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GUILT – ASPECTS OF COMPARATIVE LAW

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Abstract: *Starting from the definition of crime, according to the provisions of article 15 of the Criminal Code, a crime is considered to be a deed regulated by criminal law, committed with guilt, unjustified and imputable to the person who committed it. A second important characteristic of crime, according to article 15 of the Criminal Code, is guilt. In order for the deed to be considered a crime, it is not enough that the activity performed by the perpetrator correspond to the incriminating regulation, it is also necessary that the author acted from the mental position described by law as a crime. Article 16 of the Criminal Code stated the rule according to which "a deed is a crime only if it was committed with the appropriate from of guilt, as required by criminal law".*

Key words: *guilt, Criminal Code, crime, intend, subjective element.*

1. Introduction

Starting from the definition of crime, according to the provisions of article 15 of the Criminal Code, a crime is considered to be a deed regulated by criminal law, committed with guilt, unjustified and imputable to the person who committed it.

A second important characteristic of crime, according to article 15 of the Criminal Code, is guilt. In order for the deed to be considered a crime, it is not enough that the activity performed by the perpetrator correspond to the incriminating regulation, it is also necessary that the author acted from the mental position described by law as a crime.

Article 16 of the Criminal Code stated the rule according to which "a deed is a crime only if it was committed with the appropriate from of guilt, as required by criminal law". If we were to corroborate the provisions of article 15 first alignment with those of article 16 sixth alignment, we would conclude that the regulating law, in addition to describing the forbidden action, the obligation it involves and the immediate consequence, it must also state the form of guilt for that specific deed to be considered a crime.

For establishing the form of guilt regulated by law, the new Criminal Code stated, in article 16 sixth alignment, two rules used to determine the form of guilt.

The first rule establishes that the deed consisting of an action or inaction is considered a crime when it is committed with intent, whereas the second rule states that the fact committed without intent is a crime only when the law expressly states it.

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In regard to guilt as an element of crime which can manifest in different forms, we must state that this institution is very important as the deed will not be considered a crime if it was not committed with the appropriate form of guilt as stated by law.

This is owed partly to one of the characteristics of crime, in general, that is the specific type of the deed.

In the following section, we will try to point out different aspects and characteristics of guilt, as well as its forms of manifestation, in Romanian law as well as in other European states' law.

2. Guilt - a condition for the existence of crime; a subjective element of crime

Guilt, as an element of the subjective side, represents the mental attitude of the perpetrator in regard to the deed and its consequences, an attitude which is expressed in the form required by law for that type of crime.

In specialized literature it was underlined that we must distinguish between guilt as an essential trait, a condition for the very existence of crime and guilt as a subjective element of crime. Guilt as an essential trait of crime exists whenever we are in the presence of any form of guilt as stated by article 16 of the Criminal Code.

Guilt as a subjective element of crime exists only when the material element of the crime was committed with the form of guilt required by law.

Thus, it is possible that there is guilt as an essential trait of crime, without there being guilt as a subjective element (in case of trespassing, a crime regulated by article 224 of the Criminal Code, it is required that the perpetrator acts with intent; if he commits the deed without intent, there will be guilt as an essential trait, but not as a subjective element of the crime, thus the deed will generate no criminal liability).

It is also possible for guilt to exist as an element of the content of crime, without guilt existing as an essential trait of crime (for example, self defence, the state of necessity).

According to Romanian criminal law, there are two factors inherent to the mental state of a person: conscience or the intellectual factor and will or the volitional factor which are intertwined and closely connected.

The intellectual factor assumes the full representation of the content, sense and acknowledged and accepted consequence, as well as the foreseeable development of the deed.

The volitional factor is the mental element which propels and commends the physical energy, thus assuming the transition from the manifestation of conscience to the manifestation of will through which the subject mobilises his energies in order to achieve the goal he desires.

Guilt expresses a certain dangerous mental attitude of the perpetrator in regard to the deed and its consequences.

By studying the provisions of article 16 second alignment of the Criminal Code, we can see that guilt can manifest under the following forms: intent, fault and overridden intention.

The new Criminal Code does not define guilt, but only its forms and means.

According to the provisions of this text, guilt can be defined as the mental attitude of a person who acted on his own will by committing a deed regulated by criminal law and by having had the representation of the result it might produce and having had accepted and desired that result or wrongfully thought that the result might not occur or believed that the result might not occur even if he should have foreseen it.

As an essential trait of a crime, guilt exists every time we are in the presence of

guilt in any of its forms; on the other hand, for the existence of guilt as a subjective element of a certain type of crime, there must be a realization of all the comprising elements of crime (the action, the immediate consequence and the causality link).

