

WHY JUSTIFYING CAUSES AND WHY NON-IMPUTABLE CAUSES?

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Abstract:

*The regulation on new basis of the definition of the offence determined a new judicial rethink of other important institutions, because, Chapter II is consecrated to **justifying causes**, and Chapter III is consecrated to **non-imputable causes**, causes that replace in two distinctive institutions the former causes which removed the penal character of the act provided for by the Criminal code from 1968 in Chapter V, Title II.*

The law, as a normative act which emanates from the legislative organ, brings under regulation all existing social relations and requires compliance with them by the force of state's coercion.

The Romanian criminal code in force, the law 286/2009 gives a clear definition of the delinquent act (offence) in which it states that: it is necessary to provide for the act in the criminal law, it is necessary to commit the offence with guilt, it is necessary the unjustified character of the act provided for by in the criminal law, the criminal act must be imputable to the person who committed it.

Keywords: *justifying causes, non-imputable causes, criminal law.*

Introduction

The law, as a normative act which emanates from the legislative organ, brings under regulation all existing social relations and requires compliance with them by the force of state's coercion. The law determines a certain mandatory conduct norm (with a general and impersonal character), and, if non-complying with the norm, to proceed to its imposition by coercion of the specialized bodies of the state.

The Romanian criminal code in force, the law 286/2009 gives a clear definition of the delinquent act (offence) in which it states that:

- It is necessary to provide for the act in the criminal law.

An act is considered to be provided for by the criminal law when the legal rule sets in what conditions a certain action or inaction, manifesting a social peril, is susceptible to be characterized as an offence and so to attract criminal liability, because every offence has at its basis a human act, an exterior manifestation of the will.

- It is necessary to commit the offence with guilt

For the offence to exist it is not enough that the activity manifesting social peril of the subject to be within the description of the offence as it is incriminated in the special part of the Criminal code, but it is also necessary that the act provided for by the criminal law to be committed with guilt¹.

When the act is not committed with guilt, it is not imputable to the one who committed it, it shall not be imputed.

It has to be emphasized that not any psychic attitude of the perpetrator may constitute guilt, but only that which, by the psychic processes which it comprises and by their relation with the committed act and its consequences, expresses the psychic causal link between the perpetrator and the committed act².

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¹ I. Pitulescu, T. Medeanu, (2006), *Criminal law. General Part (Drept penal. Partea generală)*, Bucharest, Lumina Lex Publishing House, page 107.

² C. Bulai, B. Bulai, (2007), *Handbook of Criminal Law. General part (Manual de Drept penal. Partea generală)*, Bucharest, Judicial Universe Publishing House, page 153.

- *It is necessary the unjustified character of the act provided for by in the criminal law*

This implies that the act is not allowed by the judicial order, in other words, it has an illicit character³.

Although the legislator does not indicate in the regulations of the Criminal code the content of the statement “unjustified act”, the introduction of this essential feature in defining the concept of offence is not accidental, but, on the contrary, it corresponds to the current social and judicial realities⁴.

Thus, it is possible, even though an act is provided in the criminal law, it is not illicit because its commission is allowed by a legal rule. For example, homicide of a person in legitimate defence corresponds entirely to the description made by the legislator in the text that incriminates the homicide, but the act does not have an illicit character because the law authorizes its commission in the given conditions⁵.

- *The criminal act must be imputable to the person who committed it*

This essential feature constitutes a novelty in defining the concept of offence, and related to it, the Criminal code does not contain regulations to explain the statement “the act imputable to the person who committed it”⁶.

There are authors who show that both non-justification and imputability cannot be considered as essential features of the offence not being specific to this, their existence being found with a general character in the sphere of all the forms and modalities of penal and extra-penal illicit⁷.

Comparing the legal texts included in the Criminal code from 1969 and the Criminal code in force, in the subject of defining the offence we see that the definition proposed in the Criminal code in force in Article 15 is substantially modified from the one contained in Article 17 in the Criminal code from 1968.

Thus, we can see that among the essential features, two of them are surely not missing: the act is provided for by the criminal law and the act is committed with guilt. We see that two new features appear, the unjustified character of the act provided for by the criminal law and the penal act to be imputable to the person who committed it.

Because of this conception regarding the essential features of the offence, the systematization of the articles in Title II was conceived. Thus, after announcing the essential features of the offence, the next two articles (Articles 16 and 17) are dedicated to some elements which refer to guilt.

The regulation on new basis of the definition of the offence determined a new judicial rethink of other important institutions, because, Chapter II is consecrated to **justifying causes**, and Chapter III is consecrated to **non-imputable causes**, causes that replace in two distinctive institutions the former causes which removed the penal character of the act provided for by the Criminal code from 1968 in Chapter V, Title II.

Under the name of “causes that remove the criminality of acts”, the Criminal code from 1968 provided for in detail certain states, situations or circumstances with a less common character in whose presence or context, the commission of any acts provided for by the criminal law could no longer imprint to it a criminal character.

The causes, which eliminate the criminal character of the act, were systemized, in the penal doctrine, around three essential features of the offence according to the Criminal code from 1968: social peril, guilt, the act to be provided for by the criminal law.

