# IMPUTABILITY AS A SPECIAL FEATURE OF THE OFFENCE, ACCORDING WITH THE NEW PENAL CODE (LAW NO. 286/2009). CONCEPT. CONTROVERSIES

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**Abstract**

*The issue of imputation in penal law generated, through out the history, many controversies. The principal aim of this study is to clarify this concept, both in relation with the Romanian and foreign doctrine, and with the new provisions of the new Penal code, enforced by the Law nr. 286/2009. The new Penal code introduces, a new definition of the offence, containing the concept of "imputability". Our study is based both on the opinions of some foreign authors regarding the concept of imputability, imputation and Romanian authors.According to the Initiator (Ministry of Justice) the main justification for introducing this concept into the offence definition was that "a deed, in order to bring upon criminal responsibility, must not only to correspond with the legal description, to be unjustified, but also, the deed, must be able to be imputable to the offender; that means, the deed could be reproached to the offender. In order to discuss this concept of imputation, there are necessary some premises: the offender must have had the representation of his/her actions or inactions and the lack of any duress (the offender should not have been irresponsible, intoxicated or an under aged). In addition, the offender must have known the illicit character of the deed when committing the offence (the lack of error). Also, the study is structured in tree parts, fist beginning with the need for a definition of the offence, second part refers to the concept of offence in Romanian law; third part (the extended one) is dedicated to the essential features of the offence, with a special view on imputation/imputability.*

**Keywords:** *imputability, imputation, incrimination norm, action/inaction, result, illicit character of the deed*

## Introduction

The important innovation of this project is renouncing to the material concept of the offence and orientation toward the formal one. It did not renounce only to the social danger element, but also to the definition of the purpose of penal law.

Conceiving, in this way, the essential features of the offence represent a novelty also in relation with the new Penal code adopted in 2004, a Penal code that defined the offence, as "a deed provided by the penal law, that presents a social danger and it is committed with guilt". This new Penal code, although regulated the matter of justified causes (Chapter II, articles 21-25) didn't considered necessary to mention that the lack of these justified causes could represent an essential feature of the offence; error corrected by the second new Penal code, which not only renounces to the social danger as an essential feature of the offence, but introduces, amongst the essential

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features of the offence the "unjustified" character of the deed (meaning the lack of justified causes) and also the *imputable* character of the deed.

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The concept of imputability (or imputation, it is still not clear what term should we use when talking about this essential feature of the offence) is based on some necessary premises: the offender must have had the representation of his/her actions or inactions and the lack of any duress (the offender should not have been irresponsible, intoxicated or an under aged). In addition, the offender must have known the illicit character of the deed when committing the offence (the lack of error).

As arguable as this is, the requirement that the act to be imputable to a person, the criminal doctrine has long ago emphasized the equivocal character of the concept of imputability. It may have the meaning of **causal relation** (a crime act is imputable to X because it is the effect of his/her action) as well as the meaning of **guilt** (a crime act is imputable to X because he/she committed it guiltily). In both cases, the concept of being imputable appears as useless because both the relation of causality and guilt are implicitly emphasized or explained by the other characteristics[1].

A criminal act simultaneously implies an action or an omission, their immediate consequences and implicitly the relationship between the external manifestation and the immediate consequence, thus, **guilt appears explicitly as a distinct concept** within the formulation of the essential characteristics of a crime.

## I. The Necessity of an Offence Definition

In the Romanian Penal code in force now the essential features of the offence were influenced by the Italian Penal code of 1930 (Codice Rocco)[2].

Ministry of Justice, namend further as Initiator, in the statement of reasons[3] highlighted the following: „having regard to the tradition established by the Penal code in force now, by introducing an offence definition within the Code, although in the majority of the foreign legislations such a tradition doesn't exist, being considered as falling within the doctrine jurisdiction, decided to maintain this regulatory model and formulate the definition of the ofence in the 15th article". So, this definition took into account both interbelic Romanian criminal law tradition and European regulations that establish a definition, an example being Profesor T. Pop. Since 1923, he defined the offence as "an antijuridical deed, imputable and sanctioned by the penal law". Exactly this definition and a provision of the Greek Penal code (the 14th article) was the justification of the Initiator in choosing these essential features of the offence in the new Penal code, including the "imputability" feature.

