THE FUNDAMENTS OF EXPLANATORY CAUSES

Lavinia Mihaela VLĂDILĂ*

Abstract:

The new Criminal Code in the specter of the legal life the division of causes removing the criminal feature of the offence in explanatory causes and non-attributable causes. This dichotomy is not without legal and factual fundaments and has been subjected to doctrinaire debates even since the period when the Criminal Code of 1969 was still in force. From our perspective, one of the possible legal fundaments of the explanatory causes results from that the offence committed is based on the protection of a right at least equal with the one prejudiced by the action of aggression, salvation, by the legal obligation imposed or by the victim's consent.

Keywords: *legal fundament, explanatory causes, anti-legality, typicality.*

1. Introduction

The current study aims the fundamental analysis of the explanatory causes, necessary because the new Criminal Code makes a new distinction of the causes removing the criminal feature of the offence, by dividing them into explanatory cases and non-attributable causes.

Why was it necessary such different approach? By what is justified materially, formally or legally?

The new Criminal Code does not define the explanatory cases, in general, just enlists them, defines them each other and reveals their effects. According to it are explanatory causes the self-defense (Art 19), the state of emergency (Art 20), the exertion of a right or the fulfilment of an obligation (Art 21) and the victim's consent (Art 22), the latter one being of absolute novelty in the Romanian criminal legislation, while the exertion of a right or the performance of an obligation was stated before by our previous codes, namely the one from 1864 and 1937.

According to Art 18 of the new Criminal Code, an action is not an offence if it is committed under the conditions of one of the explanatory causes. Thus, the main effect, criminally speaking, of keeping one of the explanatory causes is represented by the consideration of the offence as anti-judicial, tort, as not being an offence, because, though it is stated by the criminal law, it has in that context, a just feature. Therefore, unlike the previous legislation, self-defense or the state of necessity are no longer causes removing the criminal feature of the offence because the offence is not committed with guilt, but because it has a just feature; as a conclusion, in these cases, the perpetrator commits the criminal offence conscious of his actions and their effects, but, nevertheless, the criminal law understands to approve such behaviors, by considering them justified (allowed and licit), for the reasons which shall further exposed[1].

2. The notion of offence and the new concepts of typicality and anti-legality

According to Art 15 Para 1 of the new Code Penal, it is offence the action stated by the criminal law, committed with guilt, unjustified and attributable to the person who has committed it. Thus, from the definition, it results that are considered, in the present, features of the offence, the lack of stating the offence in the criminal law (the legality aspect of incrimination and thus of typicality – Art 1), the absence of guilt and the imputable feature (Art 16) and the unjustified feature[2]. When even one of these features is absent, the action is no longer an offence, a criminal sanction not being applicable. This is why, in our opinion, unlike that of other criminal doctrinaires of very high value[3], the explanatory causes are just one of three types of causes which can remove the criminal feature of an offence, each of them removing one of the essential features of the offence. Because they can have a

* Lecturer, PhD, Faculty of Law and Administrative Studies, "Valahia" University of Targoviste (e-mail: **laviniavladila@yahoo.com**).

[1] Lavinia Valeria Lefterache, *Drept penal. Partea generală. Note de curs*¸ Universul Juridic Publ.-house, Bucharest, 2014, p. 93; George Antoniu, *Noul Cod Penal și Codul Penal anterior, privire compratívă. Partea generală*, in the Romanian Criminal Law Review, No 4/2004, p.15; Florin Streteanu, *Tratat de drept penal. Partea generală*, C.H. Beck Publ.-house, Bucharest, 2008, p.470

[2] In our opinion, there are not four features of the offence, but only three, because the attributive feature is part of the guilt, which it completes in order to become one feature of the offence and not two, different. Also, in the German doctrine, where this concept has first emerged, after that being taken by Austria, Spain, Portugal, Greece, the offence was defined from the perspective of the three features, previously stated by us (typicality, anti-legality and guilt). See in the meaning of a comparative law analysis, Lică Constantin, *Tipicitate și antijuridicitate*, in the Romanian Criminal Law Review, No 2/2008, pp. 143-145

