

CURRENT PRACTICAL APPROACHES TO TORT LIABILITY IN THE CASE OF SERVICE RAPORTS OF CIVIL SERVANTS

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Abstract: *The analysis of the present study started from the text of art.1 and art.18 of Law no.554 / 2004, according to which an action can be filed in the administrative contentious court only regarding the granting of compensations for the damages created by issuing illegal administrative acts. The special provisions of the law on administrative litigation were opposed, in the comparative analysis, the provisions of the Civil Code on tort liability so that by corroborating with the solutions of the courts to be outlined a legal regime regarding the liability of civil servants.*

Key words: *tort liability, contractual liability, damage, civil servants, employee*

1. Prologue

The obligation to compensate for the damage caused by committing a harmful wrongdoing is the source of duties underlying both tort and contractual liability, thus being the common element of the two forms of civil liability. What differentiates them is the origin of the obligation that has been violated by the action or inaction of the perpetrator, in the case of tort being the wrongful act in general, the civil offence, while in the case of contractual liability the unlawful act consists of the non-performance or improper performance of the obligation assumed by the contract.

In both cases, if the wrongful act generates for the other party of the legal relationship, whether it is a contractual relationship or a binding relationship in general, a damage, the enforcement of liability is mainly intended to compensate the damage in order to restore the order prior to the commission of the infringement and, in the alternative, to prevent such unlawful acts in the future, by making the parties aware of their own conduct.

Over time, the exclusively restorative function of the legal institution of liability, whether we are talking about the civil or the criminal one, has proven insufficient,

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bringing more accent on the preventive and educative principles regarding the individual conduct and the decisions taken.

The idea of reparation of the damage is the dominant one that applies to the two distinct forms of civil liability, tort and contractual, but between which there is no fundamental difference according to the local doctrine (Stătescu & Bîrsan, 1994, p. 122; Pop, 1998, p. 171; Anghel & al., 1970, p. 290), although there are authors (Uliescu, coord., 2014, p.441), which support the unity of the institution of civil liability, especially in the new form of regulation of the Civil Code (2009).

Civil tort liability, sometimes also called non-contractual, is the obligation of a person to make good the damage caused either by an unlawful act outside a contractual relationship or by a violation of a conduct established by the legal norm. Thus, in the case of tortious liability between the parties, the perpetrator of the wrongful act and the injured person, there is no pre-existing legal relationship prior to the engagement of liability, while contractual liability arises on the basis of the contractual relationship between the parties, as a result of non-compliance or breach of the obligations previously assumed by the parties signatory to the contract.

In the case of civil servants, who are in the execution of a service relationship in the service of citizens, prior to the Administrative Code (O.U.G.no.57/2019), according to the specific legislation (art.75 of the Law no.188/1999 on the status of civil servants), the guilty of breach of duty of the service duties attracted, as the case may be, the disciplinary action (specific to the labour relations) from the public authority / institution in which they carry out their activity, administrative liability (specific to the relations of administrative law according to art.16 of the Law no.554/2004) in relation to the citizens for whom they provide the public service or issue the administrative act in the name and on behalf of the public authority, and also civil or criminal, in relation to the committed act.

It should be pointed out that both rules that were and are currently regulating the status of civil servants, namely Law no.188/1999 and O.U.G. no.57/2019, contain specific articles on the joint liability of the public official with the public institution / authority, to be applied, if citizens who considers themselves harmed through law or a legitimate interest as a result of an administrative act or by the refusal to solve a request regarding a legitimate subjective right or interest file a complaint to the administrative contentious court according to the contentious procedure (art.7 and art.11 Law no.554/2004). This situation, regulated until 2019 according to art.76 of the Law no.188/1999, respectively currently by art.491 O.U.G. no.57/2019, both articles being corroborated with art.16 of the Law no.554/2004, refers to the administrative liability typical to the legal regime of the public official, a form of liability close to the delictual one in which the public official, found guilty in issuing the illegal administrative act or in the procedure of refusing to solve a request, is called upon jointly and severally with the public authority/institution to cover the damage caused to the injured person.

We also mention from the very beginning that in the case of the civil servant there is a relationship of service of the civil servant with his employer (the public authority / institution), a relationship similar to that of work but different in legal regime including the act from which this relationship is born, through an unilateral act of appointment to the public office that can be assimilated (as content and legal effects in the relationship

of natural person- legal person) with the individual employment contract. Thus, in the absence of this bilateral act that enshrines the rights and obligations of the parties to the service relationship, the contractual liability cannot be engaged, but the typical administrative liability (based on art.491 GEO no.57/2019 corroborated with art.16 Law no.554/2004), or the administrative-disciplinary one (according to art.492 GEO no.57/2019) is applied in the case of the public official in the context of a authority-official relationship.