The so called tradition of a legislative definition, specific to the soviet legislations, was introduced within the Romanian legislation not by the Penal code adopted in 1968, but by a provision introduced in the Penal code adopted in 1936, through a Decree of the Presidium of the Grand National Asembly of People's Republic of Romania, no. 187/ 30th of april 1949. The article 1,

[1] G.Antoniu, *Critical remarks on the new Penal Code*, Analele Universității "Constantin Brâncuși", Târgu Jiu, Seria Științe Juridice, Nr. 2/2010, p. 10-11

[2] Tudor Avrigeanu, *O teorie pură a dreptului penal*? în Studii de Drept Românesc nr. 1-2/2008, p. 87

[3] www.just.ro

which defined the offence, is somehow different as it was provided in the article 17 of the enforced Penal code, but it has some similarities with the definition prposed by the Initiator, without any reference to guilt.

The issue of a legal definition that specifies the content of a concept represents a legal technique method[4]. These legal methods are useful for an authentic interpretation of the law, with a previous setting of the content of a specific concept (notion).[5] On the other hand, it shouldn't be overlooked the fact that a lack of a legal definition, or a too extended definition, that exceeds both in quality and in quantity the necessity and utility of the definition, would be more a dizadvantage to both the practitioners and to the science of penal law. Therefore it is necessary an equilibrium between the law and the interpretation[6].

The majority of the doctrines tried to show the advantajes and disadvantages of the legal definitions. We remark here a comparison between the western law systems and the socialist ones. The socialist doctrine promoted a material concept of the offence (it established in what material conditions the punishment would be applied in case of disobeying the law or violation of protected values). On the other hand, the same socialist doctrine, introduced the forbiddance of using the analogy[7]. Forbidding using the analogy is not regulated *expressis verbis* in the enforced Penal code. The dominant theory starts from the idea that forbidding of using the analogy it is provided by the article 2 of the Penal code: "The law provides which deeds are offences, the punishments applied to the offenders and the possible measures that could be applied in case of committing these offences". But, this was not always so. There was a period during which using the analogy was permitted, 1949-1956. After C. Roxin[8] the material concept is extended beyond any codified penal law system, raisisng the problem of the objective criteria of the criminal behavior.

The specialized doctrine of the western countries has given great importance to the concept of offence; but not all of them adopted a definition, allowing the doctrine to do it.

Both the Romanian Penal code in force now and the new Penal Code (Law no. 286/2009) have chosen in favor of keeping the offence definition, with different arguments: a definition could help in making a differentiation between the domain of penal law and the extrapenal laws, such as: administrative law, contravention law, etc.; a definition of the offence would reflect the specific principles of the penal law (the principle of the social danger, the legality principle, the principle of penal responsibility); another argument was continuing the tradition in our country. A definition could constitute a guaranty for the recipients of the penal law that they could not be held criminally liable unless the concrete deed correspond with the essential features that penal law characterized the offence.

## II. The Concept of Offence. Short Considerations

Sanctioning of a concrete deed is not possible unless the legislator incriminates it, meaning, the legislator describes the deed in an incrimination norm, by that proclaiming it as inconvenient for the social group and therefore liable to be punished. From the description of the deed and the

[4] J. Rinceanu, *Analiza trăsăturilor esențiale ale infracțiunii în legea penală română*, R.D.P. nr. 1/2010, p. 56

[5] Hans Lüttger, *Genese und Probleme einer Legaldefinition dargestellt am Beispiel des Schwangerschaftsabbruchs*, în Hamm Festschrift für Werner Sarsdedt zum 70, Berlin/New York, 1981, p. 169; W. Frisch, *Le definizioni legali nel diritto penale tedesco*, citat de Alberto Cadoppi : *Omnis definition in iure periculosa? Il problema delle definizioni legali nel diritto penale*, Padova, 1996, p. 495

[6] Alberto Cadoppi, *Il problema delle definizioni legali nel diritto penale*, Padova, 1996, p. 18

[7] J. Rinceanu, *Analiza trăsăturilor esențiale ale infracțiunii în legea penală română*, R.D.P. nr. 1/2010, p. 58

[8] C. Roxin, *Strafrecht Allgemeiner Teil*, Band I, Grundlagen – Der Aufbrau der Verbrechenenslehre 4, 2006 § 2 A

punishment that could be applied, we deduce the *precept of law*, meaning the command, disposition of the legislator to forbid or to order a certain behavior. The incrimination norm it is also called the *legal model*, the tipical hypothesis in relation with concrete deed, that committed afterwards, should be comparing to. If the concrete features will coincide with those prescribed by the penal norm it means that the precept was violated, as the legislator wish, and the deed will be chatacterized as an offence and susceptible to be punished, as the law prescribes.

