THE BENEFITS OF A SPECIAL CRIMINAL PROCEEDINGS *IN ABSENTIA*

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Abstract:

A criticism of the national legislator's decision not to introduce a shortened hearing as a special criminal procedure in absentia, which would exclude the Preliminary Chamber and would leave the civil action unsolved. In our opinion, such a procedure would definitely contribute to the efficiency of the judiciary system by significantly reducing the duration of trials, seeing that the evidence of the case would not be administrated in the absence of the accused and, as a consequence, the witnesses and the victim would not be repeatedly subjected to the stress of the hearings. Moreover, not solving the civil action would be a measure of protecting the interests of the civil party, seeing how a simple request of the defendant would suffice to invalidate the court's decision given in absentia, and with it, the ruling on the civil claims of the case.

Keywords: *special criminal procedure, trial in absence, in absentia, abbreviated procedure*

1. Context.

The perpetration of an offense gives rise to the *exercise* of criminal proceedings, and in the case of offenses resulting in damages, the criminal proceedings can be joined by the civil action. The relation between the public and the civil (private) action has seen several systems, the Romanian legislator preferring as early as 1864, *the hybrid system*, namely the system allowing the two actions to be exercised jointly within a single criminal trial[1].

Therefore, within our legal system, the party injured by the perpetration of a deed stipulated by the criminal law is entitled to choose between seizing the civil court and joining the civil action to the criminal proceedings exercised concerning that unlawful deed.

I find that the reason for joining the two actions is twofold. Thus, first of all, regard must be taken to the more favourable terms under which the civil action is settled, in this case the evidence is the same for the two actions and it can even be ordered by the court *ex oficio* or at the prosecutor's application, the proceedings unfold with greater celerity etc. At the same time, it must not be neglected the fact that the direct opponent of the civil party, the defendant, might be interested in paying the civil claims in order to benefit from this conduct in the criminal aspects of the trial by nearing some mitigating circumstances stipulated by the criminal law, a resort unavailable in the hypothesis of settling the civil action by a civil court.

From another point of view, I believe that the state might have a real interest for the civil party to bring the civil action in front of the criminal court, given that in this context he/she might submit evidence unknown to the judicial bodies which might serve for the correct settlement of the criminal aspects, especially as far as the individualisation of the penalty is concerned.

1.1. Introducing the civil action in the criminal proceedings and the options of the injured party.

According to the criminal procedural law, the civil action seeks to establish the civil liability in tort of the persons responsible for the damage produced by the perpetration of the deed subject to the criminal action. To this end, the injured party must express his/her wish to bring the civil action in the criminal proceedings, a step which implies becoming a civil party; this indication of will can be made at any time throughout the criminal trial but no later than the commencement of the judicial inquiry.

Note that the injured party is entitled to choose between becoming a civil party in the criminal trial, thus joining the individual civil action to the criminal action exercised by the prosecutor, or seizing directly the civil court, one choice excluding as a matter of principle, the other *(electa una via non datur recursus ad alteram)*. Thus, in case the injured party has become a civil party within the criminal trial, he/she can seize the civil court only if the criminal court has not settled the civil action [article 27 paragraph (2) of the Criminal Procedure Code], if the criminal trial has been suspended [article 27 paragraph (3) of the Criminal Procedure Code] or if the damage has not been fully repaired [article 27 paragraph (5) of the Criminal Procedure Code] or if the damage was generated or discovered after becoming a civil party [article 27 paragraph (6) of the Criminal Procedure Code].

It follows that the injured party who chose to bring the civil action in front of the criminal court will not be able to leave this court regardless of the fact that he/she finds useless the settlement of the private action by the criminal court.

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[1] I.P. Chiș, Soluționarea laturii civile în procesul penal în caz de dezincriminare. Situații tranzitorii, in the Magazine „Caiete de drept penal" no. 4/2014.

1.2. The trial in absentia of the defendant.

Further, it must be reminded that the Romanian criminal proceedings allow the trial *in absentia* of the defendant, regardless of what the penalty he/she is facing on the criminal side of the trial, *i.e.* fine, imprisonment or life detention, as well as regardless of the amount of the civil damages to which he/she might be held liable on the civil side of the trial. At the same time, it does not matter whether the criminal court could order certain security measures against the defendant, *e.g.* special confiscation, extended confiscation etc., the criminal trial can lawfully take place without them.

Obviously, for the trial *in absentia* of the defendant to be possible, the summoning procedure must be fulfilled according to the law, irrespective of whether the communication to the defendant concerning the criminal trial has been successfully accomplished or not.

