ON THE LIMITS AND CONSEQUENCES OF THE CASE SPLITTING IN THE ROMANIAN CRIMINAL PROCEDURE SYSTEM

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Abstract

In the Romanian criminal justice system, the framework or procedural context in which one of the two main judicial functions is exercised - dealing with essential elements of the conflict report - is not fixed but flexible.

The current study aims to analyze some of the procedural manifestations of case splitting, one of the legally accepted operations that have as purpose to modify the procedural framework.

The analysis seeks to identify not only the general pattern in which case splitting may occur, but also the possible solutions to overcome any impediments or incidents generated by the actual application / enforcement of this operation. Last but not least, the study also suggests making changes to the incidental regulatory framework, where it lacks efficiency.

Keywords: *case splitting, procedural incident, boundaries, effects, prohibitions.*

Introduction:

This research approach addresses a seemingly benign issue in all incidental or ancillary procedural operations. Undoubtedly, the procedural purpose of the case splitting does not refer to the merits of the case, in the sense that this operation is not capable of influencing the solution to be given on the conflict report subjected to the investigation or judgment. Paradoxically, however, the case-splitting may result in the procedure being an important operation in the general economy of the judicial process. In terms of the regulatory framework incidentally concentrated on case splitting, the institution was approached rather tangentially in the literature.

However, the particular judicial manifestations of case splitting have shown that in many cases the erroneous or distorted realization of this operation can raise serious problems that are difficult to overcome.

1. Preliminary aspects regarding the procedural operation of case splitting in the Romanian criminal procedural system

From a normative and also a judicial perspective, *case splitting* is regulated as a common procedural incident on jurisdiction in criminal matters. As a way of procedural manifestation, the case splitting is a derivative incident that interferes closely with the *joining* of the criminal cases, realizing in the opposite sense a similar consequence to it. Both when joining the cases and sometimes when case splitting, there is a prorogation of competence of the judicial bodies, which thus are empowered to manifest themselves judicially, in compliance with the regulation, beyond their original competencies. In this sense, in the doctrine[1], the prorogation of competence was defined as a form of extension of the jurisdiction of a judicial body also as regard the facts or persons not falling within the scope of the competence determined in accordance with the common rules. When considering the effects[2] of the competence, the prorogation of competence is basically a procedural remedy whereby the extension of the powers that derive from the natural, ordinary jurisdiction of a judicial body and other matters will not be sanctioned under the conditions of common law. Thus, the acts performed by a judicial body through the extension of the competence as well as regarding the facts, persons not assigned to them according to the customary norms, shall not be found to be null (sanctioned by absolute nullity) or annulled (nullified by relative nullity), but will be considered valid, producing legal consequences.

In the current criminal procedural system, prorogation of competencies operates not only in terms of *facts* or *persons*, but also in terms of **circumstances,**

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[1] G. Gr. Theodoru, *Criminal Procedure Law Treaty, 3rd Edition*, Hamangiu Publishing House, 2013, p.265. The author deals with the indivisibility and connectivity under the most often encountered cases of prorogation of jurisdiction, forms that no longer found an express normative correspondent in the Criminal Procedure Code. See in this respect the provisions of article 43 to 46 CPC.

[2] If the *positive* effect of competence determines the habilitation or the empowerment of a judiciary to manifest themselves by performing specific tasks and carrying out concrete acts, the *negative* effect of competence determines the impossibility of the same judicial body to overcome its competencies established based on its competencies. In this respect, A Zarafiu, *Criminal Procedure. The general part. Special art,* 2nd Edition, CH Beck Publishing House, 2015, p.123-124.

such as the pre-proceedings questions[3] of extra-criminal nature that causes an extension of the functional competence. When synthesizing the incidental regulation, nowadays the prorogation of competence operates when joining the criminal cases, when splitting them, in case of pre-proceedings, change of legal classification or qualification of the offence. The prorogation of competence is regulated as a common incident regarding the competence, having the possibility to intervene both in the activity of the courts as in the activity of the prosecution bodies, as a rule of reference under article 63 CPC.

However, the prorogation of competence remains an *possible event*, since the extension of competence does not operate even if one of the ways provided by the law manifests itself (it is not mandatory to extend the initial competence if the change of legal classification leads to a qualification that falls within the jurisdiction of the same judicial body where the case is pending).The law prefers, as a rule, the prorogation of competence in an ascending order, intervening only in favor of a body of similar or higher degree. By exception (in the case of pre-proceeding matters), the prorogation of competence may also operate in favor of the inferior body, as it is manifested in terms of functional competence.