In such a vision, the offence appears as being composed from a *concrete action*, inconvenient to the social order, *an incrimination norm* that describes it and to wich it relates, and, finally, by *a concordance* between the features of the concrete deed and those described in the incrimination norm.

When we affirm that the offence is a concrete deed that violated the incrimination norm (penal norm), we only say a half of truth. The features of the concrete deed doesn't contradict the description of the norm, they coincide with the description, but they are in opposition with the precept (as a component part of the norm structure incrimination, precept that is not directly expressed, but deduced from the norm), and they contradict the disposition given by the legislator, disposition that may be an obligation to have a certain conduite or, on contrary, the obligation to refrain from certain acts, conduites.

The same, we don't express a complete truth when we affirm that the offence is the deed to which the juridical order attributes as consequence a punishment, because the punishment applies to a concrete deed and only if the freatures of the concrete deed correspond to the incrimination norm and the punishment is provided by the law only as a consequence of this concordance. So, the offence could not not be conceived only as a concrete deed which features, if they are identical with the ones described by the norm, will entail the punishment provided by the law.

We do not express a complete truth even when we use the concept "abstract offence" instead of "incrimination" because the two concepts do not substitute each other. The abstract offence represents a gereralization of the concrete deeds committed after the incrimination. The incrimination is prior to the concrete deed, and the concrete deed, in order to be considered an offence has to be correlated with the incrimination norm. Neither does the incriminated deed is identical to the offence because the incriminated deed is the deed described by the incrimination norm, which is the legal frame of the offence. The offence is the concrete deed actually committed. „The concrete offence" wrote Prof. Dongoroz, "it is only the fact commited in the conditions provided by the abstract description of the offence".

If we conceive the offence as having the content showed by the incrimination norm, we are poining out only the *formal aspect* of the offence; we underline only the exterior side that characterizes the offence (the contradiction of the concrete deed with the precept provided by the incrimination norm).

In a *formal conception*, the offence exists only between the bounderies within an incriminated deed. In other words, the penal norm "creates" the offence, the description of the deed in an incrimination norm is the basic condition of its existence and it is the main source of the offence (*creatio criminis sub specie juris*). „The offence is a fact incriminated by law" wroted Prof. Dongoroz, "any other addition to the offence definition is useless". The formal definition of the offence reveals only the juridical appearance (the formal side) of the penal deed, and not the natural containt (the substantial side).

The penal law enforced now did not take the stand of the formal conception of the offence, because, by introducing the social danger amongst the essential features of the offence, adopted a substantial conception on the offence.

In a *substantial conception*, decisive in characterizing the concrete deed as an offence is not the legal frame, the incrimination norm, but realities, substantial processes that determined the

legislator to incriminate a deed and to give it a socially dangerous character, meaning, unconvenient in relation with the society's interests.

## III. The Essential Features of the Offence. Special view on the "Imputability" as a Special Feature of the Offence

**The new Penal code in relation with the enforced law now.** The recent Penal code adopted by taking responsibility by the Govern defines in a new way the offence. So, the new definition abandons the idea that the offence is the deed that presents a social danger, meeting the doctrine requirements to renounce to the social danger as an essential feature of the offence. Instead of this essential feature it is mentioned another one, namely, the deed provided by the penal law, granting it the deserved priority. This essential feature was the last one provided by the enforced now penal code. Further, the new definition mentions guilt as the second essential and substantial feature, systemazided, naturally, after the feature regarding the provision in the penal law, fulfilling the requirements of the jurisprudence and doctrine. To these features, the new definition adds another two essential features of the offence: the unjustified and imputable character of the deed.

By "provision in the penal law", we see, based on the german doctrine[9], the objective side (action, immediate consequence, causality, offender, victim) and the subjective side of the incrimination content (forms of guilt: intention, praeterintention and fault).

The unjustified deed is excluded by the existence of a justified cause. The justified causes regulated in the articles 18-22 of the new Penal code (self defence, state of necessity, exercising a right or fulfilling a legal obligation, victim's consent) shows the inspiration from the Italian Penal code in force now[10].

The Initiator, with the reason that this notion has a double acception, excluded initially the guilt, as an essential feature of the offence. The two acceptions are: a) as a secondary element of the subjective side of the offence representing as the intention, praeterintention and fault; b) as general feature of the offence. In the first acception through guilt it was analized the concordance of the committed the concrete deed with the model described by the legislator (tipicity). As for the second acception, it was considered preferable by the Initiator, the aknoledgement of a distinct concept – "imputability" – in order to define the guilt, the main reason being that, according to the normative theory, the guilt, as an essential feature of the offence, is regarded as a reproach, as an imputation made to the offender because he actioned otherwhise that law required, although, he had a clear representation of his deed and a complete liberty in the manifestation of his will. According to the statement of reasons[11], imputability is not confused with the secondary element of the subjective side.

