# The role and the current valences of civil liability principles and functions

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***Abstract*:** *Always a current issue in the legal consciousness, but with very deep roots in the legalarea, the theme of civil liability finds a new consecration in its current legal system of private law. In fact, it is not a novelty, as this notion was never a monotonous one. Knowing and understanding the meaning of the new regulation in civil liability matter can only have as a starting point the analysis of principles and functions. Based on the current conceptualization of the civil liabilityconcept, the approach will be oriented towards the analysis, in the current legal context, of the principles governing the application of the civil liability system. Closely related to the principles, we analyze the related functions, seen by the doctrinaires as necessary tools, having a clear role in asserting and maintaining the social order. Using content analysis, through documentary descriptive research and rich analysis of the specialized literature, this study aims at identifying the contents of the above mentioned concepts, presenting a point of view on the regarded issue.*

***Keywords*:** *civil liability; prejudice; illicit act; restitutio in integrum; prevention*;

## Introduction

Whether we are talking about tortious or contractualliability, the purpose of these institutions is undoubtedly the same: *it contributes to defending the subjective rights of the individual, both as a physical and legal entity, thus maintaining the social order*. Relating to the role that it currently holds the civil law in the current society, to the same extent it identifies also the role of civil liability in private law: the application of the principle of Roman law *neminem laedere* (not to harm anyone) is eloquent in this sense, granting as application the functions of civil liability upon which we will insist to the end of this paper. Continuing in the same spirit, the opposite is valid as well, according to the saying *suum cuique tribuere* (give everyone his due) [1].

All of the rules by which a society is organized and functions form the normative framework of the social system in question. In the human society it is not allowed to violate another person's rights causing a prejudice by its activity or by itsabstention. This basic rule of conduct is not circumscribed only to the legal relations, but it is a very old precept known as a general rule of conduct, since the most remote times and to different communities and social order [2]. Regarding the role of socio-legal role of civil liability and its impact on the state development of mankind, it has been rightly argued that morality was the one who influenced the phenomenon of civil liability in the first instance, so that, in turn, the morals was adapted as well asa legal phenomenon [3].

## 1. The concept of legal liability

In civil law as a branch of private law, the legal relation is defined as a social, patrimonial or non-patrimonial relation ruled by the legal norm of civil law, and the means of accountability to one who commits an unlawful act causing prejudice is the institution of civil liability.

Fundementing this legal concept is and it will be determined by the great changes in the human society, especially in the European space in the past two centuries, referring, obviously, also to the regulatory reform that marked the space of the Romanian private law, namely the entry into force of the new civil encodings, adopted by Law no. 287/2009 [4]. By adopting the Law no. 71/2011 implementing Law no. 287/2009 of the Civil Code on 1 October 2011, the Civil Code came into force, when it was repealed the one from 1864, and also other normative acts [5].

The legal effort applicable to civil liability, which emerges as a fundamental category of law [6], is considerable, doubled by the specialized literature and a rich jurisprudence, evolving from one stage to another, an aspect whichemerges from the substantiation of various forms of civil liability.

The content of articles 998-1000 of the Civil Code of 1865 have established for a century and a half the civil liability principles, producing legal effects both in tortuous and contractual liability. What is new in the current civil coding? The legal framework of civil liability takes on a new texture in the Fifth Book, *Onobligations*,Title II - *The sources of obligations*, Chapter IV, *Civil Liability*. We should highlight, however, that none ofthe current or the previous regulation defined this concept.

In the context of this omission of the legislator to givea compact and satisfactory definition, in the legal literature there were elaborated different formulations from the intent of establishing one that would capture the specificity of this form of social liability.

In this sense, it can be stated that civil liability is a form of legal liability, which consists of a legal obligational relation under which a person is indebted to repair the prejudice caused to another by the act or, in the cases provided by law, the prejudice for which it is held responsible [7]. The jurisprudence and the doctrine developed on this issue other definitions as well, including the following according to which the "*liability is the legal obligation relation where a person named responsible is indebted to repair the prejudice suffered unjustly by another person*" [8].

We will add on the latter few observations: *the person is responsible for its act; it shall assume the consequences of the committed act; the conduct of the person is the one which comes from the incidence of the law; the victim manifests the desire to repair the prejudice; the person is required to repair damage; the parties resort to mediation solution, intervening, if necessary, the coercive force of the state; the victim's subjective right is protected; it intervenes the reparative function of the liability*.

