Some Considerations on the Liability of Principal for Acts of the Agent

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Abstract: The objective of this research is to briefly examine the stipulations of article 1373 of the Civil Code, referring to regulating the tort liability of the principal for the illicit act of the agent. From a comparative point of view with the old provisions, and also in a critical formulation, the study contributes in supporting the recognition of principle nature of the subject under review. Using content analysis, through descriptive documentary research and case-law analysis, this study aims at identifying the content of the obligation for the liability of the principal, presenting a view on the legal status of such type of legal liability. The paper continues further research in this area which has been published in various publications. The concrete results of the research focuse on the examination and interpretation of the new provisions relating to subsistence of the general and special conditions of this type of liability.

Keywords: civil liability; principal; agent; tort liability; vicarious liability

1. Introduction

In civil law, as a branch of private law, the legal relation is defined as a social, patrimonial or non-patrimonial relationship, governed by the legal norm of civil law, and the means of sanctioning the one who commits an unlawful act causing injury represents the institution of civil liability.

The idea of liability is one of the oldest moral ideas of humanity, taken from the Christian morality and whose reflection was highlighted both by the legal doctrine and the case law of the civil law. It was repeatedly stated that civil liability is the legal institution that has aroused the most intense interest

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among the specialized literature, seen by those who have studied closely the liability system evolution, in a metaphorical formulation, as "*the neuralgic point of all institutions*". (Josserand, 1931 apud Neculaescu, 2010, p. 45)

Fundementing this legal concept is and it will be determined by the great changes in the human society (Boilă, 2008, pp. 37-39)[1] especially in the European legal area of the last two centuries, referring, obviously, also to the regulatory changes that marked the Romanian private law area: the adoption of the New Civil Code[2], as a consequence of the need for a profound reform in the Romanian legal system, in the context of the realities and demands of the current society.

Having into view the great global socio-economic changes, the diversity of social, commercial and implicitly the working relations, regardless of the legal nature chosen to run the activities-enterprises, corporations, self-governing administration, unions, freelancers, contract etc., one cannot ignore the fact that every participant in the daily life activity follows two interests: increasing revenues and avoiding any losses. This is a natural social and economic system of laws, which must be consolidated on a strictly legal basis and in terms of which it must be viewed and interpreted as a framework (Roşu, 2010, p. 12). It is just as natural for a person to engage in providing its services to another person or in its interests. We are seeing a diversification and expansion of the employee or employer quality, the latter having the duty to respond to the harmful acts committed by those who have acted in his interest, at least as an expression of social liability. (Barbu et al., 2008, p. 344)

In this context, the legal domain permanently accompanied by the human activities, guaranteeing and defending through a series of regularities

[1] In one of his works, on the basis of scientific and legal argument, it is performed a blueprint of the tort liability, the author presenting the implications of the radical changes in a society caused by the industrial revolution on the doctrine and jurisprudence in the matters of tort liability.

[2] Originally published in the Official Monitor of Romania, Part I, no. 511 of 24 July 2009, the Civil Code was amended by Law no. 71/2011 for the implementation of Law no. 287/2009 on the Civil Code, published in the Official Monitor of Romania, Part I, no. 409 of 10 June 2011. Subsequently, the law implementing the Civil Code was republished under article 218 of the current law, in the Official Monitor of Romania, Part I, no. 409 of 10 June 2011.

appropriate to the rights and duties of each individual, so that, *ope legis* would not produce any reprehensible act. That is why in civil matters, the legislator has provided in its depositions with a principle feature one of the most important forms of vicarious liability (article 1349[1] of the Civil Code in relation to article 1373 of the Civil Code)[2] namely the liability of principal for illicit acts of the agents in their entrusted functions[3].

2. Some Details Concerning the Legal Regulation on the Liability of Principal for Acts of the Agents

As with all forms of legal liability, the tort liability is governed by the principle of legality[4], undergone through the essence and content transformations with the legislative change occurred in the field. In order to perform the analysis of this type of liability in the Romanian positive civil law it is required, in advance, the presentation and compliance with the civil legal corpus.

Also in this field, the specialized literature has excelled in highlighting the views of clear scientific requirements taken fully or partially by the legislator in the current civil regulation. In light of the Civil Code in 1865, the principals' liability for the acts of the agents is ruled with gaps, by the provisions of article 1000 paragraph 3: "*The masters and the principals (are liable) for the damage caused by their servants and agents in their entrusted*

[1] Under the provisions of article 1349 line 1 of the Civil Code, any person has the duty to follow the rules of conduct which the law or local custom requires and not to bring prejudice, by his actions or inactions, legitimate rights or interests of others. In addition, paragraph 3 of the same article provides that any person is obliged to repair the prejudice caused by the acts of others.

