

The Psychology of Guilt in Criminal Law: A Comparative Review of Romanian Legal Aspects

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ABSTRACT: Criminal law is based on a subjective characterization of an objective act. The dichotomy of the concept is the very base of the investigation process and, at the border of the two notions, stands the forensic psychiatry. It adds quality to quantity by constructing arguments and building a strong foundation for the undeniable definition of the criminal offence: guilt. If law analyses facts as quantitative manifestation of an antisocial activity, the psychological meaning of the guilt is dissected in a complex lexical and scientific family of equivalent aspects. Discernment, intent, responsibility, motivation, motive are constructs of environmental and internal cognitive and emotional influences that align into proportional connections, characterizing guilt, which implies past, present and future implications of a criminal offence.

KEYWORDS: criminal, guilt, discernment, expertise, psychiatry, law

Introduction

Throughout the world, law, no matter its form and language in every civilization, defines a criminal offence, an antisocial act, by the guilt of the person that initiate that action. Every sentence, ending a judicial investigation process, finds the accused part guilty or not guilty, which defines in a general, quantitative way, the antisocial act, his mental integrity when committing that act and the responsibility he is taking for those actions which inquires assuming a punishment. Understanding the concept of guilt in its qualitative aspect, requires understanding all psychological processes behind a motivated action and all dimensions of the psychocognitive construct that flow from instinct, emotion and thoughts to materialized physical effort.

In order to understand the importance of the psychological meaning of guilt, we can give for example the irresponsibility of a psychiatric patient with violent behavior towards others. In this case, a forensic psychiatric expertise will examine the patient's mental state, elaborating all his psychological yield, by going through each layer of his cognitive, emotional and mental construct, in connection with the antisocial act of which he is accused. A mental illness will affect his judgmental capacities, proportionally with the severity of the disease and the cognitive levels affected by it. As such, a mild depression or an unstable emotional state will not affect his cognitive capacity as hard as schizophrenia or maniacal stage of bipolar disorder because the profound layers of conscience are not as severely affected. Moreover, emotional filter and their influence are somehow invert proportional to the way discernment works. Massive violence can be triggered by both affective impulses and psychosis but in the first case, emotional drive will bypass the neurological restrain pathways, without altering them while in the second case, there are few or no emotions involved, but only a damaged neurobiological pathway of cognition. A severe psychiatric disorder means the absence of guilt because the psychocognitive processes that construct the guilt are inconstant and disconnected, so all its dimensions are not equivalent and proportional (Gladchi 2016, 19-25).

Another example, this time referring to offenders with psychocognitive integrity, is the one of psychological profiling, especially in the cases of dangerous criminals or serial killers. Going back from the felony to the psychological bases of the act, understanding the way that person thinks, his motives, his intentions, his emotional drive, are all important parts of the

investigation but also of the prosecution because they demonstrate all the aspects of that person's guilt in relationship with his actions (Tănăsescu 2018).

This example reinforces the complexity of guilt beyond its judicial importance and the way the bases of criminal law are profound and complex and require a full understanding of the psychological qualitative aspect of the criminal act definition.

From material to immaterial – the cognitive construct of guilt

In order to understand what guilt means in all profound psychological aspects, there are logical flowing processes to examine, going back from the objectiveness of law to the relativeness of psychology and physiology of the brain. Starting from the definition of criminal offence, Romanian law states that a criminal act is an antisocial activity manifested with guilt. Legal investigation gives a quantitative characteristic to guilt, it weights the amount of guilt proportionally with the complexity and severity of the action by gathering specific measurements, objective facts, proofs and scientific expertise. Guilt can be seen as a social, psychological and law phenomenon, all these parts being subsidiary to each other (Bobîlcă and Paraschiv 2009, 79; Tănăsescu and Tănăsescu 2004, 132-153). Psychological processes like brain mechanism, conscience, personality, emotional filters construct the mental state integrity that is the foundation of discernment, critical judgement which is the base of responsibility. Responsibility is the base of social integration and moral compass. Also, it is the characteristic that makes a person capable of assuming the blame for a wrong deed, understanding its negative impact and further, assuming the punishment and rehabilitating (Colţan 2008, 115-122; Tănăsescu 2014, 111-128).

