Legal Liability from a Threefold Perspective. General Aspects

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Abstract: This paper aims at approaching general issues regarding the legal liability, starting from the principle of responsibility in the field of General Theory of Law to the legal liability under national law, public international law and European Union law. Legal liability under national law does not exhaust the subject, as the liability of states can be engaged at the level of international society – Draft articles of 2001 prepared by the International Law Commission within the United Nations, but also the liability of intergovernmental organizations – Draft articles of 2011. A controversial aspect, both at the normative level and at the doctrinal level, remains the international legal liability of the individual – natural person. The legal liability under the European Union law falls mainly to the states for the failure to fulfil their obligations according to the Union law, by means of the infringement procedure, other types of legal liability existing also at the level of the Union. In order to strengthen the concept of legal liability, in the light of the aspects promoted by the European Union, a special role was played by the European Commission, whose main mission was to ensure the application of and compliance with the European Union law, and the Court of Justice of the European Union by its extensive case-law.

Keywords: responsibility-liability; social liability; legal liability; moral liability; religious liability; national law; international law; state liability; liability of international organizations; war crimes; crimes against humanity; genocide, European Union law – a new legal typology; infringement procedure; action for annulment; action for failure to take action; preliminary rulings; the relationship between national law – international law – European Union law

1. Introduction

Responsibility or liability? Do the two terms have the same meaning, designate the same notions, can they substitute for each other or, in fact, do they designate different notions, each having its own independent meaning? Where does responsibility begin and where does liability intervene? What does the notion of responsibility include? What about the notion of responsibility? Are there several types of liability – civil liability, criminal liability, administrative liability, disciplinary liability? Does the liability concern only the facts of natural and/or legal persons? Are the states liable? Who involves the liability of states? Can liability be analyzed from a threefold perspective – liability under national law, liability under international law, liability under European Union law? Is European Union law a new legal typology? Are there several types of liability at the level of the European Union? What are the conditions and cases in which a State's liability under European Union law can be incurred? And we could continue with such questions that we have certainly asked ourselves and that we all have tried to answer during the study of legal sciences.

By this paper, we intend to provide these answers, and if we do not find a specific answer, with subject and predicate, at least we can try to clarify certain aspects that could lead us to and/or delineate/shape an answer and/or an opinion.

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2. Content

2.1. General Aspects

At first sight, we might be tempted to say that responsibility and liability have the same meaning, both in the common language, as well as in the legal language, specific to those studying legal sciences.

In this regard, several opinions have been stated in the specialized legal doctrine, and we will present below only a few of them.

Thus, as regards the two terms, Professor Nicolae Popa concludes that "Although traditionally, the concept of responsibility has been absolutely placed in the field of morality, newer research highlights the need to outline this concept also in the field of law. (…) Liability is a social fact and is limited to the organized, institutionalized reaction triggered by an act considered reprehensible; the institutionalization of this reaction, its fitting within the legally determined limits are necessary, since liability and sanctions are not (nor can be) in any case forms of blind revenge, but ways of legal reward (one good turn deserves another! – according to the people), of repair of the violated order, of reintegration of a damaged heritage and of social defence" (Popa, 2020, pp. 260 – 261).

Following the analysis of the two concepts, Professor Mihai Bădescu concludes that "liability and responsibility are not two phenomena with complementary spheres (i.e. where the force of liability ceases, the field of exercise of responsibility begins). Therefore, *liability* and *responsibility* are not phenomena that manifest themselves separately, but are *simultaneous* and, under certain conditions, *unitary*: they are two dimensions of social agents that intertwine, interconditioning each other, in different ways" (Bădescu, 2020, p. 338).

After having read the opinions indicated above and not only, we can conclude that the notion of responsibility is much more comprehensive than the notion of liability.

Responsibility can be translated as similar to the conscience of each individual who, in the society, must respect the rights and freedoms of others, and the exercise of his rights and the execution of his own obligations must not be such as to violate those of other individuals in the society, which is why in case of such non-compliance, it must be punished by holding the offenders liable by imposing sanctions.