[2] In the old civil law - article 1000 paragraph 1 and 3.

[3] (Viney & Jourdain, 2006, p. 974, n° 790) according to which: "*le législateur n'est pas resté entièrement muet. Il existe en effet une série de textes visant certains contrats ou certains professions particulières et admettant qu'un débiteur peut être appelé à répondre du dommage provoqué par le fait de certaines personnes qu'il s'est substituées ou adjointes dans l'exécution de ses obligations/the legislator has not remained completely silent. There are in fact a series of texts which take into consideration certain contracts or some specific professions and admitting that a debtor may be reliable for the damage caused by the acts of others who have substituted or assisted him in the performance of his obligations*".

[4] This principle implies that liability can only operate under the conditions and strict cases provided by the law.

functions". Also, the Commercial Code contains similar provisions within article 393 paragraph 1: "the owner is liable for the acts of the agents (...) within the limits of the given task."

The current civil legislation[1] governs this form of liability in a more comprehensive form, dedicating to it an entire article, 1373, with its three paragraphs: *(1) "The principal is obliged to repair the prejudice caused by its agents whenever the offense committed by them is related to the assigned duties or functions. (2) It is principal the one who, by the virtue of a contract or by law, exercises the direction, supervision and control over the one who accomplishes certain functions or assignments satisfying his or the other's interest. (3) The principal will not be liable if he proves that the victim knew or under certain circumstances he may know, at the time of committing the harmful act, that the agent acted without any connection with the assigned duties or functions."*

Having an overall analysis, these provisions provide the general framework on this variety of liability, with issuing people who are committed, the special conditions of principal liability, landmarks in establishing the legal basis, specifying the grounds of exemption, etc.

Principal's liability for the illegal acts of its agents, or as in the current wording, consistent and yet criticized of the Civil Code, *the liability of principal for the acts of agents*, is the second form established for vicarious liability, having the value of principle (Pop, 2010, p. 13), aiming at obtaining full compensation for the prejudice suffered by the victim. The French doctrine, to which we have related fairly consistent in this matter, stated that in order to deny this type of liability, it should not grant the implicit legal substance, it would be equivalent of denying the very existence of the principal as a legal entity, which is unthinkable.[2]

In light of reports, features, conditions and consequences which it produces, we believe that in the application of article 1373 Civil Code, which we will

[1] Book V - *About obligations*, Title II – *The sources of obligations*, Chapter IV - *Liability*.
[2] See (Viney & Jourdain, 2006, p. 971, n° 790).

generally examine, there are respected the restrictive conditions or article 1349 paragraph 3 of the Civil Code, which provides that "*a person is obliged to repair the prejudice caused by the actions of others.*" In fact, we have a legal reflection of the link between gender and species, in the sense of the relation between the principle of vicarious liability and one of the forms of manifestation of this principle.

3. Terms and Basis of the Principal's Liability

We previously referred to the salutary approach achieved by altering the civil law in the new social context, as there have been efforts sustained by the doctrine and jurisprudence of removing from the crisis the institution of tort liability. The current outlining on this form of liability was the corroborative result of the opinions of foreign (especially the French model), and national doctrine and a rich jurisprudence, the case law being nuanced. The statistics of the last 4 years (2007-2011) indicates a significant increase in the share of the patrimonial law, legal action arising from illegal acts, in 2007 - 7500 actions, 2008 - 6696, 2009 - 6603, 2010 - with a number of 7481 actions and in 2011 it corresponds 9964 such cases.[1]

The legal regime applicable to the liability hypothesis is particular compared to the one established by its own act, by the stipulations of the principle of article 1357 of the Civil Code, but also compared to contractual liability which enjoys a special regime and its own regulatory rules.

In terms of terminology, the expression "principals' liability for the agents" is open to criticism, in the sense that a principal is not liable for any wrongful act of the agent, but, although the legal text does not clarify that, we interpret that his liability will be retained only when the agent commits that prejudice within the functions assigned by the principal. We believe that this omission will not affect the court decisions, but we think that it

[1] National Institute of Statistics, https://statistici.insse.ro/shop/index.jsp?page=tempo3&lang=ro&ind=JUS108A #, Accessed on 10 November 2012.

would be fair and reasonable that the formulation would be complete, given the recent intervention on the codification.

For engaging in the liability for the prejudices caused by the agent, both the legal literature and the case law have stated on the general conditions and their fulfillment cumulatively: the prejudice, the illicit act, the causal link between the illicit act and the prejudice, the guilt of the agent. All these conditions were necessary under the rule of articles 998-999 of the old Civil Code, but are also applicable to the liability for its own act and the contractual liability.