2. Brief Analysis of Tort Liability Compared to Contractual Liability

In the realm of legal liability, through breach of an obligation, whether it is one of general, legal conduct, or one established by a contractual clause, when a subjective right of a person is prejudiced, causing material or non-material damage, arises the liability either in tort or in contract.

The constant preoccupation in Romanian legal doctrine(Deak, 1961, p.174-175; Anghel & al., 1970, p.290; Pop, 1998, p.170) to establish a relationship between these two forms of civil liability was, somewhat, enhanced by the regulation of the Civil Code of 1864 according to which the regulations were distinct suggesting two legal norms: tort liability was regulated in Art.998 et seq., while contractual liability was regulated in Art.1081 et seq., that is, within Chapter VII On the Effects of Obligations of Title III On Contracts or Conventions.

The Civil Code of 2009 unitarily groups the regulation of tort liability (art.1349 C.Civil) with that of contractual liability (art.1350 C.civil), although taken individually they seem to be two distinct types of civil liability, the relationship between them being in fact the one from general to special (tort liability is the common law, and the contractual one represents the specific difference). Thus, the first difference between the two forms of civil liability lies in the nature of the breached obligation, that is to say, in the case of tort liability, the obligation breached is a general, legal obligation, by virtue of which all persons under the law must avoid harming the rights of another by wrongful acts, whereas in the case of contractual liability we are in the presence of a specific obligation, established by a contractual clause enforceable on the contracting parties, provided that the contract is validly concluded. The last condition is essential, because in the event of a breach of an obligation arising under a void or voidable contract, the liability that arises will be a tortious one, because the injured party cannot hold the infringer to any contractual provision.

Because of that contractual relationship, the effect of the principle of relativity of the effects of the contract is implemented in practice by depriving third parties of the right to plead non-compliance with a contract, giving the prerogative only to the contracting parties, with the result that the third party relates to the contract, only in so far as his legitimate right or interest is affected, as a legal fact, opening the way to action for tortious liability to cover any damage.

Other differences between tort and contractual liability can be found in the case of the conditions of their employment, namely the conditions regarding the capacity of the person liable (the contractual capacity does not coincide with the tort capacity, in the

latter case there are no restrictions from the perspective of a minimum age threshold, but the assessment of the tort capacity is made in relation to the discernment with which the perpetrator acted - legal presumption of discernment is applied on for persons over 14 years of age).

In the case of tortious liability, the right of notification of the perpetrator for the deed is de jure put into suspension at the time of committing the wrongful act, about the existence of which he had to know according to the legal norms, while for the engagement of contractual liability the party who has not complied with his contractual obligation must be put in default, in the forms required by law – notification, summons as the case may be.

If the contractual debtor is liable only for the damage directly caused (*damnum emergens*), which was foreseen or was foreseeable at the time of the conclusion of the contract, in tort the liability is entirely, both for the foreseeable damages and the unrealized benefits (*lucrum cessans*), as well as for the unpredictable ones. Full coverage of the damage in the case of contractual liability can be achieved only if the damage comes from a serious fault of the contracting party, with the guile as a manifestation of their will, in the sense that the contracting is made by the parties freely (Ghiţă, 2009, p.103).

Under both the old regulation (art.1003 of the Civil Code) and in the new Civil Code (art.1382), the tort liability comes into effect under the condition that the damage produced is the result of a single harmful illicit act (a single tort resolution - action/inaction), so that the tort liability will act on all the collective persons causing the liability with their illicit act(C.S.J., Criminal Section, Decision no. 4/1993) . Unlike tort solidarity, in the case of contractual liability, the collective liability, applies only if it is expressly provided by law or results from the contract (art.1041 old Civil Code, respectively art.1526 new Civil Code).

In the matter of tort liability, the general rule is that the aggrieved person must prove the fault of the perpetrator of the deed, while in the case of contractual liability the beneficiary of the other's obligation must prove only the existence of the contract and the non-performance of the obligation at the terms / non-compliance, with the fault being thus presumed on the basis of these circumstances (Stătescu & Bîrsan, 1994, p.123-125; Pop, 1998, p.332-334; Anghel & al., 1970, pp.38-40; Ghiţă, 2009, p.104).

3. Civil Liability and Administrative Liability

The two types of liability, belonging to distinct branches of law, are frequently encountered in the current society, in many cases cumulating (referring to the administrative responsibility in the strict sense – art.492 GEO no.57/2019 – i.e. an administrative-disciplinary liability).