According to the statement of reasons of the draft, this definition was taken from the definition of the offence made by T. Pop even since 1923, but, it must not be overlooked the fact that the Initiator, initially reonounced to define the guilt as an essential feature of the offence, based on the reason that Prof. T. Pop also omitted that. But, T. Pop defines the offence as "antijuridical deed, culpable, with a penal sanction"[12], and imputability and culpability do not have the same semnification – "imputability is the condition for culpability, and the culpability is the

[9] C. Roxin, *Derecho penal, parte general, vol. I*, Ed. Civitas, Madrid 1999, (traducere germană), p. 370

[10] Il Codice penale, art. 50 – Difesa legitima, stato di necessita, consenso dell'avente diritto, esercizio di uno diritto o adempiminento di un dovere.

[11] www.just.ro

[12] T. Pop, *Drept penal comparat*, Cluj, Ardealul, 1923, p. 189

condition of the criminal responsibility"[13]. **So, imputability is not an attribute of the deed, but a condition or capacity of the offender**[14] (accordingly to N. Buzea[15], imputable is the person capable of a normal conduct, or to be influenced, naturally, by the reasons of his actions).

The Initiator also specified another reason that determined including the imputability amongst the essential features of the offence. The reason was the text that defines the offence in the Greek Penal code: „the offence is an antijuridical deed, commited with guilt, provided by the penal law and punishable by law". Prof. Jean Pradel, in his writing „Droit pénal compare", translates the definition that we find in the Greek penal code in the folowing way: „*l'infraction est une acte injustifié, imputable a son auteur et puni par la loi"*. This definition of Prof. Pradel seems to fit better with the definition of the offence proposed by the Initiator, the imputability is understood as a psichological element of the offence, element that is not confused with guilt.

We observe a desire of the Initiator, in the statement of reasons, to shift the approaching of guilt as an essential feature of the offence from the psychological theory toward the normative theory. According to this theory, guilt, as a general feature of the offence, is being seen as a reproach, as an imputation made to the offender because he actioned otherwhise that law required, although, he had a clear representation of his deed and a complete liberty in the manifestation of his will, as we mentioned before.

In Romanian doctrine prof. Tanoviceanu[16] introduces the concept of "imputability", in the context of responsibility, when discussing the free will. "The laws that govern the society do not annihilate the individual freedom"[17] (in the same way: A. Prins, R. Garraud). Prof. Tanoviceanu does not agree with the free will theory, stating that the will of an individual is a result of three forces: heredity, education and environment. So, if an individual disobeys the laws he must considered mentally ill. In this theory, a partial or diminished responsibility is not admitted[18]. According to this theory, neither the social responsibility is to be admitted[19]. According to E. Ferri, "the deeds of an individual can be imputed to him (are imputable a.n.) and, as a result, he is responsible for those deeds because he lives in society". The same author speaks about a *material imputability*, when a person is the author of the deed, and a *juridical and social imputability* because the person must support the consequences of the deed that he committed. An interesting theory, but with flaws. A mentally disturbed person is not moral responsible but is still socially responsibly because he lives in society? It seems, according to Tanoviceanu, that Ferri is making confusion between one of the essential conditions of the offence and punishment and the actual fundament of the punishment.

So, a perfect healthy person is to be punishable if the conditions are fulfilled. A mentally ill person, with a diminished capacity is to be evaluated by specialists, to determine whether a punishment must be applied, or another form of measure (a medical one, for example).

From the point of view of criminal doctrines, the idea of diminished responsibility is unsound both within the **free will doctrine** and in **determinism doctrine.** The free will doctrine supports itself on the idea that the free will is not determined. It is free. Admitting the diminished

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[13] T. Pop, *Drept penal comparat*, Cluj, Ardealul, 1923, p. 189; J. Pradel, *La reforme du droit penal estonien dans la contexte des reformes penales survenues en Europe etspecialement en Europe de l'Est*, Juridica International VIII/2003, p. 47

[14] G. Levasseur*, L'imputabilite en droit penal*, RSC, Paris, 1983, p. 13 şi urm.

