THE CRISIS OF CRIMINAL DOGMATICS AND THE THEORY OF GUILT[*)]

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Abstract

The authoress analyses the most recent theories in the matter of criminal guilt, reaching the conclusion that the judgment of guilt must pursue two phases in the case of formal crime, and four phases in the case of material crime.

Keywords: *guilt; imputation; reproach of guilt*

1. Introduction. The Western doctrine[1)] mentions more and more frequently a crisis of the penal dogmatics, determined by the tendency of the international bodies to draft indictments questioning both the sacred principle of lawfulness, as well as the determination of the penal law, and, especially, the principle according to which the penal liability is based on the idea of guilt[2)].

Yet, the authors seem to have not paid attention to the fact that this tendency was, in its turned, determined by the stall of the very theory of guilt, so that, to end it, the first necessary step is to proceed to a research of the current stage of the debates on the theme, as well as to an attempt to clarify the controversial or questionable aspects, thus contributing to the general efforts aimed at drafting a new more solid and convincing theory of guilt.

For this purpose, we shall also analyse the issue of guilt, and afterwards, as much as possible, on the objectives mentioned above.

2. Current situation. The dominant legal doctrine presents guilt as an essential condition of any form of liability or, in other terms, as a principle governing the legal liability, in general.

Nonetheless, when it comes to indicate the significance of the legal concept of guilt, the opinions of the authors do not converge. Not only the content assigned to this concept, but also its importance, and even the used terminology is the

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[*)] Many of the ideas included in this paper have already been published (see *Vinovăţia – actualităţi şi perspective*, D. no. 6, 2004, pp. 132-144; *Principiul răspunderii pentru vinovăţie*, D. no. 4, 2007, pp. 165-173; *Discuţii în legătură cu definiţia infracţiunii*, D. no. 11, 2007, pp. 123-141).

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[1)] See, among others, A. Demichel (Professor at the University Paris VIII), *Le droit pénal en marche arrière*, Recueil Dalloz, 1995.

[2)] For this purpose, O. Jerez, *Le blanchiment de l´argent,* Revue Banque Edition, Paris Cedex, 2003, p. 247.

object of controversy. Besides this, one can see that the approach of these matters is quite difficult, since debated on this subject are, in general, pretty philosophical.

Especially in the case of the German penal doctrine – which has exercised and continues to exercise a strong influence on the whole Western-European legal thought – the polemics on this theme took into account, in the last decades, a strong enthusiasm, thus determining not only paradigm changes, but also legislative solutions. In this matter, one should mention a fact already known due to the works of Professor George Antoniu[3)], namely that, as of the 40's in the 20th century, the German penal doctrine grew more and more distant from the „psychological theory" (which even today dominates the Romanian penal science), which states that guilt is conceived as a psychological reality, as a mental connection between the perpetrator and the illicit deed, adopting, in exchange, the so called „normative theory", according to which the concept of guilt refers to a contrary relation between the agent's will and the law norm.

Even if many of the German authors continue to explain guilt as a „reproach" or a „legal disavowal"[4)], yet they state that the guilt reproach does not refer, and it could not refer, to the mental attitude, the way of thinking of the deed perpetrator (because this would infringe its freedom of thought and of ideas). It strictly refers to the action, its anti-legal behaviour, or that reveals a lack of insufficient motivation with respect to the observance of the norm. For instance, Professor Kindhäuser defines guilt as an „internal connection between the author – as addressee – and the lawfulness of the norm"[5)], which determines the occurrence of the „emotional component of the deception for the infringement of the norm"[6)] (as this author claims, the perpetration of the illegal deed process that its author dis not establish as a dominant principle that of establishing the norm, because otherwise, they would have certainly managed to avoid its infringement). In short, in this new vision, the concept of guilt is related to what German authors call "the motivation efficiency of the norms" – which led to the conclusion that the establishing of the guilt implies an assessment of the agent's behaviour, as compared to their level of commitment to the „legal values or goods", which are protected by the norm.

On the other hand, the German authors did not manage to identify the criterion, which could be the basis of such an assessment[7)] and, besides this; some

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[3)] G. Antoniu, *Vinovăția penală*, Publishing House of the Romanian Academy, Bucharest, 1995, pp. 20-36; G. Antoniu, *Vinovăția în perspectiva reformei penale*, RDP no. 2, 2003, pp. 9-28.

[4)] H. Blei, *Strafrecht, Allgemeiner Teil*, München, 1983, p. 174; the same idea is supported by H. Jescheck, *Lehrbuch des Strafrechts,* Berlin, 1988, p. 384.

