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EUROPEAN PRACTICE OF STATE ACCOUNTABILITY FOR STATE OFFICIALS ACTIONS: EVOLUTION OF APPROACHES

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Under the influence of transformations in post-socialist republics since the start of democratic evolutionary processes, it would be useful to substantiate the legitimacy of the conceal coming back from XIX c. that state accountability for its officials' activities is based on public fundamentals and formed on the principle of protection of not only individual interests but public also. Complexity of the problem of state accountability is brought about by other numerous problems of a more common legal character requiring prior solution. Some of the issues concern civil law, for example:

1. What is indemnification?
2. What are the conditions of possible accountability for actions of others?
3. Whether and when is accountability possible in the absence of guilt?

Some other issues belong to the sphere of state, public law, for example, what is the essence of legal relations between the official and the state, on the one hand, and between the official and the citizen, on the other hand?

Scholars, as a rule, divide the problem of state accountability into its constituents, which due to the nature of the issue is not always successful. Some scientists focus on accountability for illegal actions of officials, who are the representatives of fisc and state. While others consider just the issues of officials' unlawful activities, irrespective of their being either fisc representatives or public authority agents[1]. Some researchers analyze a new question of state accountability in detail - indemnification to innocently-imprisoned persons. Still others give a theoretical foundation of state accountability for harm caused by officials' unlawful and illegal actions when fulfilling public authority[2].

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[1] Loening. *Die Haftung des Staates aus rechtwidrigen //.* Handlungen seiner Beamfen. – *1979. –S. 117-135.*

[2] Hauriou. *Les actions en indemnite contre l'etat* //Revue de droit public. – *1896.#11. – P.51-55.*

In the meantime a theoretical substantiation of state accountability requires a thorough research of state obligation to pay indemnification in case of its judicial or administrative mistake as fulfilling justice and administrative governing are the two forms of realization of the same public authority.

It is possible to divide the concepts of state accountability for the harm caused by actions of its officials into three groups. The first group of scientists determined the state accountability for wrong actions of officials on the basis of public law, the second group - on the basis of private law, the third - on the basis of both. Representatives of the first group are the proponents of public contract theories, subjective public law and public accountability. The second group are adherents of the theories of quasi-contract or extra-contract guilt and the concept of professional risk. The third group consists of supporters of the theory of moral duty and justice[3].

According to the theory of public contract or duty, which derives from the contract, in the case when citizens did not break law but were subject to non-authorized prosecution and condemnation, they must be given the right to sue state in judicial procedure. This old theory is reflected in a new theory of public benefit, or quasi-delict obligation. Indemnification by the state is a form of transforming an unequal burden into an equal one. The conditions of the referred right defined by A.Mayer, German theoretician of administrative law, are the following: „a) harm caused at fulfilling public management. If they were caused by fisc activity, the question of indemnification must be solved by rules of private law; b) harm should be particular (specific) victim; c) intervention of authority is carried out concerning the direct sphere of personal rights[4]". Harm caused by war or court is not subject to compensation.

The theory of extra-contract, or of aquiliana guilt (culpa aquiliana) established state accountability on fundamentals of private law according to the relation type between the principal and the trusted, the mandatory and the mandate, the master and the servant at exercising corresponding duties.

An obligation of extra-contract character arose from committing civil delict and quasi-delict. Thus, in France the state is subject to principles of civil code of France that establishes an indirect state accountability for its officials' activities. Besides state can be subject to corresponding principles of private law which establish its direct accountability. The concept of extra-contract guilt caused numerous disagreements on substantiating indirect accountability of state for harm caused by representatives' mistake made by the fault of the latter (culpa) or at his/her will, but without any malicious intention (without dolus).

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[3] Гаген В. *К вопросу об ответственности государства за действия должностных лиц* // Вестник права. — 1903. —Октябрь. — Кн. 8. — С. 1-38.

[4] Mayer O. *Deutsches Verwaltungsrecht.* Bd.II. – S. 345.

