Basic Concepts of Criminal Law and Setting up Incriminating Norms

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Received: November 8, 2011 Accepted: November 22, 2011 Published: March 1, 2012
doi:10.5539/jpl.v5n1p109 URL: http://dx.doi.org/10.5539/jpl.v5n1p109

Abstract

Starting from the assumption that as compared to the old theory of guilt, called "psychological", the new theory, called "normative", has a broader rational value, this paper tries to integrate the basic concepts of the criminal law (crime, criminal, guilt) into such a theory and, at the same time, to highlight some rules that should be taken into account when setting up the incriminating norms.

Keywords: Act, Illicit, Individual, Offender

1. Guilt

The Western criminal doctrine is currently dominated by a new theory on guilt, called "normative", which is significantly different from the former "psychological" theory.

Summarizing, the new theory denies the fact that guilt (delinquency) would represent a „psychological reality" or a naturalistic element, which would be misidentified either with the *will* and *conscience* to commit an offence or with the so-called *subjective element* of the offence, respectively the form of guilt (*intention*, *negligence* etc.), required for the existence of a certain offence. On the contrary, it considers that the notion of guilt, like all legal notions, is an abstract precept developed, set up by "value judgments". And, because in case of guilt these judgments follow several stages, the normative theory defines guilt as a ***judgment in stage*** (Hoyer, A., 1996, p.59).

Regarding the number of stages that judgment of guilt should run through, there is no unitary point of view. However, it seems that the opinion that this judgment basically follows two stages dominates: in a first stage the court conducts a judgment upon the *objective imputation* – based on which it decides whether or not a crime was committed; and, in a second stage, the court conducts a judgment upon the *subjective imputation* – on which it decides whether there is an offender or not, or if there is an "active subject of the offence".

Please note, however, that we are the ones who have assigned these meanings to the two stages of imputation, considering that the only way we could explain why, in legal matters, the author of an offence is likely to be declared not guilty and to be discharged from liability, is simply because he/she does not meet the general conditions required for establishing the existence of the "offender" or of "the active subject of the offence" – for instance it is the case of the irresponsible person or the minor who does not have the age required in order to be considered criminally liable.

And we are also the ones who, starting from the explanation of guilt itself as a judgment in stages, reached the conclusion that the notion of *guilt* is not subordinated to the notion of *offence (*or *criminal illicitness)* – the way that the psychological theory alleges. In fact, things are quite opposite, meaning that the term guilt represents a superordinated concept which includes in itself both the notion of *offence*, and the notion of *offender*. Moreover, it refers to the broadest concept of the sanctioning law, because the concept of guilt embeds not only the concept of offence but also every other form of *illicit* action or *delict*; not only the concept of offender but also any *delinquent* (criminal, misdemeanant etc.). The generic concepts of delict and delinquent are both subordinated and embedded in the concept of guilt. Thus, one could graphically represent guilt as a set of three concentric circles: the first circle, the closest to the centre, represents the concept of *delict* (offence, administrative breach, civil delict etc.); the second circle, which is broader, embedding the first one, represents the concept of *delinquent*; and the last circle, the broadest, embeds the other two, and represents the concept of *guilt*.

Nevertheless, we have initially argued that the notion of guilt would be mistakenly associated to that of delinquent (offender) and, therefore only two concentric circles would be involved (Guiu, M.K., 2004, pp.132-148; Guiu, M.K.,

2007, pp.165-173). And this appears, as a consequence of the already mentioned observation that, in practice, the cases of inexistence of the offender coincide with those of inexistence of guilt – as it is proved in all cases when the agent does not meet the general conditions required for the existence of the "offender" or of the "active subject of the offence" (age, liability, freedom of will and action), it is also found out that it operates one or more of the so-called "causes removing the guilt".

