SOME REMARKS ON THE LEGAL REGIME OF CIVIL LIBERTIES

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ABSTRACT: *The study outlines - from a practical perspective - the criteria according to which a subjective civil right can be distinguished from a civil liberty. Indirectly, a theorization of the concept of civil freedom is made in a context in which the Romanian doctrine - older or more recent - gives preference to examinations related to subjective law.*

It is observed that there is a rich concern for this field but the offered solutions are extremely diverse and, especially, contradictory, which can disrupt the solutions of the practice that occur in complete uncertainty.

Therefore, a model is suggested; the truly significant distinctions between a subjective right and a liberty are verified only in a civil liability mechanism in which - according to pre-established criteria - the judge selects the preferred legitimate interest, contained in a right or a freedom; and the selection criteria must be sought in the inappropriate behavior of the perpetrator of the conflicting right and freedom.

KEY WORDS: *subjective law; civil liberty; legitimate interest; legal liability.*
JEL Code: *K 38, K 13.*

1. PREMISES

The exercise of current practical activities has given us an unexpected finding: subjective civil rights are the favorites of detailed doctrinal analyzes and this to the detriment of the concern to examine the applied content of the concept of civil freedom.

This preparatory statement, however, requires an explanation: we do not claim that the notions of liberty or civil liberty have not enjoyed over time or at present the preoccupation of doctrine or practitioners; we note something else: the liberty was not examined from the perspective of the subject of civil law as the holder of prerogatives, powers, which would result from the admission of the idea - otherwise valid and applied - that he - the subject - is a bearer of liberties, civil liberties.

For this reason, the debates on liberty, with the species of assertion of liberty[1](Albu, 1933),(Pătulea, 1997) (Stoica & Babiuc , 1995) (Stătescu & Bârsan, 2008) (Beleiu, 2007) have been - mainly - the object of philosophical studies[2](Ilie, fără an), (Berlin, 2010) of

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the theory of law and, especially, of constitutional law[3](Dănișor , 2007)(Mihai, 2005), in the latter case - with explicit reference and the necessary distinctions. - to the fundamental rights and liberties enshrined in the Constitution[4](Dănișor, et al., 2008).

I note, therefore, that the liberty - the liberty of the subject - has been and is preferably examined in a theoretical way, first as a goal and then as a premise of the functioning, application of the civil law(Cercel, et al., 2008).

In other words, in civil theorizing the subject is seen and described only as a bearer of subjective rights, with all the consequences that would result from this: holder of a property right, a right of claim, personality rights, intellectual rights, etc. .; and in the opposite direction it is analyzed what the excessive exercise of a subjective right means(Deleanu, 1988) (Ignătescu, 2019). Or - as the case may be - what it means - reparative or repressive - the violation of a subjective right(Boroi, 2001).

We - out of practical need - and without contesting or at least questioning the significance of the approaches - have raised another issues:

1. as long as constitutional law develops the theory of fundamental liberties so much, since contractual liberty - even if it is not recognized as a constitutional principle[5] - the autonomous will of the subject - substantiates subjective civil rights - would it not be justified to examine the civil liability from the perspective of its powers. given to the wearer, if and how many they exist?
2. if the liberty offers the subject an option, a possibility, a prerogative, a power - and one can debate what they are, beyond formulations - what does a free option distinguishe from a subjective right, differences - as many and how many bear comparison - pursued, then , in training, in their exercise and, why not, in the consequences of conceptualization?
3. the preferential location of in-depth civil study towards subjective law is a fact; the discussion obviously points us to something else: does a proper deepening of civil liberties, in opposition to subjective rights, really helps?

Basically, we would try to explain - starting from the principles - how a civil liberty attached to a certain subject is born and, especially, how it works; from the sphere of generous and beneficial principles we would stop at the mechanisms that effectively implement a civil liberty in a concrete social context fixed in an infinity of autonomous interests - usually vague, confused - and dominated - legitimately or not - by the manifestations of the holders of subjective rights endowed with precisely described prerogatives.

