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Implications Generated by the Moment Established by the Law for Introducing the Civilly Responsible Party and the Moment Up Until the Injured Person Can Constitue as a Civil Party

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Abstract: The civilly responsible party can be introduced, according to art 21, alin (1), C.p.p. as modified through CCR Decision up until the end of the criminal persecution by the person in right according to the civil law, in order to be able to formulate requests and to raise exceptions in the preliminary chamber.
So, the civil party, as the person in right by the civil law, can ask to be introduced the civilly responsible party by the end of the criminal prosecution.
On the other hand, the injured person can constitue as a civil party, as art. 20, alin (1) C.p.p. statues, up until the beginning of the judicial research.
Therefore, in the situation that the civil party is not constituted up until the beginning of the preliminary chamber and she does not ask to be introduced the civilly responsible party is there an infringement of the right of the prosecuted? Nor the ones of the civilly responsible party? Are there any remedies?

Keywords: *preliminary chamber, the civilly responsible party, the civil party, the prejudice, the right.*

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In order to analyze this judicial report we consider we should review the qualities of the parties involved and the judicial base for their responsibility. Therefore, during the criminal trial, the person who was injured as a result of the criminal act has the right to ask for the prejudice reparation according to the civil law, but using the evidences that the prosecutor has gathered during the prosecution. On this base begins the civil party of a criminal trial. The same consideration is the base for the quality required by the law to ask for the responsible civil party to be introduced in the trial, in order to assure the fulfillment of the prejudice. The civil responsible party is, according to art. 86 C.p.p., " the person who, according to the civil law, has the legal or conventional obligation to repair, alone or in solidarity, the damage caused by the criminal act and who is called to answer in the trial". We agree that the injured person has the right to satisfy the financial damage caused by the criminal act, but shouldn't we also recognize the recognize the right of the defendant to have the responsible civil party covering for him?

At a closer look to the legal definition of the responsible civil party, we can observe that the responsible civil party has the obligation to repair the damage on a legal base or a conventional one. The legal base statues the obligation to repair the damage for the the legal representatives, regarding the criminal acts of their children and for the principal, regarding the acts of the previous permitting in art. 1372-1374 C. Civ. Therefore, the legal representatives as being those who, according to art. 1372 C. civ., on a legal term, a contract or a court order, has the obligation to supervise a minor child, a person put under whether detention answers for the damage caused by others by one of the mentioned persons. They answer even though the prosecuted, being without discernment, does not answer for his own action. In alin. (3) of art. 1372 C. Civ., the law statues an only case to exonerate the responsibility of the legal representatives, specifically when they can prove that they could not prevent the harmful event. When the legal representatives are the parents, or, by the case the legal guardian, the proof is considered as being made only if they prove that the reason the child created the harmful event from other causes than the the way they fulfilled the specific duties of the parental authority. Therefore, in this case we can not talk about the effects of the term stated to introduce the responsible civil party or of the person who can ask for the introduction of the responsible civil party, because we can apply the ability of the responsible civil party to intervene in the criminal trial. Regarding the liability of the principal for the actions of the servant, according to art. 1373, C.civ., the principal is forced

to repair the damaged caused by his servants every time their action is related to the responsibilities or the purpose of the entrusted functions. The principal is the one that, on a legal base or a contract, exercise the control, the direction and the surveillance on the one the fulfill some functions or some assignments in the interest of the principal or another person. Therefore, the base of the responsibility is either a contract or the law, meaning that we can consider the right of the servant to call for his principle to answer in case his actions, dictated by the principal cause a damage. Considering the situation that the injured person constitue herself as a civil party after the preliminary chamber, when she can ask for the civil responsible party to be introduced, for example in the first appearance in the phase of judgment, what are the possibilities the defendant has to introduce the responsible civil party in the trial? None, according to the law. He will have to repair the damage himself and then to start a civil trial against the principal in order to recover what he paid in the criminal trial. In this case, aren't there affected the rights of the servant who acted on demand of the principal, caused a damage and paid for it even though, legally, he should not answer with his own patrimony? Of course this situation does not cover the hypothesis that the servant acted in no connection with the assignments of the function that the principal gave him, witch is the only case stated by the law when the principal does not answer for the actions of his servants.

With similar considerations was amended the Constitutional Court of Romania both in 2017 and 2018 when different courts in Romania encountered with similar situations.

The judges of RCC have apprehended that the injured person is free to decide if she starts the civil trial separate from the criminal trial, as she can use this judicial instrument in the criminal trial, the civil trial inside the criminal trial being governed by the availability principle. This principle is characteristic to the civil trial, but given the nature of the civil trial inside the criminal trial, it is governed by the same rules as a standing civil trial. Therefore, the injured person, on the base of this principle can determine not only the existence of the civil trial inside the criminal trial through the triggering of the judicial procedure by formulating the request to be constituted as a civil party, but also the content of this action, establishing the procedural structure regarding the parties, the object and the perspective of the formulated defenses. By establishing the procedural structure, the civil party can ask for the responsible civil party to be introduced or not, no other party having the right to ask for it, not even the defendant, who must submit

his own patrimony to cover the damage the injured person suffered even though, for example, on a legal or conventional basis he assured himself. Also related to the parties, the RCC, in the Decision 257/2017 reiterated the considerations on Decision 482/2004 according to with, " in the case that the injured person submit, in the criminal trial, claims in order to repair the material damage she suffered as a result of the crime, she accumulates two procedural qualities: injured party and civil party. These two parties of the criminal trial have, though an identical situation, precisely the person injured in her rights by the criminal offense, witch justify the existence of the legitimate interest stated by art. 21 of Constitution". Therefore, the injured person, in our opinion has an legitimate interest in the criminal trial consisting in assuring her safety by establishing a criminal responsibility to the defendant, in case he can be held criminally liable, and the civil party has an legitimate interest in recovering the damage produced by the criminal action.

