“REVOLT OF THE FACTS AGAINST THE CODE”*. ARGUMENTS FOR REFORMING THE CIVIL CODE

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Abstract: *The title of this scientific approach is a paraphrase of what François Geny, author of "Science and Technology in Private Law" called "the revolt of deeds against the law." The fact that the current Civil Code was hastily drafted by several coding teams, each with its own concepts, affected the rigor of the new regulations. The examples highlighted in the paper are a small part of a lot of poor regulations and wrong legal solutions that need to be remedied as soon as possible in order to be able to say, without fear of error, that the current Civil Code is our private "constitution", as Jean Carbonnier characterized the French Civil Code.*

Keywords: *Civil Code, questionable provisions, revision*

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Motto:

“Les lois sont faites pour les hommes, et non les hommes pour les lois. Elles doivent être adaptées au caractère, aux habitudes, à la situation du peuple pour lequel elles sont faites”.

Jean-Étienne-Marie Portalis

(Discours préliminaire du premier projet de Code civil - 1801)

1. The interest of the discussion

It is well known that the appearance of the current Civil Code in the Romanian legal landscape was one of the conditionalities of our accession to the European Union. This is the reason why its elaboration was done in a great hurry and through the contribution of several successive teams of legal professionals, each imposing his own conception regarding the main matters subject to regulation, which affected that guiding spirit necessary for any encodings. History has repeated itself, because the old Romanian Civil Code of 1864 arose from the same need to align itself with the general European values of the time, constituting "a kind of divine benevolence, a work fallen from heaven", as our great man stated of state Nicolae Titulescu. That is why the debates led by Constantin Bozianu, the then president of the Senate, lasted only 40 days, including its promulgation, while the drafting of the French

* After Edgard Morin, *La revolte des faits contre le code*, Paris, 1915, circumscribed to the relationship between given and constructed in law, one of his reference theses Françoise Geny, in "Science et technique en droit positif", Paris, 1914.

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Civil Code took place between August 12, 1800 and March 21, 1804, the preparatory works being the subject of 15 volumes, doctrinal work of great doctrinal importance.

In turn, the current Civil Code was developed with the support of the Canadian International Development Agency through the group of Quebec experts who worked on the drafting of the Quebec Civil Code in 1991, being registered in the Chamber of Deputies for debate on 15 06 2009 and entered into force by the assumption of government responsibility by the Romanian Parliament on July 17, 2009. There followed a long period of general enthusiasm, the then Minister of Justice, initiator of the project stating that the new Civil Code “is a code of freedom...”.

In reality, individual freedom has never been more limited than it is today, when the moralization of the contract, the protection of its weaker part, ensuring the balance between benefits, broadening the notion of violence in contracts, unforeseen regulations, the judge's right to restore the balance over the will of the parties, etc. announces a new philosophy of a different contract, invested with a social and economic function. If in the vision of absolute freedom of will, the judge was considered a "servant of the contract", in the regime established by the new Civil Code he is only an "agent" of it. This is the period in which civil law analysts, especially those in Quebec, spoke of an "assault" and an "invasion" of public order, as "an armed occupation"¹

The reactions of our relevant doctrine of civil law are, in my opinion, far too lenient, avoiding unequivocal rulings on breaches of the Civil Code, some of which are even strident, as I hope to prove by the examples I have stopped, considering that, above the care of the sensitivity of their authors, lies the truth. Therefore, I would like to provoke a lively *sine ira et studio* debate as much as possible, meant to contribute, not only to a simple sequential cosmetology of some of the regulations, but to a total revision of the entire Civil Code, in order to be able to rise to, which Jean Carbonnier, referring to the French Civil Code, metaphorically characterized as “private constitution”.

2. Some of the questionable legal constructions of the Civil Code²

2.1. "Subjects" of civil law or "subjects" of civil law?

According to art. 25 of the Civil Code, “subjects of civil law” are “natural persons and legal persons”.

We have come to speak of subjects of law, and not of subjects of law, because the first of the expressions suggests, by its very name, the idea that law does not deal with man himself, but with man in his capacity as a person, that bearer, or virtual bearer of rights and obligations³. The explosion of fundamental rights, however, brings civil law closer to the

¹ L. Rolland, *Les frontieres de l'ordre contractuel: les traçages économiques et juridiques*, Papyrus, Université de Montreal, 2006.

² To be seen S. Neculaescu, “*The traps of ambiguity of Romanian legal terminology*”, *Universul Juridic*, August 10, 2018.

³ The word “person” has its origins in the Etruscan word *phersu* (see Fr. , 1994 - *persee.fr*). The author advances the interesting thesis that, in fact, the idea of linking the meaning of the word person to a mask, given the passion of the Greeks for theater, and not of the Romans, who only took it over, consecrating it. Originally, the term meant appearance, the human figure so that, later, the Latin word *persona* meant the mask that the actor wore before entering the stage, the one that, through the grimace that was imprinted on him, announced either destiny tragic of the embodied character, either the comic

existential problems of man, regulating a number of issues concerning "the human body, organs and tissues detached from it and even physical or mental pain"⁴, values that do not they are always the same, because even human sensitivity is not equal, and cannot be standardized according to the same criteria as property rights.

If, for the most part, the Romanian doctrine of civil law agrees with the classical phrase⁵, there are also authors who, analyzing the structure of the civil legal relationship, take into account its subjects. Thus, Professor Ovidiu Ungureanu, who dealt mainly with the rights of the individual, after referring to "civil law subjects" in the 2003 textbook, later, in 2007, during the introductory course in civil law, talks about "Subjects of the civil legal relationship". formula he finds preferable. It is presumed that the distinguished author took into account the same arguments, finding that, in the current language, the phrase "subjects of civil law" is in total disagreement with its usual meaning, that which concerns only the subjects of civil law. However, if a number of terms in everyday speech acquire a technical meaning in legal language, the terms borrowed by law should not be used in a very different sense from the usual one, especially where we have other options for expression.

But, an authoritative argument is provided by the Orthoepic and Morphological Orthographic Dictionary of the Romanian Language, compiled by the "Iorgu Iordan" Institute of Linguistics of the Romanian Academy, according to which the plural of the word subject, in the sense of person, is subjects and not subjects, because behind the person is in fact the man, the subject of all civil rights and obligations. Therefore, the agreement must be made between the person and the subject and not between the person or party and the subject. An example in this sense is art. 32 C. pr. pen. according to which "the parties are subject to litigation...".

Likewise, Section 2 of Title V, Book V of the Civil Code, is inappropriately entitled "subjects of payment", a phrase which, in current parlance, can only signify possible reasons for which the payment was made. However, since the meaning of the phrase is different, we militate for the phrase "subjects of payment", especially since, in this matter, the parts of the obligatory report have specific names: solvens, the one who makes the payment, and accipiens, the one who receives it.

Although the discussion may seem slightly frivolous, I believe that a legal system, especially one that we claim has been reformed, should be recommended for consistency and consistency of terminology, especially when it comes to terms that are instruments. primary of the legal, normative or doctrinal discourse.

accents of the role in which he was cast. Only then did the term begin to mean the character played by the actor. The perverse effect of this evolution is that the term *personne* has taken on a bipolar meaning, meaning in French, both the person, or no one (the negative and absolute meaning of the answer to the question who did you see?).

⁴ O. Ungureanu, in O. Ungureanu, C. Jugastru, *Civil law. Persons*, Rosetti Publishing House, Bucharest, 2003, p. 18.

