

THE DECODIFICATION OF CHILEAN CIVIL LAW IN LIGHT OF THE NORMS CONTAINED IN BOOK IV, TITLE XXXV OF THE CIVIL CODE

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Abstract

This work examines the decodification phenomenon in light of the rules of tort law contained in the Chilean Civil Code, given the proliferation of tort norms contained in special statutes, contrasting the latter with the principles contained in the Civil Code. The aim is to determine whether it is possible to conclude that decodification has occurred in this regard, and if the latter question is answered in the affirmative, the work addresses what the general rule would be today, on matters related to the factors for attribution of liability.

Key words: *Decodification, tort law, statutory torts, factors for attribution.*

I. INTRODUCTION.

Much has been written about the decodification of the law and – above all – regarding civil law.² The first to coin the concept was Professor Natalino Irti, who predicted – as early as 1978 – that ours would be an era of decodification, and that law fixed in codes would become residual.

This work deals with the aforementioned concept, in light of a specific area of private law:³ tort law, regulated in Bello's Code in its Book IV, Title XXXV,

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2 In Chile, for everyone, particularly noteworthy is the work of GUZMÁN BRITO (1993), pp. 39-62; and FIGUEROA YÁÑEZ (2005), pp. 101-116.

3 In this sense, there are many and different statutes dictated after the Bello Code: "In the matter of persons and family law can be mentioned the primitive statute of civil marriage, now replaced by a more modern one, but which deals with identical matter; the laws that improved the situation of natural children and then equalized all children; the one that authorized the change of names; the one which gave full capacity to married women; different statutes on adoption and organ transplants. In the matter of proprietary rights, we had the Agrarian Reform Act, which deeply altered the provisions on expropriation of agricultural properties; and we have the laws on intellectual and industrial property, regularization of small real estate and real estate co-ownership, while in contracts we have the laws on urban and rural leases, money lending operations, agricultural garment, industrial garment and garment without displacement; and consumer rights and consumer protection. The list is long and complex." FIGUEROA YÁÑEZ (2005), p. 105. We will focus only on extravagant rules of torts.

articles 2314 et seq., contrasting the proliferation of tort norms contained in special statutes with the principles contained in the Civil Code related to this matter, so as to determine whether it is possible to affirm that decodification has occurred in this regard. Furthermore, if the latter question is answered in the affirmative, this work addresses what the general rule would be today, on matters related to the factors for attribution of liability.

For this task, we will refer to the notions of codification and decodification. After addressing the ways in which the latter has been materialized, we will establish the sense in which we shall use the term ‘decodification’. In a separate section, the *ratio* of the norms contained in the Civil Code in relation to torts shall be established, to compare it with tort cases referred to in peripheral norms, so as to determine if some form of decodification has occurred. Finally, we shall present the conclusions arrived upon, after the aforementioned investigation.

II. ON THE NOTION OF CODIFICATION

Addressing decodification –incidentally– implies addressing codification as a manner by which law is established.⁴ In Figueroa’s words, codification refers to a “systematic presentation, organized in a synthetic and methodological manner, of a body of general and permanent rules governing one or more particular areas of law, in a given country”.⁵

This kind of establishment “is characterized by innovating with respect to the introduction of normative material and the organization thereof, to establish new law that distances itself from its predecessor, and to determine the loss of validity of the previous legal provisions, though they may be compatible with codified legislation”.⁶

In this respect, Barros⁷ recognizes two methods of codification: one is formal and another is material. Regarding the former, civil codification “answers to the purpose of systematically ordering rules relating to an extensive field of private relationships, which arise from family, property, from legal acts and legal occurrences, including death. In this regard, Civil Law is codified in a formal sense”.⁸ As per the latter – that is to say, the material sense – “it may be understood as an order that responds to a certain ‘internal’ system, since it is articulated around normative principles and conceptual categories, and since it usually consolidates generally incre-

4 On the subject, *vid.* GUZMÁN BRITO (1977).

5 FIGUEROA YÁÑEZ (2005), translation of the author of the concept of Vogel, p. 101.

6 CORRAL TALCIANI (2005), p. 642.

7 BARROS BOURIE (2005), pp. 151-161.

8 BARROS BOURIE (2005), p. 151.

mental changes, though in certain critical places they tend to be discreet, introduced by case law (*jurisprudencia*) with the aid of legal doctrine”.⁹

In Chile, the beginning of the codification process can be placed in 1822, with O’Higgins’ idea of translating the Napoleonic codes, thus opening a debate as per the replacement of inherited law from the monarchy, so as to establish a law of its own. Thus, after failed attempts, Andrés Bello solitarily completed the task, approving and enacting the Civil Code of the Republic of Chile in 1855: the first national code. This codification movement continued with the Code of Commerce (1865); The Penal Code (1874); The Law on Organization and Attribution of Courts (*Organic Code of Courts*); The Mining Code (1874); The Code of Civil Procedure (*Adjective Law*) (1902); And the Code of Criminal Procedure (1906). After this classic period, what followed was the codification of more modern, sector specific branches, such as Health law (1918); Labor law (1931); Tax law (1960) and Aviation Law (1990).¹⁰

III. THE IDEA OF DECODIFICATION AND ITS CONSEQUENCE TO GENERAL PRIVATE LAW

After the aforementioned codification phenomena, what followed – as some have stated – was “a long period that has been called the ‘decodification’ of civil norms, characterized by the fragmentation and dispersion of these norms in various legal bodies”.¹¹ Such normative dispersion of civil rules can be explained by the fact that the Civil Code could not foresee everything, and regulating increasingly complex and specific activities became necessary.¹²

For Irti, this situation is comprised of distinct historical phases:

[I]n the first, the general rule continues being *the law of the greatest number of cases*, and the special rule is restricted to the regulation of cases provided with differentiating data. In the second, the general norm is degraded down to residual law, or the norm of the lesser number of cases, extending itself from criteria of the special norm to other special norms, widening the recipients of the same. In the third and last (phase), the regulation criteria, introduced by the special rule, also cover the broadest hypothesis and become the content of a new general rule, of which the given cycle may be reopened.¹³

9 BARROS BOURIE (2005), pp. 152-153.

10 *Vid.* GUZMÁN BRITO (1982).

