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Civil Liability and Administrative Liability. A Comparative Approach

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Abstract: As a main form of administrative liability, contraventional liability intervenes in the case of anti-social acts with less social danger (in principle) than that of a crime, but similar to criminal liability in multiple aspects: the public character of coercion. Like the acts criminalized by the criminal law, the acts targeted by the contraventional norms can have a complex character, attracting both contraventional and civil (delictual) liability (Pricope, 2013; p. 332).

Keywords: *civil liability; administrative liability; legal liability.*

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1. Introduction

The moral imperative *alterum non laedere* (do no harm to another), considered in paragraph (1) of art. 1349 of the Civil Code is an equivocal expression. The terminology (Neculaescu, 1994; 2010) frequently used by the current Civil Code, is taken from the French legal terminology (*atteinte*), where it denotes the action of causing damage to another, in the meaning of an attack. Thus, the French Penal Code criminalizes attacks on the nation's interests, attacks on freedom, private property, etc. Referring to the tort liability, phrases such as "attack on property" (*atteintes aux biens*) or "attack on the person" (*atteintes ă personne humaine*) cannot be taken over in the Romanian language, where the term "attack" does not imply simply causing damage the holder of the infringed right. A handy example is the interference with private life regulated in art. 74 of the Civil Code. Therefore, the duty that should have been evoked by the principle written in para. (1) of art. 1349 of the Civil Code aims to comply with the rules of conduct aimed at not causing harm to another, the premise of any assumption of delictual liability, as provided by the Civil Code of Quebec (Ministère du Travail, du Plein emploi et de l'Insertion, 1991, Section 1457, Art. 1).

The principle from para. (2) of art. 1349 of the Civil Code (Romanian Parliament, 2011) is flawed, being able to create confusion that the presence of discernment would be the only condition of tortious liability, when, in reality, tortious liability continues, to a large extent, to be based on an illicit and culpable act (Apostu, 2016). If, however, it was appreciated that the statement would find its place within the general provisions, it should have been completed with the formula "under the rule of law", as we find it used in the case of contractual liability, in art. 1350 para. (2) of the Civil Code (Romanian Parliament, 2011a), so that this provision can be put in agreement with the other subsequent provisions regarding the responsibility for one's own acts and for the acts of others.

As for the obligation to fully repair the damages caused, it constitutes a principle provided for in art. 1385 para. (.1) of the Civil Code (Romanian Parliament, 2011a), within another Section — Section 6 — allocated to the repair of damage in the case of tortious liability, which makes it unnecessary for any repetition that does not take advantage of the new regulation.

On the other hand, under the conditions in which, according to art. 1368 para. (1) of the Civil Code, "the lack of discernment does not exempt the author of the injury from paying an indemnity (...)" (Romanian

Parliament, 2011a), which is a solution imposed by equity and transposed for the first time in our civil legislation, it was necessary that the provision we are analyzing be evoked through a norm of reference.

2. Comments on the legal nature of civil and administrative liability as forms of legal liability

Although considered, in principle, to be part of the "criminal law branch" by the jurisprudence of the European Court of Human Rights, in our country the contraventional liability, as found by the specifically established bodies, is verified by the civil court, the rules of procedure being those provided by Government Ordinance no. 2/2001 (Romanian Government, 2001), which is supplemented by the Civil Procedure Code (Romanian Parliament, 2015).

In these conditions (Barbu 2016a; 2016b), the question arises of the effects of the irrevocable decision pronounced in the contraventional process against the tortious civil liability, that can be requested by the person who was harmed by the contraventional act, if the contravention also produced civil damages (Barbu 2016a). Are there such effects? Within what limits and under what conditions?

In principle, we can appreciate that the legislator, when he wanted to ensure a unified resolution of the factual aspects regarding the different types of liability (in criminal and civil cases), imposed the *res judicata* authority of the criminal judgment against the civil process in which the tortious civil liability will be determined based on the establishment of the deed, the author and the guilt. As there is no such rule in the field of contraventional liability, it can be appreciated that the contraventional decision does not "hold" in any way the court invested with solving the tortious civil liability action (obviously, there is no authority in the opposite sense either, if the civil tortious liability action would be settled first).

The doctrine of civil procedural law shows that, in addition to the possibility of invoking a *res judicata* exception, there would also be a presumption of *res judicata* authority. Thus, this principle would prevent not only the retrial of an already tried case, having the same object, the same cause and being conducted between the same parties, but also the contradiction between two court decisions, i.e. the refutation of findings made in an irrevocable court decision, through another subsequent court decision, given in another case. It is shown that, while the application of the *res judicata* authority exception presupposes an identity of actions, which stops the repetition of the judgment, the presumption of *res judicata* imposes

consistency in the judgment, namely that what was ascertained and ruled by a judgment should not be contradicted by another.

We observe from the formulation of this theory that this presumption of *res judicata* is described as an absolute, irrefutable presumption. However, the exact application of this principle would lead to the same consequences as if there were a *res judicata* based on the triple identity (parties, object, cause) and would determine that a factual situation established in the contravention process, possibly without the participation of the victim of the damage, be imposed on the parties of the subsequent civil litigation, based on tortious civil liability (Pricope, 2013, p. 333).

