

SHORT METHODOLOGICAL CONSIDERATIONS REGARDING THE LEGAL LIABILITY CONCEPT

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Abstract

Various disputes and discussion regarding legal liability have not yet lead to a unitary definition of the same, each theory utilizing specific categories and notions that allow the achievement of an analysis of its research object in an own language, which renders the researcher's task even more difficult.

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The large number of interpretations of the legal liability notion is due, in our opinion, first of all to its gnoseological nature. Starting from the pluralism of the law meaning approaches, we might say that in the process of knowledge there is always the possibility to focus very much on one side of the problem, to give it importance and to neglect other facets. Hence the numerous definitions given to law, which is not something very bad, if this unilateral definition does not claim to replace all the existing others, to become the only one correct and to annihilate the others.

We can also observe this fact in the development process of the visions of the issue to understand legal liability. Within the limits of each approach legal liability is examined through one of its important aspects, accentuating the attention: either on the essence of legal liability (its submission to the constraining character and authority of the state to perpetrate an illegality), or on its achievement process (reaction of the state, negative qualification by the state, application of sanctions), or on the achievement manner (legal responsibility relation), or on the purpose and result of applying legal liability (obtaining legal behaviour, self responsibility and the subject's obligations)

The authors' opinions are different and because some give priority to the "active" side of liability – state activism and that of its representative bodies, considering liability as reaction of the state to the perpetration of an illegality. That reaction is manifested by a negative qualification and conviction of the illegal behaviour and by the application of the sanction. Other authors enhance the "passive" side, viz.: perpetrator's obligation to abide by the authoritarian constraint measures of the state, such submission being defined as a punishment measure of the perpetrator displaying the illegal behaviour. In principle, legal liability as a legal phenomenon exists in a dialectic objective unit of the active and passive sides.

The existing concepts concerning the legal liability have not only a gnoseological significance but an applicative one, because each approach is directed to a specific subject (group of subjects). Thus, the approach of legal liability as a new specific obligation, occurred in relation to the perpetration of an illegality, has a fundamental importance for the legal practice, especially for the construction of the branch legal norms, branches where predominate patrimonial sanctions and where parties are legally bound by determined relations (they have rights and obligations until perpetrating the illegality). This approach has methodological importance when the norm that is being built, regardless of the branch, presupposes sanction, the determination of those consequences that will inevitably occur should the recipient of the norm disobeys its provision.

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The methodological approach through which liability is treated as application of sanctions falls under the competence of the one enforcing the law bringing to the foreground the obligation of the authorised bodies to prove enhanced mobility for the mandatory application of the effects provided by the sanction of the violated legal norm when illegalities are perpetrated. This approach allows us to include within the content of the legal liability both the material and proceedings legal norms. During the law application process, the liability concept through the legal relation helps establish the rights and obligations of the law enforcement bodies, on the one hand, and of the person to whom the legal sanction will be applied, on the other hand.

The treatment of liability as punishment for illegality has educational importance and is intended to the recipients of the legal norms – citizens, special subjects etc.

For the deep understanding of the legal phenomenon of liability, all definitions, even if they reflect only a small part of the entire phenomenon, in our opinion, are welcome and useful. The more comprehensive definitions are good through the fact that they direct us to analyse liability within the legal relation, the legal consciousness until the perpetration of the illegality. The narrow approach presents a more practical aspect which serves to satisfy the purely legal needs, to settle judiciary cases and to stop and prevent the perpetration of illegalities. In scientific purposes and in the interest of achieving an efficient legal process it is good to enjoy all the approaches of legal liability, to unify and synthesize them by creating a single category is the same is claimed by the applicative aspect. For the practical use it is good that a unique definition be formulated that will serve not only the practical interests but to give birth to an integrative acceptance of the legal liability phenomenon.

Debates between lawmakers regarding legal liability have helped us acknowledge first of all that this is a complex phenomenon, secondly, it eased the highlighting of various aspects of its shape and thirdly it brought us to the conclusion of the need of different approaches of liability depending on the social relations field and the social role of the liability subjects. Moreover, the following methodological problems were distinguished:

1. Determination of the role of legal liability in preventing and stopping illegalities, as well as the exclusion of dangerous social consequences of the same, which is expressed in particular by the difficulty of establishing the role and place of legal liability in the legal regulation process, its reporting to certain legal categories such as: subjective law, subjective obligation, legal relation.

2. Mutual connection between the Legal science and the law-making process.

This connection gives birth to a vicious circle inside which, when examining legal liability, it is always mentioned that the lawmaker grounds his activity on doctrine, and lastly, in his turn, is built on the laws in force.