Here is the sequential development of the consequences in case of an illegal act, related to the conduct of each involved party. But how would this process evolve, if it paid more attention to the preventive criterion that would predict and prevent the production of the prejudice? This is actually the issue established by the precautionary principle, hard to adapt, as the authors specify [9], with the mechanism of remedying the civil liability.

It must be indicated the extent of this principle in the legislation to which we have always reported, especially from the French one, even if its recognition is recent [10]. It was noted the potential of this concept that gave birth in France to a real speech doctrine, and facts as well, as numerous judgments confirm the jurisprudential appetite for the precautionary principle [11]. As far as we are concerned, we consider that it would have been a good opportunity to include this principle along with others established by the civil liability with the entry into force of the legal civil corpus. To this issue, which will be subject to review in the upcoming section, we agree with the idea of changing the view on the liability institution construction, where the preventive function would acquire a preponderant place, but secure.

In the European law, if we refer to the French laws and doctrine, the definition of this concept there were followed the same guidelines. "*The civil liability feature is to reestablish, as exact as possible,*

*the balance destroyed by the prejudice and to restore the claimant at the expense of the responsible person, in the situation whereit would be found that the act which caused the damage did not occur*" [12].

In another approach, the civil liability assumes a wider dimension, being equally regarded as a legal institution, meaning that all legal regulations regarding engaging a person's obligation to repair the prejudice caused by his contractual or extra-contractual act [13].

**2. Principles of civil liability**

Beyond the concrete forms that it has, the legal liability [14] is governed by certain common rules, general principles whose guiding role reflects the content, the essence and the social importance of this institution. As for the principle nature of civil liability, in addition to itspresentation, we will highlight the role played by each in order to maintain the "idea of justice" [15].

The doctrine has not proved to be consistent in determining the principles that characterize the legal civil liability. While some authors [16] evoke and analyze the principle of legality, that of full compensation for the damage and the repair in nature of the damages, others [17], for interpretative reasons, eliminate the principle of legality from this gallery, arguing its generality feature which it incumbents, retaining and developing only the last two. The effects of these principles, but also the specific functions of civil liability should be viewed as a whole; they can be achieved in concrete by adding the individual characteristics, but by also by co-operating in order to insure the legitimate protection and interests of the individual.

Regarding their role in protecting the affected subjective rights and maintaining the law order is needless to reflect for the very concept of rule of law, as the guiding idea reflects in law the value of the truth of those already sustained. But given the quality of the principles of civil law, can they become sources of law?

Article 1 of the Civil Code provides *expressis verbis* the role of general principles of law that can become in certain situations sources of civil law: "*There are sources of civil law, the law, the customs and general principles of law*".

Prior to accept this point of view on this possibility, we note the novelty of the depositions by the specific inclusion of usage and principles in the category of civil law sources, assertions that dominated for a while the doctrine and the jurisprudence in the matter.

Systemizing the palette principles governing the civil law, their classification remains a classic one, namely:

- fundamental principles of the Romanian law;
- general principles of civil law;
- principles of civil law institutions [18];

According to the same author, the sources of civil law can only be the general principles of law, as long as to the situation is not an incident of another legal rule or practice [19].

There are general principles of law, and therefore sources of civil law under the normativity for the entire system of law, serving to substantiate the law the following: *the principle of property, equality before the civil law, the principle of combining personal with the general interests, the principle of good-faith, the principle of guaranteeing and protecting the subjective civil rights*. We may include the principles of full compensation and in nature of the prejudice, principles very commonly used and essential in the legal space, as general principles of civil law? Although they are classified as operating *secundum legem*, the principles of full compensation and in nature of the damage coexist with the legal texts [20].

We consider that what characterizes these two principles, the social values which it defends, tend to be treated as general principles of civil law. Perhaps the subjective principle of guaranteeing and protecting the subjective civil rights becomes in this case redundant as far as the content goes. In order to support this point of view, we start from the idea that everyone is held accountable for its actions. Moreover, the doctrine has joined to the two main functions of accountability a third one, the normative function. It refers, on one side to the whole normative work specific to liability, and on the other hand refers to that "*the liability itself is a normative source*" [21].

