UDC 347.1:340.132.6 (477)

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SUBSIDIARY APPLICATION OF THE NORMS OF CIVIL LEGISLATION TO CRIMINAL-PROCESSUAL RELATIONS

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Abstract.

Purpose: *the main task of this scientific research is to analyze the current legislation of Ukraine, judicial practice regarding the application of the norms of civil legislation to criminal-procedural relations.* ***Methods:*** *the method of specific sociological research was used in the study of judicial practice and the identification of the law-enforcement significance of the subsidiary application of the norms of civil law to criminal-procedural relations.* ***Results:*** *for the implementation of the norms of civil law, criminal procedure law creates forms for solving in criminal proceedings issues of compensation for material and moral harm caused by a crime, with the help of a civil lawsuit.* ***Discussion:*** *the criminal procedure law chose an intermediate position in regulating the issue of how to overcome gaps, a joint examination of a criminal case and a civil suit has a number of advantages, the courts should pay attention to the need for accurate and consistent compliance with the requirements of the law on compensation of material damage caused by crimes against property to the victims.*

Key words: *subsidiary application of norms, civil legislation, criminal procedural legislation, civil lawsuit.*

1. Introduction

A characteristic feature of civil law is that it regulates personal property and property relations, and assumes the equality of the parties to these relations and allows them to determine their rights and responsibilities within the limits established by law, which can not be said about the criminal procedural law. The assumption is that crimanal law regulates all cases that could occur in practice, and when certain cases which are including civil lawsuits are not regulated by crimanal law, the courts should, in order to fill up the gap, apply the general principles on which the Civil Code is founded [1, p. 1].

It is worth mentioning that the criminal law process has chosen an intermediate position in regulating questions of ways to overcome the gaps. But the analogy is unacceptable in the criminal law of Ukraine. There is no provision in the Criminal Procedure Code of Ukraine (hereinafter – the CPC of Ukraine) which directly prohibits or allows the use of analogies and the subsidization of legislative norms. However, even if count the fact that the CPC of Ukraine is not allowed to overcome gaps (the analogy of the law and the analogy of rights), subsidizing the application of the rules of law as a legal means of saving the normative material is permissible.

2. Problem and its actuality

The similarity of the subject and the method of legal regulation allows to speak about the relative unity of branches of law. Therefore, it is no coincidence that the same normative legal act the norms of various branches of law can be found. In this case, the legislator does practically, guided by the principle of economy, rational use of normative material, he found out well-founded solutions, instead of introducing in the new legal act the rules that already exist, he refers to the sources in which they are located. In such cases, it is a question of the subsidiary application of the law.

3. Analysis of result research

The study of the essence of the subsidiary use of the norms of the law is devoted to the publication of domestic and foreign lawyers, in particular, S.S. Alekseev, A.V. Ashishmina, M.Ya. Baru, V.I. Borisova, A.I. Drislyuk, O.S. Ioffe, Yu.H. Kalmykov, O.O. Karmaza, V.N. Kartashov, N.S. Kuznetsova V.V. Lazarev, V.V. Lutz, R.A. Maidanik, S.V. Ochurchenko, S.P. Pogrebnyak, S.O. Pogromnyi, S.V. Polenina, O.F. Skakun, K.I. Spector, Ya.F. Farkhtdinov, E.O. Kharitonov, O.I. Kharitonova, V.V. Zura.

4. Setting objectives

Investigation of the subsidiary application of norms of civil legislation to criminal-procedural relations.

5. Presenting main materials

Criminal processual legislation creates forms for dealing with a criminal case for the compensation of material damage caused by a civil lawsuit bring by the reason of criminal offense, precisely for the implementation of civil law. Joint consideration of a criminal case and a civil action has several advantages, since establishing the type and extent of the damage caused by the crime required to resolve the crime of legal issues concerning: the qualification of the accused, the type and amount of punishment, the presence or absence of a crime. In these cases, the establishment and reparation of harm becomes an integral part of the crime of the process [2, p. 30].