[15] N. Buzea*, Infracţiunea penală şi culpabilitatea*, Alba Iulia, 1944, contrar, Garraud, *Traite Theorique et practique du droit penal francais,* I, Paris, 1913

[16] I. Tanoviceanu, *Curs de drept penal*, vol. I, Bucuresti, Atelierele Grafice Socec & Co., Societate Anonima, 1912, p. 114 si urm.

[17] Quetelet, *Essai sur l'homme et le developpement de ses facultes*, I, Paris, 1835

[18] E. Faguet, *Et l'horreur des responsabilites*, Paris, 1911, p. 83, citat de I. Tanoviceanu

[19] E. Ferri, *La sociologie criminelle*, edtia a II-a, trad. franceza, Paris, 1905, p. 400

responsibility means recognizing implicitly that the will is not perfectly free, but determined by external causes. An illogical situation. A diminished responsibility is also impossible within the determinism doctrine because whatever the determinant causes are, no one could be held responsible (for these causes). So, is either responsible or irresponsible. *Tertium non datur*. Prof. Tanoviceanu[20] proposes a solution, for the ones with diminished responsibility, namely, those with diminished responsibility to be assimilated with the irresponsible ones. The interests of justice are better served in this way.

According to Prof. Dongoroz[21], imputability is a juridical situation. In this case, the person is attributed with a criminal deed and with criminal intent. Therefore, according to prof. Dongoroz, guilt (culpability) appears as a condition of imputability.

The absence of culpability means automatically a legitimacy of the deed in virtue of the constraint exercised by the "laws of nature" that is granting the author with "a right to commit the deed"[22].

According to Prof. Dongoroz : "ascertain the reality of a criminal offence requires a correspondence between deed and the description provided by a statutory provision. The illegal result must have had as cause one or more voluntary acts (*imputatio facti*) and the voluntary act must be accompanied by intention or neglijence (*imputatio iuris*)"[23].

The subject of criminal law is configured by Dongoroz[24] as subject to an obligation to obey the laws, who becomes, through the offence, subject of the subsequent obligation to suffer the punishment provided by the law that was broken, except the situation when he "justifies himself".

Prof. H. Welzel defines the guilt as a personal reproach (not upon the action/inaction but upon forming the will not to refrain from the antijuridical action, although there was the possibility of refraining from the offender). We may say that the reproach is addressed, in fact, to the behavior of an individual, understood as an exteriorization of a subjective will. So, that member of the society who commits a reprobable deed from the ethico-social point of view is "culpable and therefore he shall be reproached, meaning, he is held responsible[25]". At the foundation of the imputation theory is standing in fact the divergence between the actually will of the offender and the will of law of the society. The relation between the action and the produced result will be resolved based on the objective imputation theory of the result[26] (the German, Spanish, Portughese Swiss doctrines). This theory helps to delimitate, at an objective level, the situations when a certain result may be imputed to the offender. In Romanian doctrine,[27] a practical applying of this theory implies two stages: first consists in verifying if the action created a relevant danger for the protected value, from the juridical point of view; the second stage consists in verifying if the produced result is a consequence of the state of danger created by the action. This form of imputation fits the best to the commisive offences of result[28]. In the case of the offences of real danger, the imputation is decided based only on the first stage of the analisys because in these cases it must be demonstrated that the action or inaction of the offender created effectively the state of danger required by the incrimination norm.

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[20] I. Tanoviceanu, *Tratat de drept si procedura penala*, ed. a-II a, Vol. I, Curierul Judiciar, Bucuresti, 1924

[21] V. Dongoroz, *Tratat, Drept penal*, reedit. Editiei 1939, Asociatia Romana de Stiinte Penale, Bucuresti, 2000, p. 334 si urm.

[22] Idem, p. 335

[23] Idem, p. 334

[24] Idem p. 335

[25] T. Pop, *Drept penal comparat*, vol. II, Orăştie, 1926, p. 346

[26] F. Streteanu, *Tratat de drept penal, parta generală*, vol. I, Ed. C.H. Beck, 2008, p. 419

[27] D. Nițu, *Teoria riscului în dreptul penal*, R.D.P. nr. 1/2005, p. 109

[28] G. Fiandaca, *Riflessioni problematiche tra causalita e imputazione oggetiva*, L'indice penale nr. 3/2006, p. 951 şi urm

The behavior of the offender that determined the result, in order to be the basis for imputation the result, must be a dangerous one, meaning, the result was likely to create a probability in causing a damage or endanger the protected value. Usually, the dangerous character of the behavior is decided using the adequate cause theory[29]. The behavior is dangerous when it is adequate in producing the tipical result, in other words, when it leads to the significant growth of the possibility in producing the result. The possibility of producing the result will be decided taking into account all known circumstances by a prudent individual at the moment of the action and also other knowledge that the author had at the moment of commiting the offence.

