CONCEPTS AND HISTORICAL REFERENCES REGARDING THE CRIMINAL GUILT IN ANCIENT TIMES

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Abstract:

The contemporary reality cannot be separated from the past and the future. It is just a certain stage of development. This article contains the multilateral tendencies, often contradictory, of the past, which lead to a qualitative new situation. The guilt must be considered under the historical aspect and the concepts regarding the guilt, characteristic for a particular system of law and legal family in different eras, should be systematized in order to understand the essence of guilt as a legal phenomenon and to elucidate the actual contents of this category.

Key- words: *unlawful deed, the guilt, the subjective side, criminal responsibility, fault, ill will, intention, negligence*

To get to the form of legal liability, and particularly to the criminal one, which we perceive today, legal liability has come a long way and its development is closely linked to the history of mankind in general, with the peculiarities of an era to another and from one nation to another, dictated by the necessities of social life and the achieved level of civilization. The advancement of social life and especially the economic progress have exerted on the evolution of the theory of legal liability categorical influences much more visible than in any other area of law. It must be said that originally the responsibility had solely criminal character and characteristically impregnated with religiosity. Criminal liability was systematized step by step: from the norms that did not make any distinction, in the primitive society, to the norms without rules and without regard to legal institutions established in the Modern Era codings[2]. Regarding the guilt as a condition of legal liability, it is clear

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that we are witnessing a constant evolution, an evolution which is not always understandable or easy to be explained, but certainly entered into a clear and pressing social logic, and therefore rationally justified. The establishment of the legal liability on the guilt of the perpetrator is a basis of the legal liability and in generally it is accepted that the application of liability without the fault element would annihilate one of the functions recognized as being part of the legal liability, the educational function.

The negative deed gradually turned into an unlawful act throughout history. And this time the unlawful act was not only identified and explained, but it also applies to a penalty. In the primitive world the liability was associated with the idea of repression as a necessity dictated by the need to punish antisocial actions to satisfy the divine will, to remove evil in general, which led to the conclusion that at that time the repression was an act of submission in relation to divinity and its representatives in the material world, a way of redemption through suffering.

In ancient times all civilizations believed that the rules, the regulations directing them in all aspects of their life were directly dictated by the gods. Only in time the right has become a "people business" which, as we shall see, did not mean the exclusion of the religious factor from the legal sphere, but rather a clarification of the distinction between them. Therefore, the customary rules were required by mere collective belief that they have a sacred origin. All these rules that were directing the social life had a repressive nature. Gradually the criminal liability releases from the supernatural forces, also the liability of the social group is removed and the criminal liability is restricted to that which, directly, caused the result. Even though in ancient times people could not talk about the guilt(in the actual meaning of this notion), the philosophers and the lawyers of this historic segment tried to find out a subjective basis of the criminal liability and to underlie it scientifically[3].

Probably Aristotle is the first who paid a special attention to the psychological aspect as a subject apart, which attempts to show the correlation between the body and the soul. He also considers that man unlike other living beings has intellect, and this in turn is the fact that

[3]Ion Mircea, *Vinovăţia în dreptul penal român*, (Bucureşti: Lumina Lex, 1998), (1), 7.

determines his actions[4]. Plato believes that the individual soul is just a continuation of the human soul (eternal), noting in this regard that it is constituted and it implies the following three origins: the intellectual (conscious), affective (impulsive) and volitional (volitional, will.) [5].

Egypt. In the conception of the ancient Egyptians, the idea of human justice requires a steady state, an equality which must be respected, and a social report[6]. "The balance of this country lies in the practice of justice"[7]. For this reason it is stated the idea that anyone breaking the order must[8] be punished: "Punish the one who deserves to be punished and no one will vilify justice".

The first ,,appearances,, of criminal guilt were discovered in Egyptian laws such as those of Menes (3100 B.C.), Ramses II (1304-1237 B.C.) [9] or by Sasychis and Bocoris (Sec. VIII B.C.), the latter had made a huge legislative work in the VIII century B.C., consisting of books (40 papyrus scrolls). Due to these findings were outlined the ideas that at that time the most serious attacks were considered crimes against the state and social order (treason conspiracies, plots, etc.) and some religious works such as; killing sacred animals: cats, owls etc. But yet, the guilty responded together with his family for those socially dangerous acts. [10]. Therefore even in that period the death penalty could be replaced with slavery, which sought to remove the murder, giving to the guilty persons the opportunity to use the labor force in the possession rule[11].