A. *The principle of full compensation for the prejudice* (*restitutio in integrum*) presupposes removing all harmful consequences of an illegal act, in order to restore the balance by putting the victim in the previous situation [22]. This principle is derived from the very essence of the idea of civil liability: reestablishing the balance destroyed by the interference of the prejudice and restoring the victim in the situation prior to its achievement.

Established in the past by interpreting articles 998-999 and article 1804 of the Civil Code of 1864, this principle is explicitly based on the provisions of article 1385, paragraph (1), article 1349, paragraph (2) in conjunction with article 1350, paragraph (2) of the Civil Code, according to the tortuous or contractual source of the liability. These texts cover the shortcomings of the old rules and rule on the recognition of the principle which has the full compensation of the prejudice: "*the prejudice will be compensated fully, if the law provides otherwise*" (article 1385, paragraph 1). Substantiated on this direction, it results that the central idea of a tortuous liability represents the full compensation. As for the punishment of the offender, it becomes secondary [22].

In conclusion, the one that violates with discernment the rules of legal conduct, conventional or imposed by certain customs, is responsible for all caused damages, being required to full compensation. The patrimonial rebalance of the prejudice must be a correct, judicious one, meaning that the value which it had before committing that civil offence on the one hand, and also the integrality of the damage, to the extent where the patrimony of the victim does not know any negative fluctuation. Usually, *the seriousness of the guilt* is not,in the practice of the courts, a criterion for determining the amount of compensation, the author of the prejudice being fully responsible even for the smallest fault [23]. It gives the possibility for both *damnum emergens* (the caused damage) and *lucrum cessans* (unachieved benefit) to be fully covered as a result of compensation function which incumbents the civil liability, as it results from the provisions of article 1385, paragraph (3) Civil Code: "*The compensation should include the loss of the injured, the gain that in ordinary circumstances he would have been able to accomplish of whichit was deprived, and the expenses that it made in order to avoid or limit the prejudice*".

We mention that *repair* means the benefit to understand that activity of giving, of doing or not in order to remove the harmful consequences of the illegal act. The argument is supported by the provisions of article 1381 Civil Code: (1) "*Any prejudice gives the right to compensation.* (2) *The right to compensation arises on the day of causing the prejudice, even if this right cannot be immediately achieved*".

The first paragraph seems to be a sentence, and it will probably be often used in the jurisprudence, by clarifying and stating that any prejudice presupposes judiciously its compensation. On the other hand, the principle states the rise of the right of the victim to obtain that compensation.

B. *The principle of repairing in nature of the prejudice*. Closely related to the above mentioned principle, the principle of *repairing in nature of the prejudice* [24] precedes over the compensation by its equivalent. Consequently, the legislator, acquiring both the doctrinal formulations, especially the situation

given by the court on this issue, specified *expressis verbis*, the establishment of the principle, by the provisions of article 1386 Civil Code, which we will partially mention as follows: "(1) *The repairing of the prejudice is achieved in nature by restoring the previous situation, and if this is not possible or if the victim is not interested in the reparation in nature, by the payment of the compensation established by the parties or, failing that, by court order*".

The creditorsof the compensation are obviously the victims of the prejudice, both the direct and indirect victims, a right which will be transmitted to their heirs as well.

If repairing in nature is not possible, the victim will be compensated in the amount of asset's value. The same situation will be retained, also at the will of the victim to prefer the compensation by equivalent, even if in nature would have been possible to achieve.We show empathy for this legal alternative which is only at the reach of the injured to choose for recapitalization of the lost right, not at the discretion of the person who has been guilty of producing the illegal act. We appreciate that this impossibility is considered as a tacit punishment for the perpetrator, to which it will be imposed a behavior that can sometimes not be in his favor, that is more difficult to execute, giving preeminence, wisely, to the victim. The legislator leaves also at the agreement of the partiesto choose the compensating methods and when they cannot reach to an agreement, it will be the court's choice, any abuse being avoided.

Of the same legal framework it enjoys also the situation for repairing a future prejudice, except that the amount of the compensation may be fluctuating, increased, reduced or suppressed, as the legislator states, when after its statement there are established modifications on the initial value.

A complete analysis of the mentioned provisions will be achieved with the development of the two forms of vicarious liability.

