Aspects of comparative law regarding the causes which remove the criminal character of the deed, respectively the justifiable causes and the impunity causes

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Abstract:
This paper focuses on research into the causes that remove the criminal nature of the act and of the justifiable causes and impunity causes respectively, under various legal systems, both in Western Europe and Asia. This panoramic approach allows the observation of both similarities and differences regarding this institution under the studied criminal codes, regulatory arrangements being similar, but also different at the same time, compared to the Romanian legislation and that of the Republic of Moldavia. Differences refer not only to the name or location within the criminal law, but also to the very foundation and conditions these causes must meet.
The comparative research of criminal law in various countries are of special theoretical and practical importance, being able to provide viable solutions to the problems and non-unified solutions within the national law. Moreover, comparative studies are commonly used in the preparatory processes of law drafting, the method of comparative law having a double role: it facilitates the creation of new law, and leads to a supranational unification of Rights.
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1.THE EUROPEAN CONVENTION ON HUMAN RIGHTS

The European Convention on Human Rights [1] does not distinctly regulate the causes eliminating the criminal nature of the act, those being regulated in a subsidiary way, as of linking them to the fundamental human rights which enshrine them. This allowed self-defense is a justifiable part of the illegal violence against an individual, the defense being subsumed within the right to life provided in art. 2 Title I, which provides:

1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of death sentence of a court following his conviction of a crime for which his penalty is provided by law [2].

2. Deprivation of life shell not be regarded as inflicted in contravention of this Article where it results from the use of force that is no more than absolutely necessary:

a). in defence of any person from unlawful violence;

b). in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

c). in action lawfully taken for the purpose of quelling a riot or an insurrection.

The right to life is a fundamental right that is grafted on all other human rights; due to its importance it occupies the first place among the rights and freedoms enshrined in both the European Convention on Human Rights and the fundamental laws of states in general.

Due to subsumed regulation, in relation to the right to life, only acts that result in death of the person should be considered; this is the sole situation under the provisions of art. 2.

However, the European Court of Human Rights held [3] - although jurisprudence is rather highly demanding in this case - that the provisions of this Article shall not be interpreted narrowly, any damage to physical integrity, under certain circumstances, being allowed to fall, be that only exceptionally, under art.2, although they are usually made in the realm of art.3. Thus, once before such a request, the Court cannot de plano reject judging it under art. 2 but it can be done only after a preliminary verification of all the circumstances in which injuries occurred and only whether they put life at risk, threatening the very existence of the person. Also in this regard, one should bear in mind that states have not only a general negative obligation to abstain to cause the death of a person, but also a positive obligation to take all necessary measures ensuring effective protection of the right to life, which includes for example, sound expertise in case of a death (see: Yaşa v. Turkey, September 2nd. 1998 Salman v. Turkey, June 27. 2000)[4].

Under art.2 fall the situations where a person is sentenced to death when, although the effective death cannot be taken into consideration, the execution of the capital punishment is imminent [5].

The exceptions provided in the second paragraph have only a seemingly restrictive role of the right to life; they are but ways to guarantee and defense it. The state has the obligation to defend the general interests of society, and if a person breaks the law by one of the methods provided in para. 2, due to their social risk of facts, the state must intervene assuming, as a last resort, even the right to life of the guilty, in favour of safeguarding the right to life (and other rights) of the innocent.

Although most authors [6] claim that in the second paragraph letter a). it is self-defense - as the cause that removes the criminal nature of the act -;we only partly agree

with those views, considering that when the actions of defense of person are carried out by state agents we are in the presence of other similar cases, namely: the exercise of a right or performance of an obligation. This is because - under the previous penal code - we are followers of production in personam and not in rem of the effects of self-defense. All statements set out in para. 2, wherein causing the death is justified, are mainly, by their nature, modalities for the exercise of a right or performance of an obligation by the state agents under the general positive obligation for the Member States to protect effectively and efficiently the lives of people under their jurisdiction. Precisely by virtue of the active subject of defense: a state agent - that in order to fulfill their duties, receives special physical and mental training –mental coercion cannot be relied on to determine a lack of guilt, self-defense foundation. In this case the agent acts with free will and conscience; what justifies the deeds, however, is their lack of social danger, being targeted towards defending the very interests of people. Law itself regulates such professions and allows, permits or requires it to carry out such actions, which in normal circumstances would constitute a criminal offense. Applying the cause that removes the criminal nature of the act within the right or fulfill an obligation (to the duties performed) excludes the incidence of self-defense.