Intent and “culpa”

Proceeding to the psychological analyzation, if the criminal act is the center of criminal law, as a quantitative measuring unit, then guilt is what adds qualitative weight to an act. In other words, we can describe guilt by dissecting it into two manifestations: the external manifestation which is the physical action or inaction in order to obtain a specific goal and the internal manifestation, which is the intention of doing an action. Intent has multiple layers with intent being the primary characteristic and “culpa” which define an involuntary skip of details when constructing a plan of actions. In U.S.A. law, one form of “culpa” is manslaughter and as we see, there are specific names for each type of “attenuated” intent but Romanian law gives them all the generic title of “culpa” (Grama 2007, 129-133; Tănăsescu 2012, 11-17).

Intent is viewed by the law as the primordial and elementary intrinsic aspect of guilt. It is a result of psychological processes no matter the physical outcome. Intent assumes a cognitive integrity in order to understand, motivate and critically assess the plan of action, its motive and its consequences. If we backward to the time when society's moral compass was managed by church and if we analyze the Christian beliefs, we could make some interesting parallels that will shed some light over the significance of intent. Sin is the equivalent of criminal offence but one is an action or inaction that makes a person responsible to God and the other responsible to the law. Sin begins in the soul of human being, altering his thoughts and making him plan something against the moral Christian order. The same thing happens with intent in criminal law. It begins with thinking about a plan, with emotional or material motivation and with assessing all possibilities before conducting the action. Proving the integrity of the mental state of a person means proving that he planned the deed with actual intent which gives that person, guilt. As a result of psychological processes, intent is analyzed in two directions: one is the intellectual factor and the other is the volitional factor. As such, there are 2 pathways that interact when the plan of an action begins in the thoughts. The intellectual factor describes the cognitive level at which, the criminal details of an action is known to the felon. Understanding the negative aspect of an activity is the first step. After

that, there is will that motivates the plan towards a goal and also, emotional filters act on volition like a volume button because it increases or decreases the motivation of that action (Ștefan 2021).

Intent has multiple extensions and subsidiary characteristics and each extension give unique features to a criminal act that will furthermore, be useful to judicial inclusion of the act in the Criminal code. As such, each feature is actually a psychological way of developing a plan, depending on the intensity of the intellectual or the volitional factor. The main classification of the intent is by how it is oriented to the goal and the result. We need to mention that goal and result or outcome do not always coincide. The first form of intention is the direct one. It is defined as planning the action foreseeing the outcome and desiring that outcome. It is the simplest form of the intention. For example, shooting a man in the head from close range is prove that the intent was killing, because he aimed a vital part of the body from a short distance in order to succeed. The second-degree intent is a special form of direct intent. In this case, the outcome of the action is a necessary condition for the final goal of the person involved. He is able to understand and accept that outcome in order to obtain something more important for himself. It can be described with the phrase “*the end justifies the means*”. For example, the owner of a building wants to collect insurance money. He is aware of the fact that people living in that building could be hurt but he needs to cause a fire in that building at a certain time. The outcome is death and injury of those people as a secondary result to his plan, which is burning down the building and collecting the money. The indirect intent is the case where the person is aware of the negative impact of his action, he accepts that it can produce damage and he continue the action although he doesn’t actually want that result to happen. For example, the owner of a land wants to secure his agriculture products and, in order to do that, he installs an electric fence. He knows that it could harm animals or even humans, but he relies on the scary impact of the fence and thinks that no one will approach it. None the less, no matter the possible harm he could cause, it is more important for him to secure his plantation. A person is injured by the electric fence. As we can see, in all these cases, the active subject is responsible for his actions because the intellectual process is upright but the volitional factor decreases as we progress from direct to indirect intent (Mîțu 2014, 107-110).

