal, the appeal in cassation or the application for review complies with the statutory provisions, including those on summoning the parties and on allowing sufficient time for preparation.

At the preparatory stage, the prosecutor's role is to verify that the bench has been lawfully constituted.

A court that lacks jurisdiction to hear a case under domestic law is not a tribunal "established by law" within the meaning of Article 6 § 1 ECHR. Any change in the composition of the bench must comply with the law and be reflected in the case file.

It is not permissible to seek the recusal of a judge, or of all the judges of a court, in advance, before the bench that is to hear the criminal case has been constituted.

An application for recusal prevents the court from ruling on the merits; it must first be decided by a different bench that does not include the judge whose recusal is sought. Otherwise, a decision delivered by the judge who is the subject of the recusal application is vitiated by absolute nullity (Pamfil et al., 2008, p. 146).

A ruling dismissing an application for recusal may be challenged only together with the decision on the merits, as no separate remedy is available. Accordingly, an appeal lodged against such a ruling before, and separately from, the court's decision on the merits is inadmissible.

A further problem may arise where the judgment has not been translated into the state language or contains clerical errors.

Equally important is the prosecutor's task of checking the defendant's identity details, the correct spelling of the defendant's name in the court decisions, the presence of information on previous convictions, and so on.

Public prosecutors must pay particular attention to the quality and reasoning of applications for appeal, which must be consistent

with the law and with the case file, and be specific, clear and reasoned.

An application for appeal must be reasoned and specific, setting out the grounds on which the contested decision breaches the principles of lawfulness, soundness and adequate reasoning. In other words, it must put forward arguments showing that the decision is unlawful, unfounded and inadequately reasoned, by identifying: (1) the specific breaches committed at trial, with the relevant facts and evidence; (2) what confirms those breaches, by presenting specific arguments and evidence; and (3) the legal basis for quashing or varying the decision of the trial court.

On appeal, the factual circumstances of the case are not re-examined as a whole, but only in the light of the evidence and arguments put forward by the parties. Thus, the application for appeal alleging that the contested decision is unlawful, together with the supporting arguments and grounds, and the opposing party's written response, constitute the subject matter of the appellate court's review.

The means of review is the judicial examination itself, in the course of which the court must assess each claim by weighing the arguments presented by the parties, and in which the evidence in the case may be examined directly.

Only once the examination of the appeal is complete and the subject matter of the hearing has been fully addressed can the court rule on whether the arguments in the applications are well founded. The subject matter of review is therefore the central element of the appeal hearing.

With regard to the appeal, Volonciu states that:

> "the grounds of appeal are, ultimately, the criticisms that those entitled to appeal level against the contested decision. In formulating them, the appellant is not confined to certain cases predetermined by law, but may raise any objection concerning matters of fact or law and the flawed manner in which the court of first instance resolved them. It has been accepted in practice that the prosecutor may, in writing or orally, at once or in stages, rely on grounds other than those previously stated, up until the close of argument" (Volonciu, 1996, p. 249).

"The application for appeal need not set out the grounds of appeal, since, by virtue of the devolutive effect of the appeal, the ap-

pellate court is obliged – irrespective of any grounds relied on or requests made by the appellant – to examine the case, even in the appellant's absence, in all its aspects of fact and law. The author further explains that "in criminal matters, since the courts are obliged of their own motion to ensure the complete and regular performance of the procedural acts that make up the criminal process (...), the absence of reasons does not relieve the court seised of the appeal of the duty to review of its own motion the conduct of the criminal proceedings up to that point; the law may, of course, depart from this principle in certain cases, but in the absence of an express derogation it remains applicable and mandatory". The value of stating reasons lies in the fact that, on the one hand, it makes known the cause of dissatisfaction with the contested decision and, on the other, it clarifies and delimits the scope of the discussion and of the review hearing (Paraschiv, 2002, p. 98).

The prosecutor must also verify that the charges were properly brought, and that the order bringing charges and the indictment comply with the law.

In the case of an appeal, the law allows a supplementary appeal to be lodged, in which additional grounds of appeal may be raised. No such option exists for an appeal in cassation or a challenge.

In a supplementary application, the prosecutor taking part before the appellate court may raise additional grounds of appeal concerning any aspect of the criminal case, and may also withdraw or amend some of the grounds raised in the original application.

As regards the withdrawal of an application already lodged: since recourse to a means of appeal is optional for those entitled to it, they may choose whether or not to exercise it (Papadopol & Turianu, 1994, p. 112).

