

THE EXERCISE OF A RIGHT OR THE CARRYING OUT OF AN OBLIGATION – JUSTIFIED CAUSES REINTRODUCED INTO THE NEW ROMANIAN CRIMINAL CODE

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Abstract

This study aims to analyze an old concept, namely, the exercise of a right or the performance of an obligation as one of the justified causes, reintroduced into the new Romanian Criminal Code after more than 40 years. Even having a long history of existence within the Romanian criminal codes adopted in 1864 and 1936, during the communist era, once adopted the Romanian Criminal Code in 1968, in force until 1-st of February, 2014, this justified cause had been removed. At the time, the communist legislator considered as being useless to mention it among the other causes which can remove the criminal liability. The doctrine of the time argued that a criminal fact committed when carrying out an order given by the law or the competent authority didn't meet the criteria of being a crime, because it lacks the mental element, mens rea.

The practice of nowadays demonstrated, the question under discussion is not so easy, the lack of mens rea cannot be always raised as a defense and therefore, the legislator realized the necessity of reintroducing the exercise of a right or the performance of an obligation as one of the justified causes.

Keywords: justified causes, the exercise of a right or the performance of an obligation, the order of the law, legitimate authority, the fact imposed by the law.

Introduction

1. The new Romanian Criminal Code, came into force since February 1, 2014 contains within the chapter dedicated to the *justified causes*, in addition to *the self-defense* and *the state of emergency* (which had been included also within the content of the previous Romanian Criminal Code, adopted in 1968, and which was in force until the above-mentioned date), there are two new categories of justified causes, *the exercise of a right or the performance of an obligation* and also, *the consent of the victim*. Throughout this article, we decided to do a short analysis of the concept of *exercise of a right or the performance of an obligation* because it has an interesting history, being included among the justified causes of some previous Romanian criminal codes before the communist era, hence the interest of the legislator to reintroduce it within the criminal provisions after more than half a century.

For a specific fact to be deemed as crime, it is necessary to meet all the legal criteria previewed by the criminal law with respect to this crime. So being, when investigating a crime, firstly must be found the elements of the crime, like *actus reus* and *mens rea*, then to analyze the possibility of existing one or more justified causes, like the *order of law and of legitimate authority* which can exclude the criminal liability¹.

¹ L. R. Popoviciu, *Criminal Law. General part (Drept penal. Partea generală)*, Bucharest, Pro Universitaria Publishing House, 2011, page 248.

2. The Romanian Criminal Code of 1864 included the *order of law and of legitimate authority* within the category of *ordered acts*, which were *inter alia*, the justified causes removing the criminal responsibility. In the legal literature of the time, have emerged two points of view on the nature of these causes². Thus, as a first opinion, it was considered that *the order of law* and *the order of legitimate authority* are two distinct elements, independent each of other and therefore, but the essential condition for accused to raise this kind of defense, is to exist both of them at the time of committing the offense. It means that, if any of the two elements is missing, the act is deemed as being unjust and constitutes an offense. This point of view asserted that only these two elements combined constitute a justified cause. Therefore, imposing a law without an order coming from a legitimate authority is not enough. The other point of view appreciated that *the order of law* and *the order of a legitimate authority* are not two indispensable conditions of a single justified cause, but there are two elements supporting independently the same justified cause which thus exists when any of these two elements exists.

The two points of view are not contradicted entirely because there were situations when, to justify an act, which was itself a criminal act, it was necessary in addition to the order of law, an express order given by the legitimate authority (as example was given the fact the executioner cannot perform an execution of a person sentenced to death penalty without a order given by the competent authority and only upon a final judgment of conviction).

The paragraph no. 255 stipulated that “it does not count any crime or offense when the murder, injuries and violence were ordered by the law and ordered by the legitimate authority”. Since the law treated this special case, specifically with reference only to the crimes of murder, assault and injury, the application would be restricted to these three offenses, and therefore did not constitute a general justified cause, but special.