[3] With all due respect for the Prof. George Antoniu, we cannot share his opinion according to which, the explanatory causes are different from the causes removing the criminal feature of the offence in which are included only the absence of typicality and of guilt, namely cases of non-attribution, because for some of them may be ordered safety measures, having a subjective feature. George Antoniu, *Cauzele justificative*¸ in the work coordinated by George Antoniu, *Explicații preliminare ale noului Cod Penal*¸ 1st Vol., Art 1-52, Universul Juridic Publ.-house, Bucharest, pp. 175-176. In the meaning of our arguments, see also the opinion of Gheorghe Ivan, Maria Claudia Ivan, *Drept penal. Partea generală conform noului Cod Penal*, C.H. Beck Publ.-house, Bucharest, 2013, p. 134

simultaneous existence with the commission with guilt of the offence, are considered by the doctrine as objective causes, while the causes of non-attribution are considered subjective causes[4].

When an offence is committed, which can have a criminal feature, the first of these features to be analyzed is the one referring to the fact if the offence is stated by the criminal law. A part of the French doctrine, considers this action as being enough, and as involving the attribute of typicality, German term. In this case, the French doctrine uses the term of **legal element**, the authorized bodies having to be sure that the concrete offence corresponds to a legal definition stated by a previous adopted text[5]. According to the new Romanian criminal conceptions, of German inspiration, as previously shown, supplementary to this first normative phase, it shall be analyzed if the offence is identical with the incrimination norms, presenting all its constitutive elements, this concordance being named **typicality**[6].

Nevertheless, an offence may be stated by the criminal law and may have a typical feature, but it can be justified, when it is authorized by a legal norm, when there is the consent of the victim (according to the law), when a right is protected or when an action to save is performed, under the conditions of the law[7].

This is why when the offence has no unjustified feature, we are in the presence, *per a contrario*, of an explanatory cause, "*being the proof that the incriminated action is not, simultaneously, contrary to the law*"[8]. This position of contrariety of a criminal action with the law itself, with the legal order, has been named as **anti-legality**[9], the term being taken on the Spanish channel[10], from the German doctrine.

According to Prof. Maria del Carmen Gómez Rivero, a certain anti-judicial behavior is when it trespasses a certain imperative norm, which without being justified, it endangers the social relation protected by that norm (the special legal object protected by the incrimination of the offence, we might add), which cannot be protected only by extra-judicial means[11]. This is why the anti-legality has a formal aspect, because it aims the violation of a criminal norm and a material aspect (substantial). Also, in order to be ascertained, the anti-legality requires a positive fact, namely the typicality, and a so-called negative fact, the absence of the explanatory causes[12].

Therefore, the two concepts, of anti-legality and of explanatory causes are complementary, the presence of one denying the other one, and vice versa[13]. The presence of an explanatory cause shall make the action to have a licit feature, according to the law and legal order. This idea wishes to emphasize that the presence of an explanatory cause in the commission of a criminal offence makes it permissible by the criminal law, but it does not assume that it is positive or wanted. Also, its existence (of the explanatory cause) does not necessarily assumes the absence of the typical feature of the offence, but "*it removes ab ignition the vocation of the typical action to transform into an offence*"[14].

Another issue generated by the apparition of the new concepts, was if, outside the explanatory causes stated by the Criminal Code, we may add some new ones. Starting from the principle of the legality of the incrimination, the existence of an explanatory cause is analyzed only from the perspective of the ones expressly stated by the law (here are listed all types of explanatory causes, including the ones stated as special causes applicable to certain offences, or the ones stated by other laws than the Criminal Code), because these represent exceptions from the principle of the criminal repercussions and cannot be of strict interpretation[15]. Though, in the German doctrine, starting from the differentiation between anti-legality, specific criminal notion (where the idea that the notion *criminal anti-legality* is a pleonasm), and the judicial licit, which can exist in all areas of law[16], it is considered that there are explanatory causes also in other areas of law, whose role is to remove the legal illicit. Although in terms of effects, these are identical, however the criminal explanatory causes are limited and, in general, are applicable to all areas of law[17].

