THE EVOLUTION OF THE GUILT NOTION IN THE MEDIEVAL PERIOD AT SOME EUROPEAN NATIONS

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Abstract:

The law is not static, immovable, given once and for ever, it is a social phenomenon during the historical evolution and it bears the imprint of historical ages and the spiritual particularities of different peoples. The law has left us such a fingerprint during the middle Ages, when it appeared and evolved with the development of the society in general and with the economic development and public labor specialization in particular. During this period the foundation for future national legal systems, within the formation of the national states was set up. The customary law from the early feudal era, the Canon law and the Roman law were the base for the formation of the legal systems of the European medieval states. In fact, the Canon criminal law has made much progress compared to the Roman law (it has determined the criminal sin and secondly it gave us the detailed meaning of guilt, although it has used much of its borrowings from the Roman lawyers' law, however, they managed to turn this concept into a more sophisticated and more differentiated one).

Key - words*: blame, guilt, fault, intention, negligence, breach.*

The middle Ages are the era when the foundation for future national legal systems has been gradually constituted within the formation of national states. This long process ends in most states in already the new age[2]. The customary law from the early feudal era, the Canon law and the Roman law were the base for the formation of the legal systems of the European medieval states.

A unique phenomenon, the reception of Roman law has been manifested in the XI -XII centuries in Western Europe. Despite the fact that the Roman law arose much earlier than the right of the early feudal

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[2] Жидкова О.А., Крашинниникова Н.А., *История государства и права зарубежных стран (*Москва: Инфра-Норма-М, 1996), *192*

monarchies, the level of the Roman lawyers' legal instruments was much higher. The meaning of the Roman law is defined by the enormous impact on the entire process of the appearance of the European law. The Roman law is characterized by the unparalleled accuracy the development of all existing legal relationships. The Roman lawyers have never forgotten the ultimate goal of law and their theoretical works show best how to handle the right as to remain fair[3].

The consequences of accepting the Roman law occurred throughout the further history of the development of the European law and have not lost their value so far. Some laws, regulations and even whole codes were created being based on the Roman law rather than on their own country's law. The Roman law, in fact, has become an integral part of contemporary legal codes of many countries and has contributed to the development of the general legal principles underlying European legislation. The Roman law in its action had the same effect on unifying jurisprudence and legislation of European nations, as Latin had on them[4].

The approaches regarding the definition of ***guilt*** and its forms that have been developed in the Roman law have not lost their value during the development of the humanity and the right. The notion of guilt was reinforced in the legal sources of the medieval Western European countries in the process of accepting the Roman law and relating it to the canon law. However, the Objectivist conception of the guilt characteristic for the right from the preceding periods was not definitively deprecated. It lasted almost until the end of the XVIII century and the beginning of the XIX century.

The content category of "***the guilt***" was discovered in the norms of the customary law of the concrete state at the beginning of the development of statehood in Western Europe. During this period the concept of the guilt is filled with new connotations. And in the future, under the influence of the Roman law and the canon law, the concepts of the guilt gradually bear some significant changes.

The canon law has emerged as the law of the Christian Church and

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[3] Хвостов В.М., *Система римского права* (Москва, 1908), 12

[4] Шершеневич Г.Ф. ,*Учебник русского гражданского права*. (Москва: Статут, 1995), 26

has gained a special importance because it was not only supported by the Catholic Church, but it was also universal and extraterritorial. It covered a wide circle of public relations, including some of the spiritual and secular life. The concept of the guilt in the canon law was based on the concept of guilt in the Christian religion. For many people, it was clear that the force, not only coincided with the right, but too often it disagreed and even eliminated it[5]. An attitude of true awe law as an aspiration for an ideal justice has characterized the middle Ages in this regard.

With the spread of Christianity, the Christian religion that becomes dominant establishes its own philosophy that will dominate the thinking for a long time. The concepts borrowed from the ancient Greek philosophy, the Neo-Platonism and the Jewish tradition were used for its establishment.

The blind faith in the divinity's intervention to show the ***culpability*** or the innocence of the accused has generated the existence of legal proof known as "ordalium" or "the God's judgment "[6].

