

JURIDICAL ASPECTS OF THE EXERCISES OF A RIGHT OR OF THE FULFILLMENT OF OBLIGATIONS

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***ABSTRACT:** THE ROMANIAN CRIMINAL CODE ESTABLISHES IN WHAT CIRCUMSTANCES AND UNDER WHAT CONDITIONS WHICH ARE A LEGAL PROVISION THAT THE SOURCE OF A RIGHT OR AN OBLIGATION, PREVAILS REPORT DISPOSITION PROVIDED FOR ANOTHER LEGAL NORM.*

***KEY-WORDS:** JUSTIFIED CAUSE, CRIMINAL DEED, FEATURE OF OFFENSE, THE EXERCISE OF A RIGHT, THE FULFILLMENT OF OBLIGATIONS*

1. The regulatory framework

The provisions of art. 21 C.p. covered two cases supporting: the exercise of a legal right (paragraph 1 sentence 1) and the fulfillment of an obligation imposed by law or by the competent authority (paragraph 1 sentence 2 and paragraph 2), meant to establish the circumstances a criminal offense committed in the exercise of a right or the fulfillment of an obligation, dress juridical aspect, the act is not a crime because it fulfills an essential feature of the offense, ie unjustified [1].

In accordance with art. 21 C.p. “is justified by the criminal law act consisting in the exercise of a legal right or the fulfillment of an obligation imposed by law, subject to the conditions and limits laid down by it.

It is also justified by the criminal law act consisting in the fulfillment of an obligation imposed by the competent authority as provided by law, if not manifestly unlawful”.

Although the exercise of a right or fulfilling an obligation operates on an act that fully meets the standard described incriminating legal model (typical), the act becomes permissible considerations relating to the interests of the legal system as a whole, for it would be conceivable that an activity authorized or ordered by a legal standard to be considered unlawful by another rule.

2. The exercise of a legal right

The meaning of „law” in the phrase „exercise of a right” is very broad, with respect to prerogative power under state authority (judge, cop , agent of a public authority) or a person (parent, guardian), meaning as subjective, purpose of legal or legitimate college. In a generic form, the term „law” justifies any behavior which seeks to satisfy a public

concern or private interests permissible under the regulations in their entirety constitute legal order of a state [2].

In the exercise of a right, the literature [3] shows that it can be both a source of law (constitutional, organic or ordinary) and the acts (decisions, O.U.G., O.G., individual administrative acts), in custom, contract, or a provision of an international treaty [4], in so far as it is ratified by the Romanian state [5], or in Community legislation.

The exercise of a right as justification to commit a criminal act may be cited as an official and a private citizen.

The exercise of a right doctrine [6] is exemplified by: parental authority or the right of parents of minors correction; exercise of constitutional rights; official authorization; exercise of creditor rights; a profession, trades or other occupations, according to the law; sports and sports competitions; persons enjoying immunity [7].

From literature and practice specialty [8], remember several instances where the exercise of a right appears as a supporting question:

a) The right of parents correction of minor children. Considered by most as a common law doctrine, the right of parents to apply small corrections severity of their children - without them they endanger the physical, mental or moral harm no dignity minor, does not influence the growth and education them - allowed and liable to remove illegal character in the case of low gravity acts (art. 206 C.p. - the threat) [9]. Right of correction may be delegated by parents to other people (educators, people in whose care the child is left), but can not be exercised by strangers.

b) Official authorization. Often the lack of authorization from the competent state body appears as a constituent element of the offense, so that removes authorization act provision in the criminal law itself. Assuming that the legislature has not provided the constituents, the existence of approval signifies a supporting cause (eg, exhumation of a corpse constitutive elements of the offense provided for in art. 383 C.p. - desecration of corpses or graves, but when he performed with the authorization issued by the competent state authority, would not be made illegal and therefore not an offense, the same port without the right of possession or non-lethal weapons in the category subject to authorization - art. 342 para. 2 C.p.; authorization detention [10] of a prisoner correspondence (art. 63 par. 3 of Law no. 254/2013 on the enforcement of sentences or measures involving deprivation of liberty ordered by the court in criminal proceedings [11]).