[5)] U. Kindhäuser, *Derecho penal de la culpabilidad y conducta peligrosa* (trad. span), Universidad Externado de Columbia, 1996, p. 34.

[6)] U. Kindhäuser, *op. cit.*, p. 29; *For the same purpose:* Schumann, *Positive Generalprävention*, 1989.

[7)] For the same purpose, G. Antoniu, *op. cit.*, pp. 28-29.

of them also noticed that, in general, the explanations referring to guilt are somewhat ambiguous.

Therefore, the German penal doctrine split. One part showed the tendency to entirely eliminate the concept of guilt, and to replace it with various „objective imputation criteria"[8] applied to the behaviour or to the result (for instance, „the accepted risk", the „social role" of the citizen etc.), through which one has stated various „normative theories". Such theories (especially that of „the accepted risk") significantly contributed to the clarification of certain matters, which are of interest for the penal science – such as, by indicating the connection existing between the illicit action and the mental position assigned to the agent[9], or by proposing more convincing solutions for some of the problematic cases – but, unfortunately, they all present the failure to bring more and more confusion of the conditions of the penal liability (in fact, none of the legal significances of the applied criteria is quite clear[10]). With respect to its justification, such a tendency is usually supported by the argument that one would impose the penal liability „to cease to be founded on naturalistic elements – causality, fraud etc.[11]"

3. The evolution of the normative theory. The decline of the psychological theory was marked by the publishing, in the 1935's-1936's, of the first "studies" regarding the penal system, drafted by Professor Hans Welzel.

According to the opinion of the majority, Welzel is the one who founded the finalist current into the German dogmatics, by stating a theory which represented the very opposite of what its name seemed to suggest: it is not a penal theory, which encompasses concepts oriented towards the penal purpose and it is, therefore, normative – with built notions –, but a theory including notions taken from reality and oriented towards reality, thus being an ontological theory"[12].

Mainly, Welzel asked for the renunciation to the so called „causal theory of the action", based on which the crime is deemed as a mere sum of two different, even opposed, sides (the objective and the subjective one), proposing in return an „intentional pattern", in which the action is understood as a „purpose determining

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[8] The theory of the objective imputation was, firstly, developed, in the civil law, by K. Larenz (*Hegels Zurechnùngslehre,* 1927) and the, in the penal law, by R. Honig (*Kausalität und objektive Zurechnung,* 1930). Today, there are several variants of this theory, of which the less known are those of C. Roxin and G. Jakobs.

[9] Thus, one has noticed that while the intention implies an illicit *in radice* action, the guilt implies an action „with an illicit basis" and, therefore, it is only partially illicit.

[10] Kindhäuser claims, for instance, that „the accepted risk" must not be analysed as a exculpatory cause, or as a cause meant to eliminate the non-value of the result, but as an excuse eliminating the existence ofan infringement of the diligence obligation, in case of the guilt related crimes.

[11] G. Jakobs, *La imputacion objectiva en derecho penal*, Universidad Externado de Columbia, Bogota, 1994, p. 22.

[12] T. Avrigeanu, *Contribuții moderne la teoria infracțiunii*, in RDP no. 2, 2001, p. 9.

the orientation of a demarche[13)]". Such a way of explaining the action – according to which „the intentionality" (the will of the will) is the criterion based on which one separates the action from the mere events, – was deemed, at the time, the fruit of an avant-garde philosophic thought current, even though, in reality, it represented, as one has noticed later[14)], a mere „deviation" from Aristotle's technological pattern.

But Welzel did not manage to apply his captivating idea, that of building a theory meant to restore the natural unity between the objective and the subjective.

Although one has noticed that the identification of the guilt with the so called „subjective element" of the crime is an error, Welzel did not research long enough the way in which the previous doctrine created the concept of crime, so as to also discover the more profound faults of this building, but he rushed into correcting it: he eliminated the „subjective side" of the crime, and converted the subjective element into a „feature" (requirement) of the objective content of the incrimination (the subjective element was to be „ascertained", together with the objective side of the crime). But if „corrected" as such, the crime theory was rather downgraded. Under these conditions, the concept of guilt became a void concept, lacking in contents and, besides it, one has accredited the idea that the intention and the guilt, as subjective requirements of the illicit aspect, must be always „ascertained", including when the deed was perpetrated by someone who is not capable – which does not make sense, because the acts of thought can never be directly ascertained and, even supposing that they could be, such an „ascertaining" is not necessary as long as, in legal terms, at least, someone who is not capable must always be deemed as „not guilty".

