CIVIL ACTION SETTLEMENT IN CRIMINAL PROCEEDINGS THE DANGER RELATED CRIMES

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Abstract

Article 1357 para. (1) Civil Code stipulates that "one that causes harm to another by an unlawful act committed with guilt is obliged to repair it". In this study, we propose to analyze whether and to what extent, a danger related crime can generate a prejudice, and if for committing such a crime, civil action may be exercised in criminal proceedings.

Keywords*: civil action, danger related crimes, criminal proceedings, moral damage, patrimonial damage.*

1. Introduction

Article 1357 para. (1) Civil Code stipulates that "one that causes harm to another by an unlawful act committed with guilt is obliged to repair it". The conditions are therefore tort: wrongful act, injury, causation between them and guilt. When the wrongful act committed is not only a civil offense but also a crime, the legislator created the possibility for the injured person to seek compensation for the damages encountered due to the criminal act subject matter of the criminal proceedings[1]. In this regard, Article 19 para. (1) Criminal Procedure Code shows that "civil action pursued in criminal proceedings is meant to hold accountable those responsible for tort in line with the civil law, for the damages caused by the act subject to criminal proceedings".

As it is rightly shown in the literature"the exercise of the two actions in one single process has advantages both for justice and for the persons concerned. Thus, justice means a saving of time and material resources when the two actions are performed in the same criminal case and settled by the same court, thereby avoiding the separate administration of relevant proof for the same offense/crime and the same perpetrator and avoidance of contradictions that could intervene in the decisions of two different courts. For the person aggrieved by the offense/crime it constitutes an easier and faster way to obtain compensation for the damages suffered, with reduced expenses. For the defendant, there is the possibility to concentrate its defense at the same time on both criminal and civil parts of the action, which reduces the costs that he would have to bear"[2].

2. The danger related crimes. Notion of.

Depending on the immediate consequences produced, crimes have been classified as regular crimes and crimes resulting from danger[3].

Danger related crimes are those offenses which are not implemented immediately through a concrete result, into a change in the surrounding reality, but the immediate result is a state of danger to the social value protected by the incrimination rule. In this regard, this type of crimes are for example traffic offenses, offenses of breach of the regulations on ammunition and weapons, offenses of forgery, breach of the measures on child custody, bigamy, incest, electoral related crimes, treason, etc. In these cases, the crime is consumed simply by taking action or inaction banned by the incrimination rule, not being necessary to also produce any concrete results.

Instead, in the case of regular crimes - result related, the immediate consequence is an actual result, and it is actually necessary to have some tangible changes in the surrounding reality. The regular result related crimes are: murder, manslaughter, interruption of birth, fetal injury, personal injury, fraud. In these cases, by simply committing the action or inaction that constitutes the material element of crime, is not sufficient for the existence of the crime itself to be considers as consumed, it is always necessary to produce a certain result.
In the majority opinion of the doctrine there is an overlap between the categorization of offenses in result related or danger related and in material crimes or formal crimes[4]. Such an overlay has been criticized, however, showing that "categorization of crimes as formal or material is made proportionally against the

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[1] I. Neagu, M. Damascin, *Tratat de Procedură Penală. Partea Generală,* București, Ed. Universul Juridic, 2014.

[2] G. Theodoru, *Tratat de Drept Procesual Penal*, București, Ed. Hamangiu, 2008, p. 114-115.

[3] F. Streteanu, D. Nițu, *Drept Penal. Partea Generală*, vol. I, Ed. Universul Juridic, București, 2014, p. 294-295, T. Dima, *Drept Penal. Partea Generală*, București, Ed. Hamangiu, 2014 p. 156-157, L. L. Lefterache, *Drept Penal. Partea Generală*, București, Ed. Hamangiu, 2016, p. 159.

[4] T. Dima, *op.cit.* p. 156-157, L. L. Lefterache, *op.cit*, , p. 159, C. Mitrache, Cr. Mitrache, *Drept Penal Român. Partea generală,* București, Ed. Universul Juridic, 2010, p. 130-131.

existence or absence of a physical object as a constituent element of the crime"[5].

