THEORETICAL ISSUES REGARDING THE JUSTIFIABLE CAUSE FOR EXERCISING A RIGHT OR FULFILLING AN OBLIGATION

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Abstract

The review of the legal background, based on which was inserted in the time-specific normative acts, the justifiable cause under study indicates the legislator's concern to provide some provisions removing the unjustifiable character of a criminal act.

The legislator authoring the new Criminal Code emphasized that not all the causes removing the criminal character of an act are based on the absence of guilt. As regards justifiable causes, criminal law allows committing some acts that it itself forbids. In fact, in the context of some well-delimited states or circumstances, the unjustifiable character of a criminal act is removed, providing it the aspect of legality.

The doctrine underlined the need for a regulation granting safety and certainty upon fulfilling their duties to the person enforcing the law, especially when, between such person and the law, an authority empowered to issue orders interposes itself; this means that such person should be aware that they are protected and defended against any liability, to the extent they fulfill their work-related duties in strictly legal conditions.

Keywords: *cause, justifiable, exercising, right, fulfillment, obligation.*

1. Introduction

Criminal law, as a branch of legal-criminal sciences, is essential for establishing the rules and punishments intended to protect social values and human safety, serving to identify behaviors that are dangerous to society as a whole, and to establish the punishments applicable to such. By defining and enforcing the laws, criminal law contributes to preventing and combating criminality, providing the legal framework required for ensuring social order and safety.

Moreover, it is important to consider the evolution of society as a whole as regards developing and perfecting criminal law rules. This involves continuous adaptation of laws to social and cultural changes, in order to efficiently meet the contemporary challenges, this being not only a punishment system, but an effective tool for promoting and protecting fundamental social values, such as safety, individual rights and liberties, and the social milieu as a whole.

The general part of criminal law requires a more comprehensive theoretical discussion, given that each solution chosen by the legislator is based on a certain theory, chosen in its turn from among a larger number of theories proposed by the doctrine.

In this paper, we are going to focus on a series of criminal law issues from its general part, emphasizing especially, as the title of our paper suggests, some judicial theoretical and practical issues related to the justifiable cause for exercising a right or for fulfilling an obligation.

This justifiable cause is set forth in the provisions of art. 21 CP, as follows:

- is justifiable the act set forth by the criminal law, consisting in exercising a right recognized by the law, or in fulfilling an obligation prescribed by the law, in compliance with the conditions and limits provided by it;
- is also justifiable the act set forth by the criminal law, consisting in fulfilling an obligation prescribed by the authority with jurisdiction, in the form set forth by the law, unless this is obviously unlawful.

Hereinafter, we are to approach the theoretical issues related to the justifiable cause we referred to, in view of grasping some notions such as parental authority/ the right to discipline, official authorization, exercising some constitutional rights, exercising some creditor's rights, fulfilling an obligation or order. Further, we are

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going to present a series of comparative law issues and, last but not least, we are going to provide a brief review of some questions related to the evolution of legislation.

2. Evolution of legislation

The issue of exercising a right or executing an obligation has emerged as early as 1865, being brought to attention in the Romanian criminal law, more precisely in „*Codul Cuza*" (Cuza Code), the first Romanian Criminal Code, inspired by the French Criminal Code of 1810 and the Prussian Criminal Code, drawn up in 1851.

The provisions of art. 57-65 CP 1865 mentioned „*The causes that defend against punishment or diminish punishment*". In the special part, were stated some reasons for excluding liability in cases of murder, injuries or beatings, such as „order of the law" and legitimate defense in the event of nocturnal break-ins (art. 255-257). Art. 302 prescribed a special justifiable cause, consecrating thus the principle of judicial immunity.

It is relevant that this justifiable cause has, in part, a precedent in art. 255 CP 1865, stating as follows: „*Are not considered murder or crime the manslaughter, injuries and beatings prescribed by law and ordered by the legitimate authority*."

We should emphasize that CP 1865[1] contained a special cause for excluding crime, operating only in the event of murders, manslaughters and beatings or injuries.

