IS FREEDOM THE ASSUMPTION ON WHICH CIVIL LIABILITY IS BUILT?*

¿Es la libertad el presupuesto sobre el que se construye el edificio de la responsabilidad civil?

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Abstract:

This article deals with the idea of free will, from the constitutive philosophical bases, in the field of tort law. When exploring in the idea of free will the basis of the regime are found and freedom underlies in the idea of free will. From its foundations in Aristotle and then referring to the historical tradition, it is explained how the idea of free will was established in modern dogmatics, based on Kantian (and, in short, neo-naturalist) ideas. As a consequence of this conception, the differences in liability regimes are explored, explaining them from their bases and the impact that such conception has had on the idea of the functions of the regime.

Keywords: Free Will; Freedom; Guilt; Functions

Resumen:

El presente artículo aborda, desde las bases filosóficas constitutivas, la idea de voluntad en el ámbito de la responsabilidad extracontractual. Es en la exploración de la idea de voluntad mediante la que se alcanza el fundamento del régimen, en la libertad, que subyace a la idea de voluntad. Desde su fundamento en Aristóteles, pasando por la tradición histórica, se explica de qué modo dicha idea de voluntad se asentó, a partir de ideas kantianas (y, en definitiva, neonaturalistas), en la dogmática moderna. Se exploran, como consecuencias de dicha concepción, las diferencias de regímenes de responsabilidad, explicadas desde sus bases y la repercusión que dicha concepción ha tenido en la noción de las funciones del régimen.

Palabras clave: *voluntad; libertad; culpa; funciones*

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I. FREEDOM AS PRESUPPOSITION OF CIVIL CONTRACTUAL AND AQUILIAN LIABILITY

The structure of our institutions of contract and liability, ultimately rests on the idea that human acts are free. As for the contract, this question is obvious, but it is also obvious in the approach that civil liability has about free will.[1]

According to this scheme of thought, justice will be conceived as refraining from invading the "sphere of freedom" of another.[2] In fact, the explanation of liability as the duty to compensate for the damages caused by the invasion of another's sphere continues to be the basis of the definition to this day. On the one hand, it supposes a duty to refrain and, on the other, a subjective right to claim compensation.[3] Honoré warns that corrective justice, which is in the end the ultimate foundation for limiting individual's freedom, even if there is no guilt, is a substantive principle that has moral basis.[4]

1 As Barros (2020) indicates, p. 76: "...for the harmful act to be attributable to person it is required, in addition to his capacity, that the conduct be voluntary, that is, that the action or omission be attributable to him as a free act". Salvador Coderch, Castiñeira and then Díez-Picazo, in a more general way, who refers to this as the function of demarcation, insofar as it is a matter of establishing a limit between the areas of freedom of action and the protection of certain goods and interests Salvador and Castiñeira (1997), p. 103; Diez-Picazo (1999), p. 43. For Owen (1997), p. 202, freedom is one of the most important and fundamental moral values that supports the building of liability.

2 Carpintero Benítez (2000), p. 213, points out that in absence of extra individual things from which legal relationships may be based on, this idea of justice was developed as a unilateral interpretation –according to the author- of the Kantian work. See Carpintero Benítez (2004), pp. 224-228; 232-236.

3 See Sánchez De La Torre (1962), pp. 12, 22 et seq. According to the author, when a subject exercises his claims, when managing his goods and interests, he must do so in such a way that he does not impede, limit, harm or damage the freedom and interests of another, when he does not respect the relevant reciprocity: this is what he calls legal liability. In this sense, Filomusi (1949), pp. 192-193. According to some authors, Kant may be qualified as the epigone of the rationalist School of Natural Law. On this subject, see especially the work of Carpintero Benitez (1989), pp. 9-19 and Ahrens (2004), p. 48, although the criticisms that Kant made of the method of the rationalist School of Natural Law cannot be ignored. Also, Welzel (1977), pp. 175 et seq.

4 Honoré (1997), p. 84. It is not surprising that the rule of *nemienm laedere* has been described by Ripert (1949), p. 198, plainly as a principle of moral order. For a discussion about the basis of civil liability, which rests on corrective and distributive justice, see especially Pino (2013), pp. 111 et seq., and, Papayannis (2012), p. 80, but especially Papayannis (2014), pp. 272 et seq.

It should also be understood that an act is free if - according to article 2318 - the tortfeasor has initial control of the situation. As San Martin rightly points out:

> apart from the involuntary lack of reason or discernment, the fact that the subject in reality lacks the physical or intellectual aptitudes to carry out the activity or to foresee the harmful outcomes of his action, in principle, is no obstacle to considering him in guilt, since, from the Roman Law, there is guilt if someone undertakes an activity, knowing or having to know that he lacked the aptitudes to carry it out or that due to a lack of attention he did not foresee its consequences, as well as who places himself in the position of not being able to control his own acts. In Chile, the latter idea is contained in article 2318 of the Chilean Civil Code, which expressly punishes the responsibility of the inebriated, a provision that the doctrine has extended to all voluntary deprivations of reason.[5]

Barros considers that this rule is the basis for a broader judgment, including the cases where the agent, although not having control over the act, has had control over the cause of the act.[6]

This scheme of freedom, based on Aristotle's philosophy, is strengthened, with the scheme of the rationalist School of Natural Law, where free will is understood as freedom.[7] It is preceded, however, by an intense theological debate explaining its triumph.

As Cassirer points out, with the advance of modernity the Enlightenment will intensely fight against the dogma of original sin and the Augustinian idea of

5 San Martín (2018), pp. 581-582.

6 Barros (2020), p. 80.

7 Once the way is open for voluntarism and Platonic ideas - as stated by Carpenter - all the supporters of this current are based on the idea of natural state of man, free and equal. In fact, as Ahrens (2004), pp. 16-17 and Carpintero Benítez (2000), p. 205 state, each supporter of this current emphasized some aspect of this state of nature, which was sometimes totally contradictory, such as sociability (in the cases of Pufendorf and Grotius), happiness (Thomasius) or utility (Hennecius, thus reaching Bentham's utilitarianism). In a similar sense, Hesphana (2002), p. 153. As we shall see, Wieacker (2000), p. 232 and Wieacker (1995), p. 214, consider that these different foundations constitute differentiated stages in the construction of rationalist ius naturalism. The most important feature of men is the freedom of choice, of self-determination, and since these thinkers used logical categories (especially the principle of non-contradiction), what is preached in relation to one must be preached in relation to the others. As Carpenter states again, free will is no longer considered a simple human power, more or less at the service of reason, but is understood as the totality of reason. Carpintero Benítez (2000), pp. 212-213.

the natural corruption of man.[8] In the Pelagian doctrine, collected by the Jesuits, sin and evil are, in short, explained only by human free will. Here, Christ's grace and redemption help, but are not essential.[9] This is the idea that will take up an important part of the Enlightenment when constructing the idea of human nature. Human kindness, on the other hand, whose principle is the freedom of action, is that which is proper to man whose state of nature has not been corrupted by society.[10] Its background is found in Descartes, who gives human freedom as a datum, logically prior to the methodological doubt, which must be confronted with the existence of an omniscient and omnipotent God; therefore capable of knowing and predetermining the facts of the future; how can human freedom be made compatible with this notion of God? Here, there is room for the previous discussion, which is unsolvable from the theological perspective.