This proof was used in the case of theft, murder, witchcraft and adultery. The most used legal proofs were:

- *the cross-fire test* - the accused crossed the flames, he stepped on the hot fire or on the swaths of hot plough, holding in his hand a certain time a piece of hot iron, or some molten lead was poured in his palms;
- *the boiling water test* - was practiced in the medieval Europe by the Celts, the Scandinavians, the Anglo-Saxons, the Longobards, the Franks, (referred even in the legal acts of the Kings of the Franks) and it consisted in removing an object from a pot with boiling water by the hand. If after these tests, the burns of the imputed, bandaged for three days, disappeared, the person concerned was declared innocent;
- *the cold water test* - common in the Middle Ages for the Anglo-Saxons, in France, Italy, Spain and Germany, it consisted in throwing the accused with his arms tied with the legs, into a deep water. If the water

[5]Ovidiu Drimba, *Istoria culturii şi civilizaţie*, vol. V (Bucharest: SAECULUM I.O. and VESTALA, 1998), 348

[6] Badescu Mihai, *Concepte fundamentale in istoria şi filosofia dreptului vol I* (Bucharest: Lumina Lex, 2001), 31

kept him on the surface, he was considered innocent;

- *the swallowing test* (of some liquids, poisoned, sanctified, or damned food) was common for Franks, Frisians and Anglo-Saxons. For example, if a certain amount of bread and cheese could be swallowed up by the accused, without drinking water, it would have proved his guilt;
- *the cross test* - was a test of Christian origin, deriving from a penance applied for the monks; the accused had to remain motionless, with his arms stretched above his head in the shape of a cross as long as the recitation of prayers took place, the slightest movement that he made, would prove his culpability. Being authorized by the laws of the Franks, it remained in use until the end of the 9th century;
- *the coffin test* – being practiced in Germany, France, Spain (until the 17th century) and Italy, it supposed that all persons who could be suspected of murder to come in front of the victim's body; if the suspect's body began to move his lips, when somebody came closer, it meant that he was the culprit.[7]

The wide application of these tests revealed, with the exception of certain cases (suggestion, mystics, and sleight of hand), the people's credulity in the middle Ages, both ordinary people and people with some level of culture.

The *Salic law* in its oldest form, drafted by *Clovis* (486-496), which comprises some archaic aspects of the customary law, has been the most important law of the ***Franks***. From this derived the laws of other Germanic peoples in Central Europe (VII-IX centuries). In the criminal law of the Franks[8] and namely in the Salic law (Pactus Legis Salicae)[9], it

[7] Badescu Mihai, *Concepte fundamentale in istoria și filosofia dreptului,* 31

[8]Popa D. Marcel, Matei C. Horia, *Mica enciclopedie de istorie universala* (Bucharest: IRI, 1993), 146.

[9] Legea Salică (*Pactus Legis Salicae*) was a collection of laws used by the Franks, their official form being set in the 6th century, under the reign of Clovis I. The provisions included: the punishment for manslaughter, namely fines for theft and damage to personal property (including slaves), one third of the fines was reserved for court expenses; the interpretation of the laws was made by a jury of citizens. An interesting aspect and a great importance in the history of Europe is the law of inheritance; the Salic law banned the women to inherit lands and, therefore, their ascension to the throne.

was provided that in each case, the perpetrator had to be proven guilty[10]. If the offender confessed his fault, he necessarily needed to recover the cost of the damage caused. In another review, however, we found that at that time the confession of the accused was considered the queen of evidence[11]. We also find in this source of law the principle of personal character of the criminal liability: the father could no longer be held liable for the criminal facts of his son, the husband could no longer be held liable for the criminal facts of his wife, or the wife could no longer be held liable for the criminal facts of her husband. The presumption of innocence of the accused person has already been formed during this period in France and during the research. Or just because of this, a witness was needed, even if it was not enough that there should be at least one[12]. The witness test reinforced by the oath represented a fundamentally religious act of invocation of the deity as a witness or a guarantor in support of any claims made by the one who swears[13]. The oath was always accompanied by lifting the right hand gesture, with other hand on the shrine, on the lance or on a sacred text or on relics. And the punishment for perjury was also applied.

The tortures were also applied to get the confession of the accused. Since the thirteenth century, the torture was applied in both civil and criminal cases. It went so far with tortures that in the same century, Pope Innocent III authorized the civil courts in order to employ the torture for the extirpation of heresies[14].

There were a few degrees of torture, according to the social status of the accused and the gravity of the offense. The priests, the elders, the pregnant women and women breast feeding their children were not subjected to torture, but the torture for the nobles, the doctors and the minors was more subdued. The practice of torture provided legally

[10]A. Smochină, *Istoria universală a statului şi dreptului (epoca antică şi medievală)* (Chişinău: F. E. R "Tipografia Centrală", 2002), 128.

