

Kobzar'-Frolova M. N., Dzhabbarov E. B., Frolov V. A.

THE CONCEPT AND EVOLUTION OF LEGAL AND SOCIAL ESSENCE OF "GUILTINESS" AND "INNOCENCE"

The concept and evolution of legal and social essence of "guiltiness" and "innocence"

Kobzar'-Frolova Margarita

Nikolaevna,

*Doctor of law, Professor of the
Department of customs law at
Russian Customs Academy,
Professor, Moscow region, Lyu-
bertsy,*

MargoKFMN@Yandex.ru

Dzhabbarov El'vin

Bagishevich,

*Graduate student of Russian
Customs Academy,*

elvinaldo@gmail.com

Frolov Vyacheslav

Aleksandrovich,

*Graduate student of Russian
Customs Academy,*

Glotozop2@yandex.ru

On the basis of research of scientific works in the field of law, philosophy, sociology, psychology in terms of determining the legal and social essence of two antipodes – guiltiness and innocence, the authors have concluded that there is a need for more detailed research in this area and elaboration of science-based concepts of "guilt", "guiltiness" and "innocence" with a view to their further consolidation in the existing legislation, and exception of bringing an innocent person to juridical responsibility. Definitions of the concepts of "guiltiness" and "innocence" are proposed in the article for a scientific debate.

Keywords: guilt, feeling of guilt, guiltiness, innocence, forms of guilt, responsibility, grounds of responsibility, correlation of guilt and responsibility.

Development of state and law opens to scholars unlimited possibilities for the study of various legal institutes, sub-institutes, categories, legal, social and other phenomena and concepts in all areas of scientific knowledge. This allows us to enlarge and enrich the available scientific knowledge, participate in scientific discussions, improve our own knowledge, elaborate research projects, etc.

Scientific papers devoted to the concept of innocence contain various approaches to its research and analysis. And this applies to "innocence" not just as to a philosophical-legal concept, but also as to a category outside the law.

If you go from reverse and explain the concept of guilt, we can assume that innocence will be the antipode of guilt. We shall try to prove it.

Since ancient times, the concept of guilt was included as one of the fundamental concepts of religion. For a religious man the awareness of guilt acts as a sense of sin, as a duty to ask for forgiveness from God. The procreation itself and further human existence in Christianity was originally recognized sinful.

"Always sincerely blame yourself, recognizing yourself the culprit of troubles. Say: I am guilty. I am sinful. Remember that you are as weak as your neighbor is, and weakness is terminated, and you must not blame weak and sinful ones if they recognized their weakness. You have to blame the devil that is strong in evil" [15, 304].

In the Old Testament, guilt was identified with the notion of responsibility. In the New Testament the term of guilt was not used directly, but guilt was understood as responsibility for a deed and attitude of a man to this deed. Feeling of guilt is a complex and incredibly powerful state. "In small doses it is necessary and healthy, in excessive - destroys, and its complete absence is fatal" [2, 152].

There was also no concept of guilt in *Russkaya Pravda*. But there was the concept of responsibility, which comes for the very fact of infliction harm or "umbrage". In the Council Code of 1649 was firstly introduced the principle of individual responsibility in the Russian legislation. There was enshrined the rule about unequal responsibility depending on social class, both for the guilty and for the injured party. Great importance for the development of the concept of guilt has Military Charter of Peter I (1715), which for the first time in Russian law formed an important condition for legal responsibility - the mental state of a person held liable. Pre-revolutionary criminologist S. Budzinskii wrote that a crime could occur only as a result of the simultaneous merger of will and deed, i.e. when a free will was inseparably bound with a deed [3, 99-100]. A significant contribution to the development of forms of guilt was made by the Russian pre-revolutionary legal scholars N. S. Tagantsev and N. D. Sergeevskii. The latter considered guilt as an element of crime. "If a person really envisaged or foreseen consequences, really was aware of the law prohibition and actually had an opportunity to take this prohibition to guide its activities, the combination of these conditions is called subjective guiltiness" - N. D. Sergeevskii wrote [20, 410, 17, 266].