Thus, as can be seen, we can use three terms, respectively: responsibility – liability – sanction.

Therefore, responsibility supposes the conscious assumption by the individual that his actions and/or inactions falling within the scope of the wrongdoing may have certain legal consequences on his fundamental rights and freedoms and/or on his goods, and yet he continues and deliberately seeks to successfully complete his illicit activity and/or inactivity.

At the same time, we must not ignore the fact that, in the spirit of this responsibility, most individuals in the society comply with the rules of the society, observing them and willingly giving them effect.

It must be recalled that "the rules of conduct in the society are of different nature, so that social liability is of several types: legal liability, moral liability, political liability, religious liability etc." (Pop, Popa & Vidu, 2015, p. 300).

The legal liability, which we will mainly consider, targets the institutionalized reaction to illicit acts by means of the state bodies competent in this regard, so as to ensure the restoration of the rule of law, as well

as to establish whether or not the conditions of legal liability are met by those who committed the illicit acts, resulting in the application of the appropriate sanctions, if the case may be.

To the extent that all legal conditions of the related legal liability are determined to be met – civil, criminal, administrative, disciplinary liability etc. – the third element mentioned above, respectively the sanction, intervenes.

The sanction, which can take different forms depending on the area of the legal liability on which we are, has the role of punishing the person who is guilty of committing an antisocial act, but also the role of discouraging those who would be have been tempted at some point or are still tempted to commit an illegality, thus ensuring the necessary balance in society in order to guarantee, exercise and protect the fundamental rights and freedoms, as well as their coexistence in a climate of honesty, honour and justice.

In conclusion, although there are similarities and differences between the two notions, responsibility covers a wider scope than the scope of liability, while liability requires that certain specific conditions be met, we could even assert that responsibility involves liability but is not limited to it, the two notions are not mutually exclusive and are not complementary phenomena.

2.2. General Aspects Related to Legal Liability under National Law

The passage of time faces and recognizes an evolution of the legal relations and relationships that arise, change and end in the society, as well as their diversity, so that four main types of liability are enshrined in national law, namely: civil liability, criminal liability, administrative liability and disciplinary liability.

According to the specialized doctrine, the civil liability is "one of the most important concrete manifestations of the legal liability. (…) As far as we are concerned, in relation to the relevant regulations of the new Civil Code, we consider that civil liability means the legal relationship of obligations in which a person, referred to as the liable person, is obliged to repair the wrongful damage suffered by another person, referred to as the victim or injured person" (Pop, Popa, & Vidu, 2015, p. 301).

According to the provisions of the New Civil Code, the civil liability is divided into tort civil liability and contractual civil liability, the seat of the matter being represented by articles 1.349 – 1.395 of the New Civil Code.

The tort civil liability is in its turn classified into: (a) liability for one's own act, (b) liability for the act of another – respectively for the act of the minor or the interdicted person and for the act of the agent, (c) liability for the damage caused by animals or things and (d) liability for the ruin of the building.

Contractual civil liability occurs whenever, following the conclusion of a legal transaction, one of the parties does not execute its obligations or executes them improperly or executes them late, thus causing damage to the other party, damage that must be fully repaired.

"Criminal liability, as a form of legal liability, is the immediate consequence of the commission of a crime, which materializes by the application of a criminal sanction. Specifically, criminal liability is the means by which the society reacts to persons who violate the rule of criminal law and derives from the commission of a crime" (Dima, 2014, p. 706).

According to art. 15 of the New Criminal Code, par. (1) "The crime is the deed provided by the criminal law, guiltily committed, unjustified and imputable to the person who committed it", par. (2) "The crime is the sole basis of criminal liability."

Criminal law sanctions are classified into three broad categories, namely: (1) penalties, (2) security measures, and (3) educational measures.

The specialized doctrine defines the administrative liability as "that form of legal liability which is incurred when the rules of administrative law are violated, by committing an illegal act, action or inaction or act of commission or of omission, generically called *administrative offence*" (Ștefan, 2012, p. 152).

