THE SUBJECTIVE ELEMENT AND THE PENAL GUILT

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1. The concept of subjective element designates, according to a point of view accepted unanimously in our doctrine\(^1\), the psychical attitude of the agent towards the committed deed and towards its consequences, attitude which has to take, for the offence to subsist, the form of guilt (intent, negligence, *praeter* intent) asked by the law.

Defined in this way the concept of subjective element send us, to another one, the concept of guilt, which is explained in an almost identical way\(^2\) with a single difference that the last (the guilt) would concern not one, but all the forms and modalities of the guilt; it is sustained, with other words that the concept of guilt would constitute a general concept, which includes that of subjective element (the form of guilt requested for the existence of a determined offence).

But this pretended relation between guilt and the subjective element appears as unacceptable then when it is continuing, showing that “it may exist in actual case one of the forms and modalities of guilt shown in article 19 Penal Code and in spite of this to be absent the subjective element of an offence and on contrary it may exist in actual case the subjective element but it doesn’t exist the guilt”\(^3\). Beyond the difficulty to enter the meaning of these “explanations”, it appears clearly enough the fact that the relation between guilt and the subjective element can not be that of whole and a part, because, in this case, the absence of the guilt would be equivalent to the absence of the subjective element and the reverse. On the contrary it may be about two different conditions of existence of the offence, because, as it is sustained, the guilt represents a general condition (“feature”), proper to any offence, while the subjective element represents a special condition, proper to a determined offence.

On such a position is actually situated the so called “normative theory”\(^4\), (dominant in Germany, Austria, Switzerland etc.), in which the intent and the negligence are not being dwelled upon as “forms of guilt”, but as requests of the content of the incrimination, different from the guilt, whose existence is deduced both from the establishing of the illicit character of the action, and of the fact that, in an actual case it has no incidence any justified case or any case which would eliminate the guilt.

In the normative theory, the guilt has a very close meaning to that which the psychological theory attributes to it (which dominates our penal thinking), because it is sustained that it expresses a relation of oppositeness between the will of the agent and the will of its lawmaker, or in other

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\(^2\) In the Penal Code commented and annotated, general part, scientific publisher, Bucharest, 1972, page 92 it is shown that guilt “represents that the subject to have acted in that psychical state to which the law conditions the existence of the offence... and which supposes a certain assessment in the conscious of the subject and the character of the action or inaction, of its consequences relating to the exigence of the society expressed in the Penal Law.”


\(^4\) For the details regarding this theory to be seen George Antoniu, The penal guilt, publisher of the Romanian Academy, Bucharest, 1995, page 27 and the next.
terms, it expresses “the blamable character” of the attitude of the agent towards the social values protected by the penal law. In exchange a very controversial and confused issue remains in the normative theory too, that of the significance of the “subjective element”.

2. In these conditions in order to set straight what actually designates the concept of “subjective element” and which is the relation between this and the concept of “guilt”, we have to start from the concept of action.

We will start by noticing that, in the philosophical theory of the action it is sustained that “the intentionality” is the criteria of an action and that the actions differ on the ground of this criteria from other events, even from other corporal actions and reactions. The same theory shows us that, the renunciations are “actions” too, to that degree they can be attributed to the persons, as “the intentional passivity”. The term “intentionality “ has, in this context, the meaning of will determined through reason or “consciously will”, which constitutes the basis or the ground of every action: in order to attribute to a human manifestation the denomination of the action, decisive is its character of “effect” of some “rational causes”, of a will which is, at its turn, determined by principles, wishes, passions etc. Intentionality supposes not only the will, the mobilization of the energies in order to act effectively, but a determination of the will through thinking too, an “intelligent” behaviour, oriented to the achieving of a goal, a determined purpose. Such a behaviour is proper to any human being, without to be important if, in concrete it is about an incapable person, because the manifestations of the incapable, because they follow the achieving of some goals, have also intentional character. What determines us to conclude that the concept of “action” designates all those human manifestations which appear as “effect” of the interaction of two factors: the conscience (the thinking) and the will.

3. But the penal doctrine pretends that the two factors- the conscience and the will- would define not the action, but the guilt, and such a thesis obliges us to proceed to some distinctions, not only of words but of meanings too.

When it is stated that the guilt supposes that the human manifestation represents, both an act of conscience and an act of will, it is taken into account, in reality, even a different meaning, in the case of the term “conscience” – even a feature or a quality- in the case of the term “will”. The term “conscience” designates so, when it is about guilt, that what the philosophy designates “the competence”, meaning the aptitude of a person to observe the rules and to dispose of rules, which implies that of ascertaining and to adopt the system of social values protected by these (rules). To the concept of “competence” corresponds in the language of the coercive law, the concepts of “discernment”- term through which is designated “the competence” of the minors- and of “responsibility”- term through which is designated “the competence” of the grown ups ( in the civil law is absent such a distinction, considering that “the lack of discernment” is proper to all incapables, indifferent if their incapacity is because of their ages or of some other causes which affect the discernment). In return, the term of “will” appears, then when it is used bound to the guilt, as an improper term, because the eventual lack of will is equivalent, as it was already noticed, to an absence not only of the guilt but even of the action; in the absence of the will can not be talked about “a deed” of the man. What is desired to be said through the term “will” is, actually, something else, this means that the will manifested by the agent must have been free, undetermined by external causes to this or, other said, the agent had to act voluntarily, unforced – his will must not have been constrained.