Of course, secondary extensions can be added to the main forms of intent. Spontaneous intent refers to a powerful emotional driven act, when the offender acts on powerful instinctual impulses, bypassing cerebral restraining pathways, as a response to severe stress or emotional tension. There is very fine line between self-defense, when powerful stress activates surviving instincts and interior psychological tension and impulsivity that drives someone to commit a violent act. This is the case of many crimes that take place during severe intra-familial arguing or between couples. As we can see, in this case, both intellectual and volitional factors are bypassed by affection and instinct, but with no real annulment of the critical judgment. Another variant is the premeditated intent that usually connects to the direct intent and adds judicial significance to it. It refers to the period of time that the offender took to prepare his crime and the action he took in order to complete his plan, to find the perfect time to do it, how to hide evidence from the law, what materials he gathered while planning. The most obvious example in that matter is the case of serial killers (Veresha 2016).

Another variant of intent is the exceeded intent. In this case, the offender’s actions exceed his expected outcome but in a negative way. Although the volitional factor is constant and somewhat clear, the characteristic of this variant resides in the details that he is unaware of or the miss-calculation of the circumstances. For example, a man hits his wife because he considers so during an argument. The woman is pregnant but loses her pregnancy because of injuries in the abdominal area. The result the man expected was “a corrective lesson” but the outcome was exceeded because of the injuries that caused the abortion. Another example is hitting a person with spontaneous intent, for example, but the victim loses his balance, falls down and hits his head. The cranio-cerebral trauma causes the victim’s death, so the expected

result (hitting in anger”), is exceeded by a new circumstance that appeared during the event – the loss of balance, fall and head trauma. This circumstance is a cause of the offender’s action but he could not calculate the force of the hit in that precise moment so he could not expect the actual result (van Kempen and Bemelmans 2018).

The term “culpa”, as stated above, is a term that generically defines, in Romanian law, a secondary form of intent or variants of indirect intent that actually act as attenuating circumstances if the fact are proved as such. Although other la systems defines each case with a penal codification name, psychological and forensically speaking, the generic term is necessary in order to understand the multiple dimensions of guilt. In terms of “culpa”, the intellectual factor refers to the capacity of the person to completely foresee the outcome of his action in special, usually spontaneous, circumstances. Foreseeing, in this case, means preventing a dangerous situation, usually by neglecting safety measures or prudence rules. There are two dimensions of “culpa”: one is the foreseeing type, in which case, a person engages in a dangerous activity being aware of the harm he can cause but he chooses to ignore the danger. An example is the case of a hunting team going after a boar. One of the shooters spots the animal close to a colleague and he decides to shoot even though he could harm the man standing near the boar. He is certain of his skills and talent and that, added to the intent of winning the hunt, overcomes the safety measures he has to take. He is guilty for all of the above and that, indirectly makes him guilty for his colleague injury. There is a very fine line between foreseeing “culpa” and indirect intent and sometimes there are confusing elements during investigations. In such cases, the differentiating element is finding out the initial plan, proportional with the facts. The character of the way the offender foresaw the outcome differentiates the penal character of the act. Foreseeing “culpa” means he foresaw the outcome but did not accept the result, even though he took it into consideration while indirect intent means that he foresaw the outcome, he took it into consideration and accepted it indifferently. The other type of “culpa” is the one without clear foreseeing, so the intention is actually bypassed completely. We can view it as the less harmful psychological form of intent but contrasted by the significance of the possible outcome because it is, finally the very definition of neglect. More specifically, even though the person could and should foresee a possible dangerous outcome, he does not think in any way at that outcome because he isn’t at all focused on a specific plan. As such, we could consider this case like an inaction more than an action. For example, a mother leaves the children alone in the house while she goes for some groceries. She thinks that everything will be fine s she doesn’t evaluate that she will be missing for more than half an hour. Meanwhile, the children find some cleaning products and one of them accidentally ingests some. The child’s injury is the responsibility of the mother, who, did not foresee the possible outcome and did not secure the products, even though she should have thought about it. As we can see, there is no plan of action in this case, but there is missing a plan of safety and the direct thinking of all possible damages and how to avoid them (Wright and Gudjonsson 2007, 307-316).