Mesopotamia. The Babylonian and Assyrian societies were based on an organic system of laws. S. Moscati stresses that "to the people of Mesopotamia, the right was a typical basic category of thought, naturally tending to transform the customs into rules; so another aspect of that cult

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[4]Аристотель, *«О душе»*, Собрание в 4 томах, Москва, 1976, Т.1, с. 399.

[5]Платон, «*Государство*» в 3-х томах, Москва, 1971, Т. 3, с. 232-241.

[6]C. Stroe şi N. Culic, *Momente din istoria filosofiei dreptului*, (Bucureşti: Ministerului de Interne, 1994), 16.

[7]Stroe and Culic, *Momente din istoria filosofiei dreptului*,16

[8]Horia. C. Matei, *Lumea antică, Mic dicţionar bibliografic*, (Chişinău: Universitas, 1993), 168; Е. Аннерс. «*История европейского права*», Изд. «Наука», Москва 1999, с. 23.

[9] Matei, *Lumea antică, Mic dicţionar bibliografic*, p. 168;Е. Аннерс. «*История европейского права*», Изд. «Наука», Москва 1999, с. 23.

[10]К.И. Батырова, «*Всеобщая история государство и право*», Изд. «Юристь», Москва 1998, с. 26.

[11]Батырова, «*Всеобщая история государство и право*»,, с. 26.

which coincides with the existence of social order "[12]. The Sumero-Babylonians considered the right as having a divine nature[13]. In Mesopotamia's laws, according to some Russian authors[14], the first subjective requirements have already appeared for some socially dangerous acts. For example, the sin that violate God's will is considered to be committed either intentionally or with an unpremeditated intention. But despite of this, in the Babylonian conception the meaning of sin was possible without any guilt; so that the sinner even could "not know" that he had committed a sin, for example, breach of "clean" during the ritual. This fact is appreciated as one of the most formal because it could be considered repaired simply by the offender's repentance.

Some historical monuments related to the criminal culpability in Mesopotamia can be found in the Code of Hammurabi. Being published 2000 years B.C., the Code of Hammurabi contains purely legal, moral and religious rules. In the principle considerations, the Babylon legislator states that the law should bring good to people; it must stop the strong man from doing harm to the weak one. After Hammurabi, the man must affirm himself only living in a society, and that the coexistence is possible only by respecting justice. The one, who breaks the law, rejects man offending both him and the God[15]. As he is the "king of righteousness", he aims "to do justice to prevail in the country, to uproot evil and wickedness, the strong man not to push the weak one"[16]. The defendant must have committed crime or offense deliberately in order to be punished.

The offences committed by negligence were punished easier when it was proved that the act was not committed intentionally: "If in a fight, one hits another one and he does an injury, if he swears:" I have not intentionally hit, to pay only the doctor" (art. 206); "If the wounded died because of his hits, he would swear (it was not intentionally) and if (the

[12]Sabatino Moscati, *Vechi civilizaţii semite.* (Bucureşti: Meridiane, 1975), 74 (quated by Stroe and Culic, *Momente din istoria filosofiei dreptului*, 10.

[13]Ovidiu Drimba, *Istoria culturii şi civilizaţie*, vol. I, (Bucureşti: SAECULUM I.O. and VESTALA, 1998), 96.

[14]О. А. Жидкова, Н. А. Крашинникова, «*История государства и права зарубежных стран»*, Изд. Инфра-Норма-М», Москва 1999, с. 81

[15]Stroe and Culic, *Momente din istoria filosofiei dreptului,* 16.

[16]*Codul lui Hammurabi,* p. 305. *(*quated by Bădescu Mihai, *Concepte fundamentale în teoria şi filosofia dreptului*, (Bucureşti: Lumina Lex, 2002), 3.

dead) were a free man, he would pay a silver mine" (art. 207) [17]. It was also appreciated[18] that this code had and other assumptions by the acts committed by negligence (carelessness) such as the situation referred to (art. 207) according to which: "If the husband was in captivity, and his wife did not have what to eat, she went to another man's house, in this case, she had no guilt (art. 208) "[19]. We find from (art. 218) another similar example telling about the presence and the regulation of the subjective aspect of the socially dangerous facts even at that time, which stated that: "If a doctor had made someone a difficult operation with a bronze knife, but the man died, or he opened someone's eye socket with a bronze knife, and he broke the eye (the patient's eye), his hand had to be cut, too"[20]. In this sense, it should be noted that although Mesopotamia's legal thought has not reached the level of development through which the concept of criminal culpability would become steady in its laws, with all its slave structure and despite some archaic residues; the Code of Hammurabi included "modern" ideas regarding it.