c) Exercise of creditor rights (eg retention of title recognized by doctrine and jurisprudence in favor of the creditor on the debtor's property to meet the obligations arising in connection with that work, supporting a cause for offense of breach of trust - art. 238 C.p., committed refusal to refund method).

d) Pursue a profession, trade or other occupation in the law (eg, a doctor amputates an arm or do an operation and the patient dies from it, a historian reveals the evil deeds of a historical figure, a critical defects envisages a work of art, a painter or a sculptor exhibit nudes, night wears driver audible alarm etc.). In all these cases, carry out certain activities that correspond to the pattern described in an abstract rule incriminating, but they are lawful permits law as the result of inherent natural profession, trade, occupation offender without it to have strayed from normal duties.

e) Sports and sporting competitions. There are sports that, by their nature, necessarily involve a minimum of physical violence (injuries, collisions, homicide), but they have an illicit nature, as permitted by the rules of their conduct. Some authors

consider that the violence exercised in sport can be justified on the basis of authorization, while other authors argue are justified and consent of the injured party [12].

f) Other situations in which it can invoke the exercise of a right. Civil law may allow committing acts that are under criminal law, for example, who bought a good, paying the real price from a person who had stolen it can not be convicted of concealment, because it will invoke the presumption possession has legal significance that title. In some cases, applying criminal laws have priority over other legal rules enshrining certain constitutional rights. For example, the right to an opinion, freedom of expression is limited by the provisions of art. 368 C.p. - public provocation that criminalises the act of incitement to hatred or discrimination; law journalist who may be punished for offenses committed under certain conditions through the press or harassment of a person (art. 208 par. 1 C.p.); owner's right to dispose by destruction of its own good (art. 253 par. 3, 4, 5 C.p.) etc.

2. Fulfillment of an obligation imposed by law or by the competent authority

Fulfillment of an obligation may mean supporting a cause, whether it is an obligation stemming directly from a legal rule or a provision of the authority [13]:

- When the law provides that an activity must be met, therefore the activity can not be considered illegal, as it is under the law. For example, members of the public order (police, gendarmerie, border guards) can use physical violence or the armament [14], under the law, committing acts that formally can be included in article. 193 C.p. - Battery or other violence, art. 194 C.p. - injury, art. 205 C.p. - deprivation of liberty unlawfully, art. 253 C.p. - destruction) in the work of maintaining public order [15].

They are notorious in this regard, where policemen or gendarmes shoot firearms for restraining criminals, trying to flee after committing the crime; to prevent escape or escape from escort those in the legal status of detainees; to detain people on that evidence or probable cause that they committed a crime and fight back or try to fight back with weapons or other objects. The situation is the same people who make use of the weapon against the attacking soldiers serving in the guard, guard, escort, protection, maintenance and restoration of the rule of law, against those who committed the act, by surprise, jeopardize the purpose guarded, and against those who attack or impede military to execute combat missions.

Worth illustrated situations where police officers, gendarmes and intervention units, intervening in force to restore public order seriously violated using batons, tear gas, rubber bullets and other materials that are supplied to interventions resulted in bodily injury to members turbulent or anarchist groups, or the death of either of them.

Can benefit from this issue and supporting others, especially among the local police, the security services and protection of civil servants invested with authority by virtue of office duties prescribed by law, have the right and duty to take or require action, even by resorting to force and thus committing offenses under the criminal law. In these situations, individuals have an official capacity, which gives them the power to make direct application provisions imposed by law. It acts itself tort obligation ordered by function or profession [16].

