Comparative Study of the Legal Grounds for Excluding the Criminal Nature of the Act

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Abstract

The legal framework governing the causes that exclude criminal liability constitutes an essential safeguard within criminal law, ensuring that sanctions are imposed only when all legal and moral prerequisites for criminal responsibility are fulfilled. This paper offers a historical and comparative analysis of both justification and non-liability causes, tracing their development in Romanian criminal law from the 19th century to the current Criminal Code. It highlights that justification causes - such as self-defence and necessity - remove the unlawfulness of the act and operate in rem, while causes excluding criminal liability - such as mistake of fact, coercion (physical or moral), and fortuitous events - exclude culpability and generally produce effects in personam. The study pays particular attention to the distinction between typicity and unlawfulness, as well as the impact of recent codifications which provide a clearer demarcation between the subjective and objective elements of criminal liability. Using an analytical and comparative methodology, the article examines the conditions of applicability, scope, and legal consequences of self-defence, necessity, mistake, and fortuitous case, with a focus on their effects on both the offender and third parties. The conclusion stresses the importance of precise and coherent legislative drafting in this area, given the significant implications these causes have for the exercise of criminal prosecution. Proper recognition and application of these legal concepts are essential for upholding human dignity, the principle of legality, and the proportionality of criminal sanctions.

Keywords: *criminal liability, justification, grounds excluding criminal responsibility, Romanian Criminal Code, legality principle.*

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1. Grounds for Removing the Criminal Nature of the Act - General Considerations

Over time, criminal legislation has regulated situations in which a person who committed a criminal offence was exempted from the imposition of any penalty. Although the terminology used has varied from one historical period to another, the substance has remained the same, referring to situations such as minority, self-defence, lack of criminal responsibility, fortuitous event, force majeure, error, and others.

In antiquity, the concept of a criminal offence was primarily reduced to its material aspect, entailing an objective form of liability whereby punishment was imposed on the perpetrator regardless of the presence or absence of culpability (Antoniu, 1995). The offence was defined as a deviation from the ideal order, considered the cornerstone of society, which meant that a general presumption of liability always operated. However, even in ancient legal systems, this objective liability was the exception. The Code of Hammurabi, Greek laws, Egyptian laws, and Roman law already distinguished between punishable acts and acts encompassing a cause that removed the criminal nature of the conduct, thus recognising the principle of subjective liability. In practice, this principle materialised through the sanctioning of the ease with which the offender became intoxicated, rather than the act itself that had been committed.

In the framework of current criminal codes, subjective liability represents a legal safeguard for citizens, ensuring that no one shall be punished unless they have committed, with culpability, an act that presents a certain degree of social danger and is provided for by the criminal law, provided that no cause exists which excludes criminal liability. Consequently, such causes must be regulated with utmost precision in the criminal legislation, as due regard must be afforded to every human life - both that of the victim and of the accused.

In our former legislations, certain provisions existed concerning specific cases in which the imposition of a penalty for an act defined by criminal law was not possible. Thus, Article 59 of the Criminal Code of the Old Kingdom stipulated that no crime or offence may be excused and no penalty may be mitigated, except in those cases and under those circumstances in which the law declares the act to be excusable or allows for the application of a less severe penalty.

It can be observed that, at that time, the concept of causes that remove the criminal nature of the act had not yet been fully developed in legislation. However, a legal framework had been established

whereby, in certain situations, the perpetrator could not be punished, or a mitigated form of liability was instituted.

The Romanian Criminal Code of 1864 provided, in a distinct chapter, for the causes that shielded from punishment or reduced the penalty, referring to loss of reason, self-defence, minority, and other excuses or mitigating circumstances.

A comprehensive regulation of the causes that remove the criminal nature of the act can be found in the Criminal Code of 1937, Articles 127 to 159, under the designation of causes that exempt from or reduce criminal liability. These causes include: mental alienation and other states of unconsciousness, moral coercion, necessity, self-defence, physical coercion, fortuitous event, error of law and fact, legal order and command of a legitimate authority, minority, deaf-muteness, provocation, and mitigating circumstances (Rătescu et al., 1937).

In the former Criminal Code, the causes that remove the criminal nature of the act (Articles 44-51) are the following: self-defence, necessity, physical coercion and moral coercion, fortuitous event, lack of criminal responsibility, intoxication, the minority of the perpetrator, and mistake of fact.

The incidence of criminal law - and, in particular, of criminal liability - may arise only when it is established that, in the objective reality, a person has committed an act that meets all the constituent elements of an offence. There are instances in which, at first glance, an act appears to fulfil all the requirements for being qualified as a criminal offence, but upon thorough examination, it becomes evident that the act cannot be subsumed under the framework of any incriminating provision. The concepts concerning the existence or non-existence of an offence, the existence or non-existence of criminal liability, and the applicability or non-applicability of criminal sanctions have evolved in parallel with the transformations brought about by advances in science and technology.