In time, however, we reviewed our findings, so that, more recently (Guiu, M. K., 2010, pp.48-61; Guiu, M. K. & Voicu, A., 2010, pp.35-63), we showed that the examination of guilt should also include a third judgment ("imputation") – according to which to decide whether or not the rule breached by the agent corresponds with a rational requirement, whether or not it is legitimate. Because we define guilt as a reproach to the agent for the fact that he wanted something that the norm prevented him from wanting, its examination should logically include a specific value judgment, distinct from the other two, where individual reasons (faculties of reasoning) that led to the illicit act and the common reasons (faculties of reasoning) that led to the adoption of the norm (rules of conduct) are weighed. And only afterwards, one could decide which of the conflicting practical reasons has a more rational value.

Given the fact that the possibility of a judgment on the legitimacy of the rules is still being questioned, allegedly stating that the rules in force would enjoy an absolute, irrefragable, presumption of legitimacy. However, in our opinion such a thesis should be abandoned because it is characteristic to totalitarian states, which confuse law with force. In a democratic state, the validity of any positive rule remains dependent only of its rational value, of its capacity to avoid any "*useless antagonism between the law of community and that of the individual*" (Djuvara, M., 1995, p.486). That is why this validity is required to be investigated whenever one finds out that the rule was broken. In any case, the practice of law can never be reduced to a mechanical application of the "legal" rules included in the official sources but it must be guided by superior principles of justice from the "*rational justice*" (Djuvara M.).

1.1 Objective Liability

Observing the difficulty of the issues under discussion, many authors require, more or less explicitly, that one should give up guilt and adopt instead an objective, absolute or "*legal liability*" (as professor Enrico Ferri called it).

Therefore, the so-called "objective responsibility", although forecast sometimes by international bodies (GAFI, European Parliament), does not correspond at all with the common ideals of justice (Jerez O, 2003, pp.237-249). Additionally, its adoption is not possible, at least as long as the criminal law will continue to distinguish between intentional and negligent offences by stipulating them under different punishments - because in these circumstances, giving up guilt would only mean to abandon the investigations, although we do not have yet a clear and precise criterion of distinction between *intention* and *negligence* (the definitions offered by the psychological theory are so confusing that the practitioner can not work with them and ends up invariably by proceeding arbitrarily). Or giving up guilt would only mean abandoning the system of causes removing guilt, including the general conditions for the existence of the offender although, by doing so, we would certainly transform the criminal justice into a pure absurdity.

On the contrary, it is therefore required to deepen the research on guilt and to develop another theory, more appropriate and compatible with the scientific rigors. We should not give up the judgment of guilt, but the psychological theory of guilt, which, like all concepts called "naturalistic" or "substantial", ignores the fact that law is not an acknowledgement science that studies reality as such, but it is an abstract science that studies the value judgments - which is why legal concepts invariably transform reality and arrange it according to the rules of logical thinking. Ignoring this feature of legal concepts represents ultimately the true reason for which not only guilt, but also other basic concepts of criminal law, including the generic concept of offence, is under the sign of uncertainty.

2. Offence

The majority criminal doctrine defines the offence even at present as a social action that would show certain characteristics or individual features (Bulai, C., 1997, p.149; Bettiol, G., 1973, p.226).

However, this explanation itself, apparently elementary, reflects a serious misunderstanding of the study object of law, but also the fact that the theories of social action, whichever they might be, are the prerogative of philosophy and, not at all, of law. Contrary to the common belief, the field of law is limited to "value judgments", to assessment of the legitimacy of various social actions and to their elevation to the status of law, common rules of conduct. Therefore, law should not offer any definition of social action or practice but it should take into account the findings of philosophy.

It is most likely precisely because of this misunderstanding, that the theory of the offence ignores many of the findings of philosophy - which led to the current situation, where not only the definition, but also the characteristics and structure assigned to offence differ from one author to another (Guiu, M.K., 2007, pp.123-141).

In philosophy, *action* is defined as an intentional human expression, oriented by a purpose (W. Vossenkuhl, 1999, p.176), underlying thus that such actions (commissions or omissions) "of negligence" do not exist; as opposed to simple events, actions are human expressions of a conscious and intentional nature (the scope gives specificity to action, delimiting it from any other physical expression of man).

