

The cover features a futuristic cityscape with a prominent glass capsule in the foreground. The capsule has a white top with a red stripe and a black panel with the word 'Ursula' and a star symbol. The background is a dense urban landscape with a river. The top half of the cover is overlaid with a geometric pattern of overlapping triangles in shades of blue, purple, and teal.

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PHENOMENON OF POSITIVE LIABILITY: CRITICAL ANALYSIS

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Abstract

The article criticizes the existing scientific views on the concept of positive legal responsibility. Their followers believe that liability is a type of social responsibility and can be not only retrospective but also positive. In this regard, there are sufficient grounds for emphasizing and consolidating the concept of "positive legal responsibility" in science and law. The authors of the article substantiate the opposite view that the introduction of the concept of "positive legal responsibility" into scientific use, legislation and law enforcement can confuse and create difficulties in both legal understanding and law enforcement. The article analyzes cons, weak spots and contra-dictions of the above-mentioned approach. The authors argue that the positive aspect of social responsibility is its scientific abstraction from morality, psychology, pedagogy, sociology and philosophy that has roughly the same meaning in all spheres of social life and there is no reason or ground to materialize it and divide into types, including in the field of law. While considering the debatable issue of "positively responsible" behavior and its boundaries, the authors have concluded that this concept does not include the subject's behavior that complies with legal requirements but violates other social norms.

Keywords

Social responsibility – Positive social responsibility – Liability – Liability types – Positive liability

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Introduction

It has been relatively recently that the concept of two aspects of legal responsibility and two forms of its implementation has been formed and gained popularity in the general theory of law. While regarding legal responsibility as an integral legal phenomenon, its supporters still complement the so-called "traditional" (retrospective or negative) type of legal responsibility arising in response to an offense with a positive (prospective) type. The latter consists in the legal obligation of citizens to comply with and fulfill the requirements of legal norms, which is expressed by their lawful behavior approved and encouraged by state (D.A. Lipinskii, R.L. Khachaturov, A.V. Malko, Yu.M. Savelev, etc.)¹. Foreign scholars also support this approach (D. Carbe-Chalon)².

Supporters of positive legal responsibility developed and published the Draft Concept of Legal Policy in the Field of Legal Responsibility in 2015³. This document reflects the fundamentals of this theory, the position of its supporters, the nature and essence of positive legal responsibility.

However, advocates of this theory note that legal science has not reached consensus on the phenomenon of positive legal responsibility (E.V. Loshenkova, D.A. Lipinskii)⁴. There are different approaches to defining both a general concept and corresponding sectoral sub-concepts. Some jurists understand positive legal responsibility as an obligation to comply with the rule of law, behave lawfully and not commit any offenses (B.T. Bazylev)⁵. Others associate it with a sense of duty or a sense of responsibility (V.G. Smirnov)⁶. The third group of legal experts analyzes positive legal responsibility through a positive state reaction to lawful behavior expressed in the application of incentives or the non-application of sanctions (restrictions) (A.V. Malko, V.V. Nyrkov)⁷. The fourth group connects it with legitimate behavior (N.M. Kropachev, V.S. Prokhorov)⁸. The fifth group of jurists regards positive liability as a legal relationship, whose parties are endowed with mutual rights and obligations, including the right to

¹ D. A. Lipinskii. Problemy yuridicheskoi otvetstvennosti (Saint Petersburg: Izd. "YurTsentrPress". 2004); Yu. M. Savelev, "K voprosu ob aktualnosti pozitivnoi yuridicheskoi otvetstvennosti kak formy realizatsii yuridicheskoi otvetstvennosti", Vektor nauki Tolyattinskogo gosudarstvennogo universiteta. Seriya: Yuridicheskie nauki Vol: 4 num 19 (2014): 91-94 y D. A. Lipinskii; V. V. Romanova y Repeteva, O. E., Institut yuridicheskoi otvetstvennosti: monograph (Moscow: INFRA-M, 2019).

² D. Carbe-Chalon y M. A. Rogoff, "Tort Reform À La Francaise: Jurisprudential and Policy Perspectives on Damages for Bodily Injury in France", Columbia Journal of European Law Vol: 13 (2007): 231-303.