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[5] For details, see G. Gîrleșteanu , *Valoarea juridică a libertății contractuale în dreptul român și francez* în https://drept.ucv.ro/RSJ/images/articole/2006/RSJ3/B05GeorgeGarlesteanu.pdf, accessed at 13. 03. 2021; separately, it should be noted that in the decision of the Constitutional Court no. 365 of July 5, 2005 in the Official Gazette, Part I, no. 735 of 12 August 2005 states that: "freedom of contract is the possibility granted to any subject of law to conclude a contract, in the sense of mutual consensus, as a product of his manifestation of will converging with the other party or parties, to establish and to determine its object, acquiring rights and assuming obligations whose observance is obligatory for the contracting parties "; for insights: I. Dogaru, P. Drăghici, *Drept civil. Teoria generală a obligațiilor*, Ed. All Beck, București, 2002, p.44,

2. THE CURRENT APPROACH TO THE PROBLEM OF THE THEORY OF ROMANIAN CIVIL LAW

The theory states - in a first generic formulation - that liberty would be, however, a prerogative; that the prerogatives of subjective law cannot be confused with other civil prerogatives - more or less autonomous - which would result from civil liberties or faculties(Nicolae, 2018).

More precisely, taking the French wording, we are dealing with a possibility "recognized to the person to do what he likes, his power to act according to his own desire." (Nicolae, 2018)

Here, then, are three successive expressions, in the same sentence: a possibility, a prerogative, a power.

Basically, we understand, in this examination, for the stated purpose, it is not the expressions that matter - although the effects of rigorous wording cannot be disregarded - but the substance of the expression: there would be a headline - a subject of civil law - while we discuss civil liberties - bearer of a liberty that gives him - the bearer - a power: to do what he wants.[6]

And we are told something else: it would be very relevant if this content offered to the bearer of a freedom was studied in opposition to the clearer powers held by a holder of a subjective right.

The differences are listed as subjective right - civil liberty.

The holders of (subjective) rights are individuals and legal persons; the bearers of freedoms are only individuals; the content of the rights is very varied, according to its nature or object; the content of the liberty has a limited scope: there is a choice between doing or not doing something; the subjective law imposes a correlative task on someone; the liberty invariably imposes on third parties a general task of doing nothing; law presupposes a specific, unequal and conditional prerogative, while the liberty is always equal and unconditional; the right is and can be legally and contractually protected; the liberty is protected by legal guarantees (Nicolae, 2018).

The civil faculty - indicated by law or natural (Luțescu, 1947)- although it gives the holder certain prerogatives - is not autonomous; the faculty, the option, does not exist in itself but is essentially linked to a certain subjective right(Nicolae, 2018).

Separately, it was observed that any variety of liberty in its exercise necessarily involves a number of restrictions; in other words, legal liberty, civil liberty, in opposition to subjective law, is not privileged; from this point of view, the law imposes multiple limitations: any analysis for liberty will be built around the “liberty - restriction of liberties” axis; this, precisely in order to fix a field of action reserved in part and well specified for each observed liberty(D. Balea, 2021).

In particular - with reference to the rights of the personality - it was held that an individual has the right to dispose of himself, if he does not violate the rights and

[6] It should be noted, however, in order to avoid confusion, the distinction that the doctrine makes between the civil power observed as the possibility to act in the name and on behalf of another and the intrinsic power retained in the hands of a subjective right holder who voluntarily exercises the legal attributes of his right; in this study we see civil power in the latter sense; for reverse developments, see: V. Stoica, *Despre puterea de reprezentare* , Revista română de drept privat, nr. 2/2019, pp. 27; V. Stoica, *Dreptul material la acțiune în materia drepturilor reale principale*, Revista română de drept privat nr. 4/2018, p. 21

freedoms of others[7]; Here, then, it is said indirectly - starting from the express text of the law - and we consider it important to emphasize this - that a civil liberty can be recognized and exercised until its effective exercise strikes at the observation and exercise of another's freedom or even another freedom.

Civil liberty - with express reference to non-patrimonial options[8] - is seen as a possibility for the subject to collect certain legal benefits that would flow from the option; the possibility gives the beneficiary a power, a right with particularities, which has a vague, generally determined content and which does not have an obligatory correspondent to be imposed on a certain determined passive subject; this right with characteristics, such power - which would describe a liberty - could be understood as a rule and power to choose a certain concrete conduct; thus, liberty can also be exercised "in the absence of a corresponding (passive) subject, including when another bears certain consequences(Balea, 2021)"

The analysis supports the same evaluations when the options have patrimonial significance(Balea, 2021); the valuation follows the same steps as in the case of non-patrimonial descriptions.

