

# Cases when Criminal Action Stops for not being well Grounded

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This work focuses on analyzing the circumstances and obstacles that stop the criminal action beginning and exercise, clearly provided by the content of the New Criminal Procedure Code, for not being well grounded.

**Key words:** criminal action, criminal trial, obstacles, criminal liability, defendant, evidence.

## General aspects

The cases that prevent the beginning or the exercise of the criminal action are circumstances or obstacles permanent, such as the death of suspect or defendant, the amnesty or the prescription, or temporary, such as the absence the initial complaint, of the authorization or notification of the competent body, leading, this way, to elimination or putting aside of the functional skill of the criminal action.

Generally, the New Criminal Procedure Code maintains the situations that prevent the beginning or the exercise of the criminal action, provided by art 10 of the Criminal Procedure Code of 1968, together with some alterations. Yet, by introducing the principle of opportunity of the criminal prosecution and by eliminating from the legal definition of crime of the social danger aspect as main feature, they removed the case of art 10 paragraph (1) letter b<sup>1</sup>, of the Criminal Procedure Code of 1968<sup>11</sup>.

Despite the unifying regulation, the obstacles provided by art 16 Procedure Code divide into two categories, depending on their material or judicial ground such as: impediments deriving from the lack of the action theme, provided by art 16 paragraph (1) letters a - d Criminal Procedure Code, basic impediments related to the material or judicial lack of crime, which according to art 15 paragraph (2) Criminal Code, is the only reason for the criminal liability; and obstacles deriving from the absence object of the criminal action, provided by art 16 paragraph (1) letter e - j Procedure Code, motivated by the material or judicial impossibility to have the object of the criminal action, that is the bringing to justice for criminal liability<sup>12</sup>.

This division of cases into two categories, one based on the lack of ground and the other based on the lack of the object, is determined by a difference of solutions to be ruled depending on these impediments but also on the further effects concerning the solution of the accessory civil action, regarding the criminal treatment for the author in a new criminal trial etc.

Compared to the previous Criminal Procedure Code, the new one provides the difference between the solutions only when the criminal action ceases in the judgment phase. According to art 396 paragraph (1) Criminal Procedure Code, the Court passes judgment on the accusation brought against the defendant, ruling the sentence, the cease or postponement of the punishment measure, the acquittal or the cease of the criminal trial. Paragraph (5) states that the defendant acquittal shall be ruled in the cases provided by art 16 paragraph (1) letters a-d Criminal Procedure Code, whereas according to paragraph (6) of the same article, the cease of the criminal trial is ruled in situations provided by art 16 paragraph (1) letters e-j Criminal Procedure Code.

During the criminal prosecution, despite the cause that prevents the exercise of the criminal case, this is stopped by the same solution, classification.

The causes or obstacles which result from the criminal action lack or reason are the following: the deed is absent, the deed cannot be provided by criminal law or the guilt is not contained by the law, there are no pieces of evidence that a person committed the crime or there is a justifying or non imputable cause.

## The deed is absent

This represents one of the legal impediments related to the beginning or the exercise of the criminal action. By regulating it, the lawmaker envisaged the case where the deed doesn't exist from the material point of view; in other words the surrounding world hasn't been physically modified by the deed.

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<sup>11</sup> Art. 10 paragraph (1) letter b<sup>1</sup>) of the former Criminal Procedure Code stated that: the deed doesn't have the social danger degree of a crime.

<sup>12</sup> A. Zarafiu, Criminal Procedure. General Part. Special Part, C. H. Beck Publishing House, Bucharest, 2014, p. 79.

This case is not identical to the one provided by letter b) art 16 Criminal Procedure Code, which states that the deed is not comprised by the criminal law. In this case a deed has been done, we have its materiality, but there is no incrimination, it is not a crime and, therefore, we have no criminal liability and applicable punishment.

The absence of the deed assumes the absence of the defendant and thus, we have the impossibility to hold somebody criminally responsible.

Only the person's external behavior can be set as crime, not the simple psychological process that occur inside the person's brains. In Latin we have the expression "*nuda cogitatio*" meaning that the simple intention of the offender to commit a crime, not materialized in external behavior as preparing actions or actual commission of the crime, doesn't lead to criminal liability.

The absence of the deed objective reality is not a cause for any liability, especially the criminal liability. Establishing the existence of the deed is also important for the exercise of the civil action in order to recover the caused prejudice. If there is no deed, there will be no source for the prejudices and after the analysis of art 25 paragraph (5) Criminal Procedure Code, we see that this case, together with those provided with at letters c) and d) of art 16 Criminal Procedure Code<sup>13</sup>, are not among the situations where the court, ruling the acquittal, the cease of the criminal trial, shall leave the civil action without solution so that the victim or her successors, civil part in the criminal trial, can take the case in the civil court.