We understand here only to mention about the administrative-disciplinary liability, the administrative-patrimonial liability and the contravention liability.

Disciplinary liability is the form of legal liability which "intervenes only in the case of a disciplinary offence qualified as such by rules of public law, therefore in public law relationships, the active subject is a civil servant and the passive subject is the authority or institution in which he works, the procedures for finding, applying and appealing disciplinary sanctions are subject to special rules" (Ștefan, 2014, p. 190).

According to art. 247 par. (2) of Law no. 53/2003, "the disciplinary offence is an act related to the work and which consists in an action or inaction guiltily committed by the employee, by which he violated the legal norms, the internal regulation, the individual employment agreement or the applicable collective employment agreement, the orders and the legal provisions of hierarchical leaders."

It must be recalled that there are other forms of specially regulated disciplinary liability such as the disciplinary liability of lawyers, magistrates, bailiffs, notaries public and judicial experts etc.

Without exhausting the sphere of legal liability under national law, in the above we tried to review the main forms of legal liability under Romanian law and to mention some general aspects regarding each of them, their detailed analysis being the subject of distinct papers.

We note that "in principle each branch of law knows a specific form of liability" (Popa, 2020, p. 265) of which we only mention by way of example: legal liability of a political nature, state liability for damages caused by judicial errors – Law no. 303/2004, liability for damages caused by product defects – Law no. 240/2004, liability for ecological damages – Government Emergency Ordinance no. 195/2005 and in particular Government Emergency Ordinance no. 68/2007, medical civil liability – Law no. 95/2006 etc.

2.3. General Aspects Related to Legal Liability Under International Law

But is legal liability limited to the liability under national law? The answer to this question is a negative one, legal liability is not limited to the liability under national law.

At the beginning of this paper, we evoked the legal liability under international law, as well as the legal liability under the European Union law, in addition to the legal liability under national law.

When does legal liability intervene in international law? What are the subjects of international liability? What conditions must be met in order to enforce the international legal liability? These are only some of the questions that we will try to answer below, presenting relevant general aspects related to legal liability under international law.

International law is divided into public international law and private international law. When we talk about *international law* we refer to public international law. In this paper we have not developed aspects of private international law.

The stakeholders in the field of public international law are*:* sovereign states (main subjects of public international law), intergovernmental organizations (derived subjects), Vatican and the Sovereign Military Order of Malta, participating entities (peoples and national liberation movements, international non-governmental organizations, transnational corporations and the individual – natural person).

There is a doctrinal controversy regarding the individual – natural person, whether or not he is the subject of public international law, the opinions being divided.

Some authors consider that he could be recognized as a subject of public international law as long as he can refer alone to international courts, as well as by virtue of the fact that he is the direct addressee of certain rules of public international law.

On the other hand, other authors consider that the individual – natural person is not a subject of public international law, being only an *actor* in the international society, a mediated beneficiary of some rules of international law, lacking independent and own international legal capacity.

Thus, the issue regarding the capacity of the individual – natural person of being or not a subject in the public international law has not been clarified yet.

Two types of liability are enshrined in the international legal order, namely the liability of states and the liability of intergovernmental organizations.

The constituent elements of international legal liability, both in the case of states and in the case of intergovernmental organizations, are: (1) unlawful conduct (internationally wrongful act – action and/or inaction) consisting in the violation of certain rules of international law and (2) the imputability of the unlawful conduct to a subject of international law, respectively to a state or an intergovernmental organization.

At the level of public international law, just like in the national law, there are exonerating causes of liability, namely: (a) the victim's consent, (b) self-defence, (c) countermeasures, (d) force majeure or fortuitous event, (e) the state of danger and (f) the state of necessity.

The second constituent element that must be fulfilled in order to engage the legal liability of the state in the field of international law is the imputability of the unlawful conduct.

