

THE JUDICIAL TREATMENTN APPLICABLE TO INFRINGEMENT OF THE PROVISIONS ON SETTING AS CIVIL PART IN THE CRIMINAL TRIAL

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Abstract

Admisibilitatea echivalează cu permisivitatea din partea legii. Un anumit act poate fi interzis de legea ce guvernează procedura în care este efectuat, însă același demers judiciar poate fi permis într-o altă materie, de o altă lege. Constituirea de parte civilă îndeplinită legal potrivit legii vechi, își păstrează valabilitatea și sub imperiul legii noi, cea din urmă aplicându-se doar cu privire la modalitatea de soluționare a acțiunii civile.

The admissibility is the equivalent of the permissiveness of the law. A particular act may be prohibited by the law governing the procedure inside which it is performed, but the same approach can be allowed in other judicial matters, by another law. The legal constitution of civil party fulfilled under the previous law, remains valid under the new law, the latter one being applicable only on how to solve the civil action.

Keywords: inadmissibility, civil action, civil party, transitional regulations

Test case: Following a traffic accident, caused solely by the defendant on September 22, 2011, the injured party suffered injuries, which required 150-160 days of medical care. In legal terms, this is a civil part in the criminal trial, according to the legal provisions in force at that moment, namely the provisions of article 15, line 1 and 2 of the Code of Criminal Procedure from 1968¹, without indicating the amount of the claims, grounds of evidence on which they are based.

By the indictment of October 26, 2015, the defendant was prosecuted for bodily injury by negligence.

At the first hearing, the injured person has been suggested that he should also specify the civil action, obligation that was not carried out.

By the Criminal Verdict 273 of March 14, 2016 pronounced by the Court of Law of District 3, it was rejected as inadmissible the civil action exercised by the civil party inconsistent with the defendant and the civilly responsible party, considering that "...failure to comply with any of the conditions cumulatively set in line 1 and 2 of the article 20 of CCP entails, according to the provisions of article 20 line 4 CCP, the mandatory penalty of inadmissibility of civil action in a criminal trial, the civil party having the option to bring it in a civil court.", therefore "...the civil action in a criminal trial constitutes a procedural benefit granted to the victim, in order to harness all elements gathered by the prosecutor in the prosecution, as well as the entire procedural framework of the criminal proceedings, in order to meet all the civil, patrimonial or moral interests affected by committing the offense

and, therefore, should have been exercised in the conditions imposed by the legislator..."

Vested with the civil party appeal against this verdict, the superior court considered that "...assuming that constitutions as civil part does not meet the conditions provided by law, the situation is equal to the one in which the injured party has not been civil part in the criminal trial, therefore it does not justify rejecting the civil action as inadmissible (solution which involves constituting as civil part in the criminal procedural law conditions, to be in the presence of a civil action adjoining the criminal one)."

Moreover, the judicial control has further mentioned that "...in question, indeed, the constitution of civil part of the injured party has taken place on November 21, 2011, therefore according to the old law and, hence, remains valid, over the provisions of article 4 line 1 of the Law no. 255/2013."

Accordingly, the appeal of the civil party it has been partially admitted and sent the case back for another trial to the first instance court, only with regard to its civil side².

In addition to the relatively innovative solution to send back the case for another trial by strictly taking into consideration these aspects³, but which is not the subject of the present study, I consider that the case raises a series of discussions regarding the judicial treatment and the procedural penalties applicable to the civil action performed in the criminal trial.

In the criminal procedure, the concept of admissibility is equivalent to the permissiveness from

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¹ The injured person can be a civil party against the defendant and the civil liable party. (2) Constituting as civil party can be done during the prosecution, as well as in court until reading the notification act.

² Bucharest Court of Appeal, IInd Criminal Division, D.P. 918/June 1st, 2016, file no. 32105/301/2015.

³ As it involves a direct approach of the more conventional standard stipulated by the provisions of article 2 line 1 of the Additional Protocols 7 to the E.D.O Convention. For further explanations, please check I.D. Samoilă- *Motivations of the judicial solutions- guarantee of the rights of the defense*, in European Legal Studies and Research (book dedicated to the international conference of PhD students of Law), Edit. Universul Juridic, 2016, pages 431-435.

the law in order to achieve a particular judiciary approach (to perform an act or exercise a right).

Inadmissibility is therefore a procedural penalty, which burdens a right that is prohibited by the law. This impermissiveness of the law occurs, though, in two ways:

- Tacitly, when the law does not provide the existence of the right⁴.
- Expressly, when the law prohibits the exercise of the right⁵ or its depletion⁶.

In other words, if the law does not grant a procedural vocation to a certain participant at the criminal, to achieve a substantial right or judicial interest, the judicial instrument used by the participant in question is *ab initio* invalid, by legislative will. However, declaring this invalidity is the exclusive privilege of the judicial authorities, which basically runs an *a posteriori* control over the document drawn up in such conditions.

It follows therefor the *latent* character of inadmissibility, which becomes operative on the act, only after observing it.