And then, although it stated that the establishing of the guilt implies a legal appreciation or a „judgement", Welzel was not concerned with establishing the aspects submitted to this appreciation – which resulted, among others, in the fact that in his theory, as well as the psychological one, it is still unclear why while the establishing of the guilt also implies the ascertaining of the inexistence of a exculpatory clause, or of a clause which would eliminate guilt. But, under this aspect, one must mention, by observing the truth that, Welzel started to present the guilt as a „judgement", without starting from an analysis of the structure which the doctrine assigned to the crime, according to the causal theory of the action, but from a general examination of the positive law, which allowed him to notice that the legal norms are the result of a whole series of „judgements" (or „valorisations"). For the purpose of such an examination, one concluded that the incrimination norms imply, first of all, a determination and ranking of the social values (the first valorisation), and secondly, a determination and ranking of the

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[13)] H. Welzel, *Das neue Bild des Strafrechtssystems*, Z.St.W., 1936, p. 1.

[14)] W. Vossenkuhl, *Practica, în Filosofie* (fundamental course), Scientific Publishing House, Bucharest, 1999, p. 176.

dangerous behaviours (the second valorisation), and thirdly, an appreciation of all these behaviours according to the goal intended by the agent (the third valorisation). This leads to the idea that Welzel deemed guilt as an abstract „judgement" (or „valorisation"), inherent to the incrimination norm, and which, eventually is not connected to the individual, which came up with this norm. But for this purpose – the general and impersonal valorisation of the goal of a certain type of behaviour – guilt is usually reduced to the rule, which is impossible to include in a modern law system, and according to which, the individual is not entitled to wish something, which the norms forbids them to wish; on the contrary, the individual must remain „loyal" to the goal of the norms, to be attached to the values consecrated by it, and to form as a „dominant reason" (Kindhäuser) that of observing the „rightfulness" (justice), belonging only to the norm, but never to the individual.

It is very probable that, precisely as an answer to this concept of guilt, another German author, Gunther Jakobs[15)], stated the so called theory of the „social role", which assigns a completely opposite significance to guilt[16)]. According to this theory, the agent has, as a citizen, both the right to their own thought and to lead a life based on their own will, without being compelled at all „to decide on the reasons of a behaviour compliant with the norms"; the reciprocal of this liberty being „the obligation to act according to the norm", but only if the norms is „legitimate" – in the sense that it could be interpreted as equal freedom imperative.

Yet, beyond such relatively isolated positions, Welzel's theory seems to have satisfied the exigencies of the German doctrine, since his ideas are mainly supported even today. For instance, one continues to support the thesis according to which it would be necessary to ascertain the existence of the mental processes of intention and guilt at the level of the deed. For this purpose, one usually starts from the observation that human behaviour could not be deemed as „illicit" only due to the fact that it has provoked the forbidden result (which the norm intended to prevent), and from which one deduces that the existence of the illicit aspect would be equally conditioned by the establishing of the fact that the agent has foreseen the result (in this case, the deed is deemed as intentional) or, at least, that they could have foreseen it (in this case it is deemed as a deed based on guilt)[17)].

But such a thesis is more than a mere error; it is a typical example of self-contradiction. This is because, despite the contrary statements, it proves to be a thesis specific to the causal theory of the action and it shows that, in reality, the German penal doctrine has never abandoned this theory, in favour of a finalist theory of the action. Thus, one ascertains that, only in the case of the causal theory

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[15)] G. Jakobs, *Schuldprinzip (Principiul vinovăției),* 1993.

[16)] As the very author emphasises, his theory takes into accout a „material" concept of guilt, which does not trigger „moral self-corruption" (G. Jakobs, *op. cit*., p. 35).

[17)] A. Hoyer, *Strafrecht, AllgemeinerTeil,* Berlin, 1996, p. 59.

– which starts from the premise that every crime has a result – one can continue by saying that for each crime one must establish both the causal connection between the action and the result, as well as the predictable nature of the result, namely the existence of the intent or of the guilt. Moreover, one ascertains that, from the point of view of the theses specific to this theory, it is completely irrelevant weather the intent and guilt are deemed as requirements attached to the material element of the crime, and they are deemed as individual requirements, which might reflect a distinct structural element, namely the subjective element of the crime.

