LEGAL LIABILITY CONDITIONS FOR THE ABUSE OF LAW

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Abstract

Knowing that in more and more cases, the only defence of the party whose law or interest has been injured is to invoke the abuse of law, the express interdiction of the abuse of law becomes a need as an answer to the social demand for legality and equality in all legal relationships. The issues of current legislation related to the abuse of law may be analysed in the light of the social role law has, especially from the viewpoint of its function of harmonization of the individual interests with the general ones. The concrete way to express the abuse of law is represented by the exercise of the subjective law beyond its legal limits as well as the pursuit of a goal in bad faith, but other goal than the one for which the law was consecrated. The role of legal liability for the abuse of law is represented by the legal relationship of constraint whose content consists in a plurality of rights and obligations of substantive or procedural law appearing as a result of commitment of some deeds non-compliant with the model prefigured by the legal norm by which the state is entitled to hold liable the one who exercised a subjective law in bad faith cumulated with the violation of the goal for which such law was consecrated and the guilty party is going to answer for their deed and to obey the sanctions provided under the law. This paper focuses on the conditions that must be met cumulatively, in the current legislation, so that the holder of a subjective law exercised abusively may become the subject of civil, contraventional, criminal, and administrative legal liability, etc.

Keywords: *abuse of law, legality, individual interests, equality, subjective law, procedural law.*

1. Introduction

Citizens' exercising of rights is guaranteed against any arbitrary restrictions imposed by the authorities and, as a result, the law acts not only as a limitation to the individual freedom, but also as an incentive for the free exercising of the rights and freedoms, protecting individuals against arbitrary actions from authorities and the other individuals, the reign of right of the strongest, of the self-will and arbitration, of the *abuse of law*, by eliminating the most important obstacles to the citizens' free exercising of their legitimate rights. As it is expressly provided by the Constitution of Romania, the constitutional rights and freedoms must be exercised in good faith, without any breach of others' rights and freedoms.

As appropriate and clear as the law may be, it is for nothing if the addresses thereof to no conform to it. As already and reasonably outlined in the specialised literature, once they are passed, "the legal rules shall be conformed to by all legal provision addressees, either individually or collectively subjected to the law".[1]

On the grounds of the civil law regulating patrimonial and non-patrimonial relationships established between natural persons and legal persons with equal legal rights and of such rights being sometimes exercised in breach of the limits determined according to the

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[1] Craiovan Ion, *General Theory of Law.* (Bucharest: Militară, 1997), 137; Duminică Ramona, *The crisis of contemporary law.* (Bucharest: C.H. Beck, 2014), 16.

economic and social purposes thereof, the theory of the *abuse of law* was developed firstly in terms of civil law, by way of several specialised papers published on this subject matter.[2]

In the 19th Century, as a mean of counteraction and reaction to the absolutistic trends in civil law, Louis Josserand[3] developed the *abuse of law* theory, making history on this matter in civil law. According to this theory, "the subjective law products of the society and awarded by the society, shall not be abstractly granted for us to exercise them at our discretion *ad nutum;* each of them has its basis and its mission to accomplish. When we exercise them, we have a duty to conform to this spirit and act accordingly. Otherwise, we will deter the right from its purpose and abuse it by making a mistake likely to make us accountable."[4]

In the Romanian legal system, the reference regulations governing *the abuse of law* are provided by Decree no. 31 of 1954, Art. 1-3, according to which, in Art. 1: "the civil rights of natural persons are recognised for the purposes of satisfying personal, material and cultural needs, in accordance with the general interests, under the law and the Socialist cohabitation rules", and Art. 3 (2) provides that the civil rights "may be exercised only for their economic and social purposes".

The concept of *abuse of law* may be defined as a deterrence of the rights from the intrinsic purpose thereof, expressed for the aim for which they were recognised and guaranteed[5]. In other words, the use of the rights for purposes, other than those considered by the legal rule underlying them, such purposes being considered as incompatible with the general interests and the requirements of the social cohabitation rules[6], represents not a use of the rights, but an abuse of law, therefore, the exercising of the rights passing from the normal into the abnormal domain, which removes them from legal protection and exposes the abusively exercised right to sanctioning.