In order to understand the limits and procedural consequences of case splitting, similar aspects of the case joining must first be cleared, because the institutions are correspondent but accomplished in the opposite direction. As a legal operation, case joining involves bringing two or more separate causes into a single file to be solved by a single judgment. Case joining is a form of achieving the procedural operability as it involves the simplification of the judicial activity and prevents contradictory rulings, through which different rulings are issued for the same legal relationships or interrelated legal relationships .The material premise of case joining is the valid existence of many criminal causes as the unification of the procedural context cannot operate at the virtual level, but always in the concrete. The functional premise consists of an intrinsic, formal, etiological, etc. connection, between these causes that claim the need to reunite them. The circumstances justifying the judicial operation of the case joining are its cases (grounds), in the absence of which the case joining, even if it corresponds to a judicial purpose, takes on an unlawful form. At present, the situations of case joining are no longer exhaustively regulated, in order not to affect the dynamic nature of the procedural forms, except in the case of compulsory case joining.

Sometimes case joining can also lead to a prorogation of competence in the sense that the body that will investigate or judge all causes did not have initially the competence over some facts or some perpetrators[4] . It is the possibility and not the binding nature of the incidence of the prorogations of competence in terms of case joining that is emphasized in the doctrine, providing that *"if several causes between which a connection exists are pending in front of the same court or the same prosecutor's office, the case joining will not imply by itself as well the prorogation of competence"*[5]. As mentioned above, joining criminal cases is regulated by the current provisions of article 43 CPP either as a *mandatory* incident or as an *optional* incident.

The mandatory case joining is caused by the circumstance or the legal situation in which a plurality of material acts or criminal acts constitutes, by its nature or by the will of the legislator, a unit requiring the settlement of the entire procedural complex by a single court. Practically, the plurality of legal relationships of conflict will be given a single judicial ruling that will ensure the security of legal relations. Corresponding to indivisibility cases in the former legislation, the present cases of compulsory case joining involve an organic connection between several facts or several material acts that make up a legal or natural unity of the offence. For the mandatory hypothesis for which it was regulated, the case joining appears, according to article 43 paragraph (1) CPC, in the form of a positive procedural obligation for the judicial body losing the right to assess the justifiable nature of the case joining from a judicial perspective. Its manifestations are limited only to *finding* that there is one of the cases of compulsory case joining without being able to refuse or ignore the benefit of the case joining.

The provision for the criminal cases joining is obligatory issued:

When it was regulated as an optional operation, the case joining seems to be caused by a less close link between two or more criminal causes, thus manifesting itself in a short term and only if it does not affect the procedural operability.

The *optional* case joining intervenes:

a) in the case of a multiple offenses contest - when two or more offenses were committed by the same person;
b) in the case of criminal participation - when more than one person were involved in the crime (even if in different qualities);
c) when two or more offenses are connected (by the

[3] In the case of pre-proceedings questions, through the prorogation of competence, the criminal court acquires jurisdiction to judge in matters other than the criminal one. According to article 52 paragraph (2) from the CPC, the judicial consequences of this extension are manifested in two aspects, concerning the procedure (rules) and the means of evidence.

[4] In the same sense, in doctrine I. Neagu, M. Damaschin *Criminal Procedure Treaty. The general part*, Universul Juridic Publishing House, Bucharest, 2014, p.366, it was stated that "Case joining is a situation in which the prorogation of competence can be retained because, depending on the reason leading to the case joining, competence norms are established according to which certain cases are settled by criminal justice bodies, which, under normal circumstances, do not have the competence to resolve them."

[5] M. Udroiu in M. Udroiu (coord.), *Code of Criminal Procedure. Comment on articles* , 2nd edition, CH Beck Publishing House, Bucharest, 2017, p.202

object, persons, cause, etc.) and the case joining is necessary for the good performance of justice.

This *general situation* of optional case joining may include the situations which, in the former procedural law, were considered to be cases of inherent connection:

- when two or more offenses are committed by different acts, by one or more persons together, at the same time and in the same place;
- where two or more offenses are committed in a different time or place after a prior agreement between offenders;
- when an offense is committed to prepare, facilitate or hide the commission of that offense, or is committed to facilitate or ensure that the perpetrator of another offense is excluded from criminal liability.