A. A. Piontkovskii for the first time gave the definition of guilt, which then was reflected in the current legislation: "Guilt is a mental attitude of a sane person to a criminal deed committed by it in the form of intent or negligence" [14, 131]. At the same time A. A. Piontkovskii highlights such kinds of guilt as a "moral guilt" (as an act of evil will of an offender), "formal guilt" (committed in the form of intent or negligence); "material guilt" (awareness of a deed) [13, 32]. B. S. Utevsii introduced the concept of "culpable conduct" – this is a conduct that receives negative evaluation from the perspective of socialist morality and socialist law and which is the basis of criminal responsibility [21, 10-59]. From the standpoint of B. S. Utevsii, guilt has a subjective-objective nature, contains both subjective and objective foundations, separate of which may be beyond of a *corpus delicti*.

Further study of the legal literature revealed that the essence and content of the concepts of "guilt" and "guiltiness" though have a single lexical root, their essence and content are different.

The study of the scientific literature has led to the conclusion that guilt is considered by scientists and researchers from different perspectives: as a legal category, as a feeling, psychophysical provision, moral and ethical state, as a mechanism of control over a person, as a phenomenon of remorse, etc. Feeling of guilt is not a separate subject of scholars' researches. As a rule, the feeling of guilt is spoken about as a state that hinders the development of identity [19; 24; 25].

Researchers in the field of Psychiatry ascertain that experiencing of the feelings of guilt is peculiar just mainly to mentally healthy people. Conversely, people with psychiatric disabilities and pathologies of mental development (psychopathy, schizophrenia, and others) do not show the presence or development of the feeling of guilt. Accordingly, guilt is considered by domestic psychologists and psychiatrists as ethical feelings, ability to self-evaluation and self-judgment, the regulator of social behavior, the phenomenon of remorse, the regulatory mechanisms of social control, the consequence of an offense or crime, the consequence of spontaneous activity, as well as a necessary and important element of a mature, healthy psyche [8, 9, 5]. At different periods of the development of the Russian society "guilt" has acted not only as a psychological, socio-political, but also as a class notion.

There is also such an opinion among modern scholars that guilt is an "artificial legal category that has its own value different from guilt in psychology, philosophy and other areas of human knowledge that for centuries have been studying the problem of guilt. Guilt in criminal law is limited to the attitude of persons to the stipulated by criminal law deeds and their socially dangerous consequences.

In other words, guilt in law is possible only in respect of the values protected by the State represented by its legislator" [5, 21].

In foreign psychology guilt is described as an asocial phenomenon, deviant behavior of personality, and is associated with the unconscious behavior, the desire to inflict pain, sometimes for no reason. Sigmund Freud considered guilt as a kind of anxiety, "the anxiety of conscience", which allows you to split your own "I" into justice and victim. The source of guilt is fear, which is transformed into conscience, and exists in two forms – the two sources of guilt:

- 1) fear of authority – forces you to abandon the meeting of primary impulses;
- 2) fear of "super-ego" – subsequent – forces you to abandon forbidden desires and exercises punishment [23, 64].

Outstanding researcher B. F. Skinner reasonably proposed an original idea of the sources of guilt. From his point of view, the process of development of guilt or its absence occurs under the influence of the measures of persuasion and coercion, in particular encouragement. If good deeds are rewarded, and bad ones are accused, a man forms a feeling (or understanding) of correct and wrong conduct. So the knowledge of "what is good and what is bad" forms the mastering of proper conduct. A man seeks to repeat the enshrined conduct, and the accused conduct is more likely will not be repeated [18].

Foreign studies of the psychology of guilt have also other arguments. But mostly they are boiled down to the fact that guilt is recognized as a conditioned reflex and equate it with the fear of punishment.

We have defined one more direction, in which researchers-scientists offer to consider guilt in the context with the legal concepts of "misconduct", "unlawful action / inaction", "responsibility", "choice", etc. [11; 12, 22; 16, 362].

It has become interesting for us to consider their interrelation.

Guilt (*culpa*, *schuld*, *culpabilite*) as a legal category is the basis of responsibility. The concept of guilt discloses the basic law institute – institute of legal responsibility. Guilt in law is a mental attitude of a person to its socially dangerous actions and their consequences in the form of intent or negligence. Guilt represents a real fact, which is to be detected by court, executive authority body, official (in the case of a disciplinary offense, an administrative offense).