Only few scientists recognized state accountability to be a general rule in all cases. Some of them proved the accountability resulting from mandate, which took place, or from representation[5]; others established not direct, but subsidiary state accountability as a silent guarantee of the state, which it vests it agents with and which infers duty for citizens to obey officials' act as that of the state[6]. The third group deduced state accountability and concept of legal person, which has a real but not fictitious mode of existence (official is not a representative, but a state body, which responds for its fault, as for his/her own[7]).

The majority of authors differentiate between cases, when the state is or not responsible. Indirect civil liability is excluded in cases where unlawful activities are committed through the fault of officials, but through their intermediary - state as legal person of public law, as sovereign. Such accountability is admitted in cases where „actions committed through officials by the state as by subject of patrimonial rights, as by the legal person of civil law, as fisc[8]". According to Laffayer, the higher the position of functional duties of the official the more limited is state accountability. Therefore the state is not responsible, when this function borders with sovereignty. „In acts of administrative character, that are not sovereign acts, or acts of public authority (actes de puissance publique), or acts of performance (actes de gestion), state accountability is less for the former and, and bigger for the latter. But the biggest responsibility is determined by the norms of civil law in the acts adopted by the state in its property interests"[9].

The appearance of a new theory of professional or industrial risk was brought about by the necessity to prove state accountability, excluding an element of guilt. This concept, with the help of analogy, assumes that state can do harm and even in on a greater rate. Therefore it is necessary to extend accountability of risk to state. State is responsible for harm not due to culpa aquiliana, for legal mistake is a probable case; but due to the risk and danger accompanying judicial activity. Thus, classic element of quilt concerning the type relations not regulated by public law was rejected.

The theory of professional risk formed the basis for laws on accountability for job related accidents, appeared as antipode to the theory of guilt. The latter was an exceptionally and precisely individualized and turned out to be ineffective in determining the question of accountability when harm was done by „the huge machine called state". The principle of solidarity and mutual aid

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[5] Gierke O. *Die Genossenschaftstheoric und die deutshe rechtssprechung.* – Berlin, 1887. – S. 743.

[6] See, in particular: Pfeiffer. *Practische Ausfuhrungen aus alien Thelein der Rechtwissenschaft:* Hannover, 1828,Bd.II.- S. 369.

[7] E.g.: Windscheid. Lehrbuch des Pandectenrechts, # 59.

[8] Гареи В. — *Op. cit.,* p. 25.

[9] Гареи В. *Op. cit.,* p. 25-26.

demands that everyone, in whose interests this machine functions, be involved in compensation of the harm caused"[10].

The referred concept is closely related to the theory of insurant accountability. «The case is viewed as if the state, as a legal person, organized mutual insurance between subordinates against administrative risk. The idea of similar insurance logically stems from the equality before the law and public functions: equality before public functions must be pursued directly in cases, where it is possible to execute it, for example, levying taxes... military service. It should be pursued indirectly with the help of compensation, reward, when public function... is unequally distributed among subordinates"[11].

According to Oriu's conditions of harm indemnification caused to citizens in the sphere of administrative management are of specific character of harm: mistakes and negligent performance are rather rare, and persons, who became their victims, in comparison with other subordinates are in such an unjust situation, which demands indemnification. The latter is public law by its nature and its practical application admits a great flexibility. In our opinion, in comparison with the theories of private and public law, the concept of indemnification suggested by Oriu, has certain advantages. First, it considers indemnification at the expense of state not only at presence of administrative mistake, but also in case of deceit; second, it excludes a direct application of civil law norms to public law phenomenon. Thus, Oriu's concept can be considered as fiction which permits to determine indemnification as paying from the fund of mutual insurance formed by tax-payers[12].

Among the theories of the private law character we can distinguish, primarily, the theory of emergency based on the following principle of civil law: „the one who caused harm, shall compensate it, for the enterprise, which caused harm, was his/her enterprise, the expenses for which must be paid by it"[13].

Arthur Rocco's concept is close to the group of public law character theories which formed state indemnification law in case of a judicial mistake as subjective public law[14]. The starting point for Rocco's theory is the theory of state law developed by Herber, Laband, Ellenik. The founder of German sociological positivism in the field of state law influenced upon A. Rocco

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[10] Kohler. *Der Entwurf eines gesetzes Entschadigung.* – 1904. – S. 337-384.

