Theoretical survey on defining civil liability for external contractual damage in the Republic of Kosovo, Albania and some other EU countries

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Abstract

Most liabilities arise on contractual basis, which means that the contract is the principal source of the liability. However, in addition to the responsibilities created by contracts, they are also created outside the contracts, respectively by law. Obligations can therefore arise even without contracts being entered into, which implies that they are created by other causes, such as actions or omissions of people, for which the manifestation of the will as a party is not a feature. Non-contractual liability for damage arises from the harmful action that creates a relationship between the damager and the damaged party, respectively between persons who previously did not have a relationship of obligations. By unilateral actions or certain omissions, the law provides for legal consequences, regardless of the will of the person who has committed or has not committed the act.Example: when person A causes damage (breaks the glass window) to person B, person A is obliged to compensate damage to person B, regardless of whether he or she wishes to respond to the damage. So, besides the contract, as an important source of liability, there is also the source of causing the damage and the obligation to pay this damage. Unlike contracts, where conciliation of will between certain entities is a general condition for the creation of a relationship of obligations, in causing harm the obligation is created by the fact that the harm is caused to another. So there is an obligation that someone must compensate for the damage caused. Thus, extra-contractual civil liability arises when the damage is caused because the very fact of causing the damage creates the obligation for its compensation.

Keywords: off-contract civil liability, damage, damaging, damaged, reward.

Introduction

Causing harm as a relevant fact also creates the responsibility for it. The damaging party is liable for the damage caused to the injured party, therefore it is stated that liability for the damage is caused as a result of the damage caused. This is also normal in these relationships, because everyone must have their own consequences. The person responsible may be like the person causing the damage or someone else who is in a special relationship with the person causing it. The holder of the dangerous thing or the organizer of the dangerous activity is also considered responsible. Therefore, functioning of responsibility in these and other cases offers certain protection to the victims, as well as punishes the potential harm. In addition, certain conditions, such as: a) the existence of the damage; b) the existence of the illegality of the act or omission; c) the existence of guilt and d) the existence of a causal link between the act or omission and the resulting damage:So, with regard to setting the criteria and conditions that must be met for the existence of extra-contractual civil liability, we can say that the rules on the basis of this liability must be carefully monitored and analyzed when it is known that our society has not yet reached that level of

development to provide protection to all its citizens from the potential damage that may be caused.

1. Theoretical debate on the criteria and conditions to be met for the assignment of civil liability for non-contractual damage in Albania, Kosovo and some EU countries

Most liabilities arise on a contractual basis, which means that the contract is the principal source of the liability. However, in addition to the responsibilities created by contracts, they are also created outside contracts, respectively by law (Bilalli & Kuçi, 2009:325). Obligations can therefore arise even without contracts being entered into, which implies that they are created by other causes, such as the actions or omissions of people, for which the manifestation of the will as a party is not a feature (Gjata, 2010:12). Non-contractual liability for damage arises from the harmful action that creates a relationship between the damager and the damaged party, respectively between persons who previously did not have a relationship of obligations (Krasniqi, 2014:156). By unilateral actions or certain omissions, the law provides for legal consequences, regardless of the will of the person who has committed or has not committed the act. Example: when person A causes damage (breaks the window glass) to person B, person A is obliged to compensate damage to person B, regardless of whether he or she wishes to respond to the damage (Gjata, 2010:12). So, besides the contract, as an important source of liabilities, there is also the source of causing the damage and the obligation to pay this damage (Nuni & Mustafaj & Vokshi, 2008:94-95). Unlike contracts, where conciliation of will between certain entities is a general condition for the creation of a relationship of obligations, in causing harm the obligation is created by the fact that the harm is caused to another. So there is an obligation that someone must compensate for the damage caused. Causing harm is an expression found in many legal provisions of the Albanian Civil Code, ranging from entities, property rights, contracts, obligations, unjust enrichment, and more. In some cases it comes in the form of contractual damage and in some cases in the form of extra-contractual damage (Tutulani-Semini, 2016:161). Thus, extra-contractual civil liability arises when the damage is caused because the very fact of causing the damage creates the obligation for his / her compensation.