The solutions that can be ruled in absence of the deed are the following: classification during the criminal prosecution phase and acquittal during the judgment phase. Art 314, Criminal Procedure Code, called "solutions for not prosecution and not judgment", states that: "after analyzing the notification, when all the necessary evidence were gathered at the file pursuant to art 285 Criminal Procedure Code, the prosecutor, being requested by the criminal prosecuting body or ex office, rules the solution for the case by order, deciding the classification, when there is no exercise of the criminal action or, depending on the case, cease the exercised criminal action given the presence of one of the cases provided by art 16 paragraph (1)". Also, according to art 315 paragraph (1) letter b) Criminal Procedure Code "classification is ruled when one of the cases provided by art 16 paragraph (1). About the judgment phase, art 396 Criminal Procedure Code named "solving the criminal action" states at paragraph (5) that the defendant acquittal is ruled in cases provided by art 16 paragraph (1) letters a)-d).

### **The deed is not provided by the criminal law or its guilt is not envisaged by law**

Art 16 paragraph (1) letter b), Criminal Procedure Code, make part of one single cause preventing the beginning or the exercise of the criminal action, meaning the deed is not provided by the criminal law or its guilt is not envisaged by the law, cases provided by art 10 paragraph (1) letter b) and letter d) of Criminal Procedure Code of 1968<sup>14</sup>.

Differently from the above mentioned case, here we have an objective deed exists, but it is not among those presented by criminal law or the manner it was committed, its guilt, is not provided with by law, which means lack of incrimination. Pursuant to art 16 paragraph (1) Criminal Procedure Code, the deed is considered crime only has the guilt form requested by criminal law, and according to paragraph (6) of the same art, a deed represented by an action or non action is a crime when it has been committed with intention; the deed by fault is a crime only when the law provides with it clearly.<sup>15</sup>

The expression "the deed is not specified by the criminal law" shall contain, among the deeds that can be considered contraventions or misconducts, the ones which could be crimes but they lack one of the essential elements, except for those elements related to the subjective side of the crime, covered by the expression "was not committed by the guilt requested by law"<sup>16</sup>.

The notion "deed specified by criminal law" will not be mistaken with "criminal illegal", meaning the criminal deed or crime, provision in the criminal law or typicality, representing only one of the essential features of the crime. According to article 15, Criminal Procedure Code, the crime is stipulated by the criminal law, committed with guilt, not justified and imputable to the person who has done it; the crime is the only reason for the criminal liability. Typicality derives from the principle of incrimination legality "*nullum crimen sine lege*" and represents the relation between the real deed, directly or indirectly committed by a person and elements of objective and subjective nature set by the judge in the abstract patten, provided by the incriminating law.

<sup>13</sup> There is no evidence that a person committed the crime; there is a justifying cause or a non-imputable one.

<sup>14</sup> Art. 10 paragraph (1) letter b) of the former Criminal Procedure Code stated that: the deed is not provided by criminal law; art 10 paragraph (1) letter d) of the former Criminal Procedure Code stated that: the deed is lacking one essential element of a crime.

<sup>15</sup> According to the former Criminal Code, the deed represented by an action occurred by fault is a crime only when it is provided by law [art. 19 paragraph (2) Criminal Code], and the deed represented by an inaction is a crime either because it was committed with intention, either by fault, except for the case where the law punishes only the commission of the deed with intention [art 19 paragraph (3) Criminal Code].

<sup>16</sup> N. Volonciu, A. S. Uzlău, New Criminal Procedure Code, Hamangiu Publishing House, Bucharest, 2014, p. 47.

Article 1 of the New Criminal Code begins with the principle named "legitimacy of incrimination", stating that "criminal law lay down the deeds which represent crimes; no person can be criminally sanctioned for a deed not stipulated by the criminal law the moment it was committed"<sup>17</sup>. This rule includes both the circumstance where the deed was never included by the criminal law, and those which contain it in the criminal law, but places it outside the accusation the moment of deed commission; or, depending on the case, it was not mentioned by the criminal law when it was committed, but it was incriminated subsequently. Thus, if this rule is not satisfied, the deed is not a crime, making useless the analysis of other features of the crime and therefore, the deed cannot be the ground for criminal liability, according to art 15 paragraph (2) Criminal Code, the crime is the only reason for criminal liability, and art 14 paragraph. (1) Criminal Procedure Code, the criminal action represents holding criminally liable the persons who committed crimes.

We have to remember that the deed was not committed with the guilt provided by the incriminating law such as direct or indirect intention, clearly mentioned by art 16 paragraph (3) of the New Criminal Code, fault, direct or indirect, provided by paragraph (4), foresight or simple fault, and exceed intention or *praeter intentionem* regulated by the new code at paragraph (5).<sup>18</sup>

Consequently, if there is no relation between the deed and the abstract pattern provided by the incriminating law, both objectively and subjectively, we have an obstacle for the beginning and the exercise of the criminal action.