Subsequently, CP 1936[2] kept, as the CP 1865, „*the causes defending against punishment*" as well as „*the causes diminishing punishment*". Even if not adopting explicitly the classification of causes defending one against criminal liability into non-culpability causes and justifiable causes, it, however, acknowledged tacitly such division, by using specific phrases, such as „*are not liable for*" the crime – in the case of non-culpability causes (for example: art. 128, 129, 131), the phrase „*it is not considered*" a crime, in the case of justifiable causes (art. 131 – where the state of necessity was provided; art. 132 –emphasizing legitimate defense; art. 134, providing acts of God; art. 137, which emphasize the prescription and order of the legitimate authority).

The two main sources of inspiration were the Italian Criminal Code and the Transylvanian Criminal Code, which, in essence, was based on the Italian and, respectively, Austrian legal models.

According to art. 137 CP 1936: „*The following are not considered crimes: the act prescribed or authorized by the law, if executed according to law, as well as the act committed by the authority with jurisdiction, in virtue of a work-related order, if such order is given, in legal forms, by the authority with jurisdiction and unless it is obviously unlawful*".

The publication of the CP 1969[3] marked the introduction of a series of modern criminal policy principles.

It is relevant that the provisions of art. 21 CP, in force at this moment, have no equivalent in the general part of the CP 1969.

However, in the special part, within the rule incriminating torture, provided under art. 267 para. (5) CP 1969, mentioned the following situation: „No exceptional circumstance, of any type, whether a state of war or threats of war, domestic political instability or any other exceptional state can be invoked for justifying torture; and, neither the order of a superior or of a public authority can be invoked."

The legislator authoring the CP 1969 considered as evident that an action allowed or required by law or by the superior authority within it cannot be considered a crime in such circumstances.

Although, in other situations, such action could fulfill the incrimination criteria, this was considered implicit and evident naturally, without requiring any express regulation.

According to the CP 1969, if an action was respecting the law in general, such action was supposed not to be regulated by the criminal law, so that was not a crime and, therefore, did not involve criminal liability.

Further, another reason invoked was that, in such a situation, the action regulated by the criminal law cannot be considered a crime, due to the absence of social danger, which was a required essential characteristic (according to the CP 1969).

Finally, following some deficiencies indicated by the legal practice and doctrine in the previous regulation, the Criminal Code of 2014 revealed the justifiable cause under study, namely exercising a right or fulfilling an obligation, a rule that was absent from the previous Criminal Code, general in character.

[1] CP 1865, republished in the Official Gazette of Romania of 22.10.1912.
[2] CP 1936, published in the Official Gazette of Romania no. 65/18.03.1936.
[3] CP 1969 (Law no. 15/1968, republished, as subsequently amended and supplemented).

The legislator authoring the new Criminal Code felt the need, due to the social realities, for introducing such a justifiable cause, which did not appear in the previous Criminal Code, but is not strange to our law system, as we have showed.

3. The notion of „exercising a right"

The doctrine contended that the term „right" justifies any behavior aiming at fulfilling the public or private interest, in the conditions allowed by the regulations that, as a whole, form the judicial order of a state[4]. Exercising a right that is recognized or is implicitly allowed by the law can take place in various fields of activity. For such purposes, we should mention practicing a profession, trade or other occupation in the conditions provided by law. It is possible that, upon practicing such profession, trade or other occupation, the persons perform certain activities that could correspond to some acts provided by criminal law.

For example, in emergency surgery, physicians can perform activities that can cause physical pain to the patients, or the amputation of some limbs; policemen who, under a search warrant issued by a judge, against the concerned person's will, break in the latter's home; the policeman who, under an arrest warrant, detains the concerned person that avoided to serve their sentence and takes them to prison; the policeman that works under a false identity as an investigator under cover, authorized by the prosecutor, can buy drugs within the case they work for, but cannot be considered criminally liable for committing acts provided by the criminal law, such as using false identity or drug trafficking.

