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THE THEORETICAL FRAMEWORK OF THE THEORY OF CIVIL RESPONSIBILITY

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ABSTRACT

Civil responsibility occupies an important, prestigious and sensitive position in the legal system, specifically in the philosophy of civil law. Civil liability gives an Individuals the rights to obtain compensation if he/she suffer from the wrong act of other Individuals by suing them. Therefore, to be an awarded of compensation, the injured party has to have suffered an actual loss, such as; damage to property or financial loss. Nowadays, there is doubt that that civil responsibility is unable to keep up with new developments of life. This research aims to identify the theoretical aspects of the theory of civil liability. Furthermore, this research also aims to clarify what is meant by both contractual liability and omissive responsibility, what is the difference between them using the approach of juridical-normative with descriptive analysis This study has reach to a result that omissive responsibility and contractual responsibility are differ if we address their original source of obligation, but both responsibility are based on the general and legal obligation of not harming others in the society. Even if their original source of obligation is not the same there is a very great convergence in nature between both of it. Considering this, it is necessary to consider the possibility of establishing a legal system that is independent of the traditional one that would avoid the constraints and challenges of that responsibility.

1. INTRODUCTION

A contract is defined as a promise or set of promises to which the law attaches a legal duty and also provides a remedy for breach of that duty. (Al Amaren & Rachma Indriyani, 2019) Civil responsibility has passed many stages until it reached to its current form, it arose initially from the idea of retribution and

activating the idea of revenge as a punishment for the opponent, and then the issue evolved with the aim of alleviating that situation to enter the idea of optional (*diyah*). However, the intervention of the public authority forced the opponents to move to the issue of (compulsory blood) in accordance with the rules of custom, so that the public authority at a later stage-imposed penalty for criminal offences, while obliging the offender to pay the money as compensation to the victim.

The approach used in this study is considered the analytical approach, through the collection, organization, and analysis of information, reliance on critical analytical investigation and problem identification.

2. The Elements of the Civil Liability

Civil liability was not in its current form from the beginning of the existence of human, it has gone through many stages, the most important of which may be the separation between it and the criminal system, and therefore the gradual entry of the wrong corner as a prerequisite for its values.

2.1 The Form of Civil Liability

The civil liability (Responsabilité Civile) is: "The legal status of a person who has committed a mistake that has resulted in harm to a third person money or honor, then it has become possible to force him judicially to compensate for this damage". (Makris, 1988) The wrong or fault act was not the basis of responsibility initially, but the damage was the essential elements of the establishment of civil responsibility, and gradually the idea of the wrong or fault act has emerged until it became the cornerstone of civil responsibility existence. It was found that, the jurist has addressed it in ancient Roman law in his most prominent books (civil laws) by saying: "All the losses and damages caused by an Individual, whether due to lack of foresight or lightness, or ignorance of what should be known or done or any similar error, no matter how simple, must be compensated by those whose lack of vision or error is the cause of their occurrence. (Al-Sanhouri, 2015)

Regarding this era in the system of civil responsibility, the researcher find many doctrinal tendencies has adopt many different doctrines in the issue of the ramifications of that responsibility, as a part of French jurisprudence has called for the unity of civil responsibility from a contract responsibility and a omissive responsibility, as they has saw that, that their basis is based on a previous breach, and they challenge the cause and effect. But it seems impossible to conform their unity, as jurisprudence should ask how their scope is determined? If both can exist at the same time. (Amer & Amer, 1979)

The two-sided hypothesis was absolute due to the nature of the two responsibilities, which was the direction of French jurisprudence until the late nineteenth century. On the one hand, omissive responsibility is between Individuals who had not been legally linked before. On the other hand, contractual responsibility is among contractors, as it emphasizes the relations between the two contractors based on the underlaying contract between them. Omissive responsibility has its own scope that differ from the contractual responsibility. Furthermore, they are many differences between

omissive responsibility and contractual responsibility in puberty in contractual liability, judicial notice, scope of compensation, the specificity of solidarity, the burden of proof and obsolescence, in addition to the exemption from liability. (Amer & Amer, 1979)