According to Copleston on this point Descartes was ambiguous. He states that, although refraining from referring to theological problems in his "Principles of Philosophy" he defends human freedom, admitting that, precisely, the theological solution of the problem transcends human understanding (i.e., while affirming freedom, it is understood that God pre-determines the future). In any case, the French philosopher entered to the theological dispute, sometimes favor-

8 To understand this problem properly, the general context must be taken into account. No one has seen this problem, and its impact on European legal thinking, better than Kolakowski. In particular, the author illustrates the conflict of Jansenism - Catholic movement that was born in France especially from the 16th century - and the debate on grace and freedom, between Pelagianism and Protestantism. According to the author, both, Jansenism and the Protestant world saw human nature as corrupted, following the Augustinian ideas of the fall. From the state of perfection and union with God, man departed through original sin. The fallen nature, the concupiscence, implies that if man acts badly following his instinct and, if he acts well, he does so because the grace has been an irresistible force on him. For reasons that escape men God has chosen those whom He has decided to save. No participation truly has freedom in salvation. The Jansenist doctrine - which became ultimately anathema and was condemned - was opposed to Jesuit orthodoxy, which attributed the merit of salvation to human freedom. For this interesting debate, see Kolakowski (1996), pp. 20 et seq. As to the implications in law, it should be noted that Domat, as important part of the legal elite of his time, was a Jansenist. This influenced his ethics and his position before the law. For this question, we refer to our paper Aedo (2018c), pp. 5 et seq. For Domat's influence on the codification process, see our paper Aedo (2017a), pp. 629 et seq. See also Masi (1963), pp. 7-28. For the political dimension of Jansenism and its projections, Brian (2013), pp. 304-308.

9 Díaz (1995-1996), p. 131.

10 Cassirer (2013), pp. 159-168; 175-179. Particularly, Rousseau approaches to the issue from a political-legal perspective. This optimistic view – which was so important in the field of law - reaffirms two points: on the one hand, that human nature is good, but, in order to live in society, individuals must make a pact and give up a share of their freedom; secondly, that law, finally, is based not on reason, but on the free will.

ing a Protestant stance of predetermination, some others favoring Jansenism over Molinism, and consequently Jesuit postures, while in other writings, he favored the Jesuit vision of freedom, as genuine indifference to acting well or badly.[11]

Yet, even though he does not develop a complete philosophy, Copleston points out that -as Saint Thomas - Descartes accepted that the end of human life is beatitude - but while for the former beatitude meant reaching God, for the latter it meant a tranquility or contentment of soul, achieved by one's own efforts.[12] In any case, it is clear that Descartes assumes an optimistic vision of human nature, beyond the ambivalence about the theological problem of freedom and grace. As in classical philosophy, men act correctly, and if not, they do so by mistake.[13] And therefore men are free to choose between good and evil.[14] And this would be the perspective that has been transferred to civil liability, kept by the rationalist School of Natural Law and adapted by the Enlightenment. The Kantian bases of liability, correspond, in short, to this scheme.[15]

11 Copleston (2017), t. IV, pp. 107-109. The author notes: "The truth of the matter seems to be that when dealing with the theological issues of the free will controversy, Descartes adopted rather improvised solutions, without a real attempt to make them consistent".

12 Copleston (2017), t. IV, p. 112.

13 Again, however, there is a certain background to the theological dilemma. As Díaz (1995-1996), pp. 128-129, points out: "It is interesting to note how the theological interest in the matter led to a significant shift in the focus, the consequence of which will be a change in the philosophical concern. Indeed, if we look at the problem from an exclusively rational perspective, as philosophy does, the question of free will consists in explaining the action of the free will when it seems to act against the understanding. Because when the free will acts reasonably, that is, when it decides to do what the understanding indicates as correct, that action does not seem difficult to explain, since it has enough basis on the reason. This reason is found precisely in what the intellect prescribes. To the question why does the free will perform such an action we can clearly answer: because the understanding points it out".

14 As Karmy (2008) indicates, p. 38: "Now, if man has potentially the possibility of "discerning the true from the false" and therefore, falls openly in error, it means that, in the logic we have pointed out, it would be necessary to search on which are the causes, according to Descartes. In fact, after assuming the "impenetrable" character of God and, therefore, the human impossibility of knowing his intentions, Descartes points out that errors depends on two causes, namely: "(...) the faculty of knowledge, which is in me, and the faculty of choice, that is, my free will; that is, my understanding and my will" (p. 166). Thus, Descartes says that first of all man has "free will", precisely because he can not only know, but because he can 'choose' good from evil".

15 For this question see specially Wright (1992), pp. 644-665, building on Weinrib's ideas.

Let us now consider how this idea of freedom is projected in the configuration of free will in civil contractual liability and *lex Achilia*, which is based on this same idea of freedom that we have just analyzed but projected in a different way.

II. THE MANIFESTATION OF FREE WILL IN CONTRACTS AND *LEX AQUILIA*: A HISTORIC AND DOGMATIC DUALITY

2.1. The idea of contractual free will in the codification and its bases in the Aristotelian ideas

When are we in presence of free will, of a human act, in civil liability? Although the doctrine has paid little attention to it, the free will scheme, in crimes and quasi-delicts, allows us to answer the question posed in this article and, through it, to initially approach to the issue of freedom (underlying free will) and the functions of the regime. For this reason, it is convenient to stop at these two assumptions on which it operates: the manifestation of free will and the underlying idea of causality.[16] As was said, by discovering its foundations we can analyze the problem of freedom in civil liability, in a regime such as the Chilean one.

As we will see briefly, the idea of free will in *lex Aquilia*, is quite different to the idea of free will in the theory of the legal act. The entire doctrine of the legal act conceives free will as that which conducts freedom towards an end.[17] In other words, it is the Aristotelian idea of free will.

16 Although we do not wish to address this problem, it should be borne in mind that - although with diverse philosophical bases - the Roman world, with its subsequent legal tradition and modernity, the emphasis of Platonic ideas and the predominance of mathematics when understanding of the world, operates on the basis of material causality, structured on an immutable world, according to laws, also immutable, which translates into a subject/object distance when determining the causal processes. For the approximation of modern sciences to mathematics and Platonic ideas, as Bello Reguera (1993), p. XXVI indicates see Alpa and Bessone (1976), p. 280. For the codified tradition, by all of them, Ripert and Boulagner (1965), pp. 106; 110.