11 FIGUEROA YÁÑEZ (2005), p. 101.

12 “One cannot hope for a code to take charge of the thousand questions set out by the practical application of each institute; nor to regulate the special legal statutes, which are largely addressed in the rules and general principles of the discipline” [BARROS BOURIE (2005), p. 159].

13 IRTI (1992), p. 52.

Thus, “special laws regulate matters and institutions outside of, or contrary to, the Civil Code. Enacted for the fulfillment of constitutional principles, or born of ‘group statutes’, special laws are no longer ‘specifying’ with respect to the Civil Code; instead, they obey *autonomous logic*, speaking with sector-specific language and jargon. For certain matters or categories of relations, the law of the Civil Code assumes a *residual nature*, in the sense that it intervenes when special normative resources have been exploited and exhausted”.¹⁴

This phenomenon had multiple factors: “In the first place, the complexity and multiplicity of social needs require the legislator to sanction special rules that address the problems that arise from human relationships. Second, the case-law attributed different interpretations to the norms created by the legislator and created new institutions that were foreign to our legal bodies”.¹⁵

The direct consequence of the aforementioned is the loss of the Civil Code as a continent of general law, taking its place as residual law, as a vessel of principles and logics with particular application, suffering an inversion of its function: “[it no longer consists of a] discipline of broader assumptions of fact, but rather of empty and devoid assumptions, from those elements of fact, those characteristic notes, which give rise to new principles in special laws”.¹⁶

IV. OF THE WAYS OF DECODIFICATION AND THE MEANING THAT WE SHALL APPLY TO THIS EXPRESSION

Among others, the following have been pointed out as manifestations of this phenomena:

a) “The loss of value and utility of the Code as a technical instrument for the establishment of law”;

b) “The loss of applicability of the Code to private conflicts, due to the proliferation of special laws that overlap with its norms”;¹⁷

c) “The distancing of the case-law from the rules of the Code, so as to face new realities, for which the legal provisions present themselves as obsolete and anachronistic”.¹⁸

14 IRTI (1992), p. 117.

15 FRONTERA (2009), p. 104.

16 IRTI, (1992), p. 33.

17 In this part we follow the scheme proposed by CORRAL TALCIANI, (2005), pp. 641-651.

18 CORRAL TALCIANI, (2005), pp. 641-651. About this interesting point, *vid.* COUAILLER (2005), pp. 117-131. The author explains how through judicial interpretation, “legislative inflation” took place on the basis of the rules of the Code on torts: “The right of criminal and quasi-crimes liability, so hurriedly treated by the Civil Code - twenty lines in three articles - was profoundly enriched in the course of an extensive Praetorian construction with theories of risk, theories of direct and indirect causality, the theory of abuse of law, the definition of custody of the thing, of its active or passive role, the criteria of custody of the structure, custody of behavior, collective custody, defined the no-

For Irti, decodification translates to relegating the Civil Code to the category of microsystem, due to the proliferation of special laws:

[t]he legal system no longer coincides with a single set of rules, with the old, nineteenth century constellation that had the Civil Code at its center, and the movement of special laws gravitated upon it. The Civil Code is now *one of the systems*, of which the great universe of private law is comprised. Other set of norms, which have broken any nexus with the Civil Code, are constituted in systems and are developed according to sector logics.¹⁹

Notwithstanding the foregoing, the author is criticized for not having given relevance to the notion of singular statutes in his study, as well as for equating the concept of special statute to those provisions that regulate what is established in the Civil Code, although in a different manner, as well as those provisions that rule the unknown by the same. For Guzmán Brito, “the true ‘decodification’ is produced not by the special statute, but by the singular statute”;²⁰ so to refine the concept of decodification, the notions of special²¹ and singular statutes²² must be established and clearly differentiated. The latter may be verified in three ways: (i) formal; (ii) material and formal; and (iii) material.

The formal manner refers to the creation of special and new law, producing proliferation of statutes around the Code, but without ignoring its relationship; the material and formal way is the establishment of singular law through extravagant or out-of-Code statutes; finally, the material decodification occurs through the creation of singular law that leads to the modification of its own rules. Thus, “the true ‘decodification’ is the material, regardless of whether or not it is formal; it affects the logic of the legal system as a whole, including the code, whether the rules are introduced through articles or remain outside them”.²³ Decodification occurs when the

tion of force majeure, etc., with the 1985 law to specify all rules of responsibility and compensation in the event of traffic accidents” (p. 127). In Chile, the phenomenon could be repeated with the courts’ extensive interpretation of articles 2320 and 2322 to the companies and the state workers. This exceeds our study. *Vid.* CORRAL TALCIANI (2013), p. 233 y ss.

19 IRTI (1992), p. 63.

20 GUZMÁN BRITO (1993), p. 44.

21 There is a relationship of specialty-generality: “one hypothesis is endo-systematically special with respect to another, which then is general, when the aggregated note and specializing the first belongs to the system in which the hypothesis is inserted, that is general with respect to the specialized one” [GUZMÁN BRITO (1993), p. 45].