According to the foreign doctrine,[30] it is suffiecient an aggravation of a preexistent risk. The actions that intensify a state of danger already existent become relevant for the imputation of the result. In the same way, it is imputable the result because of a delay, for the example, delaying the rescue of the victim.

In the case of omissive offences, when the danger is preexistent to the inaction (the danger may even not be a result of a behavior, for example, natural causes) first, it will be verified if the offender diminished the danger, as required by his obligation. According to Prof. Streteanu[31] the omission of diminishing the existent risk would be equivalent with the "the risk is created on the grounds of the objective imputation".

The result cannot be imputed to the offender if that is the result of some authorized activities, the so-called *permitted risk*[32]. It is the case of the offences commited without guilt (for example, the road traffic, when the result is injuring a person that was crossing the street in a forbidden place; in this case, the result couldn't be imputed to the offender, as long as he respected all restrictions imposed by the law: speed limit, granting priority for the pedestrians) because there is no guilt, although the objective deed is tipical (corresponds with the incrimination norm). According to the objective imputation theory, we are not in the presence of a tipical offence because it lacks the condition of imputation the risk at the objective level. In case of *inexistent risk,*[33] the imputation of the result is not possible, after some authors[34], under no circumstances. So, in the case of permitted risk, the imputation will be excluded only in the hypothesis in which the offender actioned respecting all legal norms imposed by the law to that respectively (or particularly) activity.

In case of *diminished risk*, the imputation will be excluded when the offender, by his action, is diminishing a danger already created for the protected social value, imputation having as premises creating or aggravating a risk[35]. For example, if the victim is pushed down in order to avoid a car accident and the victim suffers small scratches, the author will not be held responsible, being even excluded the tipicity of the deed because he acted in state of necessity. But, it is necessary to be a causality link between the initial danger and the result, true, less harmful for the victim.

So, if the tipical result is a consequence of the state of danger created by the action, that result could be imputed to the offender.

*The problem of the deviated risk*. This risk exists when the author, althotgh he created a danger to the protected value, the result does not appear to be because of materialization of this

[29] F. Streteanu, *Tratat de drept penal, parta generală*, vol. I, Ed. C.H. Beck, 2008, p. 420
[30] F. Hurdado Pozo, *Droit penal, partie generale* II, Ed. Schulthess, Zurich, 1997, p. 50
[31] F. Streteanu, *Tratat de drept penal, parta generală*, vol. I, Ed. C.H. Beck, 2008, p. 420
[32] C. Roxin, *Derecho penal, parte general, vol. I*, Ed. Civitas, Madrid 1999, (traducere germană), p. 372
[33] E. Morselli, *Note critiche sulla teoria dell'imputazione oggetiva*, L'indice penale, nr. 1/2000, p. 24 şi urm.
[34] Idem
[35] H. Jescheck, T. Weigend, *Tratado de derecho penal. Parte general*, Ed. Gromares, Granada, 2002, p. 308

danger, but because of an external fact, a random fact[36]. If, for example, the offender wanted a specific result and acted with the intention for that result to be produced (the death of the victim), but, because of random causes the desired result did produced, but as a consequence of external factors, the result, although wanted by the offender, could not be imputed to him because there is no direct causal link. The result is not materialized in a state of danger created directly by the action of the offender. In the example mentioned above, the offender wil be held responsible only for an attempt. The things are different when the action of the offender is directed to obtain a certain result but this result produces in other modality that the offender wanted. For example, if the victim is stabbed but the death produces because of a hart attack, not because of the stabbing, the result will be imputed to the offender because his unique action created both danger states[37] and the result is the consequence of one of the created danger states.

Regarding to the *culpable risk*, the situation when the subsequent fault of the victim contributed decisively in producing the result, the imputation cannot be applied. The subsequent behavior of the victim, with fault (not guilt) cannot be imputed to the offender. In the same way is the Spanish doctrine[38]. But the French jurisprudence remains faithful to the equivalent conditions theory. According to this theory, any previous action or inaction is a cause without which the result would not be produced (any *sine qua non* condition). Without developing further this theory and its shortcomings, we mention only the fact that it is still used further on by the jurisprudence, including the Romanian jurisprudence. But, there are efforts made in order to determine the structure of the causality relation. Regarding the culpable risk and the culpable action of the victim we must mention the hypothesis when, although the result was produced because of the culpable action of the victim, the result could be imputed to the offender because the victim was forced to use the action that led to the result. The same, the result cannot be imputed to the offender if there is no **direct** causality link between the deed and the neglijent attitude of the victim.

