THE DEFENCE OF SUPERIOR ORDERS IN PORTUGUESE AND IN COMPARED MILITARY CRIMINAL LAW

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1. In countless dimensions of social life, in the relationships between people, between people and organizations and between organizations, it is possible to identify ways of supremacy which grant a power of imposing upon others the practice of a given behaviour. Many of those subordination relationships are legally acknowledged and find in legal planning a definition of the terms in which they may be constituted and materialized in that command power.

The military organization is, by definition, structured in a hierarchical model which is filled with content exactly through the subordinate's duty of obedience towards the orders of the hierarchical superior.

In the Portuguese military criminal law, the duty to obey orders has express legal consecration in several legal precepts:

> *«The soldier […] has as special duties […]: to fully and promptly execute the orders relative to service» (article 4, no. 2, of the Regulation of the Military Discipline[1])*

1 Decree-Law no. 142/77, of April, 9.

> *«The plea of obedience is consequence of the provisioned in military laws and regulations and expresses in the full and prompt fulfilment of their norms, as well as of the determinations, orders and instructions emanated by hierarchical superior delivered in matter of service given that the fulfilment does not imply crime practice» (article 12 of the Statute of the Army Soldiers[2])*

In the Portuguese legal system, according to the article 271, no. 3, of the Republic Constitution, of 1976[3], and with the aforementioned article 12 of the Statue of the Army Soldiers, it is absolutely undisputed, in criminal matter, the non obligation of an order which may lead to the practice of a crime, any crime. The reach of the mentioned norm is very clear: the obedience is not due when the execution of the order implies the practice of a fact described as a crime[4].

In principle, the exclusion of unlawfulness of a typical fact committed by a soldier when carrying out a superior order may only occur when that order is legitimate. An order cannot by itself, regardless its conformity to legal planning, eliminate the *criminal unlawfulness* of the typical fact performed in its execution.

Being the behaviour of the subordinate criminally unlawful, as it is the practice of a typical fact in obedience to an illegitimate order, the imputation of due criminal liability depends yet, naturally, on the existence of *culpability (Schuld)*. Here is important to know if the fact that the soldier acted under order has any special effect in the *guilt stage* of criminal responsibility. More specifically, if culpability may be excluded by *direct* effect of obedience to an illegitimate superior order and, if so, on which grounds and under which presuppositions.

The exclusion of guilt by obedience (excuse), similarly to exclusion of unlawfulness (justification) by obedience, is often associated to the issue of compulsory illegitimate orders[5]. In fact, exclusion of unlawfulness and exclusion of guilt are as two sides of the same coin. In the context of compulsory illegitimate orders, the exclusion of guilt appears normally as the getaway to counterbalance the denial of exclusion of unlawfulness and the opposition to the justification theory. Therefore, more important than to fundament the excuse is to contradict the

2 Decree-Law no. 236/99, of June, 25.

3 It is established in article 271, no. 3, of the Constitution, that «the duty to obey orders ceases whenever the execution of the orders or instructions implies the practice of any crime».

4 *Cf.* Dias, Jorge de Figueiredo, *Direito Penal. Parte Geral, Tomo I: Questões Fundamentais. A Doutrina Geral do Crime*, Coimbra: Coimbra Editora, 2004, 18.º Cap. § 7 *et seq*., and Brandão, Nuno, *Justificação e Desculpa por Obediência em Direito Penal*, Coimbra Editora, 2006, p. 251 *et seq.*

5 *Cf.* in detail, Brandão, Nuno, *Justificação e Desculpa por Obediência em Direito Penal*, § 9.

exclusion of unlawfulness. Hence, the exclusion of guilt is often taken as a fact, with no need to realize its fundament or to explicit its presuppositions[6].

Generally, the excuse related with the execution of an order is grounded on duress or error. Obviously, an exclusion of guilt of the soldier who acts unlawfully in fulfilment of an order may be reached through one of the several general circumstances which excuse the author, some regarding duress and some others regarding error. However, the only issue that needs to be understood in this context is the exclusion of culpability directly related to obedience to superior orders. Therefore, given that there is, in the Portuguese positive law, a cause of exclusion of guilt specifically related to this issue, the *excusing undue obedience* of article 37 of the Portuguese Penal Code, we will focus our attention in it: «the civil servant who executes an order without knowing that it leads to the practice of a crime acts without culpability, if this is not manifest in the frame of circumstances that he knew».