So what causes the absence of criminal nature of the act of murder (possibly and exceptionally of injuries) in the cases provided by art. 2 para. 2 committed by an agent of the state is in our opinion the lack of social danger of the crime; and not the absence of guilt.

If we analyze, however, these situations as justifiable causes - as they have been designed and provided as such by the European Convention on Human Rights and effectively enforced by the European Court, and later taken up by the new Criminal Code - then, we do admit we are in the presence of a particular form of self-defense, given that this time the effects are produced in rem. So from this perspective, for the application of the benefit of self-defense only objective elements will be taken into consideration: the existence of the attack and the danger created by it, that state of self-defense, excluding the subjective elements: the presence or absence of guilt due to psychological coercion (such as in personam report of the effects of self-defense).

We appreciate that we are in the presence of a particular form of self-defense, because of special preparation of the active subject of defense, so the use of force must be absolutely necessary and the force used must be strictly proportionate to achieve the purpose authorized and monitored. What is the essence of this special case of self-defense is that public order agencies must have unquestionable and reasonable belief that at the time of the offense there was a dangerous situation even if it would be later proven not to have been according to reality [7]. In terms of proof when the provisions of Art. 2 are applied, the burden of proof is the obligation of the government of that particular state [8], and in proving the state of facts and assessing the evidence the Anglo - Saxon common law principle of "beyond reasonable doubt" [9] should be applied.

As far as the art. 2 para. 2 letter a) is concerned, we must point out that so far the European Court has not known any practical application of this text. Judge Corneliu Bîrsan [10], however, makes reference to a case that although being trialed under subparagraph b), has had the provisions of letter a) applied in relation to the facts.

2.CRIMINAL CODES OF SOME COUNTRIES FROM WESTERN AND CENTRAL EUROPE

The French Penal Code [11], Chapter II "causes that remove or mitigate criminal responsibility" of Title II "criminal liability" includes the following causes: irresponsibility (art. 122-1), coercion (art. 122-2) error (art. 122-3) exercise of a right or performance of an obligation (art. 122-4), self-defense (art. 122-5) and the presumption of legitimate defense (122-6), the state of emergency (art. 122-7).

What is surprising, however, is the proportionality requirement , both for self-defense, and in the state of emergency, which refers to the means used and not to the intensity of defense or the severity of consequences of the deed as the Romanian practice, doctrine and legislation rightly provide. We believe that the condition of the equivalence of the means used creates an disadvantageous legal situation for the defendant, the latter not having enough time, nor any real possibility to evaluate those means.

The German Criminal Code [12], in Chapter 4 provides two causes that remove the illegality of the act: self-defense (§32-33) and the state of emergency (§34-35).

In §33 it provides the term of justifiable excess of self -defense, so that in §35 we also find a special regulation that removes from the benefit of the state of emergency he who created the danger himself, or is related to the person who created it.

Criminal Code of the Netherlands (adopted in 1881 [13]) in Book 1 "General Provisions", Title III "Exclusion and worsening of responsibility" stipulates five causes eliminating the criminal responsibility, namely: recklessness (art. 39), force majeure (art. 40) necessary defense (art. 41), the enforcement of a legal requirement (art. 42) and executing an official order (art. 43).

It is noteworthy that the Dutch criminal law lacks a state of emergency, situations of this kind being probably settled under force majeure. It is also interesting how they antagonistically regulate the causes eliminating the criminal nature of the offense with aggravating circumstances, while attenuating circumstances are covered separately in Chapter III, as "Reasons for reduction of sentence".