Article 5 of the Criminal Code of the RF legislatively enshrines the principle of guilt: "A person shall be brought to criminal responsibility only for those socially dangerous actions (inaction) and socially dangerous consequences in respect of which his guilt has been established. Objective imputation, that is criminal responsibility for innocent infliction of harm, shall not be allowed". Articles 25 and 26 of

the Criminal Code of the RF disclose the concept and content of the forms of guilt. The legislator introduces the concept of intent (indirect and direct) and the concept of careless deed. At that, the legislator does not give the concepts of "guilt" and "guiltiness" and "innocence". Meanwhile, there is an opinion among theoreticians and practitioners that "the understanding of guilt solely as intent and negligence" seems to be a firmly established delusion [6, 119]. Identification of the principle of guilt with the principle of subjective imputation causes among scientists some controversy because the term of "subjective imputation" is ambiguously interpreted in the legal literature [5, 22].

Significant contribution to the study and justification of the concept of guilt was brought by Georg Wilhelm Friedrich Hegel (1770-1831) - an outstanding German philosopher. In his work "Philosophy of Law", which has become the source of a lot of citations, he considers legal essence of intent and guilt. Hegel concludes that "guilt contains a completely external judgment, whether have I committed something or not? The fact that I shoulder blame does not mean that the crime can be imputed to me". Hegel invariably correlates guilt and responsibility. At that, he argues that if things or objects of one person inflict harm to others, to society, it yet does not refer to the deed of this person, though, when considering the issue of responsibility this fact should be taken into account. The philosopher writes: "If things, of which I am the owner, inflict harm to others, this is not my own deed. However, I am, to a greater or lesser degree, responsible for this harm..." In this connection, he concludes that as a guilty should be considered someone who knows and understands what he/she has committed. And if a person committing a deed does not know that what he does is prohibited, it should not be considered guilty: "The guilt of my will just insofar as I know about it" [4].

Action - an active conduct of a person, which includes inner motivation, in which it manifests itself as a personality. Lawful action - a conduct based on the rule of law, correlated with the moral values and ideals, which requires a moral choice. Inaction - a passive conduct of a person, which also can include an inner motivation. At that, the person may be aware of the nature of passivity, may allow indifference, although could and should not allow it. An act of accusation (punishment) will be the result of action / inaction, which has come into conflict with legal, moral, ethical, social, religious or other norms.

"Choice" is an active state of a man. It is an expression of your own "ME", manifestation of personality, its autonomy. Man is constantly faced with the choice of one of alternatives of behavior, and society expects from it the manifestation of response to the interaction with the environment. Choice can be made within

the legal framework, and may be beyond of lawful behavior and then we can talk about the choice in correlation with the concepts of "guilt", "punishment" and "responsibility".

Our study has showed that there is a different understanding and perception of the essence of responsibility. Responsibility in the scientific literature in most cases is treated only as accountability and imputability. Philosophical and sociological concept of responsibility is disclosed through an objective, historically specific nature of interrelations between personality, collective and society from the standpoint of conscious exercising of mutual demands placed on them.

Some researchers understand responsibility as a subjective obligation to be responsible for deeds and actions, as well as their consequences. Others associate responsibility with the need to choose the form of their deeds, with willingness to accept the consequences of choice as unavoidable accomplished facts. There is an opinion that responsibility is not a guilt, but confidence in their actions. From morally ethically point of view responsibility is a certainty, reliability, honesty in respect yourself and others; this is an awareness and a readiness to admit that the result (of response), which you receive during your deeds and actions, is exactly a consequence of your deeds (actions).

In the explanatory dictionary of D. N. Ushakov responsibility is treated as a provision, in which a person performing any work is required to give a full account of its actions and take the blame for all the consequences that may arise in outcome of assigned duties, in performing any duties, obligations [22]. Thus, Ushakov associates the concept of responsibility with the concepts of "guilt", "duties" and "obligations".

Such a different understanding of responsibility in our view can be explained by its versatility. Responsibility may be ethical, moral, social, material and legal. We do not exclude other types of responsibility. In turn, the legal responsibility can be represented as: criminal, civil, administrative and disciplinary.