³ A. V. Malko; D. A. Lipinskii; S. Yu. Sumenkov y O. S. Vyrleeva-Balaeva, Proekt kontseptsii pravovoi politiki v sfere yuridicheskoi otvetstvennosti (Moscow: RIOR, 2015)

⁴ E. V. Loshenkova, "Pozitivnaya yuridicheskaya otvetstvennost: est li dostatochnye osnovaniya dlya ee priznaniya?", Aktualnye problemy rossiiskogo prava Vol: 1 (2007): 437-444 y D. A. Lipinskii, "Kontseptsii pozitivnoi yuridicheskoi otvetstvennosti v otechestvennoi yurisprudentsii", Zhurnal rossiiskogo prava Vol: 6 (2014): 37-51.

⁵ B. T. Bazylev, "Sushchnost pozitivnoi yuridicheskoi otvetstvennosti", Pravovedenie Vol: 4 (1979): 40-46 y B. T. Bazylev, Yuridicheskaya otvetstvennost (teoreticheskie voprosy) Krasnoyarsk: Izd. Krasnoyarskogo un-ta, 1985).

⁶ V. G. Smirnov, "Ugolovnaya otvetstvennost i nakazanie", Pravovedenie Vol: 4 (1963): 78-89.

⁷ A. V. Malko, Stimuly i ogranicheniya v prave (Moscow: Yurist. 2004) y V. V. Nyrkov, Pooshchrenie i nakazanie kak parnye yuridicheskie kategorii (Saratov: Izd. SGAP, 2006).

⁸ N. M. Kropachev y V. S. Prokhorov, Mekhanizm ugolovno-pravovogo regulirovaniya: ugolovnaya otvetstvennost: Student's textbook (Saint Petersburg: Izd. SPbGU, 2000).

require proper behavior and the application of sanctions or incentives, which ensures a certain legal balance (A.S. Mordovets, N.I. Matuzov)⁹. The sixth group describes positive legal responsibility as a complex phenomenon that comprises both objective and subjective components and features (duty, awareness, lawful behavior and positive state reaction) (D.A. Lipinskii, V.V. Romanova, O.E. Repeteva)¹⁰. According to some scholars, positive liability is the right of citizens or civil institutes to hold state bodies and officials responsible for the performance of their functions and the realization of their social goals (V.A. Zatonskii, A.V. Malko)¹¹.

The above-mentioned concept has not received unambiguous approval and general recognition in legal science. Many jurists consider arguments in favor of the appropriateness and effectiveness of introducing the concept of "positive legal responsibility" and its sectoral sub-concepts into jurisprudence and even legislation as contradictory, obscure and unconvincing; therefore, this initiative causes serious objections (V.A. Tarkhov, V.K. Duyunov)¹²

The concept in question has certain drawbacks, controversial, unconvincing and ambiguous points; therefore, it should be subject to close consideration and critical analysis without any premature decisions.

Methods

The methodological base of this article comprises general and specific scientific methods of studying phenomena and processes of social life.

Throughout the study, we complied with the methodological principles and traditional techniques of complex scientific analysis, which generally contributed to the accuracy and reliability of the scientific results obtained.

Within the framework of the study, we used a set of specific scientific methods, including systemic-logical, formal-legal and logical-legal. In addition, we applied such methods as synthesis, analysis, comparison, induction and deduction.

To ensure the reliability of the results obtained during the study, we compared them with the data obtained by other scholars.

⁹ A. S. Mordovets, *Sotsialno-yuridicheskii mekhanizm obespecheniya prav cheloveka i grazhdanina* (Saratov: Izd. Saratovskoi VSh MVD RF, 1996) y N. I. Matuzov, "Obshchie pravootnosheniya i ikh spetsifika", *Pravovedenie* Vol: 3 (1976): 23-33.

¹⁰ D. A. Lipinskii; V. V. Romanova y O. E. Repeteva, *Institut yuridicheskoi otvetstvennosti...* 55-59

¹¹ V. A. Zatonskii y A. V. Malko, "Otvetsvennost publichnoi vlasti kak sposob povysheniya effektivnosti rossiiskoi gosudarstvennosti", *Vektor nauki Tolyattinskogo gosudarstvennogo universiteta*, *Spetsvypusk "Pravovedenie"* Vol: 1 num 1 (2008): 32-39 y V. A. Zatonskii, *Otvetsvennost publichnoi vlasti – neobkhodimyi element sodержaniya kontseptsii pravovoi politiki v sfere yuridicheskoi otvetstvennosti. Razrabotka proekta kontseptsii pravovoi politiki v sfere yuridicheskoi otvetstvennosti* (Moscow: RIOR, 2015).