Starting from this criterion of classification between formal crimes and material crimes, the author points out that there are many danger related crimes that have a material object and numerous regular crimes that do not have a material object. Such a distinction between danger related crimes and formal ones is not the subject matter of this work. In this study, we propose to analyze whether and to what extent, a danger related crime can generate a prejudice, and if for committing such a crime, civil action may be exercised in criminal proceedings.

3. Exercising civil action for danger related crimes. Jurisprudential highlights

In the guiding decision no. 1/1969 issued by the former Supreme Court show that crimes of danger are not causing harm through themselves and, as such, for such offenses, the trial court vested with the criminal proceedings is not competent to settle joint criminal and civil action. However, in our opinion, this rule should not be generalized, but analyzed reported to the issue with which was the subject matter of the reported guiding decision. Specifically, through that decision, the former Supreme Court has shown that when the person driving on the public highway a motor vehicle without a driving license, commits also other acts, through a committed or omitted action, causing material damage by degradation or destruction of property by negligence, and may be ordered by the criminal court to pay civil damages to repair the damage unless those facts, distinct from the offense of driving on public roads a vehicle without driving license, fall under other provisions of criminal law and the perpetrator was prosecuted for committing them.

Incidentally, five years later, in a decision of this case covering committing offenses of forgery and use of forgery, the Supreme Court stated that the fact that the existence of ,,crimes of forgery and use of forgery is not conditional on the occurrence of material injuries and does not exclude the possibility that, in fact, these are generating claims, either exclusively or involved in an antecedent causal complex and, as such, there is no denying the injured party the right to pursue civil action in criminal proceedings against their author, since - in this situation - a civil action has its source in the same material acts as the criminal proceedings and these material facts constitute crimes"[6].

The High Court of Cassation and Justice was also seized to decide on the path of appeals on such points of law, namely on the possibility of exercising civil action in connection with crimes of danger.

By decision of 2 June 2008, published in the Official Journal, Part I no. 230 of 08.04.2009, the High Court stated that – "the trial court vested with the criminal action in case of driving a motor vehicle on public roads by a person that doesn't have a driving license will not resolve also the civil action exercised by the owner of the damaged or destroyed vehicle during road offense". The decision showed in its justifications that "as long as the criminal court referral is made only for the offense of driving on public roads by a person not possessing a driving license, offense which by its nature is not generating injury, the party injured by the effects of other acts of the defendant committed on the same occasion, is not entitled to also proclaim itself as a civil party in the case and to join action for both civil and criminal liability. To consider otherwise would mean admitting to the possibility of exercising and joining any civil proceedings to the criminal proceedings, without deriving from it, which would be contrary to the principles governing the criminal process.

Indeed, it should be noted in this respect that the offense of driving a motor vehicle on public roads by a person without a driving license is not causing material damages by itself, because for such damages to occur, the driver would have to commit either through a committed or omitted action, at least one act to result in the damage. Therefore, in such a situation where the driver has committed another action, committed or omitted, generator of the damage, the claim cannot be accepted by the criminal court if that act that produced the damage is not incriminated under by criminal law.

In another appeal on points of law, the High Court of Cassation and Justice has shown that "the criminal court vested with the prosecution of offenses under article. 84 of Law no. 59/1934 on checks, as amended and supplemented, does not have competence to solve the civil action joint to the criminal action, as such its ruling rejected as inadmissible the civil action."

In support of decision no. 43/2008, published in the Official Journal, Part I no. 372 of 03.06.2009, the High Court showed that "essentially such crimes are: issuing a check without the authorization of the drawee; issuing a check without sufficient availability pulled, issuing a check with a false date, issuing a check which lacks an essential element or is issued in favor of the person issuing it. The aim of the incrimination of such facts is to primarily prevent the issuing of bad checks when the bank account does not have the required reserve for completing the operation to other ways that would harm the recipient. The offenses covered by Law no. 59/1934, amended and supplemented, called in the doctrine as formal, jeopardize the civil circuit in the broad sense. Their existence does not require the production of consequences to property because these protect the social relationships related to transactions with checks in order to ensure the credibility of these payment instruments, holding a particular role in trade/commercial relations. In case of committing such

[5] F. Streteanu, D. Nițu, *op.cit*, p. 294-295.