By regulating self-defense, one is allowed to defend himself, other people, his honour or property against immediate unlawful attacks (art. 41 para. 1). At first glance we might consider that property, reputation and pride of a person are granted a privileged position. Analyzing, however, case law [14] - contrary to appearances created by the mere reading of the legal norms, loaded with a patina over a century - it can be seen that priority is given to the rights that are inextricably linked to the life and integrity of the person, even if that person is the very attacker.

In para. (2) thereof the justifiable excess is provided in a formulation similar to the Romanian Penal Code.

The Criminal Code of Sweden [15], in Chapter 24, considers as falling under the class of causes that remove the criminal responsibility the following: self-defense (sec. 1), the authorization of use of force (sec. 2 and 3), the state of emergency (sec. 4), the consent of the injured (sec. 7) the execution of the order (sec. 8) and the error (sec. 9). Section 5 states that will benefit from the application of the cases covered in the section. 1- 4 whoever else assisted (takes part alongside) the person so entitled, which suggests that the effects of these reasons apply in rem.

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suggests that the effects of these reasons apply in rem. The justified excess, for the situations described in sections 1 to 5 is provided in section. 6; this time the effects occurring in personam. The use of force is allowed in the case of the police (sec. 2) and the military (sec. 3) for special circumstances expressly regulated both by the rules of this Code, and by the norms to the special laws referred to in their very contents.

The regulation of similar cases of authorization of the necessary use of force are found, as we have shown, in the European Convention on Human Rights art. 2 Right to life, para. 2 [16].

Although both in the Criminal Code of Sweden and the European Convention on Human Rights, these cases are dealt with together or joined with the self-defense we should not consider them special forms of it, but causes eliminating the criminal nature of a completely distinct act. Categorical distinction between the two categories of cases is the fact that self-defense is a cause that removes guilt, while authorizing the use of force averts the social danger. Those entitled to it (police, military etc.) are persons specially prepared for extreme situations and thus they will act with lucidity, professionalism, guilt does not disappear; it is a useful and necessary action for the society that removes the social danger, not the guilt; so their foundation is completely different.

This approach however is specific to our previous legislation and jurisprudence, where the effects of self-defense were found in personam and not in rem. To the extent that they are to be found in rem - as is the case in most western laws - professional categories listed above may benefit from self defence too.

Danish Criminal Code [17], addressing the causes that eliminate the criminal nature of the act in a manner similar to that of Sweden, includes in this category: self-defense (§13), the state of emergency and relatively minor offense (lack of social danger) (§14), irresponsibility (§15) and minority (§16).

The similarity lies, on the one hand, in the fact that, in the very wording of the regulation of self-defense timeframes of the imminent or ongoing (§13 para. 1) attack are set, a less common aspect in other kind of criminal legislation, this task being part of this doctrine, on the other hand, it lies in the fact that in §13 para. 3 the use of force is authorised, which this time is even assimilated to self defence, the legislature providing

that similar rules apply to necessary actions when executing an order, making an arrest or preventing the escape of a person lawfully detained.

The justifiable excess of defence is present again, being covered in §13 para. (2).

Polish Penal Code [18] in Chapter 3, "Removing criminal liability" regulates the self-defense (art. 25), the state of emergency (art. 26) an experiment (art. 27) mistrial (art. 28), error law (art. 29, 30) and irresponsibility (art. 31). A question that incites interest but raises a series of controversies both ethical and moral, and especially legal ones is that provided in art. 27- an experiment. It is laudatory that the Polish legislature pays special attention to development of science and technology, but we believe that priority must be on the protection of the population from possible violations of fundamental rights such as the right to life, to health, to an unpolluted environment etc. In such cases the settlement of this case should be thought out long, so as not to prioritize the development of science and technology in relation to fundamental human rights.

On the other hand, we can see the lack of other causes common among other legislations, such as the physical and moral coercion.

3.CRIMINAL CODES BELONGING TO ASIAN COUNTRIES

In Asian countries, although they have a tradition and a culture different from the European ones, we find legal regulations that are quite similar, this situation appearing with regard to the causes that remove the criminal nature of the act in Chinese and Japanese criminal law.