Indeed, the law makes no distinction in this regard, between the three possible situations, the continuation of the criminal judicial proceedings being possible when the accused has actually taken note of the criminal trial but waived his/her right to appear before the judicial bodies either *i)* explicitly, by formulating an application to be tried *in absentia* or *ii)* implicitly, by the unjustified absence after being summoned by the judicial bodies; as well as when *iii)* the accused has not been formally informed about the criminal trial against him/her, the summons procedure being accomplished by a mere legal fiction such as posting the notice/summons.

In the first case, if there is evidence pointing that the accused has actually taken note of the criminal trial against him/her, we are in the presence of a waiver to the right to appear in front of the judicial bodies, the accused thus disposing of his/her right to participate to trial.

If to the contrary, there is no evidence that the accused has actually been informed about the criminal proceedings against him/her, the trial *in absentia* shall continue and in the case of a conviction solution the law stipulates the possibility of reopening the criminal trial by merely formulating an application to this end within a month from the communication of the final criminal ruling.

Note that in the case where the accused tried *in absentia* has knowledge about the criminal proceedings and refuses to respond to the summons of the judicial bodies, as well as in the case where the accused has no knowledge about these proceedings, the criminal trial shall take place according to the general trial procedure, following the preliminary chamber procedure and assessing during the trial all the evidence of the case as if the accused had been present for trial.

The legal assistance is guaranteed throughout the criminal trial and in the case where the accused is underage, admitted to a detention centre or an educational centre, detained or arrested even in a different case, where the accused is subject to a safety measure or placed in a medical institution, even in a different case or where the offense brought to the accused charge is punished by life detention or an imprisonment penalty exceeding 5 years, the legal assistance shall be provided *ex oficio* (article 90 of the Criminal Procedure Code).

1.3. The preliminary chamber procedure.

The preliminary chamber procedure is the phase of the criminal trial[2] ensuring the judicial context for verifying the lawfulness of the criminal investigation acts. Within this procedure, after checking the court's competence, the preliminary chamber judge examines the lawfulness of receiving the indictment, the lawfulness of evidence-gathering and of the performance of the criminal investigation acts.

The preliminary chamber procedure is essential to the economy of a criminal case given that this is the only procedural moment where the accused can criticise the lawfulness of the criminal investigation acts, the result of this procedure influencing the continuation of the criminal trial or the return of the case to the prosecutor's office.

2. Reopening of the criminal trial in the case of trial in absentia.

Reopening the criminal proceedings in the case of a trial in the absence of the convicted person[3] is a procedural remedy, at the convicted person's disposal, which can be used after the criminal ruling pronounced *in absentia* has become final, but no later than a month from its communication. Thus being, in our legal system, reopening the criminal proceedings is considered an extraordinary legal remedy, limited to points of law, within the jurisdiction of the court that issued the challenged ruling, of withdrawal, designed to ensure the compatibility of the Romanian legislation with the standards imposed by the conventional block, as well as by the right to a fair trial in the broadest meaning of the term.

If the court finds grounded the application for reopening the criminal proceedings, it will admit it in principle, the final ruling pronounced *in absentia* being thus reversed by the law itself, both concerning the solution pronounced on the criminal side of the case and the solution pronounced on the civil side of the

[2] For solid arguments for the qualification of the preliminary chamber procedure as a pre-trial stage, see A. Zarafiu, *Procedură penală. Parte generală. Partea specială,* C.H. Beck Publishing House, Bucharest, 2015, p. 376-378. In arguing this view, the author shows that the stages of the criminal trial must be represented as those sections of the criminal trial where the competent judicial bodies exercise one of the main judicial functions (investigation or trial) and where one of the solutions of cease of the criminal action can be ordered or pronounced.

[3] Further, to ensure the flexibility of the commentary, whenever I will refer to this legal remedy, I will use the wording *Reopening of the criminal trial.*

case, the trial being resumed from the stage of the trial in first instance, with all its consequences: reassessing the evidence of the case, the taking of a new first instance ruling, the pronunciation of a ruling in appeal and the enforcement of the new final ruling.

3. The criticisms of the present system.

The criticisms can be divided in two: criticisms concerning the conceptual aspect of the notion of reopening the criminal proceedings and criticisms concerning the incompatibility of the national system with the conventional block, as well as with the right to a fair trial.