Thus, the following are attributable to the state:

(1) "the acts of any state bodies (authorities) without distinction – legislative, executive, central or local courts [art. 4 par. 1 of the Draft Articles];

(2) the acts of persons or entities that are not state bodies, but are empowered by the law of the respective state to exercise the elements of governmental authority, if the persons or entities have acted in this capacity in the given situation (art. 5);

(3) the acts of a body of another state made available to it by that state, if the body acts in the exercise of the elements of governmental authority of the state for which it was made available (art. 6);

(4) for the acts of one of its bodies or of a person or entity empowered to exercise elements of governmental authority, even if they act, in this capacity, going beyond their attributions or going against the instructions (art. 7);

(5) the acts of a person or group of persons if the person or group of persons acts based on instructions or under the guidance or control of the respective state (art. 8);

(6) the acts of persons or groups of persons who in fact exercise attributes of governmental authority in the absence or in case of non-fulfilment of the attributes by the official authorities and in circumstances that require the exercise of such elements of authority (art. 9);

(7) the acts of an insurrectionary movement which forms the new government (art. 10);

(8) in situations where – in the cases mentioned in the previous letters – not all the conditions of imputability are met, but the state confirms and assumes the respective acts as its own (art. 11)" (Năstase, Aurescu, & Jura, 2009, pp. 413 – 414).

It should be noted that the state is not internationally liable for the acts of individuals, "however, the liability of the state may be engaged, by omission, in cases where its bodies have not taken the usual steps of diligence for the prevention of an unlawful act, the identification and punishment of the perpetrator" (Miga-Beșteliu, 2014, p. 38).

Also, in the case of insurgency acts, it should be noted that the liability of the state intervenes depending on the outcome of the events, therefore if the acts of insurrection were *suppressed* the state will be liable only for the acts attributable to its agents, not for the acts of the insurgents, and if the acts of the insurgents were successful, the new government will be liable for all acts committed during the insurrection, including for those of the previous authorities.

The liability of the concerned states is incurred by the injured states (one or several), the liability consisting mainly in the cessation of the unlawful conduct and the repair of the damage caused, requests which may be the subject of a notification for which no particular form is established, but which must expressly mention the unlawful conduct which it must end, as well as the manner in which the suffered damage must be repaired.

As regards the settlement of disputes which may arise between states in the international society, we must recall the principle of non-recourse to force or the threat of force and the principle of the peaceful settlement of international disputes.

The methods of peaceful settlement of disputes fall into three categories: (1) political and diplomatic methods, namely negotiations, good offices, mediation, international investigation and conciliation, (2) judicial methods, namely arbitration, the International Court of Justice[2] and other international jurisdictions and (3) agreements or regional bodies.

The main jurisdiction of the International Court of Justice, located in The Hague, is the settlement of disputes with which it has been vested by the Member States and the issuance of advisory opinions on matters referred by duly authorized bodies.

The International Court of Justice must not be mistaken for the International Criminal Court!

[2] https://ro.wikipedia.org/wiki/Curtea_Interna%C8%9Bional%C4%83_de_Justi%C8%9Bie.

Also known as the *International Criminal Tribunal*, the International Criminal Court[3] is a permanent international court of justice located in The Hague, its main jurisdiction being to prosecute individuals accused of crimes of genocide, war crimes and crimes against humanity.

In this regard, we must recall the *Nuremberg Trials*, famous for the fact that important members of the political, military and economic leadership of Nazi Germany were indicted during them. The trials took place between 1945 and 1949 in the city of Nuremberg, Germany, in Nuremberg Palace of Justice[4].

The International Military Tribunal for the Far East, also known as the *Tokyo Trial*, was a military trial convened on April 29, 1946 to prosecute the leaders of the Empire of Japan for a joint conspiracy to start and wage war (categorized as "Class A" crimes), conventional war crimes ("Class B"), and crimes against humanity ("Class C").[5]

We also mention the International Criminal Tribunal for the former Yugoslavia[6] among the most reverberating disputes settled by this tribunal are that of former Yugoslav President Slobodan Milošević [7] (charged with crimes against humanity and a grave breach of the Geneva Conventions) and of Croatian generals Ante Gotovina, Mladen Markač and Ivan Čermak.[8]

We also mention the International Criminal Tribunal for Rwanda, which was an international court established in November 1994 by the United Nations Security Council in the Resolution 955, to try the persons responsible for the Rwandan genocide and other grave breaches of the international law in Rwanda or by Rwandan citizens of neighbouring States, from January 1 to December 31, 1994. [9]

At the level of international law, the *Draft Articles of 2001* on the Responsibility of States and the *Draft Articles of 2011* on the Responsibility of International Organizations were drafted by means of the UN International Law Commission.