As a result, there can be guilt as an essential trait of a crime, but not as a subjective element of the incriminated deed.

According to an unanimously accepted point of view, the notion of subjective element refers to the mental attitude of the agent in regard to the deed he committed and the consequences it produced, an attitude which should manifest under the form of guilt (intent, fault or overridden intent) in order for the deed to be classified as a crime, according to the legal provisions.

In theory, guilt has a very similar understanding to that attributed by the psychological theory (which dominates our criminal thinking) as it was claimed that it expresses a contrary report between the will of the agent and the will of the lawmaker, or otherwise said, it expresses "the reprehensible character" of the agent's attitude in regard to the social values protected by criminal law.

There is, however, some controversy regarding the significance of the "subjective element".

Although guilt - which is "an essential trait" of any crime - can and must be established in the form and result of crimes, what is specific to the latter is the fact that guilt no longer depletes the comprising content of the crime, because in this case it becomes necessary to prove the existence of a causality link between the deed committed with guilt and the wrongful result.

The demand of establishing the specific existence of an identical result with the one described in the legal model ("typical result") brings about the demand of proving there is a causality link between the action (inaction) of the agent and the "typical result", a link which must be appreciated from two different points of view: on the one hand, from an objective point of view, ex post, in regard to general laws of becoming and, on the other hand, from a subjective point of view in regard to the human capacity of foreseeing the typical (illicit) result.

What is essential to the existence of the subjective element is not effective knowledge, but the knowable character of the circumstances in which the action (inaction) became effective for the illicit result; the predictable character of this result is established accordingly.

The knowable and the predictable character are the fundamental structures which define the subjective element.

Unlike the Romanian lawmaker, the German lawmaker offers no legal *stricto sensu* definition of crime, nor does he describe the traits of this definition in one specific group.

However, we notice that the Criminal Code offers a definition of the deed committed without right, in the sense of criminal law, thus "it is considered to be a deed committed without right only that which comprises the content stated by the regulating law"(article 11, alignment (1), point 5 German Criminal Code).

The German lawmaker refers only to the regulation of the deed in criminal law, but makes no remark about guilt as a characteristic of crime.

Given all these, German doctrine thought that we must distinguish between the deed committed without right and crime, as they have distinctive features.

Thus, crime was defined as the "deed which comprises the content of an action regulated by criminal law, committed without right and with guilt"[2].

The difference comes from the fact that

guilt is an element of the crime, whereas, in the current regulation, the deed committed without right is not necessarily performed with guilt.

In German criminal law, guilt is an element characteristic to the deed committed with intent, without right and regulated by criminal law, as it is also a subjective element in regard to "the means by which the deed will be attributed to the person who is believed to have committed it"[2].

Much like the German lawmaker, the French one uses the same characteristics, by not grouping the traits of crime. As a resemblance to the Romanian Criminal Code in regard to the characteristics of crime, we may notice the attribution of the deed to the culprit.

Thus, the French lawmaker states in article 121-1 that "a person is criminally liable only for his own deed", in article 121-3 "there is no crime or offence committed without intent".

The French lawmaker makes no distinction between crimes and offences. Usually, crimes are deeds with a significant degree of social danger, whereas offences are those with a lower degree of danger.

As we can easily notice, there is an important distinction between crimes and offences examining the regulations of the special part of the French Criminal Code, we can conclude that all crimes and some offences are committed with guilt. We must also point out that by the phrasing used, guilt is assimilated to intent, as a general rule.

If in German and French law, we can't find guilt as a trait of crime or even described in a distinctive legal provision, Italian law is somewhat closer to the Romanian one from this point of view.

In the Italian Criminal Code we will find guilt regulated in a distinctive provision, but not as a trait of crime, but named "the psychological element of crime" as regulated by article 43.

The lawmaker makes a clear distinction between the subjective and objective side of the crime. Furthermore, we must also mention that, in article 42 second alignment, the Italian Criminal code states that "no one can be punished for a deed regulated by criminal law unless the deed was committed with intent, except for the cases in which the law clearly regulates the deed committed without guilt or with overridden guilt".

As a similarity with the French Criminal Code, we notice that the general rule is that intent is a form of manifestation of guilt but, unlike the German and the French code, overridden intention is clearly regulated.

The Italian doctrine was preoccupied with defining guilt *stricto sensu*; therefore, guilt was defined as "the main condition based on which a deed can be attributed to its author" [1].