Legal science cannot operate with insubstantial definitions, otherwise it might break away from practice and lose its value. Due to these reasons, it would be better off to leave outside the limits of the legal liability study all attempts to establish its nature by the use of semantic methods etc., which are not underlain by a serious and complex analysis of the laws in force and its applications practice. The analysis of the terms, formulations and definitions is undoubtedly important as it allows legal advisers to express themselves in the same language and has as main effect the uniform application of the law. Besides that, it is equally obvious that all sorts of linguistic claims cannot substitute the real study of law, its application practice, the development needs and perspectives.

On the other hand, the true scientific research aspiring to the status of innovation and scientific importance cannot be limited to the simple commenting of law and its application practice. This research, under the study of the objective manifestations of law, must also present the fundamental development tendencies, to also establish the mutual connections between them, and the needs of the person, collective, society and state.

The new visions and representations occurred in the legal science are also reflected in the law application practice, which, consequently produces modifications of the research object and, obviously, gives birth to the new approaches and scientific studies. This process is infinite just because it allows the legal science to evolve. Moreover, the described process causes the occurrence

of difficulties related to the instability of the mechanism referring to the used notions and categories.

3. Certain and same terms may have more meanings that are not connected. A dissimulated danger emanates in this case not from the fact that the lawmaker might use the same notions to identify different meanings, which is excluded by the interpretation of the legal norms, but from the fact that the adepts of different concepts of legal liability assign the same different meanings to the same notions. Moreover, the use notions originating in other sciences (philosophy, psychology, sociology etc.) which, without extra arguments, create additional difficulties in understanding them.

4. Correlation of legal liability with its forms. Thus, there are cases when certain problems having significance only for one or more legal branches or legal sciences, are attributed a general meaning, which renders difficult the unique definition of legal liability. The liability for the deed of another person from the civil law may serve as an example.

On the other hand, the general theory of law is not making full use of the achievements from the legal liability study field obtained by other branch sciences. Thus, in the civil and administrative law there are simultaneously used notions as “default” and “tort” or “offence” in the contraventional law, whereas the theory of law use exclusively the notion of “tort”, which eclipses the connection between the legal liability and the legal obligation whose enforcement must be ensured first.

It is also necessary to focus one’s attention on the fact that the critical insufficiency in establishing the meaning of the legal liability leads to the blending of the traits characteristic to different branch sciences. Often such traits, included in the legal liability definition, may contradict each other. The definition of legal liability must reflect common traits for all its forms. This possibility to apply the definition to all legal branches and therefore to the different forms of liability must be grounded on an objective fundament.

Regardless of the nominated methodological problems, of the aforementioned disputes regarding legal liability, we consider that it is possible to delimit two moments coming off from most works:

- Legal liability notion is indissolubly connected to the notion of tort. Usually, this dependency originates in the finality of the legal liability – to not admit the perpetration of new illegalities, to exclude the socially dangerous consequences. Here one needs to channel attention on the fact that any illegality is identified with the default provided by law. Consequently one might say that legal liability is called in to ensure the enforcement of the legal obligations.

- There is no doubt that legal liability is tightly connected to the application of state constraint. Moreover, many specialists in the field assert that it represents a state constraint measure and is manifested by the application of sanctions by the same. The connection between legal liability and state constraint is not denied neither by the positivist adepts of legal liability, which comes to confirm the fact that state constraint is acknowledged by the specialists in the field as a key-element for legal liability. Divergences occur only in relation to the fact that all state constraint measures, or just some of them (those sanctioned by the legal norms sanctions) are meant to ensure the achievement of legal liability.

In the context of the aforementioned, we propose to nominate certain fundamental landmarks reflecting our position in the analysed problem. We agree with many of the approaches explaining the content and essence of legal liability but we do not accept the opinion of the authors who are keen on establishing the meaning of legal liability by unifying the “positive” and “negative” aspects. It is difficult to adhere to such understanding of legal liability due to the following reasons:

Firstly, the detachment of legal liability aspects yet calls for the preservation of the essence of the phenomenon in each of its aspects. In dualistic constructions of liability this essence cannot be found. Thus, the meaning of legal liability is sought in the awareness of the subject’s duty, the submission and possibility to control the liability subject. The “negative” aspect (legal liability) refers nevertheless to the violation of strictly determined obligations, of certain legal norms related to the state constraint and the subject’s obligation to abide by such measures. Thus, the proposed

definitions do not present at all common essence elements and do not connect the motivational sphere to the outer regulators, without which the essence of legal liability cannot be established.

