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CHARGEABILITY AND GUILT AS FEATURES OF THE
OFFENSE

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Abstract

With the entrance into force of the new Criminal Code, a new perspective on the notion of offence has been promoted. The definition given by Art 15 Para 1 of the Criminal Code now recognizes, at least formally, four key features of the offence, namely: its statement in the criminal law or typicality, guilt, unjustified feature or anti-legality and the chargeability; among them, only two drew the attention of the specialists in law due to their redundancy: the guilt and the chargeability. Thus, the guilt as key feature of the offence represents the subjective aspect under which the offence is committed, being reproduced as three legal forms: intent, culpability and obsolescence. The chargeability refers to the fact that the offence is physically and especially psychically attributed to the perpetrator, which automatically relates to the guilt with which the offence is being committed. Also, the clauses removing the non-chargeability of the offence (defined by Art 23-31 of the Criminal Code) are clauses for removing the guilt. By adopting this new definition, the new Criminal Code has chosen the formal thesis of defining the offence, unlike the substantial one of the former Criminal Code.

By analyzing all these and other contradictions, the current study aims to conduct an objective and comparative analysis of these two features of the offence, as well as the necessity of their common existence within the definition of the offence.

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1. Introduction

Defining the offence and incorporating it in the Criminal Code was a matter debated by the penal doctrine throughout the years. Thus, most of the criminal codes drafted during the contemporary era, more precisely in the 19th century, did not state a definition for the offence. After the World War II, certain states have agreed to insert such definition in the criminal code. Among them was the Romanian criminal code, which, in its version of 1969, stated in Art 17 that it is an offence: "...that action representing a social danger committed with guilt and stated by the criminal legislation" (Pascu et. al., 2014, pp. 109-110).

Giving priority to the substantial theory of the offence (Antoniou et. al., 2015, pp. 148-149; Streteanu & Nițu, 2014, pp. 251-253), by stating as one of its features the state of social danger, the definition stated three key features, namely: the social danger of the action, the guilt and its provision by the criminal law.

The new Criminal Code has a different definition for the offence, by removing the social danger as feature of the offence, and introducing another two features: the unjustifiability and the chargeability. Thereby, the Romanian legislator has chosen the formal theory for defining the offence, subsequent to the formal legality (Vlădilă & Mastacan, 2012, p. 22; Ionaș, 1999, p.10), unlike the substantial theory adopted by the former Criminal Code. Thus, according to Art 15 Para 1 of the new Criminal Code, the offence "*is an act provided in the criminal law, committed with guilt, unjustified and chargeable for the person committing it.*"

This definition of the offence is very close to a west European model, found mainly in the German doctrine, but also in the Spanish, Italian and even the French one (with certain semantical differentiation).

Thus, according to the French doctrine, the offence is defined as an action presenting a legal, a material and even a "moral" feature ¹(Renoult, 2007, p. 90), while the Italian doctrine proposes as legal model an action committed in guilt, to which some authors add also the punishable feature (Antoniou et. al., 2015, pp. 164-165; Streteanu, 2014, pp. 251-253).

The German model defines in a triple manner the offence, considering that its key features are: the typicality, anti-legality and chargeability (Crespo et. al., 2015, pp. 14-23; Berdugo Gómez de la Torre et. al., 2004, pp. 171-176), while the Spanish Criminal Code (Art 10) refers to an act, either an action or inaction, committed with intent or out of negligence, which is sanctioned by the criminal law, definition similar to the Italian one (Crespo et. al., 2015, pp. 15-17, 20-23; Berdugo Gómez de la Torre et. al., 2004, pp. 171-176).

From this brief analysis of the offence's features, it results that all the definitions, either legal or doctrinal, both in Romania, as well as in other west European states, the guilt, identified as the "moral" feature by the French or chargeability (by the Germans and the Spanish) is a definitive element for its existence.

The current paper aims to analyse both the guilt, as well as the chargeability of the offence, separately, but also comparatively, to emphasize what these features have in common, what differentiates them, as well as the need to for their presence in the legal definition of the offence.

¹ Does the term "moral" is improperly translated from French, because what could be considered as moral in an offence?

2. Problem Statement

The current paper aims to delimit, as it is possible, the two features of the offence, namely the guilt and the chargeability, one from the other, and to identify a definition appropriate for the offence, by analysing also the theories regarding the guilt which have been exposed in time.

3. Research Questions

Is the guilt different than the chargeability?