Moreover, voluntary compensation for damage or elimination of the damage until the decision on the merits of the case in accordance with paragraph 2 of Part 1 of Art. 66 of the Criminal Code of Ukraine (hereinafter – the CC of Ukraine) is a circumstance that mitigates punishment, and in cases stipulated by Art. 46 of the CC of Ukraine may serve as a ground for terminating the criminal case for reconciled treatment of the victim [3] in accordance with the procedure provided for in Chapter 35 of the CPC of Ukraine, in the presence of certain conditions, such as: committing a crime of minor gravity or a negligent crime of moderate gravity for the first time, reparation for damage caused and reconciled to the accused of the accused (defendant) with the victim. Unfortunately, the code could not provide clear cut solutions for a legal issue, that it left gaps and uncertainties; consequently the task of the judge was not limited to deciding which rule of the code had to be applied in a given case, but this task also comprised the explaining of obscure rules, the filling of gaps, and the adjustment of rules to unforeseen future developments [3].

According to Part 1 of Art. 61 CPC of Ukraine as a civil plaintiff is a physical and legal person who has filed a civil suit in a procedure established by the CPC of Ukraine by a criminal offense or other socially dangerous act which caused moral (with the exception of a legal person) and / or property damage.

According to the explanation contained in paragraph 29 of the resolution of the Plenum of the Supreme Court of Ukraine «On judicial practice in cases of crimes against property» No. 10 of October 6, 2009, courts should pay attention to the need for accurate and steady compliance with the requirements of the law on compensation of moral damage caused by property crimes. A civil lawsuit may be filed with the pre-trial investigation body or court, but before the trial begins.

Article 23 of the Civil Code of Ukraine regulates compensation for moral damage. In response to this provision, a person has the right to compensation for the moral damage caused by the violation of his rights, freedoms and legitimate interests.

Civil lawsuit, which was brought to protect the interests of minors, recognized incapable or partially capable in the manner prescribed by the civil procedure law, persons who for other reasons are unable to protect their rights and legal interests, all these people may be represented by their legal representatives or prosecutor (Part 2 of 3 Article 128 of the CPC of Ukraine), and to protect the interests of the state – the prosecutor (Part 3 of Article 128 of the CPC of Ukraine).

When damage is caused to the property owned by a state or communal enterprise, institution, possession, use and disposal (Part 3 of Article 326 and Part 2 of Article 327 of the Civil Code of Ukraine), then such enterprise or institution is recognized as a victim.

If the owner of a stolen, destroyed or damaged property is a minor aged between 14 and 18, or a juvenile who married or declared fully capable, such persons may be recognized as civil plaintiffs because, by virtue of Articles 15, 16 of the Civil Code of Ukraine and parts 2, 3 of Art. 29 of the CPC of Ukraine, they have the right to personally defend their rights, freedoms and legitimate interests in court.

By virtue of Part 6 of Art. 55 of the CPC of Ukraine in criminal cases of crimes, which resulted in the death of a person, the rights of the victim, provided for in this article, pass to one of his close relatives and family members, the definition of which is contained in paragraph 1 of Art. 3 CPC of Ukraine. Thus, these persons in criminal cases of this category are both civil plaintiffs at the same time. At the same time, the criminal-procedure law does not contain provisions that prevent the recognition of several victims of the deceased's relatives as victims and civilians.

By virtue of Part 3 of Art. 128 of the Civil Code of Ukraine with a lawsuit for the defense of the interests of the state and citizens who can not, under the established reasons of the law, protect their rights themselves, the prosecutor may appeal.

In accordance with Part 1 of Art. 62 CPC of Ukraine, the civil defendant in criminal cases may be a physical or a legal person who, by virtue of law, bears civil liability for damage caused by criminal acts (inactivity) of a suspect, accused or insulting person who committed a socially dangerous act and to which a civil lawsuit has been filed in the manner established by the CPC of Ukraine.

Only claims for compensation for actual damage (cost of stolen property, rehabilitation costs, bringing the property to a proper condition) and compensation for moral damage can be satisfied with the civil lawsuit. The requirements of the civil plaintiff for payment of lost profits, etc. can not be satisfied.

When filing a civil suit in the stage of criminal investigations, the court, while studying the case file, must ensure that there are lawsuits for the recognition of victims by civil plaintiffs and defendants – civil defendants. In the absence, the court needs to decide question about the recognition the victim – the plaintiff, and the accused – the defendant, explaining them the rights stipulated by Art. 42, 55 CPC of Ukraine.