This definition arose from the need to elaborate a unified definition of guilt with or without intent.

The same authors mention the following about guilt "based on the regulation of guilt, there is no real possibility of accusing a person of committing a crime unless that person has the ability to understand or the wish to commit a crime as regulated by criminal law" [1].

To conclude, we might state that, although guilt is not necessarily an element of crime or an important condition for its existence, most times it can be deduced by interpreting the circumstances of a crime.

Furthermore, without guilt as a subjective factor, we can't talk about a crime.

We must also keep in mind that, in spite of a strict regulation or a rich doctrine in regard to guilt, it will always have to be determined *in concreto* in each specific case.

3. Forms of guilt

From the provisions of article 16 second alignment of the Criminal Code, we can conclude that guilt can be present under the following forms: intent, fault, overridden intention.

From the legal definition of intent, we can see that it can exist in two forms: direct intent and indirect intent.

According to the provisions of article 16, third alignment, we can state that the perpetrator commits the deed with direct intent when he foresees the result of his action, wishes to produce such a result (for example, in legal practice it can be proven rather easily in most cases that the perpetrator has foreseen the result of his action and actually wished for it to produce that certain consequence.

There is no doubt that the perpetrator wished to kill his victim by stabbing it multiple times in essential parts of the body).

According to the provisions of article 16 third alignment, we are in the presence of indirect intent when the perpetrator foresees the result of his action and, although he does not wish for that result to happen, he accepts the possibility of it happening.

In case of this form of intent, the intellectual factor is specific by the fact that the perpetrator has a representation of at least two results: one that he wishes for and can or cannot be regulated by criminal law and one regulated by criminal law which he does not wish to produce, but he accepts the fact that the result might be produced as a consequence of his actions.

Such an example is found in judicial practice, when it was ruled that there is manslaughter when the culprit, as a result of the repeated urges of the victim to stop the car and subsequent threats to jump out of the moving car, refused to stop the car and accelerated in spite of the victim's protests, determining him/her to jump out of the car and causing the death of the victim.

From the provisions of article 16 fourth alignment we can see that the deed is committed with simple fault when the perpetrator foresees the result of his actions but does not accept it, recklessly thinking that it might not be produced (such an example is the deed of the driver who, knowing that there are some problems with the breaking system of the car and thus he might a produce a serious car crash, still decides to drive based on his skills as a driver, thus thinking he will be able to avoid an accident; the accident happens and causes the death of a pedestrian) or by neglect when the perpetrator does not foresee the result of his actions, although he could have and should have foreseen it (such an example is the culprit who accidentally injures a drunk person who was sleeping on the side of the road, although, provided he paid more attention, he could have avoided the accident).

Article 16 fifth alignment of the Criminal Code regulates overridden intention, which exists when the deed, consisting of an action or inaction committed with intent, produces a much more serious result owed to the negligence of the perpetrator.

Judicial practice lists as an example of deadly bodily harm the deed of the culprit who had hit the victim whom he merely intended to injure, in an area of the skull which caused massive bleeding and the subsequent death of the victim, a result far more serious than the one the culprit should and could have foreseen.

While the Romanian Criminal Code clearly states the forms of guilt, the German Criminal Code does not provide such details. The only reference is found in the law regarding indirect intention.

Thus, in article 11 second alignment of

the German Criminal Code it is stated that "the present law incriminates the deed which comprises the present regulation, but as form of guilt states overridden intention, as the perpetrator although did not act in order to achieve that certain result, he acknowledged the possibility of the effect his deed might produce".

We must also notice that the current legal definition is quite similar to that of the Romanian Criminal Code [article 16, alignment (3), letter b)].

As a consequence we can deduce that direct intention as a form of manifestation of guilt is presumed by relating this assumption to the German lawmaker, as the direct intent will be established specifically for each case.

It is the doctrine that provided a definition of direct intent based on its traits, claiming that "the person who acts voluntarily and knows the results of his actions and the deed he commits comprises the legal elements of a crime, then he acts with direct intention" [2].

Starting from this definition we must state that in order to establish guilt, the person must have acted on his own will, without constraint and being aware of his actions.

If the perpetrator has no representation of his deed, we will be talking about a deed committed without intent, thus not a crime, but a deed committed without right.

As for the crimes committed without guilt, the German criminal law does not define them in its general part; however, article 15 strictly regulates that "only the deed committed with intent will be punished, except for the cases in which the law incriminates the deed committed without intent".

In the special part of the German Criminal Code, the possibility of establishing whether a deed qualifies as a crime if committed without intent is strictly regulated.

