Some Ethical Landmarks Regarding the Settlement of the Civil Action by the Prosecutor

**Florin Octavian BARBU¹,
Claudiu Gabriel NEACȘU²**

¹ PhD Student, “Academician Andrei Radulescu” Institute of Legal Research, Romanian Academy, Bucharest, Romania, florin_octavian2000@yahoo.com

² Faculty of Law and Administrative Sciences, Valahia University of Targoviste, Romania, claudiugabriel0@gmail.com

Abstract: Article 20 para. 2 thesis 11 of the Criminal Procedure Code provides that, in addition to specifying the nature and amount of the claims, the declaration of civil party must contain the applicable reasons and evidence. This provision must be regarded in conjunction with art. 20 para. 1 thesis I I of the Criminal Procedure Code, as regards the final moment until the party must fulfill the essential conditions iprovided by law, which are absolutely necessary for a valid legal claim. In addition, the obligations of the civil party regarding the conditions for filing the declaration of civil party must be cumulatively met. The need for the act of constitution as a civil party to indicate the evidence that the claim resides on results not only from the general form that a civil action must fulfill (as it is regulated in the civil procedure legislation, according to art. 194 letter e of the Civil Procedure Code), but also from the obligation stipulated by art. 99 para. 1 of the Criminal Procedure Code, in the sense that, in the civil action, the burden of proof falls on the civil party, unless the prosecutor exercises the civil action for the persons protected by art. 19 para. 3 of the Criminal Procedure Code, in which case the burden of proof falls on the prosecutor. The settlement of the civil action exercised in the criminal trials falls within the prerogative of the criminal court, which may admit it, dismiss it or leave the civil action unresolved.

Keywords: *prosecutor, civil action, provisions, competence.*

How to cite: Barbu, F.O., & Neacșu, C.G. (2020). Some Ethical Landmarks Regarding the Settlement of the Civil Action by the Prosecutor. *Journal for Ethics in Social Studies*, 4(1), 44-52.
<https://doi.org/10.18662/jess/4.1/27>

1. Introduction

Based on the provisions of art. 318 para. 3 letters a and b of the Criminal Procedure Code (from the previous version of the text, as mentioned in the Government Emergency Ordinance no. 18 of January 20, 2016), as an element of novelty was introduced compared to the previous regulation, an exception to the principle according to which the issues related to the settlement of the civil action fall exclusively within the jurisdiction of the court. This is a special case for solving the civil action by the prosecutor (Barbu, 2016a, p. 34; 2016b). Currently, even if the ordinance of waiving the criminal investigation is subject to verification by the hierarchically superior prosecutor (according to art. 318 para. 10 and 11 of the Criminal Procedure Code, as amended and supplemented) and, respectively, by the judge of the preliminary chamber (according to art. 318 para. 12 - 16 of the Criminal Procedure Code), the prosecutor is still the one who, optionally, proceeds to resolve the civil action through the modalities conferred by the current art. 318 para. 6 letters a and b of the Criminal Procedure Code.

Considering the provisions of art. 318 of the Criminal Procedure Code, the solution of waiving the criminal charges may be ordered both when the perpetrator is known and when he is not known. For the situation in which the perpetrator is known, the legislator shows that in assessing the public interest the perpetrator's conduct before the crime is considered, on the one hand, and the attitude of the suspect or the defendant after the crime, including his efforts to remove or reduce the consequences of crime (para. 3 letter g), on the other hand. The provisions of art. 318 para. 3 letter g, para. 6 letters a and b, para. 7 and para. 9 of the Criminal Procedure Code are, however, able to lead to the transformation of the private interest, related to the reparation of the damage, into a public one, which is not judicious, because the civil action, regardless of the jurisdiction before which it is exercised, defends interests that are essentially particular. We therefore consider that the victim's private interest in repairing the damage should not be turned into a public interest, which could lead in itself to the non-disposition of the waiver of the criminal charges or even to its revocation.