### 3. Civil liability functions

The civil liability develops two important functions, namely, the preventive and educational function and the reparative function, which are closely related. They should be viewed in conjunction with the mentioned principles. The direct effect of the principle of *restitutio in integrum* corresponds to the reparative function: *the compensation obligation for the suffered prejudice*.

*Preventive and educational function* has a general feature, being recognized all forms of liability. It consists of reducing the number of prejudice as a result of the awareness of the obligation to repair, asany prejudice is entitled tocompensation. The right conduct, adapted to rulingis based, if not on the balanced conscience of the individual, at least on the fear of not being put into a position of decreasing their patrimony. Being liable does not mean necessarily that the damage was produced in order to be repaired. Equally, or rather, primarily beingliable presupposes to assume any permanent damage and being conscious of future prejudices, the state of not producing them, depending only on our conduct. Only then we can prevent their happening. "*Mieux vaut prévenir, que guérir*" says the Frenchman (it is better to prevent than to repair - s.n.).

The educational feature happens by educating the society on respecting the fundamental social values, deriving also from the good faith and sense duty of the citizen to act with care not to damage the interests of others, in fact, to obey the law [25]. Prevention is translated also by a voluntary conduct to refrain from committing future illegal acts.

*The reparative function* is the basis of civil liability, it is intrinsic, resulting from the provisions of article 1381 Civil Code. The principle of full compensation for the damage emerges as a direct consequence of this function, relying, according to expert opinion, on the "exigencies of commutative justice" [26]. Any patrimonial imbalance claims to be solved through the intervention of the law, which protects the victim, and through the effect of coercion (if necessary), the prejudice will be repaired entirely by the one who is guilty. This is the only "penalty" that the civil law provides: the payment of the entitled compensation to pay them for the judicious referral of the situation, differing from other forms of legal liability (administrative - the system of fines, criminal - the punitive system).

As stated, the damage can be repaired in its entirety either by nature, namely in the substantially of the affected / destroyed goods or the equivalent under the form of granting compensation. The latter is a fairly commonly used solution, being at the discretion of the parties to determine the extent of damages and the method of repairing them and even their transmission [27].

The reparative function is only relative as it is often impossible to replace those prejudices, in their specific nature, and when it is possible, it requires a reinvestment of social work, a new employment expense to complete the damaged values. We refer to the non-patrimonial rights (rights concerning the existence, physical, moral integrity of the person or referring to the identification elements of the person) whose possibility to repair them in nature cannot be questioned, intervening the compensation of the affected value. Some authors have stated that in this situation we can speak partly of the reparative feature, and more about the compensation and arbitrary estimators [28].

In this context, it was said that no damage can be absolutely repaired, as we do with the memory of supporting its achievement? Physical suffering experienced as a result of an accident or of moral nature due to loss of a loved one, are "repaired" financially through the payment of some compensation, but that amount will never be able to erase the suffering of the victim, or even to alleviate. The equilibrium of lost values will not be restored. That is why we believe that those amounts are rather financial penalty for the perpetrator. Here is actually the limit of this principle which is actually within the limit of human beings. From this perspective, in the French positive law it speaks increasingly of the granting damages-interestswith the role of "compensation" and not repairing the prejudice [29].

At European level, these two functions were adopted differently by the legislation, with a focus mainly on one of them, either the compensating feature of the civil liability, after payment (as in the case of France) or the preventive-educational feature, specific to the English legal system. The German legal system combines the two directions, assuming both the corrective justice principles of the English law, but also those of reparative justice [30].

**Conclusions**

According to the above, we believe that what characterizes the content and the role of principles and functions of civil liabilityis reflected in the knowledge of the fact that any illicit action will not remain unpunished, thus contributing to the protection of the subjective rights and legitimate interests of all physical and legal entities.

The doctrinal assertions put into practice by the jurisprudence, with the comparative law analysis, appear to have the necessary results for the new legislator which considered necessary to state explicitly the principles of civil liability in a formula that is closer to what it believes to be in the future, the European principles of civil liability. The approach on their harmonization is not an easy one andat the national level there are taken the first steps.