Code on Administrative Offences of the RF (hereinafter – CAO RF) does not provide the concepts of "guilt", "guiltiness", "innocence", while the legislator identifies them with presumptions, such as "presumption of innocence" (article 1.5), and discloses through the concept of offense (article 2.1: "a wrongful, guilty action (inaction) of a natural person or legal entity, which is administratively punishable under this Code or the laws on administrative offences of the subjects of the Russian Federation, shall be regarded as an administrative offence") and responsibility (articles 2.1, 2.4, 2.5, 2.6, 2.6.1) , as well as circumstances mitigating or aggravating administrative responsibility (articles 4.2 and 4.3). Article 2.2 CAO RF enshrines

the forms of guilt: intent and negligence, and article 4.1 – general rules of imposition of administrative punishment. The study of the concept of guilt in CAO RF was carried out by V. V. Kizilov, who noted in the tort legislation of Russia the absence of the concept of guilt and offered his concept of definition of the notion of guilt [7]. According to this author, guilt is “a category of social society, the rules of the existence of which are governed by various norms, including legal ones. In isolation from society the concept of guilt does not exist. And, above all, guilt is an assessment by society of committed deeds”.

Thus, it can be assumed that the concepts of guilt, guiltiness and innocence the legislator discloses in CAO RF through the forms of guilt and the rules of imposition of administrative punishment.

We find interesting a legislatively enshrined rule contained in the Law of the Russian Federation No. 3132-1 from June 26, 1992 “On the Status of Judges in the Russian Federation” that “In imposition of disciplinary penalty shall be taken into account the nature of disciplinary offence, circumstances and consequences of its commission, the form of guilt, the identity of the judge who has committed a disciplinary offence, and the extent of the violation of citizens’ rights and freedoms, the rights and legitimate interests of organizations by judge’s actions (inaction) (part 2 article 12.1). At that, the legislator does not explain what is a guilt, what forms of guilt can be in case of a disciplinary offence. In part 1 of the considered article 12.1 the legislator discloses the concept of disciplinary offence through the concept of culpable actions (inactions). That is, from the point of view of the legislator the concept of “guiltiness” of a judge is a reflection the concept of “misconduct” (“For the commission of a disciplinary offense, that is, culpable action (inaction) in the line of duty or in outside activities, as a result of which have been violated the provisions of this Law and (or) the Code of Judicial Ethics approved by the all-Russia Congress of Judges, what has resulted in the derogation of judiciary credibility and harm infliction to the reputation of a judge...” [1]).

Civil legislation also does not disclose the concepts of guilt and guiltiness, however, actively operates with the concepts of innocence and intent (articles 169, 227, 404, 697, 901, 963, 1079, 1083, 1104 of the Civil Code of the RF and other). So, paragraph 1 article 401 of the Civil Code of the RF contains the definition of innocence in case of obligation default: “A person shall be recognized innocent, if, taking into account the extent of the care and caution, which has been expected from it by the nature of the obligation and conditions of turnover, it has taken all the necessary measures for proper discharging of its obligation”. It can only be assumed that a person will be deemed to be guilty in reverse, that is, if the person “with

the extent of the care and caution, which has been expected from it by the nature of the obligation and conditions of turnover," has not taken all the necessary measures for proper discharging of its obligation. It should be noted that guilt in civil law is not based on the person's mental attitude to offense committed, and it is rather of an objective-subjective nature. A more detailed analysis of the civil legislation norms allows to conclude that in civil law a person is imputed the presumption of guilt. This is evidenced, for example, in paragraph 2 article 401 of the Civil Code of the RF, where the legislator indicates that "The absence of guilt is proved by a person who has breached an obligation". It remains unclear, what should the person prove? And why has the person already been accused and who has recognized it such? Also we have noted that in article 151 of the Civil Code of the RF the legislator introduced the concept of "degree of guilt": "When determining the size of compensation for the moral damage, the court shall take into consideration the degree of the culprit's guilt and other circumstances, worthy of attention", what criteria should be applied and what must be understood under the "degree of guilt" is not explained. Unlike the Constitution of the Russian Federation that enshrines the norm on the presumption of innocence of an offender: "an accused is not obliged to prove its innocence". "Everyone accused of committing a crime shall be considered innocent until its guilt is proved according to the rules fixed by the federal law and confirmed by the sentence of a court which has come into legal force". In the meantime, we close the position of those legal scholars and researchers, among whom there is point of view that this norm applies solely to criminal legislation and does not apply to administrative and disciplinary legal relations. The fact that it does not apply to civil legal relations is proved by the above norm of paragraph 2 article 401 of the Civil Code of the RF.

