

# Psychological theory of guilt in the Romanian Criminal Code

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## **Abstract**

*In art. 16 paragraph (1) – (4), the new Romanian Criminal Code refers to some psychological processes, such as representation and willpower, which lead us to believe that the psychological theory of guilt has been preserved, being also mentioned in art. 19 in the old Criminal code. This theory of guilt has known many tendencies over time, entering our doctrine and legislation as the theory of representation. According to this theory when someone wants to do a certain physical act he foresees the consequences of that act, meaning that in his mind he has the representation (the image) of the natural consequences following that activity, and this representation of the result, the finality of the willful activity, is an act of conscience accompanying the act of will. These are reference points to be taken into consideration when the judiciaries analyze the criminal guilt whenever an offence has been committed under the criminal law.*

**Keywords:** *guilt, theory of representation, conscience, willpower, normative theory.*

**JEL Classification:** K14

## **1. Introduction**

According to art. 16 paragraphs (1) - (4) from the new Romanian Criminal Code:

*“(1) The act is considered an offence only if committed with the form of guilt stipulated in the criminal law.*

*(2) There is guilt when the act is committed willfully, negligently or with oblique intent.*

*(3) The act is willfully committed when the perpetrator:*

*a) foresees the result of his act, pursuing it by committing that specific act;*

*b) foresees the result of his act, and though he does not pursue it, he accepts its possibility of coming to pass.*

*(4) The offence is committed by negligence, when the perpetrator:*

*a) foresees the result of his act, but does not accept it, believing without reason that it will not occur;*

*b) does not foresee the result of his act, though he should and could have foreseen it.*

*(5) There is oblique intent when the act consisting of a willful action or inaction produces a more serious result, due to the perpetrator's negligence.”*

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As we can see from this regulation regarding the forms of guilt, the new Romanian Criminal Code refers to some psychological processes, such as representation and willpower, which might lead us to believe that *the psychological theory of guilt* has been preserved, consecrated in the old Criminal Code and endorsed without reserves by the jurisprudence and the vast majority of doctrine in our country.

Besides, the legal definition of the forms of criminal intention and fault from the new Criminal Code is identical with the one from the art. 19 from the old Romanian Criminal Code, which is why it would be difficult to accept the idea that the legislator would have had the intention of giving up this theory concerning criminal guilt. Nevertheless, even in the Explanatory Memorandum to Law no. 286/2009 regarding the Criminal Code<sup>2</sup> it was said that the new Criminal Code made a fundamental change in this regard.

In the doctrine of other countries (for instance Germany, Spain, Italy) another theory of guilt has been consecrated in the second half of the 20th century. This theory does not emphasize the psychological processes of the perpetrator, the emphasis is on the fact that the perpetrator committed an act forbidden by the criminal law, considered reason enough to be held responsible before the society for breaking the norm. This theory is called *the normative theory of guilt*. According to the normative theory, guilt seen as a general characteristic is regarded as a reproach, a blame against the offender because he acted in a way contrary to the law despite the fact that he had the clear representation of his act and the full freedom in manifesting his willpower.<sup>3</sup>

Preference for the normative theory of guilt has also been explicitly laid out in an opinion from our specialized literature where the theory of psychological guilt has been criticized because in the case of actionable negligence there would be impossible to make a psychological connection between the author and the dangerous result of his act, because it does not take into account the reasons behind committing the act and because this theory could not explain the lack of guilt in cases of moral constraint.<sup>4</sup>

In order to see if the new Criminal Code has really made a shift from the psychological theory to the normative theory, a more in-depth analysis of the content of the psychological theory of guilt in the present doctrine should be done.

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<sup>2</sup> Published in Official Monitor no. 510 from July the 24<sup>th</sup> 2009.

<sup>3</sup> Explanatory Memorandum Law no. 286/2009 regarding the Criminal Code, published in Official Monitor no. 510 from July the 24<sup>th</sup> 2009.

<sup>4</sup> Florin Streteanu, *Tratat de drept penal. Partea generală (Treaty of Criminal Law. General part)*, vol. I, published at C.H. Beck, Bucharest, 2008, pp. 546-547.