In accordance with Part 1 of Art. 129 of the CPC of Ukraine, during deciding the case, the court must also decide whether the civil suit, in whose favor and in what amount, should be satisfied. At the same time, the criminal-procedural law provides for the following types of decisions on civil laws, which the investigator, prosecutor, the court has the right to adopt:

– to satisfy the claim in full or in part (when pronounced and convicted of a final sentence);

– to refuse to satisfy the legal claim (when it is pronounced and acquitted by a court sentence (Part 1 of Article 373 of the CPC of Ukraine) or the closure of a criminal prosecutor (paragraph 1 of Article 284 of the CPC of Ukraine), or the closure of a criminal proceeding by a court in the preparation of a court session (paragraphs 4-8 Part 1, Article 284, Clause 1, Part 3, Article 314 of the CPC of Ukraine), or the closure of a criminal proceeding by a court during a trial (paragraphs 5-8, part 1, Article 284, Article 288, 475 of the CPC of Ukraine);

– to leave a civil iгше without consideration (Part 1 of Article 326 of the CPC of Ukraine);

– to acknowledge the right of the civil plaintiff to satisfy the lawsuit and to refer the question about the amount of his compensation for consideration in the procedure of civil legal proceedings, upon closing the criminal proceeding on the grounds set forth (Article 129 of the CPC of Ukraine);

– to terminate the proceedings in a civil claim in connection with the refusal of the civil plaintiff from it (Part 3 of Article 61 of the CPC of Ukraine). In this case, the consequences of the waiver of a civil lawsuit must be explained to the civil plaintiff.

Quite interesting is the verdict of the Moscow District Court of Kharkiv dated July 15, 2016, the court was considering a criminal prosecution under the charge of PERSON_1 in the criminal law offense provided for in Part 2 of Art. 146 of the CC of Ukraine. He suffered a pre-trial investigation in a civil suit, in which he asked to recover from the defendant non-pecuniary damage in the amount of 100 000 hryvnias. In the court session, the victim

refused this lawsuit, and therefore the court closed the proceedings for the said suit [4].

When a civil lawsuit is satisfied and when it filed against several suspects, accused, in the sentence, it is worthwhile to indicate which particular amounts are to be collected from them jointly, which – in proportion to the degree of their fault.

It should be borne in mind that due to the provisions of Part 1 of Art. 1190 of the Civil Code of Ukraine joint liability may be imposed only on persons who have caused damage by joint actions or inactivity to the victim, that is, co-perpetrators of the crime.

Juveniles who have jointly caused harm are also liable to the victims jointly. Partial compliance may be established by the court at the request of the victim, in his interests. In the event of harm caused by joint actions of several minors, originating from different parents (adopters) and (or) under the care of different persons, the guilty shall compensate the damage on the principle of joint responsibility, and their parents (adopters) and trustees are responsible for the principles of partial liability.

Joint liability of property does not relate to convicted persons, although in one case, but for independent crimes, are not connected with the common intention.

If property damage is caused by the suspect or by the accused with another person, in respect of which a criminal case has been allocated in a separate proceeding, the court shall be obliged to compensate for the full damage to the suspect, the accused. And when solving the issue of satisfaction of the lawsuit, the courts must take into account the amount of partial reimbursement of damage.

In addition to the claims for compensation for property damage, a person who has been the victim of moral, physical or material damage is also entitled to file a civil suit for compensation for moral damage, which, in accordance with the law, is paid in cash, regardless of whether the damage to property is subject to compensation. In resolving such claims, it is necessary to govern Article 23, 1167, 1168 of the Civil Code of Ukraine, the resolution of the Plenum of the Supreme Court of Ukraine "On judicial practice in cases of compensation for moral damages (non-property)" No. 4 of March 31, 1995. In the case of causing moral harm to the criminal actions of several individuals, moral damage is recoverable, under the rules of partial liability.

In accordance with Part 7 of Art. 128 of the CPC of Ukraine, a civil lawsuit arising out of criminal proceedings, if it was not filed or which was left without consideration, may be filed for consideration in accordance with the procedure of civil proceedings under the rules of jurisdiction established by the CPC of Ukraine.

Civic claims in criminal proceedings, left unheeded, as well as civil lawsuit after the cancellation of a sentence in civil claim, shall be considered in accordance with the rules of jurisdiction of a civil claim prescribed by Chapter 1, Section 3, of the Civil Procedure Code of Ukraine. For example, a criminal case of intentional murder (Article 115 of the Criminal Code of Ukraine) was considered in the court of first instance. The verdict in the case contained a decision on the recovery of the convicted monetary compensation for non-pecuniary damage, but in the part of a civil claim this sentence was appealed in absentia with the appointment of a new trial in the court of the first instance (art. 415 of the CPC of Ukraine) in the course of civil proceedings A civil action in part with a canceled sentence is subject to consideration by the district, district in the cities, city or mid-city court.