However, a unified and clear concept has never existed - neither at the level of legal theory nor within criminal legislation itself. This conceptual ambiguity is also present in contemporary Western legal systems. For instance, the Italian Criminal Code (Article 52), when defining self-defence, uses the phrase “non è punibile”, which indicates that, in the view of the Italian legislator, self-defence constitutes a cause of non-punishability (Regno d’Italia, 1930). Similarly, the Spanish Criminal Code (Article 20), in referring to the causes that affect the existence of the offence, employs the expression “están exentos de responsabilidad criminal”, thereby conflating them with the causes that exclude criminal liability (Jefatura del Estado,

1995). In contrast, the Swiss Criminal Code clearly treats self-defence as a justification, using the wording “acts in self-defence who repels an unlawful attack” and placing the provision among the general grounds that exclude the unlawfulness of the act (The Federal Assembly, 1937). Likewise, the Texas Penal Code provides that “a person is justified in using force against another when and to the degree the actor reasonably believes the force is immediately necessary to protect the actor” (Texas Legislature, 1973), thereby framing self-defence explicitly as a justifying ground.

The former Romanian Criminal Code used the expression “grounds that remove the criminal nature of the act.” The current Criminal Code classifies these grounds into justifying grounds and grounds excluding criminal responsibility. Most Romanian legal scholars adopt the terminology established by the current Code.

In Western criminal law theory and legislation, a distinction is typically drawn between two categories of grounds that negate the existence of the offence:

- **Justifying grounds**, based on the existence of a legal right to commit certain acts - also referred to as objective grounds for excluding criminal responsibility, or grounds that remove the unlawfulness or illicit character of the act; and
- **Excusing grounds**, based on the absence of personal blameworthiness - also referred to as subjective grounds for excluding criminal responsibility, due to the absence of fault or culpability.

Together, these two categories are referred to by some authors as exclusive grounds for excluding criminal responsibility.

Under the current law (*De lege lata*), the following are considered grounds that remove the criminal nature of the act: self-defence, necessity, the exercise of a right or the fulfilment of a duty, the victim’s consent, physical coercion, moral coercion, non-attributable excess, mistake, fortuitous event, lack of criminal responsibility, intoxication, minority, as well as certain special grounds (Udroiu, 2014a).

Given that in Romanian criminal law (as well as in other branches of national law), the terms illicit and unlawful have traditionally borne equivalent meanings, the use of the concepts of typicality and unlawfulness as distinct analytical criteria appears inappropriate, as it may generate confusion. In our legal system, the notion of unlawfulness is subsumed under that of typicality, since the legal classification of an act (its conformity with the legal description of an offence) inherently presupposes the absence of any ground that

would negate the illicit nature of the act. Virtually, general provisions are part of the content of the incriminating norms themselves.

The provisions of the General Part form, by operation of law (*ope legis*), an integral part of each provision governed by the Special Part of criminal law.

The **justifying grounds** were introduced in the new Criminal Code, returning to the provisions contained in the 1937 Code, thereby aligning the criminal legislation with the European framework (Rătescu et al., 1937).

The concept of unlawfulness corresponds to evident social and legal realities. Thus, alongside prohibitive norms - namely, incriminating provisions - there also exist permissive norms, which remove the criminal character of an act even when that act is formally described in an incriminating provision. These permissive norms take precedence over prohibitive norms and operate not only in criminal law, but across all branches of law. For example, self-defence, although regulated by the Criminal Code, is applicable in all areas of law, being defined by the legal permissibility to respond with force to an act involving the use of force (*vim vi repellere licet*).

Doctrine designates the correspondence between the concrete act and the incriminating provision as typicality. This generally coincides with unlawfulness, although there are exceptions to this rule. Following the acknowledgment of the possibility of a lack of concordance between typicality and unlawfulness, the latter has been regarded in legal doctrine as a distinct essential element of the offence, alongside typicality and culpability - an idea adopted from German, Italian, French, and other legal doctrines.

According to the provisions of Article 18 (1) of the Criminal Code, “an act provided for by criminal law does not constitute an offence if one of the justifying grounds provided by law exists.”

The effect of justifying grounds extends also to participants in the offence. Thus, it can be stated that the circumstances constituting justifying grounds produce **effects in rem**.

With regard to self-defence, the new Criminal Code has eliminated the requirement of the attack generating a serious danger, the assessment now focusing on the proportionality of the defence in relation to the gravity of the attack (Antoniu, 2006).