[11] Hauriou. *Op.cit;* See also Klevitz, who considered fisc accountability resulting from insurance agreement.

[12] Гаген В. *Op. cit.*, p. 27-29; Орию Н. *Основы публичного права.* — М., 1929.

[13] Гумбольт В. *О пределах государственной деятельности.* — М., 2003. — С. 79: See also Алєксєєв Н.Н. in his book «*Идея государства*». — СПб., 2001. – С. 112.

[14] Rokko A. *La riparazione alle vittime degli errori giudtziari* // Rivista penale. – Novembre. – S. 514.

greatly[15]. According to this theory, state as well as its citizens, are subject to positive law. State is considered to be a legal person and a capable subject.

State is a legal person not only in the sphere of private but public law when it acts as fisc: buying, selling, obliging, and while performing public law activities, acting as sovereign, legislator, authority, punitive institution. The legal person of a citizen has the same double character.

He is a subject of law, when acting not only as a private person entering relations with other private persons or state as a subject of private laws, but as a citizen, coming across direct clashes and state-sovereign. The rejection of citizens' subjective public rights is an equivalent of rejecting judicial relation between the state and the citizen and at last the very public law, as legal relations allow the presence of two subjects. Indemnification to victims of judicial mistakes is a legal duty on the part of state and subjective public law on the part of citizen. In accordance with A. Rokko's theory state performs social activities, besides judicial - it interferes into social relations aiming at ensuring well-being in the society by eliminating property inequality, and indemnification of harm to innocent persons.

Some authors tried to build up special accountability of state to assign to public law or grounded it on the public law institute as conversion. Romano, theoretician of administrative law supported applicability of public law state accountability, though it is not included into the norms of written law, but it is in accordance with general principles formed by doctrine and legal practice[16]. First, state is responsible for harm caused by officials; without need for „dolus" or „culpa" in official's actions; second, harm must be caused by illegal act, which, in its turn, must be done by state and by the an official[17].

The other theory was based on the institute of public law conversion and compensation that presupposes special rates for harm done by the state and public enterprises according to the law. In accordance to this theory the principle «qui iure suo utitur neminem laedit „in the field of public law is interpreted differently from that in private law. In public law individuals' desires must concede wherein by public interests and state law demand. At the same time the public corporation, assigning sacrifice inconceivable under normal conditions on private right of individual must compensate or transform it into the benefit"[18]. Such institute of public law is sometimes referred to «as direct accountability" of public corporations and are applied at immovable property expro-

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[15] See. Еллине Г. *Общее учение о государстве.* – СПб.: Юридический центр Пресс, 2004. – 750 с.

[16] See *Государственное право Германии.* Сокращенный перевод немецкого семитомного издания. Т. 1. — М., 1994 – С. 53-62; М., 1994. — С. 220-229.

[17] Romano. *Principi di diritto administrativo italiano.* – Milano, 1901. – S. 50 , 53-56.

[18] Гаген В. *Op. cit.,* p. 16.

priation. It may also be used in the case of indemnification to innocently sentenced persons, who are in mass numbers in Eastern Europe.

The theory of moral duty and justice is referred to the third group, concerns only substantiation of state accountability for the harm resulting from judicial mistakes and considers it to be based on charity and in its turn on justice. The basis for the given concept that society (state) has obligation to its members - militia, protection, social care, impartial court - is initial.

The obligation of indemnification is based not only on guilt (culpa), but on the mistake which occurred, injustice, is moral not a judicial one.

The given classification of theories of state accountability for officials' unlawful activity allows to make some generalizations on the theoretical foundation of such accountability proposed by scholars, theoreticians and practitioners in the states of continental system of law. When considering the development of the concepts on state accountability from the historical perspective, one can distinguish between three historical periods of the development.

The first period marked by the domination of an old doctrine justifying state accountability is based upon separate legal provisions, but not on legal principle. While the state attitude to the official and consequences resulting from it are on analogy with other legal relations regulated by positive law.

The second period marked by the discussion of the issue on analogies taken from private law. Mandate relations were especially popular.