Regarding to the *equal risk*[39], the imputation will be excluded when it is determined that the result would have certainly produced, even in the hypothesis of a correct, licit conduit. In the german doctrine,[40] this solution was nuanced in exemplifying, theoretically, some situations that could appear. So, the imputation is possible even without an action or inaction of the author because there is a possibility or a probability of a consequence as an effect of another person action. Also, the imputation is possible when, in the absence of the author's action, the result would have be produced, but in another form (for example, shooting a person that is very ill is imputed to the offender even if its proved afterwards, based on a forensic medical expertise, that the victim would have died, certainly, at a latter moment). In case of omisive offence, the result is imputable to the offender if the action to which he was legally obligated to do would have led in avoiding the harmful result.

In case of *unprotected risk,*[41] the result will not be imputed to the offender because this result is not a part of the cathegory of results that violated norm protected. For example[42], the result cannot be imputed to the driver of a car who, passing the red light, injuries a pedestrian. The purpose of the norm that impose stopping at the red light has as main goal preventing the collision with another vehicles. Even if the victim was reckless in crossing the street, the result will not be

[36] C. Roxin, *op. cit*., p. 373
[37] F. Streteanu, *op. cit*., p. 424
[38] E. Bacigalupo, *Principios de derecho penal, parte general*, Ed. Akal, Madrid, 1998, p. 197
[39] H. Jescheck, T. Weigend, *op. cit*., p. 309
[40] C. Roxin, *op. cit*., p. 368 şi urm.
[41] F. Streteanu, *op. cit*., p. 427
[42] Idem, p. 427

imputable to the driver, according to the spenish, german doctrine[43]. Although, at the first sight, this theory may be just, in our opinion, it must not be overlooked the causality link, even it is not a **direct** one. Theoretically, the produced result could be imputed to the author. The fact that the produced result is not a part of the cathegory of results protected by the violated norm, it does not automatically lead to an exculpation of the author. The injury of the pedestrian was due to the lack of diligence of the author, who, passing the red light, produced a result. Indeed, not the result protected by the violated norm, but another result occurred (injuring a pedestrian, not a collision with another vehicle). So, in our opinion it shouldn't be excluded, *de plano*, an eventual imputation of the driver. An example is given by the Romanian doctrine[44]. The hypothesis when, near a school it is a speed limitation in order to protect the children. The offender, exceeding the speed limit, injuries a mature person. Although the protected result refers to the protection of the children, the speed limitation has a general application, so that any person located in that area is protected by the general provision.

**Other controversies**. The function of the legal authorities is not to know and describe law, but to prescribe or permit human behavior, making the law. A rule of law, is, for instance, the statement that, if a man has committed a crime, a punishment ought to be inflicted upon him. But the connection described by the rule of law has a different meaning from that of causality. As professor H. Kelsen[45] says "the criminal delict is not connected with the punishment, and that the civil delict is not connected with the civil execution, as a cause is connected with its effect".

Thus, the connection between cause and effect is independent of the act of an individual. However, the connection between a delict and a legal sanction is established by an act or acts of the individuals.

So, the statement that an individual is "*responsible*" means that a sanction can be inflicted upon him if he commits a crime. The idea of imputation as a specific connection of the crime with the sanction is implied by a juridical judgment that an individual is, or is not legally responsible for his behavior. The cause is responsible for the effect; the effect *is imputed* to the cause, just as the punishment is imputed to the crime.[46]

Nevertheless, there is necessary to make a distinction between *causality* and *imputation*. The difference between causality and imputation is that the relation between the cause and effect is independent of a human act. Another difference may be that each concrete cause must be considered as the effect of another cause, and so on. Causality represents an infinite numbers of links. The line of imputation has not, in comparison with the causality, an infinite number of links. A definite consequence is imputed to a definite condition. Causality has no end point. Imputation does.

The subjective imputation seems to be more as a specified personal imputation. S. Pufendorf (a representative voice of the *natural law* theory) was the first one to introduce into jurisprudence the concept of *imputation* (the deed of the agent is to be imputed if the deed is a free action and if the deed belongs to the agent *ad ipsum proprie partinens).* Only in this case the action becomes *causa moralis* of the result (result) and could determine the criminal liability.