2.4. General Aspects Related to Legal Liability under European Union Law

Is the European Union law a new legal typology? Why, when and how can the liability of a Member State of the European Union be engaged? Are there several types of legal liability at the level of the European Union? What sanctions can be applied to the states that do not comply with their obligations as Member States of the European Union? These are just a few questions that we will try to answer.

The European Union has its own legal order, distinct from that of the Member States, "in a broad sense, the legal order of the European Union is given by the set of rules governing the legal relationships in which the Union participates. In a narrow sense, this legal order represents the relationships between the European Union and the Member States, the relationships between natural and legal persons belonging or not to the Member States, the relationships between the European Union and other international organizations" (Fuerea, 2011, p. 137).

Is the European Union law a new legal typology?

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[3] https://ro.wikipedia.org/wiki/Curtea_Penal%C4%83_Interna%C8%9Bional%C4%83.
[4] https://ro.wikipedia.org/wiki/Procesele_de_la_N%C3%BCrnberg.
[5]https://ro.wikipedia.org/wiki/Tribunalul_Militar_Interna%C8%9Bional_pentru_Orientul_%C3%8Endep%C4%83rtat.
[6] https://ro.wikipedia.org/wiki/Tribunalul_Penal_Interna%C8%9Bional_pentru_fosta_Iugoslavie.
[7] https://ro.wikipedia.org/wiki/Slobodan_Milo%C5%A1evi%C4%87.
[8] https://www.icty.org/x/cases/gotovina/tjug/en/110415_summary.pdf.
[9] https://en.wikipedia.org/wiki/International_Criminal_Tribunal_for_Rwanda.

At the doctrinal level, according to the dependence on the typology of social organization systems, based on the criterion proposed by J. Poirier, the legal systems are classified as follows: slave law, feudal law, bourgeois law and socialist law (Popa, Anghel, Ene-Dinu & Spătaru-Negură, 2017, p. 40).

According to the criterion proposed by René David on the affiliation of the law to a pool of legal civilization, there are several families of law, namely: (a) the Romano-Germanic family, (b) the Anglo-Saxon family, (c) the family of socialist law, (d) the family of Muslim law, (e) the family of Hindu, Chinese, Japanese law, and (f) the family of black African and Madagascar law.

According to the specialized doctrine, "in order to be able to speak of a new legal typology, the following are necessary:

- the existence of an autonomous will that commands the legal decision-making process, a will that does not represent a simple sum of the individual wills of the states,
- the existence of basic requirements commanding the community legal order" (Popa, Anghel, Ene-Dinu, & Spătaru-Negură, 2017, p. 78).

Likewise, in the specialized doctrine it was emphasized that, "the European Union law represents a new legal typology from the perspective of the theory of law and can be defined as the specific legal order, having autonomous and unitary character, integrated in the legal system of the Member States, grouping all the legal rules contained in the treaties of the European Union, as well as in the acts of its own institutions which have been adopted in application of the treaties and issued on the basis of a specific procedure" (Spătaru-Negură, 2016, p. 240).

The liability of states in the European Union law is not to be confused with the liability of States in the public international law, as the liability under the European Union law concerns the legal relationships between the States and the European Union, following the acquisition of its status as a Member State, while the liability of states in the public international law is engaged through the enshrined international relations between the subjects of international law within the international society.