It is necessary to detect these conditions and to specify that in the light of the recent decades, with the amendment and support of a point of view which tends to find its common ground also in the Romanian civil law, as an echo of the doctrinal discussions and solutions of the French jurisprudence practice, the last of the four conditions (fault) was criticized and even abolished, according to which in order to engage the principal's liability, under article 1373 Civil Code, i.e. in the absence of any concrete formulation, it should not have to prove the guilt of the agent, the other conditions ensuring the elements that provides to the victim the compensation of the prejudice. If the legislator would have wanted to include guilt as a condition, he would have stated this reality *in terminis*. And we specify this with full conviction, as in the Project of the Civil Code in 2004, it was expressly provided the inclusion of the fault condition: *"The principal is bound to repair the damage caused by the guilt of his agents."* Article 1373 specifies strictly "*the principal is obliged to repair the prejudice caused by its employees*." Therefore, the interpretation of the legal guilt, the guilt is no longer a condition for engaging the liability of the participant. (Pop, 2010b, p. 25) The doctrine has not unanimously shared this theory, leaving as court practice in October 2011 to offer its solutions in response to the specific situation under review.

In addition to the evidence of the above mentioned conditions, the text economy article 1373 of the Civil Code it results that engaging the principal's liability there are required two special conditions that grafts onto

the conditions of common law, namely: the existence of the legal report between participant and agent between the committee of the illicit and harmful act and the commitment of the illicit and harmful act by the agent in connection with his duties or functions under the purpose of accomplishing the functions entrusted by the principal.

New coding assigns a vast space, necessary to establish such special circumstances, based on the provisions of article 1373, the existence of a legal report between participant and agent that arises based on an agreement of will, the principal assigning the agent with a specific function or task and reserving the power to monitor the entrusted activity. It results that there are established relations that from the participant's perspective there are authoritative and, from the agents' point of view, there are subordinate; the agents are under the authority of the principals, as their subordinates, the former having the power of direction, supervision and control over them. To be in the presence of the legal report between participant and agent, but not necessarily direct, immediate and permanent contact of the principal to his agent; the right of the principal to give orders, to supervise and to control the agents does not actually entails its exercise.

The legal report between participant and agent, in principle, is born only by mutual consent, meaning the declared willingness of the principal and the agent. In the most common situations the legal report between participant and agent arises from a contract; it is primarily the employment contract between the employee and the employer. There are also situations where its source is non-contractual. It is essential and it remains as such the subordination of the agent in the exercise or performance of his established.

Also, from the first special condition it derives the second one, the illicit act of the agent must be related to the duties and assigned functions. It undoubtedly results also from the article 1373 paragraph (1), the final part, of the Civil Code: "The principal is obliged to repair the damage caused by its agents whenever the offense committed by them is related to the assigned duties and functions."

We define the notion of entrusted function as being that task assigned by the principal to be fulfilled by the agent, in the interest of the principal or another, under his direction, management and control, with the agent's free acceptance or forced to subordination in order to achieve it (Pop 2012, p. 483). Under these circumstances, the principal's liability will be accepted only when the agent has committed the illicit act during the achievement of the activity in the interest of the principal, according to the tasks that make up the contents of his duty, following the instructions and orders that the principal gave.[1] Moreover, the jurisprudence has retained that the principal's liability will be engaged also in the case of abusive exercise of work duties, keeping the hypostasis of committing the illicit act while performing work tasks.[2]

On the basis of principal's liability, from what we expected, the Civil Code does not express a firm position that would shed light on the controversial doctrinal and jurisprudential views. What standpoint does the current rule sustain? The guilt reason, the theory of risk and guarantee? It would be fair and judicious that the legislator, in relation to the rich doctrine and jurisprudence, would adopt a more strong point of view. Probably this issue would still be reflected. However, interpreting the provisions of the articles in question, we detect that, *de lege lata*, it is envisaged the support of the theory embraced by many, the full liability of the principal, based on the theory objective guarantee which has as support the idea of activity risk and equity. (Pop, 2012, p. 487; Lipcanu, 2010, p. 39)

4. Conclusions

In this paper we have analyzed the provisions to one of the forms of vicarious liability, the principal's liability for the illicit acts of the agents in the performance of the entrusted tasks. Using the comparison of the two

[1] Bucharest Court of Appeal, Section IV of the Civil Code, in December No. 1236/2001, in P.J.C. 2001/2002, p. 275 cited in (New Civil Code. Comments doctrine and jurisprudence, 2012, p. 704).
[2] The Supreme Court, s pen., December No. 1555/1997 (*Revista română de Drept/The Romanian Journal of Law*, no. 3/1998, p. 68)

legal regimes, there have been reported both new elements and small inaccuracies of the current legislator, which will generate new arguments and doctrinal solutions, whose reason roots are in the protection and enforcement of the subjective rights of the rightful subject.

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