22 There is a singularity-regularity relation: “[the] hypothesis is exo-sistemically special with respect to another, which is then general, when the aggregate note that specializes the former does not belong to the system to which the hypothesis belongs, which is general with respect to the specialized one” [GUZMÁN BRITO (1993), p. 45].

23 GUZMÁN BRITO (1993), p. 49.

meaning of the system incorporated in the code is unknown, when the new norms escape its logic or principles.

It is precisely in the latter sense that we will use the expression ‘decodification’.

V. ON THE RELATIONSHIP CONTAINED IN THE RULES OF BOOK IV. TITLE XXXV OF THE CIVIL CODE

In the case of civil wrongful acts, our Code contains a special section in Book IV –Title XXXV “Of the delicts and quasi-delicts”– which develops tort law in detail throughout twenty-one articles.

To determine the attribution factor in civil wrongful acts, it must be considered that in a subjective model of liability such as ours, the lack of care or the positive intention to cause harm to a person or to the property of another is what imposes the duty to make up for the damages caused upon the agent, either by not adopting the measures conducive to avoid the damage or by its special incentive to cause.

Thus,

a general duty of diligence exists when the system’s rules impose the duty to act with the care and prudence required by the circumstances of a person, time and place; or, as affirmed in the Anglo-Saxon sphere, when one has the duty to act as a prudent man would. On the other hand, there is a particular duty of diligence when the norms order a specific conduct, such as driving at a certain speed or the adoption of concrete measures [...]. In the latter case, the violation of a specific rule allows to affirm that the agent was negligent or faulty.²⁴

While in the case of objective, strict, or blameless liability, the agent’s duty to repair does not come from a lack of diligence or a special *animus* at the time of executing the conduct or omission that inflicts harm upon the victim. In this sense, as Papayannis points out, “[t]he duty to repair may be based on the risk inherent in the activity performed by the agent, or in the riskiness of the objects used for it. It could also be based on the benefit that the agent gains from the harm-inducing activity. What is relevant here, is that strict liability is not triggered by the violation of any standard of conduct. It only requires the existence of a causal link [...] between the risk involved in the activity and the damage”.²⁵

Having established the foregoing, by reviewing the rules of Title XXXV, we are able to affirm that, though the main notions of liability are fault, causation and

²⁴ PAPAYANNIS (2014), p. 32.

²⁵ PAPAYANNIS (2014), p. 32.

harm,²⁶ fault²⁷ being the concept upon which the system of attributing liability is developed in the Civil Code:

a) Art. 2314, “Anyone who has committed a *delict or quasi-delict* that has inflicted harm on another is liable to compensate ...”.²⁸ The legislator emphasizes subjectivity: it is not enough to inflict harm upon a person, but the voluntary act that originates it must come from a positive intention or from a negligent action or omission;

b) Art. 2319, in regard to tort capacity, children under the age of seven and the insane are excluded, but it establishes liability of the persons who were in charge of them, inasmuch as “*they could be accused of negligence*”.²⁹

c) Art. 2320, regarding the presumption of fault of the principal, as per those that are under his or her charge. The article considers an exculpatory rule of responsibility; those who are responsible for others may prove that there was no absence of care; in other words, “if, with the authority and *care* conferred upon them by their title, they could not have prevented the act”.³⁰

d) Art. 2321, with regards to the responsibility of parents for harmful acts of their minor children which “are known to have come as a result of poor education, or from the vicious habits they have allowed their children to acquire”. Parents have a duty to raise and educate their children, so that “if the child has misbehaved or has acquired said habits, it means they have not fulfilled this obligation; therefore, there is manifest liability of the father or mother in charge of his or her child’s care, and nothing may explain or excuse (*the non-fulfillment*)”.³¹

e) Art. 2322, regarding the presumption of fault that falls upon the masters due to acts of their domestic servants. As in the case of article 2320, an exculpatory rule of liability is established “if it is proven that [...] they have exercised [their functions] in an improper manner that the master had no means of anticipating or preventing, exercising ordinary control, as well as competent authority”.³²

f) Art. 2326, in the event of harm caused by an animal, the owner or manager thereof is liable, “save for when the release, loss or damage cannot be attributed to the fault of the owner or to the dependent responsible for the custody or service of the animal”.³³ The article continues to indicate that the rule applies to any person who

26 TAPIA RODRÍGUEZ (2005), p. 280.

27 Despite the cases where fault is presumed (arts. 2320, 2321, 2322, 2327, 2328 Civil Code).

28 The highlight is ours.

29 The highlight is ours.

30 The highlight is ours.

31 ALESSANDRI RODRÍGUEZ (2005), pp. 92-93.

32 The highlight is ours.

33 The highlight is ours.

uses someone else's animal, "save his action against the owner, if the damage has been due to a quality or vice of the animal, should have either known or foreseen by employing a medium level of care or prudence, and which was not made known".³⁴

g) Art. 2327, which presumes the fault of the holder of a fierce animal that causes damage, when the animal does not provide utility for the custody or service of a property; in such case, the caused damage shall "*always be attributable to he or she who has it (the animal)*",³⁵ per the article: "the fact of having a fierce animal on a property [...] constitutes liability in and of itself. Liability exists as long as the animal remains on the premises, because (liability) is not constituted due to a lack of watchfulness over the animal, but rather due to having a useless, and dangerous animal on the premises; it shall be impossible for the owner, possessor or holder to prove otherwise".^{36 37}

h) Art. 2329, which establishes, in its first paragraph, the principle of *restitutio ad integrum*, which is based once again on the fault or malicious intent of the agent: "any damage that can be attributed to *malice or negligence* of another person, must be repaired by him or her";³⁸ after which in the numbered points of its second paragraph –according to most commentators– there would be cases of presumptions of fault by the very fact;³⁹ and,

i) Art. 2333, grants a popular action in case of conceivable damage which "threatens indeterminate persons, by someone's recklessness or negligence".⁴⁰

