CONNECTIONS AND INTERFERENCES BETWEEN THE ACTION IN CIVIL DELICTUAL LIABILITY AND THE CRIMINAL LIABILITY ACTION

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Abstract

In a situation in which through an illegal act which represents also a crime, it is caused a prejudice, the injured person is entitled to choose between two options in order to obtain the conviction of the person responsible for the repair. The action in civil delictual liability can join the penal action to be ruled by the criminal court. The path chosen by the victim for the prosecution of the civil claim will determine the applicable rules of the proceedings in the civil process or in the penal process.

The cumulation of the two types of responsibilities is the evidence that they have a conjugate destiny in order to restore the legal order. The ruling of the action in civil delictual liability by the criminal court shows some obvious advantages for the plaintiff claiming damages especially evidenced by the less expensive and faster criminal procedure, as well as by the widely possibilities of providing pieces of evidence. Of course, in order the victim to pursue a civil action, a mise en accusation is mandatory. The problem of res judicata of the criminal court decision in civil court does not arise when the civil action for damages is not based on an illegal act which is a crime

Key words: offence, crime, delictum, civil action, criminal action.

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1. Introduction

1.1. Brief history and justification

In the course of history, the issue of liability of the individuals for their actions had been a concern of the most brilliant minds who have endeavored to find a scientific substantiation.

The major legislative modification embodied by the entry into force of the new Civil Code in 2011 and the new Criminal Code in 2014 represented a real challenge for the proposed analysis, as yet the practice is not sufficiently contoured and some legal provisions are uncorrelated and, sometimes, even contradictory. The interest in the chosen topic started from the many practical needs which the trial courts must respond and more.

We can state that, in the modern age, tort liability and criminal liability are the two initial types of legal liability, of the greatest importance in the past and today, around which gravitates the whole issue of ensuring the rule of law.

The actuality of the chosen theme is the constant and general applicability of the liability institution in Romanian jurisprudence. The principles governing this

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institution had survived to all vision changes of the legislator regarding the legal liability. The theme of the article was generated by the diversification situations occurred due to the evolution of modern society, with immediate effect on the legal relations caused by them and the legislature could not neglect this development complexity assumptions to be decided and tried to regulate them, sometimes global sometimes applied.

1.2. Notions

Tort is the civil human act that causes an injury to another, whether or not he pursued this[1]. D. Alexandresco, defined the civil offense as "any human volunteer illegal fact and harmful for the individual, fulfilled by action *(commissio)* or inaction *(omissio)* with intent to damage another[2]". For this reason, only victim is the one that can bring an action against the called to respond, which is being filed to obtain compensation for the suffered damages.

Criminal offense, in a broad sense, the crime, is the act by which the public interest is undermined – it affects the fundamental values of society – the author must answer before law and bear the punishment provided by law; and hence the notion of criminal liability arises. Injury is "an act contrary to the rule of conduct which attracts the application of sanctions provided for committing them. The very term crime, as we have shown, has the meaning of act by which the mandatory rule of conduct is defeated"[3].

Torts do not all constitute crimes, because criminal law does not incriminate all acts which represent a violation of another law. Likewise, not all crimes are civil misdemeanors.

On one hand, criminal law incriminates acts which threaten or endanger the maintenance or the exercise of certain rights, without damaging them, meaning that these acts do not have as a result the production of a material or moral prejudice. Moreover, criminal law sometimes incriminates acts issued by any intent to harm, for example, murder by negligence.

2. Principles

The principle of legal liability, although widely known, with a broad applicability, it was not prescribed by the legislator, being the result of other principles that protect the rights and freedoms of the individuals, and also of the right to reparation principle arising from the constitutional equality principle. The importance of the principles is given by the fact that the regulation of the legal norms

[1] H. Capitant, A. Colin, *Traite de droit civile*, (rewritten by L. Julliot from Morandiere), t.2, 1959, p. 618.
[2] D. Alexandresco, *Explicatiunea teoretica si practica a dreptului civil roman in comparatiune cu legile vechi si principalele legislatiuni straine*, 1898, Tipografia Nationala Iasi, p. 390.
[3] P. Tourneau, L. Cadiet, *Droit de la responsabilite et de contrats*, Dalloz, 2000, p.141.

grafted onto them, and by the fact that the possibility for the court to apply directly such a rule, even in the absence of an express legislative consecration. So these directives constitute essential legal guidance systems not only for the legislator, but also for the judge who applies the legal norms to situations to be decided.

3. Connections and interferences

The subject of the proposed article we decided to be chosen for its practical character, involving the civil action which could be promoted in the civil trial and the civil action which could be promoted within the criminal trial by which tends to obtain remedies, material or moral, to cover the damage suffered by the victim of a crime.

