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The Analysis of the Functions of Civil Liability

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Abstract: Occupying a prime position next to the current national law, within the new civil regulations, the civil liability claims the same two classic functions, the reparative and the preventive-educative one. Enacted under the general desideratum of maintaining social order, and in particular the defense of subjective rights of man, of respecting the rules of conduct that the law or local custom impose, the first two paragraphs of article 1349 of the Civil Code shall formulate, without being ambiguous, the ideational content of the two functions governing cumulatively the civil liability: the preventive and reparative function. Using content analysis, through documentary descriptive research and rich analysis of the specialized literature, this study aims at identifying the contents of the above mentioned concepts, presenting a point of view on the regarded issue.

Keywords: civil liability; prejudice; preventive-educative function, restitutio in integrum; reparative function

1. The Current System of Civil Liability and its Inherent Functions

Finding ourselves at the crossroads of two major forms of liability of equal importance to civil law, it is noted the classical vision of addressing the issue, meaning that the current Civil Code establishes, traditionally, the same two forms of civil liability, permanent standards for specialized literature and jurisprudence – tort liability[2] and contractual liability[3].

In this context, the overall pattern of civil liability (Pop, 2010, pp. 425-516) completes better its shape, "*without daring novelties*" (Vasilescu, 2012, p. 569), but with a new and an applicable broader regulatory structure. The quoted author analyzes the advantages and disadvantages of maintaining the same civil liability cases, as the common law legal system of liability, applicable whenever special norms do not intervene. It finds equally the failure that would have generated another approach, the futile effort to modernize something that has never become obsolete. The common denominator of civil liability remains the same: the restoration owed to the one who suffered a prejudice, regardless the forms of expression of this principle, as "*every effort of intellectual unification of the liability becomes more a chimera than a win for the main coherence of the legal issues raised by the liability*." (Vasilescu, 2012, p. 570)

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[2] The tort liability is based on mandatory provisions of art. 1349 Civil Code, par. (1): "Everyone has the duty to respect the rules of conduct which the law or local custom requires and without bringing prejudice, through its actions or inactions, legal rights or interests of others."

[3] Regulated by article 1350 Civil Code, the contractual liability supplements the legal support and by the rules enshrined in Book V has, in Chapter II, "Compulsory execution of obligations" under art. 1516-1548. It consists of contractual obligation of the debtor to restore the damage caused to the creditor by his act, consisting of unlawful non-enforcement of creditor's performance due to its creditor, under the concluded contract.

The literature of civil liability was, is and will be a "passionate" one, the supporters of the idea agree (Delebecque & Pansier, 2008, p. 1)[1]. The list of civil analysts who have dedicated their entire evolutionary study research approach of this institution is large, varied, both at national and European level. The analyzed problems have the same range. Speaking of the dynamics of the law, driven by the one of the society, obviously they have developed a real research lab of the liability, culminating (at European level) with concerns to find a common denominator through the establishment of the *liability of the European law* resulting from primary and derivative law of the European Union. The approach is not at all easy and not too soon achievable.

Internally, the registered office is common to both forms, the developing Chapter being generically called *Civil liability*, included in Title II (*Sources of the obligations*) of Book V of the (*About the obligations*) of the Civil Code. This chapter comprises six sections presenting mainly (Pop, Popa & Vidu, 2012, p. 389) the legal framework of the two forms, over approximately 50 items, from art. 1349-1395. The two forms are dominated also by the *common idea of repairing the caused damage* by presenting numerous common points[2] in terms of conditions, modes, causes excused from liability, and that both relate to the same functions, the preventive-educative and the reparative functions, which are subject to the analysis.

2. The Functions of Civil Liability

As previously stated, the wide range of discussions and opinions that characterize the institution of liability could not go around the theme of identifying, defining and determining the content of the principles and functions of civil liability.

It could not be avoided such a theoretical approach, but it even constitutes a fundamental stage, sine qua non, as we cannot deny the evolution of ideas that generated throughout time certain theories, sanctions etc., which led to the unanimous identification of principles and functions of civil liability. The moral, the identity and the religious factors have also played a leading role which is now in the substance and in the constant identification of the functions of the civil liability. The fact that we currently seek other and other facets of the legal concepts represents only a synthesis effort of the ideas progressively exposed, conceptualized at social, historical level and reflected in the principles, values.

By the conjugated contribution of the specialized literature with that of the force emanating from the judicial practice in civil liability, the civil liability develops two important functions, namely, **preventive and educative function and reparative function**, which are closely related. These must be seen in conjunction with the principles governing the legal liability, namely, the principle of full compensation for the prejudice (restitutio in integrum)[3] and the principle of reparation in nature of the prejudice[4]. Moreover, it is estimated that these functions are derived from the essence and the purpose

[1] Supporting the idea, the author invokes various considerations which establish to the study of the liability an interdisciplinary feature: the philosophical reasons (the principle of freedom), jurisprudential reasons, economic, cultural and social reasons.

[2] The major difference between the two forms of liability is the different source, the law or the will of the contracting parties.