As Alessandri points out, the theory adopted by our Civil Code is "the classic theory of *fault liability* in all its breadth; the risk theory is not supported by the Code in any case. It could not be otherwise if we consider that it was dictated in an era - 1855 - in which no one questioned or doubted the need for negligence or malice on the part of the agent to compromise his or her liability".⁴¹

34 The highlight is ours.

35 The highlight is ours.

36 ALESSANDRI RODRÍGUEZ (2005), p. 93.

37 Against, CORRAL TALCIANI (2013), p. 246. For this author, it would be a case of "strict liability or no fault liability, established by the law to sanction anyone who, with no need, keeps a dangerous animal".

38 The highlight is ours.

39 Against, CORRAL TALCIANI (2013) Who understands that the cases mentioned in article 2329 are not meant to be presumptions of fault, but rather of causation: "fault must be proved, but the causal relationship between negligent behavior (shoot the weapon, remove the slabs, have in bad shape the aqueduct or bridge) and the damage caused (death or injury of a person) is established (legally presumed), until proven otherwise (p. 227).

40 The highlight is ours.

41 ALESSANDRI RODRÍGUEZ (2005), pp. 91-92.

Thus, the Code's system of attribution of liability is based on the proof of fault of the agent, which is common to all western law,⁴² preserving the cases in which it is presumed.⁴³

VI. OF THE REGIMES OF LIABILITY NOT INCLUDED IN THE CIVIL CODE.

In Chile, outside of the realm of the Civil Code, we can identify the following rules regarding torts that regulate liability regimes in particular, without the following comprising an exhaustive list:

- a) The non-contractual Civil Liability of the State and of the Municipalities (Political Constitution of the Republic, Ley N° 18.575 y N° 18.695);
- b) Civil liability for accidents at work and occupational sickness (Ley N° 16.744);
- c) Civil liability for defects in construction (D.F.L. N° 458 of 1975);
- d) Civil liability for hydrocarbon spills (D.L. N° 2.222 of 1978);
- e) Liability for the use of pesticides (D.L. N° 3557 of 1980);
- f) Non-contractual liability of directors of public limited companies (Ley N° 18.046);
- g) Liability for nuclear damages (Ley N° 18.302);
- h) Civil liability for air accidents (Aviation Code);
- i) Civil liability for damages to the environment (Ley N° 19.300);

42 CORRAL TALCIANI (2013), p. 89. Historically, we have placed in Roman law the first notions about compensation for damages, with *lex aquilia*, which only required damage to proceed. Subsequently and under the influence of Christianity, medieval law establishes a system of attribution of responsibility based on personal fault, leaving the Roman model by the end of the fourteenth century. It will be the French jurists Domat - developing the work of the natural lawyer Grocio - and Pothier who will elaborate the so-called classic regime of civil responsibility that will pass to articles 1382, 1383 and 1384 of the Code and then to our Civil Code, as in all legislations inspired in the code of Napoleon. CORRAL TALCIANI (2013), pp. 75-82.

43 Thus: (i) article 2320, first clause, general rule of presumption of fault regarding the fact of third parties; (ii) article 2320 second clause, presumption of fault of the father or mother by the fact of the minor children who lives in the same house; (iii) article 2320, third clause, presumption of fault of the guardian or curator for the conduct of the ward who lives under his or her dependency and care; (iv) article 2320 section four, first part, presumption of fault of the heads of schools and schools for the deeds of his disciples; (v) article 2320 subsection 4, second part, presumption of liability of craftsmen and entrepreneurs for the fact of their apprentices or dependents; (vi) article 2321, presumption of parental liability for the acts of the minor children which are known to come from their bad education or the vicious habits that have allowed them to acquire; (vii) article 2322, presumption of liability of the "masters" for the conduct of their domestic employees; (viii) article 2327, presumption of liability of the holder of a fierce animal that does not report utility; (ix) article 2328, presumption of liability of the people who live in the part of a building, by the things that are dropped or thrown; and (x) article 2329, presumption of fault in the proper act.

- j) Products liability (Ley N° 19.496);
- k) Medical civil liability in public health establishments (Ley N° 19.966);
- l) Civil liability for the storage of personal data (Ley N° 19.628);
- m) Civil liability derived from journalistic activities (Ley N° 19.733);
- n) Non-contractual civil liability for traffic accidents (Law N° 18.290); etc.

However, as we have already stated, the mere proliferation of rules is not enough to talk about decodification, at least in its true sense.⁴⁴ In order to answer if there is a material decodification of torts contained in the Civil Code, it is necessary to analyze the issue from the perspective of liability in a broad sense. So that, whenever we are facing a strict liability⁴⁵ regime –or blameless liability– there will be a departure from the *ratio* of the rules contained in Title XXXV.

