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MORAL SOURCES OF LEGAL LIABILITY IN NATIONAL AND INTERNATIONAL LEGAL DOCTRINE – THEORETIC CONSIDERATIONS

Mara-Cleopatra OCHIROŞ*

Abstract:

The present period determined major changes to the level of humans, both in relation to political, economic and social issues and to legal ones. Romania of the last 20 years has passed through radical changes at social, political and economic level, from a centralized system of socialist economy whose main objective at the level of the organisation, was the production and the achievement of the required production parameters towards a market economy system. The new market economy principles had a strong influence on the existent systems of human values and implicitly on moral life; consequently, we are now facing major changes of the perceptions of the generations on the system of moral values, reinterpretations of moral principles and moral values of a society in full transformation towards a new system of values. These changes of moral principles have a strong impact also on the system of legal liability that we want to discuss about in this paper. Under the social issue of legal criminality, we are now the witnesses of a change of the perception of the statute of "criminal" at the level of the whole society, on the background of an increase at this level. The idea of a "moral crisis" about which we discuss in this paper is more and more accepted. The corruption, the felonies are themes of great actuality.

This paper proposes to present briefly the impact of social changes towards morality, of the relation between moral, justice and legal liability.

Keywords:

legal liability, fundamental theories of law, responsibility

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The liability, and especially legal liability, we widely treated and developed by specialty literature both from Romania and from abroad. Most of the treaties, of academic manuals on general theory of law (Lidia Barac, Gh. Boboş, M. Costin, I. Craiovan, M. Djuvara, M. Dvoracek, Gh. Dănişor, I. Humă, D. Mazilu, Gh. Mihai, E. Moroianu, N. Popa, S. Popescu, V. Rebreanu, etc.) approach to the concept of legal liability in different ways. Present Romanian and foreign theories treat legal liability starting from the person, personality, liability, social and moral values such as sanction, punishment, and compensation. Illustratively, the theories of Fr. Terre, H.L.A.Hart, O. Weinberger, Gh.Boboş and Gh. Mihai are distinguishable due to their originality.

Most of the authors that I have already read approach to the concept of legal liability through the prism of fundamental theories of law, each of them concentrating on certain or several aspect, but none of them treats deeply the interdependency between inter-conditioning phenomenon existent between the values of moral principles of the law subjects involved in the individualisation of a punishment on one hand, and the punishment applied as effect of legal liability on the other hand.

Specialised monographies from the field of the theories of liability and legal liability treat issues relevant for the institution of legal responsibilities. The authors introduce step by step new categories in scientific circuit – such as the legislative construction of legal liability – and includes in this category multiple aspects of legal theory and practice such as: the definition of liability and legal liability, legal liability – expression of conviction from the part of the state to an illegal behaviour, legal liability and the sanction as institution of public constraint; general conditions of legal liability, principles and functions of legal liability; material forms of legal liability, process form of legal liability, etc.

An analysis of doctrinarian, normative and jurisprudence was performed also at the level of several European states, such as France, Spain, Italy, England or of European Council in relation to the evolution of the forms of liability, from the subjective to the objective one, of its role within the process of evolution of the democratic state aiming to the direction of sustainable development.

In our opinion, an individual can be considered responsible according to the laws imposed by civil society by means of regulations and civil and criminal common law only to the extent in which he knows and is able to make a distinction in relation to the social significance of his

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actions. The individual must be aware if his actions might affect the subjective rights of the other members of the society, and namely the individual must have the conscience of his anti-social character of his behaviour. We allege here Kant's idea according to whom "the individual is the only being capable to act as moral force fully responsible of his own actions" (Vrabie, Popescu (1993): 134).

To be moral means that through all the actions performed one does not affect negatively (under the aspect of social principles) the interest of other people. The moral fundaments for the "good" of a society are the liberty, the rightness, the equality and the truth.

There are two essential conditions so that the liability can exist: the liberty of the personality and its capacity to decide "only the individual is able to decide only if he is free and is able to restrain himself" (Mihai, (2006): 38). A person is socially responsible if one complies with social norms and is responsible from legal point of view if one complies with the legal norms.

Once the state has appeared, along with the concept of state and supreme authority, the laws have appeared as effective modality of this authority to impose at the level of main subjects of law – and namely of the citizens of the state. At the same time, the institution of legal liability has appeared correlated with the sanctions for the ones who breach the laws. The punishment must be in compliance with the severity of the act, and the one who establishes such a punishment must be able to determine the level of intensity according to law breached. Along with the evolution of the society, the legal punishment has evolved also in the context of the evolution of legal liability from theoretic and practical point of view.