⁵ Gh. Beleiu, *Romanian civil law. Introduction to civil law. Subjects of civil law*, 11th edition, revised and added by M. Nicolae, P. Trușcă, Universul Juridic Publishing House, Bucharest, 2007; L. Pop, *Civil Law Treaty. Obligations. Vol. I. General Legal Regime*, Ed. C.H. Beck, Bucharest, 2006, p. 19; G. Boroi, *Civil Law. The general part. Personas*, 3rd edition, revised and added, Ed. Hamangiu, Bucharest, 2009, p. 58; E. Lupan, I. Sabău-Pop, *Civil Law Treaty*, vol. I, General Part, Ed. C.H. Beck, Bucharest, 2006, p. 93; Fl. Baias, *Simulation. Study of doctrine and jurisprudence*, Rosetti Publishing House, Bucharest, 2003, p. 129.

2.2. "Affecting" the right or interest or "harming" the right or interest?

A term frequently used by the current Civil Code is that of "touch", provided in art. 62 para. (1) according to which "no one can harm the human species", at art. 64 on "achieving the integrity of the human being", at art. 72, in the matter of any "damage to honor and reputation", or art. 74, a rule that lists several "violations of privacy."

The preference of the authors of the new normative texts for this term is also present in the matter of tortious liability. According to the provision of art. 1359 of the Civil Code, "the perpetrator of the illicit deed is obliged to repair the damage caused even when it is a result of the damage caused to another's interest", and in the matter of repairing the non-patrimonial damage, art. 1391 para. (3) of the Civil Code refers to "the right to compensation for infringements of the rights inherent to the personality". As can be seen, this term has become a pass-partout, by which are designated both the facts by which the rights to privacy and the dignity of the human person are violated, and their consequences, contrary to a requirement imposed by the rules of legislative technique to distinguish between them.

In their turn, the violations can be as harmful for the interests of the victim, as is the case provided by art. 1359 of the Civil Code, as well as independent of any prejudice, such as those from art. 74 of the Civil Code, which makes the term "touch" ambiguous, affecting the accuracy of the normative expression. Therefore, it is inexplicable to use the term 'harm', avoiding the term 'harm', which is much more accurate and therefore preferable. Thus, although the marginal name of art. 1359 is "reparation of the damage consisting in the damage of an interest", the hypothesis of the norm refers to "the damage caused and when it is the result of the harm done to the interest of another", a vague and equivocal formula. What could it be like to pursue an interest here than to harm it?

In my opinion, the coherence of the legal language requires the use of the same legal terms, even with the risk of repeating them, as it happens in another normative text, the one from art. 1360 of the Civil Code on self-defense, when the phrase designating it, appears both in the name of the norm and in the described hypothesis of the norm.

However, before enumerating them, it was preferable to define such infringements in a statement of principle, which provided for their unlawful nature, avoiding the repetition of the phrases "without right" or "without". agreement "to all ten facts inventoried. The authors of these texts have another option. Art. 75 of the Civil Code, called sec "limits" stipulates that "it does not constitute a violation of the rights provided in this section the violations that are allowed by law or by the international conventions and pacts regarding human rights to which Romania is a party".

A first objection concerns the elliptical nature of this marginal name. Let it be the limits of the rights provided in this section, as we would be inclined to believe by reading para. (1) of the norm or of the limits of the sanction of some violations of these rights, as it results from the provision from par. (2)? The question could have been avoided if the text had adopted the solution provided by art. 8 par. 2 of the European Convention on Human Rights, which uses the term "interference".

But, on the merits, the statement from art. 75 para. (1) The Civil Code is debatable. First, the denial that "the violation of the rights set forth in this section does not constitute a violation of the rights permitted by law", even if taken from the text of the Convention, could nevertheless be replaced by a positive statement, according to good legislative technique.

Then, the statement itself that the violations that are permitted by law or by the international human rights conventions to which Romania is a party does not constitute a violation of rights, is, in our opinion, partially true. Upon a careful examination of the facts of art. 74 of the Civil Code, we will observe that a good part of them concern facts that violate rights that the holder may have, where the rule *volenti non fit iniuria* is verified. Thus, entering, staying in a home, with the consent of the person legally occupying it, capturing the image or voice of a person with his consent, as well as other acts committed with the consent of the owner, can not be considered violations of privacy. However, when it comes to the unlawful interception of a private conversation, provided in art. 74 lit. b) the new Civil Code, or to keep the privacy under observation, by any means, provided by letter e) from the same text, facts for which the approval of competent bodies is required, other than the holder of the right, they remain violations of the right to privacy, even if the law, in a broad sense, admits interference in the exercise of such a right. Moreover, the very term “interference” designates the interference in intimate life, its violation, while “legitimate interference” is the one defined by art. 8 par. 2 of the European Convention on Human Rights, according to which “interference by a public authority in the exercise of this right shall be granted only to the extent that such interference is provided by law and constitutes a measure which, in a democratic society, is necessary for the security national security, public safety, the economic well-being of the country, the defense of the order and prevention of criminal acts, the protection of health or morals, or the protection of the rights and freedoms of others”. Likewise, art. 28 ^ 1 para. (1) The Swiss Civil Code stipulates that “the person who has suffered an illicit touching of his personality may sue any person who participated”, and in para. (2) of the same text provides that “the violation is unlawful when it is not justified by the consent of the victim, of a predominantly private or public interest or by law.”

Therefore, in order to be considered an infringement of privacy, the interference must be unlawful, or, if a more general, illegitimate formula is preferred, while its opposite, legitimate interference, although a violation of the right to privacy, is not will be sanctioned. If we admit that in the case of interception of conversations, we are not facing a violation of the right to privacy just because the law allows interference, we will credit the idea that human rights are left to the discretion of the authorities, when in fact they are natural rights, opposable to authority. Any limits or conditions concern only the exercise of the right and not its existence as such, as it seems. 2 in art. 8 of the European Convention on Human Rights.

Then, the inclusion among the violations of privacy in art. 74 lit. a), “taking from it (from the dwelling - s.n.) any object without the consent of the one who legally occupies it”⁶, according to the model from art. 36 point 1 of the Civil Code of Quebec, is debatable, given that such an act is called theft, which could hardly be said to be directed against privacy. The right to privacy is violated from the moment of entry or refusal to leave the home, so that subsequent acts only overlap with this interference.

The Civil Code uses only sequentially the term ambiguous infringement, avoiding it in matters related to the one mentioned above, which, again, calls into question the homogeneity of legal language, contrary to the provision of art. 35 para. (1) of Law no. 24/2000 on the norms of legislative technique for the elaboration of normative acts, according to which “in the normative language the same notions are expressed only by the same terms”.

⁶ It is a less elaborate text that also suffers from a grammatical perspective. In order for the statement to make sense, the text could refer to “taking any object out of the house without the consent of the person legally occupying it”.

Thus, art. 253 of the Civil Code stipulates that “the natural person whose non-patrimonial rights have been harmed or threatened” and not affected or harmed, as well as, art. 255 para. (6) refers to “... defense of the infringed non-property right”, and not to the right that has been infringed. It is obvious that these texts belong to different authors and that they were not correlated.

I argue that the use of the phrase 'infringement' instead of 'infringement' unnecessarily complicates the relevant legal terminology, and that the traditional term 'infringement' is therefore preferable.

In fact, the meaning of this term in French is different from its Romanian counterpart. According to DEX, the word "touch" means, first and foremost, the act of "making direct (but superficial) contact, easily or in passing, with a thing or a surface", as opposed to the usual meaning of the French term "Which has a more offensive meaning"⁷. Here he designates the action by which an injury is caused to someone, the injury, the injury, as well as the damaging result, meaning that the Romanian equivalent term acquires only through a metaphorical expression.