17 For this question, see De Castro and Bravo (1967), pp. 57-58, who, citing the authority of Thomas Aquinas, say: "...since the juridical business, as instrument of human freedom, has its root in the free will (*quod radix libertatis est voluntas*)". And he adds: "The will is moved by the "vis cognoscitive" ("*nihil volitum nisi praecognitum*") and by the "vis appetitive" (desire, "velleitas"). Knowing (having conscience) and, if necessary, weighing ("judgement", "consulted", "to deliberate") possibilities and ends, the decision is reached ("*electio*"; a preference for possible ends and means). This is made concrete in the intention

In fact, we follow Gordley in this matter, in relation to contracts, and we start from the analysis in Article 1134 of the Napoleonic Code, considered the mechanism by which the autonomy of the free will was enshrined. Gordley considers that the drafters did nothing but to incorporate the ideas of Domat and Pothier – and of natural law authors - who in turn took them from the Spanish late Scholasticism and this latter, in turn, from the ideas of Thomas Aquinas, who would have created his doctrines of property and contracts based on the thought of Aristotle. Thus, when it comes to property, the doctrine of individual property - as opposed to community property – was already developed with Aristotle, but in addition, the definition of article 544 - as well as the rest of the articles - were focused on the limitations to property rather than on its individualistic aspect. In the area of contracts, as Gordley graphically points out, article 1134 prescribes that the contract is a law for the parties, but on the contrary, he didn't mention the principle of free will. Again, the basis of the free agreement that generates a contract would have been taken from Thomas Aquinas and carried to the natural law authors. Gordley points out that the rule refers to the "nature" of contracts and that from that very nature, rules in accordance with "equity" arise. [18]

Certainly, Gordley is right, although it cannot be ignored that in this matter - as with the School of rationalist Natural Law that precedes and shapes it - the Code represents a true symbiosis between continuity and rupture.[19]

2.2. The idea of free will in tort law: Does it have an Aristotelian basis?

2.2.1 The idea in scholarship

As we affirm, the idea of free will in civil liability is different to the one in contract theory. Let us see some examples of scholar treatment, in order to notice the difference in both comparative and Chilean doctrine.

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or purpose with which something is said or done (conduct of the declarant). For such intention to reach a legal meaning, it is not enough that it exists previously ("*cogitationis poenam nemo patitur*"), but it is required to be exteriorized or manifested ("*de manifestis tantummodo iudicare*", Innocent III)". For Chilean law, Vial Del Río (2004), p. 22.

18 Gordley (1994), pp. 459-479; 483-505. See also, Gordley (1992), specially pp. 35 et seq. The author explains how the medieval jurists adopted, from the Roman texts, the philosophical tradition of Aristotle, collected, in turn, by Thomas Aquinas.

19 Following Watson (1986), p. 29, Roman law has shown itself to be an extremely adaptable regime, operating in all kinds of regional, cultural, social, political and religious realities. In the case of the Code, the rationalization of Roman institutions and the French tradition will receive its final impetus in Portalis.

Bueres explains that the manifestation of human free will, voluntary and involuntary, includes instinctive and habitual acts, and outside of them, there are only reflex acts, states of total unconsciousness, or those resulting from irresistible force. [20] For Santos Briz:

> ...the juridical concept of action is different from the philosophical one, which comprises only the voluntary acts. The former also includes the production of a result by means of a corporal or unconscious movement, as long as the control of the conscience together with the direction of the free will are given (...) the agent must also be juridically liable for those consequences of his actions related to the acts he has not foreseen and even those that he has not wanted, but which, according to human foresight, he should have taken into account and that therefore must be considered controllable by him.[21]

In the same perspective, Antunes Varela indicates that when reference is made to a voluntary act of the agent, it is not intended to restrict relevant human acts in matters of liability to those that he wanted, that is, those cases in which the agent has mentally prefigured the effects of the act. On the contrary, liability arises when there is no mental representation or even in case of harmful acts performed by distraction or lack of normal self-control.[22]

Among Chilean authors, the same understanding is to be found. For Rodríguez Grez, for whom the circumstance that the human act (action or omission) is an objective matter that escapes any willingness analysis, the latter must be part of the tortious capacity or the subjective element.[23] Corral, who also names this element as human act, explains that it must be a voluntary act, excluding transitory states of loss of reason, such as sleepwalking, hypnosis or physical or moral violence.[24]

20 Bueres (1996), pp. 42-43. However, also in matters of legal business, it is considered that the free will ceases to be such, if the subject is deprived or diminished in his mental and/or physical capacities. See Flume (1998), p. 76.

21 Santos Briz (1993), pp. 26 and 27. See also, Díez-Picazo (1999), p. 287.

22 Antunes Varela (1996), p. 547.

23 Rodríguez Grez (1999), p. 124.

24 Corral (2004), pp. 112, 113-114.

As we have emphasized on another occasion, these ideas in relation to human conduct have been taken from criminal scholars, particularly from the causalist and neoclassical conceptions of crime.[25]

2.3. The basis of the construction when differentiating Aristotle's notions of voluntary and involuntary acts

However, a decisive influence of Aristotle's thought cannot be ignored here in the area of *Lex Achilia*. For the purposes of this paper, the following can be affirmed: In the philosophy of Socrates, Plato, and Aristotle, the idea of free will is linked to knowledge, so that if a person acts wrongly from a moral perspective, he does it, to a great extent, out of ignorance, since the exercise of free will is - especially in Aristotle - a habit, more than a disposition.[26] It should be noted, in any case, following Dilhe, that the expressions of voluntary and involuntary were not known to the Greeks. On the one hand, Dihle shows that Greek thought didn't develop the idea of free will (not even in legal matters). The Greeks, in their concept, explained thought with an intellectualist interpretation: decisions depended either on the intellect or on passions: both forces either enhanced or blocked the decision, in one or in the other sense. On the other hand, Dihle

25 Náquira (1998), p. 11: In this respect, Náquira indicates that: "Influenced by naturalistic positivism and as a reaction to the Hegelian theory of imputation, Beling and Von Lizt postulate that the action should be conceptualized as: "voluntary corporal movement that causes a modification in the outer world perceptible by the senses". The "voluntary" character of the corporal movement is reduced and limited, only and exclusively, to affirm that there is a simple and mere "free will to cause"; in other words, to verify the existence of a voluntary muscular innervation". The causalist theory received later contributions from the neoclassical causal conception of crime, defended by Mezger, Mayer, among others, according to which the action, considered as simple muscular innervation, is now conceived - in evaluative terms - as human behavior. As Náquira: "Under this doctrine, the free will is not considered only and exclusively in a mechanical-causal dimension: motor and force of muscular movements, but as carrier, in addition, of a certain and determined "social sense": of an idea, a purpose or an aim that animates human action (...) In spite of having recognized this new causal approach that the action supposed an objective-external factor: the voluntary-causal, and a subjective-internal factor: the voluntary-final, in short this doctrine persisted in maintaining the division between the free will as a causal force and the content of the free will as a final force and, therefore, in affirming that the action was exhausted in the objective-external: the voluntary-causal, relegating the subjective-internal, as did the predecessor doctrine, to the field of criminal responsibility".

26 Milo (1996), pp. 67-70; Adkins (1960), pp. 326 et seq. Vicol (1973), pp. 317-329. As indicated by Trueba (2004), p. 111, one of the criteria in Aristotle for the legal admission of crimes was ignorance. According to the author, in Nicómaco's Ethics: "...Aristotle considers that ignorance plays a role in the course of certain actions and to that extent can serve as a basis for excusing or exonerating the agent".

explains the development of the doctrine of free will, especially by the hand of St. Augustine.[27]

Beyond this precision, Aristotle uses *ἀτύχημα* as a misfortune: "Now, when the harm occurs in an unforeseeable way, it is a misfortune" ("*ὅταν μὲ οὖν παραλογως ἡ βλάβη γένηται ἀτύχημα*"). The definition of *ἁμάρτημα* is more complex, because according to Aristotle when the damage: "...does not occur in an unforeseeable way, but without malice, it is a mistake" ("*ὅταν δὲ μή παραλογως, ἄνευ δὲ κακίας, ἁμάρτημα*"). Finally, for Aristotle *ἀδικημα* takes place if: "...it is done knowingly but not deliberately, it is an unjust action" ("ὅταν δὲ εἰδὼς μὴ δέ ἀδικημα").