Extrinsic manifestation of guilt

The previous section explained that the intrinsic manifestation of guilt is intent, and the extrinsic manifestation of guilt is the criminal act. It begins as a plan, in many psychological variables, with inner and outer influences and passing through more or less emotional filters. We might think that intent will directly transform into action, into a material concretization, but actually, a criminal offence can be represented by either an action or inaction. The first case is a positive manifestation of will and intellect capacity towards a certain achievement. The second one is a negative manifestation that harms a law protected social asset. In fact, by not doing what the law or a rule state that should be done, a person can create harmful situations. While action is a clear manifestation against the law and according to a plan in order to obtain something, the inaction has a more complex concept. Likewise, “culpa”, there

are special forms of inaction or neglect, stated in the Romanian law (Mariț and Șomicu 2014, 106-111).

In every criminal act, the foundation of the active antisocial behavior is based on the relationship between offender and offended, one being the harmful factor and the other, the victim. In order to explain the theory of the inaction in Criminal law, there is a special type of relationship that rises in this matter, between the victim and aggressor. It is a kind of spontaneous relationship or a contractual based relationship in some cases. A baseline example is the case of a car accident, with victims. There is just one witness to that accident but that witness decides to ignore the scene and leaves without calling to emergency. This is a basic example of an inaction that represents a criminal offence. As we can observe, there is a special spontaneous responsibility relationship between the victim of the accident and the witness. It is a social and moral obligation to help a person in distress but also, a juridical one. Beginning from this example and from the bases of inaction as a criminal offence in law theory, the relationship that translates the responsibility between the two parties in specific circumstances, is considered as a guarantor position. That means that in special cases, the one who did not act and offended the law as such, develops a guarantor position for the victim, because, in those special cases, he is the only person that could act in the benefit of the victim but chose not to (Rea 2003, 381).

Romanian law describes three main situations that involve the inaction as a criminal offence by violating the guarantor position. The first is case in which the offender is the creator of a dangerous situation. For example, if a driver hits a pedestrian with his car due to alcohol consumption or exceeded speed, he automatically becomes a guarantor for the victim's life he has damaged. The criminal offence consists in him not taken responsibility for the victim and escaping the accident area without calling to the police. The second situation is the case where the offender does not control a dangerous situation. This is the case of dangerous breed dog owner that don't take all safety measures when walking his pet. If the dog attacks and injures someone, the dog owner becomes the guarantor for the victims' life. The third situation, refers to controlling third parties' actions. This is the case of contractual guarantor responsibilities as it involves persons that provide certain professional care to others. It is the case of teachers that do not interfere in bullying and violence cases during school hours or doctors that have contractual obligations to attend to their patient's life but more specific, an example is the case of psychiatric patients that become violent to each other while the doctor does not control the situation (Tănăsescu 2018).

Being responsible and responsibility

Although both concepts refer to the relationship between individual and society as forms of integration, the notions have different practical meanings, as responsibility implies the person's psychologic capacity and his moral compass while taking responsibility is a psychological and material concretization of the first. Responsibility is the notion present before committing and action while taking responsibility implies a post-action concept. Responsibility is a generic notion that defines the integrity of mental functions, psychological processes and emotion filters in deep connections with all environmental influences. Taking responsibility is a more specific notion that refers to a person assuming the blame and understanding the severity of his actions, assuming the punishment and furthermore, assuming the right social reintegration (Denney 2005).

These equivalences are all dependent on the person's psychological capacity which, in the Romanian law, is the individual's psychological characteristics on cognitive, intellectual, character, volitional and affective levels that ensure the performance of organizing a motivated action that translates into facts and quantifiable results. It is a compatible attribute with practicing rights and obligations inside a social community. Examination of the integrity of the psychologic capacity is one of the main objectives of the forensic psychiatry which

aims to identify, those people that could be dangerous for themselves and the society due to the incapacity of understanding and assuming their actions, therefore being irresponsible. Of course, severe mental disorders are an example of irresponsibility but also, being under the age of 14. There are scenarios in which an individual can be considered irresponsible for his action even if he has a full psychologic capacity, such as error, emergency situations and self-defense. In these cases, not knowing the true circumstances of the case or being threatened and in immediate danger, could be considered attenuating factors of a criminal offence, but, in Romania, they do not annul the guilt completely (Packer 2009; Bobîlcă 2009, 79).