³ A. Boroi, (2010), *Criminal Law. General Part. In accordance with the New Criminal Code (Drept penal. Partea generală. Conform Noului Cod penal)*, Bucharest, C. H. Beck Publishing House, page 144.

⁴ *Idem.*

⁵ A. Boroi, quoted work, 2010, page 144.

⁶ *Idem.*

⁷ N. Giurgiu, (2010), *Critical opinions regarding the new Criminal code – general part (Opinii critice privind noul Cod penal – partea generală)*, in R.D.P. no. 4/2010, page 49.

“This systematization, even though it was based on legal dispositions, still maintained a conventional character, relatively, each of these categories of causes that were enumerated having as an effect the elimination of that essential only with preponderance, not as an exclusivity. For example, a cause that eliminates preponderantly the social peril has indirect effects on the other essential features; concomitantly such an act will not be provided for by the criminal law and will not be committed with guilt”⁸.

The causes removing the criminality of acts, were those states, situations or circumstances whose existence at the time of committing the offence, made, according to the law, the execution of one of the essential character of the offence to be impossible⁹.

Defining the offence based on the essential features distinctive from the ones provided for by the Criminal code from 1968 determined the systematization around those the justifying causes and non-imputable causes.

In the Romanian Criminal code from 1968, the subjective liability constitutes the legal warranty for a person not to be punished if he/she committed with guilt an act that manifests social peril and is provided for by the criminal law with the condition not to exist a cause which makes the act not to constitute an offence.

The only basis for criminal liability was the offence which was characterized by three essential features, provided for by Article 17, Paragraph 1 Criminal Code 1968. The absence of any of these features excluded the existence of the offence, of the criminality of the act, and implicitly, of criminal liability.

In the conception of the present Romanian criminal law, the followings are considered fundamental institutions of the criminal law: offence, criminal liability and sanction. These institutions correspond to objective realities around which all the criminal law regulations are: criminal act, perpetrator, and criminal judicial coercion¹⁰.

In the criminal law, there are provided for only dispositions that regulate these institutions, the effects they produce, and dispositions that refer to the modalities in which the above mentioned fundamental institutions stop to produce their effects.

Thus, the institution of offence will correspond to the dispositions regarding the justifying causes and non-imputable causes; the criminal liability will correspond to the dispositions regarding the causes that remove criminal liability, and the institution of sanction will correspond to the dispositions regarding the causes that remove the sanction¹¹.

Why a separation of the justifying causes from the non-imputable causes?

Justifying causes are circumstances that remove the third of the essential features of the offence – the unjustified character.

It is about the circumstances that operate in rem, their effects being also extended on the participants.

The code shows the justifying causes which make the act provided for by the criminal law not to be an offence: legitimate offence, state of necessity, exercising a right or fulfilling an obligation and the consent of the person who was harmed.

Exercising a right or fulfilling an obligation has the same sphere of coverage as “the order or authorization of the law and command of the legitimate authority” consecrated in the Criminal code

⁸ G. Antoniu, (2004), *The general part of the Criminal code in a European vision (Partea generală a Codului penal într-o viziune europeană)*, published in R.D.P. no. 1/2004, page 37.

⁹ V. Dongoroz, S. Kahane, I. Oancea, I. Fodor, N. Iliescu, C. Bulai, R. Stănoiu, (2003), *Theoretical explanations of the Romanian Criminal code (Explicații teoretice ale Codului Penal Român)*, Volume I, 2nd Edition, Romanian Academy Publishing House, Bucharest, All Beck Publishing, page 332.

¹⁰ A. Boroș, (2006), *Criminal law. General part (Drept penal. Partea generală)*, Bucharest, C. H. Beck Publishing House, page 186.

¹¹ C-tin Mitache, C. Mitache, (2006), *Romanian Criminal law, general part (Drept penal român, partea generală)*, Bucharest, Judicial Universe Publishing House, page 135.

from 1936, representing only a modern formulation of this justifying cause, and the consent of the person who was harmed was provided as a justifying cause, after the model of other legislation.

“The consent will not operate as a justifying cause for those social values of which the person cannot dispose, either because they do not belong to him/her (for example, the consent of a spouse given to the other to close a new marriage is not valid, because the injured value does not belong to him/her), or because it will lead to a total and irreversible loss of the social value (for example, the consent that was given by the victim for the author to amputate his/her leg, without existing a medical necessity in this respect). Also, the consent will not produce effects for the offences against life, when the law excludes its justifying value (for example, trafficking in persons”¹².

The acts provided for by the criminal law as offences, but whose existence excludes the offence, because they are permitted or allowed by the law, are the justifying causes.

The literature provides that these causes are considered circumstances or data of reality which blocks the realization of the offence’s elements, because the criminal law accepts, from superior reasons, not to engage the criminal liability of the one who committed them. They are acts that exclude anti-legality.

Thus, it is contended that, as far as a superior social value opposes itself against the one protected by the criminal rule, the latter will comply with, and the act becomes, through the will of the law, a permitted act, even though it is typical, even though it reflects on the social values¹³.