At the same time, it would not seem fair for this solution to be able to be embraced if the author is not known (regardless of the aspects related to the civil part of the conflict), but there should be a possibility of excluding such a claim if the author is known, but does not make efforts to removing or diminishing the consequences of the crime. Reporting should

be done strictly in the public interest, with the exclusion of the private one, leaving open to the injured party only the way to capitalize on civil claims before the civil court when an amicable settlement has not been reached. It does not appear fair either that the prosecutor should retain the faculty (the phrase "may") to settle the civil action as a discretionary right, nor that the solution of waiving the criminal investigation or revoking the ordinance ordering it should become incidents depending on the prosecutor's will to settle or not and aspects related to the private, civil domain.

For these cumulative reasons, we propose, *de lege ferenda*, the removal from the content of art. 318 of the Criminal Procedure Code of the references and implications of the civil lawsuit. Moreover, neither the solution of dropping charges from the previous regulation, on the grounds that the deed does not present the social danger of a crime (art. 11 pt. 1 letter b in conjunction with art. 10 letter b1 of the previous Criminal Procedure Code, with the application of art. 181 of the Penal Code) - which is somewhat similar to the waiver of criminal prosecution provided by art. 318 of the Criminal Procedure Code - did not provide for such restrictive conditioning. It should be mentioned that, in the specialized literature (Streteanu, 2012, p. 17), it was rightly considered that the provisions of art. 318 of the Criminal Procedure Code have a mixed nature, of both procedural law and substantial criminal law, containing provisions that lead to the exoneration of criminal liability of the perpetrator and the establishment of obligations, on the execution of which depends the very exoneration of criminal liability. In the motivation of one of its decisions, no. 1470/2011, the Constitutional Court shows, regarding the delimitation criteria between the norms of criminal law and those of criminal procedure law, that the placement of these norms in the Criminal Code or in the Criminal Procedure Code does not constitute a criterion for their distinction.

2. Criminal proceedings and civil proceedings, separate parts of the same trial

Therefore, we are of the opinion that the criminal action and the civil action must remain at this stage of the procedure as separate issues, and the private interest arising from the specifics of the civil action should not be transformed into an absolute public one, likely to prevent the exoneration of criminal liability or the waiver of criminal proceedings as a result of revocation, only for the simple fact that the perpetrator is known (Barbu, 2019).

Moreover, if the legislator understood to protect the rights and interests of victims in case of the waiver of criminal prosecutions, it does not appear fair that the same protection is not stipulated in case of concluding a plea bargain (art. 478 and the following of the Criminal Procedure Code). Or, article 486 para. 1 and 2 does not contain provisions similar to those of article 318 para. 6 letters a and b, para. 7 and para. 9 of the Criminal Procedure Code, and in case of the non-conclusion of a transaction or a mediation agreement regarding the civil action, the civil action remains unresolved, and the other alternative is to file a lawsuit to the civil court. If maintaining the conditionality of waiving the criminal prosecution by resolving the civil law is wanted, such conditionality should be similarly stipulated in the case of the plea bargain (the reasoning being even stronger in this case).