The causes eliminating the criminal nature of the act are dealt with in the Criminal Code of the Republic of China [19] in Section 1: offenses and criminal liability of Chapter II: Crime, comprising unforeseeable circumstances and force majeure (art. 16), minority (art. 17) irresponsibility (art. 18), blindness and deaf mutism (art. 19), self-defense (art. 20) and the state of emergency (art. 21).

Highly unusual and, at the same time, discriminatory is blindness and deaf mutism regulation (art. 19) as a mitigating circumstance or cause which removes execution. Under the circumstances we must consider that the political system of this country is a communist one, a totalitarian system and that in general this kind of

regimes treat people with disabilities in a discriminatory way. At the same time, however, willing to maintain an appearance of equal treatment of these individuals and even special social protection, they resort to solutions that are profoundly demagogic, which do nothing but reinforce the idea of discrimination and differential legal treatment, even if here we are in the presence of the so-called positive discrimination.

Also, the legal treatment for justifiable excess presents certain peculiarities. The Chinese law maker means to admit its effectiveness, as an exception, only in the case of self - defense and only when the attack materializes in an act of murder, robbery, rape, kidnapping or other crimes of violence that seriously threaten the security of a person (art. 20 par. 3).

Pardonable excess is provided both in self-defense (art. 20 para. 2) and the state of emergency (art. 21 para. 2); it may be, however, either mitigating circumstance or a cause that eliminates the execution. A scoring welcome, in our opinion, is contained in Art. 21 para. 3 and it concerns the fact that he who has rescuing as part of his daily work will not enjoy the benefit of the state of emergency (Example gratia: firemen, police, military, etc.).

Surprisingly, the Criminal Japanese Code [20] uses a very similar name to the one used by the Romanian or the Moldavian law maker and at the same time, revealing to the nature of the causes which eliminate the criminal nature of the act, giving name to the 7th chapter that includes them -The reduction of punishment and the insufficiency of the criminal nature. The regulated causes are - the exercising of a right 9 art. 35), the self -defense (art.36), the state of emergency (art. 37), the error, (art. 38), the irresponsibility (art. 38), the minority (art. 41). The justified excess and the excusable excess are dealt with together in the same paragraphs, both in the paragraph about the self-defense (art. 36, al. 2) and in the one about the state of necessity (art. 37, al. 1), specifying that the application of one or the other can only be determined while considering the circumstances of the respective cause.

On the second paragraph of the 37th Article we find a similar provision to that in the Chinese Criminal Code, by which the persons who carry rescuing actions as part of their working obligations are removed from the benefit of the state of necessity, provisions that we find in Romania and in Moldavia only within the special laws [21]

which regulate the respective professions. Thus, for a better understanding and systematization of the institutions of self-defense and state of necessity, we find this provision appropriate and, de lege ferenda we propose its inclusion in the Romanian Penal Code and in the Moldavian one, especially if we consider that in Criminal Code Carol II [22] it was found under art. 131.

On a critical note, it is worth noting that most of the surveyed codes incorrectly name, the causes eliminating the criminal nature of the act as causes eliminating the criminal responsibility, the difference of which is an essential one: in the presence of the first category of causes the crime, the illicit character is excluded, non-existent; while relatively to the second category, the act retains its criminal character, the criminal liability being the one that is removed.

Also, in a critical manner, we see that very often they are treated together with the mitigating or even aggravating circumstances, institutions of law so different that they have totally divergent effects and only lead to augmentation or diminution of punishment, having no impact whatsoever on the existence of the criminal act.

The wrongful lawmaking so similar to these institutions within the criminal codes in Western Europe is probably due to the fact that initially these cases were dealt with as such in the Napoleon's Criminal Code [23], which was the model for most criminal modern codes. It includes the Romanian Penal Code of 1864 [24] that was structured in the same manner including causes that eliminated the criminal nature of the offense in Title IV causes that defended the penalty or decreased the punishment.

The current special regulation of western and eastern countries is the result, on the one hand, of the obsessive tendency of the communist regime which, in an attempt to get rid of "bourgeois remnants" created new codes; and on the other side of the traditionalism of democratic countries - excessive even if we consider that Dutch criminal law is in force since 1881 - under which the same line was kept, remaining dependent on old approaches.