According to the definition given by a legal dictionary frequently used by the doctrine of civil law⁸, the term "atteinte" means "action directed against something or someone by direct means", an action which may be material (degradation), immaterial), bodily (injury), legal (plunder), as well as the prejudicial result of these actions, the damage, the damage"⁹. Being polysemantic, this term should have been avoided, or, if it had been considered preferable to the traditional "violation" or, as the case may be, "injury", it was necessary to have defined its meaning beforehand, as required by one of the requirements of legislative technique, according to which “if a notion or term is not enshrined or may have different meanings, its meaning in the context is established by the normative act establishing them, in the general provisions or in an annex intended for that lexicon, and becomes mandatory for normative acts in the same subject”¹⁰.

2.3. Does "any" damage give rise to repair?

This statement is provided by art. 1381 para. (1) Civil Code It is as laconic as it is erroneous, being elementary that not every damage is repairable, but only the one that meets a series of conditions that the text does not provide.

For a fair interpretation of this text, it is important to know the context in which it was written.

For those who followed the discussions during the drafting of the New Civil Code, it will be easy to see that, in the version adopted by the Senate on 13 September 2004, the above-mentioned legal provision provided that “reparation is due for any material, bodily or moral damage, caused by an illegal act ". Considering that this classification “does not correspond, in reality, to a distinct species of damage”, the author of an unfortunate amendment to the version of the Project, proposed to modify the text by amputating it,

⁷ In French, crimes such as espionage, assassination, conspiracy, etc. are grouped under the title of violations of the fundamental interests of the nation and phrases such as violation of the Constitution, violation of modesty, sexual assault, fatal assault, have no correspondent in Romanian.

⁸ G. Cornu, *Vocabulaire juridique*, Presses Universitaires de France, Paris, 2007, pp. 88 and 89.

⁹ *Ibidem*.

¹⁰ Article 35 para. (2) of Law no. 24/2000 regarding the norms of legislative technique for the elaboration of normative acts.

without mentioning the reparable damages. Presumably, the author of this amendment, who made the epoch (not him, but the amendment ...), either considered unspoken reasons or simply did not know that a whole doctrine today pays special attention to bodily harm, being the first mentioned among the reparable damages, in an order meant to signal the paramount importance of these values protected by law. Moreover, at European level, there are consistent concerns and proposals for the development of a European law on personal injury¹¹, based on the recommendations of Council of Europe Resolution no. 75-7 of 14 March 1975 made to the EU Member States to take into account the 19 principles of this important European document on the reparation of injuries caused by bodily injury and death.

The paradoxes do not stop here. The Civil Code itself advances distinct regulations and derogations regarding the damage of bodily integrity or health to art. 1387-1393 of the Civil Code, with both components, material and moral, but avoiding the phrase "bodily injury", given that the most important model considered by coders in the matter of obligations, and not only, the Civil Code of the Province of Quebec, orders that the person responsible for the damage caused to another is required to repair it, whether bodily, moral or material¹².

According to the author of a monograph on damages in civil liability law, the inclusion of some bodily harm in material damage and others in moral damage, may be a sign of a lack of respect for the most precious values of man¹³. The same author speaks of a "fundamental opposition between bodily harm and other harm." Moreover, important authors of French civil law are advocating for the reform of the law of liability, whereby all bodily harm, regardless of its origin, should be remedied in its own right¹⁴.

The same provision is also criticized because, according to it, "any damage gives rise to reparation", an expression that takes us back in time to private justice, when the Law of the Twelve Tables provided that the one who caused another harm, was answered with a another similar evil ("tooth for tooth, bone for bone"). Or, today, the right to reparation cannot be given by someone or something, but is established and recognized only by law.

In another respect, we are not talking about any damage caused to another, but only about the unjust damage thus caused, as provided by the Italian Civil Code¹⁵. Thus characterized, such damage also implies its illicit nature, in the broadest sense of the term (*quod non iure factum est hoc contra ius*). The damages for which the irresponsibility clauses operate, the assumption of risk, such as the damages caused in sports competitions, a whole series of other debatable damages, such as the damage consisting in the loss of the chance not to be born, which was the subject of controversies, or the consisting in the chance of not being born disabled, they are not subject to repair. In other cases of liability for damages caused by others, instead of seeking a culprit, instead of qualifying an act as wrongful only

¹¹ Yv. Lambert-Faivre, *Droit du dommage corporel. Système d'indemnisation*, Ed. Dalloz, Paris, 2000, p. 44.

¹² CCQ - Art. 1457 - Toute personne a le devoir de respecter les règles de conduite qui, suivant les circonstances, les usages ou la loi, s'imposent à elle, de manière à ne pas causer de préjudice à autrui. Elle est, lorsqu'elle est douée de raison et qu'elle manque à ce devoir, responsable du préjudice qu'elle cause par cette faute à autrui et tenue de réparer ce préjudice, qu'il soit corporel, moral ou matériel. Elle est aussi tenue, en certains cas, de réparer le préjudice causé à autrui par le fait ou la faute d'une autre personne ou par le fait des biens qu'elle a sous sa garde.

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¹³ X. Pradel, *op. cit.*, p. 310

¹⁴ *Ibidem*.

¹⁵ CCI - Art 2043 "Qualunque fatto doloso o colposo che cagiona ad altri un danno ingiusto, obbliga colui che lo ha commesso a risarcire il danno.

because it caused damage, instead of resorting to questionable constructions such as a series of presumptions of guilt, as they would be called after the adoption of guilt in the legal language specific to civil law, we can explain the responsibility from the perspective of the victim.

2.4. Does the right to compensation for damages arise "from the day on which the damage was caused" or on "the date on which the judgment requiring reparation becomes final"?

Surprisingly, important civil law authors approve of this solution. Thus, in the comments made on this text, Professor Liviu Pop, co-author and coordinator of an important treaty of obligations, notes that "in the charge of the responsible person, it is born at the moment of causing the damage, when the conditions for engaging in tortious civil liability are fulfilled"¹⁶.

I will allow myself a more nuanced opinion, stating that, at the time of causing the damage, the victim's right appears as a simple vocation for reparation. The triggering of the obligatory relationship itself, which is a personal relationship, involves the identification of the person in charge of repairing the damage. If there are situations in which the two moments coincide, there are frequent cases in which the triggering of the liability mechanism takes place later, just as not all damages caused to the victim can be imputed to a certain person, in order to talk about fulfilling the conditions of tortious liability. For example, when the owner finds his damaged car in the parking lot, without knowing the circumstances, a car is damaged in the parking lot by an as yet unknown perpetrator, the owner of the car suffers a damage, which, however, could have different causes, which must first be clarified. As the French doctrine states, "the damage suffered should not be confused with its value, because the value of the damage may change later"¹⁷. The French author himself quoted by Professor Liviu Pop mentions that "the damaging deed gives rise to the victim's right to reparation, which, at this time, appears as a formless claim, which will not become liquid and enforceable until the moment of trial"¹⁸.

This path is clearly highlighted by Mihail Eliescu, who, analyzing the right to compensation, states that it "is born from the date of the damaging deed and is completed by concretizing the object of the correlative obligation, either by agreement of the parties or by the final decision"¹⁹. At this point, the reparation of the damage is the subject of a "duty at a value without monetary expression"²⁰.