The rights likely to be abusively exercised are the subjective law, namely, the rights representing both the legal means for limiting the behaviour of the other subjects of law by reference to the holders thereof, and for limiting the behaviour of the holders of subjective law by reference to the other. As a result, the subjective law are both the legally guaranteed grounds for requesting the other participants to the legal relationships a specific behaviour, but also, a limitation of the own behaviour, of the own conduct.

Considering that the rights cannot be abusive in themselves, the process referred to as an *abuse of law* does not consist in the abusive existence of the rights, but in the abusive exercising or non-exercising thereof, in the deterrence of the rights from the social and economic purpose for which they were awarded and guaranteed, thereby causing a material and/or moral prejudice or being likely to cause such a prejudice. [7]

The *abuse of law* exists regardless of the nature of a predetermined subjective law but, according to the nature of the subjective law, the nature of the legal grounds arises for requesting a specific type of conduct to the other participants to given legal relationships. Therefore, when the subjective law are civil in nature, the holder thereof have legal civil grounds for requesting to other parties a civil conduct and limit their own civil conduct and, to the extent the subjective law are of another nature, the holder of the concerned rights cannot

[2] Boroi Gabriel, *Civil Law. General. Persons.* (Bucharest: All Beck, 2002); Florescu Dumitru, *Sanctioning the Abuse of Law from the New Civil Code Perspective.* (Bucharest: Romanian Law Magazine, 1973), No. 2; Deleanu Ion, *Subjective Law and the Abuse of Law.* (Cluj: Dacia, 1988); Beligrădeanu Șerban, *Reflecting – in the Doctrine and Jurisprudence – the Notion of Abuse of Law in Labour Relationships.* (Bucharest: Romanian Law Magazine, 1989), No. 7; etc.
[3] Josserand Étienne Louis, (1868 - 1941), French journalist, Dean of the Law Faculty in Lyon.
[4] Josserand Étienne Louis, *French Positive Law Course.* (Paris: Librairie du Recueil Sirey, 1930), 206.
[5] Terre François at al., *Civil Law. Obligations*, (Paris: Dalloz, 10e édition, 2009), 748-749.
[6] Butculescu Claudiu Ramon, *Considerations regarding the influence of the legal culture on the codification in Romania during 1864-2009*, volume, Science and Coding in Romania, (Bucharest, Universul Juridic, 2012), 368.
[7] Mihai Gheorghe, *Fundamentals of Law. Legal Liability Theory*, (Bucharest: C.H.Beck, 2006), 200.

benefit from the grounds under which a specific civil conduct can be requested from others, but from a conduct appropriate to the nature of the concerned *subjective law*. [8]

The subjective law must be put forward according to the purpose[9] thereof from an economic and social perspective, fully balanced against the major meanings of social order, as expressed by the general interests, as a sum-up of individual interests, as a consequence of a systemic character of that [10]. To this effect, the subjective law are to be determined by social order, as an expression of freedom as a necessity, and as legal reasons for human freedom.

2. Contents

The definition of the *abuse of law* as a way of exercising subjective law in breach of the principles for the exercising thereof details two fundamental matters: *a subjective matter* – exercising in bad faith[11] of the rights specific to the field to which they apply and an *objective matter* – deterrence of specific subjective law from the purposes for which they were issued. *Legal liability,* as defined by Rene Savatier[12] is as follows: "… the obligation incumbent on a person to cure the damage caused to another one by way of their deed or by way of the deed of the persons or things depending on such person" shall be a legal constraint relationship, which consist in the following: the right of the State to hold accountable the party having breach the rule of law, by applying the sanction provided by the breached rule and; the guilty person's obligation to be liable for their deed and be subject to the sanction applied based on the legal rule.

Therefore, regardless of the form thereof, the legal liability always faces the State to the trespasser, and the application of the legal rule sanctions does not result only in the restoration of the rule of law breached by the illicit deed[13], but also, in the consolidation of lawfulness, the sanction acting in two manners - *educative and preventive,* and *repressive and intimidating*, these roles being exercised on the trespasser, and on the other participants to the social relationships. This double action of the sanction has different results, depending on the nature of the sanction, sometimes, the educative and preventive side being more important, and other times, the repressive and intimidating one.