However, in law, under the influence of psychological theory of guilt, it appeared the idea that there would be other actions "of negligence" (for example, the Romanian Criminal Code specifies actions/inactions committed "*of negligence*" in several texts - Art.19, Art.273 etc.)

And, as a result, many doctrines, including the Romanian one, make no distinction between the subjective position of the agent towards action (which takes, invariably, the form of intention) and its subjective position towards the result of the action (which may take both the form of intention or negligence). This explains, in our opinion, many of the contradictions of the current theory. We notice, for example, that the existence of certain "actions of negligence" does not agree in any way with the statement that law punishes only voluntary acts, a thesis which emerges from the definition of constraint, physical or moral, like a cause removing guilt (Art. 46 Criminal Code); or the fact that today's doctrine faces two different notions of criminal intent: a classical and abstract notion, to which a positivist and concrete notion is opposed (Bouloc, B., 2005, pp.231-236).

Likewise, philosophy believes that any action is composed of an external expression (physical) and an internal expression (psychical). Instead, in law opinions differ. Some doctrines (e.g. the French one) say that the offence being an action, also displays two elements: an *objective element* consisting in the external physical expression; and a *subjective element* consisting in the internal psychical expression. Other doctrines, however, under the influence of the so-called "causal theory of action" (published in Germany in the nineteenth century) say that we are discussing not about two elements but about two aspects of the offence - one objective and another subjective - each comprising several elements. Misinterpreting the philosophical thesis that every action has a purpose, the supporters of causal theory of action argue that any action would have a result; and, therefore, they added the result and causal relationship to the objective element (physical expression), considering that the latter would still be physical entities and that, together with the material element would form the objective side of the offence.

They have not observed that, in nature, there are no "results"; the notion of "result" (or "effect") is a purely abstract notion and has an attributive value designating the affiliation of a certain event to a causal series, the fact that that event was necessarily preceded by another, which we call "cause". Moreover, they have not observed the fact that the notion of "causal relationship" is a superordinate notion which includes in itself both the notion of "effect" ("result") and the notion of "cause", so that it is nonsense to claim that the causal relationship would be the third "physical element" of an offence, distinct both from causal action (the "objective element") and the result.

In short, the present theory of the offence is mainly mistaken and correcting it is a requisite. It is also necessary to abandon the thesis that the offence would be an action.

The offence can be defined neither as a real, precise action (as the material approaches claim), nor as an imaginary action, a "model-action" provided by law (as formal conceptions claim), because despite appearances, the notion of offence is not taken from nature, but it is a created abstract notion, modelled by value judgments.

According to the rule that reality appears in law only when it is transformed, action does not appear in law either. On the contrary, the two elements of the action change into two different and concentric concepts, namely the concepts of *offence* and *offender*: while the concept of an offence is based solely on the physical expression, the concept of offender, which is wider, is built around both physical and psychical expression.

As a consequence we may not define offence as an „action". In real situations, it is required to make a clear distinction between the philosophical notion of "action" and the criminal notion of "deed" – term which strictly designates the external manifestation or the objective element of the offence.

2.1 Building Incriminations

First of all, in order to set up the concept of an offence, law distinguishes the two elements of action and changes the physical expression into that "*body of offence*" (Desportes, F. & Le Gunehec, F., 2006, p.412), called "*material element*" or "*objective element*".

However, the incriminating norm is not restricted to that "*verbum regens*", that is a description of the "objective element", of the "body of crime" or of the deed itself.

Since the body of crime always consists (or, better said, it should consist) in a physical *licit expression,* the incriminating norms must also include a series of *essential requirements* – that determine the circumstances (surroundings), either real or personal, where physical expression ceases to have a licit nature and becomes *offence*,

criminally illicit. For instance, in case of the theft offence, the objective element consists in "*taking of a mobile asset*" (Art.208 Criminal Code) – which is in itself, a "licit" expression; this physical expression becomes however, "criminal illicit" (theft offence), to the extent that three "essential requirements" are met: the mobile asset is in "*the possession or ownership of another person"*; the mobile asset is taken "*without his/her consent*"; the mobile asset is taken "*with a view to lurching it*".