Summarizing our research in the area of responsibility we have concluded that the legislator puts equality between the terms of guilt and guiltiness. At that, the researches of scientists show that not everyone agrees with this identity. Thus, "if the legislator puts an equal sign between guilt and guiltiness, it should after the words "is guilty of..." write "that is intentionally or negligently", - A. I. Martsev writes [10, 34-35].

Study of scientific works in the field of philosophy, sociology and psychology has allowed us to conclude that the innocence, as well as responsibility, can be considered as a legal and non-legal concept. Psychologists usually describe the state of innocence as an instinctive human behavior, the result of habitual activity. From the perspective of legal psychology it appears to us that innocence can be described as:

- own perception of the legitimacy of actions in accordance with the values and standards of conduct inherent to conscience;
- the result of expectations of society from a man;
- the ratio of your own and public perception;
- the absence of a gap between your own and public perception.

As a legal phenomenon “innocence” in our understanding is the opposite of “guiltiness”.

The research conducted in the mentioned topic also has led to the following general conclusions:

1) analysis of scientific and educational materials has showed that the institute of guilt in the domestic doctrine has acquired its greatest development in criminal law;

2) review of scientific views associated with the issues of guilt has exposed the lack of a unified interpretation of the term of “guilt”, “guiltiness”, “innocence” and common understanding of this phenomenon both in different fields of human knowledge, and within legal and non-legal branches. This has led to the expansion of this notion and blurring of the boundaries of legal norms. In practice, the ambiguity of scientific positions along with a lack of legislative consolidation leads to incorrect evaluation of human conduct and as a consequence to bringing an innocent person to responsibility.

Since the legislator does not explain any of the concepts of “guilt”, “guiltiness” and “innocence”, we can only conclude that there is a need for more detailed research in this area and elaboration of science-based concepts of “guilt”, “guiltiness” and “innocence”, with a view to further consolidation in the current legislation and exception of bringing an innocent person to responsibility.

The research has allowed us to put forward an assumption that innocence may be presented as a legal category, as legal presumption, as psycho-physical, moral state of a person. We have obtained a conclusion that innocence is a philosophically-legal presumption of the institute of public service, which has a direct relation to social and legal guarantees of public servants.

We offer for scientific debate a philosophical and legal concept of the essence of “guiltiness” and “innocence” (not claiming completeness and its inclusion in normative legal acts). Guiltiness as a legal phenomenon means a phenomenon, in which there is an essence of unconscious, deviant behavior of a personality.

Innocence as a legal phenomenon means a state that is formed under the influence of the rules of proper behavior, and develops under the influence of legal prohibitions, methods of persuasion, encouragement and coercion.

References:

