

The civil action as part of the criminal procedure

Abstract

This Phd Thesis and named “**The civil action as part of the criminal procedure**” constitutes a scientific analysis of the regulations in the topic of civil action, civil action that is part of the civil right but in the light of the fact, that, in many cases, once an infraction is committed, the result might include significant moral and/or material losses to a person. The purpose of this paper is to highlight the evolution of this very important branch of the procedure in criminal law, from a practical point of view, as a result of the decision factors in the criminal law as of the civil part within a criminal case.

This subject is a current because during 2013 a new Code of Civil Procedure was adopted; and in the previous year the New Civil Code was adopted, with legislative modifications that provides either maintaining previous directives (e.g. both, the New and the Old Civil code allow that a person who suffered prejudice as a result of an infraction, to be able to close a transactions with the persons responsible for causing the prejudice or civil responsible - these directives can be found at art. 2.268 para. 2 in the New Civil Code and art 1707 in the Old Civil Code) or the creation of new directives that will ease the work of the Court by defining, more concretely, certain situations that can result from a committed infraction , as in the case of providing compensation for the loss of work capacity of a major or minor that was already employed or who did not have professional training or was in process of completing training (art. 1385 and 1rt 1387 of the New Civil Code).

The up to date character of this PhD thesis is also result of the large amount of practical cases exemplified in here and that are being applied by the Criminal Court and, at the same time, by altering certain pre-conceived impressions after the leave given to a number of Appeals made in the interest of Law.

The scientific analysis of this theme it is a topic specific to the General Theory of Law, a topic that belongs to the civil law side; this thesis is comprised of six chapters, in which the civil action is analyzed as part of the criminal procedure.

The first chapter, called “ **The civil action as part of the criminal procedure – introduction**” it is made of two sections “**Introductions**” and “**Making justice in a subjective way**”; it outlines a general framework for the concept of establishing a civil action as part of a criminal procedure, by presenting not only the rules that form the legal basis to exercise this action, the object of the action and the parties that have the right to be part of the action. At the same time, this thesis will illustrate the possibility for both parties, the plaintiff and the defendant or the party that is responsible in a civilly to defend against the accusations; the defense, in the case of a private person, for which the civil action was started by default, by bringing extra proof or by raising a new request in the civil action, proofs and requests not presented by the criminal law prosecutor that were bound to exercise the default civil action or the possibility given to the defendant to prepare his defense by which to prove either the absence of a prejudice, the real value of a prejudice or the action as being groundless because the act was not committed by himself or any other situations considered by law that absolve the defendant by criminal responsibility and, implicitly, by civil responsibility as part of the criminal process.

In the second chapter called “**Categories of actions that can be exercised in criminal proceedings**” is also comprised of two sections “Criminal proceedings” and “Civil proceedings”; sections that, when considered side by side,

encompass the action in Law, namely the legal means through which the conflict in law it is brought to legal authority for resolution; the legal authority holds the coercive legal power to make justice and to establish the truth in a criminal case.

To be able to exercise the civil action as part of the criminal proceedings, a number of particularities should be considered, making it mandatory to either present the civil action in front of the criminal court, or, the possibility of constituting as civil part during the criminal investigation, either the possibility of becoming a civil part in a criminal proceeding before the establishment of the criminal case without the consent of the defendant, or, after that moment, in front of the first appearance in criminal court; becoming a civil part in a criminal action it can be done with the approval of the defendant, or, in the case of people under legal tutelage because of total or partial incapacity, the civil action can be exercised by default, without making necessary becoming a civil party prior to these moments. Therefore, the starting point for the civil action, which is dependent, as explained above, of the certain moments in time based on the people that suffered prejudice, it is the infraction to be done, the infraction being the only basis for the criminal responsibility.

The third chapter, called "Terms of exercising the civil proceeding in a criminal lawsuit", is made of seven sections that together make a description of the five necessary conditions to exercise a more detailed description of a person's guilt, a person who caused a prejudice ; the guilt is considered from a criminal law perspective but also from a civil law perspective.

Also, to be able to talk about civil responsibility, a prejudice must exist and to know the prejudice, I made a number of classifications, at national and international levels, especially for the French doctrine and jurisprudence; these classifications establish the different types of prejudices that are the result of infractions. At the same time, the restoration of the prejudice in criminal law it is

also in accordance with the most recent regulations of the Civil Law; these regulations, based on Article 1357 of the New Civil Code (2012), provide, as in articles 998, 999 from the old Civil Code, the mandatory aspect of the given prejudice and also of the lost opportunity, also known as “*damnum emergens lucrum cessans*”.

At the same time, in this chapter I illustrated a number of comparisons about the possibility for providing compensation for future prejudice in accordance with the eventuality of the civil prejudice; I exemplified through the situation where we discuss the prejudice resulted from the diminishing or total loss of the capacity to work; this prejudice it is recovered by a periodic monetary support given to the victim until full recovery; this version is approved also by the regulations contained in the New Civil code and the situation where the ultimate prejudice can not be established (e.g. the owner of a race horse who can win a derby because the animal was injured through an illicit fact and can not compete.)