From the moment of the birth of the right to reparation, and until the date when the victim has a liquid claim, being able to capitalize it, a whole evolution is consumed. This explains why the normative text from art. 1381 para. (2) The Civil Code provides that the right to reparation arises on the day of causing the damage, even if this right cannot be exercised immediately²¹. Therefore, we cannot agree with the assessment that the final wording of the text would be unnecessary, stating that "the right to compensation depends on an objective fact, that of the damage, without being able to be influenced by the creditor's

¹⁶ L. Pop, în L. Pop, I. Fl. Popa, Basic treaty of civil law. Obligations, Universul Juridic Publishing House, p. 558.

¹⁷ Fr. Terré, Ph. Simler, Yv. Lequette, *op. cit.*, p. 609.

¹⁸ Ph. Brun, *op. cit.*, p. 371.

¹⁹ M. Eliescu, Tortious civil liability, Academy Publishing House, Bucharest, 1972, p. 469.

²⁰ *Ibidem*.

possibilities to capitalize on it"²¹. Just as it is important to distinguish between the damage and its extent, we will also have to accept that, in order to capitalize on its claims, the victim will have to obtain a title recognizing a liquid claim, which involves quantifying the damage under conditions. contradictory, specific to any civil process.

From this perspective, interesting discussions also occasion the following legal provision from art. 1381 para. (3) of the Civil Code, according to which "the right to reparation is subject, from the date of its birth, to all legal provisions regarding the execution, transmission, transformation and settlement of obligations". According to the doctrine, "from the day on which the damage was caused, {...} all the provisions on the operations and legal mechanisms by which the dynamics and settlement of obligations {...} are carried out are usually applicable"²². A question that requires an explicit answer is whether such legal provisions also apply to the right to reparation, which, although born, cannot be exercised immediately, according to the legal distinction made in the previous paragraph of the same article.

Both the right to reparation and the correlative obligation to repair the damage caused to the victim, components of the patrimony, are transferable, universally or universally, as an effect of legal or testamentary inheritance, or as an effect of the legal modes of transmission of obligations (assignment of claim, subrogation, debt collection, novation). It is equally true that the debtor is legally in arrears when the obligation arises from the commission of an extracontractual wrongful act²³, as provided in art. 1523 para. (2) lit. e) However, not all the provisions regarding the transmission and settlement of the obligations, as provided by the text invoked from art. 1381 para. (3) The Civil Code The fact that we are talking about an informal claim, which is not yet liquid, cannot be without practical importance. And that it is so, it results from the fact that a way of extinguishing the obligations inapplicable at this moment, is the compensation, which, according to art. 1617 alin. (1) The Civil Code operates "as soon as there are two certain debts, liquid and due, whatever their source, and which have as their object a sum of money or a certain amount of fungible goods of the same nature". However, the victim's simple right to reparation does not meet this condition.

On the merits, this solution has been criticized because, "although it is logical, it is unfair and contrary to judicial practice, which requires that the value be determined at the time of sentencing"²⁴.

2.5. Liability for "deed" or "harm"?

The term "liability" comes from the Latin *spondeo* by which the debtor is solemnly bound to the creditor by the formalist contract *verbis*. Hence the verb *respondere*, which means to guarantee for something (*pro aliquo spondere*). In the broadest sense of the concept, responsibility means being accountable for social behavior, repairing the harm caused by

²¹ R.L. Boilă, în Fl. A. Baias and collaborators, the New Civil Code. Comments on articles, Ed. C.H. Beck, Bucharest, 2012, p. 1457.

²² L. Pop, in the collective work *Civil Law Treaty. Obligations (according to the new Civil Code)*, Universul Juridic Publishing House, Bucharest, 2012, p. 558.

²³ The phrase "non-contractual wrongdoing" is inappropriate. It would mean, by implication, admitting the pair "contractual wrongdoing", an even more unusual expression. From a terminological perspective, the phrase "non-contractual liability", specific to the French legal language, is not assimilated by our Civil Code, which prefers the phrase "tort liability", an option that is required to be preserved in all relevant regulations.

²⁴ P. Vasilescu, *Obligations ..., op. cit.*, p. 668.

one's own deeds. Ever since Jean Domat imposed it on universal legal thinking over 4 centuries ago, and was later taken over by French coders, the principle of responsibility was born with the vocation of eternity. Deeply marked by individualism, he starts from "any deed of man", an illicit and guilty deed for which the perpetrator must be punished. All liability is based on fault, as the sole basis of any liability liability.

Subsequently, the industrial revolution led to the emergence of collective damages whose causality could no longer be located in a concrete act of someone, which is why a new theory, that of risk, was preferred by doctrine as the basis of liability, with two variants, risk created and profit risk. The latter proved to be more in line with equity, which imposes the rule *ubi emolumentum est ibi onus debet esse*. Later, another theory, that of guarantee, supported by Boris Starck, starts from the idea that everyone has the right to personal security, so that their rights to life, to the physical and material integrity of their property are required to be guaranteed against anyone. touches²⁵.

As can be seen, although the principle of civil liability has a moral substance that no one doubts, its rationale is perhaps the most difficult task of civil law theory. Therefore, Josserand stated between the two world wars that "responsibility tends to occupy the center of civil law, therefore of all law; {...} It becomes the focal point of all institutions"²⁶. Its right is called to intervene in eminently conflicting situations, offering solutions that are as rational and equitable as possible, meant to give value to the positive legal system in which it is integrated. Its technical virtue would be confirmed by a rare application, knowing that the law is made to be respected and not necessarily applied. As if defying, by its permanence and gravity, the very etymology of the term by which it is named, responsibility is not an answer, but a continuous question, always current, meant to offer adequate solutions in the individual-society relationship. Although the principle of liability is part of the universal legal constructions, the solutions advanced over time have always proved to be provisional and in a continuous search for the foundation, always proving to be perfectible. Perhaps no other area of civil law requires a more consistent regulatory effort than liability law.

Although the new regulation brings some novelties, the systematization of the subject, the terminology and some advanced solutions are still debatable. According to the evaluation of the eminent Romanian author Mihail Eliescu, the responsibility is "the cumbersome system that a multi-millennial development has brought us. {...} A system in which the idea of punishment is intertwined, which should entail a sanction measured only by the gravity of the mistake, regardless of the damage caused, and the idea of reparation, which, on the contrary, should be reported only to the extent of the damage caused, regardless of the existence or non-existence of a mistake or its gravity"²⁷.

The legal provision from art. 1357 para. (1) The Civil Code reformulates the traditional principle of tort liability enshrined in art. 998 of the old Civil Code according to which "Any act of man, which causes harm to another, obliges the one whose mistake occurred, to repair it", a text that also translated the provision of art. 1382 Civil Code fr. Comparing them, it could be said that the new regulation does not change in any way the primary data of the tortious liability, in the conditions in which its two pillars remain the deed and the damage. And yet, there are two differences: the first of them, the one from art. 1381 para. (1) C. civ., Seems to enshrine another orientation, different from the classical one, emphasizing the

²⁵ B. Starck, *Essai d'une théorie générale de la responsabilité civile considérée en sa double fonction de garantie et de peine privée*. Éd. L. Rodstein, 1947.

²⁶ Josserand, *Rapports et domaines des responsabilités contractuelle et délictuelle*, Sirey, 1931.

²⁷ M. Eliescu.

damage and not the deed. That is why part of our doctrine has rushed to praise the new regulation.

In fact, the context of the wording of the above text precludes the possibility that the authors of the text were motivated by such an intention.

The second difference concerns the introduction in the legal language of civil law of the term "guilt", with the stated purpose of promoting the terminological unity by taking into account the subjective side of liability.