VII. ANALYSIS OF THE TORT RULES INCLUDED IN 'EXTRAVAGANT' STATUTES⁴⁶

a) The non-contractual Civil Liability of the State and of the Municipalities: The fundamental norms in this matter are contained in the Chilean Constitution, articles 6, 7 and 38. The liability of the State is based on the notion of absence of service, the attribution factor of which is fault.⁴⁷

Thus, in D.F.L. (*Decree with Force of Law*) N° 1 of 2001,⁴⁸ which establishes the consolidated, coordinated and systematized text for Ley N° 18.575, Ley de Bases Generales de la Administración del Estado, article 4 states “[t]he State shall be liable for damage caused by the Administrative bodies in the exercise of their functions, while preserving the liabilities that may affect the state officer who caused them”.

Thus, it becomes clear that the State’s extra-contractual liability rests upon the notion of fault, in particular when article 42 paragraph 2, points out that the State has the right to suit the official “who has fallen into misconduct.”

On the other hand, D.F.L. N° 1 of 2006, which establishes the consolidated, coordinated and systematized text of Ley N° 18.695 (Ley Orgánica de Municipal-

44 GUZMÁN BRITO (1993), p. 49. Against, FIGUEROA YÁÑEZ (2005), pp. 104-106.

45 “The normative antecedent of strict liability is the engagement in an activity or holding something that creates the risk of harm. Given that qualifying the tortfeasor’s conduct is irrelevant, what is important is that the harm is caused within *the risk’s scope that is subject to strict liability*” [BARROS BOURIE (2006), p. 475].

46 In the sense given by GUZMÁN BRITO, (1993), p. 48 et seq.

47 Founded on lack of service. For Corral, these provisions “establish direct liability (...) but not of an absolute strict character and based on the material causation of harm only, but on a factor of imputation called ‘lack of service’. In this way, one can speak of a strict (objective) qualified responsibility: the plaintiff must prove the lack of service, besides harm and causation, to obtain the compensation of the State or other public bodies to answer civilly”. CORRAL TALCIANI (2013), p. 320-321.

48 Last modified on January 5th, 2016, Ley N° 20.880.

idades of July 26 of 2006)⁴⁹ incorporates the same principle in its article 152, as follows: “Municipalities will be liable for the damage they cause, which are mainly derived from absence of service,” concluding however, that they “shall have the right to suit the official who has fallen in misconduct.”

In any case, personal fault must be proven and alludes to imprudent or malicious conduct on the part of the official, following the rules of the subjective system of imputation of liability.

b) Civil liability for accidents at work and occupational infirmities: This matter is regulated in Ley N° 16.744 of February 1 of 1968,⁵⁰ which establishes rules regarding occupational accidents and infirmities. Article 1 establishes compulsory social insurance against the risks of occupational accidents and infirmities; while Article 69 establishes the system of imputation of liability for damage caused to the worker. For these purposes, the compensation is enforceable regardless of whether or not the employer is negligent, excluding the possibility of claiming compensation in case of “accidents due to strange force majeure that has no relation to the work and those (accidents) intentionally provoked by the victim” (Article 5, final paragraph).

Although, at first glance, one might think that this statute establishes a case of strict or no-fault liability, this conclusion becomes distorted by the provisions contained in Article 69 letter a): “When the accident or infirmity is due to fault or malice of the employer or of a third party, while conserving any criminal actions that may arise, the following rules shall be observed: a) The managing body shall have the right to seek damages against the person responsible for the accident, for the benefits that he has granted or must grant”. In addition to the above, the letter b) of the aforementioned article establishes the possibility of pursuing civil action, in accordance with the general rules, so that the referral to the general rules of allocation of liability for negligence is evident.⁵¹

c) Civil liability for defects in construction: Although the general rules in this area are contained in the Civil Code, articles 2323 and 2324,⁵² which establish the attribution of liability due to negligence on the part of the builder, D.F.L. N° 458 of 1975, which approves the new Ley General de Urbanismo y Construcción of 1976,⁵³ establishes special rules. Article 18 paragraph one states that “[t]he first owner and first seller of a building is liable for all harms and losses arising from faults or defects in it, whether during its execution or after completion, despite his or her right to seek damages against those who are responsible for the failures or defects in construction

49 Last modified on April 1st, 2014, Ley N° 20.742.

50 Last modified on April 21th, 2015, Ley N° 20.830.

51 In this sense CORRAL TALCIANI (2013), p. 252.

52 They establish liability for the damages caused by the ruin of the building “due to having omitted the necessary repairs, or by having otherwise lacked the care of a good parent”.

53 Last modified on May 26th, 2017, Ley N° 21.014.

that have given rise to the damage”. It also establishes owner’s liability for harm suffered by third parties as a result of defects in construction.

This is a case of liability without fault, which supposes evidence of the vice or defect in the construction as well as the damage, in order to allow for the damages award. For Corral, it would be a “strict but not absolute responsibility, because it is derived from the proof of the failure or defect of construction, and of the causation between this fault or defect and the alleged damage”.⁵⁴

d) Civil liability for hydrocarbons spills: D.L. (*law decree*) N° 2.222 regulates this matter, which replaces the Ley de Navegación of 1978. The decree establishes a liability cap (Article 145) and the obligation to sign an insurance policy or guarantee for claims that affect ships or naval artifacts weighing more than three thousand tons (Article 146). The liability in this case is strict. It is thus concluded per Article 144 N° 2, which states that “[t]he owner, ship-owner, or operator of the ship or naval device, shall be liable for any damage that may occur”; when it prevents the exoneration of liability based on the exclusive fault of the dependents of the owner, ship-owner, or operator or those of the crew; and when it presumes that the spills or dumping of pollutants to the marine environment produces ecological damage (No. 5).