India. In India the notion of law was confused with the notion of worship. A religious rule became the norm that legally regulated the social relations. The set of customs and traditions were brought into close contact with regulations, dogmas and religious rituals. In India, the law appears as a complex and strange mixture of caste rules, royal provisions and rural habits[21]. These religious, moral, civil, legal norms were gathered in collections - each collection being edited by a school or a Brahmin sect that enjoyed a real authority over their respective followers. The best known of these collections is Manu's Code or Laws. In Manu's Laws[22], which was fundamentally legal at the time, the existence of some advanced ideas on the meaning of criminal guilt are revealed, which already occurs in some provisions on the criminal guilt forms, namely, the intention and the imprudence, as well as other subjective elements of the offense, such as its reason (ex. The

[17]Bădescu, *Concepte fundamentale în teoria şi filosofia dreptului*, 3

[18]Andrei Guşciuc, Liliana Chirtoacă, Veronica Roşca, *Istoria universală a statului şi dreptului (perioada antică),* Vol.-1, Ed. "Elena" 2001, (1), 98.

[19]Guşciuc, Chirtoacă and Roşca, *Istoria universală a statului şi dreptului (perioada antică),* Vol.-1, Ed. "Elena" 2001, (1), 98.

[20]Bădescu, *Concepte fundamentale în teoria şi filosofia dreptului*, 4.

[21]Bădescu, *Concepte fundamentale în teoria şi filosofia dreptului*, 4.

[22]*Legile lui Manu*, translated by Ioan Mahalcescu, (Bucureşti: Lumina Lex, 1993), 123.

premeditated murder involved the death penalty, or the guilty of adultery were punished with death[23], or the murder during the defense of the gifts brought as a sacrifice for Brahmans or for women (was considered self-defense) was not considered a sin[24])[25].

We note in this regard that the punishment was applied only if committing socially dangerous acts, the offender involved any guilt and also in case the presence of the person's responsibility state. It had to be ascertained even in the case of an accident (except religious matters), i.e. the unconscious and the foolish, as well as in self-defense cases or in extreme necessity guilt was absolved[26]. The punishment of false witnesses was also known, where it was considered that the guilty (the false witness), was killing a hundred close people and relatives for this, but in the case of false evidence in the act of murder of any person it was equal with killing 1000 people on this occasion.

Ancient China. Since ancient times, Chinese legal regime was characterized by an extremely severe repression. The punishments were barbarian - as in all Asian countries. And all socially dangerous acts and penalties were gathered in a given period Penal Code. In it there were over three thousand socially dangerous acts (crimes), where the need to prove the guilt for the majority of them was recognized (ex. Theft is considered the intentional damage which was punished with death[27], or if the person was found in the act, but he refuses to admit his guilt, or changes his testimony during the investigations ... ", it was allowed the use of torture ...)[28]. The punishment was even worse as the culprit was a closer relative to the victim. For example, the death penalty was prescribed if the guilty caused the death by strangulation, even accidentally, unwittingly, of his father, mother, grandfather or his grandmother. The judge who intentionally acquitted a guilty or condemned an innocent is applied the due punishment according to the offender law. The judge who with bad-faith ruled wrongfully a judgment

[23]*Legile lui Manu*, Mahalcescu, 123.
[24]*Legile lui Manu*, Mahalcescu, 123.
[25]Bădescu, *Concepte fundamentale în teoria şi filosofia dreptului,* 6.
[26]A. Smochină, *Istoria universală a statului şi dreptului (epoca antică şi medievală)*, (Chişinău: F. E. R Tipografia Centrală, 2002), 43.
[27]Гравский, "*Всеобщая история права и государства*", 104.
[28]М.Черниловский, *Хрестоматия по всеобщей истории государства и права*, (Москва: Изд. «Гардарика», 1998), 32.

to capital punishment, he was executed, too. Or the one who committed a crime, but appeared before the judge before the offense has been known, was automatically absolved. It was provided that the anonymous denunciations to be punished with death, even though they contained the truth. The judge who took into account such denunciations was sentenced to 100 cane lashes, while the accused was removed from the case even if he was guilty.