In my opinion, even this time there can be no progress, given that both the concept itself and the "particular criteria for assessing guilt" regulated by art. 1358 of the Civil Code, are signals of an orientation specific to the sanctioning function of civil liability and an unjustified rapprochement between the two civil liabilities. However, in contrast to a number of authors who support the need to unify the two forms of civil liability, I continue to believe that their future cannot be a common one. On the contrary, the current regulations continue the tradition of the classical conception of tortious liability starting from the act of man, which, since it has caused harm to another, can only be unlawful and culpable and must therefore be sanctioned, "a fact that the society in which the perpetrator is considered reprehensible", as the most representative monograph on tortious civil liability in our law says²⁸.

Most of our authors started from the same premise, finding that "both judicial practice and legal literature are unanimous in considering that only an illicit act can entail tortious civil liability"²⁹, that civil liability, under both of these forms express the social condemnation of wrongful conduct³⁰, always bearing the imprint of social disapproval³¹, because it acts whenever, by an unlawful act of one person, harm is done to another"³². Therefore, the damage must be repaired because an unlawful and culpable act has been committed. According to this conception, the primary purpose of civil liability is to sanction a deed, which must be equally illicit and culpable, the responsibility being the assumption of responsibility for the result of human social action. All forms of responsibility, regardless of the branch of law they belong to, have been called to a joint effort to mobilize, influence, etc., in order to achieve the educational function of law in general. The whole edifice of civil liability is based on guilt: "in our country, there is no tortious liability without fault. It does not exist and cannot exist!", Once said the most established authors of the time³³, an imperative that seems to command even today a part of our civil law doctrine, although the search for the culprit and his conviction ab initio for a guilt, sometimes non-existent, being only presumed, is contrary to the new philosophy imposed by the assertion of fundamental human rights. Moreover, as noted, the a priori label on a person's conduct appears to be an act of "public indictment", having as its effect a great paradox, "an excessive legalization of a society that speaks more and more of solidarity"³⁴.

If most of our civil law authors claim that the educational function is the main purpose of tortious civil liability, this is the effect of the excessive ideologization of liability and law

²⁸ M. Eliescu, op. cit. p. 5.

²⁹ C. Stătescu, C. Bîrsan, op. cit. p. 154.

³⁰ T. Popescu, P. Anca, *Teoria generală a obligațiilor*, Ed. Științifică, 1968, p. 179; I.M. Anghel, Fr. Deak, *Răspunderea civilă delictuală*, Ed. Științifică, București, 1968, p. 72; I. Dogaru, P. Drăghici, op. cit., p. 218.

³¹ M. Costin, *Răspunderea juridică în RSR*, Ed. Dacia, Cluj, 1974, p. 74.

³² I. Adam, *Drept civil. Teoria generală a obligațiilor*, Ed. All Beck, București, 2004, p. 234.

³³ Tr. Ionașcu, E. Barach, *Răspunderea civilă delictuală – Culpă ca element necesar al răspunderii*, Studii și cercetări juridice, nr. 1/1970, p. 24.

³⁴ *Ibidem*.

in general, by statements such as "the reparative function is ... only relative, because it is realized only in the relations between the subjects between which the duty to repair the caused damage is established"³⁵. In other words, while the reparative function takes into account the private interest of the injured party, the preventive-educational function has a general purpose, this being "the new enriched vision of tortious liability"³⁶.

As for me, I believe that in order to decide which is the main function of civil, tort or contractual liability, we must start from what it really is, from its immediate purpose, which can not be other than the obligation to compensate by indemnity. of unjust prejudice, and not from what it should be, in an idyllic vision, a tool for shaping consciences. Without denying the preventive effect of civil liability, I believe that it is subsequent, so that, forcing the designated party to compensate for the damage, an educational message is transmitted to society, which is not indispensable, but only desirable. It is a new vision of the fundamental purposes of tortious civil liability, increasingly shared by our doctrine, according to which "this orientation demonstrates that the central idea of tortious civil liability is the full reparation of the damage, leaving in the background the sanctioning of the perpetrator. Condemning the prejudicial act, inextricably linked to the guilt of the perpetrator or the civilly responsible person, has become an idea inappropriate to the conditions of modern society"³⁷. It is an evolution that has led to talk of a "crisis of tortious liability"³⁸, a reconstruction of it³⁹.

In this context, the classic statement that "to answer means to repair and to repair means to answer" can no longer be current, the reparation of damage being a category superior to liability. Before asking who is to blame for more and more accidents of all kinds, the law must find rational solutions to repair the damage, which is far more pressing and generous than that of sanctioning guilty conduct. New hypotheses of liability appear in which guilt is increasingly overqualified and distorted, being emptied of content, a spectacle in front of which the doctrine asks: "what example of good conduct gives a right that makes the perpetrators of a non-existent guilt responsible?"⁴⁰. We are witnessing a decline in individual liability and, implicitly, guilt as a basis for civil liability, as well as an explosion of insurance amid a process of socialization of risks⁴¹, the emergence of special regimes for damages caused by accidents at work, transport, defective products, medical accidents, etc. phenomenon that brings into question "the crisis of civil liability"⁴². Moral censorship of conduct tends to remain a purely decorative expression, the practice being called to select the damages that aspire to reparation by relating them to the constant legitimacy that precedes the illicit and guilty nature of the act as the basis of liability.

³⁵ C. Stătescu, C. Bârsan, *Drept civil. Teoria generală a obligațiilor*, ed. a IX-a, revăzută și adăugită, Ed. Hamangiu, București, 2008, p. 128.

³⁶ E. Nicolciuiu, *Funcția educativă a dreptului socialist "Spre o pedagogie juridică, în lucrarea colectivă Dreptul ca instrument de formare și dezvoltare a personalității umane*, Ed. Academiei, 1973.

³⁷ L.R. Bollă, *Răspunderea civilă delictuală obiectivă*, Ed. C.H. Beck, București, 2008, p. 513.

³⁸ Fr. Terre, Ph. Simler, Y. Lequette, op. cit., p. 624, G. Viney, *Traite de droit civil. Introduction a la reponsabilite*, 2^e ed. LGDJ, 1996, p. 56, P. Jourdain, *Les principes de la responsabilite civile*, Dalloz, 6^e édition, 2004, p. 16.

³⁹ S. Carval, *La construction de la responsabilite civile*, PUF, 2001.

⁴⁰ P. Jourdain, *Les principes de la responsabilite civile*, Éd. Dalloz, 6^e édition, Dalloz, Paris, 2003, p. 17.

⁴¹ G. Viney, *Traité de droit civil. Introduction à la responsabilite* 2^e-éd., Éd. Librairie Générale de Droit et de Jurisprudence, Paris, 1995.

⁴² Fr. Terré, Ph. Simler, Y. Lequette, *Droit civil. Les obligations*, Éd. Dalloz, Paris, 1999, p. 624.

What was once said that "to speak of guilt without guilt, of guilt without an unlawful act (...) means to speak of a man without a head, of a car without a motor, of a syllogism without premises"⁴³, can no longer be valid today. Guilt, the traditional basis of liability, can no longer provide a reasonable answer for more and more damages that can no longer be attributed to individual conduct, imposing new theories that call into question the risk, the guarantee, the objective fault in substantiating tort liability.