By civil liability for non-contractual damage we mean the reasons for which someone is liable for the damage caused, which may be, the fault or when it is ignored. Guilt is the basis of civil liability for Non-contractual (contractual) and contractual liability, or liability when the fault is not taken into account (it is for damage caused by dangerous objects or hazardous activity). In the doctrine there are authors who treat justice as the basis of responsibility (Radisic, 1980:163-164). In the rules of fairness, the LCT in Kosovo, in Article 151, paragraphs 1 and 2, states that "In the event of damage being caused by a person who was not responsible for that damage, the remuneration cannot be deducted,by the person who has the duty to supervise him, the court may, when justice so requires, and in particular taking into account the pecuniary situation of the damaging party and the damaged party, adjudicate the offender in whole or in part. If the damage is caused by a juvenile who is unable to adjudicate who is unable to compensate, the court may, when justice so requires, especially in view of

the material situation of the parents and the offender, parents to compensate for the damage, in whole or in part. "These and other actions may constitute liability-based cases based on rules of justice. These actions are taken as remedial liability cases for damages (Alishani, 1989:609). However, from this it seems that justice should not be taken as the basis of responsibility, because it is an ideal of law in any legal system, where it usually assumes the correct application of legal rules, then the improvement of the wrongful acts caused, affecting the creation of many ideas in different areas of law (Alishani, 1989:609). Cases of liability, under the rules of fairness, are actions where that liability may exist under certain conditions. According to the above it is understood that these are certain cases that are valued by the court but are not mentioned as a separate basis of civil liability for damages (Alishani, 1989:609).
In the past and in contemporary law the basis of civil liability for non-contractual damage has awakened and aroused interest among many authors in the field of civil law. It is precisely here that it can be noted that there were authors and rights that created the basis of liability at the fault of the causer (Alishani, 1989:609). On the other hand, in later rights there have been authors who have defended the idea of guilt-free liability based on the risk created, as well as the other group advocating the idea of guilt-free and guilt-free liability. (Alishani, 1989:609). These thoughts have made it easier to spot the pros and cons of just one basis of responsibility, either guilt or guilt free (Konstantinovic, osnov odgovornosti za prouzrokovanu stetu, Arhiv, br, 1-2, Beograd, 1976, fq,139 dhe Alishani, Osnovni koncept ZOO, Pravo, br, 3-4, Prishtinë, 1982, fq, 142). In other words, these two extreme thoughts have made it possible for these theories to first develop to the highest level, helping to easily detect their shortcomings. Also, on the other hand, it is easier to see cases of exclusive use of one base, which can lead to different injustices. (Alishani, 1989:609). They later began to support the two bases of civil liability, subjective (at fault) and objective (not guilty), both of which have their own scope of application (Machiedo, osnov odgovornosti za prouzrokovanu stetu " Gradjanska odgovornost", Beograd, 1966, IDN, fq, 31-32). In this way it can be said that there are different rights in contemporary law. There are, however, that the legal provisions do not support both grounds of liability for damage caused. However, case law and their doctrine uphold both the guilt and guilt free basis (Alishani, 1989: 609). This has been and is indispensable at the present stage of economic development and contemporary human life in civilized societies (Weil Alex, Droit Civil, les obligations, Paris, 1971:606-612 &Starck, Boris, Droit Civil, les obligaciones, Paris, 1972:28-32). It should be noted here that there are still authors who think that the basis of civil liability in any system is subjective, complemented by cases of objective liability (Enciklopedija imovinskog prava i prava udruzenog rada III, Beograd, 1978, fq, 425). Some think that for contemporary law, both in our law and in comparative law, there must be two bases of civil liability, in which the whole theory of liability for damage caused must be brought (Alishani, 1989:610).
Albanian civil legislation does not provide general definitions for all types of liability arising from damage. This is explained by the fact that these types of obligations cannot be included in a comprehensive definition, no matter how broad it may be (Gjata, 2010:32). Therefore, in the Albanian Civil Code, the definition of liability for damage caused by all the constituent elements of this liability is defined. So the

first element is the damage done to the other in a person orhis property; the second element is the unlawfulness of the act (act or omission); the third element, is the causal link between unlawful conduct and harm, and the fourth element is the fault of the person causing the harm. In the absence of any of these elements, liability for damage is not normally borne (Gjata, 2010:32 & Semini, 2016:201). Other authors on the terms of the damage caused mention the following elements: to cause harm, to cause harm by unlawful action, to have the defector's fault, to have delinquency, and to have a causal link between unlawful action and damage (Dauti, 2016:158).