As a matter of principle, any legal remedy takes the form of procedural remedies aimed at removing the mistakes that the courts might have made in impairing justice. Therefore, these procedural remedies are based on the idea of a mistake that can be made by the lower judicial body, an error which the judicial review court, placed on a higher level and being composed of more experimented judges, is presumed to eliminate.

Even if the reopening of the criminal trial is placed by the Romanian legislator among the extraordinary legal remedies, the idea of a mistakes on which such a remedy should be based, is not in all cases true.

Indeed, the premise of this procedural remedy does not necessarily reside in the court's failure to summon the accused to the trial or in a summoning procedure which was not dully accomplished.

Truly, the hypothesis of procedural error must not be *de plano* excluded, in the end, justice is achieved by an eminently human activity which is by nature, subject to error *(errare humanum est)*. Therefore, the accused who has never been summoned nor informed officially about the criminal trial or the accused concerning whom the summoning procedure has not been duly fulfilled is entitled to apply for the reopening of the criminal trial, with the consequence of resuming the trial stage starting from the first instance trial.

Nevertheless, in most cases of reopening the criminal trial, the premise shall not reside in an error related to the summoning of the accused, but in the lawful conduct of the criminal procedures in the absence of the accused who has not been genuinely informed about it.

The summoning procedure is lawful because in these hypothesis, the judicial bodies usually use the legal fictions stipulated by the law, such as considering legally summoned the person concerning who a notification about the summoning has been posted at the seat of the judicial body or who, having changed the procedural address during the criminal investigation, has been summoned at the address previously chosen although it was no longer up to date.

Transposed into practice these situations are met in the case where the accused is not found at the addresses where the state bodies have information that he/she might be (the legal domicile or the residences irregularly used etc.), the summoning procedure and the communication of the procedural acts being accomplished by posting a notice at the seat of the judicial body.

As a first conclusion, it must be remembered that the reopening of the criminal trial is wrongly regulated as a legal remedy while it has the appearance of a procedural remedy characteristic for a special trial procedure as I shall demonstrate.

From the perspective of the right to a fair trial, it must be highlighted that the premise for reopening the criminal trial is the justified absence of the accused from the criminal trial. This justification resides on the fact that the accused had no knowledge about his/her criminal trial. Thus being, starting from this premise, it can be said that as far as the accused is regarded, the proceedings that follow the reopening of the trial is the first he/she has knowledge of, the first in which he/she can defend himself/herself using the whole range of procedural rights and guarantees.

For all this, reminding as well the fact that resuming the procedure shall only take place with the first instance trial, the preliminary chamber procedure *in absentia* remaining final, the criticism focuses on the obvious reduction of the possibilities of the accused to defend himself/herself, especially concerning the possibilities to criticise the lawfulness of the criminal investigation acts, from the clarity of the wording of the accusation to the rightness of the administration of certain evidence.

4. Positive aspects that the regulation of a special procedure of trial in absentia would entail.

Starting from the premise that our legal system accepts the trial in the absence of the accused, whatever the reason of this absence might be, a deliberate absence as a result of the explicit or implicit waiver to the right to participate to one's own trial, or an absence which is not based on an informed choice, one wonders whether a special procedure for the trial of the accused absent should not be regulated.

Note that our legal system acknowledges several special trial procedures based either on the procedural conduct of admission of guilt adopted by the accused (the plea of guilt), or on the special situation of the accused (the defendant is underage or is a legal entity).

Therefore, once accepted these special procedures by the legislator, the question arises whether the absence from the trial of the accused implies a necessity to embody a set of rules derogating from the general procedure. In other words, it must be established whether in the case of the trial *in absentia* the general trial procedure is sufficient from the perspective of the procedural guarantees and, otherwise, whether a special procedure is fully

justified[4] by number, content, systematization and operation.

4.1. The trial in absentia according to the general procedure.

I have previously pointed out why in the case of the trial *in absentia,* the general procedure does not meet the minimum guarantees of the right to a fair trial.

It is thus noted that the trial *in absentia* gives the accused the right to apply for the reopening of the criminal trial but the procedure shall be resumed not from the preliminary chamber, but from the trial stage. Thus being, starting from the premise of reopening the criminal trial, namely the trial in the justified absence of the accused, it is clear that he/she did not have the genuine possibility to contest the evidence and the criminal investigation acts, this essential part of the trial being finally settled in his/her absence. Under these circumstances, reopening the criminal trial should not be limited to the reopening only of the trial stage, the reopening of the preliminary chamber procedures being necessary as well.