Based on this differentiation, a connection between guilt and the expression ἁμάρτημα has been proposed, where the second is the basis of the technical expression created in the light of the *lex Aquilia*. But about this question we have dealt with elsewhere.[28] What is interesting is that this connection, that is, the one linking guilt with voluntary and involuntary acts in Aristotle, remained firm in the Aquinas' theological tradition, and also in the medieval juridical and even the humanistic tradition, which is in turn founded on the medieval philosophy of Aristotle.

Masi advises that all the Jesuits of the Late Spanish Scholastic, are based, in short, on Aquinas, specifically in a passage from *Summa Theologica*, I, II, C. 71, art. 6, ad. 5, in which Aquinas states that sin is considered as opposite to reason, by the philosopher, and as an offense to God, by the theologian.[29] But Aquinas is not only important because traces of the doctrine of philosophical sin are to be found in his doctrine, what in our opinion allows to strictly separate the spheres of human and divine morality, to secularize Law and to construct a general clause of liability[30]. A more objective concept of guilt can be recognized in

27 Dihle (1982), pp. 21 et seq.; 141 et seq.

28 Aedo (2013), pp. 44 et seq.

29 Masi (1963), p. 8; who warns, however, that while it is true that Aquinas distinguishes the two aspects of morality (human and divine), he did not completely separate the two aspects, since the rational could not subsist without the divine. In fact, in De Aquino (1963), p. 455, he tells us "*peccatum significat malu hominis actum, ut ex dictis patet (a.1; q. 21 a.1). Sed malum hominis est contra rationem esse, ut Dionysius dict, 4. Cap. De div. Nom. Ergo potius debuit dici quod peccatum sit contra rationem, quam quod peccatum sit contra legem aeternam"*.

30 The Chilean Civil Code, like all those of the continental tradition, enshrines a general rule of reparation of damages, as we know, in article 2314, under the historical idea of crimes and quasi delicts, whose origin is found in the *lex Aquilia*. It was not until rationalist *ius*

the passage from the *Summa Theologica*, contained in II-II, Q.64 Art. 8 ad1, and *ibidem* ad2, in which Aquinas distinguishes - with regard to homicide - between illicit and licit conducts, where guilt plays a role only in cases of licit conducts.

Aquinas offers a very interesting reflection in these matters, which as he himself indicates, follows the reasoning of Aristotle. This same conclusion is followed by Aquinas, according to whom absolute fortuitous things - in which no free will intervenes - cannot give rise to liability. On the contrary, in C. 64, art. 8, *resp* he states:

> ...it sometimes happens that something that is not wanted or intended in the act and by itself is in the free will or in the intention accidentally, inasmuch as it is called an accidental cause that removes the obstacles. Therefore, the one who does not avoid the causes of which the homicide follows, if he must avoid them, he will incur at guilt in some way of voluntary homicide".[31]

naturalism that a general regime of liability could be found, with first bases established by Grotius, with clear precedents in the Late Spanish scholasticism. In fact, in the case of our Code, Bello, in his Roman Law Institutions already distinguished between crime and quasi-delict, whether the illicit was caused with *dolus* or negligence, when dealing with the *lex Aquilia*. In fact, in title V, "De la lei AquiliaW, of Book IV, we read: "The injurious damage (*damnum injuria datum*) vindicated by the *lex Aquilia*, is any diminution of our patrimony caused against law and by a free man. For if the servant (and formerly the son of the family) causes the damage, it is called *noxia*, and if it is caused by a four-footed *pauperies*. The action of the *lex Aquilia* is taken against the tortfeasor not only because of *dolus* but also because of even slight guilt; so that this law pertains not only to crimes but also to quasi-delicts. Regarding quasi-delicts, in Title V, Bello says: "Quasi-delicts are illicit acts committed without *dolus* and with negligence". Bello (1981), p. 174. Bello, in fact, cites as sources of his treatment D. 9, 2, 27, 5, which deals with the third chapter -considered the general rule in matters of *lex Aquilia*-, and title XV, of Part 7, but in none of them a distinction between crimes and quasi-delicts appear in the way proposed in the writer's course of Roman Law. These ideas seem to have come from Heinetius, who had a great influence on Bello's thinking, who would have adopted them, in turn, from an earlier tradition. For example, if we look at Heinetius' work, *Elementa iuris civile secundum ordinem Institutionum*, he deals with the subject in Book IV, Title I "*De obligationubus quae ex delicto nascuntur*". Heinecio says that crime is: "*Est verum delictum factum illicitum, sponte admissum, quo quis ad reflitutionem, si fieri possit, ad poenam obligatur (...) Est porro vel verum delictum, vel quasi delictum. Illud ex dolo malo; hoc ex culpa fine dolo admittatur*" ("The crime is therefore either true, or quasi-delict. The former is born of dolus, the latter of negligence"). Heineccio (1787), p. 324. For the translation in Spanish, see the work of Heineccio (1829), p. 273. Regarding Vinnio, see Vinni (1755), pp. 811-812. For the origins and development of the *lex Aquilia*, see Aedo (2009), pp. 311-337 and Aedo (2011), pp. 3-30. For the evolution of the regime, until the Codification, Aedo (2018), pp. 15-223.

31 De Aquino (1990), p. 538. According to the text in Latin, De Aquino (1963), p. 419: *"Contingit tamen id quod non est actu et per se volitum vel intentum, secundum quod*

The central aspect of Aquinas' argument is precisely found at this point, since he places the initial situation of control in the basis of the attribution of liability, from which would derive the possibility of avoiding the harm to another. This is very significant, but first let us add that on this principle St Thomas Aquinas will distinguish different cases, depending on whether the tortfeasor is placed in an illicit or a licit situation (requiring guilt only in the second hypothesis). According to C. 64, art. 8, resp:

And this happens in two ways: first, when someone, occupying himself with illicit things that he should avoid, commits homicide; second, when he does not take due diligence of himself. Therefore, according to the law, if one engages in lawful things by taking due diligence, and yet the death of a man follows his actions, it is not guilty of homicide. Nevertheless, if he had employed himself in lawful things, but without exercising due diligence, he does not avoid the charge of homicide if from his action follows the death of a man.[32]

Now, Aquinas' explanation seems to us extremely relevant for the purposes of our research, because some important links can be established from it. The first is that guilt has a content, playing a role similar to Roman law, where guilt was very important as a mechanism for extending the *lex Aquilia*, exactly in cases where the subject's conduct - despite being licit – was controllable and, therefore, the subject could avoid it. Secondly, regarding the content, St. Thomas places the control of the situation at the basis of guilt, from which derives the possibility of avoiding harm, when a subject is placed in a position of duty. Both issues are well represented in the passage of D. 9, 2, 31pr.[33]

And, given that, in turn Aquinas is based on the differentiation between Aristotle's voluntary and involuntary acts, (considering at the same time the

causa per accidens volitum et intentum, secundum quod causa per accidens dicitur removens prohibens. Unde ille qui non removet ea ex quibus sequitur homicidium, si debeat removere, erit quodammodo homicidium voluntarium".