The start of the third period is connected with a necessity of state-legal grounding accountability, due to the failure of civil-law analogies. Civilian constructs came to be unacceptable in the field of relations between victim and state concerning citizens' rights renewal. Equaling fisc accountability with that of insurer is unlawful, as the idea of hypothetic distribution of inflicted harm among the population of the state in the form of insurance agreement is artificial.

In the first case the character of harm differs from that of an insured and the rate of payment to the victim is determined not by insurance fees but by significance of the public interest defined by state. The state risk must not be equaled to the entrepreneurs' risk, as interests of the former are not total to interests of personal benefit and profit. The analogy between harm to the third party under urgent necessity and to the innocent citizen at state performing legal actions is also not suitable: indemnification should be considered as a separate task of the state policy and not as a result of preferences given to one of the interests.

The recognition of incapability to absolutize the Roman principle of guilt – a corner stone of the concept of „accountability» in the area of private law relations facilitated recognition of fisc accountability irrespective of officials

guilt, who did harm[19]. The number of adherents of state-law substantiation of state accountability has been gradually expanding and at the turn of XXI c. became significant[20].

During the fourth period „indistinct, formless and uncertain aspirations to find the basis for state accountability not in the field of private law but in public one takes a more precise formulation, and finds...its expressions in various theories, which quite often set... a task to link isolated and various cases of state accountability by the uniform principle and fundamentals taken from public law"[21]. Inefficiency of theories of state accountability for its officials' actions at fulfilling state power in governing and justice based on private law fundamentals is clearly revealed due to the legislation development in this field.

The establishment of state obligation to compensate harm to victims of judicial mistakes in Germany[22], Denmark[23], Norway[24], Portugal[25], France[26], Switzerland[27], and Sweden[28] and other countries proved public private character of state accountability for its officials' actions.

The assignment of exclusive (in some countries - initial or subsidiary) accountability to the state underlined policy makers' intention to recede from private law point of view. "The specific feature of this type of accountability for harm in comparison with that used by civil law, is reduced...to the fact that the condition on harm is done not by private persons - one to another but - by authority body to its subordinate corresponds to analogous property relations. Therefore general fundamentals of accountability for harm may be directly borrowed from civilians... and then these common fundamentals must be changed according to the attendant public law element of the referred type of accountability"[29].

Indeed, civil law provisions had a great significance for creating and implementing the theory of fisc accountability for its officials' actions in the field

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[19] Лазаревский Н.Н. *Ответственность за убытки, причиняемые должностными лицами.* — СПб., 1905. — С. 614.

[20] Гомеров И.Н. *Государство и государственная власть.* – М. 2002. – С. 477-486; Рипинский С.Ю. *Имущественная ответственность государства за вред, причиненный предпринимателем.* — СПб.: Юридический центр Пресс, 2002 та ін.

[21] Гаген В. *Op. cit.*, p. 16.

[22] See: *Конституции государств Европы.* В 3-х томах . Под ред. Л.А. Окунькова. — М.: НОРМА. – 2001. – С. 592.

[23] See: *Op. cit.*, p. 764.

[24] See: *Op.cit.* V. 2. — M.: НОРМА. — 2001. — p. 661.

[25] See: *Op. cit.*, p. 750.

[26] See: *Op. cit.*, V.3. — M.: НОРМА. — 2001. — p. 433-434.

[27] See: *Op. cit.*, p. 538.

[28] See: *Op.cit.*, p. 617-619.

[29] Люблинский П.И. *Процесс как судебный порядок и процесс как правоотношение* // Журнал Министерства Юстиции. — № 1. — 1917. — С. 614.

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of justice and govern. The establishment of state accountability in these cases would be much more difficult, if in civil law, as well as in general theory of law, they firmly followed the provisions that accountability with absence of guilt were impossible. Nevertheless a mechanical transference of theories from other sciences into the field of public law relations did not reveal the essence and nature of state legal accountability.