As far as the circumstances or the "essential requirements" of incrimination are concerned, three aspects should be approached.

The first is that their determination claims a special attention from the legislator, considering that circumstances are precisely those rendering to each offence an individual configuration, as the principle of legality claims. Contrary to the common opinion, it is not at all necessary that an offence should be different from another in its body, in its objective element, but it is enough that it is different in its essential requirements. Anyway, according to the contrary opinion, the legislator has often neglected the circumstances of incrimination and was concerned exclusively in the body of crime trying to assign to each offence a different deed. However, since many offences have an identical objective element (for instance, theft and the appropriation of the asset found), the legislator managed only to assign them different descriptions, without specifying, however, clearly enough, the circumstances allowing the delimitation of the respective offences.

The second aspect is that "essential requirements" can not be classified – and this is true even if some authors, taking into account the place that was assigned to them in the structure of the offence, make the distinction between *essential requirements attached to objective element* and *essential requirements attached to subjective element*. They considered that the requirements attached to the objective element would determine real circumstances and, potentially, personal circumstances of individualization, while the requirements attached to subjective element would exclusively determine subjective personal circumstances. We wish to highlight precisely the fact that such a distinction is arbitrary. In reality, all the circumstances of incrimination are grouped around the objective element of the act itself: the deed must belong to a particular subject (for example, to an "civil servant" - Art.215[1] Criminal Code.), or have a certain material object (e.g. a "movable asset" - Art.298 Criminal Code); or have a specific purpose (for example, "obtaining…a substantial benefit"- Art.221 Criminal Code) etc. Even for the offences of result, the requirements of incrimination are grouped solely around the act – because, contrary to appearances, in these incriminations the focus is not on the subsequent event, called "result" but on the *causal aptitude* of the deed; any such incrimination forbids exclusively causal deeds for result and not at all the result itself (death, injury etc.), as some authors claim (Jescheck, H.H., 1988, pp.215-218), who omit the fact that the result being a simple event escape the legal assessment, being governed solely by natural laws.

The third aspect is related to the way in which it is precisely determined the existence of circumstances of incrimination. In this respect, it should be noted that, despite appearances, no circumstances are simply found; in reality, each circumstance requires a distinct assessment or evaluation, either in terms of other sciences or from a legal perspective (Antoniu, G., 1995, pp.88-90). For example, the death of a person becomes a relevant "result" which is relevant for the incrimination only when it is determined on the basis of expertise either if it was caused by human intervention, or if it could be prevented by a necessary human intervention according to law; or by means of the quality of "civil servant" or "close relative" to the victim. Thus the situation requires an assessment or evaluation of reality, from the perspective of the legal definition of such notions.

Finally, when approaching the matter of building incrimination, we must note that not all incriminations are set up as shown above, that is starting from a *verbum regens* and adding one or more essential requirements to it. This type of setting up corresponds solely to the so-called "formal incriminations" or "of a simple attitude" – which are the most numerous. However, besides these there are, it is known, other incriminations called "of result" – whose building up is different.

Incriminations of result are different from the formal ones from two points of view: first of all, they do not include anymore a description of the deed, a *verbum regens*; and secondly they invariably claim as essential requirement that the deed would have caused a well determined result– for instance, for the existence of offence of murder (Art.174 Criminal Code), the deed must have caused "*the murder*" (death) of a person; or for the existence of offence of destruction (Art.219 Criminal Code), the deed must have caused "*destruction*" (wrecking) of a thing. Unlike formal incriminations that might be characterized as "closed legal models" – considering that from the outset by that *verbum regens* they drastically limit the scope of the relevant criminal deeds- the incriminations of result might be characterized as "open legal models" – considering that in their case, any deed that contributed in one way or another to the appearance of the result may become relevant.