Based on the above, the theory of duplication of responsibility requires the absolute understanding of the difference between each of the two responsibilities, so that the distinction between them in terms of the source of the obligation, or in terms of the legal rules (Akush, 2001) governing the two responsibilities is that the breach of contractual obligation is different from the breach of the general legal duty of harmful act, as in the omissive responsibility, as the source of the contract is the will of the parties in the contractual responsibility, while default liability arises from the law. (Ali, 2018)

This unilateral hypothesis of single-responsibility, is characterized by the profound symmetry of the dynamic principle of the two forms of responsibility, both of which are primarily and substantially aimed at punishing the fault or the wrong act, but that hypothesis applies far from the contractual reality in many respects, in terms of the penalty of violating a contractual obligation, as well as in measuring the validity and proof of this obligation. (Al-Meryhael, 2020)

The proponents of unity of responsibility do not find a fundamental difference in nature between the omissive responsibility and the contractual responsibility, as they commented on that by stating that, they are a consequence of an earlier commitment, in addition, the two responsibilities are united in cause and effect, and there is a convergence of effects between them. Furthermore, the proponents of unity of responsibility has clam that any differences that may arise are only superficial differences, as they are not due to a fundamental difference between the two types of responsibility and that these differences are not due to the nature of responsibility but are only a legal and regulatory nature. (Akush, 2001)

Accordingly, the debate on the unity of omissive responsibility and the contractual responsibility is to some extent reminiscent of the discussion on the sources of obligations. In this regard all obligations are considered legal (legitimate), following the source of the first obligations; “no obligation could exist if the legislator had not acknowledged it and accepted it”. (Al-Aqrabawi, 2019). However, both responsibilities differ if we address their original source of obligation, but both of omissive responsibility and the contractual responsibility are based on the general and legal obligation of not harming others in the society. Even if their original source of obligation is not the same there is a very great convergence in nature between both of it. (Al-Meryhael, 2020)

It is worth to mentioned that, the idea of omissive responsibility is exceptional (Responsabilité d'exception), which does not mean that this type of liability is not important, as omissive responsibility consider as a public responsibility (Responsabilité de principe). While, the contractual liability is special due to the existence of a contract. (Flour, 2011) In the view of some

French jurisprudence, the content of the contract is gradually being regulated by law, thus moving steadily away from the will of the parties. Moreover, it is known today that the force of the contract does not find its origin in the will of the parties, but rather in the will of the legislator. (De Droit, 2007)

It is important to note that there is a jurisprudential opinion that does not oppose the idea of duplication, but this view rejects the idea of multiple errors, but goes to the unity of error, whether contractual or omissive , in any case it is a breach of an earlier duty, and they consider that the authors of the error are based on the sources of commitment as evidence, and justify their direction by comparing the law and the contract. (Al-Khatib, 1968) However, this did not eliminate the difference between the two contractual and omissive responsibility, as the civil legislator created two types of responsibility within their respective provisions, and addressed the terms of the both of responsibility, further, legislator also has dealt with the both of responsibility, their conduct within separate sections which suitable to each of responsibility. Proponents of duplication of the both of responsibility believe that the wisdom of distinguishing between the two types of responsibility is in the interest of the injured, as that interest is the responsibility of the legislator, which is essential, and the first to care. (Al-Khatib, 1968) Majority aspect of the jurisprudence has called for double civil responsibility, from contractual and omissive responsibility, because there are fundamental differences between them in the rules of the law and for the privacy of each other. (Al-Sanhouri, 2015) Thus, the researcher concludes to that, there is a complete difference between the provisions of the two responsibilities.