Irrespective of the fact that the existence of any of these cases is judicially established, the case joining will only be ordered if the competent judicial authority, within the limits of its powers, considers that the pursuit or trial are not delayed by this operation. In this respect, it is stated in the doctrine that despite the fact that the new code of criminal procedure no longer maintains the express rules of indivisibility and connectivity, *"the different legal treatment of the cases in which the case joining is mandatory and those in which the case joining is optional represents precisely the distinction to be made between instances of indivisibility and the cases of connectivity"*[6] .Thus, the link between criminal cases is not, by itself, the sufficient condition for the case joining to take place; the provision of the judicial body must be based not only on legality but also on the opportunity. In this respect, the doctrine states that *"the importance of this institution is determined by the need for the act of justice to have a unitary nature in relation to the objective reality that characterizes the committed criminal activity, because otherwise there is the risk of a misapplication of the law"*[7].

By implementing in criminal matters an incident specific to civil proceedings, the law now allows case joining as well in cases where there are several causes of the same object being analyzed by several judicial bodies. In such a situation, the case joining is based on a legal situation called *litis pendens.*

It may fall under this situation of case joining when the same appeal, introduced by the same person against the same ruling is recorded in two different cases, assigned to separate distinct bodies of the same court of appeal since it has been successively filed and registered, once by fax and once by registered letter (which arrived later). The case joining determined by the *identity of object* of two or more criminal cases is rather specific to the initial moments of the criminal trial (two different criminal prosecution bodies are pursuing the same offense and conducting parallel investigations as a result of distinct referrals).

Regardless of whether it is mandatory or voluntary, the case joining is not accomplished arbitrarily, but according to expressly regulated legal preferences that prevent abnormal situations or conflicts of competence. Thus:

- if the competence in relation to different facts or different perpetrators belongs, according to the law, to several equal-rank courts, the jurisdiction to judge all the facts and all the perpetrators (the joined cases) lies with the court first notified;
- if the competence by nature of the facts or by the quality of the persons belongs to different-rank courts, the competence to judge all the cases lies with the higher rank court;
- if one of the courts is civil and one military, the competence lies with the civil court; if the military court is higher in rank, the competence shall lie with the civil court equivalent in rank to the military court, having territorial jurisdiction according to the general rules, article 41 and article 42 Code of Criminal Procedure;
- concealment, favoring the offender, and non-disclosure of offenses are within the jurisdiction (competence) of the court that judges the offense to which they refer, and if competence by the quality of the persons belongs to different-rank courts, the competence to judge all the cases lies with the higher-rank court.

Paradoxically, the preference for the civil judicial organs with regard to the organ in whose favor the prorogation of competence operates is only functioning with regard to the judiciary. During the criminal prosecution, the preference operates in favor of the specialized body. In this respect, according to article 56 paragraph (4) and (5) of the CPC, under the form of special rules, is established the absolute nature of the provision according to which, in the case of crimes committed by military personnel, the prosecution is necessarily carried out by the military prosecutor. Military prosecutors within the military prosecutor's offices or the military units of the prosecutor's offices carry out the criminal prosecution according to the competence of the prosecutor's office to which they belong, for all participants in committing the crimes committed by the military, and the competent court will be notified according to article 44 CPP.

Practically, this preference of a special nature was only established for the criminal prosecution phase, which would be replaced by the preference regulated by common rules at the time the court was seized.

In all cases, once produced judicially, the prorogation of competence generates definitive effects, and it cannot be lost even if the ground that caused it ceases or disappears. Thus, according to article 44 para (2), the competence to hear the joined cases remains with the court, even if for the act or the perpetrator who determined the jurisdiction of these courts the splitting

[6] C.Voicu in the *Code of Criminal Procedure* , Issue 3, Hamangiu Publishing House, Bucharest, 2017, p.135

[7] B. Micu, AG Paun, R. Slăvoiu, *Criminal Procedure. Course for the admission to the magistracy and to the profession of lawyer. Tests with multiple choice questions*, 3rd Edition, Hamangiu Publishing House, Bucharest, 2015, p.82

of the cases or the discontinuation or termination of the criminal proceedings have been ordered or the exoneration was ruled. However, this rule does not work for the criminal prosecution phase, according to article 63 para (2) CPC. Currently, case joining is ordered only by the court which also shall have jurisdiction to hear the joined cases, in accordance with the above rules. There is no incidence of the rule from civil matters transferring the competence to decide on the joining of the judicial body which has no jurisdiction to hear the joined cases[8].