In case the court takes into consideration this impediment, more exactly the text of art 16 paragraph (1) letter b) thesis I Criminal Procedure Code, the civil side shall remained without solution, giving the victim or her successors, civil parts of the criminal trial, the opportunity to take the case in civil court. Thus, even though the deed is not contented by the criminal law and is not a crime, the victim has the right to claim damages and the right to take the case to a civil court as, in this matter, the criminal liability of the person shall be used for any prejudice caused, by actions or on actions, to the legal rights or interests of another person<sup>19</sup>.

The solutions for this case are the following: classification, during the criminal prosecution, the acquittal during the judgment. Art 314 Criminal Procedure Code named "solutions for not prosecution and not judgment", states that: "after analyzing the notification, when all the necessary evidence were gathered at the file pursuant to art 285 Criminal Procedure Code, the prosecutor, being requested by the criminal prosecuting body or ex office, rules the solution for the case by order, deciding the classification, when there is no exercise of the criminal action or, depending on the case, cease the exercised criminal action given the presence of one of the cases provided by art 16 paragraph (1)". Also, according to art 315 paragraph (1) letter b) Criminal Procedure Code "classification is ruled when one of the cases provided by art 16 paragraph (1). About the judgment phase, art 396 Criminal Procedure Code named "solving the criminal action" states at paragraph (5) that the defendant acquittal is ruled in cases provided by art 16 paragraph (1) letters a)-d).

### **There is no evidence that a person committed the crime**

The ex cause of art 10 paragraph (1) letter c) of the Criminal Procedure Code of 1968 was changed from "the deed was not committed by the defendant or culprit", as provided by art 16 paragraph (1) letter c) of the New Criminal Procedure Code, because "there is no evidence that a person committed the crime". The new text is better for the nowadays needs, with the possibility to have certain evidence for accusing the suspect or the defendant but, some of them not being persuasive, the criminal action shall be prevented. So this impediment is incident not only when it is not possible to prove that the deed was committed by the culprit or the defendant, but also when there is evidence but other legal conditions regarding their legal usage are not satisfied<sup>20</sup>.

In order to solution a criminal case, the judicial bodies must establish the real situation and all circumstances related to the author. The purpose of all judicial actions is discovering the truth<sup>21</sup>.

<sup>17</sup> In the former Criminal Code, the legality or incrimination had other content: "the law stipulates which deed are crimes, the punishes applied to offenders and the measures to be adopted for them" with regulation at art 2 Criminal Code, while the former one began with "the purpose of the criminal law".

<sup>18</sup> The general part of New Criminal Code defines the intention, the fault and the guilt, which, in the former code, was found only in the special part, in the constitutive content of some crimes.

<sup>19</sup> Pursuant to art 1.349 paragraph (1) Civil Code, any person has the obligation to comply with the rules stated by the law or the local way and not to violate by his actions or non actions other persons' legal interests and rights. According to paragraph (2) of the same art, the person, with power of judgment, who violates this obligation, is held responsible for all caused damages and forced to remedy them all completely.

<sup>20</sup> The evidence must be made up only of the pieces with information that help to solve all the problems of the merits. They must be pertinent, conclusive and useful.

<sup>21</sup> According to art 5 paragraph (1) Criminal Procedure Code, the judicial bodies must act, based on evidence, to find the truth about the facts and the circumstances regarding the case and the suspect or culprit. According to paragraph (2) of the same article, the prosecution must gather and manage evidence both in favor and against the suspect/culprit. Rejection or refuse to register evidence in favor of suspect or culprit are punished according to the present code.

Any element which helps to prove the existence or absence of the crime, to identify the person who did it and to know the circumstances is taken into account for ruling the right solution and for discovering the truth in the criminal case.

Object of evidence can be represented: by the existence of the crime and its commission by the culprit; the deeds related to the civil liability, when there is civil liability; real deeds and circumstances compulsory for law enforcement; any circumstance necessary for the right solution of the case.

The pieces of evidence, used to find the truth during the criminal trial, shouldn't be considered as evidentiary hearing, which is the legal manner to obtain the evidentiary piece.

According to art 97 paragraph (2) Criminal Procedure Code, "the piece of evidence is obtained during the criminal trial by the following methods: statement of the suspect or culprit; statement of the victim; statement of the civil part the civilly liable part; testimonies of witnesses; written documents, reports of experts or findings, minutes, photos, means of evidence".

