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Actio Libera in Causa – as a Frontier between Empirical and Normative Dimensions

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Abstract

This paper presents a doctrine analysis established in the criminal law – Actio Libera in Causa – i.e. "action free in its cause", namely against the background of "Ethics of authenticity" by Charles Taylor, philosopher of politics, the conception "unfree in action" is reinterpreted.

The leitmotif of the paper is the idea that events shall fit the conceptions in the normative dimension and not concepts with the events, which means the reality in itself is beyond the value assessment, moreover, it can be neglected for normative standardization of events. For defining the social organization criteria, the initial point is not the ideal of truth in itself, but a substantiated model of balance of interests in the form of so-called "agreed truth". Hence the need to subordinate the events to concepts is the core point in analyzing "action free in its cause".

Keywords: normative, culpability, ethics, authenticity, freedom.

1. Introduction

The leitmotif of the paper is the idea that events shall fit the conceptions in the normative dimension and not concepts with the events, which means the reality in itself is beyond the value assessment, moreover, it can be neglected for normative standardization of events.

2. Results and discussion

The essence of culpable action free in will and the peculiarity of understanding wrongfulness

In the criminal law doctrine, the concept – action free in its cause – is connected to "the theory of moving the competency at the first stage" (Turava, 2013), according to which the person's action is blameful not for the fact that performance of the elements of criminal act itself is done unlawfully, but because the previous act committed by the perpetrator of wrongful act is unlawful, which is the direct reason for committing the elements of the act. The Criminal law in the modern sense, is the law of conduct, and according to the normative theory of guilt, there exists a blamefulness of a conduct during performing the elements of a crime, therefore it's not accidental that the abovementioned doctrine is called the "theory of moving the competency at the first stage".

Although the doctrine – action free in its cause – comprises the crimes committed by persons in the state of intoxication, but not limited to, this doctrine considers other legal or factual circumstances existing around the unlawfulness. According to this opinion, "action free in its cause" is a crime when a person found himself guilty in the circumstances excluding culpability. From this point of view, the" action free in its cause" doctrine can be extended even in the case of

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excusatory extreme necessity and provocation of necessary self-defense. “Excusatory extreme necessity” is a super law circumstance excluding guilt, according to which a person is absolved for equivalent kindness, endangering other persons’ health and life (Turava, 2013) in order to save his/her or close relative’s life and health. For example, a member of a certain criminal group issues an ultimatum to X person: either he will be killed, or he will kill Y person. At such moment, in the case of murdering Y, X’s guilt is excluded, since during performing the elements of conduct (in the conditions of ultimatum), he/she can not be the subject of criminal reprimand. However what happens when it is established from factual circumstances that X, though it was not directly the similar ultimatum, himself/herself dealt with a criminal group, cooperated in a certain form with them or allowed to create such a circumstance within which it could be possible to use it for committing unlawful conduct? it is just at that time that the doctrine “action free in its cause” becomes actual. X with his/her free act, guiltily, created circumstances excluding guilt, which is in a causal link with the performed criminal injustice. Considering the above, X’s casual guilt in established crime can be identified not only in the case of direct intent but in such a case when X violated the prudence norm and presumptuously or negligently found himself/herself in such a situation (Turava, 2013).

About the excusatory extreme necessity, it's worth pointing out article 36 of an alternative draft of the Criminal Code of Georgia, written by professor Otar Gamkrelidze, an analogy to paragraph 35 of the German Criminal Code and according to its second part, the norm defining the privilege linked with excusatory extreme necessity is not applied if the wrong-doer himself/herself created danger (Gamkrelidze, 1998).

The mentioned “created” is the category defined in the past form, which means that the circumstances excluding guilt (“this norm”) are not active if its creation was caused by the guiltful conduct of a person committing an unlawful act at the previous stage.