Therefore, whether it is a tactically or expressly prohibited right, the procedural law is the one that determines its inability.

Drawing a parallel, more or less offset, the admissibility of criminal procedural law is similar to typicality⁷ of the criminal law, therefore it's the lack of correspondence between the conducted approach and the procedural rule that governs it.

It is noteworthy the fact that, the inadmissibility may be a *general* one, which affects a judicial approach regardless of the subject it covers, as well as *particular*, meaning that it prohibits a manifestation in a certain subject.

In other words, a certain act may be prohibited by the law regulating the procedure that is performed, but the same judicial approach is allowed in another subject, by another law which regulates it. For example, according to the dispositions of article 20 line 7 of CCP, the civil action cannot be performed in the criminal case, the person who was informed on a conventional way the entitlement to compensation, but it is perfectly admissible its performance thereof under the conditions stipulated in the provisions of article 1349 et seq CCV.

According to the doctrinal views, "...the inadmissibility concerns only the acts of the parties of the trials and not the judicial bodies, because the latter do not make their jurisdiction comply with the limits set by the law, and if they are exceeded, the penalty of nullity may occur."⁸ I consider this paradigm as being inaccurate, at least not in the context of the current regulations, because the inadmissibility may affect also the judicial bodies' undertakings⁹.

The civil action is the means provided by law to reach, on a judicial way, to undamaging the person who suffered an injury as a result of an illegal act¹⁰.

The earlier regulation of the institution, was minimal concerning the manifestation of will on the implementation hereof, the provisions of article 15 line 1 and 2 of CCV regulating only the term until when the constitution can be regarded as civil, and not with other formal requirements thereof¹¹.

Broadly speaking, the institution keeps its previous rules already established by the previous regulation, the current enactment coming with a surplus of regulations meant to align to a new legislative concept, strewn with additional elements of adversity and conventionality.

Such a regulatory surplus is also the one stipulated by the provisions of article 20 line 2 of CCP, which constitutes a series of additional formal conditions (indicating the *nature and the extent of the claims, reasons and evidence on which it is based*), under the mechanism of constituting as civil part, conditions once unfulfilled, draw the penalty treatment provided by the dispositions of line 4 of the same article.

I consider that because of these consequences that arise from failure to comply with this rule, presents great importance to establish the legal nature of the incident penalty, so as to also be determined the legal status applicable to its occurrence.

Thus, I consider relevant to determine if the phrase "*can no longer constitute civil part in a criminal trial*", is equivalent or not to an express establishment of inadmissibility.

As shown in the example above, it was specified by the fund court that not mentioning the civil action by the civil, in terms of the amount of the requested

⁴ For example, even though it is a common law and more frequently encountered, there is no legal provision which allows scheduling a certain hour to call the case. Even though there are normative sources in this regard (please refer to the provisions of article 121 line 4 of Annex to HCSM 1375/2015, regarding the approval of the Court's Internal Regulations, published in the Official Gazette 970/ Dec. 28, 2015), but given their infralegislative nature, procedural penalties cannot be applied, in case of violation of the provisions set there.

⁵ For example, according to the provisions of article 409 line 1 letter c) with reference to article 87 line 2 of CCP, the civilly responsible party cannot make a call on the criminal side of the case, only insofar as the solution from this side has influenced the civil side's solution.

⁶ For example, according to the provisions of article 213 line 6¹ of CCP, the rights and freedom judge's pledge with which a decision is made against the prosecutor's order through which the judicial control is taken, is final. Accordingly, the appeal against such verdict becomes inadmissible, the right to a superior jurisdiction being depleted.

⁷ Correspondance between the concrete and abstract model features provided by the incrimination rule - F. Streteanu, D. Nițu - Criminal Law. General Part, University course, vol. I, Ed. Universul Juridic, 2014, pg. 254.

⁸ I. Neagu - Criminal Procedural Law. General Part, Treaty, Ed. Global Lex, București, 2004, pg. 469.

⁹ For example, the prosecutor's appeal against the rights and freedoms judge's conclusion in which, pursuant to the provisions of article 213, line 6 of CCP, he revokes the judiciary control ordered by the prosecutor, must be rejected as inadmissible, as per the provisions of article 425¹ line 7 point 1 letter a) of CCP.

¹⁰ G. Antoniu, C. Bulai - Dictionary of Criminal Law and Criminal Procedure, Ed. Hamangiu, 2011, pg. 29.

¹¹ The fact that, unlike the previous regulation, it has been stipulated the possibility of constituting as civil part "*in writing or oral*", does not constitute an express dedication of the alterniteveness manifestation form of will.

damages, which represents this and the evidence it intends to use, thereby attracts the inadmissibility of the action carried out this way. At the same time though, the inadmissibility implies the absence of the right or its depletion.

Or, under the given assumption, the injured person is in full vocation to get indemnities for the injuries which have been caused, therefore one cannot speak of an absence of the right. Furthermore, this right has not been depleted in another form of prescription by the law, from those stipulated by the provisions of 22-27 CCP, namely trading, mediation, civil court settlement and so on.