Some knowledge referring to the intention degrees began to be synthesized during this period, so that the socially dangerous acts were further divided into some premeditated and others simply intentional, as those committed by mistake.

These **features of legal liability**, denoting archaic primitive reminiscences are explained by the very backward social status in Chinese society that persisted for millennia. However, the Chinese code is a remarkable effort of legal thinking.

Ancient Greece. The criminal laws of ancient Greece are based on the simple idea of responsibility for the outcome of mechanical causation, whether the act was voluntary or not. This results convincingly and in some passages of the Iliad (if a person caused the death of another person, he was automatically obliged to pay compensation).

We can also observe the delimitation between the wrongful acts and some non-wrongful acts in the Spartan laws[29].

Beginning with the V century B.C. the first signs in legal thinking of the time have appeared, the consideration of the psychological factor: the texts of laws (the laws of Lycurgus, Solon, Dragon), although incomplete and controversial, that reveal the beginning of the distinction between intentional and unintentional murder, premeditated murder and self-defense murder (Ex. If the singers' choir director gave them to drink a liquid to stimulate their voice and therefore a chorister died, he must answer for premeditated murder or negligence.). In another case (a spear thrower kills a young man who came in the trajectory) it was discussed whether the spearman had committed manslaughter or he is not guilty at all (it would be only the fault of the victim); ascertaining that the victim was called to gather the spears (so it was not his initiative) and that the spear was thrown without sufficient attention on persons being on the

[29]Smochină, *Istoria universală a statului şi dreptului (epoca antică şi medievală)*, 56.

ground, it was made a correct conclusion, that spearman had committed manslaughter.) [30].

Ancient Rome. The history of Roman law was open to a time when the issue of liability and, even less, the idea of guilt had not appeared. The historical period when the state did not get involved in conflicts occurring between individuals, and each had to make his own right, for a time it was the force that governed the relations between individuals, so that the injured or hurt in his attempt to revenge was not interested to distinguish between an injustice caused willfully and involuntary[31] ("That the damage could be committed by a human being or by an animal, a wound could have been made intentionally or of inadvertence, he was not interested, passion is blind. Under the empire of pain or anger the victim thinks only to avenge the injury suffered, whoever was the author and whatever was the cause "[32]).

In the first Roman law, the law of those XII Tables, the revenge was replaced, even though only partially, by the right to compensation that the victim gets. Thus the damage was estimated by the parties by agreement (voluntary composition) and only where there were differences they used their right to revenge[33].

Later, as the state was strengthened and felt able to impose its authority it began to interfere in the relations between individuals, fixing the price of the right to revenge in the form of a fine, the punishment.

The importance of this development is revealed by another point: the state begins to be concerned not only with illegal acts that harm the public order, but also with those affecting individuals and, in this way endorses the right to punish the authors of crimes committed[34].
Consequently, the crimes become public and henceforth not the victim will be the one who will punish the perpetrator - by his right to revenge or by redeeming it - but the state, the injured person having only the opportunity to request some compensation.

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[30]I.Mariţ, *Evoluţia conceptelor şi a reglementărilor cu privire la vinovăţia penală,* (Chişinău: Poligrafică „Tipografia Centrală", 2005),10.
[31]Mariţ, *Evoluţia conceptelor şi a reglementărilor cu privire la vinovăţia penală,*10.
[32]Mariţ, *Evoluţia conceptelor şi a reglementărilor cu privire la vinovăţia penală,*10.
[33]Mariţ, *Evoluţia conceptelor şi a reglementărilor cu privire la vinovăţia penală,*11.
[34]Mariţ, *Evoluţia conceptelor şi a reglementărilor cu privire la vinovăţia penală,*11.

It is now outlined the distinction that we meet in the Justinian age between the criminal actions tending to a penalty, civil action persecutors which tend to obtain a compensation and the joint actions that tend to both of them.

The causes of lack of guilt in the first period of Roman law must be sought not only in the deficiency or the absence of legal provisions but implicitly, the precarious state of the culture of that time, because what else is right but the expression of political and cultural social life of the society line.