Although we are advocates of preserving tradition, we must confess that without jeopardizing the idea of belonging and continuity, when science is evolving - and we appreciate the Romanian Penal Code of 1968 as superior to those of Napoleonic origin

- we believe we urgently need to tap into the new ones, otherwise we risk to fall into disuse.

References:

[1] European Convention on Human Rights, http://www.echr.coe.int/;
[2] Protocol. 6 (1985) provides that the death penalty is abolished, but maintain a derogation: State may provide in its law for the death penalty for acts committed in time of war or of imminent threat of war. Protocol. 13 (2002) provides for the complete abolition of the death penalty, prohibits any exemption under Art. 15; and formulating any reserves from Member States ratify it.
[3] See Cornelius Bîrsan, Convenţia europeană a drepturilor omului. Comentariu pe articole. Edition 2, Publisher C.H. Beck, 2010, p.76-78;
[4] ECHR Yaşa v.Turkey, two sept.1998;
http://hudoc.echr.coe.int/sites/fra/pages/search.aspx?i=001-58238#{%22itemid%22:[%22001-58238%22]}; ECHR, Salman v. Turkey, June 27. 2000
http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58735#{%22itemid%22:[%22001-58735%22]};
[5] Ilaşcu and Others v. Moldova and Russia, 8 July 2004; http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-1886#{%22itemid%22:[%22001-61886%22]};
[6] See Cornelius Bîrsan, op. cit., p. 111-113; Radu Chiriţă, Convenţia europeană a drepturilor omului. Comentarii şi explicaţii. Edition 2, Publisher C.H. Beck, 2008, p. 71.72;
[7] ECHR, McCann and Others v. The United Kingdom, September 27,
1995,http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57943#{%22itemid%22:[%22001-57943%22]};
[8] ECHR Mansuroglu c.Turciei, February 26 2008, http://sim.law.uu.nl/SIM/CaseLaw/Hof.nsf/1d4d0dd240bfee7ec12568490035df05/5e3518d2320297fec12573fa00317c07?OpenDocument;
[9] ECHR Yaşa v. Turkey, precise .;
[10] ECHR, R. and M. Wolfram v. Germany, cited by Cornelius Bîrsan, op. cit., p. 112;
[11] French Penal Code,http://codes.droit.org/cod/penal.pdf;
[12] German Penal Code, http://www.gesetze-im-internet.de/bundesrecht/stgb/gesamt.pdf;
[13] German Penal Code, http://www.wetboek-online.nl/wet/Wetboek%20van%20Strafrecht.html;
[14] Jurisprudence on art. 41 of the Criminal Code of the Netherlands, http://www.wetboek-online.nl/wet/Wetboek%20van%20Strafrecht/41.html;
[15] Swedish Penal Code, http://www.government.se/sb/d/3926/a/27777;
European Convention on Human Rights, [16] http://www.echr.coe.int/Pages/home.aspx?p=basictexts&c=#n1359128122487_pointer;
[17] Danish Penal Code, http://documents.law.yale.edu/hathaway-project/danish-criminal-code;
[18] Polish Penal Code, http://isap.sejm.gov.pl/DetailsServlet?id=WDU19970880553;
[19] The Criminal Code of the Republic of China, http://www.china.org.cn/english/government/207319.html;
[20] Japan's Penal Code, http://www.japaneselawtranslation.go.jp/law/detail/?id=1960&vm=04&re=02;
[21] See in this regard, eg, for Romania: Law no. 218/2002 on the organization and functioning of the Romanian Police, http://legislatie.resurse-pentru-democratie.org/legea/218-2002.php, Law no. 121/1996 on the organization and functioning of Military Firefighters Corps, http://lege5.ro/Gratuit/ge3demzw/legea-nr-121-1996-privind-organizarea-si-functionarea-corpului-pompierilor-militari; and the Republic of Moldavia: Law no. 416/1990 on Police, http://lex.justice.md/index.php?action=view&view=doc&lang=1&id=312894;Law no. 267/1994 on fire protection;
[22] Romanian Criminal Code of 1936, http://lege5.ro/Gratuit/heztqnzu/codul-penal-din-1936;
[23] French Criminal Code of 1810, hhttp://ledroitcriminel.free.fr/la_legislation_criminelle/anciens_textes/code_penal_de_1810.html;
[24] Romanian Criminal Code of 1864, http://lege5.ro/Gratuit/g42tamju/codul-penal-din-1864;