The provisions of art. 318 para. 6 letters a and b of the Criminal Procedure Code establishes, as an element of novelty, a case of solving the civil side of the criminal trial, but does so inadequately, in our opinion. We propose, *de lege ferenda*, the removal of these criminal procedural provisions which represent an interference in the jurisdiction of the judge in resolving civil claims resulting from an illicit act that could constitute a crime. Probably the legislator wanted to relieve the civil courts and to promote a produce for a quick resolution of the entire conflict of law, in all its aspects, criminal and civil, but did not do it in the most appropriate way possible. As an observation, we show that we did not find in the explanatory memorandum regarding the new Code of Criminal Procedure (Romanian Parliament, 2009a) the reasoning that was the basis for enacting the stipulations currently criticized. Even though, as a result of the changes made by the Government Emergency Ordinance no. 18/2016, the judge of the preliminary chamber confirms the solution of the prosecutor of waiving the criminal investigation, he does not proceed truthfully to the settlement of the civil action, but leaves it to the prosecutor, who does so through his ordinance. Moreover, it would not be fair to offer the possibility for the judge of the preliminary chamber to proceed with judging the case, according to art. 318 para. 15] letter a of the Criminal Procedure Code (which contains a general and permissive text), when the solution of waiving the criminal investigation was overturned only on the grounds that the prosecutor did not solve the civil side or solved it in an unsuitable manner. In this way, a vicious circle would be created that could have its origin in the private interest related to the civil law, and, moreover, the possibility of the prosecutor to dispose of the obligations of article 318 paragraph 6 letters a and b of the Criminal Procedure Code would become an obligation in his

jurisdiction, determined by the possibility of the judge of the preliminary chamber to annul the prosecutor's solution.

3. Effects of waiving criminal proceedings on civil claims

Regarding the provisions on the waiver of criminal prosecution and its effects on the civil claims, we show the following:

- the prosecutor is not obliged to solve the civil claims, within the meaning of art. 318 para. 6 of the Criminal Procedure Code, he only “can”, so he has a simple faculty, which is a gratifying thing, related to the criticizable provisions from art. 318 para. 6 letters a and b of the Criminal Procedure Code. However, the positive aspects are diminished by the prosecutor's discretionary right to solve or not the civil claims, but also by the right of the preliminary chamber judge to confirm or not the prosecutor's solution (depending on the analysis on the prosecutor's settlement or the refusal to order a solution regarding the to civil compensations or of the thoroughness of that decision, respectively the measure of such reparation);

- the prosecutor orders, within the meaning of art. 318 para. 6 of the Criminal Procedure Code, after consultation with the suspect and the defendant. The term of consultation means that it is not necessary to reach an agreement between the suspect / defendant and the prosecutor. Thus, if, following the consultations, no agreement is reached in principle, the provision of the regulated measures (especially those in letters a and b) becomes unnecessary, and may lead to the postponement, which is equally unnecessary, of disposing a solution of waiving the criminal investigation. Unfortunately, a consultation with the injured persons is not provided, whose protection is desired through the provisions of art. 318 of the Criminal Procedure Code, so that the remedial measures ordered by the prosecutor may not be circumscribed to the principle of full compensation;

- regarding the use of the term “suspect”, the possibility of disposing against him according to the provisions inserted in article 318 paragraph 3 letters a and b, show that the provisions in question are criticizable. To be a suspect means that the criminal action has not been set in motion, therefore we do not have a defendant. As a consequence, the suspect should not be subject to the measures that may be taken by the prosecutor in light of article 318 para. 6 letters a and b, para. 7 and 9 of the Criminal Procedure Code. Such provisions are not in accordance with those of article 19 para. 1 and 2 of the Criminal Procedure Code;

- the measures mentioned in art. 318 para. 3 and para. 6 letters a and b of the Criminal Procedure Code have the obvious purpose of repairing the material or moral damage [because the text of art. 318 para. 6 letter a does not make any distinction], but the reparation of the damage, according to art. 19 para. 5 of the Criminal Procedure Code, is made in accordance with the civil law. The provision of these measures does not cover all the situations that lead to the reparation of the damage, as does civil law. For example, the public apology to the injured person (art. 31 i para. 6 letter b of the Criminal Procedure Code) represents in fact a component of the reparation of the moral damage (therefore a reparation for the civil party), together with others regulated by art. 253 and the following of the Civil Code. Therefore, the regulation from art. 318 paragraph 6 letter a of the Criminal Procedure Code, which speaks about the reparation of the damage, without any distinction between the types of damages and their repairs, is insufficient. Also, from a civil point of view, by removing the consequences of the illicit deed, we mean the reparation of the damage itself, with the help of detailed provisions of civil law to which art. 19 para. 5 of the Criminal Procedure Code only refers;