As the original position of a responsive criticism can be considered an idea, that the crime committed in the state of intoxication differs from the excusatory extreme necessity, since in the first case there is incapacity, and in another case – the absence of guilt. This difference is univocal of course, however, I think, it is conceptually irrelevant for defining the question about determining the guilt of a person’s action free in its cause. In support of my opinion, I can supply two types of arguments: the first one is pragmatic: incapacity existing under intoxication transfers into the absence of guilt and thus this case, in relation to imputing guilt the action free in its cause, goes on the same doctrinal line as the excluded guilt during the excusatory extreme necessity. The second is substantial: the internal structure of incapacity is based on the person’s mental state, the internal agent, the free will, the ability to behave differently. During the excusatory extreme necessity, the person acting unlawfully has the possibility to behave differently. However, the question is of fundamental importance: against the background of criminal purposes and effects, to what extent does this fact put this person in a privileged position in relation to the person who has no opportunity to behave differently as a result of the high degree of intoxication and does not realize the wrongfulness of his own action? It can be said with confidence that there is no such thing as a "privilege", moreover, in a situation where the law does not require "acting differently" (in case of excusatory extreme necessity and the provocation of necessary self-defense, directly during performing the elements of the action), considering the possibility of acting differently is normatively irrelevant and doctrinally wrong.

Therefore, there is no exclusive correlation between the plea of guilty of action free in its cause and crime committed by a person with partial sanity as a result of intoxication. Considering that the normative nature of creating a circumstance excluding guileful guilt cannot be brought to the inability of a person committing criminal wrongfulness to realize the illegality at a certain moment of time, I believe that a new theoretical and methodological perspective is needed for the categorization of the concepts included in it. Such can be considered the "Ethics of authenticity"developed by the Canadian philosopher of politics, Charles Taylor (Taylor, 1992).

Ethics of authenticity

The phrase “action free in its cause” or conduct, which is free in its cause (Actio Libera in causa) is quite controversial and as I have noted in the introductory part, the clarity implied in it is such an action which is unfree in itself. What do we really mean when we say that action is free only in reason and not in itself? That we can not think of a person under alcoholic intoxication as a creature with freedom and consciousness? That he looks like a "live weapon" and just as a shooter

loses control of a bullet after pulling the trigger, so does a drunk person lose the consciousness and will he possessed. Precisely here, the above-mentioned notion of "that" is of fundamental importance. Perhaps it would be unfounded to argue that even a person under such a severe intoxication has no will or consciousness, even when he is severely encroaching legal goodness. Naturally, a person without will or consciousness cannot maneuver in time and space, and therefore neither encroach on goodness. The point is that at such times we are not talking about empirical freedom and consciousness, but about "that" freedom and consciousness, and consciously or implicitly, we are making a qualitative ranking of "consciousness" and "will". Thus, we concentrate not on the free act as a phenomenon with which we have fitted the concept, but on the notion with which we have fitted the phenomenon, within the framework defined by the criteria that we ourselves have set from the perspective of normative reality. Thus, from a criminal perspective, freedom and consciousness are relevant not as an empirical fact, but as a concept brought to a normative degree. It is this transition (or raising) from the empirical to the normative dimension, or from the event to the concept, that I relate to the ethics of authenticity, and I believe that this issue is not fundamentally analyzed, at least to the extent that the logic of systematic research requires.

For one of the most prominent figures in the field of political philosophy – Professor Charles Taylor, "personal authenticity" is a moral idea based on original internal self-determination which focuses on the problem of social organization. According to this view, a person is a being with many conflicting desires, irrational aspirations, desires based on desires. Each of us, as a moral being, has a so-called “horizon of meaning”, within the frames of which, desires, aspirations, or goals are hierarchically arranged in our being, according to priorities, and neglect of these priorities and deviation from regularity ends in the loss of freedom (Taylor, 1985). From this point of view, the freedom of the individual can be reduced to neither so-called negative freedom (“non-existence of external coercion”) (Berlin, 1969) nor positive freedom („own master of oneself”), but “freedom is the absence of internal and external obstacles in order to achieve valuable goals”. It is in the definition of “valuable goal” that the ethics of actual authenticity takes place, which criminal law – as a field, has independently (Taylor, 2012).