Short history

All the theories performed in the doctrine led, directly or indirectly, to the issue of legal liability, irrespective of the fundamental formation of the authors: jurists, economists, sociologists or philosophers. The fundaments of the liability were established on the background of the social reaction to those acts and human behaviours with negative effects.

Here we remind of Platon who in the work "The Laws" considered that nobody must remain unpunished if one does not comply with the laws. He emphasized three functions of legal liability: prevention, reparatory and educational. In the same work, Platon considers that the

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terms of "correct" and "legal" have equal meaning. Thus, the liability for something incorrect will be legal liability according to the law. In the same manner, Aristotle, the Greek philosopher consider that an individual must make a distinction between good and bad and must be capable to choose the correct variant. The accent is put on compensation rather than on punishment (the punishment being an additional sanction). He sustains that the correct and equity are desirable, but the equitable comes first seeing in it the accomplishment of equality. Both Aristotle and Plato emphasize the prevention character of the sanction.

In Antiquity, the sophists tried a definition of the law arriving to liability. Socrates refers to self consciousness and enounced the famous gnome: "Know thyself". The stoics are the ones who detach moral liability from religious one.

In Ancient Rome, private law meets with the rights and obligations of the parties and the physical constraint of the debtor is replaced with the legal one (Popa et all (2002): 66). The Romans include terms such as: responsible, agreement, reconciliation and others. A great attention is given to the will of the jurists, to good faith and to arbitrage. The Romans give a lot of importance to the moral and legal value of the individual (Popa et all, (2002): 66). Thus, the Romans set the road towards individual liberty in comparison to other states where no persons or citizens identified with the state. Cicero put the moral on the basis of legal and political.

Starting from the theories from Greek-Roman times, the Enlightenment (Hobbes, Locke, Rousseau) have taken the concepts and developed new theories based on the idea that "the laws of the state are based on natural laws", laws which are valid also at this moment, positive law being founds on natural law.

In Romania, different authors defined liability and legal liability and the relation between them. Thus, M. Florea consider that "a responsible individual is in direct relation with the norms and the values of a society actively and consciously and does not find in a situation of "blind" subordination and non-understandable obedience towards the law" (Florea, (1976): 20). For Nicolae Popa, the liability represents "assuming" the liability for the results of the social actions of the individual. The social action is the direct frame of the liability, and the liberty is its fundamental condition (Popa, (1993): 115).

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Nevertheless, N. Popa considers that liability is different from responsibility by the fact that the first is not an internal dimension of the person, does not derive from a relation instituted between the individual and people around him freely and with no other interests, but it is a phenomenon that collective authority, most of the times institutionalised under the form of norms, attributes to the individual who supports this phenomenon as something from the exterior, sometimes accepted as an obligation without any desire in this sense (Popa (1993): 115), and consequently liability and responsibility are complementary but different phenomena, a perfectly valid thing both for the social approach of the two notions and for the legal one.

The specialty literature present more complex approaches of the correlation between liability and responsibility, for example the work of D. Gusti is applicable both for the legal and for the social sense that we present in this paper. D. Gusti considers that liability is the moral and soul attitude through which, we understand to justify with dignity the reasons which determined us to produce them and to assume all the consequences (Gusti, (1989): 209). The same author considers that the term of liability has two approaches, and consequently a double aspect. The first aspect refer to the objective character in relation to the liability we have towards organised sanctions of the laws or towards the diffuse sanctions exerted on us by the constraints of public opinion and the second aspect has a subjective character referring to the liability that we feel towards the sanctions of our own consciousness, the ones which manifest under the form of private discontent, that of not having fulfilled the right thing or under the form of certain reprimands of own "self" (Gusti, (1989): 117).

M. Ralea considers that "the law is particular to each society, being its guardian and conservator" (Voinea, (1997): 96). These issues confirm the geo-national character of the science of law, idea that we share as a result of the documentation abroad.

In his theory M. Djuvara refer also to the legal personality indicating that: "legal personality crystallises on moral personality, and a moral personality manifests as such in contact with the others through legal personality" (Gusti, (1989): 193).

Moral personality has such a moral activity in the sense of the rational trend to follow the achievement of an ideal that each individual forms on the world. The legal relation cannot exists but between two personalities (Gusti, (1989): 194).