The justifying ground regulated by Article 21 of the Criminal Code - namely the exercise of a right or the fulfilment of a duty - is similar to the one provided under the former Criminal Code (lawful authority or command of a legitimate authority), albeit formulated in a modern manner, adapted to contemporary society.

The victim's consent shall be considered a justifying ground only if it concerns social values over which the holder may validly dispose.

The **excusing grounds** are regulated under Article 23 of the Criminal Code. According to this article, "an act provided for by criminal law does not constitute an offence if it was committed under the conditions of any of the grounds excluding criminal responsibility."

The effect of such grounds does not extend to participants, with the exception of the **fortuitous event**.

According to the Criminal Code, the grounds excluding criminal responsibility are: physical coercion, moral coercion, non-attributable excess in self-defence or necessity, minority, lack of criminal responsibility, intoxication, fortuitous event, and mistake.

Unlike the former Criminal Code, in relation to intoxication, the requirement that the perpetrator be in a state of complete intoxication at the time of committing the act has been removed. It is now sufficient that the person was unable to understand the nature of their actions or omissions, and, in addition to alcohol, psychoactive substances may also constitute causes of intoxication.

As regards mistake, a distinction must be drawn between a mistake concerning the constitutive elements of the offence and a mistake regarding the prohibited nature of the conduct. Thus, according to Article 30 (1) of the Criminal Code, "an act provided for by criminal law does not constitute an offence if it was committed by a person who, at the time of its commission, was unaware of the existence of a state, circumstance, or situation on which the criminal nature of the act depended." (Parlamentul, 2009)

The excusing grounds are regulated by the Criminal Code and include: physical coercion, moral coercion, non-attributable excess in self-defence or necessity, minority, lack of criminal responsibility, intoxication, fortuitous event, and mistake.

A circumstance, situation, or condition unknown to the offender at the time of committing the offence does not constitute an aggravating circumstance or an aggravating element.

By contrast, mistake regarding the unlawful nature of the act is regulated separately under Article 30 (5) of the Criminal Code, which provides that: "An act provided for by criminal law is not imputable if it was committed as a result of ignorance or misapprehension of its unlawful nature, due to a circumstance that could not have been avoided in any way."

With regard to non-attributable excess, the provisions of the current Criminal Code differ from those of the former Criminal Code.

Article 26 (1) of the current Code provides that: “An act provided for by criminal law is not imputable when committed by a person acting in self-defence, who exceeded the limits of proportional defence due to disturbance or fear.”

By contrast, Article 44 (3) of the former Criminal Code stipulated: “It is also considered self-defence when a person, due to disturbance or fear, exceeded the limits of a defence proportionate to the seriousness of the danger and to the circumstances in which the attack occurred.”

Therefore, under the current regulation, the defence justifying the non-attributable excess must be proportionate to the seriousness of the attack, and not to the seriousness of the danger and the circumstances in which the attack occurred, as provided by the previous legislation (Mitrasche, 1997).

A new provision concerning the grounds that remove the criminal nature of the act in the current Criminal Code is found in Article 26 (2), which states: “An act provided for by criminal law is not imputable when committed by a person in a state of necessity, who, at the time of the act, did not realise that it would cause consequences clearly more serious than those that would have occurred had the danger not been removed.”

This ground had previously been regulated only indirectly in Article 45 (3) of the former Criminal Code, which stated: “A person is not in a state of necessity if, at the time of committing the act, they realised that the act would cause consequences clearly more serious than those that would have occurred had the danger not been removed.”

However, these former provisions required interpretation by way of contrast (*per a contrario*) in order to recognise the excusing ground.

2 Classification of the grounds removing the criminal nature of the act

The grounds for the inexistence of the offence must be distinguished from the grounds for the exclusion of criminal liability, which are referred to in legal doctrine by various expressions such as: grounds excluding criminal liability, grounds exempting from criminal liability, grounds precluding punishment, grounds for non-punishment, or grounds of irresponsibility.

The grounds for the inexistence of the offence refer to *states, situations, or circumstances that prevent the completion of the legal structure of the offence*. By contrast, the grounds for the exclusion of

criminal liability presume that *the act constitutes an offence, but they prevent the automatic consequence of criminal sanctions from being applied* - except for security measures, which may, in certain cases, be imposed even when the act provided by the criminal law does not qualify as an offence (Mirișan, 1996).

The examination of the factual situation begins with verifying the existence of the offence, and only if the answer to this question is affirmative does the inquiry proceed to assess the existence of the criminal conflict. However, although the commission of an offence generally leads to the application of criminal sanctions, this consequence may be neutralised if a ground precluding the application of the penalty is present.

The grounds for the exclusion of criminal liability refer to those states, situations, or circumstances that render it impossible to hold the offender criminally accountable (for example, amnesty, limitation period, lack of prior complaint, etc.).