5 I. Oancea, Theoretical explanations, page 120
7 G.H. von Wright, Explanation and Understanding, Frankfurt /M, 1974, page 89
10 Cf. Herbert Schnädelbach, The reason, in “Philosophy”, page 86
11 Cf. George Antoniu, The penal guilt, page 251
Such considerations lead us to another signification of the concept of guilt, in which the guilt is not being confused with the intrinsic attributes of the action- the conscience and the will- but designates other extrinsic qualities of this, but which have a determined role regarding the engagement of the penal liability of the agent: in order to draw in the liability, the action has to belong to a “competent” person (who has discernment, who is responsible) on one hand, and on the other, it has to be fulfilled in a voluntarily way, the subject having the freedom to choose or not that action.

However, even establishing that the action has such qualities- being committed by a person who had the capacity of understanding and of observing the rules and who acted with a free will, self-determined (based on his own opinions, wishes, hobbies etc. of the subject)- it can not be spoken about the existence of the guilt yet.

Actually, it can be seen, that before to be checked the fact that the action presents the mentioned qualities- what it means, that there is no “clause which removes the guilt”12 – it must be established the non observing by the agent of a rule of behaviour; only then when the action is illicit, contrary to a rule of behaviour, it becomes necessary to be checked the inexistence of some causes which would remove the guilt. The first condition of existence of the guilt constitutes actually the illicit, unjust character of the action (inaction) of the agent and only secondly that that the action (inaction) to present the above mentioned qualities.

Therefore, the guilt represents, first of all the infringement of a rule of behaviour, of an preexistent obligation and secondly- in the extent in which it is established that this infringement was done by a person capable to understand the rules and who acted voluntarily, unforced- the guilt represents, indeed a “novatio” (M. Djuvara), because that preexistent obligation turns into a new obligation, in that of supporting the legal sanction (the punishment).

4. But if, in this regard – as it could be understood already- we subscribe fully to the so called “normative theory of the guilt”13 it appears to us, in exchange, hard to be accepted the thesis, sustained by the same theory, according to which it would be compulsory that the rule of behaviour which was infringed by the agent to be contained in a penal norm (considering, probably, that, in contrary case, the principle of legality would be disregarded).

Concerning us, we believe that such a thesis can be received without reserves only regarding the formal offences, of simple action, in whose case, indeed, the guilt supposes the infringement by the agent of a penal norm- because the offence subsists only if it is noticed a full concordance between the concrete deed and the objective characteristics of the described deed in the legal penal disposition, meaning only then when it is fulfilled the request of “typicality”14 of the action. Only in the cases of the formal offences it is justified, in our opinion, the statement that the illicit of the action is a “formal illicit”15 which is being appreciated relating to the content of the penal norm infringed by the agent.

On the contrary, in the case of the offences of result, the above thesis provides a series of limitations, because in this case, the norm of incrimination does not contain a description of the way in which it should be realized the action- the incriminations of result are generally “incriminations with open content” or “open legal models”16 but they resume to show the (forbidden) result and to declare punishable any action which “caused” it. And because in the content of the incrimination does not appear anymore

12 In the conception of the Romanian lawmaker the causes which remove the guilt contain the legitimate defense and the state of necessity, which, in the occidental doctrine, are being analysed distinctively, under the denomination of “justified causes”

13 Cf. G. Antoniu, The penal guilt, page 27 and the next


16 Cf. G. Antoniu, The penal guilt, pages 75-76
a description of the action, we should sustain, in the virtue of the mentioned thesis, that, at least as long it didn’t cause the illicit result yet, the action should be considered legal and therefore committed without guilt. In spite of all these it is obviously that such a conclusion can not be accepted; if the things would be otherwise, the punishment of the attempt could be justified in no way, because a deed committed without guilt could not be considered an offence. Therefore we must conclude that, in the case of offences of result, the action (inaction) of the agent has, also, illicit character, even if this character does not result from the reporting of the concrete action to the content of the incrimination, but it is appreciated relating to other rules of behaviour, different from the penal norm whose infringement it is imputed to the agent.

In the offences of result, the illicit character of the action finds support in another penal disposition- provided with an easier punishment- or in a simple social rule of prudence or diligence or in a “juridical” rule- meaning issued from the competent authorities and which is substituted to a social rule of prudence. What it means that, in the case of these offences (of result), the illicit of the action is not always a “formal illicit”; this time, the guilt is not being established only relating to the provisions of the penal law, but relating to the rules which form the so called “social law” (or consuetudinary) too, deduced from the “rationality” (J. Habernas) of some practices.