However, in all cases, the joining of the cases is preceded by a series of *administrative measures* (references to the competent court or panel) aimed at bringing all the cases in which the joinder will be discussed in the same hearing before a single panel.

The joining of the cases shall be ordered *at the request* of the prosecutor or of the parties. The case joining may also be ordered *ex officio*, regardless of the case on which it is grounded (compulsory or optional joining). The Government Emergency Ordinance no. 18/2016 provided that the injured party, whether or not a civil party in the criminal proceeding, may request the judicial bodies to join the cases, regardless of whether the reason invoked is a case of compulsory or optional joining. In the light of this new change, in doctrine, we also find opinions according to which *"in the course of criminal prosecution the suspect as well may ask the criminal prosecution bodies to join the cases for the purpose of the good administration of justice"*[9].

During the trial, in order to be joined, the cases must be at the same *stage of the trial*: at first instance or on appeal. The condition is deemed to be fulfilled even if these cases are at *different stages* of the trial at first instance or on appeal, or they are in the re-judgment phase after the dismissal or the cassation ordered during the ordinary or extraordinary ways of appeal. Thus, in the doctrine, it was stated that *"at the stage of the trial, the joining of the cases is done differentially according to the stage of the trial. Cases are always joined if they are pending on a first instance court, even after the cassation with remanding the case for retrial"*[10].

The joining of the cases is ordered during the trial by a court resolution which can be appealed only with the merits of the case [article 45 para (3) CPC]. In the course of the criminal prosecution, the joining of cases is ordered by an ordinance which, in the absence of derogation from the ordinary rule, may be appealed under the conditions of common law, with a complaint to the hierarchically superior prosecutor.

A form of prorogation of competence, atypical and mediated, may be considered to occur in case of splitting of the case. As mentioned, the splitting of the case is the legal operation similar to the joining of the cases, but accomplished in the opposite direction.

In spite of the apparent regulatory freedom regarding the form of procedural manifestation (the law does not explicitly provide for strict cases and conditions of operation as in the case of joining), the case splitting is circumscribed to implied limitations[11] which makes its judicial existence more specific. First of all, the act of positive disposition in the case of case splitting produces, at the same time, two categories of effects. *The procedural effect* of this operation is to gain the autonomy of the context in which either one of the elements of the already active action (with regard to some of the facts or some of the perpetrators) is exercised, or even one of the actions initially exercised in the same judicial context. *The administrative effect* of case splitting consists in the formation of new files (one or more, with different indications), derived from the original one, which retains its unique number and which will be solved separately. Secondly, the normative basis of the case splitting is different, according to the subject matter.

According to article 46 CPC the court may order the case splitting in respect of some of the defendants or some of the offenses for **sound reasons** concerning the proper conduct of the trial (eg the serious illness of one of the defendants that would lead to the suspension of the trial as far as he is concerned, the acquisition of special qualities by one of the defendants that would determine the change of personal competence and declining the jurisdiction, etc.).The measure does not affect the indivisibility of the criminal proceedings because, in such a situation, there will not be multiple judicial actions (born out of a single material cause) but the same action will be exercised in different procedural contexts.[12]

When the case splitting concerns one of the judicial actions itself, the incidental normative framework is given by the provisions of article 26 CPC. The premise of this form of case splitting is the existence of a simultaneous exercise of both legal actions in the same procedural framework, conducted in front of the criminal judicial bodies. Although generated by the same material cause (committing the offense representing at the same time a tort / delict), the two legal actions are exercised with the consideration of different procedural requirements, given that the criminal action is a public action and the civil action is a private one. Moreover, the main nature of the criminal

[8] According to article 139 paragraph (2) Code for civil procedure "The exception to the connectivity may be invoked by the parties or ex officio at the latest at the first hearing before the court subsequently seized which, by court resolution, will rule on the exception"

[9] M. Udroiu in M. Udroiu (coordinator), Code of Criminal Procedure. Comment on articles, 2nd edition, CH Beck Publishing House, Bucharest, 2017, p.205

[10] N. Volonciu, Treaty of Criminal Procedure. General Part Vol. I , 3rd Edition, Paideia Publishing House, Bucharest, p.311

[11] In this respect, according to the doctrine, N. Volonciu, Treaty of Criminal Procedure. General Part Vol. I, 3rd Edition, Paideia, Bucharest, p.311 "case splitting must be used with caution so as the separation of complex issues should not be prejudicial to the unitary resolving of the case."