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[4] Ioan Lascu, *Cauzele justificative și cauzele de neimputabilitate în Noul Cod penal*, in the Romanian Criminal Law Review, No 3/2011, p. 72

[5] The French doctrine studied by us does not use the term of typicality, but the one of legality. See Harald Renoult, *Droit pénal général*, 12th Ed., Paradigme Publ.-house, Orléans, 2007, p. 111

[6] Matei Basarab *et al.*, *Codul penal comentat. Partea generală*, 1st Vol., Hamangiu Publ.-house, Bucharest, 2007, p. 77

[7] Lavinia Valeria Lefterache, *op. cit.*, p. 94

[8] George Antoniu, *op. cit.*, p. 172

[9] Matei Basarab, *op. cit.*, p. 77. We note that the majority of the Romanian doctrine, unlike a part of the Spanish doctrine, consider anti-legality as being contrary to the entire legal order, and not just against the criminal norms.

[10] Certain Spanish authors, without explicitly using the term, define anti-legality as strictly being of a criminal nature (criminal anti-legality) and thus, as being formed only from those behaviors contrary to the criminal law, and to all the law, in general. See Luis Arroyo Zapatero, et al., *Curso de derecho penal. Parte general*, Experencia Publ.-house, Barcelona, 2004, p. 193. This is also the idea of Santiago Mir Puig, *Derecho penal. Parte general*, Reppertor Publ.-house, Barcelona, 2002, p. 146

[11] Claus Roxin, *Derecho penal. Parte general. Tomo I. Fundamentos, la estructura de la teoria del delito*, the translation from German into Spanish of the second edition, Civitas Publ.-House, Madrid, 2006, Para 4

[12] Maria del Carmen Gómez Rivero, Maria Isabel Martínez González, Elena Nuñez Castaño, *Nociones fundamentales de derecho penal. Parte general*¸ Tecnos Publ.-house, Madrid, 2010, p. 219; in the same meaning, see also Luis Arroyo Zapatero et al., *op. cit.*, pp. 194-195.

[13] Lică Constantin, *op. cit.*, p. 145

[14] George Antoniu, *op. cit.*, p. 174

[15] *Ibidem*, p. 175

[16] Claus Roxin, *op. cit.*, Para 1-3

[17] Ibidem, Para 36

Prof Florin Streteanu, also inspired by the German doctrine, appreciates in the same meaning that the "number of explanatory causes cannot be considered as definitive to those recognized in a given moment, the evolution of society determining the recognition and statement of new circumstances"[18].

Nevertheless, the aspects of legality, especially in the area of the criminal law, must prevail, and the judge is compelled to respect the formal concept of anti-legality before the material one, as explained by Claus Roxin[19].

The concepts of anti-legality and typicality, though they complete the theory of offence, do not fully explain the fundaments of the explanatory causes. This is why, in order to discover these fundaments we shall start our analysis from their creators, namely the German doctrine, supported by the Spanish, Portuguese and Italian etc. ones.

3. The fundament(s) of the explanatory causes

According to the German doctrine, pre-quoted, with the elaboration of the concept of explanatory causes, it was aimed its theoretical ground. In the beginning it was tried the creation of a unique fundament for all explanatory causes, elaborating the *theories*, called *monists*. The first of them was created by Wilhelm Sauer, in 1955 and supported by other German authors who have added their own opinions, such as Peter Noll (1965) or Eberhard Schmidhaüser (1987) and was named the *theory of purpose*, according to which an action is just in the area of law if it represents a proper mean for the achievement of a purpose recognized by the legislator as being just (fair). In other words, an action is just and permitted by the law if by it the community obtains a benefit higher than the prejudice caused. To this theory, we would say *utilitarian*, Peter Noll has added as fundament "*the ponderation of values*", while Eberhard Schmidhaüser considers that retaining an explanatory cause preserves that social relation considered as more valuable than the one prejudiced[20]. The same opinion is partially shared by the Spanish authors José Zugaldía Espinar and Esteban Pérez Alonso, for whom the law authorizes a criminal offence in order to save an interest of higher importance than the one sacrificed[21].