The relevance of the distinction between grounds for the inexistence of the offence and grounds for the exclusion (non-application) of criminal liability lies primarily in the different legal effects that the two categories produce (Mirișan, 1996).

In the case of the inexistence of the offence, the impossibility of engaging criminal liability is absolute, whereas in the case of the exclusion of criminal liability, the impossibility is only relative - either in the sense that liability was possible at an earlier time, or that it may become possible if the ground excluding liability ceases to exist.

The grounds for the inexistence of the offence produce effects from the very moment they arise (*ex tunc*), even though their acknowledgment may occur later, through judicial proceedings. These grounds have an absolute character, as they may be invoked by any participant in the proceedings and at any stage of the criminal process. During the investigation phase, the existence of a ground excluding the offence leads to the termination of the criminal investigation, and during trial, to the acquittal of the defendant (Mirișan, 1996).

The grounds for the inexistence of the offence must not be confused with the circumstances that result in the extinction or non-execution of criminal sanctions (such as the statute of limitations for enforcement or pardon). Just like the grounds that exclude criminal liability, the grounds that extinguish the enforcement of criminal sanctions are subsequent to the establishment of the offence and the determination of liability, yet they render the initiation or continuation of enforcement impossible.

The grounds excluding the offence may be classified according to several criteria. Based on the scope of applicability and the place of regulation, a distinction is made between general grounds and special grounds (Hotca, 2013).

General grounds apply to multiple offences and are typically regulated in the General Part of the Criminal Code.

Special grounds apply only to a single offence or to specifically determined offences and are usually regulated in the Special Part of the Criminal Code or in special laws.

According to the criterion of the elements to which they refer, the grounds for the inexistence of the offence are divided into grounds relating to culpability and grounds relating to the legal provision of the act in criminal law (i.e., the incrimination or the unlawful character of the act).

The grounds relating to the legal element (the provision of the act in criminal law) may be referred to as justifying grounds, while those relating to culpability may be referred to as grounds for the inexistence of culpability or grounds excluding culpability.

According to their effects, a distinction is made between objective grounds and personal grounds.

Objective grounds concern the act itself and generally produce effects with regard to all participants (*in rem; erga omnes*).

Personal grounds relate to the individual circumstances of one of the participants and produce effects only in relation to that person (*in personam*).

Among the general grounds, we may mention: the decriminalisation of the act, impossible attempt, voluntary abandonment and prevention of the result, self-defence, necessity, exercise of a right or fulfilment of a duty, victim's consent, coercion, fortuitous event, lack of criminal responsibility, intoxication, minority, and mistake. An example of a special ground is the coercion of the bribe-giver (Hotca, 2013).

From a *de lege ferenda* (proposed legislative) perspective, the legislator should clearly distinguish between grounds that exclude the unlawful nature of the act (such as typicality, legal provision, etc.) and grounds that exclude culpability. Such a distinction would enable practitioners to apply the law with greater accuracy, particularly in matters involving security measures.

Under such a legal framework, security measures could be imposed on an individual who has not committed an act constituting a criminal offence only if the ground excluding the criminal nature of the act relates to culpability, and not to the legal element. In practice, the

application of security measures to non-offenders would be possible only in cases where the ground for the inexistence of the offence is one that excludes the offender's culpability.

Moreover, while a justifying ground is typically an objective ground (*in rem*), a ground excluding culpability is generally of a subjective nature (*in personam*). Likewise, justifying grounds usually exclude all other forms of legal liability as well.

3. Comparison between the grounds removing the criminal nature of the act

Self-defence and mistake

Justifying causes remove only the unlawful (unjustified) character of the act provided by criminal law, not the culpability in the form of imputability.

The existence of a justifying cause produces effects with respect to the act itself (*in rem*), as the criminal nature of the act is eliminated; since the effects of justifying causes operate in rem, they apply both to the perpetrator (or co-perpetrators) and to the participants (instigators, accomplices) (Hotca, 2007).

When a justifying cause is established, the criminal investigation bodies, noting the existence of an impediment to initiating or exercising the criminal action, shall order the case to be closed, while the court shall order acquittal.

The establishment of a justifying cause excludes the possibility of applying a penalty, an educational measure, or a safety measure.

The presence of a justifying cause prevents the engagement of tort civil liability.

In the New Criminal Code, culpability, as a general characteristic of the offence, has been termed imputability, appearing as the third essential characteristic of the offence, and being distinguished from culpability as a constitutive element of the offence.