5. Although the guilt- which is an “essential feature” of each offence- can and must be established both in the formal offences as in those of result, specific to the last ones is the fact that the guilt does not empty the constitutive content of the offence, because, in this case, it becomes necessary to be demonstrated, additionally the existence of a relation of cause between the committed action with guilt and the appeared illicit result too.

The request to establish the concrete existence of an identical result with that described in the legal model (“typical result”) makes necessary logically the request to prove that it exists a causal bound between the action (inaction ) of the agent and the “typical result”, bound which must be appreciated from two different points of view: of one hand, from an objective point of view, ex post, in relation with the general regularity of the becoming, and on the other hand from a subjective point of view, ex ante, in relation with the human capacity to foresee the coming out of the typical result (illicit).

In every case, that principle of the modern penal law, must be understood, in our opinion, in the virtue of which the causing of a result socially inconvenient can be imputed to the agent only if it is established the existence of a “psychical correlation” between this and the result it caused.

From the perspective of this principle, the frequent error which is being made in the doctrine, it seems to us, that to consider that, the cause bound between the action and result can be established only on the basis of the exam ex post and therefore that the examination regarding the cause of the result would be the only which can offer an answer in this regard. Against this opinion it can be observed that, most often establishing the cause of the illicit result, the expert confirms or denies a point of view already formulated, which is anterior to the exam ex post, because in reality, the cause relation can be stated, or negated even from the moment of the action, as a consequence of the fact that the relation of causality appears- as virtual- trough its own predictability of the illicit result.

In this context we must notice that, if often enough, in the common language, it is attributed the term of “predictability” an identical meaning with that of the term “possibility”, in their exact meaning, these two terms are not synonymous, because the term “predictability” does not designate any statement regarding the future evolution of the events, without interesting if this evolution would be the work of the hazard or of the objective necessity, but designates exclusively the last statements, which refer to a necessary evolution of the events, corresponding to some causal laws. The predictability of the result constitutes, as it was remarked, a first expression of the relation

17 Cf. Mircea Djuvara General Theory of the law, publisher All, Bucharest, 1995, p.455-470 and the authors quoted there (G. Del Vecchio, Savygni, Beseler etc.)
18 Art. 17 from the Romanian Penal Code in force
19 K. Zweiling ,Some thoughts to philosophy, determination and causality, in German Newspaper for Philosophy, Berlin, no, 10/1964, p.1240-1245.
causality (even if the existence of this report can be stated as a certain fact only after its confirmation, on basis of the exam ex post); it does not represent something else than “the psychological dimension of the causality”\(^{20}\), meaning that “psychical correlation” between the agent and the illicit result which it caused, which is designated in the language of the penal law, through the concept of “subjective element”.

In spite of the fact that, indeed, it can not be conceived the existence of any offence, without a social inconvenient result (without an illicit result) – consisting in the endangering or damaging of some social values (or of some “judicial goods” as the German doctrine denominates them) -, characteristic to the formal offences is the fact that their immediate result is inherent to the action, inseparable of this, what explains the fact that, in these offences, the existence of the relation of causality is presumed. In the formal offences is also presumed the existence of the subjective element, as a consequence of the fact that, this element does not represent something else than another aspect- the subjective aspect- of the causality( for instance, it is presumed that that person who insulted the victim, foresaw and wanted to injure the dignity of him- obviously with the condition that, previously it should have been established the existence of the guilt). In return, in the case of the offences of result, because the illicit result is not inherent to the action anymore, but appears as a distinctive entity, separated chronologically and logically from the action, the relation of causality can not be presumed anymore, but must be proved- both under the objective aspect, ex post and under the subjective aspect , ex ante- what it means that neither the subjective element can be presumed, but must be demonstrated. And because the subjective element must be established only in the offences of result, it should be analysed as an specific structural element, proper only to these offences- so as it is analysed and the objective aspect of the relation of causality.

6. We already showed that, in the conception of the majority doctrine, the concept of subjective element designates the psychical position of the agent towards the immediate result of his action- or , in other words, the will or nonwill of the illicit result- and such an opinion obliges us to emphasize , from the beginning- that, in reality, the concept of subjective element- as well the concept of guilt-designate not only one, but several conditions or requests, whose fulfilling must be checked.

In order to understand which are those conditions, in which it can be stated the existence of the subjective element, we must start from the natural order of the things, noticing which is the order of the psychical processes- intellectual and volitional – which regard the result of the action. From this point of view, the first observation, which is being imposed, seems to us, that that it can not exist the will of a certain result, without a previous representation, imaginary conception of that result as an effect on some human manifestations- in a word, without previsions – and the prevision, at its turn, can not exist only if the subject has a certain experience regarding the action of the causal laws (the nomological knowledge) and if it recognizes in the surrounding reality the conditions of action of these laws (the ontological knowledge).

In other words the fundamental process which conditions the prevision and the will of the result, is constituted by the knowledge. The knowledge is that which makes possible the aprioristic elaboration of an object-goal and which also determines the action (inaction) of the subject, for achieving of that object-goal.