¹² V. A. Tarkhov, *Otvetsvennost po sovetskomu grazhdanskomu pravu* (Saratov: Izdadelstvo Saratovskogo Universiteta, 1973) y V. K. Duyunov, *K voprosu o "pozitivnoi" ugolovnoi otvetstvennosti. Aktualnye problemy gumanitarnykh i obshchestvennykh nauk* (Samara: Izd. SaGA, 2002).

While working on this article, we consulted with the relevant sources on the above-mentioned issues and reflecting the current state of the general theory of law and its branches. At the same time, we conducted their comprehensive analysis and compared the results they present.

The concepts, terms and definitions used in this study required an etymological analysis to determine their nature and meaning.

To ensure the reliability and case history of theoretical provisions, we referred to the existing constitutional and sectoral laws. For the needs of objectivity and comprehensiveness, we considered scientific works in the field of law, sociology and philosophy written by Soviet, post-Soviet and modern scholars.

Results and discussion

We believe that the concept of positive legal responsibility has the following drawbacks:

1) The inconsistency of different concepts, the lack of a unified approach to their definition and their insufficient justification;

2) The lack of a clear idea about the boundaries of social responsibility, legal responsibility, criminal liability, etc. and the correlation of these concepts, as well as the distinguishment between "a person observing legal norms" and "a positively responsible person";

3) The lack of valid proposals on the effectiveness of the general concept of "positive legal responsibility" and its varieties, as well as the appropriateness of introducing them into the general theory of law, its branches, the current legislation and law enforcement practice;

4) The controversial position of jurists recognizing the so-called general regulatory relations that serve as the basis for adopting legal norms and give rise to special positive liability, which means that all citizens have legal obligations not to commit offenses. Controversial views on the relationship between prohibition and obligation as methods of legal regulation and limits of the normative "invasion" of state and law in social life; the exaggerated importance of regulatory norms in ensuring public order and tranquility.

Two presumptions formed theoretical prerequisites for the concept of positive legal responsibility. First, the category of "social responsibility" represents a broader concept of the "responsibility" doctrine and has both retrospective and positive aspects. Second, social responsibility can be divided into several types, including moral, religious, corporate, legal, etc. Being secondary types, they should also have a positive and retrospective form, i.e. two aspects of implementation. Another prerequisite for establishing the concept under consideration is the so-called general regulatory relations forming positive legal relations and positive legal responsibility.

However, we cannot agree with the above-mentioned interpretation and conclusions regarding these presumptions.

First of all, we need to distinguish between two concepts – "responsibility for misconduct" and "responsibility for a certain task". Dwelling on the positive aspect of social responsibility, R.L. Khachaturov wrote that it manifests itself in a sense of accountability for fulfilling a civic duty. To be socially responsible means to respect the interests of society, foresee the consequences of one's behavior and comply it with social norms. Thus, each individual as a member of society is accountable for their deeds to society¹³.

According to the rules of formal logic, the division of any object (phenomenon, process, event or concept) into constituent components requires a) sufficient grounds, b) an objective that justifies such division and c) adherence to the rules of logical classification. In this regard, positive and retrospective aspects are common to only the general sociological concept of "social responsibility". This division has sufficient grounds (positive or negative behavior of a person) and the real need for a fair assessment of the relevant behavior in the form of its approval or condemnation to encourage the first and prevent the latter.

The further division of positive and retrospective aspects of social responsibility into types has not been sufficiently studied and requires in-depth consideration.

In contrast to retrospective aspects, the general concepts of "social responsibility" and "positive social responsibility" are evaluative ("sensual") categories from the non-legal field (morality, psychology, pedagogy, sociology or philosophy). These are important abstract concepts and principles developed by universal practice, defining and characterizing established conditions for the joint living of people and the survival of humankind, according to which each person should comply their behavior with the rules accepted in society.

In theory and practice, the concepts of "responsibility" or "social responsibility" are usually used in a retrospective meaning, i.e. to indicate a reaction (response) to misconduct, wrongful behavior or an offense. In such cases, the retrospective aspect of responsibility focuses on a particular sphere of social life. Depending on violated social norms, there are moral, religious, corporate, legal and other types of retrospective responsibility.