The field in which we most often encounter these two types of liability is that of administrative litigation, litigation in which persons who consider themselves injured in their legitimate rights or interests, address the courts for the annulment of acts or obliging the public authority / institution to a certain conduct, including the obligation to issue an administrative act, and compensation for damages caused by the act / conduct of the public authority. Thus, administrative liability is defined through a relationship to

the common law, a civil liability, defined as "a particular legal regime of civil liability applicable to public persons" (le Tourneau, Ph., 2010 quoted by Uliescu, coord., 2014) and sometimes to private persons (Uliescu, coord., 2014, p.428).

In the evolution of this form of legal liability, administrative liability has asserted a functional autonomy, including from the perspective of regulatory rules, but does not mean the rejection of private law procedures and techniques regarding the incurrance of liability, such as, for example, in the procedure followed in administrative litigation in the event of the liability of the public authority.

In this respect, the High Court of Cassation and Justice ruled (Decision of the Second Civil Section no.2905 / 27.09.2013) that the relationship between civil liability in tort and contractual liability in the case of relations between public authorities / institutions and citizens is that of general (common law) to special, so that if in a given situation the conditions of contractual civil liability are not met, in the condition that a wrongful act has occurred, there will apply the tort liability on the public authority/institution for compensation for the damages caused. As was in this case brought before the court, for the wrongful act imputed to the defendant concerning a malfunction in the public water and sewerage network, on the street where the applicant's property was located, which was not properly remedied, the consequence being the deterioration of the building due to the massive infiltration of water from the damaged pipe. The High Court held that, in this situation, since the obligation of the operator to pay the compensations does not fall within the object of the contract for the provision of public services regarding the utilities of water supply and sewerage concluded with the user (the applicant), the operator's liability will be incurred on the basis of the general obligation to compensate for the damage caused by his fault (failure to remedy the fault in the pipeline owned by the operator), so we are in the realm of tortious liability.

As the doctrine found (Uliescu, coord., 2014, p.428-429), there are situations in which the regulation of tortious civil liability is ignored by the procedures of administrative liability that regulated an own regime starting from identical situations at origin. Thus, the situations to which we have referred are those relating to the liability for the deed of another or for the act resulting from in connection with the movable / immovable things of the administration, given that even at the constitutional level we have a regulation on the liability for the deed of another from an administrative perspective – it is about the prefect's right to appeal in the court of litigation, an administratively an act of the county council of the mayor or of the local council (art.123 para.5 constitution of Romania and art.255 GEO no.57/2019).

In the romanian post-revolution doctrine (Iorgovan, 2005, p.358) the administrative liability is considered the administrative offense in-fact and the illicit cause of material and moral damages, a situation in which the repressive function consists either in the sanctioning by the administrative authority of the holder of the act. non-compliance with the stipulated provisions, or the sanctioning of the administrative authority if its act is declared illegal by the court of litigation and the authority is obliged to a certain conduct included in the executory order of the court together with the head of the legal entity (application of a fine that is made income to the cumulative state budget with penalties that can be collected by the creditor of the obligation established by the

sentence - art.24 Law no.554 / 2004).In the case of the wrongful causing damages, the restorative function is identified, thus bringing us to the civil liability aspect in order to protect the rights and interests of the person harmed by the administrative act and restoring the situation prior to the effects of the harmful administrative act.

4. Tort or Administrative Liability of the Public Official in the Exercise of his Duties

Starting from the special legal status of "employee" of a legal person of public law, the public official executes his obligations of the service relationship on the basis of the act of appointment, administrative act proper, which, similar to the employment relationship, also has a job description (bilateral act) with attributions and competences, as well as the general duties of a public office as regulated in the Romanian Administrative Code (art.430 et seq. GEO no.57/2019).

In the absence of a labour contract, in case of deviations from the rules of discipline regarding the service tasks, in the case of the public official, the administrative-disciplinary liability will be assumed, according to art.492 and we follow. Administrative Code, a procedure similar to the procedure of disciplinary liability in contractual employment relationships.

As shown above, even if the procedures are similar in terms of disciplinary investigation for the analysis of the offence, the conditions of employment and the individualization of the sanction applicable in question, and the legislature has opted in the new civil service regulation on public functions to classify the official's liability as being mainly administrative and in subsidiarily disciplinary (conclusion drawn from the comparative analysis of the texts of art.77-79 of the Law no.188/1999 and art.492-494 of the Administrative Code).