Withdrawal of the application is, in practice, tantamount to acquiescence in the decision delivered, as an expression of the right of disposal enjoyed by those entitled to appeal (Paraschiv, 2002, p. 105).

Withdrawal need not be total; it may also be partial, in that it may concern only certain provisions of the contested decision – for example, only the ruling on the criminal aspect or only the ruling on the civil aspect of the case (Volonciu, 1996, p. 253).

The wording of the law sets certain conditions for the withdrawal of an appeal. First, an appeal may be withdrawn until the judi-

cial examination stage before the appellate court. For example, under Article 415(1) CCP RO, an appeal may be withdrawn until the close of argument before the appellate court. In addition, Article 415(3) and (4) CCP RO provides that an appeal lodged by the prosecutor may be withdrawn by the superior prosecutor, and that an appeal lodged and then withdrawn by the prosecutor may be adopted by the party in whose favour it was lodged.

In our view, the provisions of Moldovan procedural law are clearer and offer greater legal certainty. Indeed, it is the arguments and requests in the application for appeal that determine whether a judicial examination is held, its scope and the effects of the appeal. In practice, at this stage the parties must be well prepared and their requests must be specific.

Verifying allegations of torture or of cruel, inhuman or degrading treatment. Where the defendant alleged ill-treatment before the court of first instance, that court should have discussed the matter at the hearing and instructed the prosecutor, as the authority empowered to verify such allegations, to initiate an inquiry and report its findings to the court.

The use in criminal proceedings of statements obtained in breach of Article 3 of the Convention automatically renders the proceedings as a whole unfair and violates Article 6 of the Convention (El Haski v. Belgium, No. 649/08, 25 September 2012, § 85; Gäfgen v. Germany [GC], No. 22978/05, 1 June 2010, § 166), as does the use of evidence obtained through acts of torture (Jalloh v. Germany [GC], No. 54810/00, 11 July 2006, § 105; Gäfgen v. Germany [GC], § 167). The use of evidence obtained through treatment contrary to Article 3 ECHR that falls short of torture does not, however, breach Article 6 unless it is shown that the breach of Article 3 influenced the outcome of the proceedings, that is, had an impact on the conviction or the sentence (El Haski v. Belgium, § 85; Gäfgen v. Germany [GC], § 178).

The prosecutor's participation in the judicial examination requires a thorough knowledge of the case file.

When studying the case file, the public prosecutor must establish whether all available evidence has been examined and, if not, what steps can be taken, what can be supplemented and by which procedural means, and which circumstances can no longer be established.

In studying the case, the public prosecutor must form their own position on the evidence, in particular as regards its admissibility, bearing in mind that the defence may again apply to have evidence excluded as inadmissible. This analytical work enables the prosecutor to form an inner conviction that the challenge to the judgment is correct and well founded.

Judicial examination on appeal is an optional procedural stage (Paraschiv, 2019, p. 181).

On the admissibility, relevance and usefulness of the evidence, the court hears the views of the person against whom the appeal was lodged and of the other participants, who may in turn propose new evidence to counter that proposed by the appellant. The appellate court issues a ruling on the application to admit new evidence or to re-examine evidence already taken at first instance, giving reasons for admitting or dismissing it according to whether the evidence is relevant and useful to the case. If the court agrees to admit new evidence or to re-examine evidence taken at first instance, a new stage of the appeal hearing begins – the judicial examination – which is conducted in accordance with the general rules applicable at first instance.

A judicial examination in cassation proceedings or on an application for annulment may take place only where the court has ordered the case to be heard in open court. Romanian law does not expressly provide for the reviewing court to conduct a judicial examination; the hearing is limited to hearing the parties and the prosecutor's submissions.

On appeal, the appellate court is entitled to admit new evidence if it considers it relevant and useful, and to dispense with evidence initially admitted if it subsequently proves unnecessary. However, if evidence was dispensed with because of a failure to comply with procedural provisions that were not essential to the purpose of taking that evidence, the appellate court's decision will be quashed in cassation as unlawful (Pamfil et al., 2008, pp. 82–83).

The purpose of the appellate court's review of the case file is to analyse the factual circumstances established by the lower court against the applicable legal provisions, to identify errors, to deliver a new decision and to correct the errors committed.

The parties move on to the evidentiary stage when they dispute

the factual circumstances of the criminal case. This involves the taking, examination and assessment of evidence, including in order to identify and correct errors committed by the court of first instance.