## 2. Versions of the psychological theory of guilt

There have been more tendencies in the criminal doctrine until the form given to the psychological theory by the Criminal Code from 1969. These tendencies had a different approach of the substance of the subjective element.

The advocates of the *theory of willpower*, prevalent in the interwar period in Germany, France and Italy<sup>5</sup>, claimed that the subjective element lies in a manifestation of the willpower regarding both the physical activity (the will to perform the physical activity), and also the consequences of this activity (the will to produce the result). When there's both willed action and result, there is intention, or do liar, when there's willed action and not a willed result there is fault. This theory has been said to have a weakness in that it did not offer the means to differentiate between fault and fortuity case and it did not explain some situations when there is intention but no willed result (exculpatory causes).

*Theory of motive* takes into account the willpower, adding the motive pursued by committing the physical action, the one who has had a motive corresponding to the harm done is said to have worked with intent, and if he has had a different motive, then he is considered to have made a mistake.

The theory adopted by the legislator of the Romanian Criminal Code from 1969, claimed even from 1924 by profesor Vintilă Dongoroz<sup>6</sup> who led the team that developed the draft for the criminal code, was the *theory of representation*. According to this theory, the subjective element consists of a *manifestation of will and conscience*. When someone wills a physical action, he foresees the consequences of that action, meaning that he has in his mind the *representation* (image) of the natural consequences which that action must lead to. This representation of the result, of the finality of the willed action is an act of *conscience* accompanying the act of *will*.

The intellectual factor derives from the raport established between the representation which the perpetrator of an act had regarding the natural finality of the willed act and the foreseeing the special finality that he had in mind when committing the willed act. *The natural finality* of an act is but the totality of indirect and direct effects which that act can produce naturally. To have the representation of the natural finality of an act is to foresee all the changes that specific act may produce, whether they appear as definite, probable or possible. Any modification that may not even be envisaged as possible, is out of the natural finality and remains as a mere fortuitous accident. The *special finality* is but the immediate result pursued by someone's willed act.

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<sup>5</sup> Vintilă Dongoroz, note 555<sup>2</sup> from *Tratat de drept și procedură penală (Treaty of Criminal Procedural and Law)*, vol. I, by Ion Tanoviceanu revised and completed. Printed "Curierul judiciar", Bucharest 1924, p. 631; Vintilă Dongoroz, *Drept penal (Reeditarea ediției din 1939), Criminal Law (Reediting the issue from 1939)*, Tempus Publishing Company & Romanian Association of Criminal Sciences, Bucharest, 2000, p. 188.

<sup>6</sup> Vintilă Dongoroz, note 555<sup>2</sup> from *Treaty of Criminal Procedural Law*, *op. cit.*, p. 631.

When a person willed an action and foresaw the consequences of that action, the act is called with intent, and when the person wanted to perform the physical act, but did not foresee the consequences of that action, the act is committed by negligence. To be considered fault, the perpetrator *could have* or *should have* had the representation of the harmful consequence.

A variant of the theory of representation is the *theory of predictability*, but professor Vintilă Dongoroz claimed that the likeness between the two theories is only in appearance.<sup>7</sup> The criterion of predictability requires that the perpetrator should have and could have foreseen the illicit result that took place, the criterion of representation of the natural finality does not require the foresight of the produced illicit result, but only the foresight that the willed act through its natural finality is susceptible of a harmful result, that to perform this act with the perpetrator's special finality in view is to resort to an antijudicial means or contrary to the disciplinary and safety rules. The theory of predictability is flawed not in concept, but in its excess; reduced only to the conception of the natural finality of the willed act and not to the foresight of the produced results themselves, this theory can remain as a fundament for the imputability of the fault.

### 3. The intellectual and volitional factor

As seen in the theory of representation, guilt implies two psychological factors: volition (or the *volitional factor*) and conscience (or the *intellectual factor*).