The testimony of the suspect or culprit, together with the statements of other trial parts, is obtained after the hearing. Article 107 paragraph (1) of the Criminal Procedure Code states that at the beginning of the first hearing, the judicial body addresses questions to the suspect or the culprit regarding name and surname, nickname, date and place of birth, personal code, parents' names and surnames, citizenship, marital status, military status, studies, profession or occupation, work place, residence and home address and also the address chosen for communication of the procedure papers, criminal record and whether another criminal trial is being held against him, whether an interpreter is needed, if it's a person who doesn't speak or understand Romanian or cannot express, and any other information useful to make up his personal situation.

The suspect or the culprit is free to state anything he wants on the deed provided by the criminal law previously communicated to him and afterwards, he is asked questions. He can make use of his right to remain silent about the deeds or circumstances he is asked about. Statements are registered in writing and signed.

In terms of witnesses, the law stipulates that any person can be heard as witness who knows about deeds or circumstances that can be considered evidence in the criminal case<sup>22</sup>. The summoned witness is heard on deeds and circumstances object of the probation in the case.<sup>23</sup> Yet, the witness's testimony cannot refer to confidential or secret deeds or circumstances except for the case where the entitled competent authority or person expresses his approval for it or when there is another case related to eliminating the obligation to keep the secret or the confidentiality.

The "written document" represents the expression in writing of the thought and will. Objects like photos, drawings or tables, unless they contain speech signs, can be considered material evidence, different from the writings. Written documents can be used as evidence if their content shows deeds or circumstances useful for finding the truth. Also, the minutes with the personal findings drawn up by the criminal prosecution body or the court is evidentiary mean.

Expertise is a technical research made by an expert, ordered for finding, clarifying or assessing some deeds or circumstances important for finding the truth. Technical- scientific report is relevant for discovering the truth. Compared to others, it is urgent being ordered in emergencies cases when material evidence are endangered of disappearing or circumstances are likely to be changed. Material evidence is represented by objects that contain or bear the trace of the committed crime, as well as other objects that can be useful to finding the truth.

Article 99 paragraph (1) Criminal Procedure Code, specifies that the burden of proof belongs mainly to the prosecutor, whereas in the civil action to the civil party or to the prosecutor who acts in the civil case if the victim lacks the capacity to do it or does it in a limited way. The suspect or the culprit enjoys the presumption of innocence, not being obligated to prove his innocence and has the right not to take part at the self accusation. According to paragraph (3) of the same article, during the criminal trial, the victim, the suspect and the parts have the right to suggest the judicial bodies to make use of evidence.

During the criminal trial, only the evidence with information useful for solving all the problems of the merits, can be used. For this, the criminal trial theory and the law uses the terms of pertinent, convincing and useful evidence<sup>24</sup>.

Art 100 paragraph (3) Criminal Procedure Code, states that the request for evidence usage drawn up during the criminal prosecution or during the trial is admitted or rejected by the judicial bodies. According to paragraph (4), they can reject a request on evidence usage whenever: the evidence is not relevant for the object of probation in the case; they consider that the object of the evidence was proved by usage of enough

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<sup>22</sup> Nevertheless, according to art 115 paragraph (1), (2) Criminal Procedure Code, any person can be summoned and heard as witness except for the main procedure parts and subjects. Also, persons doubtful of being witnesses can be heard only if the judicial body decides the person is able to relate, consciously, real facts and circumstances.

<sup>23</sup> Witness quality has priority compared to the expert, lawyer, mediator quality, or representative of one party or main procedure subject, regarding real facts and circumstances known by the person before acquiring this status.

<sup>24</sup> - I. Neagu, Treaty of Criminal Procedure. General Part, Universul Juridic Publishing House, Bucharest, 2013, p. 449.



evidentiary means; the evidence is not necessary as the deed is well known; the evidence is impossible to get; the request was lodged by a not entitled person; the evidence usage is against the law.

The appropriate pieces of evidence are the fact elements connected to facts or circumstances that must be proved in a certain criminal case. Not all the pieces of evidence are appropriate for finding the truth or ruling the solution of the criminal case. Thus, the pertinent evidence must be also convincing. The convincing evidence represents the fact elements that contribute to finding the truth or to ruling the solution in criminal trials. Logically, any convincing evidence is also pertinent, as it wouldn't be useful for a case without being related to it. Not all the appropriate pieces of evidence are also convincing. Useful pieces of evidence are the fact elements that by means of the information contained by them, are necessary to find a solution to the case. The useful evidence is implicitly convincing. The convincing evidence can also be useless, meaning that it is not necessary to the case<sup>25</sup>.

Also, we must take into account the provisions of articles 101-103, Criminal Procedure Code, stating that it is forbidden to use violence, threats or other means of constraint such as promises or urges in order to get evidence<sup>26</sup>. We cannot use listening methods or techniques that affect the person's capacity to remember or to relate consciously and willingly the deeds that make up the evidentiary object; the interdiction is applied even if the listened person consents to the usage of such listening methods or techniques.