32 De Aquino (1990), p. 538. According to the text in Latin, De Aquino (1963), p. 419: "*Hoc autem contingit dupliciter: uno modo, quando dans operam rebus illicitis, quas vitare debebat, homicidium incurrit; alio modo, quando non adhibet debitam sollicitudinem. Et ideo secundum iura, si aliquis det operam rei licitae, debitam diligentiam adhibens, et ex hoc homicidium sequatur, non incurrit homicidii reatum: si vero det operam rei illicitae, vel etiam det operam rei licitae non adhibens diligentiam debitam, non evadit homicidii reatum si ex eius opere mors hominis consequatur".*

33 As Engelmann (1965) points out, pp. 17-18, commentators took up the tradition of Roman law, to define an act with culpability as the possibility of foreseeing a harmful consequence, to deviate from the correct behavior to the point of being in a position to avoid a deviant behavior. For the functions of negligence in the lex Aquilia, see Aedo (2014a), pp. 51 ff.

coincidence between Aquinas' approach and the Roman texts), it could be thought that even if there is no full equivalence between the Roman concept of guilt and the Greek terms directly or indirectly related to it, especially ἁμάρτημα, there can be no doubt about the influence of the Aristotelian thought on the Roman one. It is possible to argue that the Aristotelian thought served as a basis for the construction of guilt, as an initial situation of control, allowing to include, in the cases of strict liability, e.g. the hypotheses of lack or absence of technical knowledge to develop an activity; or, it allows to understand why a person under the influence of alcohol should be held liable for the damages it causes.[34]

Therefore, Gordley is right when he says that to base the principle of liability on the guilt is neither a new nor and individualistic theory. Again, he considers that the foundations of the theory are laid by Aristotle, who distinguished between voluntary and involuntary acts. According to the author, it is Saint Thomas who, considering man as a rational being, enshrines the principle that a man is only liable for his guilt, which was embraced by the late Spanish scholastic (particularly Molina and Lessius) and then by the representatives of the School of Natural Law.[35]

In the same way, one could try to determine how far the influences of Aquinas -and, through him, Aristotelians- reached. In principle, the second Scholastica maintained the teaching of St. Thomas on these subjects. We can highlight, for example, the teachings of Domingo de Soto. In his book *De Iustitia et de Iure*, precisely regarding to the treatment of homicide, one can see reflected Aquinas' ideas. According to de Soto:

> No one who acts licitly and without twisted intention, even if a homicide follows from his or her action, is holden liable for it, as

34 As Hruchka points out (2005), pp. 57; 63-64, these two forms, which in modern terminology might be called ordinary and extraordinary imputation, respectively: in the first, the person at stake is in a position to avoid to cause an event or to carry out the action in question, in the decisive moment; whereas in the extraordinary, the person is not in a position to avoid to cause the event or to carry out the action in question at the decisive moment, but he can be reproached precisely for being in this situation of impossibility. In other words, there is an ordinary charge if the agent was originally free, keeping his freedom afterwards, as if he were not originally free, but he is afterwards, and may assume control of the situation. The extraordinary imputation, on the other hand, occurs when the person was not free when causing the harmful event, but he was free in its origin; case that is called *actio libera in sua causa*. If there was no freedom at any moment when carrying out the conduct, that is, whether at the beginning or when affecting the good, there is no freedom *in se,* the act is not imputable to the person.

35 Gordley (1994), pp. 479-480.

> long as the person acted with due diligence, so as not to cause any damage (...) Third conclusion: If one does something illicit, or by doing something licit he/she does not act with due diligence, he is not exempt of criminal liability in the homicide following such acts. Proof of the conclusion. If that what is not wanted, nor attempted in the act itself happens, it is wanted and attempted accidentally, inasmuch as it is not avoided what could be avoided, or was obliged to avoid; since the cause that guided what was forbidden is considered accidental. From this, it follows that anyone who does not avoid or prevent the cause or action that he was under a duty to avoid and prevent, is guilty of murder, if this results from the action. And this can happen in two ways. One is when one executes illicit actions, which he had the obligation to avoid; and another, when in executing licit acts, he or she does not take due diligence; from which follows homicide.[36]

Later on, he adds this very interesting consideration:

> The second way of holding someone liable for accidental homicide is by reason of negligence, which, if it does not constitute guilt, is not a cause of irregularity either, as stated in the chapters above, where we supported Aquinas' second conclusion. Because even though an irregularity may be incurred in without any guilt, as is clear for the judge, it must nevertheless be [a] voluntary [act], as we have said; and when the negligence lacks any guilt, its effect is not considered voluntary, since the involuntary element in those things - accidental causes - consists, as was said, in omitting what should be done.[37]

36 De Soto (1968), t. III, L. V, c. I, art. IX, p. 406. According to the text in Latin: "*Secunda conclusio. Nemo dans operam rei licita, neq; finistram habens intentionem, dum modo debitam adhibuerit diligentia ne noceat, quis ex actione sua fecuat homicidium, reatum illius incurrit. Conclusio haec praecedentis appendix est & corollaria (...) Tertia conclusio. Si quis dat operam rei illecite, vel das operam rei licita debita non adhibet diligentiam, non est a reatu homicidii immunis, q ex eiusmodi actioni fuerit subsequutu. Probatur conclusio. Contingidit quod actu per se neq; volitum est neq; intentum, per accidens esse volitum atq; intentum: quatenus id non impedit quod impediretum poterat tum etia debebat. Nam causa quae prohibes remouver, dicitur accidetaria. Quo fit ut qui causam vel actione non remouet atq; impedit qua tollere debebat, si sequatur homicidiu, reus eius coflituatur. Hoc aute fit dupliter. Uno modo quando opera nauat rebus illicitus, qs vitare debebat; altero vero qn va cans rebús licitis diligentiam no ad hibet: ex cuius contraria negligentia subsequitur homicidium"*.

37 De Soto (1968), t. III, L. V, C. I, art. IX, p. 409. According to the text in Latin: *"Secundus modusquo causale homicidiu imputatur est negligentia: quae quide si absq, vlla fuerit culpa, nulla est irregularitatis causa: vt capitulis supra citatis habetur: quibus secunda conclusionem: diui Thomae sussulsimus. Na etsi irregularitas citra negligenceincurrit, vt paret inseculariiu dice, debet tamen vt diximus, ese voluntaria: & vbi negligentia extra omnem est culpa, effectus non censetur voluntarius: quado quidem involutariu, vt dictum est in His que caue sunt per accidens, non est nisi vbi homo id facere omittit quod facere debuit"*.

It is possible to observe in Soto - who of course deepens Aquinas' point of view – the clear difference between negligence and guilt, understanding that the former does not exhaust the latter. From this perspective, it can be seen how guilt is seen as a reproach to a behavior in itself considered, emphasizing such reproach in the behavior.