As material and moral harm done by officials' wrong actions, are subjected to compensation in the public interests, public - legal relations between state and citizen cannot meet civilian constructs. Unlawful detention and sentence may cause irreparable harm not only to private, but also the state and public interests. First, breaking of economic relations of the person and society, depriving a person of his/her earnings undermine state economy. Citizens, who are resentful of the state body which deprived them of the source of income, can easily be induced by poverty into committing crimes. Infringement of justice in judicial sphere does not only material harm to the state, because it influences upon citizens' mentality, deforms their sense of justice and causes alienation from the society and brings about disrespect to law and authority. Thus, compensating harm caused, the state protects private interests which have public meaning[30].

To introduce legal basis of fisc accountability for harm done by officials, is necessary to define, besides the purpose of indemnification, the character of legal relations between the official and the citizen; and the state and the official. In the case considered these relations have a public character in contrast to the relations of master and servant, principal and agent. Therefore accountability which results from the present relations is of public law character not of civil-law. The attitude of state to its official in xx c. could not be considered as civil mandate any more, as the official is not a mandator to the sovereign, but body of public authority. Civilian understanding of state service as the relations sovereign employment and absence of the conception on the state as legal person of public law was characteristic of xvii and xvii cc. Therefore conclusions drawn by German jurists of XVII c. who employed civil-law analogies to characterize fisc accountability for officials' actions as accountability ex mandato proved to be inefficient in XX and XVI cc. Certainly, the public law character of the state service cannot be recognized under the conditions when relations of official to sovereign had a personal employment character in reality. The police state of xvii and xviii cc. in Germany, as well as in France, did not recognize inviolability of citizens' public rights, which were not actually perceived at the then time. „The civil law was the only law perceived and enacted at that time. Authority followed the rules, which were rather considered to be habitual

[30] See: *Op.cit.*, p. 614.

technical norms aimed at governing sovereign servants' activity, than legal rights establishing certain limits of authority powers and corresponding rights of citizens in regards to authority"[31]. Public law began to be perceived as the law only in xix c. A change of scholars' views on the construct of state service made application of theories grounding state accountability on the provisions of civil law unacceptable. At present, attempts to substantiate state accountability by its guilt, culpa in eligendo, cannot convince anyone that fisc shall respond for harm inflicted by officials' illegal actions.

Theories that deduce fisc accountability from the insurance contract based on provisions of civil law, do not take into consideration discrepancy of fundamentals of accountability and those of the insurance contract. The insurance contract is a compensating contract, which pursues property interests of the two parties. State accountability for officials' actions does not imply fisc profit. The essence, purpose and relations in this case are absolutely different. Insurance, as the basis for fisc accountability (as well as representation), can rather be considered as comparison. A similar contract is not actually made, as it is difficult to perceive insurance fee in tax payments.

The theory of professional risk can not serve as justification of the fact that harm caused by officials' unlawful actions assigned to fisc either. The state cannot be equaled to the enterprise: state does not receive income from public law activity. Legal relations between employees and the enterprise differ from those between state and its bodies. Along with civilian analogies the specified concept contains public law provisions (inevitability of mistakes in officials' actions requires that consequences of these mistakes be distributed equally among all citizens. Otherwise, justice will be infringed)[32]. Certainly it is impossible to reduce fisc accountability to the fundamentals of harm distribution. It would be so, if every indemnification were reflected by a proportional increase in taxes. Eventually in most cases fisc accountability is practically reduced to distribution of harm. Nevertheless the concept of professional risk (the concept received the name „administrative risk" regarding cases under consideration) is not sufficient for state accountability substantiation.

A specific public law character of state accountability in public law relation cases is confirmed by the fact that along with fisc accountability in fisc cases existed fisc unaccountability in other public cases up to the end of XIX c. The state was not subject to norms of private law. Adherents of the approach that demands for fisc indemnification have a civil character, paid special attention to the fact that fisc accountability was possible only in case of infringed civil interests and victim civil-law sphere, though concerning public law rela-

[31] Лазаревский Н.Н. *Ответственность за убытки, причиняемые должностными лицами.* — СПб., 1905. - С. 183.

[32] The concept was considered by French scholars – Oriu, Laffayer and others.

tions. The fact, that claim for the damage is considered in civil court cannot be a proof of private law nature of legal ground of accountability. Civil court can also hear public law cases for some reason of expediency. The civil jurisdiction does not solve the problem of the basis of legal relations underlying the claim - public or civil. Recognition of the fact that any determination of size of harm – is a question of civil law does not solve the question of private law character of the case.