In this study, we will seek to clarify the nature and application scope of this excuse of the Portuguese criminal law and find out its contact points with similar circumstances existing in foreign *national* criminal laws.

2. In a first assessment, we shall find the fundamental idea that justifies this excusing undue obedience defence. At first thought, *duress* should be put away as a principle which fundaments it. In that sense states the legal text of article 37 of the Penal Code, which points directly to the domain of *error* in the part it circumscribes the excused action by undue obedience to the cases of the execution of an order *not knowing* that it leads to the practice of a crime: «the civil servant who executes an order *without knowing* that it leads to the practice of a crime acts without culpability».

The excuse by duress has been supported in literature from two different perspectives. The truth, however, is that not only those two points of view do not find legal basis in article 37 of the Penal Code, but also reveal to be unfounded.

A significant part of those who support excusing theories in the context of the debate around compulsory illegitimate orders defended *duress* as fundament for

6 *Cf.*, *v. g.*, Santos, Beleza dos, *Lições de Direito Penal (Causas de Justificação do Facto)* (Apontamentos segundo as prelecções ao curso do V ano jurídico de 1941-42, coligidos por Maria de Nazareth Lobato Guimarães), Coimbra: Coimbra Editora, 1946, p. 111 *et seq*., Mezger, *Tratado de Derecho Pena*l, 2nd ed., Madrid, 1955, § 30, II, 2, Amelung, Knut, «Die Rechtfertigung von Polizeivollzugsbeamten», *Juristische Schulung*, 1986, p. 337, Küper, Wilfried, «Grundsatzfragen der „Differenzierung» zwischen Rechtfertigung und Entschuldigung. Notstand, Pflichtenkollision, Handeln auf dienstliche Weisung», *JuS*, 1987, p. 92, Dreher, Eduard / Tröndle, Herbert, *Strafgesetzbuch und Nebengesetze*, 47. Auf., München: C. H. Beck'sche Verlagsbuchhandlung, 1995, before § 32, no. 16, Lackner, Karl / Kühl, Kristian, *Strafgesetzbuch mit Erläuterungen*, 22. Auf., München: C. H. Beck'sche Verlagsbuchhandlung, 1997, before § 13, no. 27, and Toledo, Francisco de Assis, *Ilicitude Penal e Causas de sua Exclusão*, São Paulo: Ed. Forense, 1984, pp. 120 *et seq.* and e 138 *et seq.*

exclusion of guilt by execution of illegitimate orders. This fundament is used by those who simultaneously accept the existence of compulsory illegitimate orders recur to this fundament, but refuse to give justifying effects to them: while a duty to obey is imposed to the agent, it is obvious that he may not be censured by committing the ordained fact, as no other behaviour is to be requested from him. This reason took some of those who admitted the existence of compulsory illegitimate orders, but who opposed to the fact that they could justify the execution, to consider that the subordinate's culpability should be excluded in the frame of the excusing necessity[7].

The basic presupposition underlying this position is the existence of compulsory illegitimate orders in criminal matter. This presupposition is not only unacceptable regarding principles[8], but it is also inadmissible in face of Portuguese positive law, which expressly establishes the termination of the duty of obedience whenever the order leads to the practice of any crime. Therefore, all consequences that the described thesis derives from the statement of those compulsory illegitimate orders fall to the ground, more specifically the exclusion of guilt by duress.

Besides the invocation of duress as a fundament for exclusion of guilt in case of obedience to illegitimate orders as a direct result from the position assumed in the context of the discussion regarding compulsory illegitimate orders, another perspective arises, in *Spanish doctrine*, which defends an exclusion of guilt from the civil servant or the soldier who unduly obeys a superior order, which is based in a principle of duress identified with the fear of possible personal disadvantages which may derive from not abiding the order. Antón Oneca admitted the excuse of the subordinate who executes an order which he knows or suspects to be illegitimate, grounded in the idea that «the fear of disciplinary sanctions, the habit of discipline which mechanizes conduct and also the suggestion exercised by the chief's authority and prestige may create, in concrete cases, situations which, from the subjective point of view, are not free and from the objective point of view are not reprehensible, because in similar conditions most people would have done the same» [9].