Our first premise of the article, which would open up the issue of cumulating the civil liability with criminal liability, is that the act committed to be both tort and crime in order to be able to give rise to the right of option of the victim to be directed against those responsible, either exclusively by civil trial, either by criminal process.

This is the principle stated by art. 27 para. (1) of the Code of Criminal Procedure[4] presented more or less veiled. We meet two exceptions in question: the first exception regards the case that the injured person lacks the capacity to act or has limited capacity to act, in which situation the civil action should be exercised ex officio by the prosecutor on behalf of the injured person as art. 19 para. (3) of the Code of Criminal Procedure obliges.

The second exception is that in which the right to compensation for damage has been passed on in a conventional manner. We can encounter in this case, a transfer of debts, for example, or even a subrogation in the rights of the debtor by paying the debt, in which case the assignee, meaning the one who acquires claims for compensation for damage no longer can bring the civil action in criminal proceedings, but, if such transmission is made after the civil action was filed, the criminal court remains invested to judge also the civil action with the possibility, and not with the obligation, of a severance.

Of course, it remains at the discretion of the court if the body of evidence which would be required to be administered it is likely to extend the criminal trial more than reasonably. The criminal trial can be solved by the criminal court and she can disjoin meanwhile the civil action to be resolved separately if the latter implies a delay, an extension of the reasonable term in which criminal proceedings can be solved.

We talk about this principle which entitles the victim or its successors to choose between Civil and Criminal Court to promote the civil action, this option couldn't be

[4] Law no. 135/2010 on the New Criminal Procedure Code, published in the Official Gazette no. 486, 15 Luly 2010, in force from 1 February 2014. The New Criminal Procedura Code updated through EGO no. 3/2014 – for taking measures for enforcing Law no. 135/2010 regarding the Criminal Procedure Code and for enforcing other normative acts, Official Gazette 98/2014 and through Law no. 255/2013 – for enforcing Law. No. 135/2010 regarding the Criminal procedure Law and for altering and modifying other legal norms that refer to criminal procedures, Official Gazette 515/2013.

exercised but once. It is, again, about the principle imposed by art. 27 para. (1) of the Code of Criminal Procedure, the widely known *electa una via, non datur recursus ad alteram*, meaning that if we elected the civil court we stick with the civil court. And from this principle we have exceptions (as any self-respecting principle).

We have the possibility to choose between Civil Court and Criminal Court, but only if strictly the legislator allows us to do this. In matters of exceptions from this principle, we can mention the case in which the civil action that had been put into motion in the criminal trial, when subsequently a suspension cause of the prosecution or criminal judgement (if the process it is in this phase) has intervened. Thus, arises the possibility for the action titular to bring a civil action in the Civil Court, possibility granted by article. 27 para. (3) of the Code of Criminal Procedure.

In the event that the criminal trial is resumed, the civil action brought on the civil court shall be suspended after putting in motion the criminal action or after the resumption pending criminal trial and until the resolving of the appealable criminal judgement, but no more than one year. Here it is about a case of suspension, mandatory for the court, a case of suspension *de iure*, that the Code of Criminal Procedure provides it, this time, for the civil court, that it should not be confused with the case of facultative suspension provided by art. 413 par. (1) pt. 2 of the Code of Civil Procedure[5] which allows civil courts to suspend, if so desired, the civil trial where there is a pending criminal case that could have a negative influence.

This article has generated some discussion, because it does not distinguish between how such started prosecution that would allow the court to suspend the lawsuit would be a prosecution in rem or *in personam*. The majority opinion in practice is that it is advisable the civil court to stay whether the criminal investigation was commenced *in personam* and not only in rem. Moreover, advisable would be that at the end of the term of a year in which the cause of suspension mandatory would disappear, because, as we noticed, the Code of Civil Procedure states that civil action is suspended by the civil court, but not more than one year if in the meantime the criminal proceedings were not endorsed, advisable would be if this term of one year was depleted that civil court, at the end of this period, to consider art. 413 par. (1) pt. 2 of the Code of Civil Procedure in order to suspend the lawsuit that has to be settled.

The second exception from this principle would be the reverse situation, that of leaving the civil court after its initial choice (but before a rendered judgment, even not-final, because the legal text allows us to do this only if the civil court did not render itself in the first instance), in which was held the exercising the criminal action or the resumption of the criminal proceedings after suspension – Article 27 para. (4) of the Code of Criminal Procedure allows us to do so.