2. Non-contractual civil liability under French law

Under French law, extra-contractual liability exists when one person causes harm to another, where the victim may seek compensation . This is the case not only when the damage is caused by personal action (willful guilt or negligence) but also when it is caused by the objects under his possession or by the persons working for him (responsibility for the actions of another) (Legier, 2008:127). In this respect, the object of civil liability is to restore the victim to the former state by means of in-kind indemnification, if possible, or of the same value (payment of indemnity and interests called compensatory, e.g. cases of bodily harm (Legier, 2008:127). Liability is civil in the sense that it entails an obligation of a civil nature, the obligation to repair the damage. This characteristic distinguishes it from criminal liability. Responsibility is extra-contractual when circumstances develop outside the scope of the contract. We then say that it derives from a civil or quasi-delict (Legier, 2008:127).

2.1. Liability for guilt or no guilt, the regime provided by the drafters of the French Civil Code

For the authors of the Civil Code, (1804) there is only one source of responsibility: guilt. The principle is enshrined in Article 1382, which states: "Every act of a human being, which causes harm to others, compels one who has caused it by his fault to correct it." Civilian delict is a deliberately committed fault (article, 1382); whereas quasi-delict, in Non-contractual damage is an inadvertently committed fault of negligence or carelessness (article, 1383) (Legier, 2008:127). In general, guilt must be proven (art. 1382-1383) but in some cases the drafters of the Code have provided for the presumption of guilt (Legier, 2008:128).

3. Non-contractual civil liability under German law

The rules for the existence of civil liability for non-contractual damage are classified into the following categories: case of liability of a person(subject-guilt), liability for presumed guilt, (liability for the actions of another) and lastly the liability which for German jurists no longer the character of a guilty responsibility, liability for risks (no-fault liability) (Fromont, 2009:43). The German Civil Code for acts which seek to obtain abstention for an unlawful act or termination of a case arising out of an unlawful act provides for such action only when the unlawful act infringes an absolute right, such as the right to ownership or name (Fromont, 2009:46). Whereas jurisprudence tends to broaden the scope of these actions, where such actions are accepted differently from unlawful acts, which infringe on the rights of the individual or the right of the enterprise to function quietly, in particular unlike statements disseminated by the

media (Fromont, 2009:46). But the general principle of responsibility for the blame has been changed in response to the growing need to protect large sections of the community from impoverishment that could cause an accident. There are special statutes for significant types of accidents, which give the victim compensation for his or her loss without having to prove the defendant's guilt, such as: industrial, rail, air and other accidents (Swegert & H. Kotz, 1994:204-205).

4. Non-contractual civil liability under Italian law

According to Article 2043 of the Italian Civil Code, any person who has caused an unlawful or willful damage by imprudence must compensate it. This provision borrows from the French law the general liability clause and from German law the double claim of unlawfulness and guilt (Fromont, 2009:60). By unlawful damage German jurisprudence means any material damage and not only the damage caused to certain objects or persons but also the financial damage. However, according to the German example, compensation for moral damage is excluded, unless the damage is caused by some type of criminal offense (article, 2049) (Fromont, 2009:60). The Italian Civil Code has provided for some liability regimes for the blame of another, for example: a person who carries a disabled person or a child is liable for damages caused by them (Articles 2046-2048) unless he succeeds in proving that he had taken all measures to avoid harm; the contractor is liable for all damages caused by his employees, which is contrary to German law (Fromont, 2009:60-61). The Italian Civil Code has also provided for some non-guilty liability regimes relating to liability items if it succeeds in proving that it has taken all measures to avoid harm, such as: the case of liability related to dangerous activities (Article 2050) or with buildings owned by him (art. 2053), then by animals or objects he has or has kept (art. 2051-2052) (Fromont, 2009:61). In other cases only proof of use of the object contrary to the wishes of its owner relieves the latter of liability, as in the case of the owner of motor vehicles (Article 2054). Many special laws have provided for liability without fault: The July 6, 1986 law defines this liability in relation to environmental damage (Fromont, 2009:61). Following the German example, by a decree dated 24 May 1988, this responsibility was adapted to Community law for product liability as opposed to French law, merging contractual liability with fault liability is possible (Fromont, 2009:61).