That is, first, the law stated the rule: anyone can freely dispose of his property, unless the law expressly provides otherwise[9]; then the mechanism of expressing liberty is observed: the option, the possibility, is behind the subjective right, it precedes them; that is, the bearer of the liberty - master of his own will - expresses himself, manifests himself, for a certain right with patrimonial content; civil liberty becomes "a faculty to decide, by the manifestation of the will, the fate of the rights it bears over certain economic values."

Therefore, the current theorizing of civil liberty captures several defining elements: liberty is indicated by law, in principle or, as the case may be, corresponding to certain situations; it expresses - regardless of the wording - a certain power, prerogative, to choose; moreover, it precedes an interest, a subjective right: if it is a non-patrimonial option, the subject goes to the version that is most advantageous for him; if it has a patrimonial target, the subject is fixed in the content of a certain subjective right that also fulfills an interest.

Even if we see it as a right, liberty does not have the characteristics of a subjective right because the recognized prerogative does not correspond to a correlative obligation or to an indeterminate debtor.

The power of the holder of liberties is restricted by law[10]; or, very importantly, it has been held that a liberty can be promoted to a place where the freedom of another is violated.

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[7] Art. 60 of the Civil Code: "the natural person has the right to dispose of himself, if he does not violate the rights and liberties of others, public order or good morals".

[8] In the cited study D. Balea, *Ipostaze ale libertății cu efecte extrapatrimoniale*....op. cit. http://arhiva-studia.law.ubbcluj.ro/pdfs/1529921205-02Balea_25_60.pdf- accessed on 13. 03. 2021 - with reference to the possibility of a subject to choose the family name, domicile, to promote divorce, to give it up (divorce), etc.

[9] Article 12 para. (1) of the Civil Code: "anyone may freely dispose of his property, unless the law expressly provides otherwise."

[10] In the punctual expression from art. 60 of the Civil Code: "public order or good morals"; but it should be noted that this provision is a limiting component of an assembly of restrictive regulations.

3. ATTEMPT TO FIX THE GENERAL CHARACTERISTICS OF CIVIL LIBERTY AND THE CONSEQUENCES OF THEORIZING

1. This approach is not intended to be critical; its source is the need and we see it - even if it tries a global theory of civil liberty - only from a complementary perspective.

The same need obliges us to observe only those characteristics of civil liberty which produce effects vis-à-vis third parties; in principle, we are not interested in describing the powers of the wearer; we follow them only insofar as they (the powers) bother others no matter how much power they (third parties) have.

As long as liberty is the product of objective law - and the current Romanian doctrine has emphasized and accepted this - it (liberty) will always be located upstream of the subjective legal situation in relation to which liberty is capitalized: before the right is born, before the interest is expressed, the subject must make a choice; and the choice is made because he is free to choose;[11] therefore, if libery is upstream, it will be a premise for the production of the legal situation of interest; practically, there is a time gap between the existence and manifestation of the liberty and the subjective right produced or, as the case may be, the fulfilled interest: liberty and subjective law - although they work in correlation - they operate in different temporal planes; liberty is only the possibility of an initiative to produce legal situations; (Roubier, 1963) in other words, liberty and subjective law are born at different times: first liberty is expressed, then law is produced.

The observation that the liberty is the premise of subjective law does not presuppose that the expression of liberty always produces a subjective right; I have already anticipated the idea by emphasizing that the manifestation of the liberty can also be the premise of achieving an autonomous interest in relation to a certain subjective right[12].

2. Moreover, it should be noted that liberties are not acquired individually as subjective rights; they are recognized equally to all and are not described in advance by the positive norm: if the practice observes inequalities in the expression of liberties, they (inequalities) are due to possible material circumstances[13].

Hence other consequences: liberty is non-exclusive; that is, everyone manifests their choices as they wish or, why not, may not make them; conversely, it is observed that the liberty granted to one does not prevent another from exercising the same liberty(Ghestin, et al., 1994).

Such characteristics start from a civil premise; the legal norm indicating a liberty is permissive; this norm, by its nature, does not impose anything, does not place any restriction; however, the regulatory model produces a sphere of free manifestation on a certain field, a field that belongs to everyone; the purpose of civil liberty is the very

[11] Before reaping the benefits of being divorced, I must be married and opt for divorce; before I am the owner of a property right, I have to make the option to acquire it, an option that can be achieved because I am free; and so on

[12] the ability of a subject to choose a domicile, a certain residence; see supra note no. 17; for developments regarding the reality of autonomous interests, not included in subjective rights, see: V. Luha, *Încercare de justificare teoretică a prejudiciului prin ricoșeu într-o relaționare obligațională contractuală*, Revista română de dreptul afacerilor nr. 1/2021, p. 17.