At the same time, as regards the civil side of the trial, it is quite clear the violation of the civil party right to the settlement of the case within a reasonable period. I have a slight reservation making this statement given that the time necessary for the settlement of the civil action can be either shorter or longer according to the difficulty and the complexity of the evidence brought, as well as according to the choice of the accused during retrial: the general procedure implying the reassessment of all the evidence and necessitating more trial dates in the case, or the abbreviated procedure implying the settlement of the case based on the evidence assessed during the criminal investigation, the activity usually taking place in a single trial date. In the case where the accused wishes the reassessment of the evidence, the time elapsed between bringing the civil action within the criminal trial and the final settlement of the action, to which the time elapsed between the admission of the application for reopening the trial and the final settlement of the action is added, can easily exceed the party's right to a fair trial as regards the reasonable period.

On the same note, one can retain the precariousness of the final ruling given by the criminal court for the settlement of the civil action. Indeed, the right of access to court necessarily calls for the right to a final ruling and, furthermore, the right to the actual enforcement of that ruling. Or, if the civil aspects of a criminal trial are settled through a final ruling subject to reversal *ipso jure* by the mere application of the accused, there is a problem concerning the fairness of the procedures towards the civil party, especially in the context that he/she can only leave the criminal trial in order to claim damages in a civil court under extremely restrictive conditions. Therefore, the very settlement of the civil action under these circumstances appears as an activity not only lacking efficiency (the ruling being subject to reversal), but also likely to unjustifiably delay the obtainment of a final ruling issued by the civil court.

On another note, concerning the first procedural cycle, it can be seen that the criminal court assesses the evidence with a view to ensuring an adversary procedure for the defendant, even if he/she is absent from the proceedings. Therefore, it seems that within the first procedural cycle unfolded in the absence of the accused, the adversarial principle is merely simulated, the main character, the accused, being absent to this procedure.

Also as regards the accused, I find that a procedure which necessitated high efforts on the part of the judicial bodies is an extremely costly one, the legal costs being then borne by the accused. From this angle too, the lack of any culpable absence from the accused and holding him/her liable for the payment of the legal costs generated precisely by this absence appears as a contradiction of terms.

In conclusion, it must be remembered that the general trial procedure closes in a final manner the preliminary chamber procedure so that, during the retrial, the accused has no genuine possibility to contest the criminal investigation acts. At the same time, the absolute precariousness of the ruling pronounced on the civil side of the trial must be noticed as well as the fact that, under certain circumstances, the settlement of the civil action might exceed a reasonable period by resuming the procedures.

The foregoing are all reasons that justify the regulation of a special trial procedure eliminating all the deficiencies identified, through derogating provisions.

4.2. The special criminal proceedings in absentia.

The special criminal proceedings *in absentia* must be a rapid, abbreviated one allowing the examination of the case within an extremely short time, without going through the preliminary chamber procedure and without settling the civil action.

I find thus that procedural cycle *in absentia* must start by observing the absence of the accused from the criminal trial, the special trial procedure being accordingly open. Under these circumstances, the criminal proceedings shall be taken directly to the trial stage, the court adopting a solution strictly based on the evidence collected during the criminal investigation. Of course, the procedure *in absentia* shall imply the representation of the absent defendant by a lawyer, either chosen or designated *ex oficio* (a case of mandatory legal assistance).

Further, irrespective of the solution pronounced by the court on the criminal side of the trial, the possible civil action shall be left unsettled, the right to choose of the injured party being thus reactivated. Therefore,

[4] N. Volonciu, *Drept procesual penal,* Editura Didactică și Pedagogică, Bucharest, 1972, p. 502-503.

according to the special procedure, the civil action shall not be settled, the right of the injured party to seize the civil court to receive damages being immediately reinstated.

After the criminal ruling of conviction pronounced following this procedure, the possibility to apply for the reopening of the criminal trial shall be open, the trial resuming from the preliminary chamber procedure with all that this entails, the procedure unfolding as if the accused had never been absent.

Conclusions.

The judicial activity in the preliminary chamber and of trial imposed by the current regulation in the case of the trials with absent accused is not only time consuming and unfair, but also useless. This is why I consider that a special procedure having the foregoing as its main landmarks must take its place into the substantive law.

Such a procedure would be capable of settling the conflict of law within a short period, without too much effort from the judicial bodies or high expenses and it will allow the injured party to switch a moment earlier to the other option, the bar to leave the criminal court no longer existing within this procedure.

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