

## **The Liability Limits for the Minors' Acts and for Persons with Particular Legal Situation. Aspects of Comparative Law**

Varvara Licuța Coman<sup>1</sup>, Mirela Paula Costache<sup>2</sup>, Dorin Matei<sup>3</sup>

<sup>1</sup> *Danubius University of Galati, Faculty of Law, comanvarvara@univ-danubius.ro*

<sup>2</sup> *Danubius University of Galati, Faculty of Law, mirelacostache@univ-danubius.ro*

<sup>3</sup> *Danubius University of Galati, Faculty of Law, matei.dorin@univ-danubius.ro*

**Abstract:** The normal and balanced evolution of the social life imposes the respect of rules of conduct regarding the rights and interests of all its members. Nobody has the right to violate or to disregard these rights and, as a result, anyone who comes in conflict with to these rules must be responsible for his deeds or, objectively, has to guarantee and bare certain risks. Therefore, the purpose of the present paper is to study, by examining each and every element, the objective misdemeanor responsibility of the parents for the deeds of their underage children, seen from the perspective of the Civil code into force, of the New Civil code as well as of the French civil legislation.

**Keywords:** objective civil responsibility; prejudice; guilt

### **1. Introduction**

The transformation of responsibility institution at conceptual level and also in point of its applicability represents the main effect of the technical-informational explosion that rules the contemporary society. The consequence of this accelerated evolution of society and, implicitly, of the social comfort that has been created is the need to provide a severe system of social protection. Thus, aspects concerning the guarantee of human rights, of a certain social category, of a minority, of the underage and, reaching to the civil law field, the protection of the prejudiced person are more and more often approached. The doctrine and jurisprudence have underlined the importance of re-establishing the equilibrium destroyed by the damage and bringing the victim, on the expense of the responsible person, to the status before the prejudice. (Maurie, Aynes, & Stoffel-Munck, 2009, p. 11)

Starting from concrete aspects regarding the parents' conceptions about life and society, the way in which they understood or managed to impose and transmit to their children values with a general and particular character, in each age there can be noticed a special contribution to establishing those arguments having a logical-juridical nature that concern the drawing of misdemeanor responsibility of parents in case their underage child commit a derogatory deed. The XXth century brings to front the role of family in applying or valorize the principle of the underage superior interest, being marked by the understanding of the fact that, as a subject of right, it imposes the need of a special protection and defense system, as a result of his physical and psychic immaturity.

Law no 272/2004 updated<sup>1</sup>, regarding the protection and promotion of the child's rights, has a pronounced social character, highlighting the essential role of preventing the separation of the child

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<sup>1</sup> Law no. 272/21 June 2004 was published in Oficial Monitor no. 557 of 06/23/2004, with the last additions of G.D. no. 9/2008.

from his family and outlining a legislative frame whose aim is to support the family and community in the so complex process of raising and educating a child. In this purpose, even starting with article 2 related to the rights and obligations of parents, of other legal representatives of the child, as well as of any other persons to whom the child has been placed legally, it is provisioned that any settlement adopted in this domain is subordinated to the principle of the child superior interest.

The purpose of this legal disposition is to consolidate the idea according to which the parent is the person directly responsible for assuring the growth and education of the child, but without eliminating the contribution of local collectivity of which the child and his family are part.

## **2. The Substantiation of Parents' Responsibility for the Deeds Perpetrated by their Underage Children. From Subjective to Objective**

Regarding the substantiation of parents' responsibility for their underage acts, till not long ago there was an unitary opinion that left place to no interpretation, namely a relative assumption of guilt based on the idea that either the parents did not assure sufficient education or they did not supervise their underage children enough. In the French juridical literature a real "revolution" took place in what regards the classification of the ground of this type of responsibility, several stages being known. Up to the 50s, this ground aimed at a legal assumption of guilt (Maurie, Aynes, & Stoffel-Munck, 2009, p. 78)", the mixed ground of responsibility<sup>1</sup>, appeared step by step and afterwards, the responsibility in full right. These stages followed one after another in time, the role of doctrine and jurisprudence being very important. The supporters of mixed theory considered that the basis of parents' responsibility lies both on subjective and objective coordinates, being based on an assumption of guilt concerning the supervision and education modality of the underage children on the one side, and the guaranty obligation they owe to the third persons for the acts of their child. This theory was only a step towards jurisprudential support of responsibility of full right, case in which the responsibility of the parent has been compared to the responsibility of a guardian, a responsibility independent of any form of guilt, in full right, therefore, grounded on the theory of activity risk (Boilă, 2009, Pandectele Române, p. 52).