According to an analysis of the two institutions of the legal liability, the legal liability in the case of an *abuse of law* can be defined[14] as the legal constraint relationship consisting in the right of the State[15] to hold accountable the person having exercised a subjective law in bad faith and in an unreasonable manner, but also by ignoring the economic and social purposes for which it was granted, the guilty party being liable for their deed and become subjected to the sanctions under the law.

The conditions to be cumulatively met for the holder of an abusively-exercised subjective law to become subjected to the legal liability are as follows:

1. there is to exist a subjective law;

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[8] Djuvara Mircea, General Law Theory; Rational Law – Sources and Positive Law. (Bucharest: All, 1995), 160.
[9] Flămînzeanu Ion. *Elaboration of law, on the formal legistics*, in the review, Romanian Law Studies, (Bucharest: Academia Română, 2009), 27-29.
[10] Butculescu Claudiu Ramon, *The role of international law in uniformity of the legal cultures*, in volume, Romanian law in context of European Union requirements, (Bucharest: Hamangiu, 2009), 445.
[11] Gherasim Dimitrie, *Good Faith in Civil Legal Relations.* (Bucharest: Academia Republicii Socialiste Romania, 1981), 105.
[12] Savatier René, *Treaty on Civil Liability in French Law*, Tome I. (Paris: Librairie générale de droit et de jurisprudence, 1939), 1-2.
[13] Vonica Romul Petru, *General Introduction to Law.* (Bucharest: Lumina Lex, 2000), 539.
[14] Avornic Gheorghe at al., *General Law Theory*, (Chişinău: Cartier, 2004), 494.
[15] Dascalu Betarice-Daiana and Tutunaru Mircea, *Constitutional Law and political institutions. Terms of seminar. Volume 2.* (Craiova, Scrisul Românesc, 2010), 8.

2. the exercising or non-exercising of the subjective law by the holder thereof is to result in an illicit deed;
3. a moral or patrimonial prejudice is to exist;
4. a causal relation is to exist between the illicit deed and the prejudice caused;
5. the subjective law's holder's is to exist.

As it can be seen, in the case of the abuse of law, additionally to the four conditions for the legal liability, as a supplement, there is a subjective law the exercising of which, when in bad faith and in an unreasonable manner, results in a prejudice cause to another person. As long as the condition for the existence of a subjective law is met, regardless of the nature thereof, the legal liability operates so that any of the specific types of legal liability[16] – civil, offensive, and criminal, etc. – may be analysed, subject to the existence of the abusively exercised subjective law and of an abuse of law.

In criminal law, the criminal liability is defined[17] as the criminal legal constraint relationship arising as a result of felony, between the State, on the one hand, and the felon, on the other hand, in the form of a complex relationship, the content of which outlines the right of the State, as a representative of the society, to hold the felon accountable, subject them to the sanction applicable for their crime and bound the execution thereof on them, as well as the felon's obligation to be held accountable for their deed and become subject to the sanction applied, with a view to restoring the rule of law and the authority of the law. In this case, the subjective law of the State to apply sanctions according to the law for specific felonies can be identified as a subjective law that may be exercised, indirectly, through a State representative, which is a judge who, in certain circumstances, may be likely to abuse such rights and, as a consequence, cause a significant prejudice to any person, as a subject to the criminal liability.

2.1 The Existence of a Subjective Law

The *abuse of law* does not exist unless a subjective law exists, which is exercised beyond the internal limitation thereof, by the deterrence thereof from the economic and social purposes for which it was granted. The requirements of this fundamental condition for the legal liability lead to the conclusion that the abuse of law is never contrary to the contents of the positive law or the provisions of the rule of law being, at least formally, in agreement with these. To the extent the exercising of the rights is not conforming to the conduct under the law there would not be about an abuse of law, but an illicit deed committed in the absence of the existence of any rights. Based on this conclusion, an opinion[18] was expressed according to which any abuse of law is apparently legal and may appear to be legitimate under the rule awarding it, a thorough analysis of the deeds being necessary with a view to identifying, punctually, the items defining it.

When the illicit deed is committed without any reference to the exercising of a subjective law, it may, eventually be in the form of a civil offence.

When reference is made to the abusive exercising of subjective law, both the material and substantial, and the procedural subjective law are taken into consideration. Therefore, the regulations in the field must be corroborated, however, ensuring the primacy of the substantial rule of law over the trial rule of law.