The judicial bodies or other persons are not allowed to instigate a person to commit or go on committing a crime in order to obtain evidence<sup>27</sup>. Also, the evidence obtained by torture, their results or those obtained by violation of law, cannot be used in the criminal trial. The nullity of the paper which ruled or authorized the usage of such evidence leads to elimination of the evidence. The resulted evidence is eliminated if they were obtained directly from the evidence of illegal origin and couldn't have been got otherwise. About the evidentiary force, the Criminal Procedure Code specifies that evidence have no value previously set by law and are subjected to free appreciation of the judicial bodies after the assessment of all used evidence in the case<sup>28</sup>. When making the decision on the crime existence and on the defendant's guilt, the court decides, with motivation, by referring to all assessed evidence. The sentence is ruled only when the court is persuaded the accusation has been proved beyond any reasonable doubt<sup>29</sup>.

We can retain this obstacle for several situations: first, when the used evidence doesn't prove that the passive subject of the criminal action is the one who committed the crime; this case is the cause for prevention of the beginning or exercise of the criminal action provided by art 10 paragraph (1) letter c) of the Criminal Procedure Code of 1968;

Secondly when the used evidence didn't succeed to eliminate the doubt or the contradictions concerning the crime commission by the defendant, "*in dubio pro reo*" being the rule according to which, in case of doubt, authorities adopt the most favorable solution, circumstance or hypothesis to the defendant. In the Romanian criminal procedure law this rule results from the presumption of innocence. According to art 4 Criminal Procedure Code, any person is considered innocent until it is set otherwise by a final criminal decree; after the usage of all pieces of evidence, any doubt is interpreted in favor of the suspect or defendant. This presumption can be annulled only by the certainty about the guilt, based on irrefutable evidence.

This is another obstacle, different from those of art 25 paragraph (5), Criminal Procedure Code, where the Court, ruling the acquittal, which represents the end of the criminal trial, shall leave the civil action unsolved, and therefore the victim or her successors, as civil part in the criminal trial, can move the case to a civil court. It is a solution deriving from an interpretation of art 28 Criminal Procedure Code, stating at paragraph (1) that "final decree of a criminal court prevails on the civil court regarding the deed and its author".

The solutions for this case are the following: classification, during the criminal prosecution, the acquittal during the judgment. Art 314 Criminal Procedure Code named "solutions for not prosecution and not judgment", states that: "after analyzing the notification, when all the necessary evidence were gathered at the file pursuant to art 285 Criminal Procedure Code, the prosecutor,

<sup>25</sup> - I. Neagu, Treaty of Criminal Procedure. General Part, Universul Juridic Publishing House, Bucharest, 2013, p. 450.

<sup>26</sup> Art 280 of the Criminal Code incriminates the abusive research, forbidding clearly the use of promises, threats or violence against a prosecuted or judged person in a criminal case, by a criminal prosecuting body, a prosecutor or a judge, in order to establish to make or not statements, to give or not untruthful statements or to withdraw testimonies; also, it is forbidden that a criminal prosecuting body or a judge produce, counterfeit or hide unreal evidence.

<sup>27</sup> This interdiction has also some derogations; such as, according to Law no 143/2000 on prevention and fight against trafficking and drugs consumption, republished, The Prosecutor's Office of the High Court of Justice and Cassation allows, on the legal institutions and bodies, to carry out supervising deliveries, with or without total drugs substitution or precursors (art. 20). Special policemen acting as undercover agents, together with their partners can obtain drugs, essential chemical substances and precursors, with full authorization from the prosecutor, to discover criminal activities and identify persons involved in such activities. Thus, the jurisprudence decided that an undercover investigator doesn't represent a breach of art 101 paragraph (3)

<sup>28</sup> During the trial carried out according to Romanian law, every piece of evidence has its importance according to the information provided for finding the truth.

<sup>29</sup> Pursuant to art. 4 paragraph (2) Criminal Procedure Code, after using all piece of evidence, any doubt in making opinions by judicial bodies is interpreted in favor of the suspect or culprit.

being requested by the criminal prosecuting body or ex office, rules the solution for the case by order, deciding the classification, when there is no exercise of the criminal action or, depending on the case, cease the exercised criminal action given the presence of one of the cases provided by art 16 paragraph (1)". Also, according to art 315 paragraph (1) letter b) Criminal Procedure Code "classification is ruled when one of the cases provided by art 16 paragraph (1). About the judgment phase, art 396 Criminal Procedure Code named "solving the criminal action" states at paragraph (5) that the defendant acquittal is ruled in cases provided by art 16 paragraph (1) letters a)-d).