Anyway, if one would have indeed abandoned the causal theory in favour of a finalist one, the German doctrine should have renounced the thesis (which is undeniably false), according to which each crime has a result, and should have replaced it with the thesis according to which each crime has a purpose (because the lack of the purpose equals the lack of the very action – there is no action without a purpose –, one understands that, if the purpose is missing, one can no longer bring into discussion a „deed" and, therefore, there is no „crime"). This would have revealed the fact that one must clearly separate the purpose of the action – which is a general pre-existent condition of the crime – from the purpose of the illicit deed – which is sometimes provided as an incrimination requirement. Also, one must clearly separate the purpose (or the „will") of the action from the „intent" – a term which could consist of the will of the result forbidden by the norm. In short, based on a finalist theory, the German doctrine could have no longer supported the necessity to ascertain, in the case of any crime, the existence of the intent or guilt. On the contrary, one would have noticed that, far from being a general condition of the incrimination (of the „illicit aspect"), the requirement regarding the predictable result („caused" by the agent either intentionally, or out of guilt) there is a requirement specific to the result crimes, which are only a few.

Eventually, when it comes to Welzel's influence on the subsequent doctrine, one also ascertains that if, up to him, the German doctrine had been especially preoccupied with finding certain „objectives" meant to separate the penally relevant causal relations, starting with him, the preoccupations of this doctrine were re-orientated towards the finding of certain criteria of „objective" imputation – from which one can deduce that the main consequence of this theory is that it has induced the opinion that the faults of the crime theory originate not in the way in which one has explained the requirement of the causality, but in the way in which one has explained the requirement of the quilt and, more precisely, in the fact that its stability was founded on subjective, not objective criteria.

4. The philosophical circumstances of the normative theory. The orientation towards more „objective" theories, which is mirrored by the German doctrine, claims itself an explanation, especially if one wants to know if such an

orientation is correct and fit to answer the exigencies of the modern penal law, including the need to draft a fully coherent theory of guilt.

For this purpose, one is to take into account the works of two illustrious representatives of the German doctrine. Thus, in his treaty from 1908, Professor Franz von Liszt, one of the advocates of the psychological theory states that: „The concept of guilt is fully independent from the hypothesis of the liberty of will ... Only Determinism manages to relate the isolate deed to the psychological personality of the perpetrator. It is the only one capable of indicating a measure of guilt, a measure which increases or decreases, according to the deed, which is more or less, the expression of the personal stable nature of the author. Therefore, it is the only one to allow the practical distinction between criminals based on the intensity of their criminal (antisocial) minds, thus supplying a firm basis of the criminal policy"[18)]. In his turn, Professor Hans Kelsen states: „The assumption that only human freedom, namely the fact that it is not submitted to the law of causality, makes possible the responsibility of going obviously against the realities of social life"[19)]. Or, from another perspective: „Men are free because and to the extent in which the payment, the atonement or the punishment are assigned to a certain type of human behaviour, which conditions them; not because this behaviour is not determined by a cause, but although it is determined by a cause, even because it is determined by a cause. Men are free because their behaviour is the final point of the assignment[20)]".

One can clearly see that the orientation of the German doctrine towards more „objective" theories is explained through a strictly Deterministic philosophical thesis, of materialistic nature, which denies the freedom of men to want and act, the same as it denies the ethical-rational background of the Law, eventually assigning it a strictly utilitarian role of more „defender of interests"[21)].

One must remember that it is precisely against such a strictly Deterministic conception – which, by denying the free will, excludes guilt and, also, the moral background of the punishment (of the penal responsibility, in general) – one has states the „theory of the limited free will", supported, as indicated by Professor Nicolae Buzea[22)], not only by old school penal law specialists, but also by contemporary ones, authors with a high scientific authority (the author quotes Ad. Prins, G. Tarde, L. Proal, a.s.o.). In the 19th century, the debates on this theme were so expanded that they have even included writers. Feodor Dostoyevsky, for

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[18)] F. von Liszt, *Traité de droit pénal allemand* (French translation), Paris, 1911, pp. 234-235.

[19)] H. Kelsen, *Doctrina pură a dreptului* (trad. rom.), Humanitas Publishing House, Bucharest, 2000, p. 124.

[20)] *Ibidem*, p. 129.

[21)] F. von Liszt, *op. cit*., p. 94.

[22)] N. Buzea, *Infracţiunea penală şi culpabilitatea* (doctrine, legislation, jurisprudence), Iaşi, Faculty of Law, 1944, pp. 352-353.

instance, wrote memorable pages on this theme, in his book, „Notes from Underground", which many deem as the masterpiece of his entire work.