These acts have a correspondent in the criminal law, but shall not be considered crimes, because of this justifiable cause. Accordingly, while practicing some contact sports that could result in the players' physical injury (for example, football or rugby) or even in the death of some sportsmen (for example, in professional boxing, there were some boxers that died due to the beating taken), although some acts provided by the criminal law are committed, these shall not be considered crimes, being committed within an organized framework provided by law, based on some regulations accepted by all the persons practicing such sports, therefore, where this justifiable cause operates.[5]

4. Parental authority

Both the legal doctrine and the legal practice mentioned also other situations, in which exercising a right would be a cause justifying a criminal act committed.

The parents' right to discipline minor children is considered by the most part of doctrine a right arising from customs, being thus a customary right. The parents' right to implement **minor disciplinary measures** on their children is likely to remove the anti-judicial character of the acts provided by criminal law; such examples are: threat, provided by art. 206 CP, deprivation of freedom, provided by art. 205 CP, beating and other forms of violence, acts provided by art. 180 para. (1) CP etc.

The right to discipline cannot be exercised by strangers that are not legally delegated to such effect. It is relevant that the exercising of parental authority by other persons is possible, being an exceptional measure that can be ordered by the tutelary court, and has as its legal grounds art. 399 para. (1) CC. Therefore, when the parents' divorce is pronounced, when the marriage is annulled or dissolved, or in regard to the request for establishing the parents of the child born out of marriage, the tutelary court can decide to place the child with a relative or another family or person, but only with their consent, or in a protection institution.

5. Official authorization

Official authorization has the effect of justifiable cause only when its absence is not a constitutive element of the act provided by the criminal law.

In order to grasp this aspect, we are going to exemplify, by using art. 342 CP, which states that holding, carrying, making, as well as any operation regarding the movement of lethal weapons, ammunition, their

[4] V. Dobrinoiu, I. Pascu, I. Molnar, Gh. Nistoreanu, Al. Boroi, V. Lazăr, *Drept penal. Partea generală (Criminal Law. General Part)*, ed. revised and supplemented by the provisions of the Law no. 140/1996, amending and supplementing the Criminal Code, Europa Nova Publishing House, Bucharest, 1997, p. 205.

[5] *Idem,* p. 203.

mechanisms or devices, or operating lethal weapon workshops, unlawfully, is punishable by one to five year imprisonment.

Holding or carrying unlawfully non-lethal weapons **in the category of those subject to authorization** is punishable by 3 months to one year imprisonment, or a fine.

We should mention that the incrimination set forth in the provisions of art. 134 of the Law no. 295/2004 regarding the regime of arms, key components and ammunition is taken over, this being performed by unlawfully holding or carrying non-lethal arms in the category of those subject to authorization. The phrase „*non-lethal arms and ammunition*" refers to the arms designed for a useful purpose or for leisure or self-defense, made in such a way that, by using them, the persons' death is not caused; old arms fall also into this category.

Thus, making and any operations regarding the movement of non-lethal arms, without having such right, are not punishable. However, holding and marketing, without the authorization required by law, a gas gun has the constitutive elements of the crime of violating the regime of arms and ammunition, given that, according to law, holding and performing operations with arms for releasing harmful, irritating or neutralizing gases are subject to authorization.[6]

6. Exercising some creditor's rights

Into this category falls the lien, being recognized in the doctrine as the right to keep the debtor's property until the obligations arising from the relevant property are executed.[7]

The lien is considered a justifiable cause in the case of the crime of abuse of trust, set forth under art. 238 of the Criminal Code, provided that this was committed in the form of refusal to return the property.

According to art. 2495 para. (1) CC: „*The person that should remit or return some property can keep it insofar as the creditor fails to execute their obligation arising from the same legal relationship or, as the case may be, insofar as the creditor fails to compensate them for the necessary and useful expenses they incurred on account of that property, or for the damages the said property caused them.*"

Art. 2 states as follows: „The law can establish also other situations in which a person can exercise a lien."