It is necessary for them to be together present in the content of the definition of the offence?

Is the current legal definition of the offence perfectible?

Which is the most appropriate definition and towards where does the majority doctrine referring to these aspects is headed?

4. Purpose of the Study

Finding an appropriate definition for the offence and to delimit, as it is possible, the two features of the offence, namely the guilt and the chargeability, one from the other.

5. Research Methods

In drafting of this article I have studied a wide bibliography, consisting in numerous treaties, university classes and specialized magazines, including from the French and Spanish doctrine; I have used the comparative analysis of the opinions expressed and finally I have resumed by conclusions, as result of studying these doctrinal texts. An objective and comparative analysis.

6. Findings

6.1. The guilt, feature of the offence and as element of the constitutive content of the offence.

The guilt is mentioned as feature of the offence both in the Criminal Code of 1969, as well as in the current Criminal Code. The idea according to which, each person shall be criminally liable to the extent to which it is proven that he committed with guilt the offence, is unanimously recognized, not being able to create within the criminal law an objective liability, as seen in other areas of the law.

As a feature of the offence, the guilt has been defined, within the **psychological theory**, or the classic theory, as being the psychic attitude of the perpetrator towards the offence he committed and its consequences (Mitrache & Mitrache 2014, pp. 133-167; Antoniu, 1995, pp. 117), representing the psychic liaison between the perpetrator and the socially dangerous action. In this context, the guilt is formed by two factors: the intellectual factor, which certifies the fact that the perpetrator is aware of his actions and their consequences, and the volitional factor, which expresses the idea that the perpetrator is responsible for his actions, controls them, by focusing his will for their occurrence (Nistoreanu et. al., 1999, pp. 115-116).

The presence of these two factors is an essential condition for the guilt, which cannot exist in the absence of any of them. In other words, there shall be no guilt if the perpetrator was forced or could not

have control of his actions (the absence of the volitional factor), or if the perpetrator did not have or could not have the visual representation of his (in) actions (the absence of the intellectual factor) (Giurgiu, 1994, pp. 114-116; Oancea, 1994, p. 94). According to Prof Traian Dima, the intellectual factor is a manifestation of the perpetrator's conscience, which analyses and finally decides upon committing the offence, as well as on the reasons grounding it, while the volitional factor, also necessary, expresses the will to commit a certain action, as it resulted from the previous step, deliberative. The will is the attitude that mobilizes the energies of the perpetrator for performing the actions he decided upon in the process for the awareness of the offence and its consequences. This is why this side of it, makes the offence become imputable to the person who physically and psychically commits it (Dima, 2014, pp. 107-108).

Another definition offered by the late Prof Costică Bulai emphasizes precisely on the inclusion in the definition of the guilt of the two factors, underlining the prevalence of the intellectual factor, unlike the volitional one: the guilt is the psychological attitude of the person who, by committing willingly an action...criminal, has at the moment of the commission, the representation of the offence and of its socially dangerous consequences or, though he did not have this representation and the consequences, has the real possibility of this representation (Bulai, 1997, p. 157).

Other authors who, without comparing the two factors, consider that the will must be present in the content of the guilt, because it cannot be separated from the result of the committed offence, representing a voluntary action; in addition, the guilt points the criminal action towards the meaning of violating the social values protected by the legal norm (Dima, 2014, pp. 110-112; Popoviciu, 2013, pp. 119 -122).

As feature of the offence, according to Art 16 of the Criminal Code, the guilt has three forms: intent, negligence and the oblique intent.

The psychological theory was embraced by the Criminal Code of 1969 and it has been maintained until 2014 when, under the influence of certain western values, we rushed to the normative theory of the offence.

Developed in the German area in the beginning of the past century, the normative theory (also known as neo-Kantian or neo-classical theory) considers that the offence may also be defined using three features: typicality, which refers both to the objective aspects of the offence, as well as to the subjective ones, anti-legality, expressing the vexation of the offence towards the legal order and chargeability (Crespo et al., 2015, pp. 14-20). Within this framework, the guilt expresses a contradictory relation between the perpetrator's will and the one resulting from the legal norm. The forms of the guilt, the intent and negligence, are included in the typicality, while the guilt loses its inner value disappearing, reappearing as the chargeability. Thus, within the normative theory, the chargeability of the offence is seen as a reproach from the society for the serious consciousness gaps of the perpetrator and towards his blameable behaviour (Lică, 2008, p. 114; Streteanu, 2014, p. 410; Boroi, 2014, p. 319; Sima, 2015, p.89; Lefterache, 2014, p. 75).