[11] Жидкова О.А., Крашинникова Н.А., *История государства и права зарубежных стран*, 397; A. Smochină, *Istoria universală a statului şi dreptului,* 131

[12] Mariţ, Alexandru, *Evoluţia conceptelor şi a reglementărilor cu privire la vinovăţia penală* (Bălţi: F.E.-P. Tipogr. Centrală, 2005), 33

[13] Badescu Mihai, *Concepte fundamentale in istoria şi filosofia dreptului,* 31

[14] Badescu Mihai, *Concepte fundamentale in istoria şi filosofia dreptului,* 31

lasted at least until the end of the eighteenth century, when the French Revolution suppressed it[15].

The excessive functioning of the judicial authority, which led to constant uncertainty and disorder, caused by the coexistence of contradictory legal principles derived from diverse traditions, characterized the medieval justice[16].

Moreover, as the French historian Marc Bloch[17] noted, this time the administration of justice was not too complicated because the evidence means were rudimentary, the appeal to witnesses was uncommon, and the function of the judge was limited to receiving the parties' oath in counting the results of the proof test or the judiciary duel and sentencing.

Also in the Salic law in chapter XVIII, the paragraph has stated that: "If someone accuses in front of the king without fault, the responsibility anyway has already been provided for this". However, the offenses against property were assessed solely depending on the ill will with which they were committed[18]. According to the Ordinance of 1567, 1670 it was provided that the individual criminal responsibility was accepted as an exception and to the members of his family, even though the harshness of the punishment for the guilty person was left for the court[19].

As well as in ***English criminal law***, starting with the XII century, under the influence of Roman law and the canon law, the first points of view that required as the basis for criminal liability to stand the criminal guilt were crystallized. For the first time the principle of criminal liability of the person is mentioned after the teachings of St. Augustine: "The action does not make the man guilty, if it was committed without his willingness," the same principle was reflected in the laws of Henry I (1118). The English doctrine had a great influence over the meaning of

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[15] Badescu Mihai, *Concepte fundamentale in istoria şi filosofia dreptului,* 31

[16] Badescu Mihai, *Concepte fundamentale in istoria şi filosofia dreptului,* 31

[17]Marc Bloch, *La societe feudale* (Torino: Einaudi, 1976), 33

[18] Жидкова О.А., Крашинниникова Н.А., *История государства и права зарубежных стран,* 251.

[19]Andrei Guşciuc, Liliana Chirtoacă, Veronica Roşca, *Istoria universală a statului şi dreptului (perioada medievală),* Vol.-2, (Chişinău: Elena, 2001),57.

criminal guilt forms during the 13th century. However, Bratcon, analyzing the meaning of the intention and imprudence, mentioned about the murder that: "If the murderer had committed a murder, as an illegitimate action, then the liability occurred even in the absence of the criminal guilt." He had also extended the criminal liability issue and the moral-religious norms.[20]

One of the first monuments of the Russian legislation is "the Russian Truth" ("Русская правда"), created in 11-12th centuries. Unfortunately, the original text of "the Russian Truth" has not been preserved. However, there are over a hundred of different transcriptions of the "the Russian Truth", that S. Yushkov, the greatest researcher of that monument, has grouped chronologically into six editions[21]. There the concept of guilt and its forms are missing. The intentional offences, however, are described. In these articles are described the murders premeditated for anger, caused insult. The facts were delineated according to the presence or absence of the ill-will of the offender[22]. The assessment of the legal proceedings with respect to the presence or absence in them of the will of the offender has changed over the time.

In "the Russian Truth", according to the researchers, the delineation of the facts was made largely on the basis of external characteristics: committing the crime during a robbery, at a celebration or a quarrel. There is a distinction between the intentional and the negligent crimes: a premeditated murder occurs during the robbery, but during the celebration a careless crime takes place[23].

Later, in the medieval Russian criminal law, various forms of criminal guilt on the concept of the subjective side of the crime, the intention and recklessness, but also some beginnings of the subjective dimension, such as, randomness are already known. Although such means of committing a criminal offence were divided between them by

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[20] Mariț Alexandru, *Evoluţia conceptelor şi a reglementărilor cu privire la vinovăţia penală,* 34

[21] О.И. Чистякова, *Российское законодательство X-XX веков: В 9 т.* (Москва,1984), 430

[22] С.В. Юшков, *Общественно-политический строй и право Киевского государства* (Москва: Госюриздат, 1949), 484

[23] Исаев И., *История государства и права Росии* (Москва: Юристъ, 2000), 150.

different aspects and dimensions of the subjective deed, however, they did not have any impact on the classification or the limits of punishment. The principle of objective criminal liability, i.e. it was judged not by reason, but by results, was predominant at that historical stage. Regarding the stages or the phases of the crime committed in those times, we can mention that for the mere intention to commit the crime, only by itself, the person could not be prosecuted[24]. But the offenders who demonstrated a mere intention to kill the tsar or the master or non protecting the masters were punished when needed[25], the fact that showed the typical appearance of the concrete and strict objective liability.