But now analyzed the legal thought of annotators and commentators, and overcoming the idea of guilt as *nomen generale* - following Badosa - strict liability incorporated its two differentiating elements: the duty of diligence and the involuntary nature of the act, now understood as equivalent. As the author states: "Involuntariness is certainly not *dolus*, but it is also assigned to the debtor". And he adds: "In this imputation lies the root of the effectiveness of guilt as a source of the subject's liability". Thus, Badosa asks why when imputing unintentionality this is punished with liability. The author's point of view, which he gathers from the historical reconstruction of the *ius commune*, certainly is in line with our perspective of guilt:

> The reproach in the case of guilt is based on the fact that the infringement or unlawfulness committed, although not voluntary, was avoidable by the debtor. Expressions such as negligence, carelessness, lack of attention or diligence, used to describe the subjective position of the debtor, are names for the same phenomenon: it was in the debtor's hands that the offence had not been committed.[38]

This strong tradition was maintained even in humanism, by authors such as Cuyacio, who linked inexperience and guilt with Aristotelian ἁμάρτημα. Indeed, Cuyacio says:

> *Imperitia quidem ipse non est maleficium, nec enim quod ignarus sum juris, aut medinice, ideirco versor in maleficio, sed et quod quis imperite facit, quamvis re ipsa maleficium sit, jure tamen civil maleficium non est, sed* ὡς ἁμάρτημα ἡ ἀδικον*, ut Aristotel. Scribit.*[39]

Although there can be no doubt as to the depth of Aristotle's philosophy, in our ideas of tort law, the truth is that such a connection can be made with guilt, and not strictly speaking, with the manifestation of free will, as has been understood at the dogmatic level. It would then be a matter of thinking of an act in guilt, rather than just the act, but this would correspond to what Aristotle conceived as an involuntary act, and not to the expression of free will in the contract, as we said. But at this point is important to differentiate - following Hart

38 Badosa (1987), pp. 671; 685.

39 Cuyacio (1585), Chapter. IV, p. 1231.

– inadvertence from negligence, understood according to the technical language we use: because simple inadvertence is the ordinary judgment we make when someone causes a result by neglecting an activity, like a psychological operation; from whoever that is reproached for not complying with the standard required for the development of an activity.[40]

Finally, let us see the consequences we can draw from this diverse approach to the foundations of the set of regime.

III. CONSEQUENCES OF THE DIFFERENT APPROACHES TO THE CONCEPT OF FREE WILL: DISTINCTION OF THE REGIMES AND THE PROBLEM OF THE FUNCTIONS

3.1. Distinction of regimes based on the idea of free will: A different assessment of risks

As presented in civil liability, the scheme of free will has an impact, firstly, on the distinction of the regimes. If in contractual liability we find the classic notion of free will, which is based in turn, on the already analyzed idea of freedom, the contract implies certain equality between the parties, at least formally, which means that the parties have the same access to information and contractual conditions.[41] This justifies to maintain the principle of

40 Hart (2019), pp. 152-154. This concept of negligence is, however, accepted by most of the Chilean and foreign dogmatics and, in our opinion, is the concept taken from the historical tradition. To see more about the concept of negligence and its historical source, Aedo (2018a), pp. 329 et seq. See also Honoré (2002), pp. 16-21. According to the author, regarding the principle of guilt, a person is liable only when he could have controlled the situation in which he finds himself, but fails to do so. Only if a person could have acted otherwise, he is morally liable and there is a reproach for his action and in the case of negligence, he is liable only if he could have acted according to the required standard. Negligence means not only lack of character, but also in the need to remedy such guilts in order to avoid harm to another. According to Honoré, Gaius was the first to develop a legal – and not philosophical theory - about guilt, and he cites the well-known case of the *muletero*, in D. 9, 2, 8, 1, in which he holds the *muletero* liable because he knew or should have known of his incompetence before deciding to drive the mules. Then the muleteer either knew his own incompetence or was unable to see it - in his own eyes he was a skilled driver - and could have seen it. Guilt, then, may justify a regime in which there is a failure of competence.

41 For this question, see, Bernad (2019), pp. 16-21 y Busnelli (2005), pp. 535-537. As Maiorca (1981) argues, pp. 253-254, the Italian Civil Code of 1942's claim that the contract is a law for each of the parties (similarly as the French or the Chilean case), is a

autonomy of free will, contractual freedom and *pacta sunt servanda* in the codifications, even in recently modified ones.[42]

The existence of a contract, therefore, is essential for the contractual liability regime to take place.[43] As Barros points out, the fundamental distinction between liability regimes lies in the willingness to be bound in front of a wrongful act, as a source of obligations. In fact, contractual liability is preceded by a relationship which, under the efficiency and effectiveness controls of free will, constitutes a regime designed by the parties;[44] therefore the parties may design the regime and set limits for liability, unlike the *lex Aquilia* regime.

As Fleming states, by means of the contract, the idea is to promote a voluntary allocation of risks in a society that is self-regulated in a free manner, whereas in tort law risks are allocated, according to the community's assessments, by decision of the courts or the law.[45]

solemn expression to express that the contract is an instrument for the parties to self-regulate their interests.

42 For example, for the French Civil Code reform see, Taisne (2019), pp. 27-28. For the European law, see the analysis by Schulze (2017), pp. 117-120 and for a very broad European comparative perspective, Zimmermann (2019), pp. 93-104. In English law, on the other hand, free will plays only a subsidiary role, insofar as it must reflect the expression of the promise, in a deed, or made in exchange for a consideration. See Cartwright (2019), pp. 226-227. This does not mean that the contracting rules seeking to protect the weak contracting party, beyond economic variations of the contract, and also in the imbalance when creating the contract, are not re-read. About this matter, see, Barcellona (2001), pp. 306-310; 321-322; Gómez (2018), pp. 30-33; 160-170.

43 See Bianca (2018), pp. 120-121; 263 et seq.; di Majo (2005b), pp. 246 et seq.; di Majo (2006), pp. 76-77; Fernández (2012), pp. 201-202; Jordano Fraga (1987), p. 31; Morales Moreno (2006), pp. 56-57; Pantaleón (2010), pp. 228-229.

44 Barros (2020), pp. 1085-1086

45 Fleming (1987), p. 2. See also Cartwright (2019), pp. 121. As Zimmermann (2019), p. 100 points out: "The true reason for not making the debtor liable for all the damages arising from the non-performance and causally related to him according to the test of *conditio sine qua non* was announced by Moninaeus already in the 16th century when he discussed the case of a carpenter selling a box to transport fruit. He is not liable for the damage suffered by the buyer who used the box to carry wine which is then spilled, because "*periculum tacite non suscepit*". The basic issue is to assume the risk of liability. How the risk is distributed between the parties does not necessarily depend on what one of them could reasonably foresee, but on what the parties agreed or may be understood that they agreed. It is therefore a question of interpreting the contract and determining what interest was served by the contractual duty that was breached".

However, to the extent that the contract sets certain "orbit" of risks previously assumed by the contracting parties,[46] the scope of compensation is limited to those risks that the parties foresaw at the time of executing the contract, [47] and the articulation axis of such risks is the guilt.[48]

In the tort law field, on the contrary, as we have seen, the idea of freedom supports the notion of a valuable free will. Guilt is what transmits the idea of a voluntary act. It is because of this, that the social risk distribution must be made by the court, ex post, by the mechanism of guilt.[49]

46 Brantt (2010), pp. 86 et seq.; and, Mejías (2011), pp. 96-97. As states Neme (2018), pp. 112-113: "The adaptability of the contract reaches the imprecise areas of risk to be assumed by the contractors in accordance with the economic equilibrium of the contract. Even in case of extraordinary risk, where events cannot be resolved in the light of the conditions originally agreed, and which therefore require to re-mend the equilibrium of the contract, the contractual structure itself provides guidance, allowing to stablish relations of coordination and complementarity between the typical risks of the activity, the expressed forecasts of the parties regarding the assumption of risk, and, in particular, limiting the normal area of the contract, the relationship of the parties."

