

THEORETICAL AND PRACTICAL ANALYSIS OF GUILT AS AN ESSENTIAL CONDITION OR ELEMENT OF THE CIVIL LEGAL LIABILITY

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Summary: *The issue of civil guilt acquires currently a special importance and at the same time it has the chance of some progressive settlements accommodated to the dedicated solutions in the major legal systems. In the specialty literature of the country and abroad it was spoken and it is spoken about a difficulty of the guilt, by a withdrawal of the civil subjective liability, by a lessening of the social value of the guilt, as its tool to measure the antisocial behavior. Some authors from the field, on the other side, emphasize the high morality of the civil law that suppresses the guilt under various forms, making it the essential condition of the legal liability. The purpose of the present article is to highlight the peculiarities of the guilt as a condition or essential element of civil legal liability, to establish the role, the place and the possible end for this notion.*

Key words: *responsibility, civil liability, tort, guilt, civil guilt etc.*

By making use of his freedom, the man builds his own personality, but, at the same time, he must undertake the liability for his acts. Thus, the man who acts consciously is liable for his own acts and their consequences, being obliged for the reestablishment of the disturbed social balance. The real responsibility is always associated to the order of the commutative justice, which aspires to the instauration of a legal response destined to remove the effects of the prejudicial act. The relation between ethics, moral and law is thus focused on the idea of illegal act perpetrator's guilt.¹ But the illegal act and guilt are one of the conditions of the legal liability which, at its turn, takes different shapes. Out of these shapes of the legal liability, the civil liability comes out as a fundamental category, a complex institution of the civil law².

¹ L.-B. Boila. *Guilt, basis of the civil liability, in its both forms, in the text of the new Civil Code, as in the preceding one*. "The Law" (Romania), 2012, no.1, page 151

² Ioan Albu, Victor Ursa. *Civil Liability for Non-pecuniary Damage*. Cluj-Napoca: Dacia Publishing House, 1979, p. 23.

We can state that the civil liability is a shape of the legal liability consisting of an obligative legal relation according to which a person is liable for repairing the loss caused to another person by his act or damage for which he is liable according to the legal provisions¹. The involvement of the legal liability only when guilt-related acts are committed is a social need and the assertion of liability must take in consideration an educational element. In this regard, people should exercise a diligent attitude in relation to other members of society, people should be confident, there should be a safety in relation to people's actions, given that only the acts committed with guilt are likely to attract civil liability². In the field of civil legal relations when participants in these relations do not comply with the rules introduced by them by agreement or will, or by the legislator by means of regulation, there comes out the question of assessing the actions (inactions) of subjects in terms of the values that society deems valid at a certain moment in time, starting from an objective element - the human act and its effect, which is, as we have showed, always concrete, objective and, in any case, commensurable (even if it has only a conventional character, as in the case of the non-pecuniary damage) - it is necessary to see to what extent this act is attributable to someone.

Moreover, it is necessary to investigate perpetrator's subjective and mental attitude in relation to the act and its consequences. This is, in practice, the issue of guilt. But let's take them in sequence. Analyzing the civil legislation in force (Art.215, 275 of the Civil Code of the Republic of Moldova and others), we conclude that, for the application of any form of liability, a combination of circumstances, including the presence of the following conditions: the wrongful act or nonperformance, or the improper performance or the delay of the obligations; the injury, the causal link between the unlawful act, nonperformance or improper performance and injury, and **guilt**³ is necessary.

¹I.M.Anghel, Fr. Deak, M.E. Popa. *Civil Liability*. Bucharest: "Editura științifică" Publishing House, 1970, pp. 15-21, Mihail Eliescu. *Delictual Civil Liability*, Bucharest: "Editura Academiei R.S.R." Publishing House, 1972, pp. 7-8, Dumitru Vaduva, Andreea Tabacu. *Civil Law. General Theory of Liabilities*. Bucharest: Pralela 45 Publishing House, 2002, pp. 97-98.