The entire penal system tends to be elaborate upon the subjective imputation, having as premises the free will of the person; the person could held be responsible only for the consequences that are the result of the free will[47].

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[43] F. Hurdado Pozo, op. cit., vol. II, p. 56; H. Jescheck, T. Weigend, op. cit., p. 308

[44] F. Streteanu, *op. cit*., p. 428

[45] Hans Kelsen, *Causality and imputation*, Ethics, University of Chicago Press, vol. 61, 1950, p. 1-11

[46] Idem, p. 9

[47] Hans Henrich Jescheck, *Lehbruch des Strafrechts*, Allgemeiner Teil, vierte Auflasge, Berlin, Duncker und Humblot, 1988, p. 377

According to Wolff[48] "*from the application of a law to a deed it is clearly indicated that the deed is an event of such nature that it can be imputed*". This assertion assumes that there is a difference between the application of the law to an event and imputation of that event. So, applying the law to an event means also the imputing the event as a deed.

On the other side, Kant's definition on imputation states that imputed events are seen as deeds, (as something which is done), deeds that are traced to a person as their author, with the main characteristic of a free cause.

In order to clarify the difference between the subjective imputation and objective imputation, we need to mention a theory traced back to the first half of the twentieth century. The theory refers to the objective imputation and it is divided, mainly, into separate parts: a) not permitted behavior; b) relationship between the non-permitted behavior and the result[49]. Today there is unanimity in penal dogma is that verification of a causal link between action and result is not sufficient to attribute this result to the author of the action.

The penal doctrine makes another important distinction regarding the concept of imputation. According to J. Daries, cited by J. Hrushka[50]: "first level of imputation is the declaration that someone is the author of the deed (*imputation facti*, n.n.); on the other hand, the second level of imputation is the judgment as to the merit of the deed (*imputation iuris, aplicatio legis ad fatum)".*

The first level of imputation states that the event in question, to which the law is to be applied, is a deed (a commission or omission of a human act). After the application of the law (first level of imputation) we can bring into question the second level of the imputation. For example, in certain cases of duress or intoxication, the second level of imputation is not applied. Although a person is certainly the author of a deed (*imputatio facti*), he cannot be held responsible, in case, for example, of intoxication. So, *imputatio facti* is a sum between *imputatio moralis,* that establishes the connection of the natural process into which a person is causally involved with the will of this person regarded as a free rational person, and *imputatio physica* (causality). In conclusion, every application of law must be preceded by the *imputatio facti.* The second level of imputation depends on the application of the law in case of certain results are reached.

## Conclusion

According to the Ministry of Justice the main justification for introducing this concept in the offence definition was that "a deed, in order to bring upon criminal responsibility, must not only to correspond with the legal description, to be unjustified, but also, the deed, must be able to be imputable to the offender; that means, the deed could be reproached to the offender.

The concept of imputation, it is still not clear what term should we use when talking about this essential feature of the offence, is based on some necessary premises: the offender must have had the representation of his/her actions or inactions and the lack of any duress (the offender should not have been irresponsible, intoxicated or an under aged). In addition, the offender must have known the illicit character of the deed when committing the offence (the lack of error).

As arguable, as this is the requirement that the crime act be imputable to a person the criminal doctrine has long ago emphasized the equivocal character of the concept of imputability. It may have the meaning of causal relation (a crime act is imputable to X because it is the effect of his/her action) as well as the meaning of guilt (a crime act is imputable to X because he/she committed it

[48] C. Wolff, *Philosophia practica universalis*, Pars prima, Francofurti et Lipsiae, 1738 ; (second edition 1971)
[49] Gunther Jakobs, *La imputation objectiva en el derecho penal*, Editorial Ad Hoc, Argentina, 1996, p. 14-25
[50] Joachim Hrushka*, Imputation*, BYU L. Rev, 1986, p. 679

guiltily). In both cases, the concept of being imputable appears as useless because both the relation of causality and guilt are implicitly emphasized or explained by the other characteristics[51].

A criminal act simultaneously implies an action or an omission, their immediate consequences and implicitly the relationship between the external manifestation and the immediate consequence, and guilt appears explicitly as a distinct concept within the formulation of the essential characteristics of a crime.

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[51] G.Antoniu, *Critical remarks on the new Penal Code*, Analele Universității "Constantin Brâncuşi", Târgu Jiu, Seria Ştiințe Juridice, Nr. 2/2010, p. 10-11

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