

## **REFLECTIONS UPON THE REFORMING OF THE INSTITUTION CONCERNING THE DELICTUAL CIVIL RESPONSIBILITY, IN THE CONDITIONS OF THE MODERN SOCIETY**

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**ABSTRACT:** *The institution of the civil delictual responsibility has known major transformations in the last decades as a consequence of setting special regulations of compensation in certain domains of activity, like medical incidents, ecologic damage or injuries generated by faulty products. The problem of fundamental research on this responsibility, by designating the person responsible and by establishing the regime for repairing the victim's damage, has become one of the problems of contemporary doctrine and jurisprudence. A real "crisis of the civil responsibility" (Jourdain, 1996) (Terré, Simler, & Lequette, 1996) is manifested, characterized by the tendency of objectifying the fundament and the marginalization of the fault, a fundament traditionally consecrated in the dispositions of the Civil Code. The significant augmentation of the positive law dispositions on the new hypotheses of the responsibility represents the fertile ground for theoretical and jurisprudential approaches, from the perspective of the law theoretician and practitioner. Our study proposes several reflections on the actual status of the delictual civil responsibility.*

**KEY WORDS:** *the delictual civil responsibility; damage; the fault victim.*

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The idea of responsibility is one of the oldest moral ideas of humanity, taken from the Christian morals and creatively capitalized by the doctrine and jurisprudence of the civil law, the quintessence of the private law. Social peace and harmony can be realized only by regulating responsibility in all the domains of activity, as an essential condition for progress, an eloquent proof of the level of culture and civilization in a society, on a certain step in its development. In a metaphorical expression, the legal responsibility was considered as "the keystone" (L.Pop, 1998) (Boilă, 2008) of the whole social responsibility. In the conditions of the modern society, the legal responsibility has taken new and profound significations, from an important legal institution to a real "measurement" of the development level in human society.

The fundament of responsibility is a real "axiological summum" of the whole juridical construction, respectively that logical and juridical argument that determines the mechanism of engaging the obligation of the person responsible for indemnifying the

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victim, in this way establishing the conditions for repairing and resetting the person in the state prior to the damage. The research of the delictual civil responsibility from the perspective of its objective fundaments demonstrates once more the admirable quality of the civil law, the main branch of our private law, in harmonizing its standards to the reality of our social-economic life. This is possible if we consider the following idea: law, in its whole “*(...) always serves as a polar star in orienting the juridical order*”. (Sperantia, 1936)

The objective founding of civil responsibility is independent of imputing the conduct of the responsible person taking into account the risk it introduces in the society by the use of some objects and the performing of activities dangerous to the other members of the society. The strong development of the production forces by the introduction of machines on a wide scale in the industrial processes at the end of the 19<sup>th</sup> century determined an increase in the risk for injuries among workers. The impossibility of proving the fault of the persons organizing and conducting the activity for engaging the civil responsibility and indemnifying the victims started long debates on the necessity of engaging responsibility independently from the culpability of the responsible person. The protection of the victims against harmful events determined the orientation towards other fundaments of responsibility, independent of any fault. Gradually, an idea was generally approved. It stated that the fault can't be the only fundament of responsibility, as, in certain domains, the risk or warranty is invoked thus justifying the designation of a certain person responsible by engaging the civil responsibility. Under these conditions, the delictual civil responsibility was founded in different directions, in some hypotheses on a subjective, objective or mixed basis, in correlation to the specific obligations of law reporting, created by the event that generated the damages.

The subjective fault of the responsible person ceased being the only fundament for the delictual civil responsibility which determined the disappearing of harmony and coherence of a law system built on a single general principle, the one of subjective responsibility. The delictual responsibility was subordinated to a major interest with high priority, the one concerning the protection of the victim's interest by the creation of the proper legal environment for the victim to be fully indemnified through the return to the status prior to the damage.