Nevertheless, not any *subjective law* is likely to be abused and so, there are *subjective law* cannot be abused, like the non-patrimonial personal rights (the right to have a name, the right to honour and reputation) or a few of the basic rights, enshrined by the Constitution of

[16] Flămînzeanu Ion, *Legal liability*, (Bucharest: ProUniversitaria, 2010), 89-90.
[17] Bulai Costică and Mitrache Constantin, *Criminal Law – General Part.* (Bucharest: Şansa, 1992), 176.
[18] Ştefănescu Traian, *Labour Law Treaty*, vol. II. (Bucharest: Lumina Lex, 2000), 39.

Romania: the right to equal rights, freedom of conscience, inviolability of residence, are subjective law not likely to be abused[19]. The right to life, which is also a fundamental right[20], may be abusively exercised to the extent the holder's will means waiving to such right.

According to other opinions[21], the subjective law, the exercising of which is likely to be abused, could be considered as discretionary but, in fact, the abusive exercising thereof is not possible from a material law perspective. For example, the fundamental constitutional law to have a civil status is not likely to be abused. In this case, it is difficult to agree on the manner in which the acquirer of a civil status by way of the natural act of birth would abuse it but, when subsequently a change in the civil status occurs as a will of the holder thereof, there may be a certain form of abuse whenever the right to change the civil status is exercised for a purpose, other than that enshrined by the law granting it. The same principle also operates for the right of a person to have a name, which may be abusively exercised when the concerned person wishes to change their name.

2.2 Committing an illicit deed by way of subjective law exercising or non-exercising

The second condition to be cumulatively met for an abuse of law to exist is either the existence of an illicit deed committed by way of the exercising or non-exercising of the subjective law, which may be in one of the following forms: by performance, by omission or by performance and omission; therefore, prejudicing a subjective law or a legitimate interest protected by law.

The illegality or illicitness firstly consist in the breach of the objective law, resulting in the prejudicing of subjective law of certain persons, thereby meaning the broad sense of the subjective law notion, which also includes the legitimate interests. Then, illegality also consists in the breach of the social cohabitation rules, to the extent they represent a continuance of the legal provisions outlining the content, limitations and manner of exercising the subjective law recognised by law.

With a view to classifying a deed as being illicit, several dimensions of the deed committed in general, may be identified, as follows: *the material dimension* – it consists in the conduct implied by the intent, which is likely to determine anti-normative changes in the rational reality beyond the trespasser; *the social dimension* – it consists in the damaging or prejudicing of one or several *sine qua non* values of an actual society, regardless whether or not such values are of legal nature and regardless whether they are in the private or public domain; *the legal dimension* – it consists in the fact that the illicit deed is a breach of a legal obligation; *the human dimension* – meaning that the trespasser, more than an entitled person, is a personality. In civil law, the prejudice curing does not involve sanctioning less the trespasser's personality, but sanctioning them in a different way. The illicit deed has the same dimensions even when it injures non-patrimonial subjective law and the courts of law take into consideration all these dimensions, regardless of the type thereof.

According to an opinion[22] expressly stated, depending on the positive law branch, a deed that is illicit is nature is referred to in different ways: *a felony*, in the criminal law; *a breach of contractual obligation or infraction*[23], in civil law; *an offense* in administrative law, *a disciplinary breach,* in labour law. Accordingly, each type of illicit deed relates to a

[19] Tutunaru Mircea, *Constitutional Law and political institutions.* (Craiova: Scrisul Românesc, 2011), 64-65.
[20] Constandache, G.George, Friedman-Nicolescu, Iosif et al., *Algorithm, Norma and Destin*, (Craiova: Alma, 2011), 196-197.
[21] Deleanu, Subjective Law and the Abuse of Law. 93.
[22] Mihai, Fundamentals of Law. Legal Liability Theory, 170.
[23] Filipescu P. Ion, *General Obligation Theory.* (Bucharest: Actami, 1998), 110.

complementary type of liability: the felony committed entails the criminal liability in the form of a punishment; the offense entails the administrative liability, in the form of a penalty; the infraction entails the civil liability in the form of a civil sanction; the disciplinary breach entails the liability specific to the labour law, in the form of an appropriate sanction.

The illicit deed cannot be classified as such when it is committed under circumstances covered by the clauses excluding the illicitness of the deed.