In the view of some of the modern jurisprudence from French and Egypt, the distinction between the two contractual and omissive responsibility have emerged by subtracting the two types of fault or wrong act represented by the contractual error following the establishment of the contractual relationship and the violation of contractual obligations, and the default error in accordance with a general legal duty. (Amer & Amer, 1979) On the other hand - although we have previously concluded that civil liability is bilateral, some of French jurisprudence considers that, the limit between these two types of responsibility is not always clear. (Starck, 1996)

At the legislative level, the French Civil Code of 1804 dealt with the establishment of the rules of civil responsibility. On the basis that civil liability in its traditional form was based on the duty of proof, which was dealt up by the French legislator in civil law - prior to the amendment - in article 1382 by stating that:
"Any act that causes harm to others is necessary for those who have suffered from the wrong act to be compensated". (Eid & Belani, 2012)

The French legislator emphasized the content of that article after the amended by Law No. (131 of 2016) in the updated article No. (1240), which stated:
"**Any act of any human being that causes harm to others is necessary to be repaired**". (French Civil Code No. 131 of 2016)

2.2 The Impact of The Personal Theory on Civil Liability

After the development of civil responsibility from its primal state through the consideration of damage as a fundamental element and the use of the punitive function of compensation, the responsibility has moved to the next stage in which the corner of error enters the basis of its establishment with the availability of the remaining elements of liability from a causal relationship and damage. In order to ensure that the error is essentially available for the establishment of either responsibility, civil responsibility does not avoid the element of error if the element of damage is available, to reach the conclusion that the error is the basis of responsibility, whether it is the result of personal action or the act of others or by the act of things. The issuance of conduct described as a harmful act resulting in harm to others, which entails the responsibility and the obligation to compensate. (Ouisse, 2010)

The error is "a breach of an earlier legal duty, or deviation from the ordinary and customary behavior of the usual individual". Jurisprudence has addressed the theories of error in terms of the hierarchy of error to a serious error, which is akin to intentional error, a simple mistake not made by the usual individual, and a trivial mistake attributed to the neglected individual who is not careful, this theory has been attributed to the law. (Flour, 2011) While the judicial trend in France emphasized the enormity of the error, (Hassan, 1991)

The researcher come to the conclusion of that, error is the focus of the debate in the adaptation between the contractual and omissive responsibilities. Error is an unspecified concept and has no definition of an absolute barrier. on the other hand, it is difficult to adapt and prove the responsibility of the personal actions, and may involve the defenses of the official compensation to avoid the responsibility against him/her because of the diversity of civil responsibility.

3. CONCLUSION

At advanced stages, civil liability has shifted to a new form that adopts the issue of compensation for damage, free from the punitive idea of liability, as in the Old Testament, which confused civil and criminal responsibility, and therefore the doctrinal assumptions about the reality of civil responsibility in its relatively modern form, separate from the criminal nature, arose from a contractual and omissive responsibilities. This study has reach to a result that omissive responsibility and contractual responsibility are differ if we address their original source of obligation, but both responsibilities are based on the general and legal obligation of not harming others in the society. Even if their original source of obligation is not the same there is a very great convergence in nature between both of it.

It should also be noted that it is a good step by the French legislator to keep up with the development of the provisions of the civil law in accordance with the latest developments, the researcher find that, legislator has responded to the fact that the legal text must be developed to keep pace with developments, including sources and general provisions of obligations and proof. French legislator answers the call of the jurisprudence to amend, change, and reform,

through the amendment of the French Civil Code for the year (18) of 2016, to include a broader amendment to the essential part of the Civil Code.

It is worth mentioning that French laws have a great influence on Arab jurists, and we limit that Arab legislation mostly follows everything that is new in the French legal world in a way that reflects on the redrafting of laws and specifically civil ones, with some specificity of The Arab laws affecting Islamic jurisprudence (the Journal of Judicial Judgments or Ottoman Laws) as in Jordanian legislation. In light of this, it is necessary to consider the possibility of establishing a legal system that is independent of the traditional one that would avoid the constraints and challenges of that responsibility.

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