Of the numerous arguments brought against such a conception, one should mention here the one according to which the principle of the causality has, the same as any other representation of the consciousness, a relative and subordinated value[23)]. They supply a new notion of reality as series, but they are neither the beginning, nor the ending of this series, and also it does not give any indications about this reality or about its original; it does not even allow us to separate the levers, forms and values of things – as it systematically reduces the phenomena, according to a type or a mechanical scheme, leaving aside the specific and quality differences. This is why, by applying this principle to the entire nature, even to the human one, one *a priori* excludes the concepts of law and guilt: „thus, the judgements have no meaning; the compliments or the reproaches make no sense because the subject is not really at work, but the nature is at work within it – which is only a mere instrument of natural necessity[24)]". Therefore, if one wants to give meaning to these ideas, one must admit that, „besides the mechanical or strictly physical concept of nature, there is still room for another, which one could call metaphysical, and which is not less valid, nor less necessary than the first one"[25)], as it too corresponds to a logical exigencies, to „a priori forms or functions of the intellect[26)]".

Of course, the thesis of the determinism of the will does not characterise the German doctrine. As one knows, it has also been supported by the positivist school which, although born in Italy, has adepts almost everywhere. Yet, somewhat more constant, the positivists openly requested the renunciation to the idea of guilt, as well as to its legal consequence – the punishment – and, in return, to establish an objective liability („legal" – as Professor Enrico Ferri called it), having social defence as a sole end. But the German doctrine does not want to cancel the idea of guilt, deeming that it could justify it by what it called "legal liability to observe the norm[27)]". But, in this sense, namely the mere infringement of a legal obligation, irrespective of the reasons of its infringements, the idea of guilt can no longer express any „judgement". It usually originates in the idea of absolute authority of the state in relation to the individual – which is included, in a synthetically form, in the concept of „welfare state" or „police state".

[23)] *Ibidem*, p. 332.

[24)] G. Del Vecchio, *Lecții de filosofie juridică* (Romanian translation), Europa Nova Publishing House, Bucharest, 1995, p. 336.

[25)] *Ibidem*, p. 333.

[26)] *Ibidem*, p. 334.

[27)] Actually, the respect for laws is not an „obligation", in the technical-legal sense of the term, but as Professor Djuvara indicates, a rational principle, which is superior to law, and which must be separated by it (*Eseuri de filosofie a dreptului,* Trei Publishing House, 1997, p. 88); such a principle requests the individual to satisfy the need of order and general security and to, also, observe the social ideal of justice, expressed within the norm.

By drawing attention on this issue, some of the German authors actually strived to give a satisfactory explanation to the so called „legal obligation to observe the norm".

For this purpose, one should mention one of the most recent theories (1996), stated by Professor Urs Kindhäuser from the University of Bonn – a theory which is based on the philosophical and contemporaneous debates regarding the significance of the concept of „social action" (a concept deduced from the Kantian principle of autonomy as a rationality of the human practice). More precisely, it is inspired from the „theory of the communicative action" of Jürgen Habermas which, by accessing the Marxist social critique, has drafted a „normative concept of practice[28)]", starting from the idea that one would impose an answer to the question „what so people reciprocally expect from one another, what they must do in order to achieve self-fulfilment[29)]".

Thus, by developing the Communitarist ideas, Kindhäuser states that the purpose of Law would be social integration[30)], which must not be obtained anyhow, but in a legitimate way, namely by taking into account everyone's interests. He claims that through norms, one creates a „legislation of intercommunity", which limits the area of possible types of behaviour to „what is appropriate", but without this limitation entitling the deeming as invalid or illegitimate the behaviour which countervenes the norm – since the norms are the mere expression of a „polemic agreement on the coordination of the interests". The democracy, which the author interprets as being *par excellence* „the field of law", cannot offer final agreements, because „nobody can ever say that their opinion is absolutely rational". The consensus is the only one which makes the norm valid, which grants it legitimacy. The legitimacy of the norm derives, more precisely, from the democratic nature of its adoption process, from the communicative autonomy of the participants to the agreement, which submit only to the „power of the best argument". But, the legitimacy (or „rationality") of the norm is still temporary and arguable – in fact, one has to make efforts to prove that it is false, „namely to search for causes where the norm has not been correctly applies". He says that no cause could justify the legitimacy of the norm as deduced from an *a priori* ethical-rational principle, because then we would overlook the principle of neutrality of the law as compared to its non-observation; in this case, the guilt reproach would concern the irrational nature of the agent's behaviour. But, one cannot reproach the agent their lack of rationality – because on might prove that this lack actually belongs to the norm. One can only reproach the infringement of the agreement on which the norm is based or, in other terms, their lack of „communicative loyalty". The lack of faithfulness to the law, the lack

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[28)] W. Vossenkuhl, *op. cit*., p. 201.

[29)] *Ibidem.*

[30)] U. Kindhäuser, *op. cit*., p. 49.

of „communicative loyalty" represents, according to the author, the only criterion of guilt. In their opinion, guilt is "an action expressing a deficit of the communicative loyalty[31)]".