[13] For example, the liberty to drive a car on public roads is granted only to those who have a driver's license.

existence of a person in dignity; and the person in the fullness of his dignity describes a significant part of his private life.[14]

In opposition, the subjective right is obtained individually and gives unequal powers to the holders;[15] the exercise of a subjective right completely excludes others from the same ownership: the creditor - whatever he may be - with origins in the exercise of a real right or a right of claim - only he enjoys the powers conferred on him by his right; subjective law is by its nature exclusive.

3. But the practical problem remains.

The distinctions made between a right and a liberty - beyond their detail, relevance and accuracy - do not provide us with a further methodological formula.

After all, subjective law and liberty - each in its own way - express a power, regardless of the moment of birth or content; the differences can be emphasized and even accentuated: the subjective right has a determined object and content; liberty does not; for the object and content of freedom everything is vague, at the level of generality: the individual can do everything except what is forbidden to him.

Therefore, in the case of the existence and exercise of the subjective right, the holder's operating space is well delimited and the abstention of third parties is rigorously drawn; in the case of liberty, the holder has at his disposal a wide range of actions or abstentions which are done only in relation to the will of the holder; the limitation of the options is done only by the law that prescribes it only in a negative way (which it cannot do); the abstinence of third parties is equally generally traced; practically, in the case of general or special liberties, the content of the prerogatives are not described; he (the content) will be deducted from any prohibitions.

However, in the general expressions the content of a freedom - no matter how vague the expression - consists of an action or an abstention; correlatively, the third bearer of the same liberty has the same possibilities of action or inaction.

Is there any difference between a task of doing or not doing something to a debtor correlative to a subjective right and the abstentions or possibilities to make specific to a certain liberty?

In their total generality, certainly not. Does this mean that these concepts (subjective law - liberty) are equivalent?

Such an ambiguous premise would oblige us to the objective law: the norm would indicate or should indicate the content and object of rights and liberties; we thus revolve around the problem and the question persists: if the norm produces uncertainties, how do we distinguish - in an applied and essential way - between the two powers?

4. If the internal description of the two powers (the one derived from law and the one belonging to the liberty) does not help us, we will look for the revealing distinction in the relation of the holder with third parties and in the consequence of this search; that is, we

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[14] A. Benet, *Analyse critique du « droit » au respect de la vie privée. Contribution à l'étude des libertés civiles*, thèse de doctorat, Paris II, 1985, p. 398, citare în L. Thierry, *Conflits entre droits subjectifs, libertés civiles et intérêts légitimes. Un modèle de résolution basé sur l'opposabilité et la responsabilité civile*, teză, UC Louvain - Saint-Louis, Bruxelles, 2004, publicată în Bruxelles de Larcier, 2005, pct. 68, https://dial.uclouvain.be/pr/boreal/object/boreal:168645 , accesed at 24. 02. 2021

[15] Each subject acquires its own right (property, debt, mortgage, etc.); moreover, there are significant differences between the prerogatives that give them a property right and a right of claim

step over the static, morphological stage, which would describe the right or the liberty - which does not help us - and place it in the formula of their affirmation or exercise[16].

The relationship with third parties describes the phenomena of opposability and liability: third parties must take note that a right or a liberty exist as a given reality; if the powers of the bearers - of rights or liberties - collide, the phenomena of liability appear. (Chanine-Hage, 1977)

From the relationship with third parties, significant differences can be observed: the objective law distributing the subjective rights, indicates the scope as well as the means of protection (protective action)[17]; in the case of liberties, only the purpose of the liberty is indicated; it follows that the liberty can only be protected by common law means.[18]

Moreover, the purpose of the distribution of rights and, as the case may be, of the liberties differs: subjective rights have as their recognized purpose the power to have something, to recognize something to the person, something determined; liberty indicates only the possibility of being or not being oneself; such a distinction would produce - from our point of view - effects in relation to the instruments of legal protection of the two powers (what is a violation, what action protects it, how the protective action is taken, how the deviation and consequence is proved, how the injured power is restored).

Separately, we can discuss the level of link between the rights and liberties distributed to the holders of objective law and the interest intended to satisfy their interests.

5. The association of the debate with the interests of the holders places us in a wider space but related to the issues that concern us.

"In the most general sense, interest is a targeted, oriented motive; in turn, the reason is the awareness of the need, of the need, of the expectations, whatever they may be, what we find internalized; so here we are in the psychological realm.