An act provided by criminal law does not constitute an offence if it was committed under any of the causes of non-imputability (Article 23 (1) of the New Criminal Code). The new Code regulates, in Articles 24 to 31, the general causes that remove the essential feature of imputability. These general causes of non-imputability include: physical coercion, moral coercion, non-imputable excess, minority, lack of criminal responsibility, intoxication, mistake, and fortuitous event (Hotca & Slăvoiu, 2009). However, there are also special causes of non-imputability (see, for instance, Article 290 (2) of the New Criminal Code).

Unlike justificatory causes, causes of non-imputability are personal in nature, meaning that only the person who acted under their influence may benefit from their effects. These effects do not extend to participants who, unless they themselves benefit from a justificatory cause or a cause of non-imputability, will be held criminally liable for the act committed with intent, under the conditions of improper participation (Article 52 (3) of the New Criminal Code). The only exception is the fortuitous event, which constitutes the sole cause of non-imputability that produces effects in rem (Article 23 (2) of the New Criminal Code).

The removal of the criminal nature of an act committed under the influence of a cause of non-imputability entails the impossibility of applying a penalty or educational measures; however, the application of safety measures remains possible (Hotca, 2007).

Similar to the situation in which a justificatory cause is found to exist, when a cause of non-imputability is established, the criminal investigation authorities must order the case to be closed, while the court shall pronounce an acquittal.

As regards tort civil liability, it may or may not be engaged, depending on the cause of non-imputability established (for example, when causes such as physical or moral coercion, or fortuitous event are retained, civil liability cannot be engaged).

In order to establish imputability, the subject must be responsible, meaning they must possess the capacity to understand the significance of their actions. When the perception that the subject has formed regarding a certain element does not correspond to reality, the situation falls under the category of error.

According to Article 30 of the Romanian Criminal Code: "*An act provided for by the criminal law does not constitute an offence when committed by a person who, at the time of its commission, did not know of the existence of a state, situation, or circumstance on which the criminal nature of the act depends.*

(2) The provisions of paragraph (1) shall also apply to acts committed by negligence and punished by the criminal law, only if the ignorance of the respective state, situation, or circumstance is not itself the result of negligence.

(3) A state, situation, or circumstance that the offender did not know at the time of committing the offence does not constitute an aggravating circumstance or an aggravating circumstantial element.

(4) The provisions of paragraphs (1)–(3) shall apply accordingly in the case of ignorance of a legal provision of a non-criminal nature.

(5) An act provided for by the criminal law is not imputable when committed as a result of the ignorance or mistaken belief regarding its illicit character, due to a circumstance that could not have been avoided in any way2" (Parlamentul, 2009).

The main amendment brought by the new Criminal Code regarding mistake concerns the abandonment of the classical distinction between mistake of fact and mistake of law, in favour of the modern classification of mistakes into mistakes concerning the constitutive elements and mistakes concerning the unlawful nature of the act (Hotca & Slăvoiu, 2014).

A mistake concerning the constitutive elements of the offence has the effect, insofar as it is invincible, of removing guilt from the structure of the subjective element. Indeed, since the perpetrator is mistaken about a circumstance indicated in the content of the offence, the mistake affects one of the elements of intent - the intellectual element. In the absence of this, there can no longer be intent, so liability for an intentional act is excluded. The mistake generally allows for liability for a negligent act to remain, insofar as such form is criminalised. For example, if, due to carelessness, a hunter shoots at a person whom he mistakes for a wild boar, the mistake excludes liability for intentional killing (murder), but the perpetrator will be liable for manslaughter. However, if the mistake were invincible - in other words, if it was not due to the perpetrator's own fault - it would also exclude liability for the negligent act.

In situations where the mistake does not concern a constitutive element proper of the offence, but rather an aggravating circumstance, the circumstance will not be retained against the defendant.

For example, in the case of qualified murder committed against a pregnant woman (Article 189, letter g) of the Criminal Code), if the perpetrator is unaware of the victim's pregnancy, he will be held liable for simple murder (provided that no other qualifying circumstances apply) (Parlamentul, 2009).

A mistake concerning the illicit nature of the act relates to the prohibition of the behaviour in question - to its unlawfulness. In this case, the perpetrator is aware of committing an act provided for by criminal law, but believes that the act is authorised by the legal order, which in fact is not the case.

For example, the person who erroneously believes that the act is not prohibited by a criminal norm, or who mistakenly considers that, in a state of necessity, it is not required for the rescue action to be the

[2] Translation by the author

only means of removing the danger, commits the act under a mistake concerning its justification.

A mistake regarding the constitutive elements and a mistake regarding the illicit nature of the act may both present themselves either as a mistake of fact or a mistake of law.

For instance, in the case of theft, a mistake regarding the constitutive elements takes the form of a factual error when the perpetrator believes that the owner of the good has given consent to take it, and it is a mistake of law when the perpetrator erroneously believes that, according to civil law, the good already belongs to him.