Consequently, the approach of the civil party is allowed by the law, because there is correspondence between this and its prescriptive rules, included in the provisions of article 19 CCP.

This correspondence loses though its validity of the act which is burdened by further formal conditions, such as those provided by the provisions of article 20 line 2 of CCP, whereas the provisions of article 19 of CCP governs exclusively the possibility of exercising the civil actions, *in the criminal trial*.

Therefore, the final thesis becomes reasonable of the provisions of article 20 line 4 of CCP, in the sense that failure to comply with the formal conditions of constituting the civil part, invalidates itself the whole procedure exercised *in the criminal proceedings*, but not in a civil one.

Accordingly, in this hypothesis, we can talk about a *particular inadmissibility* of the civil action, but not a general one, the fund court's reasoning being correct regarding to this aspect.

It is therefore wrong the argument of the appeal court according to which the civil action admissibility implies the initial existence of this actions (thus failure to comply with the conditions stipulated in the provisions of article 20 line 2 CCP is equivalent to the absence of this action), because it induces the idea of interference of the most severe criminal procedural penalties, namely what qualifies the doctrine as being *absent*.

Besides the fact that this penalty does not benefit from a legislative regulation, the absence involves an actual reality and not a legal one¹², producing no legal effect and no need to be taken into consideration. In the present case, not complying with the conditions stipulated in article 20 line 2 of CCP, produce a series of legal consequences, namely the impossibility of joining the civil action to the criminal one, or opening the way to perform the action in the civil court. Therefore, one cannot speak about the incident of this penalty.

Another penalty, which can be discussed as being incident, would be incapacity, but the assumption established by provisions of article 268 line 1 of CCP and namely not complying with the legal term prescribed to exercise the right, is not also satisfied.

This is because the civil party expressed its option within the legal term stipulated by article 20 line 1 of CCP.

Moreover, I believe that failure to comply with the dispositions of article 20 line 2 of CCP, cannot draw the nullity penalty, with all its legal status, because the nullity's essence is the possibility to remake the act which was declared invalid, this time lawfully, according to the dispositions of article 280 line 3 of CCP. Compared to the present case, this would mean therefore the possibility to remake on a civil way, according with the legal provisions, and taking them into account in the criminal proceedings, but this possibility *de plano* excluded by the legislator, which provides the unique possibility to appeal to civil court.

On the other hand, it is correct the second level of reasoning at the court of appeal, meaning that the conditions of becoming a civil party are met according to the previous regulations, its effects still being valid according to the new law, under the dispositions of article 4, line 1 of the Law no. 255/2013.

Proceeding with a virtual dismantling of the civil action next to the criminal one, I believe that this progressively follows three major components: constituting as civil party, the actual implementation of the civil action and its resolution.

According to article 3 of the Law no. 255/2013, the new procedural regulation applies to all criminal cases that have a pending status at the judicial bodies, except the cases as stipulated by this law. Such an exception is the one referred to in the article 4 line 1, according to which, the procedure acts legally fulfilled before the Code of Criminal Procedure entered in force, shall remain valid, with the exceptions provided by this law.

Because in a civil action, the transitional rules¹³ comprised in the Law no. 255/2013 does not stipulate such exceptions, I believe that the constitution as civil part is legally fulfilled according to the old law, keeps its validity under the new law, the latter applying only when on the way to solve the action. This is because the new law is applied only on the civil action steps that were not yet covered until the moment of its entry into force, the reflection of the principle *tempus regit actum*.

Compared to this case study, since establishment as a civil party has already taken place under the rule of the old law, the new law will govern only two of the remaining steps, namely the its implementation and the resolution of the civil action.

Therefore with this regard, the court of appeal's resolution for which the admissibility of the civil action was found, appears as being the correct one.

Conclusions

Compared to the arguments above, I consider that the principle of *tempus regit actum* received express

¹² A. Crișu- Criminal procedural law, ediția a 3-a, Ed. Hamangiu, 2011, pg. 370.

¹³ Article 1-24 and 103-109 of Law no. 255/2013.

provisions in Law no. 255/2013, these behave as special provisions derogating from the general principle under *specialia generalibus derogant*. As such, these rules have priority in applying in relation to those contained in the Code of Criminal Procedure concerning acts initiated or conducted under the rule of the old law, but continue to take effect and under the influence of the new. Thus, the legal establishment as a civil party in the criminal proceedings conducted prior to 2.1.2014 remains valid after this date, but will be specified and complemented by the mentions expressly

provided by art. 20 para. 2 CPP, within the term provided by art. 20 para. 1 CPP, under penalty of its inadmissibility exercise criminal proceedings.

However, if these gaps are not filled, civil action may be exercised only in civil court without civil party applicants to be enforceable against *res judicata* judgment or criminal inadmissibility civil action stated in the frame procedure as according disappear. art. 28 para. 1 CPP, *res judicata* judgment criminal civil court reflects only the existence of the crime and the person who committed it.

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