Secondly, as we have mentioned before, regardless of the found divergences, there are common elements for the supporters of different opinions. One of these elements refers to the indissoluble relation of legal liability with the legal obligation. Its distinctive elements are represented by the legal nature of the prescriptions establishing the proper behaviour and the assurance of achieving liability through the state constraint. For the legal liability (positive responsibility) such traits are not specific. It is not bound to the subject's submission and application towards the same of the constraint measures and it cannot be formalized.

Thirdly, the dualistic concept does not explain the dialectics of positive turning to negative, of responsibility to liability. In this respect, that passage constitutes an obstacle to the unitary formulation of the theory of liability, thus attempting to explain the specifics of liability through the duty entrusted to the subject. If in the dualistic concept of liability the role of the retrospective aspect is sufficiently clear (possibility of occurrence of negative consequences of illegality and submission to the same), then the situation remains unclarified for the adepts of the positive liability: neither when they understand the legal behaviour of the subject and the aware attitude towards obligations, nor when the positive aspect is manifested outside as obligation to commit deeds according to the law. In both cases the sources, the reasons of the legal behaviour of the liability's subject, remain unexplained. Thus, anything that might be said of the dialectic unity of the positive and negative aspect, the notion of liability loses its universal nature due to the manner it is treated.

Fourthly, as practice shows, the dualistic understanding of liability does not contribute to the stimulation of the active creating behaviour. In order to treat legal liability (positive responsibility) it is specific the acknowledgement, as fundamental element, of the observance of the default obligations and aware attitude towards its attributions. Despite all these, the adepts of this theory do not explain which is the guarantee of executing such obligations and what is the difference between this liability for the moral urge to have an exemplary behaviour and the execution with good faith of the subject's duties. No clear explanation or constructive answers to these questions are offered. Since it is not sanctioned in a human behaviour influencing mechanism, this liability falls under the moralizing conveniences, without legal substrate.

The explanation of the responsible subject's legal behaviour, in our opinion, is to be sought not by detaching a special aspect of liability, but in the study of its impact on the motivation of the action, which arises from the variety of factors (internal and external), participants to the formation of such motivation. Acquiring the status of subject of legal liability, the person finds herself in an environment where various internal and external regulators interact whereby in any way it does not result that the aware attitude towards obligations represents only the consequence of the legal responsibility towards the entrusted attributions.

Thus, the attempts to establish the notion's meaning in general (in the unity of the two aspects) do not contribute to the settlement of the practical problems. Legal responsibility (positive responsibility) represents an independent legal phenomenon and an independent research object. It is certainly related to the legal liability, but the nature of this connection does not allow us to agree with its inclusion in the notion of legal liability as one of the aspects. Legal liability and legal responsibility (positive responsibility) must possess personality and distinguish itself by separate definitions.

The meaning of legal liability must answer the practical needs and to have not only a theoretical significance but an applicative one (to correctly direct the lawmaker, the law enforcement bodies and the common citizens). The narrow approach of the legal liability, in this direction, is a more practical one, yet one that does not preclude the possibility of synthesis within the limits of a single notion of various theoretical approaches and the arrival to an integrative acceptance.

It is difficult to oppose the fact that, essentially, legal liability represents the application towards the subject of the personal, limitative, organizational or patrimonial sanctions. The legality

and incontrovertibility of such matter is ensured through legal means, for instance, state constraint measures, law enforcement, legal relation. That is why, besides the application of the sanction, the notion of legal liability assumes the use of the nominated legal inventory and the legal terminology.

The application of sanction, within legal meaning, manifests itself by the occurrence and achievement of the obligation to abide by the legal effects of the inadequate behaviour. Such understanding of liability is conditioned by the instrumental approach of the essence of law that we also share. Legal liability represent one of the resources allowing law to exert its instrumental role: under the current conditions to contribute to the stabilization and ordering of the social relations, to the settlement of legal cases.

Bibliography

1. Nicolae Popa, *Teoria generala a dreptului*, All Beck Publishing House, Bucharest, 2002, p. 280-287
2. Gheorghe Bobos, *Teoria generala a dreptului*, Dacia Publishing House , 1994 p.217-225.
3. Dumitru Mazilu, *Teoria generala a dreptului*, All Beck Publishing House, Bucharest, 2000, p.199-212.
4. Sofia Popescu, *Teoria generala a dreptului*, Lumina Lex Publishing House, 2000, p.251-278
5. Francois Terre, *Introduction generale au droit*, 4e edition, Dalloz , Paris, p.430-462
6. Genoveva Vrabie, Sofia Popescu, *Teoria generala a dreptului*, Stefan Procopiu Publishing House, Iasi, 1995, p. 96-107.