[12] See also M. Udroiu, previously quoted, p. 62

action influences the procedural destiny of the secondary action by removing the possibility of affecting the features of the public action[13].

In this respect, if the resolution of the civil action determines the exceeding of the reasonable time for solving the criminal action (circumscribed in principle to the procedural celerity), the criminal court may order the splitting of the civil action. In order to be able to properly substantiate the case splitting provision, the danger of delaying the settlement of the criminal action as a result of the timing of the civil action settlement must be cert and actual, even if it is to occur in the future, but under no circumstance may it be only eventually. Thus, in the doctrine, it was shown that *"the case splitting must be well justified, the interest of the breakdown exceeding the interest of the joint settlement of the cause"*[14].

By splitting the civil action no transfer of functional competence of the criminal court to the civil court will be achieved, as the newly formed file will remain pending in front of the criminal court. This criminal case will deal with the settlement of the split civil action and will remain in the competence of the criminal court that will perform its judicial function by pronouncing one of the main solutions provided by article 25 CPC, with the possibility to pronounce as well the complementary solutions provided by article 397 CPC. The judicial activity in the case having as object the split civil action will be carried out according to the procedural rules (of procedural law) provided by the criminal procedural law, but the conflict report will be settled according to the substantive rules (substantive law) provided by the civil law. In order for the case splitting order not to be unfairly transformed for the active subject of civil action that could very hardly sustain civil claims by re-administering the evidence administered before the criminal court, the law offers an effective remedy in the provisions of article 26 para (3). Thus, the evidence administered until the case splitting will be used, by takeover, as well to the settlement of the split civil action.

Although the case splitting is regulated as a common incident in the matter of competence, when it is expressed in the form of case splitting of the civil action, the act of disposition can only belong to the court. It shall rule either ex officio or at the request of the interested subjects - prosecutor, party or injured party. In this respect, the opinion of some authors is that *"**the suspect as well** may ask the prosecution bodies to split the cases"*[15]. Moreover, in this case the court resolution encompassing the positive act (ordering the case splitting) is final, leaving out the possibility of exercising a control on the legality or on the merits of the application.

Instead, case splitting over some of some facts or some of the perpetrators (who have previously received the procedural quality of a suspect or defendant) may be ordered both at the trial stage as during the criminal prosecution. In this case the court rules the splitting of the case by court resolution while the criminal prosecution body manifests itself through ordinance. In the absence of special provisions, both the court resolution and the prosecutor's ordinance are subject to judicial review by ordinary means of appeal: the appeal or the complaint against the criminal prosecution.

When the court orders the case splitting during the trial, it is clear from the manner of regulating this incident that it is approached as an *incidental matter*, as a matter to be solved by contentious manner under the general conditions of article 351 paragraph (2), by means of a court resolution preliminary to the settlement of the case on the merits. The case splitting with regard to the facts and persons has not been explicitly regulated as to the cases in which it can operate but, despite the permissive regulation of the institution, we consider that the case splitting is not possible for the offenses and defendants for which/whom the compulsory case joining initially operated, if it were considered appropriate by the court. In this sense, in the doctrine there is also the contrary opinion according to which "*from the way in which the case splitting is regulated results that criminal cases can be separated in all situations, irrespective of the case of article 43 that would have determined the joining"*[16]. The prorogation of competence in case of case splitting operates under the conditions of article 44 para (2) CPC which provides that, once acquired, the competence will be retained by the court even though for the fact or the perpetrator that determined its original competence the case splitting was ordered.

Against the backdrop of the absence of an explicit interdiction, both the case joining and the case splitting, with the above-mentioned amendment, do not have an interlocutory character, and they can intervene several times during the criminal proceedings. Also, considering the subject matter and limits of the preliminary camera procedure, we consider that the act of case splitting is not allowed at this stage of the criminal proceedings.[17]

Last but not least, from the point of view of their procedural consequences, case splitting and case joining are the only ways in which, after the commencement of the trial, the procedural framework in which the judicial function and, implicitly, the object of judgment can be changed.