Incriminations of result are different not only from the formal ones but there are differences among them.

In order to clarify this statement we will start from three observations. The first observation is that the well-known classification in *intentional* (*deliberate*) *offences* and *offences of negligence*, far from being common to all offences, it is on the contrary a classification proper to offences of result, representing a subset of these offences. The second observation is that the distinction between the two categories of offences (intentional and negligent) begins from the very deed - which was, in fact, one of the main reasons why in some doctrines (especially in the German doctrine), "negligence" is defined as *a particular type of punishable action* (Maurach, R., 1965, pp.456-457; Blei, H., 1983, p.305; Jescheck, H.H., pp.508-509). Therefore, it is self-evident that law does not punish the mere infliction of "result", but just its infliction without right, by an expression contrary to a rule of conduct (in this respect the rule in art.174 Criminal Code is incomplete, because killing a person is classified as murder only when it was committed without right). The distinction between deliberate offence and those of negligence arises, in last instance, from the different way in which the illicit nature of the deed is assessed and more precisely, from the nature of the rule infringed by the agent: if the agent violated a rule of conduct provided by criminal law (for example the bodily harm caused to a person by hitting him/her with a hard object), it is considered that the result occurred (death) was intentionally caused by the agent and consequently, we talk about an *intentional offence* (murder); in exchange, if the agent infringed a rule of conduct provided by an extra criminal law (for example, a labor protection rule), it is considered that the result occurred (death, injury etc.) was caused by him unintentionally (without intention) and consequently we talk about a *negligent offence* (murder or negligence bodily injury). The third observation is that the different way in which the illicit character of an action is assessed determines a difference of structure between the two categories of offences: offences of negligence are simple offences; intentional offences on the contrary, are complex offences that cover other less serious offences. In fact, it has already been observed in the case of murder offence - as demonstrated by the fact that many authors consider murder as an offence of natural complexity (we believe that there is not "natural complexity", but "legal complexity" the opposite idea was inferred from the incomplete legal definition of murder). Unfortunately this characteristic was not noticed in the case of destruction offences, where, similarly to murder cases intentional destruction covers, as appropriate, acts of assault or potentially harmful acts and which passed almost unnoticed. And, since it wasn't noticed that murder and destruction differ, mainly in their material object (in case of murder, the material object is a man; instead, in case of destruction, the material object is an object), our law committed the error to assimilate to intentional destruction the acts consisting in "*preventing from taking measures for preservation or rescue*", as well as those consisting in "*removal of measures taken*" (Art.217 Criminal Code) - even though these acts are, in fact, only an "early performance", that is an attempt of destruction and not a consumed destruction (by regulating likewise, the legislator has created a hybrid incrimination, both as a result incrimination and a formal one, which ignores the specificities of the two types of offences and implicitly the demands of justice, because under these circumstances the moment of the performance of the offence can not be established and there are no distinctions between the consumed and the attempted forms).

Another distinction that may be considered proper to offences of result is the distinction between *commissive offences* (where the agent performs something against the law) and *omissive offences* (where the agent does not do what the law orders). In incriminations of result and only in their case, this distinction becomes essential – because the requirements of incrimination are different (at least, it should be like this), when the rule forbids the causing of result or orders its prevention. In fact, precisely for this reason, a part of the Western doctrine makes a clear distinction between *proper omissive offences* (which are formal) and *improper omissive offences* (which are offences of result). As it was already observed (R. Maurach, p.802), in case of improper omissive offences, one no longer reproaches the agent causing of a result – because, unlike commission (that may represent the "physical cause" of a certain result), omission may not cause anything (*ex nihilo, nihil*); in fact, this time the agent is charged with not having done what he should have done in order to prevent the result. In other words, omission is analysed as a "legal cause" (abstract) of result, considering that, in asserting its causal nature one no longer starts from a real causal deployment but from a hypothetical one, raising the question what would have happened if the deed which actually was omitted had been performed. Briefly, in case of omission, the problem which is raised is no longer to establish the existence of causal relationship, but to establish the "avoidable nature of result" (Hoyer, A., p.42), the circumstance in compliance with the rule of conduct, the agent could have avoided the occurrence of result. As far as the difference between *causing* and *avoiding the result* it is required to note that, although both of them require that one should appeal to an expertise – because the acknowledgement of the capacity of the omitted deed to prevent the occurrence of result would not lie upon simple logical assumptions but it must also find a support in "the best science and experience of the moment" – nevertheless in this latter case being about a hypothetical causal deployment, the conclusions of the expert will always express only a certain degree of probability. This fact caused many controversies in the Western doctrine related to the minimum of probability required for affirming the causal nature of omission. According to an opinion (theory of probability – sustained by Hauser, Rehberg, Schultz and