²Ion M.Anghel, Francisc Deak, Marin F Popa. *Mentioned works*, p.115.

³Ursu Viorica. *Guilt – an essential element of the delictual civil liability in the conception of the national doctrine and of the foreign doctrines in „Universitas Europaea XXI : The university science in the context of the European integration—*

The legal literature defines guilt as “*the mental attitude of the perpetrator at the moment of committing the unlawful act or in the immediately preceding moment before the perpetration, in relation to the act and its effects*”.¹

The definition formulated in the doctrine is particularly valuable because it captures the essence of the issue, of the phenomenon, referring, on the one hand, to the intellectual and volitional grounds of any human action ("the subjective attitude"), and, on the other hand, making the connection between this "subjective" element of the human being with his act and its consequences, thus, with the objective element. The legal doctrine examines two constituent factors of guilt, namely the intellectual or the consciousness-related factor and the volitional factor.

The first is fulfilled by an internal psychic process of representation of aims, means and possibilities for reaching the aims set, combining the motivations of a possible behaviour of mental type of the causality relations between actions and their effects and the consideration of an individual's interests compared to the interests of other participants to the social life.² As to the intellectual factor, we pay attention to the degree of development of the power of knowledge in general, thus, the degree of development of science at a certain moment, which gives to humans the opportunity of understanding phenomena, principles, objective causality relations and helps to prevent some antisocial acts. In this context, it is worth mentioning the scientific, technical and other expert examinations on the grounds of which it is possible to determine the situation existing in a certain conjuncture of the perpetration of some unlawful acts³.

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¹ In this regard: C.Statescu, C.Birsan. *Civil Law, General Theory of Liabilities*. Bucharest: All Publishing House, 1995, page 176. In the same regard, Fr.Deak. *Course of Civil Law, Law of Obligations, Part I, General Theory of Liabilities*, Bucharest, 1960, page 211; Traian Ionascu, *Course of Civil Law, General Theory of Liabilities*. Bucharest, 1950-1951, pag.134; L.Pop. *Civil Law. General Theory of Liabilities*, 1st tome, Iasi :Publishing House of the Foundation „Chemarea”, 1993, page 229.

² Florin Ciutacu, Cristian Jora. *Civil Law. Theory of Liabilities*. Themis Cart, 2003, page 65

³ C. Statescu, C. Birsan, *mentioned works*, p.183.

The second factor, and namely the volitional factor, involves the freedom of deliberation and decision-making of the perpetrator of the unlawful act which converges into a mental act of deliberation, of making a decision in relation to the behaviour that will be displayed. When there is a lack of freedom of deliberation and decision-making, we can speak of a lack of guilt¹.

Thus, guilt is a human subjective attitude towards a certain act and its effects and it is not a subjective, generic, theoretical, and ideal attitude.² For a correct definition of guilt it is essential to note that, obviously, guilt means a mental attitude towards the illegal act and its consequences, and namely a certain mental attitude i.e. a subjective negative attitude of ignoring the legal rules established in society, considered valid and accepted as valuable at a certain moment in time in the general axiological system of that time.³

Ioan-Dorel Romosan, who signed his work "Guilt in the Romanian Civil Law" was the first one to make a complete and multidimensional research of guilt in the civil law from Romania. In the above-mentioned work it is stated that, in civil law, guilt is an essential element of the liability, it turns the illicitness into imputableness, but because of the extraordinary complexity of the social life that meets the civil legal standard, one cannot always explain and outline sufficiently clearly the presence of the subjective factor criticized in human behaviours.⁴ Other scientists⁵ as M.Eliescu, Ion M.Angliei, Francisc Deak, Marin F.Popa, Tudor R.Popescu, Petre Anca, Traian Ionascu, Eugen A.Barasch and others, examining the civil legal responsibility, make some references in relation to the notion of guilt in the civil law as well. Constantin Statescu and Corneliu Birsan, in their work "Civil Law. General Theory of

¹ C. Statescu, C. Birsan, *mentioned works*, p.183.