From the point of view we propose, the damage is the only premise of liability. We could say that the moment of the foundation of reparation precedes that of the examination of the deed, because equity is that which requires the reparation of the unjust damage, even from its occurrence, and the deed is the terminus of the causal nexus. In fact, the need to lean towards the victim who is trying an unjust damage has been affirmed since the preparatory works of the Napoleonic Code. Addressing the Legislature, Tarrible said: "When harm has been done through someone's fault, if we weigh the interests of the unfortunate person who suffers it and that of the guilty or reckless man who caused it, a cry of justice rises and we he says this damage needs to be repaired"⁴⁴. A concrete deed that causes harm to another can be identified only by the responsibility for one's own, direct deed, not by the other hypotheses of liability. But even in the first case, the deed is of interest only in so far as it has caused harm to another, but not any harm, but only unjust harm.

2.6. "Repairing" the damage" or "compensating / compensating" for the damage?

The phrase "repairing the damage", although it goes back centuries, being elaborated by Jean Domat, in the 17th century and then taken over by the French coders at art. 1382 of the Civil Code, and of the whole doctrine, does not have the same resonance today. Therefore, it has been argued that the term "reparation is abusively preferred to indemnity"⁴⁵.

According to its dictionary meaning, the term "repair" means the restoration of a good or other value to its former state (in the status quo ante), by restoring or reconstituting it. In practice, however, it is seldom possible to repair the damage in kind and to restore the victim to the previous situation can be achieved, so that in the vast majority of cases the so-called reparation of the damage is done by compensating the victim (and not the damage, as often states). The term "indemnity" comes from the Latin *indemnitas*, and means the removal of damage (*damnum*) by compensation. Therefore, a number of European regulations avoid the formula "reparation of damage", including the Italian Civil Code, according to which the respondent's obligation is to compensate the damage ("*risarcimento dei danni*" - art. 2043 et seq.); in English law, "full compensation". Likewise, the Civil Code of Portugal (art. 483) defines the principle of liability for wrongful acts using the word "compensation".

In turn, compensation involves the replacement of one value with another, by any means capable of satisfying the injured interests of the victim. Viewed in the dynamics of obligations, the compensation once made, extinguishes the obligation of the debtor. The object of the repair itself is the affected values, and not the damage itself, which, being a loss, a void, cannot be susceptible to the actual repair. Criminal liability can only serve to remove these harmful consequences. It is a reality masterfully captured by Mihail Eliescu, according

⁴³ P. Esmein, *Le fondement de la responsabilité contractuelle*, RTDC, 1933, p. 627.

⁴⁴ Locré, tome XIII, pp. 57-58, apud M. Eliescu, *op. cit.* p. 1.

⁴⁵ G. Cornu, *op. cit.*, p. 803.

to which, the object of reparation within the tortious liability, is constituted in „{...} the obligation of the summoned person to answer the wrongful act”⁴⁶.

That is why, in a generic formula, advanced in previous studies, I have called them "remedies appropriate to the unjust situation of the victim"⁴⁷ what today French doctrine calls "réparation appropriée"⁴⁸. In this way, the classic deadlock on the so-called "reparability of non-pecuniary damage" is avoided, which, as is well known, cannot be repaired or replaced, but only to provide the victim with a substitute or satisfaction.

A consistent argument in favor of the thesis on the irreparability of non-pecuniary damage, in the same way as property damage, is that, once qualified as a claim, non-pecuniary damage will be subject to the mechanisms of tort liability specific to any source of obligations, which will lead to its conversion. from a non-patrimonial right, in a simple element of the patrimony, making useless the fundamental distinction between the two categories of damages.

Viewed only from this perspective, we can only welcome the provisions of art. 253 of the Civil Code, placed in Book I on Persons. However, the solutions arranged by the normative texts partially solve the problem of moral damages, because, on the one hand, they cannot ensure their reparation, and, on the other hand, because they only concern the hypotheses of violation of non-patrimonial rights, leaving the other hypotheses unresolved. by which other moral values are harmed, or the simple moral interests affected.

2.7. "Withdrawal" of the offer or acceptance or "withdrawal" of the offer or acceptance.

The marginal name from art. 1199 of the Civil Code, although it is also used by the Swiss Civil Code, is not the most appropriate. In the meaning of the Romanian language dictionary, the term "withdrawal" is devoid of legal significance, because it designates the simple physical action of taking something back. In a legal sense, however, the established term is "retraction"⁴⁹, which expresses a change of attitude, of refusal, of returning to a previously expressed intention.

The author of a study dedicated to the contract conclusion process, seen in the context of contract law reform and from the perspective of a common legal terminology, argues the need to distinguish between withdrawal and revocation⁵⁰. We can only talk about the withdrawal of the offer until the contract proposal has reached the addressee, while the revocation of the offer is possible until the recipient of the offer issues the acceptance⁵¹.

The authors of the amendment from art. 923 of the Draft New Civil Code by which the phrase "revocation of the offer and acceptance" was replaced with "withdrawal of the offer or acceptance" motivates that they took into account the provision from art. 2.1.3.

⁴⁶ M. Eliescu, *Răspunderea civilă delictuală*, Ed. Academiei, 1972, p. 469.

⁴⁷ S. Neculaescu, *Răspunderea civilă delictuală. Examen critic al condițiilor și fundamentării răspunderii civile delictuale în dreptul civil român*. Ed. Șansa, București, 1994, p. 94.

⁴⁸ Ph. le Tourneau, *Droit de la responsabilité et des contrats*, Dalloz, 2000, p. 565.

⁴⁹ In același sens, a se vedea L. Pop, *Tratat, Obligațiile*, op. cit. p. 107, P. Vasilescu, *Obligațiile*, op. cit., p. 298.

⁵⁰ C. Aubert de Vincelles, *Le processus de conclusion du contrat*, în volumul colectiv intitulat „Pour une réforme du droit du contrat”, coordonat de Fr. Terré, Ed. Dalloz, 2009, p. 125.

⁵¹ T. Starosselets, « Offre et acceptation: principes et quelques questions spéciales », in P. V. Alexandre, P. Wéry, *Le processus de formation du contrat*, CUP, Larcier, 2004, vol. 72, pp. 9-67

from the Unidroit Principles and art. 22 of the United Nations Convention on Contracts for the International Sale of Goods. It should be noted, however, that in the French version of the P.U., the phrase used in the invoked text is retraction (“*rétractation de l’offre*”), and not “withdrawal” as it appears in the version translated into Romanian. Likewise, art. Article 22 of the CVIM provides that “acceptance may be withdrawn if the withdrawal reaches the tenderer before or at the time when the acceptance would have taken effect”⁵². Likewise, the French Ordinance on the reform of contract law of 10 February 2016, referring to the tender, provides that it may be freely withdrawn as long as it has not reached its addressee⁵³.

As a result, in my opinion, the most appropriate legal term is “withdrawal” of the offer and acceptance, and not their “withdrawal”. In fact, it is interesting to note that in art. 1053 of the Civil Code regulates the “withdrawal of the revocation” of the donation, and not the “withdrawal of the revocation”, which proves, once again, the terminological inconsistency of the new normative texts.

2.8. Normative stylistics of the current Civil Code.

One of the peculiarities of the Civil Code is the excessive use of the conjunction “or” in most of the legal provisions regarding civil obligations, both when it is necessary and, especially, when it is not necessary. Viewed from a grammatical perspective, the conjunction “or”, being bivalent, and therefore equivocal, should have been avoided, because, misused, it often distorts the meaning of legal discourse.