47 The delimitation of contractual damages, with clear precedents in Roman and old French law, was introduced in most of the 19th century Codes related to the French code. In principle, the French Civil Code considers in its current wording a limit when repairing damages to those provided for at the time of execution, in the current article 1231-3. The same limitation of damages was incorporated in article 1107 of the Spanish Civil Code of 1889; in article 1228 of the *Codice Civile* of 1865. In Latin America, among the 19th century codes, article 1558 of the Chilean Civil Code and article 1616 of the Colombian Civil Code (which adopted entirely the Chilean one) enshrined a rule limiting damages to those provided for, article 1346 of the Uruguayan Civil Code of 1869 (updated, through a deep reform, in 1995). The codifications of the 20th century kept the rule of predictability of damages. Particularly in Latin America, sections 345 and 346 of the Bolivian Civil Code of 1975; the Paraguayan Civil Code of 1985, section 425 are examples, although it extends liability for *dolus* to mediate causes. So does the recent Argentine Civil Code of 2014, in section 1728. Among the European instruments, we can mention the European Principles of Contract Law, article 9:503; the Common Framework of Reference for European Private Law, DCFR, III. 3:703. The rule is also taken up in the Latin American Principles of Contract Law, LDCP, Article 107. For European harmonisation, see Vaquer (2017). In the common law, economic losses resulting from non-performance are also generally compensated as damages, given the protection of what Fuller and Perdue call essential trust. See Fuller and Perdue (2019), pp. 37-45. See also, Cartwright (2019), pp. 389-392; and, Burrows (2019), pp. 91-97; 105-106.

48 In fact, the delimitation of risk explains why, in tort liability, the damages are limited, as seen above, to the damage anticipated or which could reasonably have been anticipated, at the time of executing the contract. For an analysis of the rule of foreseeing damages as the core of the distinction, see Aedo (2018b), pp. 644 and ss.

49 Elsewhere, regarding tort liability, we have assigned this role to guilt. See our work Aedo (2014), pp. 714-719; and, Aedo (2015), pp. 811 et seq.; and, Aedo (2018a), pp. 342 et seq.

But to set limits for contractual and tort liability - based on risk – implies as a condition that the parties be in a genuine position to distribute their risks.[50]

IV. THE PROBLEM OF FUNCTIONS

Is the scheme of free will a contribution when designing the functions of civil liability? In our opinion, the answer to this question is positive. To think on this perspective – and according to Wilenmann - the imputation models correspond to philosophical foundations. Thus, with particular knowledge, the author explains that the traditional scheme of liability, from which civil liability would derive, would be based on the free decision of executing a harmful act; hence the latter rests on the idea of freedom, and guilt is a guarantee for the respect of individuals in society and, in short, the foundations are found in the freedom of the subjects.[51]

This perspective of tortious capacity, basically based on the idea of freedom of the subjects, not as a moral reproach, but allocating liability to the extent that there is a fail when performing social roles, leads to affirm that civil liability has an exclusively reparatory function. However, large part of our doctrine considers the preventive function only as a reflex effect of the main function of compensation in civil liability. In that way is presented, for example, by Corral, who points out: "From the psychological point of view, it seems logical that the person acting in a harmful way, and that, by virtue of this action is forced to bear the patrimonial costs of the damage caused, will try to avoid in the future the careless or fraudulent conduct that caused such loss", adding that the same can be said about the other members of society who are warned not to cause certain damages in order to avoid incurring in those disbursements.[52] Those defending

50 Alpa, Bessone, and Roppo (1982), p. 284.

51 See Wilenmann (2017), 281 et seq.

52 By all, Corral (2004), pp. 66-67. In a similar vein, in comparative law, Díez- Picazo (1999), p. 47, admits that there may be prevention, both, a general and special prevention, and a psychological impulse for the citizen who tries to avoid the unfavorable consequences of the rule; and, special prevention, insofar as it affects a person's future actions.

this preventive function,[53] denying its punitive function and rejecting to apply the punitive damages, are views coming from the economic analysis of the Law.[54]

In fact, our doctrine considers that the principle of corrective justice may justify, both, a strict liability regime and one of guilt, idea we agree with.[55] But it has also been correctly argued, that although this approach is correct, it is incomplete, since the regime requires the distributive justice to be understood.[56] And despite the fact that is not possible to discuss the distributive perspective here, it may lead to a broader understanding of the functions of civil liability and may allow the use of certain tools, both for prevention[57] and punishment, including moral damages.[58]

53 Preventive efforts have already been pointed out by criminal dogmatics. This is an already walked by path, where guilt was "attacked" since the last third of the 20th century, breaking up the punitive judgement for preventive reasons, which led part of the dogmatic, as indicated by Fernández, to conceive a criminal law not based on free will, since freedom is an empirically unprovable element. See Fernández (2006), p. 38. To cite an example, Bartoli (2005), p. 59, considers that guilt cannot be based on the possibility of wishing something to be different, since this will is unprovable, more precisely, the freedom to want is unprovable, but in addition the author reproaches that the freedom to want something to be different, adds no value, it is not a parameter, a criterion, but a fact. In other words, "to may have wished something to be different" cannot be used as a criterion in the punitive judgement or even in a normative conception of guilt, because it is not a parameter capable to be the basis of a value judgement, but rather represents an empirical reality, which may have the attribute of being open to opinion.

54 For the economic analysis of the law, its schools and proposal for prevention, see Aedo (2018a), pp. 293 et seq. According to Díez-Picazo, these aims are fulfilled according to some criteria developed by economic analysts of law: a) the formula developed by the American federal judge Learned Hand, according to whom it was possible to create an algebraic formula to determine if there is liability, thus stating that it should be declared if the costs of prevention are lower than the claimed damages: "...if the probability called P, the damage D and the cost of prevention measures C, the liability will depend on the fact that C is less than D multiplied by P"; b) the figure of the cheapest cost avoider, according to which liability may be solve in some cases according to who could have avoided the damage with the lowest cost. Díez-Picazo (1999), pp. 210-212.

55 See Barros (2020), p. 312. As Pino (2013), p. 111 claims: "I think that Enrique Barros' conclusion that, both, liability for fault and strict liability meet the requirements of corrective justice, is correct. Jules L. Coleman also reaches a similar conclusion. He argues that, in general terms, tort law is essentially strict liability, regardless of whether the agent acted with fault or not".

56 For the development of the problem of the basis of civil liability, see Aedo (2019).

57 For the problem of the preventive function of civil liability, separated from the punitive one, see Aedo (2018a), pp. 266 et seq.

58 To see about the manifestations of the punitive function, Aedo (2006), pp. 43-45. A for the case of moral damage, of a general nature, see the work of Barrientos (2007), pp. 51

Precisely, a distributive justice approach and even a broad notion of corrective justice would better correspond to what Wilenmann calls a *weak liability model*, which considers cost sharing as the main function of the regime, insofar as the imputation regime no longer necessarily lies on the free decision of the subject, as strict liability does.[59]

From this last reading, problems associated with functions, such as the liability of legal persons, could still arise, but these considerations would escape the reflections that this paper wishes to express.