² Dr. Ioan – Dorel Romosan. *Guilt in the Romanian Civil Law*. Bucharest: ALL BECK Publishing House, 1999, page 8.

³ To refer to: Nicolae Popa. *General Theory of Law*. Cluj-Napoca: C.H. Beck Publishing House, 1993, page 195

⁴ Ioan-Dorel Romosan. *mentioned works*, page 8-9.

⁵ M. Eliescu. *Delictual Civil Liability*. Bucharest: Ed. Academiei Publishing House, 1972. Ion M.Anghele, Francisc Deak, Marin F Popa. *mentioned works*, Tudor R. Popescu, Petre Anca. *General Theory of Liabilities*. Bucharest: Ed. Științifică Publishing House, 1968. Traian Ionascu. Eugen A Barasch. *Delictual Civil Liability*. Fault as Element of Liability. SCJ, no.1/1970.

Liabilities"¹, have fulfilled a thorough analysis of guilt – condition or element of the delictual legal responsibility and, more generally, have referred to the guilt in the contractual civil legal responsibility.

Studying the specialty literature and acting legislation (Art.1398 to 1425 of the Civil Code of the Republic of Moldova), we noticed that the forms of guilt in the civil law have served as a basis for discussions on the use of the concept of guilt because it was determined that this notion was accompanied or replaced by several words, i.e. negligence, fault, mistake, which have different meanings in different countries. This raises the need for a terminological unification, for a more correct application of civil legal liability.² Borrowing the term "guilt" in criminal law was regarded with reservations in the specialty literature³, estimating that the notion of "fault" would have been more appropriate, as it was traditionally set in private law matters⁴. The only certain effect of this borrowing is the "confusion in the civil legal language" which will inevitably lead to the reopening of the existing controversies on the content and finality of the concept.

In the game of the liability mechanism, fault is an essential element that was studied extensively and deeply in the specialty literature. We can state that the foundation of civil liability depends on the way of interpretation of this notion. Over time, a series of definitions were outlined, each making a substantial contribution to the interception of the special features of guilt. The data were located between the mental attitude of the offender in relation to the offense and its effects or the abnormality of his damage-causing behaviour⁵. In the French legal literature⁶, the definition of delictual guilt was influenced by the tripartite structure of the institution of liability, conditioned by the existence of an

¹C. Stănescu, C. Birsan. *mentioned works*, p.175-197.

²T.Ivancova. *Guilt- a condition of the delictual civil liability in the contemporary doctrine of different states*, "Law and Life" 2012, no.3, page 45

³S. Neculaescu. *New Civil Code, tradition and modernity as to the regulatory legal terminology*, in "Law" no.12/2010, p.24-26. of Ursu Viorica. *mentioned works*, page 407

⁴L.R. Boila. *Guilt – the eternal "lady" of the delictual legal liability*, in "Romanian Journal of Private Law" no.2/2010, p.35. of Ursu Viorica. *mentioned works*, page 407

⁵L.-B. Boila, *mentioned works*, page151

⁶J.Carbonnier. *Droit civil. Les biens. Les obligations*, (Civil Law. Assets. Liabilities)Paris: Quadrigue/Puf Publishing House, 2004, p.2294. from Ursu Viorica. *mentioned works*, page 408

injury, the commission of a fault and the causality relation. In this regard, it was underlined that one fault is a characteristic condition of liability for the own acts, the other two elements being found in all cases of liability.

In the German doctrine and the doctrine from other countries with German legal guidance¹, the theory of the "Aquilian relativity" was stated, referring to the distinction between the relative or absolute character of the civil guilt. According to this theory, the breach of the liability imposed by a rule of conduct is not culpable and, therefore, is not generating liability on certain persons who have no discernment of their actions, in relation to which protection should be guaranteed. This theory has found an echo in the doctrine of other countries of German orientation, such as Sweden, Turkey and Austria, without being dedicated in legislation. It has also been accepted in the Netherlands and was "welcomed" in Common Law (USA and England).²

Russian doctrinarians, discussing about guilt as a condition of civil legal liability, are concerned about the issue of presumption of guilt. Thus, the opinions on this subject are divided into several directions. The majority considers that guilt is presumed in civil law³. Some argue that the Civil Code of the Russian Federation contains special rules providing for the need of proving guilt⁴. Others think that it must be prescribed by law and needs not be proven in court proceedings⁵.