To make it more apparent, a famous allegorical image called "The Pact of Odysseus" (Macklin, 1987) can be quite useful, according to which: After a long journey Odysseus enters the bay which is full of sirens. He knows he won't be able to resist the temptation coming from the sirens, but completion of the journey represents his own "authentic goal”. That is why, on his own free will, ties himself up on deck with ropes and thus copes with the impending danger coming from the sirens (Macklin, 1987). In the event, if Odysseus had not limited freedom with this free act and had accompanied the temptation of the Sirens, he would have lost that self-determining freedom, which represents the authentic "I" of Odysseus and which is directly related to the highest desire according to value – the end of the trip. For him, freedom is not just the absence of external coercion, nor the presence of oneself as a master demanding the satisfaction of desires (positive freedom), but the absence of an internal obstacle – the temptation of the sirens in order to complete the journey. As for the external obstacle – the presence of Odysseus in a rope-tied situation, however, this mentioned fact is a form of restriction of freedom as well, but this is the case when the end justifies the means and, thus, from the viewpoint of ethics, this very fact cannot be considered as a restriction of freedom. This is a situation where we have adapted the concept of restriction of freedom to the phenomenon. Thus, we can define the act of general principle of the ethics of authenticity.

In terms of equalling with the goal, events conceived under the concepts are subject to selection.

A qualitatively similar ideological projection exists from a criminal point of view as well: Also as for Odysseus, in the case of his not being tied himself with the ropes, normatively ignored and beyond the authenticity, the will, and consciousness of Odysseus going to the Sirens was being created. The will and consciousness manifested by a person in a state of intoxication are also perceived by criminal law as unauthentic and normative - they exist only empirically and, therefore, can be neglected. Thus, it is the “ideal of certainty” that creates the possibility of subordination to the concept of an event. Just as it was possible to read the guilt of Odysseus in the case of his not having tied himself to the deck i.e. until the moment he is able to retain authentic consciousness and will, the act committed by a person before intoxication is considered guilt

similarly. The category of such unlawful acts can include any action in which the subject matter of law delinquently creates guilt as the circumstance that excludes the charge. Although there is no direct accusation in the act at the time of its commission, a legal reprimand can be based on the fact that a person has thrown himself in a similar situation by edging away from the ideal of authenticity.

Thus, the ethics of certainty, as a moral ideal, represents a mechanism for qualitative gradation between events, which allows their subordination to their own concepts, the function of the kind of "filter" between normative and empirical realities can be imposed on it.

3. Conclusion

Since the complexity of the concept of a criminal charge is due to the accumulation of philosophical, psychological, sociological, and normative concepts in it, we shall contain all concepts implied in it in order to determine its legal nature in the normative dimension. Resulting from it, improvement of fundamental significance and analyzing all the methods that transcribe concepts from the empirical category to the normative one. Of course, no one can ever deny the empirical foundations of these concepts, but thanks to these methods they become criminally irrelevant. It lies in the fact that the doctrine of "action free in its cause" reveals the diversity of the internal structure of the concept of guilt and transitional features that can be generalized to the characteristics of the criminal field as a whole. According to Friedrich Hayek's epistemological argument:

If we stopped doing everything, the scope of which we don't possess proper information on, we would soon be dead (Hayek, 1991).

Defining the concept of guilt by combining philosophical, psychological, sociological, or empirical aspects is doctrinally unjustified and practically ineffective, therefore these mentioned issues are of secondary importance, and the criminal semantics of guilt comes to the fore. I do believe that it is with the help of semantic analysis, that is, by maneuvering between theories of the meaning of concepts, it is possible to clarify the criminal concept of guilt. The "ethics of authenticity" represents one model for such maneuvering.

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