They are the following:

a. Self-defence (Art. 19 of the new Criminal Code), having an exonerating effect when the party in self-defence faces a material, actual, direct, unfair and imminent attack on them, another person or a general interest and which severely endangers the person, or rights of the party under attack, or the general interests – will not, under any circumstances, be considered an abusive deed.

b. The state of necessity (Art. 20 of the new Criminal Code), the execution of an activity imposed or allowed under the law or by an order from the supervisor, issued under the law, the victim's consent and the exercising of a subjective law according to the economic and social purposes thereof. [24]

c. The execution of an activity imposed or allowed under the law, when the requirements of the law have been met or the supervisor issued the order under the law[25] – cannot be clearly illegal and abusive, and the execution manner cannot be attributable to the agent. Such a kind of abuse, which is put forward the most, can be identified in the case of the legal executors' activity – who, even if acting without breaching the rule of law in any way, in many cases are considered, by the executed parties, real masters of abuse.

d. Legal non-liability case, grounded on the concept of risk undertaking, consists in a deed guiltily and easily committed, but only when the victim agreed, before it was committed, to the perpetrators acting in a specific manner, although there was a possibility for an injury to be caused by a prejudice of patrimonial or personal non-patrimonial rights. [26]

e. The exercising of subjective law according to the economic and social purposes thereof cannot be an abuse of law even when such an exercise prejudices the subjective law or the legitimate interests of persons such as particularly in neighbourhood relationships.

2.3. Moral Prejudice and Patrimonial Prejudice

The notion of *prejudice* appears as an essential element of the legal liability concept. Additionally to the meaning of *patrimonial prejudice,* which often, is considered to be the only one by strict reference to the damage caused to the *legal patrimony* of a specific person, the meaning *moral patrimony* of the persons has also been revealed, denoting the moral dimension of the negative effect of the illicit deed. [27]

The prejudice relating to the abuse of law involves certain nuances different from the one implied by the civil liability in tort.

Therefore, *the civil liability in tort* (Art. 1349 of the new Civil Code) implies the existence of a prejudice caused to a specific person as a result of an illicit deed committed by another person. For abuse of law, the liability may be engaged also when the perpetrator is self-prejudiced, if the public interest was injured thereby. As a result, the civil liability in tort is always tributary to a *direct*[28] prejudice, while the abuse of law is likely to also have an

[24] Stătescu Constantin and Bârsan Constantin, *Civil Law Treaty. General Obligation Theory.* (Bucharest: All Beck, 2002), 231.
[25] Antoniu George at al., *Criminal Law Explained to Everyone by Additional Explanations,* VI[th] ediction, (Bucharest: Societatea Tempus, 1996), 171.
[26] Anghel M. Ioan at al., *Civil Liability.* (Bucharest: Ştiinţifică, 1970), 80.
[27] Popescu Sofia, *General Law Theory.* (Bucharest: Lumina Lex, 2000), 302.
[28] Eliescu Mircea, *Civil Liability in Tort.* (Bucharest: Academiei, 1972), 83.

indirect negative consequence whereby society becomes a general passive subject, indirectly injured by such abuse.

The moral damage also includes the abuse in the form of a continuous baffling and pressuring of a person into a specific conduct. The negative result of such abuse can only be assessed by reference to the criteria underlying the determination of the moral prejudice.

The victim of an abusive deed is entitled to have the entire damage cured, regardless of the nature thereof. However, the curing function of the sanction applied in terms of civil liability in tort is not completely effective in the other fields of application of the abuse of law. In many cases – disciplinary liability in labour law, parental liability in family law – the preventive function of the specific sanction prevails, and the curing of the whole prejudice is virtually impossible. Without the *existence of the prejudice* there cannot be any question of an actual abuse of law nor will the mechanisms entailing the legal liability be started.

The prejudice must be certain both in terms of the existence thereof, and of the possibility to determine the coverage thereof currently and in the future, with a view to being able to quantify the legal liability of the trespasser. A potential prejudice, which might happen in the future, cannot be cured.

The prejudice must exist and be direct – to be a direct consequence of the illicit deed.

The prejudice must be personal – only the party whose subjective law was directly abused may claim both the discontinuance of the illicit deed, and the curing of the prejudice caused that way. The right to the curing thereof may be transferred on the prejudiced party's inheritors or may be exercised by one of the creditors thereof by a derivative action.