Though the theory and its later amendments cannot ground the situation in which both prejudiced values are identical (life against life, for instance). It is noticed that this theory puts on an equal footing a legitimate interest with a right recognized by the law and prioritizes the concept of material anti-legality.

Moreover, the German authors themselves have considered that this theory cannot justify all situations, and thus have emerged the *dualist theories*. Part of these theories have continued to find a common ground for all explanatory causes, while other have tried to find a common ground for all, which was subsequently completed for each explanatory cause.

Back to the German doctrine, Prof Edmund Mezger and Hermann Blei add to the "*theory of the predominant interest*" that of the "*absence of the unjust interest*"[22]. The absence of the interest refers to the situation in which the owner of the right or of the protected legitimate interest is no longer interest in his legal protection and agrees with its "violation" (in other words, when the victim consents to bear a certain prejudice, either material or moral, or both, then there is no confrontation of interests grounding the explanatory cause)[23]. This is why this idea offers to the consent a special place in the justification of the criminal action; though it (the consent) cannot justify by itself "*the collision of interest*" neither it represents a legal base for self-defense, for instance. For these reasons, Claus Roxin considers that this is one of the cases which exclude typicality, and thus not a fundament. For him, the common ground of all explanatory cases is represented by the "fair social regulation of opposite interests" – or, i.e. the criminal offence committed does not generate a social prejudice, being appreciated as fair by the society and, also, necessary for the protection of the prejudiced social relation[24].

With this completion a legal basis shall also be received by the situations in which the two interests or rights are equal as social value.

This is why lately have become widespread those dualist theories which finding a common ground for all – saving the predominant interest – more often, add another legal basis to each of the explanatory causes.

Certain known Romanian authors consider as general ground for explanatory causes the prevalence of the permissive norms, which remove the illicit feature, before the imperative norms which incriminate different criminal actions. This prevalence of the permissive norms is determined by the superior requirements of the social legal order, because the criminal action in the presence of explanatory causes is not contrary to the law[25].

According to us, the general ground of explanatory causes, which can be completed for each

[18] Florin Streteanu, *op. cit.*, p. 471

[19] Claus Roxin, *op. cit.*, Para 12 and 14

[20] Ibidem, Para 38

[21] José Zugaldía Espinar (director), Esteban Pérez Alonso (coord.) *et al.*, *Derecho penal. Parte general*, 2nd Ed., Tirant lo Blanch Publ.-house, 2009, p. 554

[22] Claus Roxin, *op. cit.*, Para 39

[23] Maria del Carmen Gómez Rivero, Maria Isabel Martínez González, Elena Nuñez Castaño, *op. cit.*, p. 224

[24] Claus Roxin, *op. cit.*, Para 40

[25] Traian Dima, *Drept penal. Partea generală*, 3rd Ed., Hamangiu Publ.-house, Bucharest, 2014, p. 181; see also, George Antoniu, *Explicații preliminare...*, *op. cit.*, p. 172

situation, should be searched in the very name of those causes; they express what is morally fair and just, but also legally, in the given case, for as long as we stay within the legal limits. Though are no longer considered as causes removing the guilt, because the offence is committed with intent, at least the aimed result, yet its action is within the limits permitted by the general law, but also by moral, being fair from the social perspective.

Furthermore analyzing the situation of each explanatory cause, we find that for Roxin, the ground of **self-defense** resides in the combination between the theory of the protection of the prejudiced social relation with the principle of the prevalence of law in front of an unjust aggression (we might add). The same idea is supported by the authors coordinated by José Zugaldía Espinar, who add the fact that self-defense also has "a general function of prevention, in the meaning that it warns the potential offender that the victim may react in the most energetic way possible"[26].

For the Romanian author Florin Streteanu the justification of self-defense resides in the prevalence that the society must give to the unjustly prejudiced social value, which in fact represents a combination between the theory of saving the predominant interest with the prevalence of the right of the innocent one in front of the unjust aggression[27].

Other Romanian authors legitimate this probative cause in that as long as the state which had the obligation to protect the social order cannot do it promptly, then it shall allow the possible victim to act for her own protection[28].