Chapter number four is called “**The Elements of Civil Action**” is comprised of three sections labeled: “**The Object of Civil Action**”, “**Enforcing the recovery of the Prejudice**” and “**Ways and means of mending moral damages**”; it consists of an analysis of repairing the prejudice, repair that consists of either the removal or the compensation of the negative effects of the illicit fact so that the finality is the restoration of the previous situation “*restitutio in integrum*”, so that by repairing the prejudice the scope of the civil action is complete, as how the New Civil Code provides that “any prejudice (material or moral or resulted from bodily harm, by the infringement of sexual liberties, etc).

also, in section II, I made an analysis of the defamation cases published in the Press, with significant moral consequences for the victim; in our judicial practice it is considered that by bringing a journalist in front of the court, it is not a violation of the liberty of the press, because this liberty should be understood as a free manifestation, by expressing any opinion, by exposing certain facts and circumstances, but this happening only within the boundaries of law.

At the same time, in this chapter I also analyze the issue of mending moral harms caused as a result of erroneously diminished rights when considered as a national security threat and the compensation given in the case of wrongful convictions for terrorism; this analysis proves its value when regarded through the view of new social dangers.

In this chapter IV, in the third section, I listed a number of normative acts that regulate the award of compensation for moral prejudice and also the modality of mending such prejudice when applying to a private person (e.g the Decree no. 118/1990 about certain rights to be given to people persecuted by the dictatorial regime established in 1945 and to the people that were deported abroad or were considered prisoners.

Chapter number V is called **“Exercising a civil action as part of a criminal procedure”** is made of ten sections that describe and analyze the condition necessary to exercise a civil action, a juridical capacity of the person, the relation between the civil action and criminal action, the resolve of a civil action as part of the criminal proceeding or the authority of a criminal order versus a civil order.

Any action in justice must be useful, therefore must address a material and/or moral interest. In other words, it must be based on an stake “pas d’interet, pas d’action”; the court, in the French legal doctrine, it is not asked for theoretical consultations or to deliberate about matters academically; even though sometimes

the interest signifies a profit or an material or moral advantage, it should not be confused with the prejudice.

Also, in this chapter, I present solutions that should be adopted by the criminal court in relation to the civil action exercised as part of the criminal proceedings and the situations in which the criminal court is bound to resolve the civil action by default, as it is in the case of total or partial dismissal of a certificate, or re-establishing the previous state, no matter what if the action was started by a person with full mental capacity or a person with limited or without mental capacity.

Another new aspect of my analysis that can be found in this chapter is about the authority of the criminal court in relation to a civil court. As per the Criminal Code, the final ruling of the criminal court has “res judicata” authority in a civil court that considers the civil action about the existence of the actions, of the person that committed the action and the person’s guilt. The New Civil Code brings regulations and changes of essence as of the legal authority of the ruling in the criminal court in relation to the civil court proceedings. We can say that the New Civil Code adopted in 2012 diminishes the authority of the Criminal Court by providing that the “civil court is not bound by the ruling of the criminal court nor by the final orders as the expunging or ceasing of the criminal case” – as per art. 10 of the Criminal Code. Our opinion is one contrary to the new regulation because this regulation seems to credit the criminal court only in the case of sentencing; it creates a discriminatory category as of the authority of a criminal court decision since it states that the criminal ruling is res judicata t only when a sentence was given.

Chapter VI called **“Parties to a civil action in criminal proceedings”** is the last chapter of this thesis and it is made of four Sections **“Parties to a civil action”**, **“ Civil Parties”**, **“The passive parties of the civil action and the**

parties' right, in the criminal proceedings, to benefit from the help of institutions specially created to defend their interests – Ombudsman institution”; in this chapter I present the people that can exercise the civil action or the parties entitled to exercise this action and the conditions that have to be met by the parties in order to exercise the civil action as part of criminal proceedings; such as the attribute of the person (active or passive party in the context of civil action part of criminal proceedings); the moment until they can become civil parts, the way of becoming a civil part and the duties of such parties.

Also, in this chapter, I analyzed the rights of the parties to use certain means, institutions and methods to promote their cause; these rights are part of the rights of the defendant and the plaintiff and can be found in art 6 C.E.D.O; art.6 guarantees the rights of a person to have access to equitable justice. This article states, among other things, that the person accused of an infraction should be given “the time and means to prepare his defense”.

Also, in this chapter a general presentation is made but also an exposure of practical situations when the Ombudsman Institution, which is one of the institutions meant to protect the people's interests at a national level, or the Ombudsman Institution at European level finds its applicability by intervening in the civil aspect of the criminal process applied to all parties. The necessity of such Ombudsman Institution is given by the existence of the state which assumes the first rank progress being the unfolding of a careful control of the ways in which the state, through his institutions, exercises its powers given by the law system and the existence of a regulation system as part of the state, resulting in an important role and a significant impact also in the case of the “Ombudsman's Institution” in the area of criminal law, and, implicitly, in the area of the civil side of the law within a criminal law case.