Bibliography:

Legislation

1. China's Penal Code, http://www.china.org.cn/english/government/207319.htm;
2. Criminal Code of Denmark, http://documents.law.yale.edu/hathaway-project/danish-criminal-code;
3. Criminal Code of France, http://codes.droit.org/cod/penal.pdf;
4. Criminal Code of the Netherlands, http://www.wetboek-online.nl/wet/Wetboek%20van%20Strafrecht.html;
5. Criminal Code of Sweden, http://www.government.se/sb/d/3926/a/27777;
6. European Convention on Human Rights, http://www.echr.coe.int/;
7. French Criminal Code of 1810 http://ledroitcriminel.free.fr/la_legislation_criminelle/anciens_textes/code_penal_de_1810.htm;
8. German Criminal Code, http://www.gesetze-im-internet.de/bundesrecht/stgb/gesamt.pdf;
9. Japan's Penal Code, http://www.japaneselawtranslation.go.jp/law/detail/?id=1960&vm=04&re=02;
10. Law no. 416/1990 on Police http://lex.justice.md/index.php?action=view&view=doc&lang=1&id=312894; - Republic of Moldavia
11. Law no. 267/1994 on fire safety, http://lex.justice.md/index.php?action=view&view=doc&lang=1&id=311636; - Republic of Moldova
12. Law no. 218/2002 on the organization and functioning of the Romanian Police, http://legislatie.resurse-pentru-democratie.org/legea/218-2002.php,
13. Law no. 121/1996 on the organization and functioning of Military Firefighters Corps, http://lege5.ro/Gratuit/ge3demzw/legea-nr-121-1996-privind-organizarea-si-functionarea-corpului-pompierilor-militari;
14. Polish Penal Code, http://isap.sejm.gov.pl/DetailsServlet?id=WDU19970880553;
15. Romanian Criminal Code of 1864, http://lege5.ro/Gratuit/g42tamju/codul-penal-din-1864;
16. Romanian Criminal Code of 1936, http://lege5.ro/Gratuit/heztqnzu/codul-penal-din-1936;

Doctrine:

1. Bîrsan, C., Convenţia europeană a drepturilor omului. Comentariu pe articole. Edition 2, Publisher C.H. Beck, 2010;
2. Chiriţă, R., Convenţia europeană a drepturilor omului. Edition 2, Publisher C.H. Beck, 2008;

Jurisprudence:

1. ECHR, Salman v. Turkey, June 27. 2000 http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58735#{%22itemid%22:[%22001-58735%22]};
2. The ECHR, Ilaşcu and Others v. Moldova and Russia, 8 July 2004 http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-1886#{%22itemid% 22 [% 22,001 to 61,886% 22]};
3. ECHR Mansuroglu c.Turciei, February 26 2008 http://sim.law.uu.nl/SIM/CaseLaw/Hof.nsf/1d4d0dd240bfee7ec12568490035df05/5e3518d2320297fec12573fa00317c07?OpenDocument;
4. ECtHR, McCann and Others v. The United Kingdom, September 27, 1995, http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57943#{%22itemid % 22 [% 22001-57943% 22]};
5. ECHR, W. and M. Wolfram v. Germany, cited by Corneliu Bîrsan, op. cit., p. 112;
6. ECHR Yaşa v. Turkey, September 2. 1998 http://hudoc.echr.coe.int/sites/fra/pages/search.aspx?i=001-58238#{%22itemid%22:[%22001-58238%22]};
7. Jurisprudence on art. 41 of the Criminal Code of the Netherlands, http://www.wetboek-online.nl/wet/Wetboek%20van%20Strafrecht/41.html.