In cases where a court adopts a decision on the transfer of a civil suit for consideration in civil proceeding or the revocation of a judgment in a civil claim by an appellate court with a referral for a new trial, the allocation of relevant materials from a criminal case should be conducted when the sentence is served pursuant to Articles 395, 532 CPC of Ukraine, that is, within thirty days from the day the court decision was pronounced by a court of first instance.

The obligation to form materials for a civil case through the allocation of necessary documents from a criminal case or the removal of their copies and the adoption of a decision made in the form of a separate ruling on the jurisdiction of this civil case lies on the court that considered the criminal case on the merits.

According to the civil procedure, the lawsuit is filed under the rules of the Civil Code of Ukraine after sentencing in a criminal proceeding. In this case, the plaintiff has the right to demand reimbursement of court costs for a lawyer, compensation for moral damage, expenses for treatment, including sanatorium and resort, or restoration of the situation that existed before the violation of law.

It should be borne in mind that the amount of damage established in a criminal proceeding will not be binding on the court, since the task of civil proceedings is precisely to determine the amount of damage.

6. Conclusions

Describing the above, it can be argued the necessity and expediency of the subsidiary application of the norms of civil legislation on the compensation for damages in a civil lawsuit in criminal-processual relations. Criminal Processual Law provides forms for solving criminal proceedings at the issue of compensation for material and moral damages caused by the crime, through a civil lawsuit for the implementation of the civil law.

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СУБСИДІАРНЕ ЗАСТОСУВАННЯ НОРМ ЦИВІЛЬНОГО ЗАКОНОДАВСТВА ДО КРИМІНАЛЬНО-ПРОЦЕСУАЛЬНИХ ВІДНОСИН

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Мета: *дослідження субсидіарного застосування норм цивільного законодавства до кримінально-процесуальних відносин.* ***Методи дослідження:*** *при дослідженні судової практики та виявленні правозастосовного значення субсидіарного застосування норм цивільного законодавства до кримінально-процесуальних відносин використовувався метод конкретних соціологічних досліджень.* ***Результати:*** *для реалізації норм цивільного законодавства, кримінально-процесуальне право створює форми для вирішення при кримінальному провадженні питання про відшкодування матеріальної та моральної шкоди заподіяної злочином, за допомогою цивільного позову.* ***Обговорення:*** *кримінально-процесуальний закон вибрав проміжну позицію в регулюванні питання способів подолання прогалин, спільний розгляд кримінальної справи та цивільного позову має ряд переваг, суди мають звернути увагу на необхідність точного і неухильного виконання вимог закону щодо відшкодування потерпілим матеріальних збитків, заподіяних злочинами проти власності.*

Ключові слова: *субсидіарне застосування норм, цивільне законодавство, кримінально-процесуальне законодавство, цивільний позов.*

Б.В. Фасий

СУБСИДИАРНОЕ ПРИМЕНЕНИЕ НОРМ ГРАЖДАНСКОГО ЗАКОНОДАТЕЛЬСТВА К УГОЛОВНО-ПРОЦЕССУАЛЬНЫМ ОТНОШЕНИЯМ

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Цель: *исследование действующего законодательства Украины, судебной практики о субсидиарном применении норм гражданского законодательства к уголовно-процессуальным отношениям.* ***Методы исследования:*** *при исследовании судебной практики и выявлении правоприменительного значения субсидиарного применения норм гражданского законодательства в уголовно-процессуальных отношений использовался метод конкретных социологических исследований.* ***Результаты:*** *для реализации норм гражданского законодательства, уголовно-процессуальное право создает формы для решения при уголовном производстве вопросы о возмещении материального и морального вреда, причиненного преступлением, с помощью гражданского иска.* ***Обсуждение:*** *уголовно-процессуальный закон выбрал промежуточную позицию в регулировании вопроса способов преодоления пробелов, совместное рассмотрение уголовного дела и гражданского иска имеет ряд преимуществ, суды должны обратить внимание на необходимость точного и неуклонного выполнения требований закона о возмещении пострадавшим материального ущерба, причиненного преступлениями против собственности.*

Ключевые слова: *субсидиарное применение норм, гражданское законодательство, уголовно-процессуальное законодательство, гражданский иск.*