It is easy to understand that the lien cannot be exercised when the property held comes from an unlawful act, or when the property is/cannot be subject to execution. Further, such right can be invoked by the holder in ill-faith, only in the express cases provided by law.

If the obligee does not return the property, which can be held under any title, by invoking a lien over the property, committing a crime of abuse of trust is not to be considered.

Further, the doer's wrong conviction that they have a lien over the property is considered an error, resulting in a non-imputability cause.

For the crime of abuse of trust to take the form of refusal to return property, it is not required that the return of the movable property is invoked only by the person that entrusted the property to the doer.

7. The notion of „fulfillment of an obligation"

The „fulfillment of an obligation" as a justifiable cause can arise both from a law, and from an order of the authority.

An example of obligation arising from the law is exactly the activity of enforcing public, order, carried out by the police and gendarmerie, within which some actions that can be considered crimes against bodily integrity can take place.

This aspect is even more evident considering that there are express provisions allowing using force, inclusively firearms, according to art. 34 para. (3) of the Law no. 218/2002 regarding the organization and operation of the Romanian Police, which states as follows: „*Using the available arms in order to fulfill work-related duties, in the conditions and situations provided by law, removes the criminal character of the act*".[8]

Such actions are considered unlawful per se, but, given that they are ordered within a professional or work-related obligation, they receive a lawful character.

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[6] HCCJ, crim. s., dec. no. 555/2004, in Dreptul no. 2/2005, p. 239.

[7] L. Pop, *Drept Civil. Teoria generală a obligațiilor* (General Theory of Obligations), Lumina Lex Publishing House, Bucharest, 1998, p. 451-455.

[8] Law no. 218/2002 regarding the organization and operation of the Romanian Police.

The order of law is often considered unconditionally justified, therefore, what the law commands is considered to be right. However, sometimes, in order to justify an act, which is an offense per se, it is necessary, besides the command of law, to have also a legitimate or competent authority giving some express order.

Considering the facts depicted above, an obligation imposed by an authority with jurisdiction requires also an order issued by the latter, for example, a person can be arrested only under an arrest warrant issued by a judge.

Therefore, the legal order of an authority with jurisdiction justifies, at all times, the act which per se could be considered an offense. However, the fulfillment of the conditions of jurisdiction regarding the order issuing authority, as well as of the legality conditions, namely of respecting the law, is necessary. Therefore, the authority's order justifies conditionally, subject to meeting such requirements. That order that fails to fulfill such conditions is not justifiable in character.

The Romanian doctrine contains two viewpoints as regards the system of control of legality of orders: one combining formal control with evident illegality and the other focusing on evident illegality.

According to the first viewpoint, the agent executing the order has the right and responsibility to perform the formal control of its legality. The formal legality of such order involves the existence of an authority with jurisdiction that issued the order, the inferior's jurisdiction to execute such order, and the issuance of the order according to the form provided by law. Checking the formal legality of the order is mandatory, while the execution of an order that does not fulfill such conditions results in the liability of both the person that executed the order, and of the authority that issued it. An example in this respect would be a detainment order, stating that the executor should ascertain the existence of solid evidence or signs that a fact provided by the criminal law was committed by the person ordered to be detained.[9]

According to the other viewpoint, of evident illegality, insofar as there is an apparent legality, the person executing such order shall not be considered liable. An example to such effect would be the situation of a policeman executing an arrest warrant issued by a judge, but who violates the material jurisdiction rules, who is to be exonerated from liability, even if is aware of such deficiency.[10]

There are also situations in which the law allows carrying out activities taking the form of the legal model described in an incrimination rule, but such activity shall not be considered a crime, given that it was performed for the purpose of fulfilling a legal duty. For example: the soldier that acts as a sentinel, guarding an ammunition deposit. In case a person would enter on the guarded precincts, attempting to steal ammunition, by following the legal procedure, should the suspect refuse to stop when summoned, the sentinel can shoot to kill him. Such act shall not be considered a crime, given that the sentinel fulfilled an obligation prescribed by law, their act being thus justified.