Under these circumstances, in the last decades, we assist to *the regression of the position concerning the subjective fault within the fundaments of civil responsibility*, determined by the widening of the objective responsibility cases in positive law. Adopting a “mosaic” of special rules in certain activity domains characterized by the risk of producing damages contributed to the creation of special civil responsibility regimes. Legal practice had a creative role in adapting the legal guidelines to the new social realities like the expansion in the sphere of repairable damages (the situation of moral damages) and the recognition of the legitimacy of certain persons that are entitled to being indemnified (the case of the children of the concubine that were supported by the victim).

Seen from this perspective, the objective delictual civil responsibility rests under influence of time. The dispositions in the Civil Code where the general principle of responsibility founded on the idea of fault were set almost two centuries ago and have become anachronistic to the needs of contemporary society. Besides fault other objective fundaments are invoked: risk and warranty. The new legal regulations

applicable to special responsibility regimes establish these fundaments independent of the imputability of the responsible person's conduct, but without having a general principle of objective responsibility at its basis.

Subjective responsibility is mainly an individual responsibility because it has exclusively the conduct of the person responsible in its point of view and it aims its punishment by engaging its obligation to indemnify the victim. By regulating some responsibility hypotheses founded independently from any fault, one expresses the tendency of socializing the risks of producing damages in society by setting the legal environment where the responsible person must assure the repair of the damage also in those situations when no particular conduct can be attributed to the latter. There is a fall-back from the rules of collective civil responsibility where persons other than the ones that were effectively guilty of the damage must indemnify the victim. An important role for this was attributed to the strong development of assurances destined to guarantee the repair the damage in all situations, no matter the subjective position of the person responsible, by taking the task of repairing the damage by the assurer, according to the signed contract.

The actual evolution of the institution of delictual civil responsibility can be characterized by the "rupture" between the classic principle of the subjective civil responsibility concerning the traditional founding on the fault principle and the new orientations on bases independent of any fault, a "full rights responsibility". The controversies are tougher and tougher as the "objective fault" is criticized and considered a "deforming" of the notion by the inadmissible widening of its content.

On a doctrine scale, a wide debate was started concerning *the role of fault as a classical fundament of civil responsibility*, taking into account the fact that it is possible to engage civil responsibility also in the absence of the fault in the responsible person. In this context, one has appreciated that the institution of delictual civil responsibility must adapt itself to the transformations in society, the new rules, in order to establish guidelines concerning the repair of the damages in order to insure a more efficient protection of the victim. But, this need for adapting implies a continuous re-evaluation of the fundaments of civil responsibility, also by reconsidering traditional principles. Human society, in its whole, is in a continuous transformation, and, for this, the institution of civil responsibility that was created to re-establish the social equilibrium destroyed by the production of a damage it must be remodelled in order to correspond to the new social needs.

The echoes of orientations favourable to objective founding of civil responsibility were contradictory: some praised the pragmatic character and real support offered to the victim whose rights and interests had been broken, in this way relinquishing it from the difficult task of proving the fault of the author in the given event, others considered that there was an exaggerated protection by the worsening of the position in the responsible person, the so-called "victimologist" current being criticized. Objective founding was considered as damaging, in this way not favouring the person responsible that must respond even in the absence of its fault. More than that, one has appreciated that objective founding also affects the idea of social justice itself, which traditionally considers that responsible is only the person that is guilty of the socially dangerous

consequences produced by its action. In this context, some French authors<sup>1</sup> (Radé, 2003) criticized the mode that these new orientations of the objective founding of delictual civil responsibility affects the harmony and coherence of all regulations on the laws of civil responsibility, and, in this way, damaging the principle of juridical security as the persons considered responsible are forced to indemnify the victim even in the absence of any fault, which gives the feeling of a great injustice. Categorically, as these authors considered, excluding the condition of the author's fault that resulted in a damage represents "*the strongest destabilizing factor in the civil responsibility law*".

Lately, the reparatory function of responsibility gradually gained autonomy by engaging the obligation of indemnifying the victim in the absence of the fault from the responsible person. There is a significant increase in the influence of the economical dimensions of delictual responsibility on its reparatory function, which imposes reconsideration of the functions belonging to this institution, in this way offering new possibilities for full repairing of the damage by the way of interpreting the fundaments of delictual responsibility.