In the case in which one of the justifying causes intervenes, we have to analyze if the perpetrator’s will is in accordance with the law, if the law allows or not such a conduct, while at the causes that remove the criminal character we have to analyze the psychic processes (guilt) of the person who committed the act provided for by the criminal law.

“The legal rule which provides for the justifying cause has a double meaning: it is a justified permissive rule, in certain conditions, a conduct allowed by the judicial order, even though it corresponds to a legal model of incriminating, the justifying cause being thus an exception from the incriminating rule, and, at the same time, it sets in order the social values as an expression of the judicial order’s demands, preferring the social value protected by the incriminating rule (the judicial object of the offence)”¹⁴.

In the literature, there is a distinction between the general justifying causes, regulated in the General part of the Criminal code, and the special justifying causes, regulated in the Special part of the Criminal code or in special laws¹⁵ (therapeutic abortion).

From some authors’ point of view, there is a distinction between the general justifying causes, used at the level of the entire system of law, and criminal justifying causes with an incidence only in the domain of the criminal law¹⁶.

Justifying causes remove the illicit character of the act and, implicitly, they make from that respective act an act permitted by the law, not being an offence, because the offence can be only an illicit act or an act cannot be at the same time legal and illegal, an offence and a permitted act.

Non-imputable causes are circumstances that remove the fourth essential feature of the offence – imputability.

Imputability assumes that the author of the act cannot be objected for committing it, in other words, it is a reproach to the author for his/her choice to break the law, even though he/she could have conformed to it.

¹² Report on motives, www.just.ro.

¹³ V. Mirișan, (2004), *Criminal law. General part (Drept penal. Partea generală)*, Bucharest, Lumina Lex Publishing House, page 131.

¹⁴ V. Pașca, (2012), *Handbook of Penal Law. General Part (Curs de drept penal. Partea generală)*, 2nd Edition, revised with the modifications in the New Criminal Code, Judicial Universe Publishing House, Bucharest, page 178.

¹⁵ G. Antoniu, *Justifying causes in the project of the New Criminal Code*, (Cauzele justificative în proiectul noului Cod penal), in *RDP* no. 2/2004, page 16.

¹⁶ F. Streteanu, (2003), *Criminal law. General part (Drept penal. Partea generală)*, Bucharest, Rosetti Publishing house, page 402.

For the existence of imputability there are there essential conditions: responsibility, knowing the illicit character of the act and eligibility of a conduct in compliance with the legal rule. Each of these conditions can be removed in the presence of certain circumstances, called non-imputable causes.

In Article 23, Paragraph 1 from the Criminal code in force, intituled “General provisions” is provided that “It shall not be considered an offence the act provided for by the criminal law if it was committed in the conditions of one of the non-imputable causes”.

Among these conditions are those provided for by Articles 24-31 from the Criminal code in force, as: physical coercion, moral coercion, non-imputable excess, perpetrator’s minority, irresponsibility, inebriety, error, and fortuitous case.

We determine comparatively with the Criminal code from 1968 the introduction of a new condition, the non-imputable excess, the other modifications of the causes that remove the criminality of acts, from the Criminal code in force, executing only aspects of the judicial language: inebriety (instead of drunkenness), error (instead of error de facto).

The non-imputable causes are personal causes, which are not expanded over the participants, of them benefiting only the person who acted under their rule.

So, as opposed to the justifying causes which produce effects *in rem* and are expended also over the participants, the non-imputable causes produce effects *in personam*, with the except of the fortuitous case which implies a general and objective impossibility to foresee.

The justifying causes have an effect over all the participants, because they, contributing to the commission of the same act, the singularity of the act and the general character of the justifying causes cannot allow that an act to be legal for some and illegal for others.

As opposed to the justifying causes, the non-imputable causes produce effects only over the person to whom the typical illegal act cannot be reproached (*in personam*). These effects do not extend over the participants which, to the extent to which they do not benefit themselves of a justifying cause or a non-imputable cause, they will answer for the action committed with intent, in the conditions of improper participation.

Separating the justifying causes from the non-imputable causes was made because, against the perpetrator who acted in guilt, there are some security measures that can be taken, and against the person who acted because of a justifying cause, those measures cannot be taken.

The justifying causes blocks the applying of any criminal sanction or of security or educative measures. They also remove civil liability.

We can conclude that the legislator of the Criminal code in force introduces a new classification in respect to that the Criminal code from 1968 had called causes that remove the criminal character of the act by removing the guilt.

Thus, according to Article 18 from the Criminal code in force, it shall not be considered an offence the act provided for by the criminal law if it was committed in the conditions of one of the non-imputable causes.

Conclusions

Defining the offence based on the essential features distinctive from the ones provided for by the Criminal code from 1968 determined the systematization around those the justifying causes and non-imputable causes.

Why a separation of the justifying causes from the non-imputable causes?

Justifying causes are circumstances that remove the third of the essential features of the offence – the unjustified character.

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Non-imputable causes are circumstances that remove thee fourth essential feature of the offence – imputability.

Imputability assumes that the author of the act cannot be objected for committing it, in other words, it is a reproach to the author for his/her choice to break the law, even though he/she could have conformed to it.

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