5. Non-contractual civil liability under Spanish law

Liability for guilt is based on a general clause, similar to Article 1382 of the French Civil Code: “He who by his act or omission inflicts damage on another person on account of his own fault or of his negligence, is obliged to reward the damage caused” (article , 1902). Moral damage is as damaging as material damage (Fromont, 2009: 70). However, there are no provisions similar to Article 1384 of the French Civil Code regarding liability for items, but only specific provisions. The Civil Code only provides for a certain number of liability for presumed guilt, both in the field of liability in relation to facilities (namely in relation to subcontractors, Article-1902), and in the field of liability without fault (namely in animals, buildings, damages to neighbors, objects falling from buildings, Article-1905) (Fromont, 2009:70). Some

special laws have established the regime of liability without liability: auto accident liability (1968 law), product liability (1994 law) (Fromont, 2009:71).

6. Non-contractual civil liability under Swiss law

Under Swiss law there are various sources of civil liability for extra-contractual damage, such as responsibility arising from the person is responsibility for the fault (Fromont, 2009:86). According to Article 41 of the Code of Obligations, "he who causes harm to another person through unlawful acts willfully or negligently shall indemnify him". The guilt is also a critical act that deserves harsh reproach. Guilt is assessed according to the personality of the author (ability to reflect) and the circumstances (ability to act in accordance with the law) (Fromont, 2009:86-87). The employer's liability for the actions of the employees is in principle a liability for the presumed fault, since the manufacturer may be relieved of his liability if he fails to prove, "that he has taken all appropriate measures to avoid such damage. , or the measures taken could not have prevented the damage occurring " (Art. 55) (Fromont, 2009:87). However, in addition to the fact that the lack of guilt on the part of the employer is restricted by the current law (adopted in 1971), the practice does not readily accept the evidence that justifies the employer, moreover, the employee need not have been guilty. For this reason the Swiss doctrine recognizes objective responsibility as guilt-free responsibility (Fromont, 2009:87). The liability of the pet owners is defined in a very similar way to that of the employer for the actions of the employee; the responsibility of the building owner depends on the existence of defects in construction or maintenance (Articles 56 to 59) (Fromont, 2009: 87). In 1999, a reform plan for particularly dangerous responsibilities and activities was published, regulating the responsibility arising from aides' activities. It is also unofficially accepted what French lawyers call the pooling of contractual and blame responsibilities, which is in fact only a choice (Fromont, 2009:87).

Conclusions

From the theoretical point of view of this chapter we saw that the need to regulate civil liability for non-contractual damage is of great importance, because we are witnessing our daily life in which the damage is caused to the subjects in various forms. So it is inflicted on the man himself, on his property and on legitimate interests defended.

From the treatment of this paper, we have noted that causing harm is a special source of civil legal relations, so it is dealt with in the civil laws of the states we have dealt with above, with particular emphasis also on our civil law, namely in the field of compulsory law. , in KCSH and in LOR in the Republic of Kosovo. It was also found that civil liability for Non-contractual damage applies to a wide range of everyday life, it is caused in different ways and by different persons whether natural or legal persons. So it is created in different ways of the particular person, with behaviors and actions that take something like doing some concrete action or omission, ie the passive behavior of the subject. We must not forget that the individual and his property are also protected by legal norms from other spheres of law such as criminal

law, administrative law, labor law norms etc. whereby we come to different forms of responsibility. But we must always know that when it comes to civil liability for Non-contractual damage, we are dealing with a completely different liability which differs from the other aforementioned responsibilities, that is, civil liability for damage caused by Non-contractual relations. It is clear from this that with this type of civil legal responsibility people and their property should be provided with the necessary protection for the harm caused to them by others.

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