Similarly, in the case of self-defence, a mistake regarding the illicit nature of the act constitutes a factual error if the perpetrator mistakenly believes he is facing an attack, and a legal error to the extent that he believes that, according to the law, proportionality between the defence and the attack is not required.

By recognising the mistake regarding the illicit nature of the act, the New Criminal Code, unlike the previous regulation, also acknowledges the mistake concerning a criminal norm. Such a mistake produces legal effects, as previously shown, only in the event that it is invincible, and therefore it will be admitted only rarely in practice (Boroi, 2010).

For example, a mistake of criminal law may be admitted in the case of an act incriminated the day before by an emergency ordinance and committed in the first hours after the entry into force of the legal text, when there was no possibility of becoming aware of its content.

Similarly, the mistake may be invoked when the perpetrator is misled by a representative of the authorities. For instance, the person requests an authorisation, and the competent authority replies that no authorisation is required for the respective activity. If the person is later prosecuted for performing that activity without authorisation, they may invoke a mistake of law.

However, the mistake is not admitted when the commission of the act is due to incorrect legal advice given by the person's lawyer.

Self-defence and the state of necessity

In order to make a comparison as close to the truth as possible between the two causes that remove the criminal nature of the act, it is absolutely necessary to examine their content as presented in the Code, specifically in Articles 19 and 20 (Hotca & Slăvoiu, 2011).

Thus, Article 19 begins with "the act provided by criminal law committed in self-defence is justified," and immediately defines: "a person is acting in self-defence when committing the act in order to

repel a material, direct, immediate and unjust attack that endangers oneself, another person, their rights or a general interest, provided that the defence is proportional to the gravity of the attack."

It is presumed that a person acts in self-defence, under the conditions of paragraph (2), when committing an act in order to repel the intrusion of another person into a dwelling, room, outbuilding, or enclosed area belonging to it, without right, through violence, deceit, burglary, or other similar unlawful means, or during the night.

A person is considered to be in a state of necessity when they commit an act in order to save from an immediate danger - which could not have been otherwise averted - their own life, physical integrity, or health, or that of another person, or an important asset belonging to themselves or another person, or a general interest, provided that the consequences of the act are not clearly more serious than those that would have occurred if the danger had not been removed.

In the case of a state of necessity, the situation of danger must meet certain conditions:

- the danger must be imminent
- the danger must be unavoidable
- the danger must not have been intentionally caused by the person invoking the state of necessity
- the danger must threaten one of the values referred to in Article 20 paragraph 2

At the same time, the rescue action must meet the following conditions:

- the action must be carried out with the intention of removing the danger
- the action must be the only way to avoid the danger
- the action must not produce a clearly more serious consequence than the one that would have occurred if the danger had materialized
- the person who committed the rescue act must not have had the obligation to sacrifice themselves

Just like in the case of self-defence, in the hypothesis of a state of necessity we are dealing with a justifying ground, which therefore eliminates any possibility of applying a sanction or another measure of criminal nature.

Both self-defence and the state of necessity produce in rem effects, applying to all participants (Hotca & Slăvoiu, 2011).

Nevertheless, there is an important difference compared to self-defence, in terms of civil liability. In the case of self-defence, the

damage was caused to the attacker, namely to the person who had committed an unjustified act. In the situation of the state of necessity, the damage is often caused to a third party who has nothing to do with the created danger. Therefore, the legal solution must also be different. As already mentioned, in the case of an act committed in a state of necessity, the person who carried out the action to save their own property is obliged to compensate the third party for the damage suffered as a result of that action.

In the situation where the rescue action was carried out by a third party, the person in whose favour the intervention took place must compensate the one who suffered the damage, as the rescuer does not enter into any civil legal relationship with the latter.

A first similarity between the two criminal law institutions lies in the fact that both remove the criminal nature of the act, provided that the conditions set out in the definition are strictly met.

Both institutions require the cumulative fulfilment of several conditions, without which neither the state of self-defence nor the state of necessity can be conceived. Thus, in order to speak of a state of self-defence, conditions must be met regarding both the attack and the defence, and in order to speak of a state of necessity, the conditions presented above must likewise be fulfilled (Boroi, 2010).

However, what must be noted is that self-defence can be triggered both by an action and by an omission, whereas the state of necessity can only be provoked by an action.

For the application of both self-defence and the state of necessity, the existence of a danger is mandatory; however, in the case of self-defence, the danger must be serious, whereas in the case of the state of necessity, the danger must be immediate.

The serious nature of the danger results from the fact that it threatens to cause irreparable or difficult-to-remedy consequences; however, if the consequences are reparable and easy to remedy, the defence ceases to be legitimate, as the need for protection no longer justifies this course of action.