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The morality of legal liability appears thus as a wide concept but insufficiently treated by the doctrine from the point of view of the theory. Moreover, the lack of practical attitudes so used in the field of sociology, psychology and politology, locate us, from scientific point of view, on a land where to few people studies the complexity of the entire phenomena and where nobody has described yet the principles and the directions which define the modality of inter-relationing and multidisciplinary completion.

Another Romanian doctrinarian, Gh. Mihai, considers that liability is the "essential quality *sine qua non* of the individual who knows thyself and the others and agent of the action", irrespective of its forms. According to his theory, the liability derives from responsibility, the legal liability being the consequence of having responsibly committed a legal action (Mihai, (2006): 33).

M. Elienescu appreciates the liability as "a social fact which resumes to the reaction raised by an action that the society considers punishable" (Elinescu, (1972): 5).

Professor Gh. Mihai shows that "liability derives from responsibility, the legal liability being the consequence of having responsibly committed a legal action. Attracting the legal liability is the consequence for having committed an illegal action, meaning the breach of a legal disposition – hic et nunc – through a concrete behaviour and namely il full consciousness" (Mihai, (2006): 34), speaking about cause – effect relation. According to the same author, the liability is "an attribute of the personality" and can be assigned to an "autonomous individuality" (Mihai, (2006): 35). For a personality who is not capable to know thyself (illiterate, idiot) or does not know enough thyself (the child) and in other situations, the liability is discussable. An analogy can be made with the case of those who have legal personality (the state in relation to other states or citizens (Mihai, (2006): 35). As in the case of Hart and Leo Strauss for example, the Romanian author notes the connection between the concept of personality and that or liability, while the concept of person is related to the concept of liability. Thus, the relation liability – responsibility is one of subordination.

The relation between liberty and liability was treated also by Mircea Djuvara who started from the premise according to which "a person can be held responsible for a certain action if the latter was made under no constraint, as a free action, being the product of free will,

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otherwise the individual cannot be held responsible" (Djuvara, (1930): 146). The free action of the individual is the one performed after judging on it, judgment that works normally. If the will is not free, it cannot raise issues related to the law or liability (Djuvara, (1930): 146).

Referring to the international contribution of the theoreticians from the field of legal liability, Professor H.L.A. Hart shows that the use of the term of legal liability does not have a descriptive function, but one "assuming or attribution of the liability for the actions performed" being an expression that the jurists work with (Hart, (1968): 173). The same author makes a distinction between the terms of liability, responsible and responsible for, identifying four meanings of the notion of liability:

- The liability deriving from a certain role
- Caused liability
- Responsibility
- The ability to respond (Vrabie, Popescu, (1993): 136).

In his theory, Professor H.L.A. Hart establishes the relation between legal liability and moral blaming, but explains the difference between the two forms of liability consisting of the difference of content between legal and moral norms. He is also the one who notes that legal liability intervenes as something wrong was done, while moral liability intervenes when something good was not done. According to the author, moral liability has a wider sphere than the legal one, the individual being obliged to answer from moral point of view outside the sphere of legal responsibility. The scope of moral liability is not to discourage the wish to make bad, but especially to stimulate the wish to make good (Hart, (1968): 226). For H.L.A. Hart, a responsible person is a free person, capable of moral or legal liability (Hart, (1968): 124). According to the theory of Professor Hart the word "liability can mean also the fact that the person complies with the conditions" (of understanding, decision, option – psychological conditions) in order to be held responsible. Professor Hart has an important contribution in relation to the study of criminal liability and criminal punishment (Hart, (1968): 124).

Another author – Hans Kelsen – is the creator of pure doctrine of law and a representative of legal positivism. He considers that an individual is obliged from the point of view of the law to behave in certain way if the contrary behaviour constitutes the condition of a coercive act (as sanction) (Kelsen, (2000): 155). He underlines that "only individuals can be held responsible from moral and legal point of view" (Kelsen,

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(2000): 127). Thus, "lifeless things, nature phenomenon or animals cannot be held responsible as moral and legal order impose only human behaviours; these behaviours are imposed because one supposes that the idea of norm causes volition acts only in the case of humans who, at their turn, lead to the behaviour required". Nevertheless, this coercive act, the sanction, can be addressed against another individual who is in a relation established by the law with the criminal (forced individual and responsible individual and not identical). Kelsen considers that the individual must behave according to the law and is held responsible in case he behaves otherwise. Through his behaviour, the individual can attract or avoid the sanction. The one who responds for the non-compliance of other individual's duties cannot attract or avoid a sanction through his behaviour (Kelsen, (2000): 155). For Kelsen, the issue of moral or legal liability is essentially related to that of reward, and the reward is the attribution of the recompense for merit, of the atonement for the sin, of the punishment for the felonies committed (Kelsen, (2000): 122).