It is puzzling that supporters of positive responsibility do not apply this concept to other types of responsibility (except for liability). However, some scholars working on the theory of law and other legal branches distinguished between positive and negative legal responsibility¹⁴ (only theoretically, though, since its practical application raises many questions), which served as the basis for the formation and development of positive legal responsibility, positive criminal liability, etc.

Thus, we believe that the classification of social responsibility has the necessary grounds, goals and significance only from the retrospective perspective. Positive social responsibility cannot be classified in this manner since there is neither sufficient justification nor sense for doing this.

¹³ R. L. Khachaturov, *Yuridicheskaya otvetstvennost: filosofskii, sotsiologicheskii, psikholog-icheski i mezhotraslevoi aspekty*: monograph (Moscow: Yurlitinform, 2017)

¹⁴ F. N. Fatkullin, *Problemy teorii gosudarstva i prava* (Kazan: Izd. Kazan. un-ta, 1987).

This division seems impossible because it does not answer several crucial questions: how to act in a common situation when the subject (in good faith or under pain of punishment) observes one type of social norms (for example, legal rules) but does not comply with the other type (for example, moral, corporate or religious norms)? Would it be right to call this behavior "positively responsible" or, more precisely, "positively liable"? Is it acceptable to talk about positive liability if an entity complies with federal law but violates regional law? The scholars promoting the concept of positive responsibility cannot answer these questions.

They claim that positive liability is a form of social responsibility; therefore, it can be not only retrospective but also positive. In our opinion, such statements are insufficiently substantiated and controversial.

Based on the above-mentioned provisions of formal logic, the proposed extrapolation have neither the necessary grounds nor goals and significance. Furthermore, this fact applies both to the concept of "positive legal responsibility" and its varieties, including "positive criminal responsibility", "positive administrative responsibility" and other types of liability.

Liability can only be retrospective. This concept represents the negative consequences of violating certain legal norms that become real and take on specific forms only in relation to specific branches of law and their norms that were violated. In reality, there are no general concepts of responsibility and its types, except for certain norms established by state and their specific violations: for instance, the violation of administrative law entails administrative liability, the violation of civil law results in civil liability, the violation of criminal law causes criminal liability, etc.

Liability arises in response to a specific violation of law. It is always retrospective and negative and entails punishment (condemnation or disapproval). Various branches of law dwell on this concept and adapt it to the corresponding reality. Thus, there is neither reason nor need to introduce the special concept of positive legal responsibility and its varieties into theory, legislation and practice. Attempts to introduce such concepts into the scientific community without defined content and clear boundaries can only disorient and create difficulties in legal understanding and law enforcement.

The positive aspect of "social responsibility" in the field of law and its branches means the same thing: a person must behave responsibly and "with due regard to the consequences of their actions", as well as comply with social norms (because each person is a member of society and cannot live in society and be free from society) regardless of life sphere or a branch of law. Moreover, this behavior does not depend on the formal representation of such obligations in legal norms.

"Positive liability" means that a person complies with the existing law (acts "positively responsibly") and does not violate ("observes and fulfills") legal requirements because such behavior and legal obligations are prescribed by law and approved by the state¹⁵. According to V.A. Zatonskii, positive liability "is a vital and urgent need", while the rejection of this concept "is equal to depriving civil institutes and citizens of a whole system of measures that allow (with greater or lesser efficiency) to influence public authority and, if

¹⁵ D. A. Lipinskii; V. V. Romanova y O. E. Repeteva, Institut yuridicheskoi otvetstvennosti...y D. A. Lipinskii, Problemy yuridicheskoi otvetstvennosti...

necessary, "push" state back into the sphere of lawful activity"¹⁶. However, it is unclear what opportunities, tools (a system of measures) and mechanisms citizens and civil institutes have to make such an impact and how it is connected with the concept of positive legal responsibility.

It is seemingly sufficient to entrust each subject with the relevant obligations and enshrine such obligations (to be positively responsible) in law to obtain the desired result (the more severe the alternative sanction for "disobedience" is, the more effective the result will be). As the current practice demonstrates, it is impossible to induce the subject to positively responsible behavior and make them comply with law under pain of liability and punishment.