As, the order of a legitimate legal authority did justify the offense, the problem was what happens when the superior gave an illegal order to the subordinate? Is the superior order itself enough to defend the subordinate criminal liability which by its execution had committed a crime? In answering to this question, three theories were expressed:

- The theory of *passive obedience*, according to which, the subordinate is bound to obey unconditionally the orders of his superior, having neither the right nor the duty to assess their legality otherwise overturning the discipline. The major disadvantage of this theory was that of encouraging some leaders to become despotic tyrants and that of considering the subordinate as an instrument in the hands of his superior. The subordinate was defended of the penalty, being covered by the superior responsibility;

- The liberal theory or also called *the intelligent bayonets* which asserted that the subordinate has the right and obligation to assess the lawfulness of the order given by the superior and if he found it as illegally, to refuse its fulfillment. So, the superior order does not absolve him of criminal responsibility but contrary, he is going to be responsible together with that superior who gave the order; the disadvantage of this theory is that it may undermine the institutional discipline and also the public order;

- The *intermediate theory* which combined the two previous theories and according to which, the subordinate is bound to execute the orders given by his superiors only after assessing their legality. The right and obligation of the subordinate to censor the legality of the order is three folded: whether the order is given to him by the competent authority, according with his statutory duties; whether the order satisfies the required formality; whether the order is within the subordinate’s power and competences to be executed. In the case these three conditions existed, the superior’s order protected the subordinate of the criminal liability, the full responsibility for the criminal facts belonging to that person who gave the order. The subordinate executing such an order, is entitled to consider it as legal because he knows that is not acting contrary to its obligations. It is estimated that the subordinate’s ignorance or error to the legality of the order given by his superior excludes his guilt. The literature of that time distinguished

² Traian Pop, *Drept penal comparat. Parte generală*, Publishing House of the Institute of Graphic Arts “Ardealul”, Cluj-Napoca, 1923, pag. 505.

between civilian and military subordinates, for first recognizing a greater capacity to appreciate the nature of orders received, more independence in the line of duty and more possibilities to refuse obedience, while the military lacked the knowledge and training necessary to assess the orders of superiors on the matters of service. However, although the order of a superior defended the military subordinate, it was not deemed as a blind instrument, the subordinate having the obligation to refuse the execution of the superior's order when it is manifestly illegal and is, obviously, aiming to commit an offense³.

The legitimate authority were deemed the persons vested with public authority, not those exercising domestic authority (e.g. the child's father) so that, the order given by them could not be invoked as a justified cause, the both involved persons being so criminal responsible, with only one exception, when the subjected people are family members and acted following the orders of the heads of families, guardians, curators and the law protected them from liability when committing a punishable act.

3. The Romanian Criminal Code adopted in 1936 and also known as the Criminal Code of the king Charles the 2-end provided within Article no.137 that:

"It shall not be counted as an offense the fact imposed or authorized by the law, if implemented in its terms and also that fact which was committed by the competent authority, by virtue of a legal order, whether the order is given in its legal form, by the competent authority and if it is not clearly illegal.

When the execution of a legal order proved to be a crime, the superior who gave the order is criminal responsible as author of that crime as well as is the subordinate who executed the order.

The subordinate who executed the order is exempt from punishment, if he has not been able to assess the lawfulness of the order".

The term of "*the fact imposed by the law*" in the meaning of the legislature of that time, was understood that act which was ordered by the law (for example, that of a magistrate who, under the law, issues an arrest warrant which, obviously, affects the freedom of a person or of a witness who must testify even though, it might affect the dignity of a person), and the term of "*the fact authorized by the law*" meant an action that the law tolerated under certain conditions (e.g. the therapeutic abortion)⁴.

Within the meaning of the above mentioned legal provision, the ability of the subordinate to justify the execution of the superior's order supposed to fulfill three conditions: the order to come from a competent authority; to be issued in the forms required by the law; the order is within the subordinate's powers and competences to be accomplished. It also asked the fulfillment of a negative requirement, that is, the order do not be, clearly, illegal.

As we can see in the last paragraph of the Article 137, the law provision had been previewed a situation of impunity where a manifestly illegal order has been carried out by the subordinate and for some *subjective reasons* (lack of education, information, experience) or some *objective reasons* (the way activity had been organized) could not make possible for him to realize the illegal character of the order or he was not allowed to assess its legality, not being possible so its censoring.

4. The Romanian Criminal Code adopted in 1968, in force until February 1, 2014, rejected the idea of *justified causes* and gave up this classic formula. It introduced a new terminology called "*causes eliminating the criminal nature of the act*" and excluded of which *the order of law or of the legitimate authority and the consent of the victim*.

The legislator⁵ found that it is not necessary to explicitly enshrine *the order of law or of the order of legitimate authority* as a cause of removing the criminal nature of the act. The reason was, if a fact can be deemed as ordered by the law or through a competent authority into a

³ *Ibidem*, pag.559

⁴ Ioan Molnar, *Ordinul legii* in "The Criminal Law Review", no. 2/1997, p. 54.