Below we will review the main forms of liability of the Member States of the European Union, such as:

- the liability of the states for not fulfilling their obligations (art. 258 - 260 TFEU);
- the liability of the states for violating the obligation of loyal cooperation - art. 4 par. (3) TEU - relevant in Case C-391/17 European Commission v. United Kingdom of Great Britain and Northern Ireland[10];
- the liability of the states for violating the principles of the rule of law (art. 2 and art. 7 TEU) [11];
- Joined Cases C-83/19, C-127/19, C-195/19, C-291/19 and C-355/19[12];
- the liability of the states for violating human rights as enshrined in the Charter of Fundamental Rights of the European Union[13] - Case C-396/11[14];

[10] https://eur-lex.europa.eu/legal-content/RO/TXT/PDF/?uri=CELEX:62017CC0391.
[11] https://eur-lex.europa.eu/legal-content/RO/TXT/PDF/?uri=CELEX:52020DC0580&from=EN.
[12]https://eur-lex.europa.eu/legal-content/RO/TXT/?uri=CELEX%3A62019CC0083&qid=1609248825351.
[13] https://www.europarl.europa.eu/factsheets/ro/sheet/146/protectia-drepturilor-fundamentale-in-ue.
[14] https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62011CC0396:RO:HTML.

- the liability of the states for the systemic and persistent violations or generalized practices, in this sense we indicate the proposal of the European Commission to the European Parliament and the Council from 2014[15];
- the liability of the states for the incompatibility of the treaties concluded by them under the European Union law (art. 351 TFEU)[16] [17];
- the liability of the states for the improper application of the European Union legislation[18].

Romania is represented by the governmental agent before the Court of Justice of the European Union, as well as before the Court of Justice of the European Free Trade Association, the seat of the matter being represented by the Government Emergency Ordinance no. 11/2017, Law no. 248/2017 and the Decision of the Romanian Government no. 16/2017.

The seat of the matter regarding the liability of the states for not fulfilling the assumed obligations, *the infringement procedure*, can be found in art. 258 - 259 TFEU by which the European Commission and the states can claim the violations of the legislation committed by the Member States, the sanctions being of pecuniary order according to art. 260 TFEU.

Besides the liability of the Member States for not fulfilling their obligations, at the level of the European Union we also encounter the contractual liability of the Union - art. 46 TEU[19]/art. 340 TFEU[20] and extra-contractual liability, respectively the liability of agents towards the European Union corroborated with art. 11 of the Protocol no. 7 on the privileges and immunities of the European Union, the liability of the institutions of the European Union by means of the action for failure to take action (art. 265 TFUE) and the action for annulment (art. 263-264 TFUE).

In conclusion, in this section we approached *responsibility - liability* from the perspective of European Union law – *a new legal typology*, in which the most common cases of liability are related to the states for the non-fulfilment of obligations, such as: lack of transposition, late transposition, incorrect or incomplete transposition, failure to communicate measures transposing directives and/or inadequate application of the European Union law etc.

The European Commission has a defining role in ensuring the application and observance of the Union law, as well as in reporting violations, the sanctions being ordered by the Court of Justice of the European Union.

3. Conclusions

The concept of legal liability involves an analysis from a threefold perspective, namely: legal liability under national law, legal liability under public international law and legal liability under European Union law.

The legal liability under national law is incumbent upon the natural and/or legal persons, and its main forms are: civil liability, criminal liability, disciplinary liability and administrative liability.

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[15] https://ec.europa.eu/info/sites/info/files/rule_of_law_factsheet_toolbox_ro.pdf.
[16]https://www.juridice.ro/373599/cateva-clarificari-legate-de-interactiunea-dreptului-uniunii-europene-si-alte-tratate-internationale-prin-prisma-cazului-micula-v-romania.html.
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There are other forms of legal liability under national law, the specialized doctrine stating the idea that each branch of law has a specific liability.

The constituent elements common to the above-mentioned forms of legal liability consist of unlawful conduct manifested through an action and/or inaction, causing damage and the causal link between the unlawful act and the damage caused.

Within the international society, we encounter the public international law and the private international law, this paper approaching issues related to public international law, also known as *international law*.

International law regulates the legal liability of states, as well as the legal liability of international organizations, a normative and doctrinal controversy existing regarding the legal liability of the individual – natural person.

The liability under international law must not be mistaken for liability under European Union law.

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