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[13] See also M. Udroiu in the Criminal Procedure. General Part, 5th Edition, CH Beck Publishing House, Bucharest, 2018, p.60-61 "the criminal action constitutes the central element of the criminal proceedings, representing the main action."

[14] N. Volonciu, Treaty of Criminal Procedure. General Part Vol. I , 3rd Edition, Paideia Publishing House, Bucharest, p.311

[15] M. Udroiu in M. Udroiu (coordinator.), Criminal Procedure Code. Comment on articles, 2nd Edition, CH Beck Publishing House, Bucharest, 2017, p.206

[16] I. Neagu, M. Damaschin Criminal Procedure Treaty. General, Universul Juridic Publishing House, Bucharest, 2014, p.371

[17] See, in this respect, M. Udroiu in *M. Udroiu (coordinator), The Code of Criminal Procedure. Comment on articles* , 2nd Edition, CH Beck Publishing House, Bucharest, 2017, p.206

2. Critical analysis of an unprecedented procedural manifestation regarding the case splitting in the recent practice of the Romanian courts

In a relatively recent case-law solution[18], a Romanian court ordered the conviction of the defendant PGA, based on article 26 related to article 48 Criminal Code with reference to article 248[1] Criminal Code, with the application of article 41 par.(2) Criminal Code from 1968 and article 5 of the new Criminal Code, to 7 years imprisonment, for committing the crime of complicity to abuse of office, in a qualified form. Under the provisions of article 255 para (1) Criminal Code from1968 with reference to article 6 and 7 of Law no. 78/2000 with the application of article 5 of the new Criminal Code ordered the defendant PGA to be sentenced to 7 years imprisonment for having committed the crime of bribery.

Under the article 33 letter a) and article 34 letter b) Criminal Code from 1968, orders the defendant PGA to execute the seven-year prison sentence, which the court increases by 2 years, having finally, the defendant to execute 9 years imprisonment. Of the amount of the penalty imposed on the defendant, the 24-hour retention period from 24 March 2009 on 25 March 2009 was deducted. As regards the civil aspect of the case, the court ordered to leave as unresolved the civil side of the criminal trial and the case splitting of the cause on this issue .The court held as legal basis for these measures (irreconcilable in terms of the effects they imply) the provisions of article 25 para (5) in relation to article 397 para (5) CPC.

Analyzing the above judgment from the perspective of the objectives of the present study, the unlawfulness of the measures ordered by the court on the civil side of the case is manifested in several aspects. Firstly, there is a clear contradiction between the *recitals of the judgment*, which explain the nature of the measure ordered for the civil action and its procedural consequences (continuation of the civil action before the criminal court but separately from the criminal action) and the *operative part of the judgement*, in terms of the legal ground being held. Thus, both the provisions of article 25 para (5) CPC and of article 397 para (5) CPC regulates the legal cause of "leaving as unresolved the civil action" as a way of divestiture of the criminal court with respect to lawfully exercised civil action. The solution (even in the *sui generis* form of leaving as unresolved) rendered in respect of the civil action and obviously the legal basis on which it is grounded must be indicated in the *operative part of the judgement*, according to article 404 para (1) CPC. The court's ruling must be developed and motivated in fact in the recitals, according to article 403 para (1) letter c) CPC, the detailed exposition having to keep the legal and factual correspondence of the issues resolved in the *operative part of the judgement*.

However, there is a substantial contradiction between the recitals of the judgement and the operative part of the judgement, the underlying legal basis not having a correspondent in the reasoning of the provision on the civil side, a fact which proves the lack of effective judgment in the first instance. The effects of the final courts' ruling do not correspond to the legal ground retained in the *operative part of the judgement* because the essence of the "leaving the civil action unresolved" is to enable the possibility to having it exercised in front of the civil court, the criminal court losing its functional competence to solve by extension the private action, following the manner the main action was solved.

To that end, in the absence of a concordance between the legal basis enshrined in the operative part of the judgement and the nature of the final provision, the effects of which are similar to case splitting, the measure taken by the court in respect of the civil side remains unjustified in law and thus arbitrary. Secondly, the measure finally implemented by the court without indicating the legal basis is also unlawful in terms of the procedural form in which it was disposed. Thus, according to article 26 para (1) CPC, the court may order the case splitting for the civil action when its settlement determines the exceeding of the term for solving the criminal action and according to para (5) of article 26 CPC the court resolution ordering the civil action to be split is final.