In this context, one analyses in the doctrine (Radé, Réflexion sur les fondements de la responsabilité civil. Le voies de la réforme: la promotion du droit à la sûreté , 1999) the necessity for remodelling this institution by setting the priority for the reparatory function, when facing the decline in the prevention-education function, in order to offer a more efficient protection to the victim of the damage by respecting its fundamental right for security. A certain punishment given to the guilty person isn't relevant anymore when facing the task of resetting the social equilibrium by returning the victim to its former status. The educational-preventive role of responsibility becomes less and less important, in this way appreciating that attention must be given to the repairing of the damage, given the specific of civil responsibility. The role of the subjective element of responsibility was largely attenuated leading to the sustaining the idea of its uselessness. Modifications were performed in the report between *civil fault* and the other elements of responsibility, *wrongful act, damage and the causality link*. On the other hand, one can remark the actual tendency of *socializing delictual civil responsibility and increasing the role of insurances in the domain of damage repair*.

Still, all of these can't be an argument for abandoning definitively the educational-preventive role of responsibility, so intimately linked to human personality, to the idea of legal responsibility itself. In certain hypotheses, the proven or suspected fault continues to be the fundament of delictual responsibility (responsibility for one's own deed, responsibility in teaching staff and craftsmen for the damages caused by their students or apprentices while under their supervision). In a civilized world, each member of society must respect the moral principles set by traditions and customs, must obey consciously to law and order and must prevent any behavior that could bring damages to others. In principle, one can't accept the presumption of responsibility for one person in the absence of proof stating his/her implication in producing the damage. *Punishment, repair, prevention* – these are the most important orientations on founding civil responsibility that were set over time. If the initial orientation of "*responsibility as punishment*" had the subjective fundament of fault in its essence, with an exclusive

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<sup>1</sup> C.Larroumet, *Responsabilité du fait d'autrui principe général*, Juris-Classeur Civil, *Responsabilité civile*, art. 1383, fasc 140 ; Recueil Dalloz 1991, Jurisprudence, p.324.

orientation towards the author of the event, keeping in view its subjective position towards the event and the damages it produced, with the aim of punishing its dangerous conduct towards the other members of society, the new objective fundament, the one on “*responsibility as indemnification*” is mainly based on the idea of warranty for activity risks, which is independent of any fault and it has as a main purpose the repairing of the victim’s damage and less the punishing of the author of the fault.

Together with these interpretations of the fundaments of civil responsibility, in law doctrine one analyses in the last decades “*preventive responsibility*” based on the Precaution Principle seeking the prevention of the risks of producing major and irreversible damages concerning the life, health and security of citizens, the protection of the environment, the protection of the actual and future generations, the existence of life on Earth. More actual than ever, the Precaution Principle warns on possible dangers of producing severe damages, presently unknown because of the actual level of technical and scientific knowledge. This is a new ethics of responsibility, the ethics of prevention which proposes a new approach of the fault in the responsible person from the perspective of adopting a conduct for anticipating and avoiding major risks.

The new fundament of responsibility, the Precaution Principle proposes, in this way, an interpretation different to the traditional one on the repair of a damage that is already done, on the prevention of severe damages, not produced but possible, by joined actions of citizens and public authorities. This is an innovative idea that marks a decisive moment in the evolution of this legal institution: the decline of individual responsibility and the consolidation of collective responsibility by the settlement of the legal conditions for indemnifying the victim by other persons than the one that produced the damage. Still, this doesn’t represent the disappearance of the subjective fundaments but contraire, the objectifying of its content by reporting to the prejudicial behaviour in the responsible person.

As seen from this perspective, the analysis of the objective fundaments of delictual civil responsibility is followed “*as a red wire*” by the idea of prevention, respectively the application of the Precaution Principle. A new anticipating and preventing legal responsibility is foreseen: the responsibility for the risks of producing major damages that can affect the essential interests of the whole society. This is a responsibility of the future that corresponds to the noblest ideals: ensuring the future of mankind with a healthy environment and secure conditions.

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