- When the order to commit offense under the criminal law was issued by an authority supporting a cause execution unless the order is manifestly illegal. For example, the act of demolishing a building belonging to another person constitutive elements of destruction provided by art. 253 C.p. But if the demolition is done for the enforcement of a

judgment issued in this regard will not act contrary to legal order and shall not constitute an offense. Therefore, the execution of an illegal order and it falls under proof case, to the extent that the order is manifestly illegal. For example, the execution of an arrest warrant issued by a judge does not attract criminal liability of the person who executed, even when the arrest was ordered by competent material violation (illegal order). However, if the arrest was ordered by the mayor, the order is manifestly illegal and can not be a cause for supporting the man who executed.

So the order of the law justifies unconditional; what the law orders can only be fair. Sometimes, however, to justify the act itself offense is necessary, in addition to the order of law and order express legitimate authority or competent authority [17]. Legal order of the competent authority always justify the act offense; requires fulfillment of jurisdiction of the authority issuing the order and conditions of legality, compliance with the law of the order [18].

4. Conditions

For an offense under the criminal law committed by the competent authority to be justified and thus be considered lawful, it must be noted the following cumulative conditions [19]:

a) To commit an offense under the criminal law, because no such facts, there can be no question of justification;

b) Deed be imposed by a provision emanating from the competent authority.

„Authority” means „power”, „right to issue provisions to enforce obedience” and „competent organ of state power to take action and to issue mandatory orders”; „Representative of such organ of state power” [20]. So the order given in such conditions must come from a legitimate body, entering in this category representatives of one of the three branches of government (legislative, executive, judicial).

First, an authority is legitimate if the upper and public (civil or military) are excluded private authority (eg, the prefect is considered a legitimate authority). Secondly, the authority shall be the competent authority to issue orders relating both to situations in which it is to apply the law and on how its application.

c) Order or the competent authority to take the form required by law, which means that it must contain the minimum information set out in law or other regulations. Appropriate orders, warrants, authorizations or other orders, which must contain the particulars required by the laws governing this area. An order that does not comply as required by law, even if emanating from a competent authority does not constitute a cause supporting enabling subordinate officials to evade criminal liability on the grounds that the act is permitted.

d) The order or the competent authority expressed in the form required by law, is not clearly illegal, which means that neither the first nor after a brief analysis of the person who executes it, it does not present the appearance of an illegal order. Where the charge order execution realizes that the order is unlawful act to be an offense, and he will respond with the criminal who gave the order. Order is not intended to supporting illegal unless they present an appearance of legality (it was issued in the form prescribed by law, is not obviously illegal). The order is manifestly illegal, for example, when ordered act is manifestly a crime that any person can tell [21].

In theory it was shown that the order is an imperative need, delivered in accordance with the law, the prerequisite to any kind of military action. This is the most important

element in the functional composition of any military structure, involving necessarily a big responsibility. Military personnel are forbidden to execute orders contrary to domestic law, the rules of armed conflict and international conventions to which Romania is a party. Consequently, the military can not be ordered execution of such orders, but neither may be civil or criminal liability as a result of the refusal to execute illegal orders [22].

e) Perpetrator to be competent to perform the disposal authority.

There can be no question of the impact of the case supporting the fulfillment of an obligation imposed by the competent authority whether that obligation falls outside contractor function attributions.

Conclusions

Acts committed in the exercise of a legal right and the fulfillment of an obligation imposed by law or by the competent authority are justified, are lawful, although operating on a legal deeds to the model described in a rule incriminating. They discount the antijuridic or not the deed, but not the typical character of the act; fact remains typical by the criminal law, but not contrary to the rule of law is based. As such, this will not attract criminal liability, but no other form of civil, administrative or disciplinary [23]. Where the exercise of a legal right comes into competition with the error actually is possible perpetrator intervention liability [24]. In the literature [25], the act committed pursuant to an order of the Authority, was admitted improper participation intervention solution and thus civil and criminal liability of the person who issued the order as moral instigator or copyright infringement.

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