Regarding the regime of incompatibilities and conflicts of interest regarding civil servants (art. 460-463 Administrative Code), a regime somewhat similar to that of public dignitaries, its non-compliance attracts an administrative liability, because the legal norms regarding incompatibilities and conflict of interests are general norms for public office regulated through special legislation on certain measures to ensure transparency in the exercise of public dignity, the official in question not being able to exercise public office due to a personal situation, but not lack of professional training or negligence. If, as a result of the liability of the civil servant for non-compliance with the regime of incompatibilities, if the acts issued by the exercise of public office caused harm, either to the public authority or to a third party from an administrative point of view, including for the reparation of the damage caused, the regulation is done through a procedure similar to the one regarding the tortious liability, or to a third party by the act issued in the name and on behalf of the public authority, the person concerned will be administratively liable, including for compensation for the damage caused, by a procedure similar to that of tortious liability.

In these cases under the scope of the special law of administrative litigation, the courts of law (Cluj Court of Appeal, Commercial and Administrative and Fiscal Section, Decision no. 2963/2011) asks to combine the administrative liability and civil liability in tort, considering that in order to incur administrative liability, the cumulative fulfillment of the the following conditions: 1) the contested administrative act is declared invalid

by the court; 2) the administrative act has caused material and/or non-material damage; 3) that there is a causal link between the unlawful administrative act and the damage and, last but not least, 4) there is the guilt, even in the form of negligence, of the public official, and of a legal person governed by public law. Thus, being met similarly to tort liability the conditions for incurring administrative liability, and in the case of disputes on administrative litigation, the courts will also order the compensation of the damage caused to the injured person by the administrative act jointly and severally by the public authority and the public official culpable.

5. Conclusions

It is unanimously recognized in the doctrine regarding the relationship between tort and contractual liability is that between general and special, in the sense that the former represents the common law of civil liability, while the second is a derogation of this civil liability, transforming it into a special liability. Thus, whenever in the civil law we are not in the presence of contractual liability, the rules regarding the civil tort liability will be applicable (Eliescu, 1972, p.62; Anghel & al., 1970, p.39; Ghiță, 2009, p.102).

Two theories are identified in the doctrine: duality and the unity of civil liability. The followers of the theory of the duality of faults or of the duality of civil liability (Anghel & al., 1970, p.34, p.283) claiming the existence of essential differences between the two types of liability, emphasize mainly the origin of these responsibilities by opposing the will of the parties bilaterally consented by contract, to the will of the public authority, of the legislator who unilaterally regulates the obligation through the legal norm.

Relatively newer and of French influence (Benabent, 1995, p.257-258 quoted by Ghiță, 2009, p.106), the thesis of the unity of faults or of the unity of civil liability starts precisely from the absence of essential differences between the two, practically the French authors speak of an almost perfect similarity between the two forms of civil liability, based on the same nature of guilt – the violation of an obligation established before the harmful action. Minimizing the difference between the pre-existing obligation for the damage generated by the agreement between the parties, respectively the one detached from the legal norm, the authors of the theory of unity consider the fault, in the sense of violation of the pre-existing obligation, to be the element of uniqueness, so in the event of non-performance of the contract, the regime of tort liability would apply, since the initial contractual obligation was replaced by an obligation born as a result of non-performance of the contract, obligation that arises by one's own deed (art.998 old Civil Code, art.1349 new Civil Code) (Ghiță, 2009, p.106).

The four forms of responsibility identified in the case of public officials according to the legislation in force (O.U.G. no.57/2019) – disciplinary liability (administrative-disciplinary according to art.492 GEO no.57/2019), administrative (art.491 O.U.G. no.57/2019 reported to art.16 Law no.554/2004), civil (going on the algorithm of tort liability) and criminal can be grouped on the two branches of law – public and private – depending on the legal norm they violate, of which they assume responsibility "distinguished by a different legal nature from the protected value" (Cărăușan, 2012, p.396): a) public liability – disciplinary, administrative and criminal and b) private – civil liability.

The culpable violation of the duties of the service will attract in the case of the public official one or more forms of liability, possibly also engaged in cumulation, with the following exceptions: 1) impossibility of cumulating the administrative-contravention liability with the criminal one, respectively 2) of the inadmissibility of the action for damages against the public official (tort liability) according to art.1349 of the Civil Code in case in which the injured party opts mainly for this type of liability action in the absence of any act (administrative – order/decision/provision of the to the public or judicial authority) on the imputation of the damage to the public official (Decision of the HCCJ no.4643 / 11.10.2011, appeal of the Administrative and Fiscal Section).

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