¹ Art.823, Chapter 2 of the *German Civil Code*. from T. Ivancova . *Guilt- a condition of the delictual civil liability in the contemporary doctrine of different states*, "Law and Life" 2012, no.3, page 47

² T. Ivancova . *mentioned works*, page 47

³ I.B. Novitskiy, L.A Lunts. *Обязательственное право. (Law of Obligations)* Moscow, 1950, 319 in D. Vodganov. *Вина как условие гражданско-правовой ответственности (анализ теории и судебной практики).(Guilt as a condition of civil legal liability)(Analysis of theory and legal practice)* Russian Judge, 2008, № 4, page 20.

⁴ Federal Law of the 10th of January, 2003 № 18-ФЗ *Устав железнодорожного транспорта Российской Федерации. (Charter of the Railway Transport of the Russian Federation)* СЗ РФ, 2003, № 2, page 170.

⁵ V.K. Babayev. *Презумпции в советском праве. Учебное пособие. (Presumptions in the Soviet Law. Study Guide)* Gorky, 1974, page 14. N.N. Tsukanov. *О критериях правовой презумпции. Законотворческая техника в современной России: состояние, проблемы, совершенствование. Сборник статей. (On the criteria of the legal presumption. Lawmaking technique in modern Russia: condition, issues, improvement. Collected Works)*N.Novgorod, 2001, page 504. O.A. Kuznetsova. *Презумпции в гражданском праве. (Presumptions in Civil Law)* Sankt-Petersburg, 2002, page 25-26.

As to the definition of guilt, in the French doctrine¹ it was considered that it would consist in the breach of an existing obligation, and another author has analyzed the guilt from three points of view: a material element, a human element and a sociological element. The author believes that the guilt is "the conjunction of these three elements, each of which is a specific aspect."² If we talk about the material element, then we can lay stress on the physical act that causes damages and which consists in a certain human behavior that can be interpreted not only as an action, but also as an inaction. The action can be physical, psychological, intellectual, and the inaction may consist of an omission, non-compliance with a legal obligation, or in an abstention, when there is a legal obligation to act.³

As to the human element or, as other authors⁴ call it, the psychological element, or simply will, is the one (human element) or (will) that allows the distinction between different types of guilt and that determine guilt imputability to a certain perpetrator: *intentional guilt* (characterized by an intention of causing harm. Typically, when such a type of guilt is proven, the consideration of other elements becomes practically deprived of interest, since the defendant fails to produce evidence of a justifiable act, both the causality relation, as well as the unlawful nature are presumed); "*inexcusable guilt*" (which means the guilt involving the awareness of the likelihood of causing a damage and the acceptance of this situation regardless of the reason or, in the concept adopted by law, the voluntary and exceptionally serious guilt); *serious guilt* (the guilt assimilated by deception and is found usually at professionals); *unintentional guilt* (encountered in the material of quasi-crimes, consisting of negligence or incaution. It has some degrees of assessment and namely *culpa lata (serious guilt)*, *culpa levis (slight guilt)*, and *culpa levissima (very slight guilt)*).