But, as Prof George Antoniu strongly stated *“if the guilt is connected to the reproach which could be addressed to the perpetrator, it means that it ceases to be considered to the extent to which it is proven that the subject has no other choice than to act as he did. In this case, the penalty would no longer be applied as payment (“reward”) (A/N) for bad will, but only with the purpose as special or general prevention”*, thus, the guilt becoming a useless concept. But only in this case, the penalty does not find its

purpose as special prevention, the person in this case being punished, regardless of the internal evaluation of the actions performed and the relation with the moral and social value?! (Antoniou, 2003, p. 13).

But, even in the German doctrine, where this theory first emerged, not all authors embraced the normative theory. For the purpose of offering objective explanations and eliminating the lack of bias the theory of the offence, the concept of guilt has been replaced by the one of “social risk”, “risk allowed”, but also if these new elements have managed to explain certain special details, “*have spread a lot of confusion over the conditions for the penal liability*” (Guiu, 2010, pp. 49-50).

This is why, in the west, during 1935-1936, the criminal normativity has been replaced by the **finalist theory**. The new theory has replaced the idea of guilt, transferring it to the objective side of the offence, thus emptying it of its content, representing a step back, according to M. K. Guiu (2010, pp. 49-50).

Nevertheless, numerous Romanian doctrinaires have adopted without reservation the normative theory.

Before expressing an opinion and to continue the analysis, it must be noted that the guilt, besides being a feature of the offence is also an element from its constitutive content, more precisely part of the subjective side (aspect upon which all Romanian doctrinaires have agreed). In this meaning, the guilt shall exist only when the offence is committed with the specific form of guilt stated by the law. For instance, if an offence is committed out of negligence there is guilt as feature of the offence, but if the action is sanctioned only when is committed out of negligence, then the action shall not be considered as an offence, because of the absence of a constitutive element of this offence (Mitrache & Mitrache, 2014, pp. 133, 134, 167; Antoniu, 1995, pp. 117).

Within the analysis of the constitutive content of the offence, a component of the pre-existing conditions is represented by the subjects of the offence. For a natural person to be the active subject of an offence, the doctrine has established that it is necessary for that person to have liability (Mitrache & Mitrache, 2014, p. 149; Dima, 2014, p. 143; Vlădilă & Mastacan, 2012, pp. 74-75). The liability has a definition similar to the notion of guilt, as feature of the offence, creating a stronger relation between the notions of guilt and offence.

6.2. The chargeability of the offence.

The chargeability of the offence represents a novelty inserted by the Romanian new Criminal Code in the content of the offence.

According to Prof George Antoniu, the chargeability refers to the fact that an “*offence which has been objectively and subjectively attributed to a person*”, namely the action belongs to a person who has committed it with guilt, related to the legal norm or that the offence has been committed consciously and willingly by its author, thus with intent (Antoniou et al., 2015, pp. 164-165; Streteanu & Nițu, 2014, pp. 251-253).

According to Prof F. Streteanu and D. Nițu, the chargeability connects the criminal liability with the possibility of sanctioning the subject. Thus, the chargeability is different from guilt, which from the perspective of the normative theory is a behaviour contrary to the criminal norm, being included in the notion of typicality, with its three forms. This it is made the distinction between the subjective side of the

offence and the chargeability of the perpetrator. Another argument of the authors regarding the distinction between these two terms is the one according to which the legislator has abandoned the causes excluding the guilt and had them replaced by the one of chargeability. In the same context, the causes for chargeability are divided into three categories, aiming the causes exempting the liability (minority, irresponsibility and poisoning), causes resulting from the ignorance of anti-judicial feature of the offence (error) and causes resulting from the imposition of a rule in accordance with the criminal norm (physical and moral constraint, non-attributable excess and the fortuitous case (Streteanu & Nițu, 2014, pp. 408-411).

The chargeability is, for Prof M. Udrouiu, a feature different than the guilt, not being susceptible of forms of guilt. For the existence of the chargeability it is necessary that the perpetrator to be responsible and to have acted according to his will (Udrouiu, 2016, p. 118). But, as above mentioned, this is the very definition of the responsibility, but also of the guilt.

Some authors have criticized the differentiation between the guilt and the chargeability of the offence, considering that they are in a close relation which, to a certain extent, is true.