[6] Tribunalul Suprem, decision no. 1.527/1974, in V. Papadopol, M. Popovici, *Repertoriu alfabetic de practică judiciară în materie penală pe anii 1969-1975*, Editura Ştiinţifică şi Enciclopedică, București 1977, p. 26.

acts, the passive subject is the banking institution whose credibility has been compromised by the action of issuing a check without observance of the legal requirements, and not the beneficiary of the check that was issued in violation of the law.

As a result, the crimes stipulated under article 84 of Law no. 59/1934, as amended and supplemented, are crimes of danger and the purpose of their incrimination under the criminal law is to determine the correct issuing of checks and not to cover any damage. It is further noted that in the case of the crimes covered by the provisions of art. 84 of Law no. 59/1934, as amended and supplemented, the situation-premise is given by the existence of a legal report of a contractual nature, in which the check as a payment instrument represents a guarantee for the obligations of borrowers through commercial contracts concluded. Therefore, in case of committing such acts, the harm made to the creditor as injured party is determined by non-performance of the obligation assumed by the debtor-defendant in line with the concluded commercial contract and not by the subsequent issuing of the check in breach of criminal law.

It is natural, therefore, that in such cases, in order to cover the damages suffered, creditors have available only the separate civil action as means od redress, stemming from the contract and not a civil action based on tort law, in which joint civil and criminal liability can be encountered."

In practice there have been many controversies also with regards the possibility of exercising civil action in the criminal offenses of forgery.

Being endowed with a request for a dispensation of law matters, the High Court of Cassation and Justice dismissed as inadmissible the complaint by decision no. 16/2015, published in the Official Journal, Part I no. 490 of 07/03/2015.

In the reasoning of the judgment, the High Court of Cassation and Justice showed that "in the present case the subject of the referral is the aspect which falls within the scope of the rules on civil action having as subject matter the obligation to pay pecuniary and moral damages to the defendant prosecuted for the offense of forgery of private documents. Examining the conclusion brought before the High Court of Cassation and Justice, it was found that the court does not require the interpretation of legal provisions in the abstract, but to rule on the admissibility of the civil action exercised in a criminal lawsuit, jointly with the criminal law action. The method of settlement of a civil action exercised in criminal proceedings is the exclusive prerogative of the court seized with such an action.

As such, the question that can be address to the High court should only cover issues of interpretation of the law, not facts, the analysis of which being the exclusive prerogative of the respective court."

Having examined the case law it is found that the possibility of formulating civil action for crimes of forgery received different interpretations. For example, one court "re-analyzing the civil claims brought by the civil part, in accordance with the first court stated that the crime of forgery in general and the crime of forging documents under private signature in particular are danger related crimes and not outcome/ result related ones. In other words, if the case of such crimes, the crime is considered as consumed when there is a danger to the protected social relations and is not connected with the production of a detriment.

Therefore, these crimes are not by themselves causing material damage but favoring their cause. (...) It should be noted that the crime of forgery of private documents is not causing material damage by itself, whereas for their production the defendant was required to commit at least a commissive or omissive act for which to be prosecuted and sent to court and that would have had the damage as an outcome.

For these reasons, we will not accept any ground of appeal from the civil party requesting an order binding the defendant to pay material damages, because there is no causal link between the act of the defendant (which is a danger related crime) and the alleged pecuniary damage sustained by the civil part, consisting of expenses and loss of profit. Concerning moral damages, the judge wrongly considered that through the criminal act moral damage was caused to the civil party, due to stress and the need to withdraw from the authorized accounting expert profession. The crime of forging documents under private signature is a crime of danger and the aim of its incrimination as such is to defend those social relations whose training and normal development depend on public trust given to private documents and not that of coverage of any material or moral damage. Of course it would have been a different assumption if the defendant would have been prosecuted and sentenced for the offense of forgery of private documents, as a crime of danger, along with other crimes with an end result (eg. Fraud), case in which the civil action may be joint with the criminal action.