Only a serious danger can trigger in the attacked or intervening person impulses that prevent a normal exercise of will, causing them to act under the pressure of a constraint generated and sustained by the emergence and persistence of the danger.

Thus, only the existence of a serious danger can determine that psychological constraint which evidences the absence of culpability. The assessment of the seriousness of the danger is made in relation to the actual circumstances at the time of the aggression, not ex post, based on abstract criteria (Udroiu, 2014a).

Therefore, not every attack creates a state of serious danger, and one cannot speak of legitimate defence in such cases.

As regards the imminence of the danger, the state of necessity arises from the moment when the danger is immediate and threatening, in the sense that the harmful consequences are realistically and imminently achievable.

The state of necessity will persist only as long as the danger remains immediate and current; thus, the condition of immediate or current danger, which characterizes the state of necessity, highlights the fact that a distant, even approaching, past, or future danger does not give rise to a state of necessity.

Taking into account the above, it is more than evident that both the act committed in a state of legitimate defence and the act committed in a state of necessity are required in order to avoid a serious danger (legitimate defence) or an immediate danger (state of necessity).

The distinction, however, lies in the fact that the necessity of defence arises directly from the law (*ope legis*) when the conditions concerning the danger of the attack are met, whereas necessity in the state of necessity is linked to the condition of the inevitability of the act, namely when there is no other possibility of escape.

In the state of necessity, the inevitability of the act undertaken to eliminate the danger creates the necessity within the meaning of the law for committing the act, which only afterwards must fall within certain limits of proportionality, as a necessary act. Given that the act committed in legitimate defence is imposed by the need for defence solely as a natural and proportionate reaction, the condition of the necessity of the act, in the sense of its inevitability, is not required; thus, the new Criminal Code no longer imposes the condition of the "necessary act" (*actus necessarius*), which remains specific only to the state of necessity.

Another distinction between the two institutions regulated in the General Part of the Criminal Code lies in the fact that a person is acting in legitimate defence when they commit the act in order to repel a material, direct, immediate, and unjust attack, whereas a person is in a state of necessity when the danger arises due to circumstances created by people or natural phenomena. What must be noted regarding the cause that removes the criminal nature of the act, as provided by Article 20 of the Criminal Code, is that the danger threatening the protected social values is generated by various events such as floods, earthquakes, fires, animal reactions, and not by a

person's attack, as in the case of legitimate defence (*defensio legitima*) (Udroiu, 2014a).

Another issue that must be raised on this occasion concerns the situation in which the victim of an aggression is compelled by the necessity of defence to react in such a way that, implicitly, an innocent third party must be harmed as well.

The situation is different from that of an erroneous blow (*aberratio ictus*), so the issue of error does not arise when the injury to the third party appeared to the perpetrator as possible or even certain. What is decisive in assessing the significance of the act toward the innocent third party is the fact that, under the concrete circumstances of legitimate defence, the injury to that person appears to have been imposed by the necessity of defence (for example, the stick thrown hits both the aggressor and the third party) (Udroiu, 2014b).

In the case where a single defensive act causes harmful consequences to both the aggressor and a third party, the criminal nature of the act shall be excluded - in part through legitimate defence and - in part through the state of necessity, provided, of course, that the conditions of the latter are met.

The state of necessity can be combined with legitimate defence not only in situations where the need for defence requires the commission of a single act that also affects the interests of a third person located in the immediate proximity of the aggressor, but it may also be invoked subsequent to the exercise of legitimate defence, through the commission of other acts provided by criminal law, to the detriment of persons not physically involved in the conflict between the parties. It is possible, for example, that an object belonging to a third party be used and destroyed in the course of defence, or that, after striking the aggressor, one flees and forces the door of a dwelling, thereby violating the domicile of another person (Streteanu, 2003).

Among these conditions, the state of legitimate defence generates a state of necessity between the person under attack and the innocent third party, the former being unable to exercise legitimate defence without causing harm to the innocent third party. Therefore, the person who carried out the defensive act may invoke legitimate defence in relation to the aggressor and a state of necessity in relation to the innocent third party.

Self-defence and fortuitous event

According to Article 31 of the New Criminal Code, an act provided by criminal law does not constitute an offence if its result is the consequence of a circumstance that could not have been foreseen.

This provision is identical to the one laid down in Article 47 of the former Criminal Code.

For the fortuitous event to be applicable, it is necessary that an external circumstance overlap with the conduct carried out by the perpetrator, leading to the occurrence of another result that could not have been foreseen.

The origin of this circumstance may lie in: an act of a human being (for example, a pedestrian suddenly jumps in front of a vehicle driving lawfully and is killed); a natural phenomenon (for instance, due to a landslide, a car is thrown into the opposite lane and is hit by a truck driven lawfully by the subject); the act of an animal (a deer jumps in front of the car and is killed); a technical defect (a manufacturing fault in the steering system of a vehicle leads to the occurrence of an accident) etc.