[3] This principle requires the removal of all harmful consequences of an illegal act, in order to restore the balance by putting the victim in the previous situation and it is deducted from the very essence of the idea of civil liability: restoring the balance disrupted by prejudice and the re-occurrence of the victim in the previous situation. The direct effect of the principle of restitutio in integrum corresponds to the reparative function: indemnity obligation for the suffered damage.

[4] The legislator formulated *expressis verbis* the specifics of this principle, by the provisions of art. 1386 Civil Code "(1) *Compensation is made in nature by restoring the previous situation, and if this is not possible or if the victim is not interested in the reparation in nature, by paying a compensation established by agreement or in absentia by a court decision."*

of civil liability (Adam, 2014, p. 302). This last assertion creates the opportunity to say that, in concreto, by the functions it performs, through the principles to which it constantly relates, the civil liability is a form of expression, defense, protection of legitimate rights and freedoms of the person, as the holder of rights and obligations in the field of civil law and beyond. The purpose of this institution is that of restoring the patrimony in the situation preceding the illegal act.[1]

2.1. Preventive-Educative Function

If at the beginnings of history, the priority was the implementation of a punitive function, sanctioning, in its various forms of manifestations, the evolution of society and educative factor generated a change of perspective, so that it remains strictly the attribute of criminal liability, the sanctioning function loses its consistency on the civil law field, leaving room for another essential principle, that of reparative principle. The latter finds its application in direct relation to reparative function.

However the previous moment of producing the harmful act, that arises implicitly the obligation to repair, to reconsider the situation when it is still possible, in nature or, alternatively, the equivalent, in either case judiciously, for the victim concerned, it was established *a priori* way of softening the factors that may cause the production of losses, damages. In this context we speak of preventive and educative function that meets the civil liability.

After a careful semantic analysis, this concept implies a double substantiation hypothesis: the first is based on prevention factor, to warn, to predict consequences, etc. and the second one involves the educative stimulus, contained or not in each individual through the acquisition of skills and qualities of a good citizen. In a judicious manner, this function transpires in the provisions of art. 1349 Civil Code, which provides that "everyone has the duty to respect the rules of conduct that the law or local custom requires…" In other words, the criteria envisaged for fulfilling this function are: rules of conduct, law and the customs.

The role of preventive-educative function consists of reducing the number of prejudice as a result of the awareness of the obligation to repair, as any prejudice is entitled to compensation. The right conduct, adapted to rulings based, if not on the balanced conscience of the individual, at least on the fear of not being put into a position of decreasing their patrimony. Being liable does not mean necessarily that the damage was produced in order to be repaired. Equally, or rather, primarily being liable presupposes to assume any permanent damage and being conscious of future prejudices, the state of not producing them, depending only on our conduct. Only then we can prevent their happening (Costache, 2013, pp. 508-509). "*Mieux vaut prévenir, que guérir*" says the Frenchman (it is better to prevent than to repair – s.n.).

The educative feature happens by educating the society on respecting the fundamental social values, deriving also from the good faith and sense of duty of the citizen to act with care, not to damage the interests of others, in fact, to obey the law (Eliescu, 1972, p. 29).

On the prevention it was stated that it strengthens the contracting discipline (Pop, 1998, p. 164) and it consists in that voluntary conduct of abstention from committing future illegal acts. In fact, these issues reside in our nature to respect legal norms, to act always carefully, to reflect closely the relevance and legality of certain actions, to appreciate them and they grasp the risks, to prevent the

[1] On the topic under review, the relevant point of view is reflected in the work of the author Mangu 2014, pp. 50-64.

recurrence of damage. Prudence and diligence become landmarks that protect the individual from any deviations from the social conduct, which would be subject to infringements to indemnity.

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2.2. The Reparative Function

The reparative function is the basis of civil liability[1]; it is intrinsic, resulting from the provisions of articles 1348, 1357 and 1381 Civil Code. Only the factual existence of the prejudice[2], a proved prejudice, real, by fulfilling its living conditions[3] it requires to repair it, because in its absence, the idea of civil liability is no longer sustainable.

We can say that this repairing function makes clear the demarcation between the content of the civil liability and criminal liability. While in the case of first forms the idea of prejudice arises at the same time with the idea of full repairing, the criminal liability imposes the punitive idea, punishing those who violated the norm of law, that is the one who committed a crime within the meaning of criminal law, the punishment acquiring a personal nature. The principle of full compensation for the damage emerges as a direct consequence of this function, relying, according to expert opinion, on the "exigencies of commutative justice" (Vasilescu, 2012, p. 565). Any patrimonial imbalance claims to be solved through the intervention of the law, which protects the victim, and through the effect of coercion (if necessary), the prejudice will be repaired entirely by the one who is guilty. This is the only "penalty" that the civil law provides: the payment of the entitled compensation to pay them for the judicious referral of the situation, differing from other forms of legal liability (administrative - the system of fines, criminal –the punitive system).