But as especially Prauss\(^{21}\) showed, the knowledge is nothing else than what it constitutes the convictions of the people and the things being like this, it would follow that in the estimating of the subjective element to start from the convictions which had the agent at the moment of the action, although, obviously, their exact establishing represents a task impossible to achieve. In this regard, a well known Romanian author noticed half a century ago: “There is nothing more hidden, more intimate than our conscience, our thought. We can transmit it indirectly through an external fact, through words, but otherwise is impossible (…). Except this there is no contact from psychological conscience to psychological conscience. (…) And the law would ask from us to know perfectly what has happened in somebody else’s soul? Not only this, but on this conscience, on the contact of

\(^{20}\) Cf. I. Tudosescu, op. cit., p.198

\(^{21}\) Gerold Prauss, Kant about freedom as autonomy , Frankfurt/M, 1983, p.221 and the next
the psychological wills would be grounded the whole construction of the law, with all its consequences? It would be grounded on an obvious and ingenious mistake. The precise intent of a party, as a psychological element remains an eternal mistery for the others.”22 Actually as the same author shows23 before, a part of a doctrine24 contesting the German theory called “Willenstheorie” (the “theory of will” or “the psychological theory”, which dominates in the present our penal doctrine), states that the psychological element pointed out by the external manifestation of the agent represents only a premise from which it starts the judicial estimation, to arrive at the rational, logical will, which constitutes the real basis of the law. The law imposes an interpretation of the deeds, of the external manifestation of the man in conformity to that what commands the reason, the only capable to set each personality on the same level with the others and to create that equality which is inherent to the idea of justice. “The justice consists in the rational estimation and therefore in the impersonalization of the deeds in that manner so that they can be generalized.”25

Although such considerations were expressed regarding especially the civil law, they maintain their validity in the field of the penal law too, even if in this field it is imposed, undoubtfully, a much more detailed research about the way in which it comes to be attributed to the agent a certain psychical position towards the illicit result, which he caused.

Regarding this, we already showed, that because the prediction and the will of a certain result are conditioned by the knowledge possessed by the agent at the moment of the action, the first aspect which must be cleared concerns exactly this knowledge. In spite of this we have to notice that, very often, the knowledge which is attributed to the agent does not limit to that what this has met effectively (according to the evidence administered in the case), but contains, also, that knowledge which “ must exist”, meaning that knowledge which would have had a normal and diligent man, being in an identical situation ( for instance in the extent in which, ex post, is established that the disorder which lead to the death of the patient could have been discovered at a more attentive examination and his life could have been saved, the physician is being made responsible because of not hindering the result, even if it is proven that he didn’t know that disorder which he could and should have known).

And because, in the estimating of the subjective element it is taken into account not only what the agent has known effectively, but all what he could have known at the moment of the action, it is understood that this element of the offence can subsist even then when, in fact, the agent didn’t know, didn’t foresee and therefore didn’t want the illicit result. What is essential for the existence of the subjective element is not the effective knowledge, but only the knowable character of the circumstances in which the action (inaction) acquired causal efficiency for the illicit result, about which is stated the predictable character of this result too. The cognoscibility and predictability represent, therefore, the fundamental, defining structures of the subjective element.

Regarding the fact that, sometimes, it is appreciate that the agent had the necessary knowledge for foreseeing of the result and it is concluded that he wanted the illicit result, that he acted “with intention”, and sometimes, it is appreciated that the agent didn’t have such a knowledge and it is concluded that he didn’t want the result, that he acted, “from negligence”, it finds its explanation, as we will show further, in using of other supplementary criteria. For the moment we resume to emphasize the fact that the psychical position of the agent towards the illicit result (meaning the will or nonwill of this result) does not appear, in general, as a defining structure of the subjective element; on the contrary, it appears, as a rule, as a unessential request, as a simple circumstantial element, which is of interest in the operation of “legal individualization” of the penal liability, but without influencing the existence of the subjective element and of the offence. Anyway, in

22 Mircea Djuvara, read works, p.190
23 Ibidem, p.191
24 Raymond Saleille, Essais d’une theorie generale de l’obligation (1914), Marcel Planiol, Etude s’ur la responsabilite civile (1905); Eneccerus, Legal business (1889) and others.
25 M. Djuvara, read works, p.163
supporting this thesis is, in our opinion, the fact that, in the case of the incriminations of the result, the penal responsibility subsists, in general, regardless if the agent caused the illicit result “with intention” or “out of negligence”.

7. Sustaining that the psychical position of the agent towards the illicit result is not essential for the existence of the subjective element and, implicit, of the offence, but we contradict a thesis which has been dominating for a long time our penal doctrine, according to which” all the penal deeds have as subjective element the intention”, while the negligence would represent “an exception from the general rule that the deeds provided by the penal law are being committed with intention.”26 With other words, it is sustained that, normally, the negligence would represent a cause of the inexistence of the offence.