### **There is a justifying or a non imputable cause**

According to the New Criminal Code, there are two types of causes which remove the criminal character of the deed<sup>30</sup> : justifying and non imputable causes; art 16 paragraph (1) letter d) Criminal Procedure Code, specifies that criminal action cannot begin or applied when it's a justifying or non imputable.

Presence of such cause<sup>31</sup> eliminates the criminal feature of the deed, and if the deed is not a crime, the criminal liability is absent, and thus the criminal action has no longer an object. According to art 15 paragraph (1) Criminal Code, the crime is the deed provided by the criminal law, committed with guilt, not justified and imputable to its author. The definition clearly states the three essential elements of a crime, the same for all crimes: typicality or being mentioned by the criminal law, anti-juridicity and imputability. Typical deed is not a crime if the other three elements are missing. Prosecution or the judging Court must establish, based on evidence, whether a deed is anti-judicial, meaning illegal, not allowed by the criminal law or extra-criminal and imputable to its author.

By including the institutions under the name "justifying causes" to the crime section helps avoiding all confusions regarding other institutions / operative causes in criminal – judicial matter, such as causes which remove the criminal liability or causes for not punishment, where the crime is present with all features stipulated by art 15 Criminal Code; nevertheless only the subsequent basic institution is removed – criminal liability – or the offender is defended by the punishment.<sup>32</sup>

According to art 18 paragraph (1) Criminal code, we don't have a crime if its cause is among the justifying ones mentioned the law<sup>33</sup>. According to paragraph (2) of the same article, the effect of justifying causes is extended also on the participants. The following are justifying general causes: legitimate self defense, state of necessity, exercise of a right or fulfillment of an obligation, the victim's consent.

These causes have an express regulation in art 19-22, Criminal Code. Pursuant to 19 paragraph (1), art 20 paragraph (1) Criminal Code, the deed committed in self defense or state of necessity provided by criminal law is justified<sup>34</sup>.

According to art 19 paragraph (2), (3) Criminal Code, we have we talk about self defense if the person commits the deed in order to eliminate a material, direct, immediate and unjust attack<sup>35</sup>, which puts her person in danger, another person's life, their interests or a general interest, if the defense is proportionate to the severity of the attack. It is considered to be in self defense, pursuant to paragraph (2)<sup>36</sup>, the person who commits the deed in order to reject the entrance of a person on his property - dwelling, room, annexed building or surrounded area – without having the right, by violence, by cheating, by breach of close or similar illegal ways, or by night.

According to art 20 paragraph (2) Criminal code, state of necessity represents the situation where a person commits the deed in order to save from an immediate and irremovable danger<sup>37</sup>, his life, his body integrity or his health, another person or a good belonging to him or to somebody else, or of general interest, if the consequences of his deed are clearly less severe than those which could have occurred in case the peril hadn't been eliminated.

Art. 21 Criminal code, stipulates that it is justified the deed provided by the criminal law represented by the exercise of a right recognized by law or for observance of law obligations, within its conditions and

<sup>30</sup> In the former Criminal Code, chapter V of Title I, dealt with causes which eliminated the criminal effect of the deed, with no difference, providing with 8 circumstances, obstacles for the beginning or exercise of the criminal action: self defense, state of necessity, physical and moral constraint, act of God, irresponsibility, alcohol intoxication, author's minority and fact error. .

<sup>31</sup> This impediment involves a positive ascertainment.

<sup>32</sup> T. Toader, M. I. Michinici, New Criminal Code with Commented Articles, Ed. Publishing House, Bucharest, 2014, p. 54.

<sup>33</sup> This initial article on justifying causes matter, doesn't have correspondent in the Criminal Code of 1969.

<sup>34</sup> Unlike the actual laws, art. 44 of the former regulation, the self defense was placed among the causes that eliminated the criminal character of deed, in order to produce effects in personam, given the fact that the deed provided by criminal law, committed in self defense was due to a psychological constraint.

<sup>35</sup> The New Criminal eliminated the obligation of the severity of the attack and this together with the real character of the produced effects, pursuant to art. 18 paragraph (2) Criminal Code, influences the width of the self defense institution.

<sup>36</sup> It is the case of self defense assumed to have suffered alterations at the same time with the new regulation, meaning that the space, marked with limiting signs, was removed as location for illegal breaking into, the self defense is assumed, but the hypothesis of breaking into during the night by any means, not being necessary to have violence, breaking entrance, cunning, or other similar means.

<sup>37</sup> According to the new laws, the danger receives immediate character including its imminence, a necessity demanded by Criminal Code of 1969. Also, the community interest is replaced by general interest.

limits<sup>38</sup>. Also, the criminal law justifies the deed committed in order to fulfill an obligation enforced by the competent authority as provided by law, if this is not clearly illegal.