Indeed, we should encourage positive, socially useful and "responsible" behavior of an individual. However, it is not a general but rather a legal task. It is universal, which underlies all efforts to counter social offenses regardless of the relevant legislative decisions.

V.Yu. Panchenko and A.E. Mikhaleva state, "It seems that the so-called "positive liability" cannot be regarded as a legal remedy, i.e. a tool for realizing legally significant activities, since this institute is more concerned with one's internal values and is considered through the prism of moral standards. However, a "responsible attitude" to the rule of law is among the results of a legal policy aimed at improving the legal culture of society and individuals and indicators of adequate legal regulation reflected in the fact that most citizens understand and accept the existing model for regulating legal interactions due to the availability and feasibility of state rules of conduct and their compliance with the objective laws of functioning and developing a complex social system"¹⁷.

Positive social responsibility, respect for law and its observance are conditioned by a high level of general and legal culture which has been molded for centuries and are greatly determined by the well-being of citizens and only to some extent by the normative consolidation of positive responsibility.

The main drawback of this concept consists in the fact that it is very difficult (almost impossible) to determine the boundaries of "social responsibility", "legal responsibility", "positive liability", "criminal liability", "positive criminal liability", etc. and their correlation to decide what is a positively responsible entity and whether all entities respect legal norms. I.A. Rebane emphasized the artificial nature of "positive (prospective) legal responsibility", its ambiguity and uncertainty. The scholar noted that it is unclear "from what moment and with what prerequisites it comes, how long it lasts and when it stops and, most importantly, what are the grounds for long-term responsibility"¹⁸. He failed to answer these questions, and they are unlikely to be ever answered for several reasons.

According to supporters of this concept, legal responsibility is a unified concept that comes in two forms or two aspects (positive and retrospective) like social responsibility.

¹⁶ V. A. Zatonskii y A. V. Malko, "Otvetsvennost publichnoi vlasti..."

¹⁷ V. Yu. Panchenko y A. E. Mikhaleva, O nekotorykh voprosakh formirovaniya kontseptsii pravovoi politiki v sfere yuridicheskoi otvetstvennosti. Razrabotka proekta kontseptsii pravovoi politiki v sfere yuridicheskoi otvetstvennosti (Moscow: RIOR, 2015)

¹⁸ I. A. Rebane, "O metodologicheskikh i gnoseologicheskikh aspektakh ucheniya ob osnovaniyakh yuridicheskoi otvetstvennosti", Uchenye zapiski Tartuskogo gosudarstvennogo universiteta Vol: 852 (1989): 9-30.

They mean that these aspects are mutually exclusive: either the subject complies with laws and is recognized as positively responsible, or violates them and shall bear the corresponding (retrospective) responsibility for this. In other words, they are either "white" (positive) or "black" (negative), and there is no third option. Within the framework of this approach, each subject is endowed with a certain legal obligation and should be positively responsible at every moment of their existence since the subject is obliged to comply with law. For instance, if the subject is held liable for a crime, is in custody or is a repeated offender and complies with law only to improve detention conditions, get out on parole, etc., should we regard such behavior and subject as positively responsible? Is there any sense in such an understanding of "positive liability" or "positive criminal liability" and their broad interpretation?

It is also questionable whether the legal meaning of the concepts of "positive liability", "positive criminal liability", etc. is evidenced by their manifestations in laws in the form of various legal institutes and incentives. According to the opponents of this approach, the value of these concepts lies precisely in encouraging the positive and legitimate behavior of entities through the application of measures prescribed by law. Criminal law provides a large number of such measures, including voluntary refusal to commit a crime (Article 31 of the Criminal Code of the Russian Federation), justifiable defense (Article 37 of the Criminal Code of the Russian Federation), circumstances mitigating punishment (Article 61 of the Criminal Code of the Russian Federation), release from criminal liability (Chapter 11 of the Criminal Code of the Russian Federation), release from punishment (Chapter 12 of the Criminal Code of the Russian Federation), etc. As our opponents claim, the use of such measures is based on the positive behavior of offenders, i.e. any behavior that is not associated with a violation of law should be considered positively responsible. Does it mean that whenever the state applies incentives it should indicate positively responsible behavior of the encouraged subject? We cannot agree with this statement. According to Article 206 of the Criminal Code of the Russian Federation, a person who released a hostage voluntarily or at the demand of the authorities shall be relieved from criminal liability. Similar legal constructs are also contained in Article 126 of the Criminal Code of the Russian Federation (abduction), Article 205 of the Criminal Code of the Russian Federation (act of terrorism), Article 275 of the Criminal Code of the Russian Federation (high treason), etc. The legislator's motives are clear, i.e. to prevent more serious consequences of the offense. Is it right to consider such a person to be "responsible" and their behavior "positive" or "positively responsible" in the meaning of "positive liability" we developed?