This is a system of strict liability - or without fault-⁵⁵ so there is a material and formal decodification in this respect.

e) Liability for the use of pesticides: It is systematized in D.L. N° 3.557 of 1981, which establishes provisions on agricultural protection.⁵⁶ Article 36 of this decree sanctions the activity when damage is caused to third parties, even in the absence of fault: “If damage to third parties is caused by pesticides, either accidentally or as an inevitable consequence of the application thereof, he or she may file a legal claim for damages within a term of one year from the time that such harms are detected. In any case, these actions may not be exercised after four years from the date of the application of the pesticide”.

The current case constitutes a type of strict liability or without fault that escapes from the *ratio* of the norms of the Civil Code.⁵⁷

f) Extra-contractual liability of directors of corporations: Law N° 18.046, of 1981, establishes a general rule of liability in Article 41.⁵⁸ This rule states in its first paragraph that “directors must employ, in the exercise of their functions, the care and diligence that men would ordinarily employ in their own businesses, and shall be jointly and severally liable for the damage caused to the corporation and to the shareholders for their intentional or negligent actions”.

⁵⁴ CORRAL TALCIANI (2013), p. 276.

⁵⁵ In the same sense, CORRAL TALCIANI (2013), p. 144.

⁵⁶ Last modified on December 27th, 2008, Ley N° 20.308.

⁵⁷ In the same sense, BARROS BOURIE (2006), pp. 470-471.

⁵⁸ Last modified on December 29th, 2016, Ley N° 20.954.

The system of attribution of these regulations is based on negligence or fault. It even establishes a presumption of it, in cases of breach of the law, its regulations, bylaws or rules issued by the Superintendence (Article 133). Decodification, therefore, is simply formal.

g) Liability for nuclear damage: This issue is regulated in Ley N° 18.302 on nuclear safety of 1984.⁵⁹ Its Article 49 states that “civil liability for nuclear damage shall be objective and limited in the manner established by this statute”. The liability in this case is strict or without fault and tariffed. The operator is even responsible for the risk of unforeseen circumstances and force majeure in article 56, except for when “nuclear damages are caused by a nuclear accident that is directly due to hostilities of an armed conflict, insurrection or civil war”. Additionally, Article 62 establishes the obligation to guarantee the liability of the operator through insurance. This regulation escapes the logic of the rules of the Civil Code, verifying a formal and material decodification.

h) Civil liability for air accidents: This subject refers to the Aviation Code,⁶⁰ and its Article 143 provides that “[t]he carrier shall be subject to damages for the death or injury caused to passengers during their stay on board the aircraft or during the operation of boarding or deboarding”.⁶¹ The law does not require negligence or malicious intent in the arising of damage. Consequently, this would be a case of liability without fault for the risk created. Specific cases of damage to passengers are regulated in relation to the violation of transportation contracts, in Articles 147 to 149, both included.⁶² With regards to damage to third parties, Article 155 gives way to compensation for harms to persons located on the surface “due to the mere fact that they arise from the action of an aircraft in flight, or inasmuch as it befalls from it”.

In this case, the liability of the operator is again strict or without fault: “by the mere fact” of the operation of an aircraft in flight. A formal and material decodification is verified.

i) Civil liability for damage to the environment: Ley N° 19.300, which approves the Ley sobre Bases General del Medio Ambiente, of 1994,⁶³ addresses this issue. The general rule is contained in its Article 3: “In spite of the penalties estab-

59 Last modified on December 3rd, 2009, Ley N° 20.402.

60 Ley N° 18.916 of February 8th of 1990. Last modification on April 30th, 2015, Ley N° 20.831.

61 Ley N° 18.916 of February 8th of 1990. Last modification on April 30th, 2015, Ley N° 20.831.

62 Article 147 “The compensation for delay in the execution of passenger transportation will not exceed two hundred and fifty *UF* (Chilean Financial Unit) for each one of them”.

“However, this compensation shall not be applicable if the transporter proves that he took the necessary measures to avoid the event causing the delay, or that he was unable to adopt them”.

Article 148 “The destruction, loss or damage of the luggage that happens during the air transport of the latter, or the delay in its transportation, shall be compensated with an amount equivalent to forty *UF* for each passenger”.

Article 149: “The destruction, loss or damage of the merchandise that occurs during the air transport of it or by delay in its transportation, will be compensated with an amount that does not exceed one *UF* per kilogram of gross weight of the load”.

63 Last modified on June 1st, 2016, Law N° 20.920.

lished by law, anyone who either by negligence or willful intent, causes damage to the environment, shall be obliged to repair it materially, at his or her sole cost if possible, and compensate in accordance with the law". This idea is repeated in Article 51 et seq. This provision establishes a reference to the norms of the Civil Code in matters of extra-contractual liability and requires in its first paragraph - following the *ratio* of the Code - negligence or intent in the act of the responsible party: "Anyone who negligently or willfully causes environmental damage shall answer for the same in accordance with this law". It also establishes a presumption of fault against legality in the first paragraph of the Article 52. Indeed, the provision states that "Liability of the author of environmental damage will be legally presumed if there is a violation of environmental quality standards, emission standards, prevention or decontamination plans, special regulations for cases of environmental emergency or environmental protection, preservation or conservation regulations established in this law or in other legal or regulatory provisions." Decodification in this case is simply formal.⁶⁴

j) Products liability: Ley N° 19.496, of March 7 of 1997 regulates this matter,⁶⁵ which establishes rules on consumer protection.