If the entitled parties will choose the version to promote the civil action at the civil court and if the complainant, of course, does not leave this court (accepting this dynamic as a working hypothesis) after the initiation of criminal proceedings or after the resumption of criminal trial, again, intervenes a well-known principle that for the

[5] The Civil Procedure Law, republished 2015. Law no. 134/2010 regarding the Civil Procedure Code, republished in Official Gazette 247/2015.

lawyers in criminal matters is very pleasant and which they, emphatically, always remind: "the criminal trial holds back the lawsuit" or in French ,,le criminel tient le civil en état" , Article 27 para. (7) CPP: „in civil court, judgment will be suspended after the initiation of criminal proceedings and until the resolving of the criminal case in first instance, but not more than one year".

It is that question of mandatory suspension above mentioned cause upon which we will no longer insist, as we have already developed it. The jurisdiction, the competence of the civil Court remains to be governed in all respects by the Code of Civil Procedure, all judgment before the civil court will be conducted according to the rules of civil procedure, regardless of whether the relevant injury is the result of an offense, albeit set out by the penal law, and, moreover, there is an Article 1365 of the Civil Code[6] which acknowledges in its first sentence that the civil court is not bound by the provisions of the criminal law with regard to the existence of the injury or of the author's guilt of the offence.

What does this thing mean? This can only mean that the civil court hearing such an action, instituting the proceedings of such action, will judge *in concreto* the notions of injury and guilt, exclusively using the legal category of guilt or injury found in the provisions of Civil Code, in the provisions of civil law in general.

With regard to the effects of final decree of the civil court on the Court that judges the criminal action, "the final judgement which settled the civil action has no force of res judicata before the criminal judicial bodies with respect to the existence of the criminal offence, to the existence of the person who committed it and to the existence of its guilt". It's all about Article 28 para. (2) of the Code of Civil Procedure which taking a major step forward along with the civil code which is accomplice in art. 1365 above quoted in this respect, towards the separation between the two types of guilt, civil and criminal guilt.

Interpreting *per a contrario* the text of Article 28 para. (2) of the Code of Criminal Procedure, the final civil judgment that definitively resolved the request of compensation for damage of the victim, or, if appropriate, of any other person of its successors, has the authority of res judicata in front of the criminal court in terms of the elements targeted: the existence of injury, its amount and the method of repairing the injury.

Eventually, as we will see by the end of this work, and this will also be the conclusion that we already anticipate, the civil court has the preserve of injury determination, the amount of the damage and of the manner to repair it, because of the game that the legislator thought out between the effects of final judgments, of the civil and the criminal, and their effect - res judicata.

If the plaintiff claiming damages choses to promote the civil action in the criminal proceedings, either directly here, or after leaving the civil court, there should be three conditions to be met cumulatively for a person to be able to promote civil

[6] Law 287/2009 rearding the New Civil Code, republished in Official Gazette 505/2011, in force from 1 October 2011. The New Civil Code updated and consolidated through Law no. 138/2014 and Law no. 60/2012.

action before the court of criminal law; the first condition would be that the act should be stipulated by the criminal law, with regard to which the criminal investigation have been commenced *in personam* and, moreover, the criminal action against the defendant or against the defendants to have been set in, for the civil action to be joined to criminal proceedings; the second condition, the offense to have caused a material or moral injury those who exercise the civil action, with a causal link between the tort and the alleged damage claimed; third, this injury to be sure, determined or determinable and not repaired.

We see that these conditions are nothing but a transposition in civil-criminal domain from matters of delictual civil responsibility, if so to speak, because this civil action in the criminal proceedings such action is.

Who can be subjects of such civil action promoted in the criminal proceedings? Art. 19 para. (2) extolls the injured party, that suffered directly the damage produced by the offence or its successors if the injured party no longer exists at the time of the promotion of the civil action. The question that arises now is if through offence could have been caused the death of the injured and then civil action cannot be promoted (and in this case his successors follows him in rights) or the injured party died before promoting the civil action, not during the crime, but after.

Here the legislator does not make any distinction as in the civil code in that art. 1391, in the final part, and provides that the successors can promote the civil action. There is a different treatment, but justified by the nature of the criminal committed offence, between the successors in title of the plaintiff claiming damages and the responsible plaintiff party, who can further stand in the criminal court under the civil action after the death of the plaintiff claiming damages or the death of the responsible plaintiff party, if they announce the Criminal Court within two months from the date of death or from the generating event that they want to continue the process. But if we are discussing at the same time about the defendant's successors, they enjoy a completely different treatment, because from the moment the defendant dies – this is a question of letting the civil action unsolved in the criminal proceedings – and its successors are required to be brought into the civil trial to repair the damage.

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