We believe that the above-mentioned measures and other incentives are means of moral, psychological and pedagogical influence on the psyche of people that are enshrined in legal documents as tools of retrospective responsibility. They are used in connection with the commission of an offense, not before its commission or outside its framework, i.e. only if there is a sufficient ground provided by law (for example, Article 8 of the Criminal Code of the Russian Federation). In relation to citizens who do not commit offenses, these tools contain only the declarative promise of a "carrot" or the threat of a "stick", i.e. have educational and preventive values and cannot be applied as legal sanctions.

It is logical to define the boundaries of the concepts of "positive liability" and "positively responsible behavior" in conformity with different subjects. According to Part 2 of Article 15 of the Constitution of the Russian Federation, the bodies of state authority, the bodies of local self-government, officials, private citizens and their associations shall be

obliged to observe the Constitution of the Russian Federation and laws. It is hard to assess the behavior (activity) of foreign citizens, stateless persons and foreign organizations in the territory of the Russian Federation not mentioned in Article 15 of the Constitution of the Russian Federation from the viewpoint of "positive liability". However, these persons shall also comply with the Russian legislation. It turns out that the theory of positive responsibility does not work in relation to these entities.

In our opinion, there is a broad "neutral" zone in the form of a normal, natural and not necessarily related to the individual's behavior between the positive and negative "poles" of human behavior. The positive "pole" is represented by the behavior of subjects acting consciously and respectfully due to their high moral and ethical qualities and beliefs that strictly follow all the rules of human society. Such (and only such) subjects can be referred to as positively responsible. The negative "pole" contains different types of wrongful behavior that cannot be classified as positive.

The neutral zone between these extreme poles holds the majority, i.e. those entities that observe legal norms unknowingly ("by inertia"), do it out of fear of responsibility and punishment or violate only social norms of a non-legal nature. If such behavior can be called positive in the context of observing legal norms, then bringing it to the level of "positively responsible" is questionable since it discredits both concepts and, most importantly, subjects that truly meet the high requirements of positive social responsibility.

It seems that the concept of "positive liability" as a form of social responsibility (including sectoral sub-concepts) should be interpreted based on the proper meaning of the word. It does not denote any behavior that complies with law but rather conscious behavior of a person committing acts with respect for legal regulations ("considering their consequences"). Accordingly, the obligation to comply with laws and positive responsibility are not the same things or the same concepts. Unfortunately, even the most severe state orders to observe laws cannot ensure the positive responsibility of all subjects.

Liability has compulsory legal bearing only in a retrospective aspect: the obligation to comply with laws becomes legally significant not when it is enshrined in the corresponding legislation but when a violation entails a sanction to the violator. We fully agree with V.Yu. Panchenko and A.E. Mikhaleva: "the person's desire to prevent violations of legal regulations and prohibitions in the process of activity can be based on various motives and beliefs. *If the subject's activity in the legal context of social reality is legitimate, it does not necessarily indicate "positively responsible" behavior*"¹⁹.

While analyzing the arguments supporting the concept of "positive liability", we understood that we could not agree with them. O.E. Kutafin's position seems to be more justified and correct. According to the scholar, the concept of "positive responsibility" is neither legal nor constitutional²⁰; therefore, it would be right to consider it outside the legal framework. Other legal experts hold the same opinion and state that "the semantics of the "responsibility" word indicates that it can be used in both positive and negative meanings. However, the first aspect of this concept is hardly applicable in the legal sphere as it is insufficiently substantiated and not entirely appropriate"²¹.

¹⁹ V. Yu. Panchenko y A. E. Mikhaleva, O nekotorykh voprosakh... 23.

²⁰ O. E. Kutafin, Predmet konstitutsionnogo prava (Moscow: Yurist. 2001).

²¹ V. Yu. Panchenko y A. E. Mikhaleva, O nekotorykh voprosakh... 23.