## References

[1] *Honeste vivere, neminem laedere, suum cuique tribuere* - Live honestly, hurt no one, give everyone its due. Digeste;

[2] Ion M. Anghel, Francisc Deak, Marin F. Popa, *Răspunderea civilă/Civil Liability*, Scientific Publishing House, Bucharest, 1970, p. 9;

[3] For details, see Paul Pricope, *Răspunderea civilă delictuală în reglementarea noului Cod civil, a Codului civil din 1864 şi a dreptului European*/*Tortuous liability in settling the new Civil Code, of the Civil Code of 1864 and European law*, Hamangiu Publishing House, Bucharest, 2013, p.18;

[4] Law no. 287/2009 was republished in the Official Monitor no. 505 of 15 July 2011;

[5] Law no. 71/2011 was published in Official Monitor no. 409 of 10.06.2011, as amended by Law no. 214/2013 (published in the Official Monitor of Romania, Part I, no. 388 of 28 June 2013) for the approval of Government Emergency Ordinance no. 4/2013 on the amendment of Law no. 76/2012 for the implementation of Law no. 134/2010 on the Code of Civil Procedure, and for the amendment of some related acts. One of the amendments of Law no. 71 with relevance for the Civil Code refers to the duties of guardianship;

[6] Ioan Albu, Victor Ursa, *Răspunderea civilă pentru daunele morale/Civil liability for moral damages*, Dacia Publishing House, Cluj-Napoca, 1979, p. 23. Similarly, on the importance of civil liability, in the French legal literature at the end of XIX$^{th}$ century it was said that it "*tends to occupy the center of the civil law, so the law in its entirety, in each subject, in all directions it gets to the issue of liability, in public law, in private law, in the domain of persons or family, as in that of goods; it is of all moments and of all situations; the civil liability becomes the sore point of all our institutions*". L. Josserand, preface to the paper of André Brun, *Rapports et domaines des responsabilités contractuelle et délictuelle*, p. V apud Ion M. Anghel, Francisc Deak, Marin F. Popa, *op. cit.*, p. 11;

[7] Liviu Pop, *Teoria generală a obligaţiilor/General theory of obligations*, Lumina Lex Publishing House, Bucharest, 2000, p. 160;

[8] Sache Neculaescu, *Reflecţii privind fundamental răspunderi civile delictuale/Reflections on the basis of tortuous liability*, in revista Dreptul /The Law Journal no. 11/2006, p. 41;

[9] Liviu Pop, Ionuţ Florian Popa, Stelian Ioan Vidu, *Tratat elementar de drept civil. Obligaţiile conform noului Cod civil/The elementary treaty of civil law. Obligations under the new Civil Code*, Universul Juridic Publishing House, Bucharest, 2012, pp. 380-381. Furthermore, the authors optimistically predict the change of view of the legislator, by reforming the concept of liability, in which case its functions would form the: sanction, repair, prevention;

[10] It was initially referred to in Law no. 95-101 of 2 February 2005 (now repealed), now being established in article L.110-1 of the French Environmental Code (Le Code de l'environnement) the Code as amended by Law no. 2012-1460 of 27 December 2012. At European level, this principle is governed by article 191 TFEU of the Treaty on European Union (former article 171 TEU);

[11] Daphné Tapinos, *Prévention, précaution et responsabilité civile*, Paris, L'Harmattan, 2008.Inthe 700 pagesthe author compiles in a remarkable work the impact of the implementation on these principles on the one hand, and on the other hand it supports and promotes the need to include the prevention and the precautionary obligations under the civil liability, so as to ensure the regulatory framework appropriate to the dynamic of the relation from the current society;

[12] Rene Savatier, *Traité de la responsabilité civile en droit français*, tome 1, Sirey, Paris, 1951 apud Philippe le Tourneau, *Droit de la responsabilité et des contrats*, 6e edition, Dalloz, Paris, 2006, p. 367;

[13] Ion Dogaru, Nicolae Popa, Dan Caludiu Dănişor, Sevastian Cercel, *Bazele dreptului civil, vol. 1, Teoria generală/ The basis of civil law, Vol 1, The General Theory*, C. H. Beck Publishing House, Bucharest, 2008, p. 958; Eugenia-Carmen Verdeş, *Răspunderea juridică. Relaţia dintre răspunderea*

*civilă delictuală şi răspunderea penală/The legal liability. The relation between tortuous and criminal liability*, Universul Juridic Publishing House, Bucharest, 2011, p. 75;