At present, according to the opinions of the specialists in this field, the misdemeanor civil responsibility of parents is perceived in a way minimally expressed by the syntagm „*crossroad*” and characterizes the actual situation of the misdemeanor civil responsibility institution, to which the new social-economical conditions generated by the accelerated rhythm of scientific progress have contributed, the institution being subjected at the same time to the influence of obligations and family law (Boilă, 2009, p. 139). Thus, on the one hand, the perpetration of a prejudicial deed by an underage gives birth to the civil obligation of repairing it, which is included in the field of the obligations right. In exchange, the fact that parents are the persons nominated as responsible for these prejudices corresponds to the perpetrator's affiliation to his family, as a social entity to which he is connected by biological, social, economical, affective relations. The unity and cohesion of the family take over the responsibility from the shoulders of the real perpetrators. This way, the interests of the victims regarding the reparation of the damage are correlated to the principles that govern the family relations, financial and moral support, respect and mutual assistance (Costache, 2009, p. 141). It can be noticed thus the connection that bounds the persons declared as responsables with those who have perpetrated

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<sup>1</sup> This theory of the mixed ground is sustained by L. Mazeaud, H. Mazeaud and A. Tunc. who considered that the ground of parents' responsibility leys both on subjective and objective coordinates.

directly the illegal and prejudicial deed. This connection consists of the authority that the law grants to those named responsible against the ones for who they are responsible. Correlative to this authority, subordination corresponds to it. The practical content of the civil report of indirect responsibility is shown explicitly or implicitly in the related normative disposition, such as the duty to supervise and educate the underage child.

The Romanian specialty literature and judicial practice have supported, but more timidly, the need to modify the ground of this type of responsibility. The materialization of this opinion is due to the doctrinarian critics, which highlighted the limits of the subjective conception considered to be insufficient and ineffective, „beyond the reasonable and rational limits”, especially when the guilt of parents was very hard to be proven (Pop, 2000, p. 243). Concretely, when it refers to the subjective ground of this type of responsibility, article 1000 (2) of the Civil Code indicates that there have been deviations or inadvertences of the parents in what regards the fulfillment of the obligations they have to their children, concerning a deficient fulfillment or non-fulfillment of the obligations of supervision<sup>1</sup>, raising, education of the underage, with the possibility to eliminate this assumption, if the fact that there was impossible to prevent the prejudicial deed is proven, according to the dispositions of article 1000 (5) in the Civil Code. After proving an illegal guilty deed perpetrated by the underage, the existence of a prejudice and the causality connection between them, by virtue of legal provisions, we found ourselves in the presence of a triple assumption in what regards the parents of the underage child: The assumption that, *deviations* have occurred when practicing the parental duties, which consist of illegal civil actions or inactions whose consequences consisted in a prejudice having the nature of drawing their responsibility; The assumption that there is a causality relation between the deed for which the parents are assumed as guilty and the perpetration, by their underage child, of the illegal deed causing prejudices; The assumption of guilt of parents or non-fulfillment or improper fulfillment of the duties they have to their underage child, guilt which normally is presented as negligence. Afterwards, many authors have approached a new orientation, invoking, together with the lack of supervision, the deficiencies in education of the child correlated to the obligation that parents have for educating their underage children. The reunion of the two considerations is reflected by numerous decisions of the Supreme Court, pronounced after 1977.

All these aspects have created the premise of a new orientation in grounding the parents' responsibility, being based on the non-fulfillment of the underage child's supervision and raising duty. In this purpose, the provisions of the Civil Code have been correlated to those of article 101 (2) in the Family Code according to which: „the parents have the obligation to raise their child, taking care of his health and physical development, of his education, studies and his professional training, according to his qualities and in accordance with the state's purposes, in order to make him useful for the collectivity”. The correlation of the two texts of law gave birth to different opinions, some authors arguing that the only text that establishes the civil responsibility of parents is article 1000 (2) in the Civil Code, and the provision in the Family Code has only the meaning of reinforcing what has a legal basis (Stătescu, 2009, p. 32)<sup>2</sup>. A last stage that modified the intrinsic nature of parents' responsibility includes the decline of the domination period of the guilt in favor of a responsibility of full right that can be eliminated only by proving an alien cause or of the deed of the victim. Shared to the same extent also by our doctrine (Pop, 2004, pp. 55-74), in this purpose have been invoked both the need to

<sup>1</sup> The lack of supervision constituted the traditional basis reflected in decisions of the Supreme Court up to 1975-1976.

<sup>2</sup> Also in this case, a special role has been played by the judicial practice, The supreme Court writing in December no 18 on 15th of March 1982, in C.D. per 1982, p. 101: “the legal dispositions ...regarding the parents' responsibility of supervising their underage children have been implicitly extended by the Family Code which foresees the parents' obligations to their underage children”.

change the classical concept of civil responsibility and the need to assure the protection to the victim of the prejudice. Having in view a logical order, the damage is that which has to be covered by the obligation of responsibility and not the deed to acquire relevance.