The submission of new evidence by the parties before the appellate court is simply a continuation of the defence of their own interests. When new evidence, such as witnesses, is put forward on appeal, those witnesses should preferably be heard. A party requesting that such witnesses be summoned must specify the circumstances to be established by hearing them and, most importantly, explain why they were not summoned and heard as witnesses at first instance. The need to summon and hear (Jitariuc & Bria, 2026, pp. 73–84) these persons on appeal therefore depends on how persuasively the application is reasoned.

The judicial examination on appeal may involve the direct examination of evidence or be confined to examining the evidence on the case file: further questioning of a witness, ordering an expert report, or reading out the record of the questioning of a witness or of the defendant during the criminal investigation, with due respect for procedural rights (Ostavciuc & Osoianu, 2023, pp. 72–96), the record of a confrontation or the record of the hearing at first instance. Given the prosecutor's procedural position, the burden of presenting the prosecution evidence at first instance and on appeal lies with the prosecutor. In Capeau v. Belgium (13 January 2005), the European Court held that, in criminal matters, the question of the taking of evidence must be examined in the light of Article 6 § 2 ECHR, which requires, inter alia, that the burden of proof lie with the prosecution (Capeau v. Belgium, No. 42914/98, 13 January 2005, § 25). Any shift of the burden of proof from the prosecution to the defence violates the presumption of innocence (Telfner v. Austria, No. 33501/96, 20 March 2001, § 15).

The prosecutor's participation in the closing arguments involves preparing submissions on the grounds of the appeal lodged and on the reasoning and soundness of the contested decision.

Closing arguments on appeal are confined to the appellant's presentation of the grounds of appeal and the respondent's rebuttal, together with adversarial argument on any errors of fact or law raised by the court of its own motion (Volonciu, 1996, p. 266).

The closing arguments amount to a confrontation before the ap-

pellate court between the opposing positions of the appellant and the other party – based, as regards matters of fact, exclusively on the evidence taken at first instance and, possibly, on certain new documents – with the aim of establishing the truth (as to whether the offence was committed and its seriousness, the defendant's guilt, and so on) and of applying the law correctly to the facts (Papadopol & Turianu, 1994, pp. 198–199).

Submissions before the appellate court concern criticisms of the way in which the trial was conducted at first instance and of the rulings made by that court on the criminal and/or civil aspects of the case, or on other matters subject to appeal. Argument covers all aspects of fact and law, within the limits of the position of the person who lodged the appeal or to whom it relates, and having regard to the procedural standing of the appellant. Submissions must focus on the grounds relied on in the application, with each party supporting its position by rebutting the opposing party's arguments and referring to the judicial and doctrinal interpretation of the legal provisions that justify the outcome it seeks. At the appeal hearing, the parties argue adversarially both the grounds of appeal and the response to them, as well as the errors of fact and law committed by the court of first instance. When an appeal in cassation or an application for annulment is heard in the absence of the parties, the appellant's written arguments are examined in chambers.

When the closing arguments are over, the defendant has the last word.

According to Udroiu,

> "the presiding judge gives the last word to the defendant in person at all ordinary levels of jurisdiction, as well as in extraordinary appeal proceedings. Failure to give the defendant the last word in person is, in principle, sanctioned by relative nullity, except where the breach of the statutory provisions could affect the establishment of the truth and the fair resolution of the case" (Udroiu, 2018, p. 399).

In the last word, before the decision is taken, the defendant is given a final opportunity to state their position on the charge, the judgment delivered and the appeal lodged, and to comment both on their own conduct and on the outcome of the judicial examination

(Lupinskaya, 2009, p. 720).

According to Romanian case law, before the appeal hearing closes the court must give the defendant the last word, so that the defendant can state their position on the submissions made by the prosecutor and the parties and on the criminal case in which they are involved. Failure by the court to do so results in the decision being quashed and the case being remitted for retrial (Pamfil et al., 2008, p. 83).

The prosecutor's actions after the decision is delivered.

The prosecutor's work before the appellate court does not end with the delivery of the decision. After hearing the appeal, the court must comply strictly with the statutory requirements for drafting the decision. Failure to comply with these requirements amounts to a breach of the right of defence of those involved in the proceedings.

Once the decision has been delivered, the prosecutor takes the following steps: (1) studies the decision of the appellate court; (2) in the case of an appeal, checks that the record of the hearing has been properly drawn up; and (3) decides whether or not to lodge any available means of appeal, including an extraordinary one.