*Volition* is defined as a psychological process of consciously performing an activity in all its aspects.<sup>8</sup> It must accompany any acts of those provided in the criminal law in order to have guilt, some authors considering that only after establishing the existence of the volitional factor can we analyse the content of the subject's representations (intellectual factor)<sup>9</sup>.

Firstly, there must be volition for an act of dangerous conduct to be attributable to the perpetrator. If the activity belongs to him only physically (for instance, in the situation of minority, irresponsibility, involuntary and complete intoxication) this condition of volition is not fulfilled.

Secondly, the perpetrator's volition must have been manifested freely. This implies that the volitional process should have been performed in normal conditions, allowing all the determinative elements to work together to the act of internal forethought, called self-determination.<sup>10</sup> In case of physical or moral constraint, volition is not freely determined. There can't be said that the will to commit the criminal act has been freely determined in case of a person who at the moment of committing the act did not know about the existence of a condition,

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<sup>7</sup> *Idem*, p. 634.

<sup>8</sup> Paul Popescu Neveanu, *Dicționar de psihologie (Dictionary of psychology)*, Albatros Publishing House, Bucharest, 1978, p. 777.

<sup>9</sup> George Antoniu, *Codul penal al Republicii Socialiste România comentat și adnotat. Partea generală (Criminal Code of the Socialist Republic of Romania Commented and Annotated. General Part)*, Scientific Publishing House, Bucharest, 1972, p. 93.

<sup>10</sup> Vintilă Dongoroz, *op. cit. (Criminal Law)*, 2000, p. 190.

situation or circumstance on which depend the criminal character of the act (being misled), though the error concerns the intellectual factor. Thus, the statement from the special literature claiming that between the volitional factor and the intellectual factor there is no separating wall, these two factors being intertwined and assuming one another appears to be accurate<sup>11</sup>.

Special problems arise in connection with volition in case the act consists of an omission, due to ignorance, negligence, carelessness. At first sight, we might say that in these situations there is no manifestation of volition, but the person who does not seek to find out what he is due to know or who neglects or does not notice what he shouldn't have forgotten or what he should have noticed, manifests, by this carelessness, a volition to behave omissively.<sup>12</sup>

Regarding the ascertaining of the volitional factor, given that most people have the psychophysical capacity to will, there is a natural presumption that any activity performed by a human is willed and that the volition was freely and normally manifested. If the person who has committed an act provided in the criminal law claims to have acted without will or that his will was not freely expressed, the judiciary must administer evidence in clarifying these issues, and if after the research the presumption is not rebutted, the perpetrator will be held responsible for the committed act.

*Conscience*, as a guilt factor, is the mental faculty enabling a person to understand the significance of his act and its consequences.<sup>13</sup>

The mental process of making the decision to commit a crime is in the conscience. This process involves mainly the following steps: 1) the idea to commit a certain act; 2) the representation of the consequences of that act; 3) deliberation over all the determinant reasons and 4) making the decision. Once the mental process of making a decision is finished, there is a shift from manifestation of conscience to the manifestation of volition.<sup>14</sup>

In the legal literature it is stated that, even if the volition factor and intellectual factor are intertwined and they assume one another, we can say with certainty that the intellectual factor has a decisive role in regulating human activity, including the criminal activity.<sup>15</sup>

There is not always a full concordance between the subject's representation of the conditions of committing the act, the character and consequences of his act on one side and the act of volition on the other side (as it happens in the case of the act committed with *intent*). In the cases when this concordance will lack, the law giver provided distinct forms of guilt (*guilt and praeterintention*).

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<sup>11</sup> Costică Bulai, *Manual de Drept penal (Manual of Criminal Law)*, All Educational S.A. Publishing House, Bucharest, 1997, p. 157.

<sup>12</sup> *Idem*, p. 191.

<sup>13</sup> Vasile Dobrinioiu, in *Drept penal. Partea Generală (Criminal Law. General Part)*, Europa Nova, Publishing House, Bucharest, 1999, p. 116.