- regarding the disposition, according to art. 318 para. 6 letter b of the Civil Procedure Code, to agree together with the civil party upon a way to repair the damage, this should be seen only as a desideratum, not as a definitive obligation, for various reasons (the defendant - because we exclude the idea that he may be coerced - may not have the financial means, the victim may not want, for psychological reasons, to reconcile with the defendant outside a formal trial, the victim seeks compensation that the defendant does not agree to because of the amount or methods of damage repair). However, the sanction provided by art. 318 para. 9 of the Criminal Procedure Code seems to establish a definite obligation, related to the sanction of revocation of the order to waive the criminal investigation. The fact that this latter text provides for the revocation only in case of non-fulfillment in bad faith of the obligations provided in the sense of art. 318 para. 6 letters a and b of the Criminal Procedure Code is not sufficient to exclude the idea of a definitive obligation, and in addition there are questions about how the prosecutor assesses the good faith or bad faith of the defendant. For example, non-repair of the damage / non-conclusion of an agreement with the civil party is an absolutely relative and subjective matter (especially in the case of moral damages, but even in the case of material damages, for which not all the evidence was submitted and a complete probation was not administered - for example, the depositions of witnesses were not taken, when there are no receipts or an expertise, if necessary). As a

result, the prosecutor, who is not a judge, must not be able to take on the role of a judge regarding the civil action of the criminal proceedings. Considering the principle of relativity, subjectivism and the incipient nature of judicial proceedings, such a role would lead to unfair solutions either for the defendant (in case he is considered in bad faith) or for the civil party (whose claims, as being reasonable, proven or appropriate, should not be judged by the prosecutor). The discretionary or the relativity of the solution of revoking the order to waive the criminal investigation by the prosecutor is all the more obvious as it is not subject to appeal, to any control by the preliminary chamber judge (Barbu & Niculae, 2019, p. 98). By law, it would be useful to have a control of the revocation solution from the court, according to the existing model of verifying the ordinance of waiving the criminal investigation;

- also, if the measure from art. 318 para. 6 letter b of the Criminal Procedure Code seems sufficiently clear, regarding those from art. 318 para. 6 letter a of the Criminal Procedure Code, the intention of the legislator is unclear. Thus, by ordering the defendant to remove the consequences of the criminal act or to repair the damage, one can understand this is a general notion, but at the same time it can be a strictly determined matter (i.e. to do a certain thing, to pay a certain amount of money). However, a general provision is not sufficient to lead to an effect of full reparation of the damage (so the regulation could lead to the idea of useless valences), and we consider that a specific stipulation would determine a real intrusion in the jurisdiction of the courts, beyond the fact that it could lead to erroneous and unfavorable solutions for the civil party (who could no longer benefit from the double degree of jurisdiction, merits and appeal, provided that the only procedure available would be to file a complaint against the prosecutor's acts or measures, according to article 336 and the following of the Criminal Procedure Code).

4. Conclusions

In conclusion, this regulation, which was intended to be beneficial to the full and speedy resolution of the conflict of law arising from the commission of a criminal act, actually has multiple valences of illegality and uselessness, as we tried to emphasize above. Therefore, we consider that, by law, the stipulations of art. 318 par. 6 letters a and b of the Criminal Procedure Code should be repealed, with the consequence of the correlative and partial amendment of art. 318 para. 4 and 5 of the Criminal Procedure Code. Therefore, in the case of waiving the criminal investigation, as in the

case of the previous regulation (respectively of the solutions for dropping the charges) and of the current solution to waive charges (by reference to art. 315 para. 2 letter a of the Criminal Procedure Code, which expressly speaks of the possibility of repairing the damage by way of filing a lawsuit to the civil court), the damage should always be recoverable only by appeal to the civil jurisdiction, in case it is not agreed upon amicably (by transaction or mediation). In addition, if the legislator wanted, through the provisions of art. 318 para. 6 letters a and b of the Criminal Procedure Code, to quickly resolve all the consequences of the criminal act, of both criminal and civil matters, we do not see the reason why, instead of extending or maintaining the cases of non-settlement of the civil action during the criminal proceedings, he proceeded to restrict them, as we have already shown in this article.