How it was reached such a thesis can we understand only looking over the provisions of article 19 paragraph 2 and 3 from the Romanian Penal Code in force, provisions which represent not only a legislative consecration, but also a trial of differentiation of this thesis, in the sense, that its validity would be limited to those manifestations of the people, which consist of a corporal movement, in “action” (art. 19 paragraph 2); in exchange, in the case of the manifestations of passivity, of the “inaction”, the rule would not be valid anymore, with the consequence that, the matter of attitude of the agent towards the result would come on a second level, becoming, strictly in this case, a subsidiary issue, complementary to the central issue, which is that of the predictability of the illicit result (art. 19 paragraph 3).

Referring explicitly to an “action (inaction) committed from negligence”, the provisions from the paragraphs 2 and 3 of the article 19 Penal Code emphasize the fact that, at the origin of the mentioned thesis is, actually, a confusion. Regarding this matter, we have already shown that, the action- indifferent if it consists in a corporal movement or in passivity- has always intentional character.

An “action committed from negligence”, meaning a constrained one, without intentional character is not, in reality, an action, but a simple event, a natural fact, which exceeds the sphere of juridical appreciation. What is proper to any “action” is the intentionality, the existence of a goal, regardless if the individual is or not aware of the existence of this (in any case, so as a well known Romanian philosopher emphasized27 the lack of an aim is only apparent, because the conscience supposes always an idea-goal, which can be achieved or missed).

Such considerations force us to realize that, at the level of the law, the terms “intention” and “intentionality” receive different significances, which exclude any possibility of confusion. At this level, the concept of “intentionality” denominates an own feature of the action, in the absence of which the external manifestation of the man can not be considered anymore as an “action” and becomes irrelevant from the juridical point of view- only “the actions” are submitted to juridical evaluation- while the concept of “intention” denominates the will of the “typical” (illicit) result, meaning a certain attitude of the agent towards that result of his action (inaction), which is completely in conformity with a result described in a penal disposition. The will of the action- the “intentionality” – does not suppose that the consequences of the action are always and totally provided and, implicit, wanted, caused “with intention”. But even if the agent didn’t want the illicit result, the subjective result can subsist and the agent is to be made responsible by its appearance, in a degree in which it is established that, if he had respected the rules of behaviour (which, in reality he broke), he would have acquired the necessary knowledge to foresee the result which is being imputed to him.

As a consequence, we must conclude that, the thesis established in article 19 paragraph 2 from the Romanian Penal Code in force is totally without grounds. More than that, the provision in the case (art. 19 paragraph 2 Penal Code) can not be accepted even interpreting it as it is proposed in an opinion28, in the sense that it refers not to action, but to the comissive offence. And this because the comissive offence can consist not only in a corporal movement (in “action”), but in passivity too.

26 I. Oancea Theoretical explanations, vol.I, general part, p.120-121
27 I. Tudosescu, read works, p. 177.
28 G.Antoniu, Course notes
in “inanction”) – in this last case, we talk about an comissive offence realized through omission, better known under the denomination of “improper omissive offence” - and the “inanction” can not be imputed to the agent but only in an extent in which is established its wanted, deliberated, “intentional” character.

8. Starting from the shown facts, it becomes necessary to emphasize another fact too, meaning that the intention and the negligence can not be defined as “forms of guilt”, as long as the psychical position of the agent towards the typical result exceeds the sphere of the guilt and appears as a component of the subjective element. Actually this constitute the only credible explanation of the fact that “ in concrete it may exist the subjective element and not to exist guilt” \(^{29}\) (that person for instance, who hits the victim with an axe foresees and even wants the death of this person - it therefore exists the subjective element - but he can not be considered guilty, if he caused the result illicit being in a state of legitimate defense, being minor, irresponsible etc.)

That is why we can not share the so called “psychological theory” \(^{30}\), from the ground of our penal code, in which it is considered that the concept of “subjective element” would be a notion subordinated to that of “guiltiness”. On the contrary, we must realize that it is about the two distinctive concepts, which concern different elements of the offence: the concept of guilt denominates those legal requests, which concern, strictly the action (inanction) which is imputed to the agent- requests of whose fulfillment must be checked in any offence- while the concept of subjective element denominates only those legal requests, which concern the typical result and whose fulfilling must be checked only in the case of the offences of result (because only in this case we can talk about a “typical result”).

More precisely, the guilt supposes to be demonstrated that the action (inanction) of the agent is contrary to a rule of behaviour, to a preexistant obligation− in a word, illicit− and it was fulfilled by a responsible person, who, supplementary acted with free will, self-determined, while the subjective element supposes to be demonstrated that the typical result was foreseen by the agent or, at least, it can be stated, in a convincing way that, the typical result could be foreseen by the agent, if he would have observed the rules of behaviour to which he was obliged.