Regarding the parties in the criminal trial and the rights they have, the Court established that the possibility of the injured person constituted as a civil party to ask for introducing in the criminal trial the responsible civil party " up until the beginning of the judicial research", in any procedural stage, including after the closing of the procedure of preliminary chamber has the nature of prejudice to the rights of free access to justice of the responsible civil party, stated in art. 21 of Constitution. At the same time, the manifestation of will of the injured person that constituted as a civil party to ask for the introduction in the criminal trial of the responsible civil party " up until the beginning of the judicial research", in any procedural stage, including after the closure of the preliminary chamber procedure ensure the observance of the right to defense of this party, but has the nature to prejudice the fundamental right to defense of the civil responsible party. Therefore, the Court established that criminal procedural laws of art. 21, alin (1), that states the possibility of the injured person constituted as a civil party to ask to introducing the civil responsible party in the criminal trial " up until the beginning of the judicial research" don't have the nature of maintaining the balance between fundamental rights that conquer. The Court also consider that the same considerations are applicable in the case that the prosecutor exert the civil action in the conditions of art. 20, alin. (1) si (2) C.p.p. As a result of this consideration, the civil party, or the prosecutor in the conditions mentioned above can ask for introduction of the civil responsible party only up until the end of the procedure in the

preliminary chamber, although the injured person can be constituted as a civil party up until the beginning of the judicial research.

In this manner, both the civil party and the civil responsible party have their rights covered...what about the defendant?

His position was analyzed by the Court in the Decision no. 671/2019, when it was raised the exception of unconstitutional phrase " at the request of the party entitled by the civil law" included in art. 21, alin. (1) C.p.p. The Constitutional Court approached the differences between the actual regulation and the anterior, witch stated that the responsible civil party could be introduced at the request or ex officio, the current regulation giving this possibility only to the civil party, eliminating, therefore the active role of the court and, by all means, the possibility that the prosecuted benefit from, following the example below, his insurance policy in the case the injured party introduce the request to be constituted as a civil party at the end of the legal term.

At the same time, the Court reminded that only the person who has, according to the civil law, the right to obtain compensations from the civil responsible party for the defendant action that caused damage can exert the action against the civil responsible party. On the other hand, we consider that the defended also has a right, on a legal or conventional base, the same base that oblige the civil responsible party to answer for the defendant, to ask for the civil responsible party to pay for the damage he produced with the criminal action. The Court has correctly stated that the party who ask for the introduction of the civil responsible party must have a legitimate interest, as an essential condition to have access to justice, to a fair trial, but, in our opinion, the Court lost sight of the damage of the defendant, due the fact that in the situation we analyze, although the defendant ensure his potential "lost", he can not use his policy and it is forced to answer with his own patrimony.

The court states that imposition of the procedural rules of the trial in front of the courts, as the imposition of procedural legitimize to exercise the civil trial are the exclusive competence of the legislator, that can impose, considering specific situations, special rules of procedure. Another argument of the Court is that the defendant and the injured person constituted as a civil party can not be considered as persons in a similar procedural position, the civil responsible party together with the defendant form a procedural

group forced to repair the prejudice caused through the crime. We consider the reports in a criminal trial are complexes and, on one hand we have the report generated by the civil party, witch has to receive compensation for the damage produced and, on the other hand, we have the report produced by the defendant, who covered his risks with a policy. Therefore, we consider that although the defendant and the responsible civil party are held together to repair the prejudice, between the defendant and the responsible civil party occurs a different type of responsibility that has the sources in the law or a contract. That responsibility is the legitimate interest of the defendant, specifically the cause of the contract he has with the responsible civil party, to ensure his patrimony in cases that might induce a cut of his patrimony.

The Court could not retain either that the criminal procedural law limits the exercise of the right to defense of the defendant with, according to his procedural interests, has the possibility to use all the means predicted by the law in order to invoke in his defense facts or circumstances. The Court consider that the right to defense of the defendant suppose participating at the court sessions, using means of evidence, invoke procedural exceptions and the possibility to benefit of the services of a lawyer. We consider that having the possibility to ask introducing the civil responsible party, the defendant is, actually using a mean of defending his patrimony.

In the context, the Court noted that, in the first form, the new criminal procedure code states, in art. 21, alin. (1), that the defendant also had the right to ask for introducing the civil responsible party in the criminal trial, wrong legislative standing, in Court opinion as long as procedural legitimacy of exercising the civil action can have only the one who harness a right against a person. In our opinion, the right of the defendant based on the contract he signed with the responsible civil party is the legitimacy that the Court is talking about. It is his right to have his patrimony protected, based on the insurance policy in the example we followed from the beginning. It is his right, against the responsible civil party, even though, in the criminal trial they have a common responsibility to the civil party.

Therefore, how can we talk about equity and a fair trial when there are not covered the rights of all parties? Why is the law forcing you to close an insurance policy to cover the risks of producing an accident if you will have to pay for the damage yourself in some situations just because you can not invoke the policy during the trial nor the court can ask for introducing the responsible civil party in the legal term? Why does the defendant right

have to depend on the moment when the injured person is constituting as a civil party?

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