The following element is the unlawful (sociological) element. The

¹M.Planiol. *Etudes sur la responsabilite civile, (Study of the Civil Liability)* in "Revue Internationale de Legislation et de Jurisprudence"(*International Journal of Legislation and Jurisprudence*), 1905, p.283. from Ursu Viorica. *Mentioned works*, page 409

²R.Demogue, *Traite des obligations en general, (Treaty on Obligations in general)*3rd tome, Paris, 1923, page 367 and the following from Ursu Viorica. *Mentioned works*, page 409

³Paula Mircea Cosmovici. *Civil Law. Real Rights. Liabilities. Civil Code. 3rd Edition.* Copyright 1998 –ALL BECK Publishing House, page 27

⁴Paula Mircea Cosmovici. *Mentioned works*, page 27

latest French doctrine presents at least three points of view. For some, the essential condition is that the offender comes out of the scope of the law. For the others, it is necessary that the offender affects the subjective right of another, and, finally, a third opinion, which seems to prevail, is that the perpetrator must have deviated from the behavior that would have been shown by a good parent in family, i.e. an abstract model of behavior.

As to the concept of «violation », we should note that the Principles of European Tort Law¹ preserve this notion in the Art. 4.102, according to which: "A person is liable on the basis of fault for intentional or negligent violation of the required standard of conduct." Not less, the term "violation" includes generally both the intentional violation, i.e. the *dolus*, trickery or intention and the unintentional guilt, i.e. the fault.

The Romanian legal doctrine has paid attention as well to the issue of replacing the term of guilt with the one of violation/mistake, as Art. 998 of the Romanian Civil Code mentions the violation, which can include the intentionally committed act and the one committed by fault by means of negligence or imprudence².

Respecting the traditional course of things, we use, however, the terms of guilt and fault, not removing the possibility of their replacement with a closer term, fit to the real situation by a legislator in a future regulation.

The range of problems of the civil fault acquires new meanings at present: some authors³ are proponents of the theory of diminishing role of guilt in support of objective grounds, which would impair the diminution of the role of the preventive and educational function of liability and others⁵ present the idea that the content of the civil fault in

¹European Group on Tort Law, *Principles of European Tort Law*, Ed. Springer, Vienna, 2005. from Ursu Viorica. *Mentioned works*, page 409

² M. Eliescu. *Mentioned works*, p. 170 and the following from Florin Ciutacu, Cristian Jora, *Civil Law. Theory of Liabilities*, Themis Cart, 2003, page 142

³ P.Jourdain. *Les principes de la responsabilite civile*, (*Principles of Civil Liability*)3rd edition, Paris: Dalloz Publishing House, 1996, p.17-20. G.Viney. *La faute (Fault)* in "Traite du droit civil"(*Treaty of Civil Law*), under the supervision of J.Ghestin, Librairie Generale de Droit et de Jurisprudence(*General Library of Law and Jurisprudence*), Paris, 2006, p.400-413., from L.-B. Boila. *Guilt, basis of civil liability in its both forms in the texts of the new Civil Code as in the preceding one, "The Law" (Romania), 2012, no.1, page 151*

the sense of abandoning the traditional *mental attitude* of the perpetrator, focused on an objective element, the abnormality of his damage-causing behavior, should be re-qualified.

In conclusion, we can however say that, in the specialty literature from the country and from abroad, they have talked and still talk about a dead end of guilt, of a set-back of the subjective civil liability, about a decline of the social value of guilt, in its quality of a tool of measuring the antisocial behaviors.¹

Some authors launched out a real “crusade” against guilt, as grounds of the civil liability, forecasting for it, sooner or later, an inevitable end.² This fierceness could be explained if we take in consideration the indisputable virtues of the objective civil liability, but, however, these virtues do not justify the conclusion that the history of liability based on guilt has ended. We consider that one can talk more of a limitation of the application field of the liability based on guilt and, as a consequence, of a cessation of a quasi-exclusive domination of guilt, perceived as grounds for civil liability³.

Thus, the issue of the civil guilt acquires a special importance at present and has, at the same time, the chance of finding progressive solutions, adapted to the solutions devoted to the great systems of contemporary law.

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¹ T. Ivancova *Peculiarities of guilt – a condition of the application of the contractual civil legal liability* “Law and Life”, 2012, no.2, page 31.

² Săche Neculaescu. *Delictual Civil Liability*. Bucharest: Publishing and Press House “Șansa”, SRL, 1994, p.148.

³ Ioan-Dorel. Romosan *mentioned works*, p.20.

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