The fundamental rule in this area is contained in Article 22, which provides that "[t]he products which suppliers, whether distributors or dealers, should have replaced to consumers and those for which they returned the amount received in payment, must be returned to them, against their delivery, by the person from whom they are acquired or by the manufacturer or importer, who shall also be responsible for the compensation of the costs of restitution or refunds, and any compensation payable under a conviction, provided that the defect resulted in one or the other is attributable to them". Hence, responsibility is based on the liability of the provider, following the rules of the Bello's Code for matters of civil unlawful acts.⁶⁶

As in the previous case, the decodification is simply formal.

k) Medical civil liability in public health facilities: Regarding this specific matter, Ley N° 19.966 was approved on September 3th of 2004,⁶⁷ establishing a system of guarantees in healthcare. As we pointed out regarding the responsibility of the State and the Municipalities, the attribution factor is the liability of the agent based on the notion of a lack of service. Article 38 of this law provides that "[t]he organs of the State Administration in health matters shall be liable for damage caused to individuals as a result of lack of service", adding that "[t]he agent must prove that the damage was caused by the action or omission on the part of the body, by means of the absence of said service".

64 However, for some would be contained in Article 53 of the aforementioned law, a case of strict liability. *Vid.* TAPIA RODRÍGUEZ (2005), pp. 322-323. On the contrary, see BARROS BOURIE (2006), p. 471.

65 Las modified on November 17th, 2016, Law N° 20.967.

66 In the same sense, CORRAL TALCIANI (2013), p. 267.

67 Las modified on April 24th of 2012, Ley N° 20.584.

This regulation follows the classic system of attribution of liability of Title XXXV, hence decodification here is formal, in the sense previously seen with respect to the extra-contractual Civil Liability of the State.

l) Liability for the storage of personal data: Article 11 of Ley N° 19.628 issued on August 28th of 1999,⁶⁸ on the protection of private life, establishes the origin of compensatory action against the person liable for the records or databases where personal data are stored. Specifically, the custodian is required to collect the data - and take care of that information “with due diligence, taking responsibility for damage”. In this case, the decodification is simply formal. On the other hand, Article 23 of the aforementioned statute provides that “[t]he person, or company, or the public body responsible for the personal databank shall compensate for the pecuniary and non-pecuniary damages caused by the undue processing of the data, notwithstanding if the same proceeds to delete, modify or block the data according to the requirements of the owner or if ordered by a court”. For Corral,

[t]he imperative tone of the precept ‘*must compensate*’ could lead us to think that we are faced with a new case of objective or non-fault liability. However, we must reject this interpretation for several reasons, among them, due to the fact that the liability set forth in Article 23 is a liability derived from an offense, and only proceeds when the subjective element is proven. And, given that the term ‘undue’ reveals that the intention was for the common criteria of the Civil Code to be applied, in light of the history of the establishment of the law, this is fault liability.⁶⁹

m) Liability derived from journalistic activity: Ley N° 19.733, of June 4th of 2001,⁷⁰ on the freedom of opinion and information and journalism, establishes in its Article 40 that “[t]he civil claim to obtain compensation for damages derived from crimes punishable by this statute shall be governed by the general rules”. In this sense, this refers to the rules of Title XXXV of the Civil Code, producing a formal –not material– decodification.⁷¹

n) Extra-contractual civil liability for traffic accidents: Ley N° 18.290, of October 29th of 2009,⁷² which establishes the consolidated, coordinated and system-

68 Las modified on February 17th, 2012, Ley N° 20.575.

69 CORRAL TALCIANI (2013), p. 282

70 Las modified December 23th, 2013, Ley N° 20.709.

71 With the exception that the reference to these rules differs in relation to the second paragraph of Article 40. This provision states that “The commission of the crimes of injury and slander, referred to in article 29, shall be entitled to compensation for the resulting damage, loss of profit and non-pecuniary damages”, contrary to what is stated in article 2331 of the Civil Code, which restricts compensation in case of accusations against the honor or credit of a person to only pecuniary damages.

72 Last modified March 16th, 2016, Ley N° 20.904. This legislation should be linked to Ley N° 18.490, which establishes compulsory insurance for personal accidents caused by the circulation of motor

atized text of the Ley del Tránsito, establishes in its Article 165 liability for the act in and of itself, based on the negligence of the agent, and incorporates the notion of fault against legality.⁷³

Thus, it states that “[t]he person who drives a vehicle in a way that he or she endangers the safety of others, regardless of their rights or in violation of the traffic or safety rules established in this law, shall be liable for any damages resulting therefrom”.

Furthermore, Articles 167 and 168 establish presumptions of liability of drivers in certain cases. Although, up to this point the law follows the rules of liability outlined in the Civil Code, the situation changes when it comes to the owner or holder under any title of the vehicle. The second paragraph of Article 169 provides that “unless the latter state that the vehicle was used against his will, they are jointly and severally liable for any damages or losses caused by their use, despite the liability of third parties in accordance with current legislation”.

The responsibility of the owner of the vehicle is strict due to acts of others, producing a new decoding in its formal and material sense.

VIII. CONCLUSION

In a quantitative aspect, there is in this matter an evident proliferation of norms outside the Civil Code. Consequently, there is a ‘formal decodification’, which, as we have pointed out, does not constitute a real or true decodification.

In most of the cases studied, we can observe that in conjunction with establishing a sectoral system of liability throughout the regulation of special matters, with principles and logic of their own, different from the *ratio* included in the Code, a formal and material decodification exists. This applies in civil liability for defects in construction, hydrocarbon spills, for the use of pesticides, nuclear damage, plane crashes and traffic accidents.

Nevertheless, is it possible to speak of decodification and re-codification as a remedy?⁷⁴ Is strict liability a secondary rule in our law? Has subjective liability been transformed into ‘extravagant’ law?