Thus, the agreement between the multiple subject and the predicate of any legal provision is made in the plural, in situations where the conjunction “or” has a copulative (association) role. For example, the statement from art. 1199 of the Civil Code, stipulates that “the offer or acceptance may be withdrawn....”, When the correct expression is that “the offer or acceptance may be withdrawn”. Although disjunctive, the conjunction “or” is used, this time, in the sense of associating the offer with the acceptance, both being subject to a unitary rule, reason for which the provision from art. 923 of the Draft New Civil Code, which aimed at “revoking the offer and acceptance”, was the correct one.

We find the same error of expression in art. 1553 para. (2) of the Civil Code according to which “{...} the resolution or termination is subordinated to the delay of the debtor ..”. An uninformed reader may understand that the resolution is also called termination. In order to avoid such embarrassing grammar exercises, it was more correct that, in both cases, the two terms be linked by the copulative conjunction “and”, both in the marginal name of the norm from art. 1199, according to the model of the one from art. 1,187 of the Civil Code, which, this time, refers to the “form of offer and acceptance”, as well as in the actual statements of the two mentioned norms.

The disagreement is even more obvious in the case of the hypothesis from art. 1393 para. (2) of the Civil Code, according to which “As long as the aid or pension was not actually

⁵² CIVM :Article 22. L'acceptation peut être rétractée si la rétractation parvient à l'auteur de l'offre avant le moment où l'acceptation aurait pris effet ou à ce moment.

⁵³ Ord. fr. Art. 115. Elle peut librement *rétractée* tant qu'elle n'est pas parvenue à son destinataire.

granted or, as the case may be, denied to the injured party". The text refers only to the granting or denial of the pension, although the hypothesis concerns both the pension and the aid⁵⁴.

Following the same "logic", we should say, for example, that "Eminescu or Arghezi is an important poet".

2.9. "Not appearing" (!) As a representative or "failing" as a representative?

The marginal name from art. 1297 of the Civil Code, meant to designate the lack of legitimacy of the quality of representative of the one who concludes the contract, given that "the third party contractor did not know and should not have known that the representative acted in this capacity", is foreign to all regulations European institutions in the field.

First of all, the above-mentioned provision should have defined, first, by a positive statement, what the representative must do in order to identify himself and only then to foresee the consequences of the lack of this evidence, a hypothesis which, according to the Civil Code, it would have been supposed to talk about "showing" the quality of representative, which could be an even stranger expression.

Then, the authors of this unfortunate phrase had several options to express the condition of proving the quality of representative: "empowering the representative"⁵⁵, "legitimizing the quality of representative", nomination, identification (according to art. 3: 203 of the Lando Principles), but by no means "appearance".

2.10. "Justification" of the power to represent "or "proof" of the power to represent".

The marginal name from art. 1302 of the Civil Code, taken from art. 1393 of the Italian Civil Code (justification of the powers of the representative). According to the Legal Vocabulary developed by Gérard Cornu, the justification is differently defined. For the one who pleads in favor of a case, the justification designates "the task of each party to prove the conformity of the facts with the law, necessary for the success of its claims", as provided by art. 9 of the French Code of Procedure. Viewed from the judge's perspective, it is "the factual and legal motivation on which the judgment is based." The meaning of the normative statement from art. 1302 of the Civil Code is different, because it concerns only the proof of the powers entrusted by the representative, and in case the representation is materialized in a document, to send a copy of it signed for compliance.

The text is incomplete because it does not stipulate to whom the copy of the document proving the powers entrusted must be sent, only to imply that it is only a contractor, when, in fact, the interested party can do so, as provided by the French Reform Ordinance. contract law⁵⁶.

⁵⁴ Aceeași explicație o furnizează și doctrina franceză, potrivit căreia "Dans la peur **ou** la misère lui a fait commettre cette faute, le verbe est au singulier, car il n'y a qu'un seul agent qui a provoqué cette faute, soit la peur, soit la misère (disjonction exclusive),⁵⁵ alors que „Dans la peur **ou** la misère ont fait commettre bien des fautes, le verbe est au pluriel, car ici c'est tantôt la peur, tantôt la misère les initiatrices de ces fautes (disjonction inclusive)⁵⁶. Le type de l'accord confirme ainsi la nature exclusive ou inclusive de la coordination.

⁵⁵ Ordonanța franceză privind reforma dreptului contractelor – Art. 1158 - 1. – Les tiers qui doute de l'étendue du pouvoir du représentant conventionnel à l'occasion d'un acte qu'il s'apprête à la conclure, peu demander par écrit au représenté de lui confirmer dans un délai qu'il fixe doit être raisonnable, que le représentant est habilité à conclure cet acte.

⁵⁶ Ibidem,

2.11. "Justifiable" causes of non-execution or "justifiable causes" of non-execution?

Section 6 of Chapter V of Title V of the Civil Code regulates "Justifiable causes of non-performance of contractual obligations", when, in reality, it can only be "justifiable causes of non-performance", in the same logic taken into account by art. 21 para. (1) of the Penal Code, according to which "The deed provided by the criminal law is justified, consisting in the exercise of a right recognized by law or in the fulfillment of an obligation imposed by law, in compliance with the conditions and limits provided by it". In other words, it is not the cause that must be justified, but only the non-execution of the assumed contractual obligations, as is the impossibility of execution.

2.12. Exercise of rights - "cause for exemption" or "cause that removes the unlawful nature of the act"?

The statement from art. 1352 of the Civil Code, according to which "He who causes damage by the very exercise of his rights is not obliged to repair it, unless the right is exercised abusively" is wrong.

"Exonerate" means to relieve someone of an obligation (lat. Ex, onus - task). The obligation to repair the damage arises when we are in the hypothesis provided by art. 1357 of the Civil Code, when a damage was caused by an illicit deed. The very text that we are analyzing states that the person who causes damage through the very exercise of his rights is not obliged to repair it. However, if the author of the right is not obliged to make good the damage caused by the exercise of his rights, why should he be exempted?

According to our civil law doctrine, "he who exercises the prerogatives which the law confers on his subjective right cannot be considered to be acting unlawfully"⁵⁷, reason for which "the damage caused in the exercise of a right does not engage liability"⁵⁸. Therefore, the normal exercise of the law is a cause that excludes the illicit character of the deed and implicitly the very existence of the tortious liability.

How did such a regulation come about?

The answer is provided by the time sequence of the texts, starting with the Draft of the New Civil Code, in the version approved by the Senate on September 13, 2004⁵⁹. In this first variant, the "exercise of rights" was the marginal name of the norm from art. 1095 of the Civil Code, which had two general provisions. After the first defined the principle of liability, the second provision established the rule that "He who causes harm to another by the exercise of his rights is not required to repair it, "and the exception that if, however, he has exceeded by bad faith, the limits of his right or the purpose for which it was recognized, is due to reparation". Through a new systematization of these provisions, the statements intended to define the abuse of law have been "metamorphosed" into a single provision which has been given another marginal name in order to be included in the exoneration cases. Meanwhile, the preliminary title entitled "On civil law" is supplemented by Chapter III entitled

⁵⁷ C. Stătescu, C. Bîrsan, *op. cit.*, p. 181.

⁵⁸ M. Eliescu, *Răspunderea civilă delictuală*, Ed. Academiei, București, 1972, p. 162. În același sens, C. Bîrsan, *op. cit.*, p. 181, L. Pop, *Drept civil român. Teoria generală a obligațiilor*, Ed. Lumina Lex, 1998, p. 366.

⁵⁹ În lipsa unor „lucrări pregătitoare”, vom face apel la amendamentele publicate.