others), it is believed that the criminal liability of the agent is justified only when the deed omitted by the agent was capable of preventing the result with the highest probability. According to another opinion (theory of risk – supported by Roxin, Stratenwerth and others), it is considered that the criminal liability of the agent is also justified when a simple possibility that the deed omitted would have prevented the occurrence of result.

Distinct from the avoidability of result, other specific requirements stated by the doctrine (F. Mantovani, 1988, p.193) also appear in improper omissive offence, as it follows: 1) a legal obligation of the agent to prevent the occurrence of result (this obligation called *obligation of guarantee*, may arise from the law, contract or from its voluntary assumption); 2) the deed omitted by the agent could have been possible and capable to prevent the result (for example, the parent that can't swim is obliged nevertheless to seek help for the son who fell into water); 3) the purpose of protection of the rule breached by the agent coincides with the purpose of protection of incrimination of result (for example, the cleaning lady even if she doesn't meet the obligation to close the windows upon leaving may not be held liable for the death of the person who fells down when leaning out of the window – because the purpose of this obligation is to prevent thefts and not some people's injuries, eventually fatal damages).

However, all these lead to the conclusion that, wrongfully, the Romanian Criminal Code incriminates by means of an identical rule (for example, as murder – Art. 174 Criminal Code) both the commission and the causal omission. It would have been logical for it to take into account the characteristics of improper omissive offences and, accordingly, to incriminate separately causal omissive acts, providing milder penalties.

The problem arises similarly in case of negligence because negligence can not be a "physical cause" of the result. Just as omission, negligence must be considered a "legal cause" of the result, given that it always has an omissive component consisting in the failure to comply with a rule of prudence or diligence measures or in the failure to comply with a legal provision replacing such a rule or measure. Consequently, as far as offences of negligence are concerned, the avoidance of result should also be established and not the existence of a causal relationship.

This is why in the West the jurisprudence registers many solutions in the sense that the agent can not be held liable for committing an offence of negligence, since the expertise has determined that the result could not be avoided, even assuming that the agent would have complied with the rule of conduct - for example, if a driver attempts to overcome a cyclist at a lateral distance of only 1 meter, instead of 1,5 meter, as the law prescribes, and the bicyclist turns, unexpectedly, left and he/she is fatally injured, however the driver will not be held liable for the death to the bicyclist if, *ex post*, it is determined that, due to the cyclist's advanced state of drunkenness, he was not able to go straight and certainly he/she would have turned so much to left, that the driver would have injured him/her, even if he respected the lateral distance of 1,5 meters (Noll, P. & Trechsel, St., 1990, p.209).

Consequently, the definition of a negligent offence can not be the same with the definition of an intentional offence, according to our criminal code, where murder (Criminal Code Art. 174) and involuntary manslaughter (Art.178 para.1 Criminal Code) are both defined as "*killing a person*". In fact, we find an approximately precise definition of the offence of murder only in paragraph 2 of Art.178 of the Criminal Code - because negligence involves, as we have pointed out, proving the agent's failure to comply with the precautionary measures for the exercise of a particular activity, as well as that failing to comply with those measures the result could not be avoided anymore.