The explanation of the link between the degree of culture and the notion of guilt lies in the fact that only a person with certain intellectual formation was able to notice the difference between intentional and unintentional acts because otherwise the reaction against an injustice was violent because the victim was not pleased only with simple injury coverage, but he also requested a personal satisfaction, a punishment without taking into account, of course, the degree of culpability of the author.

After this first stage, dominated as it was otherwise normal, by brutality and weaknesses, it will accede to a flourishing era of Roman law.

Now, due to the influence of Greek philosophy, the Roman jurists of the late republic, managed to formulate the notion of Aquila's fault. The Aquila's Law has established for the first time the subjective conception of liability, according to which the liability could not succeed when going against unreasonable beings, such as children and fools. Later, it appeared the idea that the children and the fools can't distinguish right from wrong, so they can't be at fault.

This regulation was a breakthrough through the attention paid to the conscious guilt of the perpetrator. Despite this interpretation, it wasn't established a general principle on the subjective side of the illegal act and it has never been made a clear distinction between the materiality of injury and psychological attitude of the offender to act and its consequences[35].

So anyway, according to the Law of Aquila, the act had to be the one committed by negligence or by the willful misconduct of the offender. If

[35]L.-B. Boilă, „Vinovăţia, fundament al răspunderii civile, în ambele sale forme, în textele noului Cod civil, ca şi în ale celui precedent", *Dreptul* 1(2012), 151.

the damage was caused by accident, the Law of Aquila could not be applied[36]. Also according to the law mentioned in the Roman law, the distinction criterion between ill will and guilt was made, as mentioned, in terms of intentional aspect. If the case of ill will the guilt takes the form of intention, while at the fault it was appreciated the absence of the intentional element. So that, even unintentionally causing material damage, the person was also sanctioned[37].

Thus, according to the law of Aquila, the legal foundation of the contractual liability was the Law of Aquila that had enshrined the idea of guilt. Then the concept of quasi offenses was created, representing the infringements committed unintentionally, differing from crimes - committed intentionally; and finally, we can see that: "in the Roman law the notion of fault remained, however, a significant extent, not enough specified, but its requirement has never managed to become a general principle, the liability without fault persisted in a number of cases ".

Thus the quasi offenses of the judge were also considered some form of guilt committed under a negligent or intentional guilt, which brought some damage to one of the parties[38].

The Aquila law constituted the first attempt to regulate the theory of responsibility, under its incidence being those crimes that were neither injuries nor theft, but were penalized only isolated in the law of those XII tables or in the subsequent laws.

In terms of the forms of guilt, the Roman jurists very well delimited the intentional offences from the misconduct offenses.

The Roman law begins for first time to outline the concept of stages of criminal activity. Thus in the case of intentional offenses, the emergence of the idea of committing the offense was called the intention formation and plotting a crime was also named the so-called "pure intention." All the Romans are those who first formulated the unanimous principle accepted by the science of criminal law "*cogitationis poenam nemo patitur*" (the thoughts are not penalized)[39]. Thus, the murder

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[36]Emil Molcuț and Dan Oancea, *Drept roman*, (Casa de editură și presă "Șansa", S.R.L., Universul, 1994), 326.

[37] Э. Аннерс, *История европейского права*, (Москва: Издательство «Наука», 1999), с. 12.

[38] Аннерс, *История европейского права*, 34.

[39]Mariț, *Evoluţia conceptelor şi a reglementărilor cu privire la vinovăţia penală*, 12.

committed by negligence as a result of a fire entailed a lower penalty than the acts committed in ill will[40]. In another example, it is estimated that: "There can be no theft if the object was not taken or was not moved during the theft. Likewise, if a person enters someone's house with the purpose to steal, but has not touched any object nor took them, that act is still not regarded as theft, and this because although he had intended to steal, he did not manifest his intention by taking any particular object [41]".

So, from the above mentions, we can state that the Romans already had quite modern or advanced concepts on the meaning of the subjective concept of the deed, even at that stage of evolution. And this we can argue through the fact that besides knowing the forms of the guilt and other issues or concepts that exclude such forms or any subjective position of the perpetrator from committing any dangerous social facts, such as the situation of the unforeseeable circumstance, other psychological dimensions of crime were already known, such as the purpose of committing it.

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[40]Батырова, *Всеобщая история государство и право*, 113.
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