1. RF Law No. 3132-1 from June 26, 1992 "On the Status of Judges in the Russian Federation" [Zakon RF «O statuse sudei v Rossiiskoi Federatsii» ot 26 iyunya 1992 g. № 3132-1]. *Rossiiskaya yustitsiya – Russian Justice*, 1995, no.11.
2. Braun S., Kharrison L. *Blessing from the Other Side. Words of Wisdom and Consolations from Life after Life* [Blagoslovenie s Drugoi Storony. Slova mudrosti i utsheniya iz zhizni posle zhizni]. Moscow: publishing house "Sofiya", 2004.
3. Budzinskii S. *Fundamentals of Criminal Law* [Nachala ugolovnogo prava]. Warsaw: 1870.
4. Gegel' G. V. F. *Philosophy of Law* [Filosofiya prava]. Translation from German, editor and compiler D. A. Kerimov, Moscow: Mysl', 1990.
5. Ivanov I. S. *Institute of Guilt in Tax Law: Theory and Practice* [Institut viny v nalogovom prave: teoriya i praktika]. Moscow: Prospekt, 2009.
6. Ivanov N. G. *Mental Abnormalities and Problems of Criminal Responsibility* [Psikhicheskie anomalii i problemy ugolovnoi otvetstvennosti]. Moscow: Academy of RF MIA, 1995.
7. Kizilov V. V. The Notion of Guilt in the Code on Administrative Offences of the Russian Federation [Ponyatie viny v Kodekse ob administrativnykh pravonarusheniyakh Rossiiskoi Federatsii]. *Aktual'nye voprosy publichnogo prava – The Topical Issues of Public Law*, 2012, no. 4.
8. Kovalev V. V. *Psychiatry of Childhood* [Psikhiatriya detskogo vozrasta]. Moscow: Medicina, 1995.
9. Lebedinskii V. V. *Disorders of Mental Development of Children* [Narusheniya psikhicheskogo razvitiya u detei]. Moscow: MSU, 1985.
10. Martsev A. I. *General Issues of the Doctrine on Crime* [Obshchie voprosy ucheniya o prestuplenii]. Omsk: 2000.
11. Muzdybaev K. *Experiencing of Guilt and Shame* [Perezhivanie viny i styda]. St. Petersburg: Sociology Institute of RAS, 1995.
12. Muzdybaev K. *Psychology of Responsibility* [Psikhologiya otvetstvennosti]. Leningrad: 1983.
13. Piontkovskii A. A. Social Protection Measures and the Criminal Code of the RSFSR [Mery sotsial'noi zashchity i Ugolovnyi kodeks RSFSR]. *Sovetskoe pravo – Soviet Law*, 1923, no. 3.
14. Piontkovskii A. A. *Criminal Law of the RSFSR. General Part* [Ugolovnoe pravo RSFSR. Chast' Obshchaya]. Moscow: State Publishing, 1925, page 131.

15. *Orthodox Prayer Book* [Pravoslavnyi molitvoslov]. Moscow: Trifonov Pechenga Monastery, Novaya kniga, Kovcheg, 2000.
16. Rubinshtein S. L. *Problems of General Psychology* [Problemy obshchei psikhologii]. 2nd edition, Editor-in-chief E. V. Shorokhova, Moscow: 1976.
17. Sergeevskii N. D. *Russian Criminal Law: General Part: Guide to Lectures* [Russkoe ugovnoe pravo: Chast' Obshchaya: Posobie k lektsiyam]. St. Petersburg: 1908.
18. Skinner B. F. *American Sociological Thought: Texts* [Amerikanskaya sotsiologicheskaya mysl': Teksty]. Under edition of V. I. Dobren'kov, Moscow: International University of Business and Management, 1996.
19. Stolin V. V. *Self-consciousness of an Identity* [Samosoznanie lichnosti]. Moscow: publishing house of MSU, 1983.
20. Tagantsev N. S. *Russian Criminal Law: General Part: Lectures* [Russkoe ugovnoe pravo: Chast' Obshchaya: Lektsii]. Moscow: 1994, vol. 1.
21. Utevskii B. S. *Guilt in Soviet Criminal Law* [Vina v sovetskom ugovnom prave]. Moscow: Gosyurizdat, 1950.
22. Ushakov D. N. *Explanatory Dictionary* [Tolkovyi slovar']. Moscow: Nauka, 1940.
23. Freud Z. *Me and It* [Ya i Ono]. Translation from German of V. F. Polyanskii, under edition of A. A. Frankovskii, Leningrad: ACADEMIA, 1924.
24. Shingarov G. Kh. *Emotions and Feelings as a Form of Reality Reflection* [Emotsii i chuvstva kak formy otrazheniya deistvitel'nosti]. Moscow: Nauka, 1971.
25. Yakobson P. M. *Psychology of Feelings and Motivation: Selected Psychological Works* [Psikhologiya chuvstv i motivatsii: Izbrannye psikhologicheskie trudy]. Under edition of E. M. Borisova Series: Psychologists of Fatherland, Voronezh: Modek; Moscow: Institute of Practical Psychology, 1998.