The question is not whether the concept of "positive liability" and its varieties exist in theory but whether they are crucial for legal science and law enforcement.

In relation to sectoral law and legislation, effective concepts are the ones that solve the relevant tasks of a particular branch. Moreover, these concepts should be as specific as possible, sufficiently accurate and understandable, excluding their ambiguous interpretation. The concepts under consideration do not meet these criteria, they are not efficient or necessary but rather harmful because they do not have specific essence and clear boundaries, which disorient and create difficulties in legal understanding and law enforcement practice. V.Yu. Panchenko and A.E. Mikhaleva note, "*The lack of clear criteria and indicators of positive liability, the uncertainty of its legal significance can disorient law enforcement since the real role of this institute is difficult to establish*"²².

We believe it is neither feasible nor efficient to introduce the concept of "positive liability" and sectoral sub-concepts into scientific discourse and legislation. There is no sense to introduce new and underdeveloped concepts into law (especially criminal law) or attach legal significance to terms, whose content and meaning are ambiguous and unclear.

We believe that the concept of positive liability and its components originated from the idea of the so-called general regulatory legal relations that give rise to positive legal relations and positive legal responsibility, which means the formation and development of the civil obligation "not to commit offenses".

Supporters of this approach claim that "there is no and cannot be legal norms that do not regulate anything", "any legal relations form a legal relationship"²³ and the adoption of legal norms serve as the basis for establishing general regulatory legal relations giving rise to positive legal relations and positive liability²⁴ of *an indefinite number of persons, i.e. all citizens of a given state and all other persons who (at least presumably) might someday violate the existing legal norms (italicized by V.D., R.Z.)*.

However, many scholars consider this issue far-fetched and regard positive liability as the "fifth wheel" in the context of responsibility. They rightly believe that the mere adoption of a legal norm and its entry into force does not form legal relations. Legal relations include only real relations regulated by the rule of law, while relations to comply with the prohibitions of criminal law are normal social relations and do not turn into legal relations; they lie outside the framework of relations regulated by law²⁵. Accordingly, these scholars do not recognize legal relations of a general regulatory nature and believe that the rule of law is not directly implemented into legal relations but creates prerequisites for the emergence of legal relations. In our opinion, the adoption of a legal norm and its entry into legal force is not futile. This process makes certain changes to social relations, affects the behavior of all subjects and the general "well-being" of society and state. This specifics should be used rationally to ensure an inevitable and fair legal impact. However, this fact alone does not lead to the emergence of legal relations and positive liability.

²² V. Yu. Panchenko y A. E. Mikhaleva, O nekotorykh voprosakh...²⁴

²³ V. S. Prokhorov, Prestuplenie i otvetstvennost (Leningrad: Izd. LGU, 1984).

²⁴ P. L. Khachaturov y R. T. Yagutyan, Yuridicheskaya otvetstvennost. Tolyatti, 1995: 150.

²⁵ Yu. S. Reshetov, "Realizatsiya norm prava i pravootnosheniya", Pravovedenie Vol: 6 (1976): 24-30.

If we recognize this circumstance, it would practically mean that each entity becomes a party to legal relations from the moment some legal norm enters into force because the state has taken the appropriate decision. It is worth mentioning that there is a large number of such legal norms (several thousands of them) since almost all important social relations receive legal representation. Thus, if we follow the above-mentioned viewpoint, it turns out that every person is involved in numerous and diverse legal relations, assuming their rights and obligations and prohibiting this or that behavior at any moment of their life, regardless of their will or desire. It is noteworthy that all these actions are done at risk of responsibility. Although the subject does not plan to violate legal requirements and does not even think about such an act, they bear the burden of responsibility that is considered a voluntary way of ensuring responsibility.

Law is closely connected with coercion regardless of retrospective or perspective aspects. It seems that coercion provides only retrospective liability and positive liability consists in willful compliance with legal requirements: it is necessary to enshrine a certain rule in the relevant document and demand its "voluntary" execution, promising incentives for good behavior. In this case, coercion is an alternative "stick" in the form of retrospective liability if one fails to comply with these requirements. However, it is more like "take-it-or-leave-it" approach: the subject either complies with legal requirements or is held liable for their violation.