The jurisprudence warned on the importance of separating the hypothesis where exercising a right or fulfilling an obligation act as justifying cause and the cases where the same circumstance has the value of a negative element of the inner content of certain incriminating deeds, and thus, checking a real situation, removes not the anti-juridicity but typicality. Cases like these can be recognized by observing *verbum regens*, which sometimes, on certain incriminating regulations, the law maker provides that the deed is a crime only if it committed without right or by breaching legal provisions or any other similar words transferring the same message<sup>39</sup>

Article 22, Criminal Code, states that it is legally justified the deed committed with the victim's consent if this had the capacity to legally make use of the endangered or injured social value. The victim's consent doesn't result in effects in case of crimes against life or when the law eliminates its justifying effect.<sup>40</sup>

To have the victim's consent as justifying cause, we need to have several conditions satisfied: commission of a deed provided by the criminal law, not a deed against life or one related to the law that eliminates the consent justifying effect; presence of the victim's real and determined consent<sup>41</sup>; the person has to be the rightful owner of the injured social value; the owner can make legal use of such value; the presence a valid consent<sup>42</sup>; the consent or lack of it should be an essential element of the law content.

There are also special justifying cases, provided in the special part of the Criminal Code or the special laws, such as the special justifying cause regulated by art 201 paragraph (6) Criminal Code, which allows the gynecologist to interrupt the pregnancy, in certain conditions; the justifying cause provided by art 203 paragraph (2) Criminal Code, when the deed is not a crime when refusing to help a person when he needs it if by helping him, the author would put his life, his body integrity or health in danger; special justifying cause provided by art 272 paragraph (2) Criminal code, stating that it is not a crime to influence statements, patrimonial agreement among offenders and the victim, occurred in case of crimes for which criminal action begins the moment of prior complaint or for which reconciliation is made possible; special justifying case stated by art 277 paragraph (4) criminal code, according to which it is not a crime to impair the interests of justice by divulging or making public papers or activities, illegally committed by authorities in a criminal case; special justifying case stipulated by art 302 paragraph (5) Criminal code, according to which it is not a crime to breach mail confidentiality, if the author happens to surprise the commission of a crime or participates to it or if he surprises deeds of public interest with importance for the community life and whose publicity leads to greater advantage for the public than for the victim.<sup>43</sup>

According to art 23 paragraph (1) criminal code, it is not a crime if it was committed due to non-imputable causes. According to paragraph (2) of the same article, the effect of non-imputable causes doesn't influence the participants except for the act of God.<sup>44</sup>

Non – imputability causes are the situations, cases, circumstances where their existence during the crimes commission determines the impossibility of their commission by the author's person<sup>45</sup>. The committed deed is a deed provided by criminal law, not justified, thus with illegal character, non – imputable to its author.

The general non – imputable causes are: physical forcing, moral constraint, non imputable excess, minority of author, irresponsibility, intoxication, error, act of God, and, just like the justifying causes, they have a special regulation in the New Criminal Code, more exactly in art 24-31.

Pursuant to law, the deed is not imputable by the criminal law in the following cases: a physical constraint exercised on the author; a moral constraint exercised on the author or another person by irrefutable threat<sup>46</sup>; the person in self defense, due to disturbance or fears, exceeds the limits of the attack; the person in state of necessity who didn't realize that her actions exceed the effects of the eliminated danger<sup>47</sup>; an under aged person who didn't have the legal capacity to be held legally responsible<sup>48</sup> ; a person

<sup>38</sup> "Law" is not a clear notion, meaning all laws made by the Parliament, and more widely, any legal prescription. We consider that the latter opinion has greater importance as the law maker talks about a "right recognized by the law".

<sup>39</sup> T. Toader, M. I. Michinici, New Criminal Code with Commented Articles, Ed. Publishing House, Bucharest, 2014, p. 59.

<sup>40</sup> The decision doesn't have an equivalent in the Criminal Code of 1969.

<sup>41</sup> Consent can be tacit but clear. Generally it must be expressed by the owner of the injured value. The consent must be given at the moment of the deed commission, being revocable during the entire period between the issuance and the end of the deed commission.

<sup>42</sup> Meaning not to be influenced by consent vice: error, violence.

<sup>43</sup> M. Udrioiu, Criminal Procedure. General Part, C. H. Beck Publishing House, Bucharest, 2014, p. 59.

<sup>44</sup> This was not present in the Criminal Code of 1969.

<sup>45</sup> T. Toader, M. I. Michinici, New Criminal Code with Commented Articles, Ed. Publishing House, Bucharest, 2014, p. 66.

<sup>46</sup> Unlike to the moral constraint, the source of a physical constraint is not necessary to be in a willing activity of a human being. It can come from a person who acts by fault or guilt, from nature phenomena, from animals or mechanical processes. We may very well think that it can be represented by internal organic processes, uncontrollable and irresistible, inside the author's body.