Finally, we should also point out that an incrimination of result is not justified at any time but only when the result is a physical event, separate from action - because only in this case, the link between the physical expression of the agent and the subsequent event ("result") could be defined as a "causal relationship", which was imposed by a law of nature and which can usually be scientifically explained through an *ex post* examination (expertise). In other words, incriminations claiming the occurrence of an "intangible result" such as, for example, the "public scandal" (Art.201, Art.321 Criminal Code), "significant disruption" (Art.248 Criminal Code), "damage" (Art. 215 Criminal Code) etc. is wrong.

3. The Offender

After setting up the concepts of different offences, law begins to restore the unity between the two parts (elements) of the action, within a superordinate wider legal concept, that of offender.

At a closer analysis it becomes obvious, that in legal terms the agent can not be called "offender", only because he committed a deed that meets the conditions of existence of a particular criminal offence; on the contrary, it must be proved further that he meets other conditions called "general conditions of existence of the active subject". Or, as the Italian authors say (Pagliaro, Pannain, Pisapia, Magiore et. al.) it must be proved that he/she (the agent) has a "criminal capacity" and he/she may be held liable for committing the offence.

We note, however, that, the positive laws do not define the concept of offender and, therefore, they neither expressly provide the general conditions of existence of the offender (age, liability, freedom of will and action) - although their

importance can not be doubted since it is widely accepted that, without them, there is no "offender" in the legal sense of the term.

We also note that although they appear only in theory, the general conditions of existence of the offender are inferred however from the law, through a logical interpretation, *a contrario*, to the provisions dealing with "causes removing the guilt" (improperly called in Romania causes "that remove the criminal nature of the deed" - Art. 44-51 Criminal Code). For example, from the provision of "minority" as a cause removing guilt, it is inferred that the offender must have the minimum age required to be criminally liable; or from the provision of "irresponsibility" and "drunkenness" as causes that remove guilt, it results that the offender must be a responsible person who acted with discretion, intentionally and knowingly; or, from the provision of "physical constraint" and "moral constraint" as causes that remove guilt, it is inferred that the offender must be a person who acted voluntarily, freely, unconstrained.

But since the general conditions of existence of the offender are inferred from law, we must conclude that the current theory is incomplete - because in theory, the causes removing guilt do not all match some general conditions of existence of the offender, as it would seem obvious. Thus, even if we leave aside the "self defence", "state of necessity", "law order" or other causes that can be subsumed to the generic concept of "constraint", we see that there are at least two causes - namely "error" (in fact or in law) and "fortuitous event" - which do not find any counterpart in the general conditions of existence of the offender. And if we try to clarify their significance we reach to the conclusion that among the general conditions of existence of the offender there should be included the condition that the agent possesses "the knowledge that he defeats a criminal precept" (or, in other words, the condition that the agent have had "the conscience of the criminal nature" of the deed), as well as the condition that the result should have been "predictable" - which appears as a general condition for the existence of the offender, in cases of incriminations of result.

However, we do not go into details (because, admittedly, such matters require a separate analysis), but we refer here only to two aspects.

The first is that we must make a clear distinction between the facto psychological will, and what Professor Djuvara called "*judicial will*"(Djuvara, M., p.186). And this is because, as demonstrated by the whole system of causes removing guilt, law will not consider any facto psychological will (as, the psychological theory wrongfully claimed), but it considers only that psychological will which, in accordance with the law, may be deemed *valid,* which corresponds to the value judgment.

The second is that, by their mere existence, the general conditions of existence of the offender demonstrate abundantly that the legal concept of "offender" does not designate a real, precise individual as all naturalistic conceptions claim (our doctrine analyses the offender as a facto entity, pre-existing the offence and by means of this theory it supports an incomprehensible theory namely that an individual is considered offender, before committing an offence); on the contrary, the legal notion of offender only designates the logical prototype, built on value judgments, the individual that can face criminal liability and who is subjected to a punishment.

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