In ***the German criminal law***, where the casuist character of "the barbarian justice" was still present, the meaning or the concept of the intentional and involuntary criminal guilt had already existed[26]. Thus, the free man causing "from recklessness" an injury, according to Saiicin's Justice, had only to return it. While the bad intention or causing damage "out of malice" led to paying off some large fines. Two kinds of socially dangerous actions such as: offence and the procedure were known in Solicesc's law. The categories of offences were far more and more detailed in Amalan's law[27].

Then there followed and other laws such as the criminal law from 1532, called Carolina's Code, or Carol's criminal Constitution according to which the liability for the committed offence was subject to only the person guilty of committing it[28]. Also, this law can still contain some entries regarding its forms: the intention and imprudence. But, aside from those references, however, the feudal criminal law established the criminal liability without any guilt, for another person's guilt not only

[24] Исаев И., *История государства и права Росии,* 150-187.
[25] A. Smochină, *Istoria universală a statului şi dreptului*, 205.
[26] Mariţ Alexandru, *Evoluţia conceptelor şi a reglementărilor cu privire la vinovăţia penală,* 33
[27]Mariţ Alexandru, *Evoluţia conceptelor şi a reglementărilor cu privire la vinovăţia penală,* 33
[28]Andrei Guşciuc, Liliana Chirtoacă, Veronica Roşca, *Istoria universală a statului şi dreptului*, 77.

once[29]. It is noted, however, a more pronounced correlation between the criminal guilt and criminal punishment.

CONCLUSIONS

So, the formation of ideas about the guilt has passed several stages, from indirect references in early feudal legislation, through the acceptance of the Roman law, with its well-developed structures, to the drafting of a complex doctrine about the guilt. In the early days of the formation of the European law, the concept of the guilt was quite weak, the customs of the tribal system were maintained and the guilt was identified with the illegal deed. Subsequently, the canon law had a strong influence on the development of the concept of the guilt, bringing with it a reference to the intellectual element, as well as to the Roman law with its legal categories and its well developed structures.

BIBLIOGRAPHY

Books

- **Badescu, Mihai.** 2001. *Concepte fundamentale in istoria şi filosofia dreptului*. vol I. Bucharest: Lumina Lex.
- **Bloch, Marc.** 1976. *La Société féodale*. Torino: Einaudi.
- **Drimba, Ovidiu**. 1998. *Istoria culturii şi civilizaţie*, vol. V. Bucharest: Saeculum I.O. şi VESTALA.
- **Gușciuc, Andrei, Chirtoacă, Liliana, Roșca, Veronica**. 2001. *Istoria universală a statului și dreptului (perioada medievală),* Vol.2. Chișinău: Elena.
- **Mariţ. Alexandru.** 2005**.** *Evoluţia conceptelor şi a reglementărilor cu privire la vinovăţia penală.* Bălţi:Tipogr. Centrală.
- **Popa, D. Marcel, Matei, C. Horia.** 1993**.** *Mica enciclopedie de istorie universală*, Bucharest: IRI.

[29]Mariţ Alexandru, *Evoluţia conceptelor şi a reglementărilor cu privire la vinovăţia penală,* 33

- **Smochină, A.** 2002. *Istoria universală a statului și dreptului (epoca antică și medievală).* Chișinău: F. E. R "Tipografia Centrală".
- **Жидкова О.А. и Крашинниникова Н.А.** 1996. *История государства и права зарубежных стран.* Москва: Инфра-Норма-М.
- **Исаев, И**. 2000. *История государства и права России*, Москва: Юристъ.
- **Чистякова, О. И.** 1984.*Российское законодательство X-XX веков: В 9 т*. Москва.
- **Хвостов, В.М**. 1908. *Система римского права*. Москва.
- **Шершеневич Г.Ф.** 1995. *Учебник русского гражданского права*. Москва: Статут.
- **Юшков, С.В.** 1949. *Общественно-политический строй и право Киевского государства*. Москва: Госюриздат.