In order to arrive to liability, a concrete fact must exist to comply with the conditions required by the legislative in order to attract disciplinary, material or criminal liability. According to the definition given by Nicolae Popa and his collaborators "the legal act represents a circumstance which has legal effects and creates, modifies or affects legal relations" (Popa, Eremia, (2005): 284). The legal act is part of social acts being related to legal consequences. The act is a willing action being the result of an action committed by an individual. There are also natural acts called events which take place irrespective of legal law (birth, death and others). The legal acts are concrete basis of subjective law. Legal obligations derived from moral duties being in strong connection with the common law of archaic communities (Mihai, (2006): 167).

At the beginning of 1974, Mircea Costin showed the existence of a "extrajudicial liability which can have a moral nature when behavioural norms are breached or a political one when the person who fulfils a political activity breaches duties with political character and namely political norms" (Costin, (1974): 15).

The history of legal liability looses together with time, some authors (Ceterchi, Craiovan, (1993): 107) noting that legal responsibility existed even in primitive times. At that time, the individual was held responsible directly and immediately, most of the times by force directly proportional with the loss.

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There are certain sciences of the individual such as psychology, sociology and policy that can serve to the law as auxiliaries (Terre, (2006): 22). Generally, in the study of law one avoids the study of the relations between law and policy (the political sociology or constitutional law study these relations) as it is considered a delicate and complicated subject from scientific point of view. For the Marxists the law is subordinated to policy and to economic infrastructure, fact which is confirmed by the legal determination of the state's competences. In Antiquity, the research of political essence and of the legal one had a common scope; later, they separated and the policy had no direct connection with the legal. Also later the policy was considered the social activity intended to be defended by means of force, generally established by the law guaranteeing interior and exterior order within a state. Kelsen considered that Christian moral "was not about a moral order without sanctions, but a moral order establishing transcendent sanctions" (Terre, (2006): 38). In Kelsen's vision, the moral applies sanctions in the social field under the form of disapprovals, blaming or even social isolation of moral delinquents. These sanctions are more efficient and at the same time more effective than other ways of punishment, as they "affect that instinct that pushes the individual to be appreciated by another one, being one of the most important components of the conservation instinct". It is called sanction only the punishment, meaning the evil consisting of the deprival of liberty, property or life. As coercive normative order, prescribing human behaviours, the law associates to opposed behaviour actions of constraint directed against those might adopt them (Terre, (2006): 39). Thus, the actions of constraint represent evil actions that must be caused to the person who breaches the law, even against his will and using physical force if required. From psychological point of view "the individual imagines through the memory and imagination, the feelings of other individuals and resents thus the sympathy that leads to the loss of interest"; the individual will follow scopes that seem to value themselves without any reference to his being" (Berceanu (1995): 56).

In a given society, the norms that govern the society and its order are not all of them norms of law (social, moral and religious norms) (Terre, (2006): 23). Among these norms there are living rules, respect norms, eating rules, common law rules, etc. The honour is not a concept of law, but its violation becomes one. The pluralism of norm of behaviour complicates the distinction between norms of law and other social norms

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and orders with social character (Terre, (2006): 25), fact that entitles us to study the dimensions of legal responsibility.

In conclusion: political, legal and social-economical changes that characterize this transition period of Romanian society found in full process of adoption and implementation of Community acquis of European Union, had strong consequences on entire Romanian social system. The perception of the individual in relation to his rights and liberties was modified together with the liberties of the individual certified and guaranteed by the statute of European citizen. This statute attracted a change of the social structure and especially of the way of perception of social liability and responsibility of the individual, together with the issuance of a new system of incrimination of the violations of the laws imposed by the legislative.

The moral of the legal liability of the individual suffered thus strong changes that reflect both at personal and at social level as reality of a social structure and of a social climate in which we co-exist.

Frequent amendments of the law, doubled by the adoption of an European legislative pack with impact on the entire society determined these fluctuations which at a concrete analysis, under the aspect of identification not only of the factors that determine the changes of the way to perceive the morality of liability, but also of the directions that can be used in order to influence the behavior of an individual, are key elements that represent the basis of this theoretic study.

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