As for the forms of manifestation of fault, although the law has not expressly regulated "neglect" or "imprudence", it was appreciated that "fault is a special type of manifestation of a behaviour which can be considered criminal, in regard to both crimes and deeds committed without right"[2].

Given all these characteristics of fault, we can state that it can manifest under multiple forms, which should be considered according to the specifics of each case.

In regard to the provisions of the French Criminal Code, these are quite similar to those of the German Criminal Code, as there is no legal list of the forms of guilt. Given all these, by interpreting, we can distinguish the form of intent and the form of guilt.

Thus, in article 121-3, the first alignment it is stated that "there is no crime or offence committed without intent"; the third alignment of the same article states that "in the specific cases regulated by law, the deed which comprises the legal content of a crime will be considered an offence if it was committed by negligence, imprudence or by disrespecting an obligation to be cautious or maintain a certain level of security stated by law or the specific regulations for that certain activity on condition that the culprit did not fulfill his duties, keeping in mind the specifics of each activity as well as the available means and his competence".

As a result, we can state that fault, as a form of manifestation of guilt is regulated by the French lawmaker in a wider manner as opposed to the Romanian and the German lawmaker.

Thus, we can distinguish between fault by negligence and fault by imprudence, as classical forms of manifestation of guilt, but also another form, fault by disrespecting an obligation resulted from the activity of the perpetrator.

In regard to guilt with intent, the lawmaker makes no distinction between direct and indirect intention, as it must be appreciated keeping in mind the specifics of each case, the severity of the deed and the person of the perpetrator.

As for the regulation in criminal law, Italian law is the closest to Romanian law, as the Italian Criminal Code expressly regulates intent, fault and overridden intent.

Thus, article 43 clearly states that "a crime is committed with intent when the dangerous deed is a result of an action or inaction of the perpetrator and the result it produces is wanted and accepted by the perpetrator".

Starting from this regulation, we might observe that intent, as described by the Italian lawmaker, is similar to direct intent regulated in the Romanian Criminal Code.

The deed will be committed with overridden intention when "the result of the dangerous action or inaction is much more serious than the one predicted by the perpetrator".

In this case, there is no significant difference between the Italian and the Romanian Criminal Code.

In regard to fault, the legal description provided by the Italian lawmaker is quite similar to that provided by the French lawmaker.

Thus, a deed is considered to be committed without intent "if the dangerous deed produces a result which, although was foreseeable by the perpetrator, is not wanted and it occurs as a result of negligence, lack of attention or experience or as a result of not respecting the laws, rules, orders or regulations of social conduct".

As for the third type of manifestation of guilt, stated both in Italian and French law, namely disregarding a legal provision or a rule of conduct, we must notice that, although we can't find it in the Romanian criminal law, it shows some resemblance to the provisions regarding civil liability.

In article 1349 first alignment of the Civil Code, the Romanian lawmaker states that "any person has the duty to respect rules of conduct which are imposed by law and not impair the legitimate rights and obligations of another person by its actions"; furthermore, the second alignment states that "the person who disregards this duty with intent, is liable for all the prejudice he has causes and will be obliged to make up for it".

Given all these, although there are certain similarities between regulations, the main difference is given by the fact that this type of guilt is found only in civil law, not in criminal law where the Romanian lawmaker makes no distinction between crimes, offences and contraventions, or crimes and offences, as do the French and Italian lawmakers.

Based on the facts listed above, we can state that guilt is usually regulated as intent or fault.

However, classifying intent as direct or indirect or fault as coming from negligence or imprudence is not a common trait of the laws we have analyzed, as is overridden intention, a form of manifestation of guilt which is not strictly defined in all cases.

4. Conclusions

Knowing the forms of guilt is extremely necessary, based on certain principles. Based on these principles, there is no criminal liability if no wrongful deed was committed, as liability derives from disregarding a regulation of the law.

Regardless of the form in which it occurs, guilt is found in all laws.

From this point of view, based on the laws that we have analyzed, we must notice that the Romanian lawmaker was the strictest, providing each form

of manifestation of guilt a legal definition as opposed to the German lawmaker who appears to be the most flexible one.

This is merely an appearance because, by studying the German Criminal Code we can see that this appreciation will be made based on special criteria of each specific crime.

Italian law is situated between these two extremes, being closer to the Romanian and the French one, rather than the German one.

Given the fact that Romanian law is somewhat new, we will see if the Romanian lawmaker's choice in favour of a strict regulation of the forms of manifestation of guilt, but also of guilt as an element of crime, is one which would facilitate the enforcement of criminal laws.

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