As far as we understand, an obligation as a method of legal regulation is *assigned* by a legal norm to certain entities who should do what it is prescribed by law. If such an entity fails to fulfill the obligation (and only in this case according to the presumption of innocence), they will be subject to retrospective responsibility. If the corresponding obligation is not assigned to the subject, there is no basis for retrospective responsibility. Thus, a legal ban is not personified and does not require assignment to specific entities. It is *the requirement to refrain* from performing certain actions addressed to an indefinite number of subjects. In case such a prohibition is violated, it is necessary to establish the fact of violation to hold the offender liable.

In many cases, the legislator "obliges not to take" certain actions. Thus, regulatory acts contain obligations not to act in a certain manner but to refrain from certain behavior addressed to an indefinite number of subjects. The legislator prohibits behavior that would violate the rule of law (for example, Part 2 of Article 15 of the Constitution of the Russian Federation). Our opponents interpret such norms as arguments in favor of positive legal responsibility.

We believe that such requirements making all entities comply with the current legislation have a certain disciplinary value. Until these rules are violated, they are declarative, i.e. most subjects do not even think about their existence, essence and meaning, take them for granted and are indifferent to them. The main methodological error of the concept we criticize consists in exaggerating the importance of legal regulation. For example, it is stated that "legal regulation covers all areas of public life", while legal norms "establish a program of actions for subjects of law (specific people), vesting them with certain rights and obligations" and "model"²⁶ the order of public relations. At the same time, the normal and lawful behavior of citizens is considered exclusively "the result of legal regulation"²⁷.

²⁶ V. S. Prokhorov, Prestuplenie i otvetstvennost... 74-75.

²⁷ V. S. Prokhorov, Prestuplenie i otvetstvennost...121-122.

In the conditions of modern civil society, social relations are regulated by different social norms and law does not fully invade various spheres of life of individuals and society. Indeed, legal norms play an important role in the life of society but there is a large number of human relations not subject to legal regulation. In civil society, the "invasion" of law (especially criminal law) into public life should have good reasons and clearly defined limits. Legal tools (especially prohibitions) should be applied with particular care and attention only if there is a real need. In this case, a priority should be given to non-legal social norms and legal norms (when it is impossible to solve the problem by other means and methods) that have the least punitive nature.

Legal relations can arise if there are at least two parties, whose opinion, awareness and will should be reflected in legal relationships. The will of one party (even if it is the state) is not enough for the emergence of legal relations. Law, including criminal law, is adopted by representatives elected by people but is a one-sided expression of the legislator's (state's) will. The will of citizens to whom this act is addressed is expressed indirectly and not always accurately. Of course, it does not mean that citizens have the right to ignore the rules that do not fully meet their interests since law is mandatory for everyone regardless of their attitude to it. The thing is that legal relationships do not arise automatically with the adoption of legal norms. Their formation is conditioned by an external behavioral pattern testifying that the obligated party wants to realize legal relationships (positive or retrospective, in case of an offense).

Legal norms are implemented into legal relationships only if not only the state but also its "counterpart" (a potential party or subject of legal relations, in particular, a citizen whose interests are affected by the regulatory act in question) directly or indirectly expressed their positive (or negative) attitude towards the relevant standard of conduct established by the state in a particular act. In this case, we can hope that the subject will be interested in compliance with legal norms and the existing legal order, as well as realizing positively responsible behavior.

Conclusion

We should note that the category of "social responsibility" penetrates social life (its various components and all spheres of social behavior) but has the same meaning. The fundamental and unshakable principle is that a normal and encouraged behavior is to observe the rules of a certain living community, while any violation entails negative consequences for the violator.

From the theoretical perspective, striving to promote the positive, law-abiding and responsible behavior of all subjects is significant but just as an idea and "respect for law". However, this idea cannot be realized through the normative consolidation and compulsory implementation of generally binding requirements and even becomes harmful since it is impossible to make all citizens observe and respect the existing laws "not out of fear, but out of conscience", as follows from the position we criticize.

Therefore, we believe that the positive aspect of social responsibility should have its own representation in all social spheres, including jurisprudence and its branches. It will promote the formation of legal culture and respect for regulatory prescriptions, but no more than that. There is neither need nor sense to state the concept of "positive liability" and its varieties (in particular, "positive criminal liability") as legal and regulatory principles based on the erroneous statement – "the more legal rules, the more peace, order and freedom".

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