Interest is a component of the expression of the subject, of the will. And if we keep examining in relation to the powers given in the hands of those who have subjective rights or have liberty, we see the interest as something preceding the power, preparing it (Luha, fără an)"; it does not matter whether the advantage comes from a liberty or a right; it is important to achieve it, but especially to protect it.

In dealing with third parties, in liability mechanisms, the preference given by the judge to the interest embodied in a constituted right or a recognized liberty will count; in other words, the legitimacy of the invoked interest will count; In a general wording, in the absence of positive law provisions, those interests for which there is a prohibition for third parties to ignore them will be considered legitimate(Gervais, 1961).

In practice, liability issues - based on a right or a libery - indicate a conflict between interests with different levels of legitimacy.

The selection of the legitimate interest - the determination of the responsibility - will be made in relation to concrete and not abstract criteria; methodologically, the process of

[16] On this distinction with its doctrinal and methodological significance, see I. Dogaru, N. Popa, D. C. Dănișor, S. Cercel, *Bazele dreptului civil, vol. I, Teoria generală*....op. cit. p.

[17] Imagine, for example, the property right and the action in claim with specific substantive and procedural details

[18] Only one protective means can be identified: the reparative action for damages or, less frequently, a possible action - also common law - sanctioning.

selecting the preferred interest will be done by comparison, by the comparison that involves a judgment offered by a court called to decide.

6. The comparison - as long as we went for distinctions in the relationship of the holders with third parties - will take into account not the bearer of rights or freedoms "but in the potential behavior of the aggressor of interest; that is, the definition of the legitimate interest - the criteria for determining it, the legitimacy - should not be sought from the victim but to the author. (Luha, fără an)

Defining the legitimate interest - and hence the pragmatic distinction between a right and a liberty - will move towards the standard of inappropriate behavior of the aggressor.

In order to define the deviation from the standard, it will be necessary, beforehand, to indicate the criteria for observing the appropriate standards of the potential aggressor subjects, in their turn bearers of interests included or not in rights or liberties.

4. CONCLUSIONS

Following this methodological scheme - only outlined - we retain - beyond any theorizing, any distinction, between a right and a liberty - however relevant it may be - a conclusion with eminently practical significance: the particularities of distinction - constitutive or descriptive - between subjective rights and civil liberties - have pragmatic significance only complementary; that is, they (particularities) - no matter how different we are - are really verified only in a relationship of responsibility.

And the fixing of responsibilities - reparative or repressive - takes into account the aggression of third parties, in turn carriers of subjective rights, libertiess or autonomous interests; In such an assembly, the reality of the aggression - with the natural consequence of indicating responsibility - depends on the methodology according to which we look for the standard of inappropriate behavior of the aggressor.[19]

The study therefore consists only of a sketch of a broader issue: an attempt to theoretically describe the content of a civil liberty in a context in which the protagonist of the debates is the subjective right; and the description would like to produce a methodology for overcoming the uncertainties that the positive law would provide.

The determining element of distinction - with practical consequences - is found - along with others, marked by doctrine, obviously with obvious theoretical significance - in the link between the rights and liberties distributed to holders of objective law and the interest to satisfy their interests.

The issue would therefore move from the conceptual sphere to the space of the possibility that a judge has - invested through an action in liability - to indicate the

[19] For details see the model described by L. Thierry, în *Conflits entre droits subjectifs, libertés civiles et intérêts légitimes. Un modèle de résolution basé sur l'opposabilité et la responsabilité civile*, teză, UC Louvain Saint-Louis, Bruxelles, 2004, publicată în Bruxelles de Larcier, 2005, pct. 68, https://dial.uclouvain.be/pr/boreal/object/boreal:168645 , accessed la 24. 02. 2021. In this thesis - and we share its approaches - it is noted that the benchmarks we would need to assess - by comparison - the concrete behaviors of the subject providing deviations would be observed in: assessing the proportionality of behaviors, their balance and, in particular , in retaining and operationalizing the need to weigh the conflicting interests; confronting conflicting behaviors - in the name of a right or a liberty - between such benchmarks - may indicate the legitimate interest to which preference may be given; and the interest selected by preference indicates - together with other criteria developed by the doctrine - already stated - the subjective right invoked or, as the case may be, the asserted liberty.

criteria of preference of a certain interest that would be selected from an assembly of broad interests all with of legitimacy

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