Thus, according to Prof Ilie Pascu, there are only three key features of the offence, namely the typicality, anti-legality and chargeability; in this context, the guilt represents only a form of typical feature of the offence, being part of the constitutive content of the offence within its subjective side, while the chargeability takes into consideration the guilt as key feature of the offence (Pascu et al., 2014, pp. 118-119). In the same meaning, Prof Traian Dima argues his opinion starting from the idea that an offence is chargeable when it is possible to subjectively and objectively assign it to the person who has committed it, which refers to the fact that the objective action is the result of a criminal decision, or in other words, the ability to understand and to act is reflected in the offence committed, namely that the offence has been committed with guilt. The same author considers the chargeability as a negative condition of the offence (Dima, 2014, p. 166).

Another critical perspective on mentioning the two features of the offence within its legal definition (both the guilt, as well as the chargeability) is presented by Prof Gh. Ivan, who considered that the chargeability aimed to express only the objective attribution of the offence to the perpetrator, the subjective aspect being already mentioned in the notion of guilt. This is why he proposes the elimination of the chargeability from the definition of the offence (Ivan & Ivan, 2013, p. 59).

On the other hand, Prof Constantin Sima, preferring the western approach, considers that through this differentiation the new Criminal Code has been separated from the psychological theory (present in the provisions of the former Criminal Code), adopting the normative theory. According to the latter one, *“the guilt is the imputation addressed to the perpetrator because he acted contrary to the predetermined judicial order. The guilt refers to the commission of a criminal offence in a broader sense with one of its forms (intent, negligence or oblique intent), while the chargeability emphasizes the possibility to put the offence on the behalf of the person who committed it”* (Sima, 2015, p. 103).

Presenting the perspective of the French doctrine, Prof Alexandru Boroi, states that the chargeability is a condition of the guilt, and the guilt a condition for the responsibility, which is more close to the truth, if we consider the definition given to these three notions by most of the Romanian doctrine (Boroi, 2014, p. 158).

In a transitory position is found Prof C-tin Mitrache, who by considering the choice of the legislator to state both the guilt and the chargeability as features of the offence, expresses the idea according to which it was aimed the direct delimitation between the guilt, as element of the subjective side of the offence and the guilt being a feature of the offence. Also, the mentioned author, by classifying the cases removing the criminal feature of the offence, considers that there is identity between the causes for non-chargeability and those removing the guilt, practically being the same (namely those defined by the Criminal Code as causes for non-chargeability) (Mitrache & Mitrache, 2014, pp. 140, 172).

7. Conclusion

As we may very well note, the opinions regarding the role of the features of the offence are extremely diverse, oscillating between two major opinions, somehow related with the two theories on guilt, already presented above, namely that the guilt and chargeability are the same thing (according to an opinion supported by Prof C-tin Mitrache, Gh. Ivan and G. Antoniu) or express different realities (opinion supported by Prof M. Udroui and F. Streteanu.

According to our opinion, the arguments tend more towards the consideration that between the guilt and the chargeability there is a strong connection being, in fact, the sides of the same coin: the guilt expresses an interior aspect, namely how the perpetrator sees his action, while the chargeability expresses an objective aspect, which is reflected on the outside and determines the society to charge the perpetrator with his action; but they cannot be separated, because are processes related to the same subjective aspect of the offence, but also to the idea of liability.

As we have already seen from the close lecture of the bibliography, it resulted that even the authors who still consider these two features as being different, define the responsibility and the discernment through the perspective of the intellectual and volitional factors.

It is obvious that we cannot deny the fact that between the discernment, liability and guilt there is a strong relation, each of them expressing the different mental and psychical processes, but intimately correlated. Moreover, if we start from the components of the guilt, enlisting here the intellectual and volitional factors, we ascertain that the so-called causes for non-chargeability are in fact causes removing the guilt, by removing one of the two factors, or even the both of them (for instance, in the case of minority it is removed the intellectual factor, for the physical constraint – the volitional factor etc.), thus that this division into three sub-categories for the causes of non-chargeability and considering them as different than the causes removing the guilt no longer seems necessary.

As a conclusion, we consider that between the guilt and the chargeability there is a strong relation, thus their simultaneous existence among the features of the offence is unjustified, and placing us on the position of the psychological theory of guilt, we consider that may be stated in the content of the offence as key features the following: the typicality, expressing only the objective side, the anti-legality of the offence and the guilt, which psychologically relates the perpetrator to the offence committed.

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