[14] There are the following legal liability principles: the principle of legality liability, the principle of personal liability, the one based on guilt, the principle of presumption of innocence, the principle of proportionality between punishment and seriousness of the offense, the principle of *non bis in idem* principle of legal accountability, to which we may add that of humanism, accountability and the precautionary principle by responsibility. It appears that they do not have an exclusive legal feature, but it also reflects the political and moral rules. See Vlad Barbu, Cătălin Vasile, Ştefania Ivan, Mihai Vlad, *Dreptul muncii/Labour Law*, Cermaprint Publishing House, Bucharest, 2008, p. 344;

[15] Nicolae Popa, *Teoria generală a dreptului/General Theory of Law*, TUB, 1992, p. 69.

[16] Ion M. Anghel, Francisc Deak, Marin F. Popa, *op. cit.*, pp. 24-27.

[17] Liviu Pop, *Teoria generală a obligaţiilor/The general theory of obligations*, Lumina Lex Publishing House, Bucharest, 2000, pp. 166-167.

[18] Gabriel Boroi, *Curs de drept civil. Partea generală/The civil law course. General Part*, Hamangiu Publishing House, Bucharest, 2011, pp. 4-9;

[19] *Ibidem*;

[20] Ion Dogaru, Nicolae Popa, Dan Claudiu Dănişor, Sevastian Cercel, *op. cit*., p. 148;

[21] Paul Vasilescu, *op. cit*., pp. 567-568;

[22] Constantin Stătescu, Corneliu Bîrsan, *Drept civil. Teoria generală a obligaţiilor/The Civil Law. The general theory of obligations*, 9th edition revised and enlarged, Hamangiu Publishing House, Bucharest, 2008, p. 159. Patrice Jourdain, *Les principes de la responsabilite civile*, 7e edition, Dalloz, 2007, pp. 140-146. The author finds the applicability of this principle in the sentence of the judge who assigns the victim's damages-interests in the amount of the suffered damage, in short, "*tout le dommage mais rien que le dommage*" (the entire damage, but only to the limit of the offence). There also discussed other issues, analyzing the possibility, the willingness to become a victim, considering its pathological predispositions to facilitate, encourage the damage, the counter-arguments derive from the legal practice, by a famous formulation of the Court of Cassation. It is necessary that the created damage was the result of the occurred damage. As stated in the national practice, the victim's compensation should be reflected in reality through a fair and full compensation of the caused damage. Supreme Court Plenum, December guidance No. 10/1961, *Culegere de decizii a Trib. Suprem pe anii 1952-1965/Reports of Judgments in the Supreme Court the years 1952-1965*, Scientific Publishing House, Bucharest, 1966, p. 17;

[23] Ioan Ciochină-Barbu, *O nouă viziune asupra prejudiciului ca element al răspunderi civile delictuale/A new vision on the prejudice as an element of tortuous liability*, in the Journal Acta Universitatis George Bacovia. Juridica, Vol.2, Issue 1/2013, p. 208;

[24] For example: the return of illegally acquired assets, the replacement of the destroyed asset, the loss of a similar one, repairing the damage, annulment of the illicit legal act, etc., Patrice Jourdain, *op. cit*., p. 137;

[25] Mihail Eliescu, *Răspunderea civilă delictuală/Tortuous liability*, Academia R.S.R. Publishing House, Bucharest, 1972, p. 29;

[26] Paul Vasilescu, *op. cit*., p. 565. The author argues that these requirements ensure not only a patrimonial balance, but also a general one between the legal subjects, being assigned also the principle of equality of the civil law of persons;

[27] The global sum or the installments, even in the form of an annuity. The solution of granting an annuity in the French legislation is especially common when the damage is a loss on certain gains (e.g.suffered injury led to lowering the wages or to the loss of sole parent). Patrice Jourdain, *op. cit*., p. 138. Constantin Stătescu, Corneliu Bîrsan, *op. cit*., pp. 160-161;

[28] For details, see Paul Vasilescu, *op. cit*., p. 565;

[29] Muriel Fabre Magnan, *Droit des obligations*, Vol. 2. *Responsabilité civile et quasi-contrats*, 2eme éditions, PUF, Paris, 2007, p. 40;
[30] C. Van Dam, *European Tort Law*, Oxford University Press, 2006, p. 8 apud Paul Pricope, *op. cit.*, p. 19;