<sup>14</sup> Ioan Oancea, in *Explicații teoretice ale Codului penal român. Partea generală (Theoretical Explanations of Romanian Criminal Code. General Part)*, vol I, Publishing House of the Academy of the Socialist Republic of România, Bucharest, 1969, p. 115.

<sup>15</sup> Costică Bulai, *op. cit.*, 1997, p. 157.

Just like the volitional factor, the intellectual factor is essential for proving the existence of guilt. While the volitional factor shows that the propulsive energy of the perpetrator's willpower is at the foundation of the physical act and thus the act belongs to that perpetrator (imputation of fact), the intellectual factor shows the attitude in the perpetrator's conscience related to the physical act he committed; this attitude allows us to see if we can find the perpetrator guilty (imputation of guilt)<sup>16</sup>. If there is no intellectual factor (the perpetrator could not foresee the harmful result), there will be no criminal guilt because this is a case of fortuitous situation with no criminal charge attached to the act.

Even if the representation or at least the existence of the possibility of this representation of the consequences of the act is the decisive factor for the existence of guilt and its forms, as mentioned previously, guilt is not reduced only to this. It reflects the attitude of the subject towards the social values he breaks, the clear or less clear awareness of the necessity to comply with these values, the morality of the subject of the crime. These aspects related to the volitional factor, contribute not only to establishing the existence of the crime, but also to knowing the personality of the perpetrator and the need of re-educating him.<sup>17</sup>

This justifies the opinion that in the concept of the psychological theory, the intent and fault, as forms of guilt, reveal not only the existence of some mental processes of external acts, but also a certain attitude imputable to the conscience of the agent towards the rule of law, certain deficiencies, a sort of numbness of conscienseness. Thus, guilt appears, from this perspective, also as a character trait of the personality of the perpetrator. This way his criminal liability is subjectified, customized, thus allowing an individualized reaction against him.<sup>18</sup>

This vision of psychological theory regarding guilt appeared later, as a reaction to the normative theory of guilt which, as shown previously, emphasizes the reproach against the way in which the agent perceives his obligations towards the rule of law.

#### 4. Conclusions

We consider that these are the reference points by which the judiciary must continue to analyze the existence of the criminal guilt whenever an act provided in the criminal law has been committed; an approach originating from the criminal norm which has been broken, as suggested by the normative theory of guilt, being impossible.

In our doctrine it has been shown under the old Criminal law that related to the provisions of art. 19 from the old Criminal Code, it would be too much to claim the possibility of grafting upon this norm the idea of exclusive normative guilt and

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<sup>16</sup> Vintilă Dongoroz, *op. cit. (Criminal Law)*, 2000, p. 192.

<sup>17</sup> Costică Bulai, *op.cit.*, 1997, p. 158.

<sup>18</sup> George Antoniu, *Vinovăția penală (Criminal Guilt)*, second edition, Publishing House of the Romanian Academy, Bucharest, 2002, p. 25. The same idea has been expressed even from 1969 by Ioan Oancea, *op. cit.*, vol. I, p. 121.

even though the provision of art. 19 from the old Criminal code was, without a doubt, a product of psychological theory of guilt, it would be compatible with the normative theory in its original form which admitted that the intent and fault are a part of the content of guilt.<sup>19</sup>

As things are not substantially different in the new Criminal Code, compared to the old Criminal Code, regarding the legal definition of the forms of guilt, we consider that the only theory compatible with the dispositions of art. 16 par. (1) – (4) from the new Criminal code is the psychological theory of guilt. For this reason, we consider that the statement from the Explanatory Memorandum of the new Criminal code according to which this normative act „shifted the approach of guilt as general trait of crime, from the psychological theory towards normative theory, embraced today by the majority of European criminal systems (German, Austrian, Swiss, Spanish, Portuguese, Dutch law, etc”) is arguable. On the contrary, we consider that the actual form of the legal text forces the judiciary to do further analysis of the forms of guilt in terms of the stated doctrine and jurisprudence under the old Criminal Code in applying the psychological theory of guilt.

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<sup>19</sup> Florin Streteanu, *op. cit.*, p. 549.