But in this case the criminal proceedings have as subject matter the crime of forgery of private documents so that civil action may not be made jointly with the criminal action"[7].

To the contrary, for the moral damages, another court showed that "with regards moral damages (40,000 euro - f. 19 folder background), from reading the constitution of the civil party as such, it follows that these claims are related, inter alia, to the use of the forged document in the civil lawsuit, act which falls into content of the offense committed by the accused. In the Court's view, the use of the forged document is capable of producing to the opposing side frustration, anguish, this part being aware that there is a risk to lose the lawsuit, through the use of illegal methods by the other party. Therefore, use of forged document in order to produce legal consequences (whether these

[7] Curtea de Apel Târgu Mureș, decision no. 36/A/28.01.2016, unpublished.

consequences occurred or not) is likely to produce a moral injury, so claims covering damages are admissible. Regarding their amount, the Court considers that the sum of 2,000 euros is a fair compensation, given (mostly) the relatively large time (several years) in which the civil parties were deprived of fair proceedings (civil) due to the crime committed by the defendant."[8].

With regard to the facts in the two cases, in the first case the defendant was prosecuted because she used the stamp of an expert accountant to forge several balance sheets of several companies, while in the second case, the defendant falsified a document which afterwards used in a civil lawsuit.

The solutions are not uniform nor as regards the possibility of pursuing civil action for other danger related crimes.

For example, in one case of the offense of failure to comply with measures regarding child custody, the Court findings showed that "first court concluded erroneously that in line with the nature of the case before hand, it is not justified and it is not possible for one to establish itself as a civil party for the granting of material and moral damages, conclusion that is manifestly erroneous in relation to the actual data of the case. Thus, it is observed that the injured party, also civil party in the case, made dozens of failed trips at the residence of the defendant to perform parental care of the child, which generated obvious expenditure evidenced by relevant proof and whose repayment is required, seeing the damage thus created is in direct causal link with the act of the defendant.

At the same time, preventing the civil party for a long time to get in touch with his son, created a sharpened mental suffering, considering that the second son of only 4 years of age cannot meet with his brother G. At the same time the negative attitude manifested by the defendant also affected the civil party's reputation in society - against which different claims not to reflect reality were expressed, which were also capable of deepening the state of distress and negative moral due to effective inability to enforce the provisions contained in the definitive judgment, fulfillment of which was supported by local authorities with responsibilities in child protection and by the police, but all these actions failed. In those circumstances, the Court considers that admission of the civil action was necessary and admissible and ordered the defendant under Art. 19 reported to Art. 397 paragraph 1 of the Criminal Procedure Code corroborated with Art. 998 Civil Code prior, to pay material damages in the amount of 6,600 lei representing the transport for the 17 failed trips on the route B-M, in line with the documents attached as proof to the request for establishment of the civil and moral damages assessed by the Court and the amount of 15,000 lei to cover non patrimonial related damages, as such admitting the civil party's appeal under Art. 421 para 1 item 2nd letter a Criminal Procedure Code"[9].

With regards the crime of perjury, in practice it has been shown that "the crime of perjury is a crime of danger, and by incriminating such action, the legislator is aiming at protecting the ordinary course of justice, so it is not possible to formulate a civil action. The crime of perjury is not liable to cause damage seeing the legislator doesn't care if it led or not, specifically, to an unjust solution, namely if the state of danger materialized or not"[10].

In another case, however, with regards the offense of misleading the judicial bodies (slanderous denunciation according to the old Penal Code) to the person against whom the denunciation was filed and against who the concocted evidence has been used, there was admitted as moral damages payment of the sum of 100 000 euro (the person concerned had been in custody unlawfully for more than one year as a result of that denunciation)[11].