But, besides the fact that this theory avoids any reference to the thesis according to which the concept of guilt would express a „judgement", thus failing to clarify whether the establishing of guilt implies or not a valorisation, it seems susceptible to many other objections.

Thus, first of all, one can object to the fact that the purpose of Law can be neither social integration, nor the coordination of the interests, but only, as Professor Djuvara states, the fulfilment of the social ideal of justice, the achievement of the aspirations towards justice of the public consciousness. The social integration and the coordination of the interests can be understood as social law functions, but not as a purpose of the law, because the law has its own purpose. The law must be seen as independent from any of its utilities, because the idea of justice is above any other reason. Justice is a purpose *per se*.

Moreover, one can object that the definition of the norm as a „polemical" and „temporary" agreement is unable to grasp the complexity of law; such a definition fails to acknowledge the „unwritten law", and it also prevents the explaining of the so called „law constants" (E. Picard).

Eventually, one can also object to the alleged obligation of „communicative loyalty" – which is not provided by any norm; or to the statement that the agreement would pause only above rational aspects (on „the best argument") –, a statement which questions the need, supported by the same author, to search for causes in relation to which the norm is not valid.

From the perspective of theme, the fundamental objection refers to the statement according to which, if one were to derive the legitimacy of the norm, and therefore, the reproach (guilt) from an *a priori* ethical-rational principle, one would overrule the principle of law neutrality in relation to its non-observance reasons. But, does the law really encompass a neutrality principle? One believes it does not. When one states, for instance, that the law cannot judge the inner forum of a human being, on states, in fact, the existence of a subjective law – the right to freedom of thought and ideas. But since it has established this subjective law, one understands that the objective (the positive legislation) must guarantee its exercising – which, obviously, excludes the idea of its neutrality. But, in order to fully clarify this matter, one must also ascertain a fact, namely that the right to freedom of ideas is not, fully and under any circumstances, an intangible right. As revealed by a CEDO decision[32)], this subjective law can be divided into two elements – an internal and an external one –, and each one of them provides a distinct regime: the internal element is intangible; the external element is

[31)] *Ibidem*, p. 53.

[32)] Manoussakis vs. Grece, 26 September, 1996.

susceptible to limitations – especially, based on the public order clause –, taking into account the fact that it implies the social and political manifestation of the personal opinions and beliefs. This enables us to deduce that the rule according to which the law cannot judge the inner forum of a person is, in its turn, susceptible to certain distinctions. Thus, one finds is undisputable that, when an individual, through their manifestations, fails to observe the existing legal norms, the positive law could not be limited to the ascertaining of the norm infringement (the illicit nature of the action), but it must establish and „judge" (appreciate) the rational value of the „reasons" of said infringement, thus verifying its own legitimacy. In such a case, one deems that the above mentioned rule is submitted, in its turn, to an absolutely justified restriction.

5. The relation between guilt and the legitimacy of the norm. Without a doubt, the idea of guilt is based, as the German authors say, on the assumption that the norm infringed by the agent is legitimate, right (because, obviously, otherwise, one could not cast the load of infringement upon them). Nonetheless, the way in which one explains this proposal does not entirely lack importance, for the contents one attributes to guilt.

Anyway, it is wrong to assume, as these authors do (indeed, based on the ideas of certain illustrious thinkers, such as Grotius, Hobbes, Spinoza and others), the norm is legitimate because it is legal, issued by a legitimate authority. Thus, one reaches the conclusion, as Professor Djuvara noted[33)], the „social order dominates justice" (Radbruch, Sauer a.s.o.), and this prepares the justification of any act of brutal force committed by the public authority. But, in fact, the social order is not superior, but subordinated to the law – as it is emphasised by the mere fact that any social order is deemed as just or unjust, based on how it succeeds or not to harmonize all the interests, by guaranteeing everyone the right to equal freedom. In fact, one can see that reason itself prevents us from talking about guilt when the norm is infringed, no matter how "legal" it is, supressed or affected, through arbitrary interdictions, the individual's freedom, in the name of an alleged interest in social order and security. This results in the following: by identifying, as the German authors do, the legitimacy of the norm with its lawfulness, one risks to void the concept of guilt of any rational content, and to assign it a false significance, where the perpetrator is, more likely, a defender of justice, a revolutionary.