V. CONCLUSIONS

Civil liability, despite its practical purposes and its potential dissociation from the direct idea of punishment, is strongly rooted in our notions of reproach, pre-legal, such as guilt, whose projections in the deep human conscience are undeniable, and which the jurist can only take charge of according to the objective, or objectives, of liability.[60]

The attribution of a damage, beyond guilt, implies the idea of freedom. I am not convinced that the mere existence of an objective guilt (as the deviation from a pattern of behavior) is enough to consider that we are in front of a weak liability model, for two reasons.

On the one hand, the structure of legal guilt (at least in the field of civil liability); and, that of moral, coincide, but act in different spheres.[61] On the other hand - and as we have seen - our conception of guilt is alien to the configuration of liability, based on a *mens rea*. Therefore, this is not about an *actus non facit reum nisi mens sit rea*, but a mismatch of social expectations, translated into a standard of behavior regarding others. Only in this dimension of guilt is it possible to understand the idea of free will and why it cannot be likened to the free will of legal acts.

et seq. The author does not share the thesis of the punitive function associated with the figure. He defends a strictly compensatory function. He has defended the use of moral damages for the purposes of punishing, by introducing criteria that imply an assessment of the offender's behavior in terms of punishment, for example, Pino (2018), pp. 496 et seq.

59 Wilenmann (2017), pp. 281 et seq.

60 To see the foundations of this affirmation, see Aedo (2020), pp. 279 et seq.

61 Aedo (2018a), pp. 251 et seq.; Aedo (2020), pp. 274 et seq.

Despite this, guilt as a mechanism for distributing social risk - for activities of ordinary risk - is very well connected to the moral foundations of civil liability, both for those who base tort law on what has been called the theory of reciprocity, supported by Fletcher,[62] and those who defend the guilt, basing it exclusively on corrective justice, like Weinrib,[63] and those who - like Papayannis - consider that distributive justice allows to justify both, a regime of guilt and a strict one (for hazardous activities);[64] and even those who have suggested a kind

62 Fletcher (1972), pp. 537 et seq., claims that risk is the principle on which liability is based. Fletcher affirms that in social life each member of society tolerates or must tolerate a margin of risk arising from the actions of others and in the light of the production of risk in relation to others. If he who starts an activity of ordinary risk not taking reasonable care, and this results in damage, then he has created a non-reciprocal risk that must be compensated. For activities that are risky of having abnormal risks, the reciprocal risk is not applicable; there can be no risk balance, and liability for damages shall be in accordance with strict liability. Although with a very different perspective, focusing on the nature of the duty of care, a bilateral look at the liability problem can be found in the theory of the dyadic rules of Zipursky(1998), pp. 67-70; Zipursky (2013), pp. 233-234, which is also well connected to the purpose of protection of the rule as a causal principle.

63 Weinrib (2013), p. 332, states that the merit of a regime on guilt is to describe the risk to be understood as illicit or disapproved, in the same way that the causal relationship connects the defendant's guilt to the plaintiff's damage. It adds: "However, when the plaintiff suffering the injury is a member of group of persons that the defendant puts at risk, and it is the type of damage or accident through due care, then, the wrongfulness of the defendant's action and the plaintiff's injury relate to the same class of risk. In these circumstances, the sequence from the creation of an unreasonable risk by the defendant until the materialization of this risk in a damage to the plaintiff constitutes the same injustice to both parties". However, if the guilt sets a disapproved area of risk, it does not seem so simple to distinguish attribution from guilt, unless causality is a purely factual problem, what we know that does not occur in the modern approach to causal imputation, especially when omissions are considered. To see how omissions, fail when describing the structure of free will, see Hart (2019), pp. 117-119. For an analysis in the conjunction between guilt and causality, especially on the creation of an unlawfully risk, Aedo (2018a), pp. 415 et seq.

64 Papayannis (2012), p. 75 indicates: "The purpose of tort liability has to do with rectifying unjust interactions and therefore with implementing corrective justice. Only by appealing to this principle the legal discourse of the participants is intelligible, while preserving the meaning that the main doctrines of tort law have for them and the content of the concepts, they use to shape them". But, as Papayannis (2013), pp. 400-401, emphasizes, for corrective justice to work, distributive justice must work first. And, according to the author, what they distribute are rights and duties of indemnity. In such distribution, there is room for the rules of liability for guilt and those for strict liability: "Since each rule has different distributive effects, they establish different contents for the rights of indemnity of each of the parties. The guilt-based liability rule implies a right not to be harmed by negligent or intentional conduct of others, and a corresponding duty not to harm in the same way; the strict liability rule, on the other hand, implies a right not to be harmed by unusually dangerous conducts". This idea, now attended to from the perspective of distributive justice, which incorporates it, can

of liability for the outcome of our action, such as Honoré[65] or Perry,[66] who do not assign a very different function to the risk allocation model that the guilt fulfills.

The idea of freedom, which underlies the scheme of conduct, makes it possible to explain – as we proposed - the delimitation of regimes (not on a dogmatic level, but on the level of their foundations), as well as to better introduce the discussion about the functions. Nevertheless, the idea of free will has not finished to conceal its structure with the omissions, as Hart has said. Therefrom,

be perfectly connected with the fact that guilt, and strict liability, operate as a mechanism for the distribution of social risks.

65 Honoré (1997), pp. 76 et seq., explains that to justify a liability regime it is not enough to show that the State adopts mechanisms to prevent undesirable behavior and protect the rights violated, by granting compensation for damages. There is something else, since the regime of liability for damages is based in the old idea of corrective justice, which is developed in a relational perspective, requiring a tortfeasor who has inferred an injury to a third party. The requirement of guilt as exclusive criterion for corrective justice is not accepted by Honoré, who thinks that this reduces the concept of it. For Honoré, liability for an outcome supposes a broad conception of corrective justice, although he later affirms that distributive justice is the one that allows for the foundation of strict liability and considers that liability arises from a combination of both. When reading Honoré (2013), pp. 128-129, the distribution of risks of civil liability opens the door to liability for an outcome, adding, as we have proposed, that both a guilt regime and a strict liability regime comply with such distribution, although in a different way. Honoré considers that both strict liability and liability for guilt are part of the type of liability for outcomes. Honoré believes that liability regimes end up assigning a responsibility for the outcome, since our decisiones or choices of behavior derive from our life experiences with others. In this way, we know that choosing this or that action could lead to disapproval or discredit of others or, on the contrary, could lead to the avoidance of damage, with society ultimately assigning the consequences of the outcomes. But, in order to be fair, such assignment made by society must be impartial, reciprocal and for a determined period. See also, Honoré (2002): 25-31.

66 According to Perry, the idea of liability for an outcome is completely in contradiction with the fact that this responsibility is intimately linked to the person, since according to this author, personality supposes a capacity for self-reflection and cognition, and implies a host of experiences and choices, so that responsibility for the result says something about our choices. The alleged liability for the outcome - thinks this author - involves an evaluation of the subject's choices. He adds that the ex post assessment is not only a retrospective projection of the behavior of the agent and the result produced by his action, because it is also a matter of determining whether the agent can justify his action or whether he has made a mistake. In sum, as an agent, not only consequences are produced, since human beings possess consciousness of themselves as beings capable of making a difference in the surrounding world. Perry (1992): 465-466; 491-492; 494. About the role of foreseeability when assessing risks, see Perry (1988): 162-164.

a conflict with the latter ones for configuring causality and for the aid that guilt offers in its construction, arises.[67]

67 About this issue, see, Aedo (2017b), pp. 514-515.

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