The **state of emergency** has as legal base the same principle of protecting the prejudiced social relation, but to the extent to which it is performed proportionally with the caused prejudice[29] (let us remember that one of the conditions of the state of emergency is that the saving action to not generate consequences more serious unless it would not have occurred[30]). But some Romanian authors suggest as fundament the absence of a real prejudice caused to the social order[31], which is near the general ground found by Roxin in his argumentation.

For the exercise of right and the performance of an obligation, the fundament was found in the very unity of the legal order, which cannot order or allow a certain thing within an area of the law or by a norm and to prohibit it in another area or by another norm[32]. Indeed, for as long as a person shall exercise a right or fulfils an obligation imposed by the law, it is protected by the law which states the right or the obligation. However, also in these cases has been ascertained that there are situations in which the initial limits established by the law are superannuated, taking either the form of the abuse of law, or the one of damaging certain legitimate interests or even rights of a person in the performance of an obligation imposed by the law. Is such attitudes are outside the area of law which allowed or imposed them and reach the area of criminal law, then the commission of a criminal action is no longer justified and the action shall be an offence, if other causes removing its criminal feature do not occur.

Same in the case in which the obligation is imposed by an authority, it is justified only if the authority who ordered it was entitled to do this, namely was a competent authority and, in addition, if this order was not intentionally illegal[33].

Finally, the last of the explanatory causes stated by the new Romanian Criminal Code is the **victim's consent**. Considered by itself a fundament by a part of the German doctrine, as stated before, the victim's consent finds its legal base in the possibility offered by the Art 26 Para 2 of the Constitution, according to which "*any natural person has the right to freely dispose of himself unless by this he infringes on the rights and freedoms of others, on public order or morals*". Hence, the fundamental law itself expresses the ground for this explanatory cause, in the right of any person to freely dispose of himself, but within certain limits, which are the compliance with the general legal order, we might say. This public order imposes that the victim of a criminal action can waive only the rights to which morally and legally can waive, enjoying of a right of disposal over them. This is why this explanatory cause is not and shall not be recognized for the offences against life or in other cases expressly stated by the law[34] (for instance, the case stated by Art 190, 210 Para 3 and Art 211 Para 3 of the new Criminal Code).

Other authors propose as basis in this case the very idea of victim's waiving, with the condition that the victim to be the owner of waived value and the value to be of significant importance[35]. Though fair this allegation, in our opinion is preferable a positive base than a negative idea as legal ground for this explanatory cause.

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[26] José Zugaldía Espinar (director), Esteban Pérez Alonso (coord.) *et al.*, *op .cit.*, p. 556

[27] Florin Streteanu, *op. cit.*, p. 478

[28] Ilie Pascu, Vasile Dobrinoiu *et al.*, *Noul Cod penal comentat. Partea generală*, 2nd Ed., Universul Juridic Publ.-house, Bucharest, 2014, p. 147

[29] Claus Roxin, *op. cit.*, Para 41

[30] Lavinia Vlădilă, Olivian Mastacan, *Drept penal. Partea generală*, 2nd Ed., Universul Juridic Publ.-house, Bucharest, p. 143

[31] Florin Streteanu, *op. cit.*, pp. 506-507; Ilie Pascu, Vasile Dobrinoiu *et al.*, *op. cit.*, p. 159

[32] Florin Streteanu, *op. cit.*, p. 540

[33] According to Art 21 of the new Criminal Code

[34] According to Art 22 Para 2 of the new Criminal Code

[35] Florin Streteanu, op. cit., p. 528

4. Conclusions

The new Criminal Code has inserted new concepts by borrowing certain elements from the German and Spanish doctrines, among which the one of dichotomy explanatory causes – non-attributive causes. This article aimed to reveal the reason for which such differentiation was necessary, searching for the ground of the explanatory causes. It proved to be not an easy task, because we have found many opinions, some of them contrary, other ones complementary, but all very interesting. We have reached the conclusion that it is possible a general cause – the performance of what it is just, from the legal and moral perspective, ground completed with other elements for each of the four causes, as previously presented.

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