By adhering to this type of reasoning, which is as wrong as the practice of law, one would reduce law to a mechanical application of the „legal" norms included in formal sources. In reality, the practice of law is never reduced to it. As Professor Djuvara[34)] noted, the opportunity to effectively apply the positive norms

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[33)] M. Djuvara, *Enciclopedia juridică,* All Publishing House, Bucharest, 1995, p. 486.
[34)] *Ibidem*, p. 501.

is successfully judged, for every new cause, while their very legitimacy is judged as such – which is possible, simply because the practice is always inspired (must inspire) by the superior principles of justice (by the „rational justice"). In fact, if things were like this, the trial would cease to be an act of justice, and it would become an arbitrary act.

Therefore, we must conclude that, far from being an absolute and violent presumption, the presumption of norm legitimacy is a relative one, which means, on one hand, that the validity of the norm still depends on its rational value, on the ability to avoid any „useless antagonism between the community law and the individual's law[35)], and, on the other hand, that this validity must be researched every time the norm has been infringed.

In fact, this seems to have been noticed also by the German authors – as proven by Professor Kindhäuser's theory – except that, instead of admitting what is obvious, namely that the legitimacy of the norm is deduced from an *a priori* ethical-rational principle and, therefore, that the guilt reproach concerns the irrational nature of the agent's behaviour, they reject this conclusion, by invoking an alleged principle of the „neutrality of the law" (this is how Professor Kindhäuser concludes, for instance, the extremely difficult to understand thesis, according to which one could not reproach the agent their lack of rationality, only their lack of „communicative loyalty"). But as one has shown before, the law cannot include such a principle. It cannot remain indifferent to any social action, but it must include and submit to their appreciation any such action. Besides this, as one has also shown, they must review their own appreciations every time their norms have been infringed, thus questioning their legitimacy.

Taking all these into account, one must conclude, in utter contradiction with all the theories so far – which, without exception, deemed guilt as an element, a feature or a requirements of the illicit deed and, implicitly, as a common condition of legal liability (to which one could even renounce) – that the notion of guilt defines something much more important, namely an existence condition of law itself, a „judgement" of the conflicting practical reasons. The guilty or not guilty verdict compares the rational value of the act (the legitimacy of the action) and the rational value of the norm (the legitimacy of the legal imperative), and, thus, it includes in itself the very principle on which the historical evolution of the law is based and which, actually, resides in a permanent confrontation between the practical reasons (common or in group) expressed by the norm and the individual practical reasons, on which the illicit deed lies.

6. The nature of guilt. One has previously show that, with respect to guilt, there are two conceptions: the psychological conception – which defines guilt as a true connection (psychological) between the perpetrator and the result of their

[35)] *Ibidem*, p. 486.

deed, namely the predictability of this result – and the normative conception, according to which guilt is defined as a „normative concept" or as a „judgement" (but unfortunately, without being able to justify this definition).

In this context, one must notice that the opposition between these two conceptions derive from another, much more wider one, which refers to the research object of the law and which, in fact, explains the reasons of the „penal dogmatics crisis" (ascertained by the majority of the specialists), which is extended excessively, thus seeming really insurmountable. Thus, it is very likely that due to the extremely close connection between low and life, the common opinion is that the object of study of the law is the real social life, the social actions of the individuals – and the these, despite the fact that, along the time, many extremely well trained and acute thinkers underlined the fact that the law is not „an ascertaining science"[36)], which studies the material deeds (which it is), but an abstract, mainly deductive science, which studies the legal judgements (which it should be).

In this context, one deems as indicative the fact that, although unanimously accepted that a deed, no matter how harmful it is, cannot be deemed as crime, except for the case in which the law qualifies it as such, almost everywhere, the penal law specialists continue to separate the crime – as a real deed – from the incrimination norm. But such a distinction denies what had just been stated – namely that the crime is a mere appellation, so to speak, a „label" which can be tagged to the actual deed, under certain legal conditions –, and besides this, one fails to acknowledge that fact the establishing of the compliance between the actual deed and the incrimination norm is not sufficient, *per se*, for the characterisation of that deed as a crime (because, for instance, one also needs for this ascertaining to be made by the competent body, within a trial, by observing the trial norms, including the presumption of innocence). More than that, most penal law textbooks, include an analysis of the „crime structure", so that one might think that crimes are just objects, while the jurist's task is reduced to being able to tell apart these objects from other similar ones.

This is why one deems it as necessary to remember what Professor Paul Georgescu said[37)], namely that the „law plan is … normative". If in the case of history, for instance, „the purpose of the scientific elaboration is that of moving on from the descriptive phase to the explanatory one, without leaving reality", in the case of the law, the scientific drafting must also exceed the facts determination phase, but not to give then a natural explanation, but to appreciate them, to give an opinion on their validity or, in other words, to issue „judgements". In fact, this is how can one explain why the realities of the law are never similar to the objective

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[36)] *Ibidem*, p. 170.