References

- Barbu, D. (2016a). *Drept procesual penal. Partea generală* [Criminal procedural law. The general part]. Lumen.
- Barbu, D. (2016b). Some aspects concerning the civil action in the criminal proceeding. In A. Sandu, T. Ciulei & A. Frunză (Eds.), *The European proceedings of social and behavioural sciences*, 15 (pp. 95-101). Future Academy. <https://doi.org/10.15405/epsbs.2016.09.12>
- Barbu, D. (2019). Controversies regarding the timing and manner of constituting a civil party in the criminal case. *Valahia University Law Study*, 34(2).
- Barbu, D., & Niculae, G. M. (2019). *Competența judecătorului de cameră preliminară* [The jurisdiction of the preliminary chamber judge]. Lumen.
- Constitutional Court of Romania. (2011). Decizie nr. 1470 din 8 noiembrie 2011 referitoare la excepția de neconstituționalitate a dispozițiilor art. 320[^]1 din Codul de procedură penală [Decision no. 1470 of November 8, 2011 regarding the exception of unconstitutionality of the provisions of art. 320[^]1 of the Code of Criminal Procedure]. *Monitorul Oficial al României*, 853, December 02, 2011.
- Romanian Government. (2016). Ordonanță de urgență nr. 18 din 18 mai 2016 pentru modificarea și completarea Legii nr. 286/2009 privind Codul penal, Legii nr. 135/2010 privind Codul de procedură penală, precum și pentru completarea art. 31 alin. (1) din Legea nr. 304/2004 privind organizarea judiciară [Emergency Ordinance no. 18 of May 18, 2016 for the amendment and completion of Law no. 286/2009 regarding the Criminal Code, Law no. 135/2010 on the Code of Criminal Procedure, as well as for completing art. 31 para. (1) of Law no. 304/2004 regarding the judicial organization]. *Monitorul Oficial al României*, 389, May 23, 2016.

- Romanian Parliament. (1968). Codul de Procedură Penală [Criminal Procedure Code]. *Buletinul Oficial*, 145-146, November 12, 1968.
- Romanian Parliament. (2009). Legea nr. 286/2009 privind Codul penal [Law no. 286/2009 regarding the Penal Code]. *Monitorul Oficial al României*, 510, July 24, 2009.
- Romanian Parliament. (2009a). Expunere de motive [Expose of reasons]. <https://www.juridice.ro/wp-content/uploads/2015/07/Expunere-de-motive-Proiectul-Legii-privindCodul-de-procedura-penala-forma-transmisaParlamentului.doc>
- Romanian Parliament. (2009b). Legea nr. 287/2009 privind Codul civil [Law no. 287/2009 regarding the Civil Code]. *Monitorul Oficial al României*, 505, July 15, 2011.
- Romanian Parliament. (2010a). Legea nr. 134/2010 privind Codul de procedură civilă [Law no. 134/2010 on the Civil Procedure Code]. *Monitorul Oficial al României*, 247, April 10, 2015 [republished].
- Romanian Parliament. (2010b). Legea nr. 135/2010 privind Codul de procedură penală [Law no. 135/2010 on the Criminal Procedure Code]. *Monitorul Oficial al României*, 486, July 15, 2010.
- Streteanu, F. (2012). Documentare privind aplicarea în timp a legii penale în condițiile intrării în vigoare a noului Cod penal [Documentation regarding the timely application of the criminal law in the conditions of the entry into force of the new Criminal Code]. <https://www.juridice.ro/wp-content/uploads/2012/04/Aplicarea-legii.pdf>