The reparative function is only relative as it is often impossible to replace those prejudices, in their specific nature, and when it is possible, it requires a reinvestment of social work, a new employment expense to complete the damaged values. We refer to the non-patrimonial rights (rights concerning the existence, physical, moral integrity of the person or referring to the identification elements of the person) whose possibility to repair them in nature cannot be questioned, intervening the compensation of the affected value. Some authors have stated that in this situation we can speak partly of the reparative feature, and more about the compensation and arbitrary estimators. (Vasilescu, 2012, p. 565)

In this context, it was said that no damage can be absolutely repaired, as we do with the memory of supporting its achievement? Physical suffering experienced as a result of an accident or of moral nature due to loss of a loved one, are "repaired" financially through the payment of some compensation, but that amount will never be able to erase the suffering of the victim, or even to alleviate. The equilibrium of lost values will not be restored. That is why we believe that those amounts are rather financial penalty for the perpetrator. Here is actually the limit of this principle which is actually within the limit of human beings. From this perspective, in the French positive law it speaks increasingly of the granting damages-interests with the role of "compensation" and not repairing the prejudice.

[1] Within the same meaning, the specialized literature said that the "reparative function is the essence of civil liability, i.e. the idea of repairing the prejudice." (Lupan & Motica, 2008, p. 396).

[2] By prejudice it is understood the result of the negative effect suffered by a certain person, as a result of the misconduct of another person or the deed of an animal or thing, for which it is the liability of a certain person. (Stătescu & Bîrsan, 2000, p. 145)

[3] In order to be imposed the idea of repairing, there is a certain number of conditions which the prejudice must accumulate them: to be clear, to be direct, personal and to result from the breach or infringement of a right or a legitimate interest.

At European level, these two functions were adopted differently by the legislation, with a focus mainly on one of them, either the compensating feature of the civil liability, after payment (as in the case of France) or the preventive-educative feature, specific to the English legal system. The German legal system combines the two directions, assuming both the corrective justice principles of the English law, but also those of reparative justice. (Pricope, 2013, p. 19)

3. Conclusions

According to the above, we believe that adding the two functions of legal liability grants legal substance to this institution, it restores the idea of fairness, it removes the negative consequences of harmful act by arising the obligation of full repairing of the suffered prejudice. The role of prevention and of the factor to achieve an educative mechanism is a priori assumption of possible negative consequences, in the sense of an obligation of not doing anything to prejudice the legitimate interests of another person. Without establishing a hierarchy between the preventive-educative and reparative functions, both in terms of ruling one of them or of the importance that both meet in the context of civil liability, the community of the two above-mentioned functions claims the active role of defending the idea of fairness, justice, defense of what civil law designates by the subjective right of the physical or legal entity.

4. References

Adam, I. (2014). *Drept civil. Teoria generala a obligaţiilor/General theory of obligations.* 2nd Ed. Bucharest: C.H. Beck.

Costache, Mirela (2013). The role and the current valences of civil liability principles and functions. *Acta Universitatis George Bacovia. Juridica*, volume 2, issue 2/2013, pp. 497-517.

Delebecque, Philippe & Pansier, Frederic-Jerome (2008). *Droit des obligations. Vol. II, Responsabilité civile, délit et quasi-délit/Law of obligations. Vol. II, Civil liability, infringement and criminal negligence*. 4th Ed. Paris: Litec.

Eliescu, Mihail (1972*). Răspunderea civilă delictuală/Tortuous liability*. Bucharest: Academia R.S.R. Publishing House.

Lupan, E. & Motica, R.I. (2008). *Teoria generală a obligaţiilor civile/General theory of civil obligations*. Bucharest: Lumina Lex.

Mangu, Florin I. (2014). *Răspunderea civilă. Constantele Răspunderii civile/Civil liability. The constant elements of Civil Liability.* Bucharest: Universul Juridic.

Vasilescu, Paul (2012). *Drept civil. Obligaţii/Civil Law. The Obligations*. Bucharest: Hamangiu.

Pop, L. (1988). *Drept civil. Teoria generală a obligaţiilor. Tratat, Civil Law/General theory of obligations. Treaty.* 2nd Ed. Iasi: Editura Fundaţiei Chemarea.

Pop, Liviu (2010). Tabloul general al răspunderii civile în textele noului Cod civil/ The general picture of civil liability in the text of the new Civil Code. Article published in *Revista Română de Drept Privat/The Romanian Journal of Private Law no. 1/2010 included in Contribuţii la studiul obligaţiilor civile/Contributions to the study of civil obligations*. Bucharest: Universul Juridic.

Pop, Liviu; Popa, Ionuţ Florian & Vidu, Stelian Ioan (2012). *Tratat elementar de drept civil. Obligaţiile conform noului Cod civil/The elementary treaty of civil law. Obligations under the new Civil Code.* Bucharest: Universul Juridic.

Pricope, Paul (2013). *Răspunderea civilă delictuală în reglementarea noului Cod civil, a Codului civil din 1864 şi a dreptului european/Tortuous liability in settling the new Civil Code, of the Civil Code of 1864 and European law.* Bucharest: Hamangiu.

Stătescu, C. & Bîrsan, C. (2000). *Drept civil. Teoria generală a obligaţiilor/Civil Law. General theory of obligations*. Bucharest: All Beck.