On appeal, checking the record of the hearing before the appellate court is also of particular importance for the prosecutor's work.

One of the prosecutor's key powers when a criminal case is heard in court is to appeal against the decision as regards both the criminal and the civil aspects of the case (Article 53(2)(8) CCP RM). Decisions of the appellate court may be challenged by an appeal in cassation in the Republic of Moldova, or by an application for annulment in Romania, in order to examine the issues raised and to correct errors of law committed by the trial and appellate courts, on the grounds provided for by law.

At the same time, under Article 420(4) CCP RM, the prosecutor must bear in mind that judgments cannot be challenged by an appeal in cassation where the persons listed in Article 401 CCP RM did not appeal or withdrew their appeal, if the law provides for an appeal. An ordinary appeal in cassation must be lodged within two months of the date on which the full text of the appellate decision was served, not the date on which it was delivered.

Romanian criminal procedure law provides for a time limit of ten days both for lodging an appeal (Article 410(1) CCP RO) and for lodging an application for annulment (Article 428(1) CCP RO), running from

the service of the decision and the date on which the person became aware of it.

5. Conclusions

The above analysis leads to the following conclusions.

Depending on national traditions, the ordinary means of appeal may take different forms – the appeal, the appeal in cassation or the challenge – but it is clear that decisions of both the court of first instance and the second-tier appellate court can be challenged. The appeal in cassation may be an ordinary and/or an extraordinary means of appeal.

The prosecutor taking part in the hearing of a criminal case on appeal must play an active role and take every lawful step, by filing the appropriate applications, to resolve issues relating to the proper constitution of the bench in the higher court, the attendance of the necessary participants and the taking of evidence at the appeal stage.

The prosecutor must take an active part in the taking and examination of evidence not only at first instance but also on appeal. Cooperation is required with the prosecutors who directed the criminal investigation and with the officers of the criminal investigation body who investigated the specific cases, in order to clarify all circumstances arising on appeal – particularly where new evidence is presented – and the information obtained must be used in strict compliance with criminal procedure law.

As a party on the side of the prosecution, the prosecutor has the same rights as the defence but bears more obligations. Before the court hearing an ordinary appeal, where the criminal case may be retried in fact and/or in law, the prosecutor acts as public prosecutor and presents the prosecution case by all means available under the law.

As at first instance, the prosecutor on appeal acts as a guarantor of the rights and obligations of the defendant, as well as of the other participants in the proceedings and of the citizens involved in them, thereby performing the function of protecting individual rights.

Means of appeal are separate stages of criminal proceedings; accordingly, the prosecutor taking part at the appeal stage has a status independent of that of the prosecutor who took part at first instance.

Errors and breaches committed by the court of first instance may determine the steps to be taken before the higher courts, either

requiring the taking and examination of evidence or making an evidentiary stage unnecessary.

Drawing together the sequence of actions to be performed by the prosecutor, the following specific steps should be taken when criminal cases are heard through the means of appeal:

A. At the preparatory stage:

1. Verifying that the appellate court has been properly seised, i.e. ascertaining whether the contested judgment is subject to appeal by law.

2. Checking that the appeal was lodged by a person legally entitled to appeal.

3. Checking that the appeal was lodged within the statutory time limit.

4. Checking that the parties have been summoned in accordance with the law.

5. Checking that the bench has been lawfully constituted.

6. Checking that the judgment has been translated into the state language and is free of clerical errors.

7. Checking the defendant's identity details, the correct spelling of the defendant's name in the court decisions, the presence of information on previous convictions, etc.

8. Paying particular attention to the quality and reasoning of the applications for appeal, the proper bringing of charges, the possibility of lodging a supplementary appeal, and the withdrawal of the appeal.

9. Verifying allegations of torture or of cruel, inhuman or degrading treatment.

10. Submitting a written response to an appeal lodged by another party to the proceedings.

B. During the judicial examination:

1. Presenting the evidence examined by the lower courts.

2. Reading out the physical and documentary evidence.

3. Presenting evidence for further examination: additional documents; further questioning of the injured party, a witness or an expert.

4. Presenting new evidence, including new physical evidence.

C. During the closing arguments:

1. Taking part in the closing arguments.

2. Making replies.

D. After the decision is delivered:

1. Studying the court's decision.
2. Studying the record of the hearing.
3. Using the means of appeal provided for by law.

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