When referring individually to a criminal act, the person will be investigated for that action and not in a general perspective. As such, integrity of the psychologic capacity referred to one act is described as discernment. Discernment is a component of one's psychological abilities that allows him to understand the value and importance of his intentions and actions but also to appreciate the consequences of that action. This is the way the law views the discernment in quantifiable terms. The psychological aspect of discernment is more complex and variable. It's referred to the same conceptualization and understanding of the actions but with two conditions: the first is the existence of a balance between intellect, will and emotions and the second is assuming moral, law and social norms that act like an efficient interior mechanism of restrain or self-control. While the balance of one's feelings, intellect and will are a bio-psychological and social construct that builds the individual's uniqueness, the other is referred to his moral construct dependent to the first. As such, we can define discernment as a dynamic synthesis between personality and conscience.

Personality has many variables. Being a unique feature, it consists in temper, sensations, way of thinking, perceptions, all placed in an evolutionary hierarchical matrix. The exact type of personality is analyzed by its sectors and its developmental levels. There are 2 main sectors of personality and those are the somatic one and the psychological one. The psychological sector is constructed on 4 structures that work from the rawest to the most complex, basically from instinct to complex thinking. First is the instinctual level that is automatic. It involves basal needs of the body to ensure self-preservation, being an inferior unconscious level. The next is the affective structure which is semi-automatic at the subconscious levels. The cognitive structure is a conscious level that manages sensations and perceptions from the outside and transforms those stimuli into actions. The symbolic structure is the most evolved level where thinking, memory, imagination and creativity work. It is a fully conscious level that can be controlled at will (Stănilă 2011, 87-96).

On the other side, conscience, has also 4 levels that work in a proportional dynamic with the personality's levels. The first is the elementary conscience that involves vigilance, awake state and temporal/spatial orientation. The next level is the operational-logical conscience that involves intellectual processes and coherent thinking which provide a realistic reflection of reality. The axiological conscience involves the options of developing values by examining social criteria. Finally, there is the ethical conscience that draws delimitations of good and bad as part of social integration. As personality and conscience work in a proportional active dynamic, the upper levels of personality must always coincide with an active ethical conscience in order to fully assess the integrity of critical judgement and these are the bases of the primary form of guilt which is intent (Damir and Toader 2014).

Responsibility and intent depend on yet other psychological processes in order to be fully active: motivation, motive and mobile. Proving and explaining these concepts will be considered as an irrefutable argument of one's guilt. Basically, motivation, motive and mobile are the answers to the 3 main questions that start every criminal investigation but also, they are the inner psychological answers to the offender's needs and stimuli. They answer what, why and how questions related to every criminal act. Motivation is an intrinsic process that works on 3 levels: needs, emotions and environmental impact. It develops as wishes and instinctive thoughts of satisfaction of the stimuli of some psychological or physiological imbalance. The motive is the subjective transposition of those necessities that works actively

with 2 vectors: the triggering vector initiates the action toward the main goal and the orientation vector, is the manager of the direction of action toward the goal. Psychological attributes and cognitive function need to be perfectly aligned in order for all responsibility mechanisms to work and in this consists the work of the forensic psychiatry and the foundation of criminal law (Scripcaru, Astărăstoae and Boișteanu 2002).

Conclusion

The institution of criminal law is an institution of guilt as this concept, with its qualitative and quantitative significance represents all subsidiary elements that reinforces the psychological, moral and lawful relationships between individual and society. Guilt is a complex phenomenon as it can be “measured” by law and analyzed by psychology in flowing hierarchical criteria, building its equivalent concept that is responsibility.

The primary form of guilt is an intrinsic psychological process that is the intent, a notion interconnected to both guilt and responsibility as there can be no guilt in criminal law without the offender having intent and therefore, the correct representation of the outcome of his actions which is responsibility.

In order to understand guilt as a law concept and quantitative characteristics, there is a need to exhaustively assess all qualitative notions that construct the guilt, beginning from intent to responsibility, imputability and ending with discernment. This flowing graphic of concepts, with all environmental and emotional influences, represent the construct of the psychological capacity of a person and it quantifies guilt in relationship with a criminal offence.

New studies have begun to immerse deeply into the neurobiology and cognitive physiological mechanisms of human behavior, with promising results for explaining antisocial activity, addictions and possible therapeutic solutions in some cases. An organic cause for some criminal behavior, other than severe psychiatric disorders, could turn around the way forensic psychiatry works.