The fulfillment of an obligation prescribed by law with the aspect of a crime is checked in case of magistrates, servicemen, policemen, physicians or other such professional categories that are most of time in service of society as a whole, most of them being subject to taking an oath when appointed.

Although, in practice, the execution of an obligation can result in criminal consequences, the doctrine stated that „the executor has the possibility to pass the obligation to be fulfilled through their own thinking filter".[11]

In conclusion, no crime committed by fulfilling an obligation prescribed by law, or by the authority with jurisdiction shall result in criminal liability, if the conditions described above are met. Why? Not because the person acting in the name of the law or on behalf of the authority with jurisdiction would have the right to commit a crime, but because the legislator himself removes the criminal, illegal character of the relevant act, if committed according to art. 21 CP.

[9] G. Antoniu (coord.), *Explicaţii preliminare ale noului Cod penal* (Preliminary Explanations to the New Criminal Code), vol. I, Universul Juridic Publishing House, Bucharest, 2010, p. 272.

[10] F. Streteanu, *Tratat de drept penal. Partea generală* (Treaty of Criminal Law. General Part), vol. I, C.H. Beck Publishing House, Bucharest, 2008, p. 544-545.

[11] Al. Roman, *Unele consideraţii referitoare la cauza justificativă a îndeplinirii unei obligaţii* (Some Considerations regarding the Justifiable Cause for Fulfilling an Obligation), in Dreptul no. 6/2015, p. 162.

8. Comparative law elements

In France, the fundamental norms and regulations of criminal law, as well as main crimes are included in the so-called „new" Code pénal (Criminal Code). In this, the French legislator emphasized the *order* or *authorization by law* and *the command of legitimate authority* as circumstances excluding criminal liability.

The French Criminal Code states, under art. 122-4 para. (1), that the person committing an act prescribed or authorized by legal or regulatory provisions is not criminally liable, while para. (2) establishes that the person performing an act commanded by the legitimate authority is not criminally liable, unless such act is obviously illegal.

The order of the law justifies the actions mentioned, when they are maintained within the limits of the necessity that imposed their use. Justifying such acts provided by the criminal law and committed by order of the law is substantiated, especially by respecting the legal framework and proportionality upon implementing the measures required.

The term „proportionality" mentioned above is relevant. Proportionality is the rule requiring that the act does not go beyond what was strictly necessary in order to meet the legal provisions or to respond to the determining event, and requiring that the act preserves a value at least equal to the one protected by incrimination. As regards defense acts, these cannot go beyond what is required for riposting to an aggression, in the event of self-defense, or to an exterior event, in case of a state of necessity. We already know that a crime cannot be justified if it determined a greater evil than the one the agent would have been exposed to naturally, without committing it.

The Italian criminal legislation, namely art. 51 para. (1) of the Criminal Code, stipulates that criminal punishment is not enforceable for exercising a right or fulfilling an obligation prescribed by a legal rule, or an order of a public authority.

Exercising some constitutional rights is illustrated by freedom of the press (freedom of expression). In the Italian law, the justifiable vocation of freedom of the press is a creation of the legal doctrine and the case-law, while exercising such freedom is subject to some conditions, of which one is the social usefulness of information (there should be some public interest justifying its disclosure).

Further, the order of the law justifies unconditionally what the law orders, therefore, it can be only just. Other times however, in order to justify the act that is an offense per se, it is necessary, besides the order of the law, also the express order of the legitimate authority/authority with jurisdiction.

Therefore, an obligation prescribed by the authority with jurisdiction involves its order; for example, a person can be arrested only under an arrest warrant issued by a judge. According to the Italian doctrine, the order is the expression of the intent of a superior addressed to a subordinate, for the purpose of determining the latter to have a certain conduct, which involves a public law subordination relationship.

An order grounded on a private law employment relationship was also admitted, provided that the executor of such order is unable to become aware of the danger caused by such execution. It was also decided that the order should come from a public official (the persons holding a legislative, judicial or administrative office, according to art. 357 of the Italian Criminal Code), or from a person in charge with a public service (art. 358 of the Italian Criminal Code).