This theory is susceptible to multiple criticisms. Thus, the *res judicata* regulation of the criminal judgment (which obviously does not respect, when comparing it with the subsequent civil litigation, the triple identity provided by art. 1201 of the 1864 Civil Code) (Romanian Parliament, 2011b) would become redundant, from the moment that any previous decision, in any matter, and even without talking about a triple identity, should be respected in the aspects that intersect with the civil litigation, as it is not possible to refute the findings made in an irrevocable court decision, through another subsequent court decision, given in another case. Also, by not requiring the participation of all parties in the first litigation, a flagrant violation of the right to defense of the injured person, who was not a "party" in the contraventional litigation, could not be formulated in the evidence administered in the case, but has described a factual situation which is opposite to it.

Such an assessment, of the existence of a presumption of *res judicata* in the contraventional trial, should be imposed in a subsequent civil trial, and could be made (but in this case a bit forced, without a clear rule) only in the case of traffic accidents (Barbu, 2020), in which the other persons involved are summoned to participate in the contraventional trial initiated by the petitioner, in accordance with art. 119 of the Government Emergency Ordinance no. 195/2002 (Romanian Government, 2002). In this case, we can appreciate that, at least in part, the second criticism of this theory, regarding the possibility of the injured person to defend himself in the trial that gives rise to the "presumption of *res judicata*", can be removed by his participation in the trial, as a party (Pricope, 2013, p. 334).

In any case, the acceptance of such a presumption in all cases, with the indicated practical consequences, would leave the imperative requirement of the legal rule provided in art. 1201 of the 1864 Civil Code regarding a triple identity without interest, in order to be in the presence of "*res judicata*" (Romanian Parliament, 2011b). Compared to this one

regulation, we cannot agree with the idea that it would not be possible to refute the findings made in an irrevocable court decision, through another subsequent court decision, given in another trial, as long as, in the first trial, there were not the same parties or object.

However, accepting the description of a factual situation in a different way, through both irrevocable and non-reviewable decisions, this situation does not seem desirable to us, compared to the principle of finding the truth that must govern judicial procedures. A solution, in terms of the regulation of this problem, would be the creation of an extraordinary appeal (new review case), which would be judged with the participation of all the people involved in the two types of litigation and would aim to establish the real factual situation (Pricope, 2013, p. 334; Florea et al., 2019).

3. Comparative aspects

In French law, the tripartite classification of crimes (République Française, 2022, art. 111-1) includes liability for the contraventional act in the form of a "criminal" liability. For this reason, if the case reaches the trial phase, in order to establish such liability (Sandu & Damian, 2018), the decision in question will have the authority of a civil *res judicata*, under the same conditions as any criminal decision, as presented above.

Taking into account the conditions that are more conducive to the administration of evidence based on the factual situation and the superior guarantees of the criminal process, as well as the possibility granted to the injured person to participate in this type of process (Barbu, 2015; 2018; Huidu, 2019), both the French legislation, as well as the Romanian one, provide a transgression of the rules of the contraventional trial from civil to criminal, taking over the *res judicata* authority specific to the criminal decisions regarding the factual situation, which could represent a solution for the future (Pricope, 2013, p. 334).

The situation presented was not, from our point of view, clarified even by the entry into force of the new Code of Civil Procedure (Romanian Parliament, 2015). Thus, the new Code takes from the doctrine of civil procedural law certain ideas concerning the institution of *res judicata* authority, allocating two articles for the definition of this notion and the establishment of its effects (art. 430-431) (Romanian Parliament, 2015). If the exception to *res judicata* appears to us formulated extremely concisely ["no one can be sued twice in the same capacity, based on the same cause and for the same deed" - art. 431 para. (1) (Romanian Parliament, 2015), the "positive" effects of *res judicata*, which are much more difficult to regulate, are indicated in a way that is too general: "any of the parties can challenge

the previous *res judicata* in another litigation, if is related to the settlement of the latter" - art. 431 para. (2)] (Romanian Parliament, 2015).

This wording allows us to further question the strength of this "opposition" (does it create an absolute presumption of truth for those facts established in the "related" litigation or only a relative presumption?) and the situations in which it could be invoked - by "being related" to the ongoing litigation, it becomes important if it should or should not also be understood as a participation of the party to whom the positive effect is opposed in the previous litigation (Romanian Parliament, 2015). The question remains to what extent does this institution ensure the right to defence of the party, since that party did not participate in the contradictory procedure that previously established an essential factual aspect that is now "opposed" to them.

4. Conclusions

The theme we proposed to analyse aimed to deepen the understanding of the evolution over time and the mechanisms of legal responsibility, the connection and relationship between social responsibility and legal responsibility, as well as the particularities of liability in administrative law, with special regard to the types of liability from administrative law. So, we appreciate our research as one of an increased scientific importance, even interdisciplinary, including the general theory of law, administrative law and civil law.

The paper proposed to overcome the enunciative stage of the concepts and thus, with the help of several methods, it combined elements of doctrine with elements of legislation and last but not least with judicial practice. It is not enough, in our opinion, just to analyze a concept from a didactic point of view, but we must go as far as analyzing its external manifestation, related to the concrete practice. This approach brought us to a conclusion that at this moment the legislation is static, so that only the judicial practice is the one which has the role of taking the pulse of social action, the one that actually captures the new meanings of liability and responsibility, regardless of the field.

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