This principle of responsibility in full right leads to an objective responsibility, without guilt, being justified by the idea of taking care of another. Based on this new orientation, parents are considered responsible „ab initio”, and there is no need to prove the guilt. This new theory can be discussed and subjected to critics in our doctrine: besides, the natural will of sharing the experience of parent does also imply to assume an obligation to support the consequences of a deficient education and care and the supervision of the underage child? Is the example of French doctrine and jurisprudence, which imposed the objective theory of parents' responsibility, eliminating the guilt, in order to give a new interpretation to its existing legal framework enough? Does the future settlement allow this interpretation or it aims at it deliberately? Does it bring other modifications meant to reform (renew) the ground of responsibility, to harmonize the institution of misdemeanor civil responsibility for the deed of another with the European and international juridical experience and legislation?

### **3. The New Civil Code**

The reflection of Romanian legislator towards elaborating a new civil code appears as absolutely essential especially in what regards the institution mentioned in this paper, due to several factors: on the one hand the Civil Code in force is from 1864, on the other side, the need to perceive this institution in the light of the existing social and political context and especially in the light of harmonizing the legislative framework as a result of European integration the more so as there have been timid attempts of European codification. According to the future civil legislation „the one who, based on the law, of a contract or of a court decision is obliged to supervise an underage or a person laid under an” will be responsible for the prejudice caused to another by these persons. (art. 1372 alin. 1). Studying these texts of law, one can notice the modification imposed by the existing global context, in what regards drawing the attention of the legislator from the area of the deed and the underage perpetrator to the area of victim and of the prejudice he/she has suffered, by extending the categories of persons upon who the misdemeanor civil responsibility can be drawn and oblige them to repair the prejudice. Another new aspect is referring to the lack of importance when instituting the responsibility, the residence of the underage and of the person laid under a court interdiction, the only exoneration possibility being induced by proving that ”he could not prevent the prejudicial deed” (Alin. 3 of art. 1372). Concerning the appreciation criteria of the possibility or impossibility to prevent the prejudicial deed, in the new legislation they are also subjective, being analyzed depending on the concrete situation of each and every case.

In article 1368 alin (1) it can be noticed that „the lack of judgment does not spare the author of the prejudice of paying an indemnity to the victim any time the responsibility of the person having, according to the law, the duty to supervise him, cannot be drawn.” Alin. (2) „the indemnity will be paid in a reasonable ration, taking into consideration the patrimonial state of the parties.” This text of law arouses the interest of the specialists raising questions about the modality in which for example, a person under 14 could pay an indemnity? According to the expressed opinions, a reasonable solution, taking into consideration the priority of covering the prejudice, would be to institute by law an insurance of mandatory civil responsibility paid by the parents of each child. The parents will pay this insurance till the child comes to age. Therefore, the insurance institution will cover the damages produced by the underage regardless of the person responsible for the supervision. If the person in

charge of supervising the underage does not manage to exonerate himself of responsibility, the insurance institution that paid for the damage will turn in addition, against this person. But here another question rises: Who will pay for the orphans?

#### 4. Conclusions

The institution of parents' misdemeanor civil responsibility has been determined as the protection of the prejudice victim's interests is taken into consideration. The evolution of the positive right in the last decades has shown the gradual abandon of imputation of the responsible person as a condition of drawing the responsibility as well as a greater attention in protecting the victim's interests. During this study, the actual coordinates of parents' responsibility for the deeds perpetrated by their underage children were presented, especially the tendencies to make the basis of this type of responsibility more objective. The actual tendency in the specialty literature and judicial practice is to extend parents' responsibility to the limit in which the definitive features of Guilt – „The eternal Lady” of misdemeanor civil responsibility is confronted to a serious identity crisis. Removing any subjective element of guilt makes place to the **quality of parent and to the special relationship that a parent has with his child**. From this perspective, we consider that is strictly necessary to reconsider the quality of parent from the point of view of awareness of all obligations that parental protection supposes, even before becoming a parent. All the law systems foresee that natural persons become entirely capable at a certain age provisioned by the legislation so that, afterwards, starting from that age they can be considered as being responsible. In Romanian legislation, the ground of parents' responsibility for the prejudicial deeds of the underage has been related till not long ago by the coming to age and by the legal residence of the underage. But step by step, the doctrine has shared almost unanimously the objective concept upon parents' responsibility, considering this fundament as the transformation of the assumption of guilt in responsibility in full right, its finality being the aggravation of parents' responsibility at the same time with the increase of effectiveness in supporting the victims in order to repair the prejudice. At the same time with the project of the new Civil code, there was also a trial to create a harmony between the legislation and both the existing legislation at the European level and especially the reality of contemporary life trying to adapt the legal provisions to the accelerated rhythm of development and social progress. However, the new settlements have started numerous controversies both in the specialty literature and in the doctrine, generating various disputes.

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