⁵ V. Dongoroz, G. Dărăngă and others, *Noul cod penal și codul penal anterior. Prezentare comparativă*, Political Publishing House, Bucharest, 1968, p. 44.

specific situation, it means that fact is not an act punishable by the criminal law and therefore, no offence and no criminal liability. If the superior's order was deemed as illegal, then the provisions relating to *abuse in office* would be applicable for the person carrying out the order and the *incitement to abuse in office* for the person who gave the illegal order⁶.

While rejecting the idea of the order of the law or of the legitimate authority as justified causes, the Romanian Criminal Code of 1968 did not mention what is going to happen and what are going to be the consequences when carrying out an illegal order. Since the order of the law had not been included among the *justified causes*, the Decree no. 367/1971 mentioned five legal case situations for using the gunshot by the authorized people and the criminal conduct of the people who did the gunshot had been analyzed according to those five legal case situations. If the *actus reus* of a person investigated for using the gunshot was in compliance with one or more situations previewed by the Decree no. 367/1971, then he wouldn't be indicted because of the lack of the *mens rea* for that crime⁷.

5. As the previous Criminal Code did not have enough legal provisions in this respect, the introduction of the Article 21, regulating the justified causes, among the provisions of the Romanian Criminal Code entered into force on February 1, 2014, proved to be welcomed. It states as following:

“It is justified the act previewed by the criminal law if it consists in the exercise of a legal right or the fulfillment of an obligation imposed by law, subject to the conditions and limitations contained therein.

It is also justified by the criminal law the act consisting in the fulfillment of an obligation imposed by the competent authority, as previewed by the law, unless it is manifestly illegal.”

The current Romanian legal doctrine appreciated that the order of the law would mean that *legal provision* through which certain facts are ordered and whose failure attracts criminal liability and the area covered by the concept of *legal provision* is deemed quite broad, including laws, regulations and customary laws.

According to the new regulation above mentioned, we observe that the carrying out of an order imposed by the law can be achieved, legally, in two ways:

1) When the law directly addresses to a person or state agent and the carrying out of the order does not have to be preceded by a lawful order of a superior authority;

2) When the law itself is not enough for taking action, the law enforcement has to be preceded by an order of a higher authority, in duty to do it, and, accordingly, in the case of acting without the consent or the order of the higher authority, the justified cause is not incident and the fact is actually a crime.

Another situation, not expressly previewed by the criminal law can be the excess in carrying out the legitimate order which, normally, attracts the criminal liability of the person who acted. If the enforcement of a law, either directly or after the preliminary order of a legitimate authority, is not itself an offense under the criminal law but it overcomes the legal framework through the excess or the abuse of the person in duty with the law enforcement, committing so an offense under the criminal law, this person can not rely on the *order of law* as a *justified cause*⁸.

The legality of an order implies that between the person ordering and that carrying out the order have to be a relationship of legitimate hierarchical subordination, meaning that there is an obligation for the subordinate to carry out the orders. It is necessary for the act to be committed within the ordered activities of a superior legitimate authority, those activities have to be within the superior's powers to give orders, and the subordinate, before carrying out the order, has to check its legal substantial and formal requirements.

⁶ Ion Oancea, *Drept penal, partea generală*, Didactic and Pedagogic Publishing House, Bucharest, 1971, p. 274.

⁷ Viorel Pașca- *Ordinul legii* in “The Criminal Law Review” no. 2/2004, p. 28.

⁸ Georgeta Gheorghe, *Ordinul legii și comanda autorității legitime* in “The Criminal Law Review” no. 1/1998, p. 34.

The superior's order may be issued pursuant to a law, but, in some situations, it may be legally given even though is not relied on a specific legal provision. In the latter cases, if the order issued by a legitimate authority has not the legal support and the subordinate commits a crime by carrying out the order and thinking it is fully legal, the subordinate can successfully raise the defense of the order of a competent authority, as a justified cause.

6. Finally, as *the exercise of a legal right or the fulfillment of an obligation imposed by law*, entered into force very recently and the doctrine and the jurisprudence are not yet crystallized, it cannot allow us to assess the impact of its reintroduction in criminal law among the justified cause but the fact it has already its own history in Romanian criminal legislation before the communist era, has a consistent theoretical foundation and there are a lot of similar concepts in the criminal legislation of other states, makes us believe that its reintroduction into the new Romania Criminal Code is welcomed.

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