More than that, opposite to the traditional conception \(^{31}\), in which is considered that the examination of the guilt would be ulterior to that of causality (and implicit, of that of the subjective element), we sustain that the things stay exactly opposite, meaning that what it is first established is the guilt and not the causality. Actually especially then when in the antecedence of the illicit result are identified several actions (inanctions), belonging to different persons, it can be seen that, the first preoccupation is that of establishing which of the involved persons is guilty of breaching the rules of behaviour. Regarding the examination ex post, through which it is established the existence of the relation of causality, this examination is always ulterior of establishing of the guilt, because− so as it becomes obviously in the case of the offence from negligence and those of omission improper− it pretends to demonstrate that, because of its illicit character, opposite to the norm, the action (inanction) became causal for the typical result; otherwise said, if the agent would have observed the norm of behaviour, this result hadn’t appeared (it would have been avoided). And because the predictability− which is an essential component of the subjective element− does not represent something else than the subjective aspect of the causality, it is understood that the establishing of this, through the so called “ex ante judgement”, remains among the last operations which have to be performed, in order to conclude that the concrete deed constitutes an offence.

9. Because in the offences of result, the illicit of action and the illicit of the result will be estimated in relation to different norms, the existence of these offences is subordinated to another condition too, meaning that between the concurrent norms to exist compatibility, in the sense that

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\(^{29}\) see supra, p.8

\(^{30}\) Cf G. Antoniu, The penal guilt, p.20 and the next

\(^{31}\) Cf Francesco Carrara, Programma del corso di diritto criminale, Pisa, 1877, p.42; Johannes Wessels Penal Law, general part, Heidelberg, 1994, p.49 and others.
the norm which forbids the causing of the result not to be removed by the norm which forbids the action.

Such an exigency was noticed for the first time, by the German author Claus Roxin\(^{32}\) who relying on the observation that, the legitimate goal of the norms of penal law is that to ensure protection to “the juridical goods” (social goods) and considering that any penal norm ensures protection to a certain juridical good (to a certain social value), being inconceivable a norm without a “goal of guardianship” or (“of protection), stated that in applying of any penal norm, it must be considered, always the goal of protection or of guardianship of this too. In the virtue of this criteria (“the goal of guardianship of the norm”), justified Roxin the exclusion of the penal responsibility in the case- repeatedly put into discussion of the doctrine and jurisprudence, at that date – of the detah of the addicted person, as a consequence of the consume of strong drugs. Regardin this case, the occidental jurisprudence considered long time, that the drugs-dealer must respond- with title of NEGLIGENCE or, at limit, with title of eventual intention- for the death of the addicted too, because he as a seller created a condition sine qua non to the illicit result, and on the other hand, he must have known the dangers, even deadly, of the consume of such drugs. Such a case, as it was shown\(^{33}\), could not find a correct solution only on base of the causal principle or calling upon the lack of negligence (or of an indirect intention) and not even through resorting to other normative criteria. The imputation of the illicit result (the death of the addicted) could be excluded only through resorting to the criteria of the goal of the guardianship of the norm, which obliged to be noticed that, in the reason which imposed the incrimination of the traffic of narcotics was already noticed the reference to the dangers for the health of the consumers, and the possibility of producing of some deadly results was, undoubtfull taken into consideration by the lawmaker, being reflected in the penalties provided by this offence, which are comparable to those applicable for manslaughter.

But the interpretations of this author, which are very valuable, need, in our opinion some observations.

First, it would be about the insufficient emphasizing of the fact that, in such a case, in which it acquires applicability two penal norms, of which one incriminates the action itself, and the other, the producing of the result, the main problem which is asked to be solved is that if it exists, a plurality of offences- a combination of offences- or it is about “a apparent plurality”\(^{34}\), by a “combination of texts” or “combination of norms”- in the last case, the matter is reduced to choosing of one of the two norms. So it could have seen the existence of a plurality of offences was excluded, because the conditions of the combination of offences were not met, which pretend to be committed by the agent of several actions (inactions), both of these constituting elements of an offence, or only a single offence (as it was the case regarding the seller of drugs), but with the condition that this single action to have caused several illicit results (corresponding to some incriminations of result) or, at least, to have met “the special requests” (attached to the material element) of more offences- what was not the case in the examined case. And excluding the existence of a combination of offences, remains in discussion only the issue of the combination of texts, and more precisely, that of establishing which of the two penal dispositions will be applied-this being the real matter which is arisen in the case.

Secondly we believe that Roxin didn’t emphasize enough the fact that, for solving these matters, must be started not from the goal of the norm which interdicts the causing of the result, but from the goal of the norm which interdicts the action itself. If this aspect would be taken seriously into account, it could be noticed that the illicit of the action is appreciated not only in relation with the penal norms, but also in relation to the extra penal norms, fact which imposes a distinctive analysis

\(^{32}\) C. Roxin, Thoughts to the matter of responsibility in the Coercive Law, in Fest. Honig, 1970, p.133 and the next; idem, Penal basic issues, 1973.

\(^{33}\) Carlo Fiore, Diritto penale, parte generale, Torino, 1997, p.209

\(^{34}\) Vintila Dongoroz, Penal Law, Bucharest, 1939, p.331 and the next.
of the situations in which the action is incriminated by those in which the action is not being incriminated, the illicit character of this following from its relating to an extra penal norm.