The issue of the public or civil character of harm caused by bodies of authority, governing and justice is not only a verbal dispute. The purpose of private law is the organization of relations of private persons, while the purpose of public law is the organization of relations of the state - its bodies with citizens. „The institutes of civil law are aimed at mutual relation of separate, independent persons, who pursue personal interests, and sometimes try to carry them out at the other's expense. In this respect establishment of accountability for caused harm quite often plays the role of a bridle... fisc accountability has different assumptions: there are no two parties that want to get into each others' pocket"[33]. Due to the fact that there are legal relations of the non-civil character are in the basis of fisc accountability in public law cases and also that it pursues absolutely a different goal, it is impossible to subordinate it to norms of civil law. The limits and conditions of state accountability must be deduced from fundamentals of public law and regulated by them only.

The corresponding norms may coincide with norms of civil law, include reference to them, and direct to the requirements of civil law on accountability. Public law employs basic provisions of civil law (the concept of harm, order of size harm proof, persons who have the right for indemnification in case of victim's death). Despite their public character, civil jurisdiction of these cases is possible. However, principles of private accountability cannot be transferred onto the state as public authority. The recognition of citizens' public rights as regards the state, which is characteristic of legal state order, is a precondition of the establishment of legal obligation to compensate harm caused to the person at the expense of state treasury. The private law approach to the relations of state with officials formed historically and developed in xix and xx cc has assisted to ignore the state accountability problem by representatives of public law, primarily of all by proponents of administrative and public law for a long time.

At the same time a change of concepts dominating civil law (particularly, extension of duty to be responsible outside the frame of guilt) had a great significance for solution of fisc accountability problem. The refusal from the principle of guilt as single provision of accountability has removed an insuperable judicial obstacle as for establishing provisions, conditions as well as limits

[33] Лазаревский Н.Н. *Op. cit.*, p. 203.

of fisc accountability. Complication of management tasks in the society increased practical significance of fisc accountability.

However, modern doctrine of state accountability for its officials' actions was formulated only due to the recognition of public - law character of citizens' claims for harm compensation caused by state officials in public law cases. Nowadays majority of national legal systems recognize a special public character of state accountability for its officials' unlawful actions. It is confirmed by the content analysis of legislative texts on the renewal of citizens' rights, who suffered in the course of unjust actions of state body in spheres of governing and justice.

Unfortunately, the specific character of public law relations has been insufficiently investigated in modern law studies. The study of theories differentiating private and public law is not of the historical interest only. Reference to the dilemma «public law - private law" allows a better understanding of the essence of state accountability for harm caused by state body activity at public functions fulfilling.

One of the reasons for considering general provisions of civil law as absolute unconditionally employed in the public law relations sphere was a specific organization of law studies at universities of Germany and France of the previous centuries. The Roman law lay the foundation of law education in Germany. All bran chew of law science, general theory of law included were elaborated under the prevailing influence of civil law from civilian point of view. For a long time jurists have not paid any attention to inapplicability of many civilian concepts to public law. Public law became a separate science due to the practice of French administrative courts. Later it influenced German jurisprudence. Together they created the core of European experience securing state accountability for its officials' unlawful actions.

Streszczenie

EUROPEJSKIE DOŚWIADCZENIE GWARANCJI ODPOWIEDZIALNOŚCI PAŃSTWA ZA DZIAŁALNOŚĆ ICH OSÓB URZĘDOWYCH: EWOLUCJA PODEJŚĆ

Autorka przeprowadza analizę doświadczenia państw europejskich, przede wszystkim Niemiec i Francji, stosownie gwarancji odpowiedzialności państwa za działalność swoich osób urzędowych na poszczególnych etapach ich rozwoju historycznego. W referacie naświetlono gruntownie ewolucję podejść podstawowych państw europej-

skich do rozstrzygnięcia tego problemu. Autorka pokazała wyjątkową wartość tego doświadczenia dla państw – młodych członków UE – jak również wykorzystania go w działalności swoich rządów.