On appeal, the amount of punitive damages were reduced to 30 000 euro. The court of judicial control showed that "on the civil side of the case, the appellate court does not deny the serious consequences produced by committing the acts of the defendant B, the main impact occurred in the victim's life by deprivation of liberty on the basis of false evidence, but it believes that the damages awarded should not be disproportionate and would constitute a means of unjust enrichment of the civil party. Therefore, given the amounts set by the ECHR in finding a violation of the right to liberty and security, by way of analogy (in this case is not about the responsibility of the state for this violation since at the time of arrest against the victim there were serious indications such as to convince an objective observer that he may have committed the acts, based on the evidence the defendant B products, breach is caused due to a particular action), the Court considers that the amount of 30,000 euros is sufficient to cover moral damage suffered by the civil party. In determining the amount, the appellate court took into account the principle of full compensation for the damage caused, principle that basically excludes consideration of the material situation of the defendant as a criterion"[12].

4. Conclusions

As for us, we believe that the possibility of pursuing civil action for the cases of danger related crimes must be analyzed on a case by case basis. In this regard, the court must examine whether the offense for

[8] Curtea de Apel Timișoara, decision no. 607/A/8.06.2015, unpublished.
[9] Curtea de Apel Ploiești, decision no. 481/7.05.2014, unpublished.
[10] Tribunalul Bucuești, decision no. 548/A,/9.05.2005 in *Tribunalul București. Culegere de practică judiciară în materie penală 2005-2006*, București, Ed. Wolters Kuver, 2006, p. 422-427.
[11] Tribunalul București, sentence no. 673/03.08.2012, unpublished.
[12] Curtea de Apel București, decision no. 402/A/18.12.2012, unpublished.

which the defendant is being prosecuted and trialed (even if it is a danger related crime) produced, in particular, any patrimonial damage to any other person. In the event that the damage had really occurred, it should be considered whether the injured person has any other possible way to recover the damage, except of course the formulation of a separate civil court action.

For example, if a person falsifies a document and uses it to proceed with a judicial action, the defendant may recover the expenses incurred in carrying out the lawsuit in a dispute settled by a civil court, according to Art. 451- 453 Civil Procedure Code.

If an innocent person is prosecuted following a complaint made in bad faith by the injured party, he/she will be able to recover expenses incurred from the perpetrator that mislead the judicial organs, in line with Art. 275 Para.5 Criminal Procedure Code.

If the person against whom the complaint was made is not prosecuted, it is natural for him/ her to be able to recover the expenses incurred to prove his innocence in the criminal case in which the perpetrator prosecuted for misleading the judicial bodies has the capacity of defendant. The same reasoning should be applied to the person injured by the offense of perjury.

Also we have to bear in mind that making a false complaint or any deceptive statements made by a witness can often affect the prestige and reputation of a person. In these circumstances we find no reason why those whose interests were affected could no seek justice through a civil action. Even if the offenses of perjury or misleading the judicial bodies are danger related crimes and belong to the category of crimes against justice, it must be taken into account that the unanimous doctrine considers that the person harmed as a result of false testimony or against whom the complaint or denunciation has been made has the capacity of secondary passive subject.[13] In our opinion these persons may exercise the civil action in criminal proceedings to the full extent if they prove the existence of actual damage.

We consider pertinent the arguments of the High Court of Cassation and Justice on the inability of pursuing a civil action (as determined in appeals on points of law mentioned above) in such cases as the ones connected to traffic offenses or offenses under the "Law of the check" provisions, but this cannot be extended in respect of every danger related crime. It remains the task of the Court to review on a case by case basis if the danger related crime subject matter of that judgment produced any damage and whether the claims of the civil party are founded.

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[13] V. Dobrinoiu, N. Neagu, *Drept Penal. Partea specială. Teorie şi practică judiciară. Conform Noului Cod Penal,* București, Ed. Universul Juridic, București, 2011, p. 365-366 și 341, M. Udroiu, *Drept Penal. Partea Specială,* București, Ed. C.H. Beck, 2016, p. 363 și 339.