If analyzing how the case splitting of the civil action is configured, it is undoubtedly that it has the nature of an incidental matter in the criminal proceedings. Without having the capacity to influence the way in which the case is dealt with on the merits, the case splitting acts as a matter or a preliminary matter which must be resolved before the action is resolved. From a procedural point of view, the solution of the incidental issue in case of case splitting is circumscribed to the requirements provided for in article 351 para (2) CPC corresponding to counter-claims guarantees. According to article 26 para (2) in relation with article 351 para (2) CPC, even when invoked ex officio, the case splitting must be discussed by the prosecutor and the parties, in all cases being released (by sentence delivery) by reasoned court resolution. The nature of the decision by which the court ruled on the case splitting of the civil action is customized by the provisions of article 26 para (5) CPC, its legal regime derogating from the provision of a general nature provided by article 408 para (2) CPC and which, as a rule, allows appeals to be made against all judgments delivered during the trial. By requiring the court to deliver a sentence on the case splitting, the law excludes the possibility that this measure may be ordered directly by the substantive judgment on the merits of the case.

[18] Bucharest Court of Appeal, Criminal Section I, criminal sentence no.115 / 23.06.2016 (unpublished), which is final on the civil aspect by the dismissal of the appeals being formulated as not grounded

Furthermore, considering the requirements under article 351 para (2) CPC, the issue of case splitting should have been first discussed in a contradictory manner in an appropriate procedural context, namely in the course of the judicial investigation, the premise of declaring that this stage was terminated in the conditions of article 387 para (1) and (2) CPP being precisely the absence of any request or issues. It is clear from the analysis of the documents in the file that the issue of case splitting has never been put into the contradictory discussion of the participants in the process, this aspect being not even debated in the debates, as it court resolutions rendered on 30.05.2016 and 02.06.2016. Therefore, not being invoked prior to the completion of the judicial inquiry, the incidental question of case splitting, even if it appeared as present directly during the debates, it would have been impossible to discuss it for the first time at the ending moment of the trial, the adequate remedy being the one provided by article 395 para (1) CPC and consisting in retaking the judgment. As the case splitting was not discussed beforehand and not even in the debates, the act of disposition could not be delivered directly by sentence except in severe violation of the legal provisions.

Such a way of proceeding deprived the defendants of the possibility of expressing positions with regard to the court's intention, amounting to a severe violation of the rights of defense and the right to a fair trial in its component of the contradictory nature of the proceedings, which also represents the injuries sustained. Although accepted at the legislative level [but only in the procedural form provided by article 26 related to article 351 para (2) CPC], the case splitting appears as a justifiable measure only when it corresponds to a functional purpose. In the context of the identity of the material cause and the possibility of overlapping in terms of consequences, in the jurisprudence of the High Court of Cassation and Justice the case splitting operation was viewed with caution if the determination of the guilt of the defendant, the individualization of the punishment and the legal framing relate to the extent of the damage caused by the offense such as, in particular, those that have produced particularly serious consequences.

In this respect, the High Court of Cassation and Justice held that in the unitary resolution of a criminal case the determination of the extent of the damage caused by the act committed by the defendant is an important criterion which is reflected in the criminal aspect of the case, his guilt, but also the plan of criminal responsibility, in the process of individualization of punishment, taking into account the gravity of the damaging consequences. The Court found that as long as the extent of the damage is not established in full, the civil side being split exactly in order to determine the damage caused, the criminal side cannot be resolved correctly either on the retention of guilt or on the individualization of the punishment, in relation with the injury caused.[19]

Relevant, in this respect, is another case-law solution[20] where the High Court of Cassation and Justice held that the court of appeals had wrongly split the civil case and sent the case to its settlement at the court of first instance, as long as it held the defendant's guilt for the offense of deception with particularly serious consequences, without knowing the existence and extent of the damage. Last but not least, the manner in which the Court of Appeal has ruled on the civil aspect of the case is criticized in terms of compliance with legal requirements and the procedure by which the court has agreed to continue the civil action, even though it has left it beforehand unresolved. Thus, assuming the irreconcilability of the two provisions that were mutually exclusive and anticipating the impediments which the pending litigation of the civil action would provoke with regard to the civil aspect of the process, the Court of Appeal opted for a hybrid procedure to overcome this incident.