More than that, in the situations in which the action is incriminated (as a formal offence), we must make distinction between the so called “impediment offences” and those called “offences with compressed result”, inherent to the action (which are also formal offences), noticing that, in contrast with the last ones, in the case of the offences “impediment”, the aim of the penal norm is not, as Roxin sustains, the protection of a certain social value, of a “determined juridical good”, but that of ensuring protection to a whole group of values, because such an action is not susceptible to cause, through itself, the damaging of some of the protected social values, so that its punishment is justified only by the danger which it creates for a certain series of values, it could contribute (only) in an indirect way, through other action (offence), subsequent, at the appearing of an illicit result.

We notice that a first characteristic of these offences (offences “impediment”) is that they represent only a generic judicial object (of group), but not an individual judicial object (specific). A second characteristic of the offences “impediment” is that revealed not only by Roxin, but by other Romanian authors too,35 that they maintain the autonomy not being able to be absorbed in the subsequent offence, of result; they attract in an independent way the responsibility of the agent, even then when he would commit the subsequent offence. Or because the traffic of narcotics is included in the sphere, large enough, of the offences impediment, it is understood that, the seller of drugs could have been made responsible of “Killing” the consumer only if he had administered by force the deadly dose to the purchaser.

In the virtue of identical reasons it must be appreciated as incorrect and the practice of our supreme court, which decided, for instance, that the deed of the military man being on duty as a guard, to leave the gun loaded and not being watched in the proximity of a group of children—because one of these, using it, shut deadly a person—constitutes, besides the offence of infringement of confinement, provided by the article 333 paragraph 1 Penal code36; or that it is responsible both for the offence provided by art. 36 from the Decree 328/1996, as well for the negligent homicide, the car driver, who gave the wheel of his car to another person, about he knew she had no driving license, and this because of his incompetence caused the overthrowing of the car, he suffered a deadly accident,37 etc.

In a similar way, in the situations in which the illicit of the action is established in relation to an extra penal norm, we can notice that the possibility to retain in the duty of the agent the committing of the offence of result is conditioned by the establishing of the fact that, the injured social value was part of those protected by the norm which interdicts the action (or inaction). This constitutes actually the explanation of the fact that the modern penal doctrine registered among the special conditions of existence of the offence of omission improper and that, that the illicit result to be part of those which the norm (extra penal) infringed by the agent wanted to prevent—considering as an example, that the cleaning lady who does not fulfill her obligation to close the windows at the end of the work, in order to prevent eventual theft, can not be made responsible because of the death of the person who, remained alone in the building, falls because he leaned out of the window.38 From the perspective of this request appears, on the contrary, as incorrect the solution of the Swiss Courts, who decided that, is responsible for the negligent manslaughter the railway worker who didn’t fulfill his obligation to close the doors of the cars, because in a curve, a lateral door opened suddenly hit an illumination pillar, which falls killing two persons (being about a goods car, the obligation of the railway worker had as goal the prevention of the thefts and not the accident, eventual deadly of some persons).

36 Supreme Court., penal decision no. 1953/1975, in C.D. 1975, p.350
37 Supreme Court, penal decision no. 279/1974, in Repertoire 1 (for the years 1969-1975), p420
39 The decision of the Federal Court is quoted by Peter Noll, Stefan Trechsel, in the Swiss Penal Law, general part, Zürich, 1990, p.209-210 (the commentators criticize, also, this solution, but only under the aspect of the predictability of the result)
In the end we still have to show that, although the interpretations of Roxin were, in general, well received in the whole penal doctrine, it was reproached\textsuperscript{40}, the criteria proposed by him not to be always susceptible of univocal applications. And this reproach, which was brought to him unjust, obliges us to realize that, this criteria (the aim of the guardianship of the norm") designates, actually, a special cause of inexistence of the offence of result- consisting in the incompatibility between the norm regarding the action and that regarding the result- which has as consequence, either that the penal responsibility is drawn in only for an offence of danger (offence “impediment”), or after the case, that the penal responsibility is totally removed. In every case the application of this criteria can not be extended – so as it results from the invoked arguments against it\textsuperscript{41} - to situations in which the action of the agent con not be considered “cause”, because the concrete result is due, in exclusivity to some independent cause, whose intervention could not be foreseen by the agent; in such a situation, the causal bound “is interrupting”, with the consequence that the result can not be imputed to the agent, as long as he didn’t have any contribution to this (for instance, if the agent shuts the victim, but the valuation establishes that his death was caused not by the shut, but because of some serious medical errors, the agent can be responsible for the attempt of homicide, but can not respond for the death of the victim, which is being imputed exclusively to the guilty medical staffs).

10. We can not end these considerations without reminding the fact that, one of these matters, which seem to preoccupy in a special way the west European penal doctrine is that to identify new susceptible causes to remove the guilt, an , more exactly, new “justified causes”, in order to remove the ilicit character of the action.