While we agree with Papayannis that “logically, negligent liability includes strict liability because there is no hypothesis in that it is answered by negligence, and

vehicles, dated on January 4th, 1986 (last modified January 9th, 2014, Ley N° 20.720) with a cap of liability, regardless of compensations that are pursued by the civil responsible per the norms of the Civil Code (article 15).

73 Whenever there is a causal link between the offense and the damage caused by the accident (article 166).

74 *Vid.* FIGUEROA YÁÑEZ (2005), pp. 104-106.

would not have been answered under a strict liability statute”,⁷⁵ what is general is not the same as what is secondary.⁷⁶

We believe that despite the actual existence of rules that are far from the meaning of the Code, such rules do not marginalize it, but rather reinforce its general and common nature.

We believe that, despite the spread of extravagant and unique rules, the Code maintains its function as secondary law, and has not become residual. As Tapia points out, “none of these special statutes provoked the destruction of the *civil unity* created by the Code, because its fundamental ideological principles –*liberty, equality and will*– were not replaced by others, and remain a democratic conquest. A *true decodification* would mean a replacement of these categories by others, an issue that is not perceived in the evolution that has been outlined in the Civil Code”.⁷⁷

75 PAPAYANNIS (2014), p. 320.

76 PAPAYANNIS (2014), p. 311.

77 TAPIA RODRÍGUEZ (2005), p. 352.

BIBLIOGRAPHY CITED

- ALESSANDRI RODRÍGUEZ, Arturo (2005), *De la responsabilidad extracontractual en el derecho civil chileno* (Editorial Jurídica de Chile).
- BARROS BOURIE, Enrique (2005), *Sentidos y métodos de la codificación del derecho*, in *De la codificación a la descodificación. Code Civil (1804-2004). Código de Bello (1855-2005)*, Cuadernos de análisis jurídicos, Colección de Derecho Privado II, pp. 151-161
- BARROS BOURIE, Enrique (2006), *Tratado de responsabilidad extracontractual* (Editorial Jurídica de Chile).
- COUAILLER, Michel (2005), *De la descodificación en la jurisprudencia francesa. Mirada de un juez*, in *De la codificación a la descodificación. Code Civil (1804-2004). Código de Bello (1855-2005)*, Cuadernos de análisis jurídicos, Colección de Derecho Privado II, pp. 117-131.
- CORRAL TALCIANI, Hernán (2005), “La descodificación del Derecho Civil en Chile, en El Código Civil de Chile 1855-2005”, in *Trabajos expuestos en el Congreso Internacional celebrado para conmemorar su promulgación*, pp. 641-651.
- CORRAL TALCIANI, Hernán (2013), *Lecciones de Responsabilidad civil extracontractual, 2ª edición*, (Thomson Reuters, 2nd ed.).
- FIGUEROA YÁÑEZ, Gonzalo (2005), “Codificación, descodificación, recodificación del derecho civil, en De la codificación a la descodificación. Code Civil (1804-2004). Código de Bello (1855-2005)”, in *Cuadernos de análisis jurídicos*, Colección de Derecho Privado II, pp. 101-116
- FRONTERA, Juan Carlos (2009), “Descodificación civil argentina. Primeras Reflexiones”, in *Ambiente Jurídico* N° 11, pp. 95-106.
- GUZMÁN BRITO, Alejandro (1977), *La fijación del Derecho* (Ediciones Universitarias de Valparaíso, Universidad Católica de Valparaíso).
- GUZMÁN BRITO, Alejandro (1982), *Andrés Bello codificador. Historia de la fijación y codificación del derecho civil en Chile* (Ediciones de la Universidad de Chile).
- GUZMÁN BRITO, Alejandro (1993), “Codificación, descodificación y recodificación del Derecho Civil chileno”, in *Revista de Derecho y Jurisprudencia* Vol. 90, T. 2, pp. 39-62.
- IRTI, Natalino (1992), *La edad de la descodificación*, (translated by Luis Rojo Ajuria, J.M. Bosch, 1992).

PAPAYANNIS, Diego M. (2014), *Comprensión y justificación de la responsabilidad extracontractual* (Marcial Pons).

TAPIA RODRÍGUEZ, Mauricio (2005), *Código Civil 1855-2005. Evolución y perspectivas* (Editorial Jurídica de Chile).

LEGISLATION CITED

- Ley N° 16.744, que establece normas sobre accidentes del trabajo y enfermedades profesionales.
- Ley N° 18.046, sobre sociedades anónimas.
- Ley N° 18.290, que fija el texto refundido, coordinado y sistematizado de la Ley de Tránsito.
- Ley N° 18.302 sobre seguridad nuclear.
- Ley N° 19.300, que aprueba Ley sobre Bases Generales del Medio Ambiente.
- Ley N° 19.496, que establece normas sobre protección de los derechos de los consumidores.
- La Ley N° 19.733 sobre libertades de opinión e información y ejercicio del periodismo de 4 de junio de 2001
- Ley N° 19.628 sobre protección de la vida privada, de 28 de agosto de 1999.
- Ley N° 19.966, que establece un régimen de garantías en salud.
- Decreto con fuerza de ley N° 1 de 2006, que fija el texto refundido, coordinado y sistematizado de la Ley N° 18.695, orgánica constitucional de municipalidades.
- Decreto con fuerza de ley N°458 de 1975, que aprueba nueva Ley General de Urbanismo y Construcciones.
- Decreto Ley N° 2.222, que sustituye la Ley de Navegación.
- Decreto Ley N° 3.557 de 1980, que establece disposiciones sobre protección agrícola.