References

- Bobîlcă, A.I. and Paraschiv, V. 2009. “Intenția în dreptul penal [Intent in Criminal Law].” *In honorem Prof. univ. dr. George Antoniu*. Craiova: Sitech Publishing House.
- Colțan, M. 2008. “Vinovăția ca element al infracțiunii și condiție a răspunderii penale [Guilt as an element of the crime and a condition of criminal liability].” *Pro Lege Journal* (3): 115-122.
- Damir, D. and Toader, E. 2014. “Expertiza medico-legală între etic și juridic [Forensic investigation, between ethical and legal].” *Bulletin of Integrative Psychiatry* 20(2): 27-40.
- Denney, R.L. 2005. “Criminal Responsibility and Other Criminal Forensic Issues.” In Larrabee G.J. (Ed.), *Forensic neuropsychology: A scientific approach* (pp. 425–465). Oxford University Press.
- Gladchi, G. 2016. “Conceptul laturii subiective a infracțiunii în dreptul penal [The concept of the subjective side of the crime in Criminal Law].” *Anale științifice ale Academiei „Ștefan cel Mare” a MAIRM: Științe Juridice*, 2(XVI), 19-25.
- Grama, M. 2007. “Aspecte generale ale iresponsabilității în dreptul penal [General aspects of irresponsibility in criminal law].” *Studia Universitatis Moldaviae (Seria Științe Sociale)* (3): 129-133.
- Mariț, A. and Șomicu, M. 2014. “Responsabilitatea și iresponsabilitatea, responsabilitatea redusă în dreptul penal” [Responsibility and irresponsibility, reduced responsibility in criminal law].” *Vector European* (2): 106-111.
- Mîțu, S. 2014. “Vinovăția sub formă de intenție [Intentional guilt].” *Vector European (Suplim)* 107-110.
- Packer, I.K. 2009. *Evaluation of criminal responsibility*. Oxford University Press.
- Rea, M. 2003. “Evaluation of criminal responsibility.” *Alan M. Goldstein*.
- Scripcaru, G., Astărăstoae, V. and Boișteanu, P. 2002. *Psihiatrie medico-legală [Forensic psychiatry]*. Iași: Polirom Publishing House.
- Stănilă, L. 2011. “Răspunderea penală obiectivă și formele sale în dreptul penal român [Objective criminal liability and its forms in Romanian criminal law].” *Analele Universității de Vest din Timișoara-Seria Drept* (1): 87-96.
- Ștefan, V.C. 2021. “Considerații teoretice referitoare la vinovăția penală [Theoretical considerations regarding criminal guilt].” *„Dreptul”* (08): 104-131.

- Tănăsescu, C. 2012. *Tipologii agreso-victimogene [Aggression-victimogenic typologies]*. Bucharest: Universul Juridic Publishing House.
- Tănăsescu, C. 2018. "The Manifestation of Will: The Vectorial Force of Accepting Guilt." *RAIS Conference Proceedings - 10th International RAIS Conference on Social Sciences and Humanities*, Princeton, USA, August 22-23.
- Tănăsescu, G. 2014. *Drept penal. Partea generală [Criminal law. The General Part]*. Vol. I. Craiova: Sitech Publishing House.
- Tănăsescu, G. and Tănăsescu, C. 2004. *Vinovăția [Guilt]*. Craiova: Universitaria Publishing House.
- van Kempen, P.H. and Bemelmans, J. 2018. "EU protection of the substantive criminal law principles of guilt and ne bis in idem under the Charter of Fundamental Rights: Underdevelopment and overdevelopment in an incomplete criminal justice framework." *New Journal of European Criminal Law* 9(2): 247-264.
- Veresha, R.V. 2016. "Criminal and legal characteristics of criminal intent." *Journal of Advanced Research in Law and Economics (JARLE)* 7(21): 1881-1890.
- Wright, K. and Gudjonsson, G.H. 2007. "The development of a scale for measuring offence-related feelings of shame and guilt." *The Journal of Forensic Psychiatry & Psychology* 18(3): 307-316.