The aforementioned circumstances may overlap either with the lawful activity of the perpetrator (a sudden defect occurring in the steering system while the perpetrator was lawfully driving the vehicle), or with an unlawful activity (the perpetrator threatens the victim, and the latter, due to a serious and undiagnosed heart condition, dies) (Streteanu, 2003).

The intervention of the external circumstance and its result must be unforeseeable.

As has been pointed out in the doctrine, unforeseeability must be general and objective, depending on the general limits of the ability to foresee.

Fortuitous event is a cause that removes the criminal nature of the act.

Specifically, in the case of a fortuitous event, an action or omission of a person produces a socially dangerous result due to the intervention of an external force (external energy) whose occurrence could not have been foreseen and which actually produces that result.

The impossibility of foreseeing, in the case of a fortuitous event, the intervention of the external force that caused the socially dangerous result is general and objective, depending on the general human limits of foreseeability (Udroiu, 2014b).

Fortuitous circumstances may be caused by:

a) natural phenomena (earthquakes, storms, lightning, landslides, insect infestations, etc.) whose occurrence in time cannot be foreseen;
b) the technologization of human activities (the malfunction of a mechanism, the premature wear of a component, etc.);

c) the imprudent conduct of a person (the sudden appearance, in front of a fast-moving vehicle, of a person);
d) the pathological condition of a person (epilepsy, fainting, heart attack, etc.).

The unforeseeable circumstance may occur prior to, simultaneously with, or subsequent to the action of the perpetrator.

An act is considered to have been committed in a fortuitous case when the following conditions are met:

a) The socially dangerous result of the act must be the consequence of the intervention of a circumstance external to the will and awareness of the perpetrator. There must be a causal link between the unforeseeable circumstance and the result produced. If no causal link exists in the sense that the result would have occurred as a consequence of the action or inaction of the perpetrator even without the unforeseeable intervention of the external force, then there is no fortuitous case.
b) The perpetrator must have been unable to foresee the intervention of the circumstance (external force) that caused the result. Unforeseeability refers to the intervention of the circumstance, to the moment of its occurrence, and not to the result itself, which may be generally foreseeable.
c) Finally, in order to assess the existence of a fortuitous case, it is required that the act which produced a socially dangerous result due to the unforeseeable intervention of an external force must be one that is provided for by criminal law.

An act provided for by criminal law, committed under a fortuitous circumstance, similarly to one committed in self-defence, does not constitute an offence, as it lacks the essential element of culpability (Hotca, 2007).

The perpetrator's culpability is excluded because they were unable to foresee the intervention of the circumstance that produced the socially dangerous result.

The impossibility of foreseeing the intervention of the external force is general and objective, and due to this aspect, the effects of the fortuitous case apply in rem, just as in the case of self-defence, meaning they extend to all participants.

Since the fortuitous case removes the criminal nature of the act, it also removes, as a consequence, criminal liability, just like self-defence.

Civil liability is also excluded, as in the case of self-defence, but only if it is not concurrent with other causes that remove the criminal nature of the act.

Conclusions

In the administration of justice, the criminal investigation body and the court have the obligation to clarify the case in all its aspects, based on evidence, as provided by the Code of Criminal Procedure.

Throughout the examination of the causes that remove the criminal nature of the act, I have sought to emphasize the importance of evaluating all the circumstances that led to the respective situation, as well as the concrete assessment of the characteristics of the person who was compelled to react under exceptional conditions.

Only under such conditions of discovering the truth - both regarding the acts and the circumstances of the case, as well as regarding the perpetrator - can the purpose of the criminal trial be achieved.

The evidentiary difficulties are evident in situations where, most of the time, the witnesses are none other than the persons involved themselves, and the assessment of the perpetrator's mental state, of their self-control capacity, must be related to the moment the acts were committed.

However, no matter how difficult such tasks may appear, the reconstruction of an event and its representation based on evidence, in all relevant circumstances that accompanied, preceded, or followed it, constitutes an activity upon which, ultimately, the fair application of the law depends.

Therefore, the analysis of all the circumstances of the case must be carried out with constant attention, in order to eliminate, as far as possible, the risk of discovering that some of the seemingly most solid arguments underpinning a solution are undermined by the failure to consider certain factors that appear insignificant at first glance but may lead to entirely different judicial conclusions.

Only in this manner can the correct application of these institutions of criminal law - the justificatory causes that remove the criminal nature of the act - ensure the proper limits of criminal liability, whose sole basis is the offence: an act provided by criminal law, committed with culpability, unjustified, and imputable to the person who committed it.

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