<sup>47</sup> Self defense and state of necessity are causes for elimination of crime, as justifying causes, unlike non imputable excess that illustrates improper form of self defense and state of necessity matter, with elimination of crime character, but under judicial nature typical for non imputable cause. The criminal law does the difference between non imputable excess and excusable excess. In judicial matter, only in the

who was not able to control her actions<sup>49</sup>, due to a psychiatric condition or other causes<sup>50</sup> or due to involuntary intoxication with alcohol or other psychoactive substances<sup>51</sup> the person who, the moment of crime commission didn't know the situation or the circumstance, on which depends the criminal character of the deed. Also, it cannot be imputed a deed provided by law whose result couldn't have been fore sought by law.<sup>52</sup> There are also other special causes of non imputability provided by the special part of the New Criminal Code: constraint to bribe giving, provide by art 290 paragraph (2).

The difference between the justifying and non – imputable causes is that the first category doesn't entail an illegal character for the deed, this being allowed by the judicial order, while, with the second group, the illegal deed is not imputable to the author. All other difference result from this: justifying causes produce *in rem*, while the non-imputability causes, except for the act of God, have *in personam* effects; the first ones have effects on all participants, while the second group only on the person to whom we cannot impute the deed; when the justifying causes are incident, no type of judicial liability can be exercised, such as criminal, civil administrative, disciplinary etc; whereas, the incidence of non imputable causes can lead to other liability types but the criminal one<sup>53</sup>.

The solutions for this case are the following: classification, during the criminal prosecution, the acquittal during the judgment. Art 314 Criminal Procedure Code named "solutions for not prosecution and not judgment", states that: "after analyzing the notification, when all the necessary evidence were gathered at the file pursuant to art 285 Criminal Procedure Code, the prosecutor, being requested by the criminal prosecuting body or ex office, rules the solution for the case by order, deciding the classification, when there is no exercise of the criminal action or, depending on the case, cease the exercised criminal action given the presence of one of the cases provided by art 16 paragraph (1)". Also, according to art 315 paragraph (1) letter b) Criminal Procedure Code "classification is ruled when one of the cases provided by art 16 paragraph (1). About the judgment phase, art 396 Criminal Procedure Code named "solving the criminal action" states at paragraph (5) that the defendant acquittal is ruled in cases provided by art 16 paragraph (1) letters a)-d).

## References

1. M. Udrioiu, *Criminal Procedure. General Part*, C. H. Beck Publishing House, Bucharest, 2014;
2. Neagu, *Treaty of Criminal Procedure. General Part*, Universul Juridic Publishing House, Bucharest, 2013;
3. N. Volonciu, A. S. Uzlău, *New Criminal Procedure Code*, Hamangiu Publishing House, Bucharest, 2014;
4. Zărafiu, *Criminal Procedure. General Part. Special Part*, C. H. Beck Publishing House, Bucharest, 2014;
5. T. Toader, M. I. Michinici, *New Criminal Code with Commented Articles*, Ed. Publishing House, Bucharest, 2014.

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first case, the deed provided by criminal law committed in reality, cannot be judicially appreciated as crime and therefore, doesn't lead to criminal liability, unlike the hypothesis of considering an excusable excess, attenuation cause of the criminal cause, with general attenuating circumstance

(art. 75 paragraph (1) letter b) and c) Criminal Code, case here criminal liability is taken into account, but in favorable conditions according to art 76 Criminal Code.

<sup>48</sup> According to art 113 paragraph (1)-(3) Criminal Code, the child under the age of 14 years, is not criminal liable; between 14 and 16 years, only if he is proved to have had judgment; the child of 16 years can be held liable according to law. Also, pursuant to art 184 Criminal Procedure Code, it is necessary a psychological report in case the crime was committed by persons of age 14 – 16.

<sup>49</sup> There must be a difference between "irresponsibility" and "lack of responsibility", the second one is proper for all persons who are not 16 yet. Starting with this age, the relative criminal capacity presumption begins to have effects for all physical persons.

<sup>50</sup> The state of irresponsibility can be a permanent or a temporary state, an innate or acquired one, psychiatric or of other type.

<sup>51</sup> Intoxication is specially regulated as compulsory aggravating circumstance, according to art. 77 letter f) Criminal Code. WE still have the opportunity to maintain the possibility to adopt such solutions, according to art. 75, paragraph (2) letter b) Criminal Code. The new element is that intoxication cannot be considered as judicial aggravating circumstance given the effect of giving up to the institution of judicial aggravating circumstances (optional).

<sup>52</sup> Meaning a general objective impossibility to foresee the happening of a circumstance or moment of its appearance.

<sup>53</sup> M. Udrioiu, *Criminal Procedure. General Part*, C. H. Beck Publishing House, Bucharest, 2014, p. 48.