Consequently, in the recitals of the judgment, and in breach of its obligation to justify in fact and in law only the acts of disposition embodied in the operative part of the judgement [article 403 para (1) letter c) and d) CPC], the court proceeded to requalification of the solution expressed in the operative part of the judgement in a sense that does not correspond either to the legal nature of the provision or to the legal basis retained by the deliberation. Challenging the procedural purpose of the pending litigation for the civil action, the court of first instance *"explained"* in its recitals (page 282, paragraph no. 12) that in fact this statement does not signify the divestiture of the court but only a split of the civil action from the criminal action.

By developing the "meaning" of the provisions given in the civil aspect of the case, the court (pages 283-284) stated that "if it leaves the civil action unresolved, it will not order the case to be resolved by the civil court, but will only separate the two actions to offer the parties the possibility to formulate all their defense in the civil action connected with the criminal proceedings." In fact, the court of first instance has radically reconfigured the nature and effects of the provision on the civil action, removing the legal basis retained in the operative part of the judgement and distorting its meaning. This apparently judicial operation does not have a legal correspondent and exceeds the limits within which the court is required to make the report.

By its final consequences, this operation cannot be described as a form of clarification of the operative part of the judgement as the procedure provided for by the provisions of article 277-279 CPC refers only to the material form (external envelope) of the procedural act and not to the legal mechanism it involves. Assessing the explanations given in the recitals regarding the sum

[19] ICCJ, Criminal Section, decision no.6281 / 25.11.2004
[20] ICCJ, Criminal Section, Decision no.5019 / 08.09.2005

of the provisions on the civil side, it is undisputed that their result consisted in distorting the initial purpose of the measure. Thus, a provision which has the effect of the divestiture of the criminal court and was duly substantiated by the provisions of article 25 para (5) and art. 397 para (5) CPC was transformed solely as a result of the reasoning in the recitals by the Court of Appeal to an extent that made it possible to reinstate the criminal court and continue the civil action in a separate file.

Practically, the Court of Appeal has moved to the field of other power in the state, because, by replacing the legislator, it has reclassified the effects of the disposition aiming to leave the civil case unsolved, replacing *its judicial component* (divestiture of the court) with an *administrative* one (the formation of a new file having as object the settlement of the split civil action). Moreover, taking into account the sequence of the two procedural operations as set out in the minutes of the decision no. 115 / 23.06.2016, the illegality of the case splitting also derives from its delay. As the court first ordered to leave the case unresolved, any subsequent action on it was lacking procedural support because the functional competence that would have allowed it to manifest itself was lost.

The only legal effects with regard to the civil proceedings left unresolved operating *ex-lege*, under the terms of an express regulation - article 27 para (2), 397 para (5) CPC, concern exclusively the precautionary measures. It is only them that are maintained by the law even if the judicial context in which they have been disposed of has disappeared, pending the bringing of the action before the civil court, but not more than 30 days, otherwise ceasing lawfully. Therefore, as stated above, the case splitting had the capacity to produce its effects only if it operated autonomously and in advance, without being cumulated with the ruling of leaving the civil case unresolved. In the absence of an express legal remedy, while the court reserved judgement on the civil action due to discussing the civil claims, contradictorily, during the debates, the court should have been ordering the redocketing of the case to discuss case splitting, according to article 395 CPC.

Moreover, in order to observe the incidental nature of the case splitting, the redocket of the case had to be accomplished by resuming the judicial investigation, since only in this way the issue of the separation of the two actions could be solved according to the requirements of article 351 para (2) and 26 para (5) CPC – through final reasoned court resolution (in fact and in law).

From the perspective of the above mentioned aspects, we appreciate that the form in which the actual operation of case splitting was manifested does not respect the requirements and limitations foreseen at the normative level, and a closer analysis of the framework in which it is allowed being necessary.

Conclusions:

Apparently regulated permissively, case splitting knows certain implicit boundaries that make it more specific in terms of procedural manifestation.

There are substantial differences between the way in which this operation is performed during the criminal prosecution and in the trial, the Romanian procedural system also having jurisdictional procedures in which the case splitting disjunction is prohibited. In certain situations, the judgment of the court in the case of splitting, although seemingly in line with the normative pattern, may be regarded as an unlawful measure that could be remedied in the appeal by sui generis reason for closure with the remanding of the case for retrial. From this perspective, a legislative modification that explicitly provides for situations in which the operation case splitting is prohibited by law would be more than adequate.

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