The prejudice must be a result of a breach of subjective law or of legitimate interests, of interests resulting from a standing state of facts, and the concerned interests must not be contrary to the social cohabitation rules. [29]

For the injured party's right to cure to become applicable, the prejudice must meet one last condition, namely, *not to have been cured by the trespasser or by a third party.*

2.4. Causal Relation

Since the abuse of law cannot be continuously conceived without the occurrence of a damaging, moral or patrimonial outcome by the deed thereof, it cannot be abused in the absence of a *causal relation* which is to exist between the abusive deed and the damaging outcome thereof. [30]

When a causal relation may be identified between the existence of an abusive deed committed by a subject of law and the existence of a damaging outcome may be determined, the abuser of law is to be held liable for the prejudice caused by his/her deed. As long as a cause-effect relation cannot be established between the abusive deed and the prejudice, the legal liability cannot be put forward.[31]

According to the definition of the system of the cause[32] category as the phenomenon which, prior to the effect thereof, is necessarily causes it to such system, the deeds not representing such cause, but only the conditions for the performance of the causing action are not in a causal relation to the prejudice, even if such conditions had great contribution to the outcome occurrence. The deficiency of this system consists in the failure to sanction the deeds acting as conditions even if the existence of the appropriate conditions create the possibility

[29] Mihai Gheorghe, *Unavoidable Law.* (Bucharest: Lumina Lex, 2002), 269.
[30] Deleanu, Subjective Law and the Abuse of Law, 107.
[31] Antoniu George, *Causal Relation in Criminal Law.* (Bucharest, Ştiinţifică, 1969), 235.
[32] Deak Francisc, Conditions and Fundamentals of Civil Liability for Prejudices Caused by Things. (Bucharest, Romanian Law Magazine, 1967), Nr. 1/1967, 18-22.

for a causal phenomenon to necessarily cause another *effect phenomenon*. With a view to overcoming the deadlock thus created, the developers of the *necessary cause* system consider that "under the law, it is possible to engage the civil liability of persons not having caused the prejudice, but acting as conditions for the causing thereof". [33]

The second system starts from the *cause indivisibility principle,* given that the system putting forward the idea that the causal relation determination is to take into consideration that the causal phenomenon does not act on its own, and the performance thereof is conditioned on certain factors, which, without causing the damaging or really dangerous effect in themselves, however, favour such effect occurrence. The theory[34] puts forward the notion of *causal complex,* or *full causal relation,* ready to explain both the consistent action of different kinds of causes and the consistent action of the causes and conditions with a view to causing a single effect.

2.5. Guilt

The legal liability for committing an abuse of law is grounded on the principle of guilt[35]. Guilt is a psychic, selective and externalised process, in the sense that the lawmaker uses not only the psychical elements intervening in actions breaching the law, being analysed only in the framework of external actions, the existence and assessment of the psychical processes being based on the analysis of an actual deed. Bad faith underlies intended behaviours and represents the externalised[36] will of the trespasser to damage the subjective law or the legitimate interests of a person.

Guilt takes three forms: *intent, fault* and *praeterintention* (oblique intention).

Intent[37] has different manners, depending on the attitude of the subject of law to the occurrence of the dangerous outcome, as *direct intent* – when the trespasser foresees and seeks the occurrence of the social dangerous outcome and *indirect intent* – when the trespasser foresees the outcome of his/her deed but does not seek it, however, accepts the possibility for such to ccur.

Fault[38] - the second form of fault – implies that the subject of law committing an illicit deed foresees the outcome of his/her deed but, while not seeking and not accepting the probability for the occurrence thereof, he/she hopes for the outcome not to occur or does not foresee the outcome, although he/she should have. Fault, also, has two forms: *prevision or imprudence or easy fault,* when the trespasser foresees the outcome of his/her deeds but does not accept it, unreasonably considering that it will not occur and *simple fault or negligence fault* when the trespasser does not foresee the outcome of his/her deed, although he/she should have. From direct intent through simple fault, the extent of the guilt gradually decreases, but, since the abuse of law is common to several branches of law and, as legal liability sometimes also applies for the smallest fault, when acting by fault, the abuser of law is to be legally liable in at least one form of this legal institution.