In each case, this is, in our opinion, the real significance of some so called “theories of objective imputation”\textsuperscript{42}, among which it is that, known under the denomination of “the theory of increasing the risk” or, simple, “the theory of risk”. This theory, put into circulation by some of the biggest French civilians\textsuperscript{43} of the 19 th century, enjoy today a big valuing in several European countries (Germany, Switzerland, Austria, Spain etc.) and this fact is, in great extent, justified. Because we had already the opportunity to show which are the basic thesis of this theory\textsuperscript{44}, we will not make their presentation again, but we have to say, that it had a decisive contribution to the elimination of the classic concepts of guilt and negligence, and in general, to the imposing “of the normative theory” of the will. In spite of all these, regarding the system “of the causes which remove the guilt” (in the conception of the Romanian lawmaker, these include, we shown, the so called, “justified causes”), the theory of risk may not have brought with itself significant changes, and some of his conclusions can be put for debate.

Under this last aspect, it seems to us more efficient the theory called “of the social role” of the person inspired, on one hand, by the juridical philosophical studies of Hans Kelsen, and on the other hand, by the anthropological studies of philosophy, appeared, also, in the first decades of the 20 th century ( especial in Germany).

Grounding on the observation that, the legal duty to behave in a certain way is nothing different from the norm which imposes this behaviour, but, on the contrary, it identifies itself with this norm, Kelsen, concluded that the individual is not of interest; what it is of interest is only a certain behaviour of an individual, meaning “the personal element of this behaviour which, is bound on the material element, constitutes the content of the obligation”\textsuperscript{45}. As a result, the natural person is not-says Kelsen. A man, is not a natural reality, but a judicial construction, a complex of rights and

\textsuperscript{40} Cf. Andreas Hoyer, the coercive law, general part, Berlin, 1996, p.42.
\textsuperscript{41} Ibidem, p.42
\textsuperscript{42} Massimo Donini, Lettura sistematica dell teorie dell’imputazione oggettiva dell’evento,Riv. It. Dir. E proc. Pen., 1989 and the next
\textsuperscript{43} Cf. M. Djuvara, read works, p.169
\textsuperscript{44} M.K. Guiu, in “The relation of causality in the penal law”, publisher “Academica”, Bucharest, 2002, p.62 and the next
\textsuperscript{45} Hans Kelsen, The pure doctrine of the law (Romanian tradition), publisher Humanitas, Bucharest, 2000, p-152
obligations reunited in a single factor, which ensure them the unity and constitute “the personification of this unity”46

Correlating the conclusions of Kelsen with those of the philosophical anthropology, regarding the behaviour based on roles in society exist, as it is sustained in this conception, several levels of the being as a person, to each level corresponding values and acts specific, what imposes that in the evaluation of the human actions to be taken into account the variety of dimensions of the social being47 – the theory of the social role of the person states, that, the attributing or “imputing” of an illicit result is justified only then when the agent didn’t respond to the normative expectations corresponding to the detained status, when he didn’t do what “he should” have done, in the virtue of that “social role”, which he had at the moment of the action (inaction). So as G. Jacobs shows, one of the supporter of this theory48 if, for instance, the confectioner K. sells the offender T. a full box of pralines, although he knew that T. will poison the pralines and will serve them to his guests, he becomes causal for the death of T.; in spite of all these, the produced result (the death of the guests) can be imputed only to T. and not to K. too because the last, according to his social role, could not refuse the selling of the pralines, not even knowing the plan of action of T. In the conception of the author (Jacobs), the confectioner K. could be made responsible for the omission to give help to the victims or to announce the authority.

Although the criteria “social role” is considered by a series of authors49 as being much general to satisfy, really, the exigencies of “personalization” (individualization) of responsibility, which it proposes, regarding us, we have the opinion that this criteria can be proved extremely useful, in special in some situations in which it is put the issue of the responsibility of the agent for the co-author50, or for the complicity, taking into account, almost exclusively, the fact that this helped, in a conscious way, the committing, of a third person of a subsequent offence. So for example, in our judicial practice was decided51 that it responds, in quality of accomplice to the offence provided by the art. 37 from the Decree 328/1960, that who gives the car to a person who is in state of inebriation, although such a solution raises serious signs of questions regarding the way in which the Court established the illicit character of the action which must exist in the case of the deeds of participation too. Analysing such a deed from the perspective of the mentioned criteria, it seems to me, it may be sustained, much more convincing, the contrary fact, that the agent responded to the normative expectations corresponding to the status of detained, that he acted according to “his social role” (colleague, friend, relative etc.), especially that, it could not be invoked any norm (obligation) which imposed to this one to watch or to prevent the eventual illicit behaviour of the third person.

46 Ibidem, p.124
47 Cf. Heinz Paetzold, Philosophy, scientific publisher, Bucharest, 1999, p.365
48 Günther Jacobs, Penal responsibility and condition of validity of the norm, in Neumann/Schulz, Responsibility in Law and Moral, Stuttgart, 200, p.57 and the next
49 Cf. M. Donini, read works, p.608
50 For a critique of the conception which allows the assimilation of some deeds of complicity of those of execution and, more exactly, of co author, to be seen M.K. Guiu, The relation of causality, p.115 and the next
51 Court Bihor, penal decision 284/1982, in RRD, no.12/1982, p.53