The Spanish Criminal Code (Código Penal Español) is the main law regulating crimes and punishments in Spain. This was adopted in 1995 and has been subject to numerous amendments, in order to be adapted to social and legal changes. The Spanish Criminal Code is structured in several parts, each covering various criminal law issues.

The Spanish criminal law, art. 20 para. (7), regulates, among the causes removing criminal liability, the one of exercising a right and fulfilling an obligation. According to this article, are not considered crimes the actions performed upon fulfilling a right, office or obligation, insofar as these are performed according to law, and do not go beyond the reasonable and proportional limits of the force required. This provision is in line with other similar European laws, such as the ones from Italy and Portugal, where exercising a right or fulfilling an obligation prescribed by a legal norm or by an order of a public authority excludes criminal liability.

The Spanish Criminal Code includes exercising a right, a profession (inclusively the one of lawyer) among the causes exonerating from criminal liability, provided in Title I, chapter II, item 7.

9. Conclusions

The regulations under art. 21 CP are part of that special category of legal situations called justifiable causes. These are special situations in which certain actions, which would be considered otherwise crimes, become justified or justifiable.

As we stated, in the legal provisions examined, the legislator has used, when defining justifiable causes, both in para. (1) and in para. (2), the term of **law**.

This is the reason why, as far as the doctrine is concerned, the question arose whether the meaning of the term of „law" is the one resulted from the definition under art. 173 CP, or a wider meaning. Some authors considered that the term of „law", being used in the Criminal Code, should have the meaning assigned to it by the criminal law. Other authors considered that the notion of „law", used by the legislator when regulating the justifiable cause reviewed by us, has a much wider meaning, including also other normative acts[12]. As regards exercising a right recognized by law or fulfilling an obligation prescribed by the law, these can have as their source, as underlined in the doctrine, a (constitutional, organic or ordinary) law, normative acts inferior to it (for example, emergency ordinances of the Government, etc.), regulations adopted according to law, an international treaty, to the extent this is ratified by the Romanian state, or a community regulation[13].

Exercising a right or fulfilling an obligation, according to the regulation in art. 21 CP, includes those situations established by law in its wider meaning, in the presence of which an act provided by the criminal law loses its illegal character, becoming allowed by the judicial order as a whole[14].

The acts provided by the criminal law and committed in the conditions provided by art. 21 CP assign a legal character to the doer's conduct, and the doer cannot be considered criminally liable for the activity performed.

Although there is an extensive case-law as regards the legal effects produced by justifiable causes, we consider that the magistrate plays the most important role in identifying justifiable causes.

Exercising a right and fulfilling an obligation are fundamental to the operation of society as a whole and of the judicial system, and, in the context of criminal law, these concepts allow excluding the criminal character of some acts, in the context in which these are performed when exercising legitimately a right or fulfilling a legal obligation.

In conclusion, the concept of „exercising a right or fulfilling an obligation" reflects a nuanced and balanced approach to criminal law.

This allows recognizing and protecting the legitimate interests of individuals and of society as a whole, ascertaining the just and proportional enforcement of the law. It is essential that legislators and law practitioners maintain such equity and flexibility, when construing and enforcing the laws, in order to respond adequately to various practical situations.

By excluding the criminal character of the acts committed when exercising a right or fulfilling an obligation, the judicial system protects both the individual rights and the collective interests, ensuring a balance between the need for punishing harmful behaviors and the recognition of circumstances justifying certain actions.

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[12] I. Pascu, *Noul Cod penal comentat. Partea generală* (The Annotated New Criminal Code, General Part), vol. I, Universul Juridic Publishing House, Bucharest, 2012, p. 168.

[13] V. Dobrinoiu, I. Pascu, I. Molnar, Gh. Nistoreanu, Al. Boroi, V. Lazăr, *op. cit.,* p. 205.

[14] I. Pascu, *op. cit.*, p. 168.

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