"Interpretation and effects of the law", which contains statements on several legal notions, including abuse of law, defined in art. 15 of the Civil Code, according to which "No right may be exercised for the purpose of harming or harming another or in an excessive and unreasonable manner, contrary to good faith"⁶⁰. As the promulgation of the Civil Code was a national emergency, the authors of these normative texts did not have time to harmonize the new provisions with the existing ones, so that, in the matter we are analyzing, we have two parallel texts on abuse of law, among which the latter should have been eliminated. In this context, the authors of the texts placed the statement among the exonerating causes of liability, although the explanatory memorandum to the amendment tells us that this reformulation had to be done to give expression to the "subjective conception of abuse of rights", in accordance with the principle of art. 57 of the Romanian Constitution according to which "Romanian citizens, foreign citizens and stateless persons must exercise their constitutional rights and freedoms in good faith, without violating the rights and freedoms of others". It is therefore significant that the authors of reference works on obligations, having to deal with exonerating causes of liability, avoid analyzing the exercise of rights as such a cause⁶¹.

2.13. The object of the "obligation" or the object of the "benefit"?

After art. 1226 para. (1) of the Civil Code defines the object of the obligation as "the service to which the debtor is obliged", art. 1227 of the Civil Code, regulates the "initial impossibility of the object of the obligation", ignoring the first provision mentioned above, when it was correct to have taken into account the initial impossibility of the benefit. Likewise, art. 1228 of the Civil Code provides that "Unless otherwise provided, contracts may also apply to future assets", when, in fact, the benefit is that which may apply to these assets, and not the assets. In other words, the correct statement was that "future goods may be subject to the benefit", as art. 1229 of the Civil Code, stipulates, correctly, this time, that "Only the goods that are in the civil circuit can be the object of a contractual service".

2.14. Undue "payment" or undue "benefit"?

The regulations for undue payment from art. 1341 as well as those from art. 1469 ff. The Civil Code are equally criticizable, requiring their revision as soon as possible for the following reasons:

- in the conditions in which art. 1470 of the Civil Code provides that the basis for payment is any payment that involves a debt, the phrase "he who pays without owing" is a *contradictio in terminis*. The statement would have made sense only if the text had referred to the simple performance, regardless of the title, which would contradict not only the legal meaning but also the ordinary meaning of the term, as defined by the Explanatory Dictionary of the language. Romanian, according to which to pay means to pay the equivalent value, in money or in kind, of a good bought, of a consumption, of the reward. In this aspect, paradoxically, the statement from art. 992 of the old Civil Code, according to which "He who, by mistake or knowingly, receives what is not owed to him, is obliged to return it to the one from whom he received it";

⁶⁰ Pentru detalii, a se vedea S. Neculaescu, *Ambiguități ale teoriei abuzului de drept*, Dreptul nr. 3/2011.

⁶¹ I.-F. Popa, *op. cit.*, pp. 348-350, V. Terzea, *Răspunderea contractuală*, Ed. Solomon, 2021, pp. 385-411.

- undue payment is defined in art. 1341 of the Civil Code as the right to restitution of the one who pays without debt. Or, being a source of obligations, it should have been defined by what it is in itself, and not by the effects it produces. It is as if we define tortious liability, another source of obligations, as the victim's right to compensation. Therefore, before we see what rights the one who has made an undue payment has, what matters first is to know what this source of obligations consists of. This logic is followed by the French Civil Code⁶², our old Civil Code⁶³, the Quebec Civil Code⁶⁴, and the French Ordinance on Contract Law Reform of February 10, 2016⁶⁵;

- the provision of art. 1341 para. 2 of the Civil Code, according to which "It is not subject to restitution what was paid as liberality or business management" is useless for two reasons: firstly, because both the liberalities and the acts concluded as management does not constitute what we call "payment" within the meaning of civil law. The phrase "payment of a liberality" is also another contradiction in terms, as long as, according to art. 1470 of the Civil Code, "Any payment presupposes a debt", and liberality presupposes, by definition, *animus donandi*, not to mention the business management where the manager acts with *animus gerendi* and where we have a distinct regulation. If, apparently, the Preliminary Draft of Catalonia proposes a similar solution by the provision of art. 1330 para. 2, according to which, when the payee proves that it was made with the liberal intention of a natural obligation or for some other reason, the restitution does not take place⁶⁶, it should be noted that there is a noticeable difference between the two texts: While the Romanian text refers to the payment made under the title of liberality, which, as I said, is nonsense, the French text considers the situation in which the recipient of the payment proves that the alleged payment was actually made with *animus donandi*. Therefore, the basis of the restitution invoked by *solvens* is even the undue payment, and if its restitution does not take place, it is because the intention of the gratification is proved;

- in another aspect, there are many other situations in which the simple payment of a sum of money has no meaning of payment, in the legal sense. However, it would be inappropriate for them to be inventoried by law. Once here, we might wonder why no other situations were really considered, on the verge of due and undue payment, given the non-existence of the material right to action. We consider natural obligations, those performed in consideration of moral duties. Their inclusion among the benefits exempted from restitution was much more opportune, all the more so as the new regulation of the extinctive prescription does not expressly provide, in case of renunciation of the benefit of the prescription, regulated by art. 2507 - 2510 of the Civil Code, the solution of validating the payment made by the debtor after the expiration of the prescription term, as provided by art. 20 of the Decree no. 167/1958 regarding the extinctive prescription. As it is known, even if the limitation period

⁶² Art. 1376 C. civ. fr. Celui qui reçoit par erreur ou sciemment ce qui ne lui est pas dû s'oblige à le restituer à celui de qui il l'a indûment reçu.

⁶³ Art. 993 C. civ. rom. Cel ce, din eroare sau cu știință, primește aceea ce nu-i este debit, este obligat a-l restitui aceluia de la care l-a primit.

⁶⁴ Art. 1491 CCQ. Le paiement fait par erreur, ou simplement pour éviter un préjudice à celui qui le fait en protestant qu'il ne doit rien, oblige celui qui l'a reçu à le restituer.

⁶⁵ Ord. fr. 1302-1. Celui qui reçoit par erreur ou sciemment ce qui ne lui est pas dû doit le restituer à celui de qui il l'a indûment reçu.

⁶⁶ C. civ. fr. - Art. 1330 alin. 2. Si toutefois il prouve que le paiement procède d'une intention libérale, d'une obligation naturelle ou d'une autre cause, il n'y a pas lieu à restitution.

has expired and the creditor's right of action in the material sense has been extinguished, for reasons of equity, the creditor's subjective right survives, so the performance will not be subject to restitution, being considered a natural obligation. The enumeration of such situations should not be made exhaustively, but it would be more appropriate to give way to other causes provided by law, a formula, moreover, frequently used by the Civil Code and which we find in the Preliminary Draft Catala in the text already analyzed, as well as in art. 2034 of the Italian Civil Code⁶⁷.

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The examples highlighted in this paper are a small part of the questionable provisions of the Civil Code that have been the subject of studies published in Legal Essentials. Even if not all the opinions and criticisms advanced will be appropriated, knowing that in law "everything is under discussion", as the inspired motto of the Private Law Review says, it is more important that they be reported and debated *ira et studio*, so that we all benefit from the most consistent regulations possible.

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⁶⁷ Pr. Catala - Art. 2034. Obbligazioni naturali – Non è ammessa la ripetizione di quanto è stato spontaneamente prestato in esecuzione di doveri morali o sociali, salvo che la prestazione sia stata eseguita da un incapace.

I doveri indicati dal comma precedente, e ogni altro per cui la legge non accorda azione ma esclude la ripetizione di ciò che è stato spontaneamente pagato, non producono altri effetti (627-2, 1933, 2331, 2940).

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