Another form of guilt, which is most often identified in criminal law (hitting or injury causing death) is the *praeterintent* which is a mix between intent and fault and, for this reason, it is also referred to as oblique intent, whereby the initial outcome is caused with intent, however, the more serious intent, which is significant and decisive occurs by fault, being much closer to fault, and not to intent.[39]

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[33] Stătescu and Bârsan, Civil Law Treaty, General Obligation Theory, 202.
[34] Eliescu, Civil Liability in Tort, 148.
[35] Antoniu, Causal Relation in Criminal Law, 21.
[36] Antoniu George, *Attempted Actions.* (Bucharest: Societatea Tempus, 1996), 32.
[37] Dobrinoiu Vasile et al., *Criminal Law, General Part.* (Bucharest: Europa Nova, 1997), 80.
[38] Antoniu George, *Criminal Guilt.* (Bucharest: Academia Română, 1996), 26 and flw.
[39] Dongoroz Vintilă, *Criminal Law.* (Bucharest: Institutul de Arte Grafice, 1939), 80 and flw.

3. Abuse of law in the New Civil Code

In the matter of the *abuse of law*, the new Civil Code is a breakthrough, in the sense that, while the prior civil law included express references to such, the abuse of law is enshrined under the provisions of Art. 15, according to which "no right shall be exercised with a view to excessively or unreasonably injuring or damaging another party contrary to good faith". According to these provisions, two assumptions on the abuse of law may be identified: on the one hand, *the exercising of a right with a view to injuring or damaging another party* and, on the other hand, *the excessive and unreasonable exercising of the right, contrary to good faith.*

Good faith, an essential condition for the exercising of each person's fundamental rights, for which, when breached, an abuse of law occurs, is regulated under Art. 14 (1) of the new Civil Code, according to which "the natural and legal persons part of civil legal relationships shall exercise their rights and comply with their obligations in good faith, in accordance with public order and good mores", and, under par. (2), "good faith is presumed until proved to the contrary". Then, complementary, Art. 26 states that "the civil rights and freedoms of natural persons and the civil rights and freedoms of legal persons shall be protected and guaranteed by law".

After establishing these principles for civil right exercising, the new Civil Code makes several references to good faith, thus, in Art. 1170, it is provided that "the parties shall act in good faith both when negotiating and when concluding contracts, and also, during the performance thereof" and in Art. 1183 (2) it reiterates the same provision according to which "the party engaging in a negotiation shall be bound by the requirements of good faith" and then, in Art. 3 and 4 of this latter text, good faith is successively referred to in case of negotiation without intent for contract conclusion and for when the party initiates, continues and interrupts negotiations. When one of the parties initiates a negotiation for a contract but does not have any intention to conclude the contract, the Unidroit Principles, in Art. Art. 2.1.15, point 3 provides that "a party acting particularly in bad faith shall be the party initiating or continuing negotiations when there is no intent to reach an amicable agreement with the other party". It is difficult to assess and decide on which party acts in bad faith when bad faith is presumed to exist, and the Court may have the deciding role when it is summoned to order on the matter. Another provision supplementing the regulations on abuse of law is the one in Art. 1353 of the new Civil Code according to which "the party causing a prejudice for the very exercising of the rights thereof shall not be bound to cure such, except when he/she committed the deed with the intent to injure another party".

4. Conclusions

To conclude, the liability for abuse of law survives in the new regulations, as a particular form of the civil liability in tort, so that it cannot be engaged in the absence of guilt and of the prejudice caused to another person. As a legal institution, the abuse of law is intended to answer the question whether and under which circumstances a right exercising may be considered as a prejudicing deed and to sanction, based on such answer(s), the legal documented concluded by abusing rights and all subsequent consequences thereof. By reference to the practice accrediting the idea of an abuse of law existence, however, corroborated with the reluctance of the courts of law to sanction such, which can also be explained by the lack of express legal rules, the regulation of such institution by the new legislation is beneficial, creating the premises for extending the solutions of the jurisprudence in the field. The existence of good faith will be an important assessment element in terms of abuse of law in the sense that, where there is good faith, there cannot be an abuse of law and,

to the extent it is exercised in bad faith, by deterring thereof from the economic and social purposes for which it was granted and by breaching other parties' rights, respectively, it can no longer be under legal protection, the court of law being the one assessing it and ordering accordingly.

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