[37)] P. Georgescu, *Logica probelor şi silogismul judiciar*, The Philosophy Magazine no. 3-4, 1942, p. 25.

ones. The legal concepts achieve, as he said, „a sequencing and schematized transcription"[38] of the deeds; they „reduce reality, condense it and rationalize it as confuse and as abundant as it may be". As a consequence, law does not deal with any deed which has not been converted.

But, if one were to take into account such observations, one could only conclude that the normative theory is right when claiming that guilt is a legal concept, not an objective reality – as the psychological theory claims.

But on the other hand, the „normative" nature of this theory is difficult to justify if, as stated before, it did not manage to indicate the content of the concept of guilt. It is true that the German authors mention a „gradual imputation"[39], both at the objective and subjective level, but they cannot indicate the number of the „imputation levels" – namely of the aspects submitted for legal appreciation, and which justify the guilt reproach. Also, it does not offer any explanations with respect to the relation between guilt and the so called „causes eliminating guilt".

The reasons of the failure of the normative theory are several. But since they have been discussed more broadly in other papers[40], one is to mention here only the fact that, the same as in the case of the psychological theory, the normative theory omits the fact that there are no natural crimes, the same as it omits that the so often mentioned will is also not a natural will (psychological), it is, as Professor Djuvara noted, a „rational will, the way it should be[41]" (namely free and conscientious) – which, in fact, reveals the reason why the will of the unable one is deemed as invalid. In other words, the same as in the case of the psychological theory, the normative theory omits the fact that the law is not descriptive; it does not render the action and the will of the action as such, but transforms them into concepts which, invariably, deform reality.

For instance, if, in reality, the action cannot be separated from its will, one can see that law does separate them, and it includes them in distinct concepts. It creates the concept of crime, starting with the objective side of the action, with the „external manifestation", to which it attaches a series of objective and subjective requirements, which are indented to grant it the penal, illicit nature. Or, it builds the concept of criminal (active subject of the crime), starting from the subjective side of the action, from the „internal manifestation" – which results in the fact that the crime can be imputed to the author, only if one establishes the existence of any of the so called „guilt removal causes".

This can lead to the wrong conclusion that the guilt has been understood as an element or a crime existence requirement. In reality, there are two concentric legal concepts, which include the wider, supersequencing concept of guilt, while the subsequencing concept is the guilt one. In fact, one deems it as obvious that the

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[38] *Ibidem*, p. 27.
[39] A. Hoyer, *Strafrecht. Allgemeiner Teil,* Berlin, 1996, p. 59.
[40] I have mentioned these works, in the first footnote.
[41] M. Djuvara, *op. cit*., p. 191.

guilt reproach could not exclusively refer to the subjective side of the action (but, if the „crime" is not present, one can no longer bring the „perpetrator" into discussion), it must analyse the action as a whole, namely both its external side, referring to the existence of the „crime", as well as its internal side, referring to the existence of the „penal capacity" (in the terms of the Italian authors), or of the „active subject" or perpetrator (in the terms of the Romanian authors).

This results in the fact that the guilt examination is usually made in two phases: during the first one, one establishes the existence or non-existence of the crime (of the „objective imputation"), and for this purpose a „judgement" is made in relation to the compliance of the actual deed with the one described in the incrimination norm; during the second one, one establishes the existence or non-existence of the active subject (of the „perpetrator", of the „penal capacity" or of the „subjective imputation"), and for this purpose a „judgement" is made in relation to the validity of the psychological will, as compared to the so called „guilt removal causes". Therefore, the guilt reproach can be addressed to the agent, or every time this action is imputable, both objectively and subjectively.

The „in principle" note refers to, besides the simple crimes („formal") – the most numerous –, there is a series of other crimes. Their existence is conditioned by an element outside the action, namely the result – thus their name, which is „result-oriented crimes". But unlike the formal crimes, in the case of the result-oriented crimes, the imputation must have four, not two phases. Thus, separately from the objective and subjective imputation of the action, in this last case, one must also establish the objective imputation of the result (namely, its *type and means to be avoided*), as well as the subjective imputation of the result (namely, the *predictability and the mental attitude* of the agent towards them – namely the intent or guilt).

Yet, one shall not detail the judgements implied by the guilt determination process in the case of these last crimes, but limit to indicating, in conclusion, that after one has established the imputability of the action and, as the case may be, of the result, the perpetrator can be declared „guilty"– which results in the transformation of the pre-existing obligation (namely, the norm observance) into another obligation (namely, the liability for its infringement, to bear the punishment); because, in other words, guilt is, as Professor Djuvara noted, „what the law calls a *novatio*".

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