7 *Cf.* Liszt, Franz v. / Schmidt, Eberhard, *Lehrbuch26*, § 42, V, p. 288, Sauer, Wilhelm, *Allgemeine Strafrechtslehre*, 3. Auf., Berlin: Walter de Gruyter & Co., 1955, § 18, B, II, 2, Kohlrausch, Eduard / Lange, Richard, *Strafgesetzbuch mit Erläuterungen und Nebengesetzen*, 39. und 40. Auflage, Berlin: Walter de Gruyter & Co., 1950, before § 51, II, Mezger, Edmund, *in: Strafgesetzbuch. Leipziger Kommentar*, I, 8. Auf., Walter de Gruyter & Co., 1957, before § 51, 12, a), and Welzel, *Derecho Penal, Parte General,* 11 ed., Editorial Jurídica de Chile, § 15, II, 2. In a close direction, Díaz Palos, Fernando, «Obediencia Debida», *Nueva Enciclopedia Jurídica*, XVII, Barcelona: ed. Francisco Seix, 1982, p. 751 *et seq*., and in the present Italian doctrine, Fiandaca, Giovanni / Musco, Enzo, *Diritto Penale. Parte Generale*, 3rd ed., 1999, p. 366, who point criminal orders not subject to inspection in article 51-4 of the Italian Penal Code as a case of duress.

8 Brandão, Nuno, *Justificação e Desculpa por Obediência em Direito Penal*, p. 241 *et seq.*

9 Antón Oneca, José, *Derecho Penal. Parte General*, I, Madrid, 1949, p. 274. *Cf.* also Saínz Cantero, José Antonio, *La Exigibilidad de Conducta Adecuada a la Norma en Derecho Penal*, Granada: Universidad de Granada, 1965, p. 144.

One must not assume, however, that this principle position may only be found in the old literature. The truth is that even in the present Spanish doctrine the exclusion of the subordinate's guilt is still defended «because of the pressure which may be imposed upon him by the hierarchical relationship»[10], «when the subordinate knows that the order is criminal and, thus, not compulsory […] and, notwithstanding its non compulsion, in face of certain conditions, such as fear of disciplinary sanctions, of loosing the job, *etc*. […], executes it without being demanded from him a different action by the law, because most citizens would have done the same in similar situations»[11].

It is an undeniable fact that obedience may be imposed in such a context that one must only conclude by an exclusion of culpability grounded in duress. However, this is far from meaning that the subordination relationship may be by itself a factor of pressure over the civil servant or the soldier that may excuse them whenever they are not able to deny obedience to an order directed to the practice of a crime. To be able to speak of a genuine duress, it is not enough that the subordinate feels helpless to disobey the criminal order transmitted to him. On the contrary, it is necessary that the order is accompanied by the threat of severe reprisals to the soldier should he disobey, which may not be avoided but by obeying.

It must, then, be concluded that most of the situations pointed by Spanish literature as situations of duress do not correspond to a real state of necessity, because the inhibition to fulfil the command imposed by the incriminating norm comes essentially from a strictly personal incapacity from the civil servant or the soldier to abide the law and not from the environment situation[12] of subordination that covers the transmission of the order.

The exclusion of culpability by duress in case of obedience to an order which may imply the practice of a crime does not constitute, therefore, a direct effect of that order and may only be accepted when the terms in which the order is transmitted and executed set a situation of *excusing necessity* defined by article 35 of the Penal Code[13]. For that, it is necessary that the subordinate is coerced to execute the order

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10 Vives Antón, Tomas Salvador, «Consideraciones Político-criminales en Torno a la Obediencia Debida», *Estudios Penales y Criminologicos*, V, 1982, p. 141.

11 Morillas Cueva, Lorenzo, *La Obediencia Debida. Aspectos Legales y Político-criminales*, Madrid: Civitas, 1984, p. 153.

12 Correia, Eduardo, *Unidade e Pluralidade de Infracções*, *in: A Teoria do Concurso em Direito Criminal*, p. 215.

13 Like this, Dias, Figueiredo, *DP-PG*, I, 2004, 24.º Cap., § 4 *et seq.*, Weber, Hellmuth von, «Die strafrechtliche Verantwortlichkeit für Handeln auf Befehl», *MDR*, 1948, p. 39 *et seq*., Stratenwerth, Günter, *Verantwortung und Gehorsam. Zur strafrechtlichen Wertung hoheitlich gebotenen Handelns*, Tübingen: J. C. B. Mohr, 1958, p. 182, Maurach, Reinhart / Zipf, Heinz, *Derecho Penal. Parte General*, I, Astrea, 1994, § 34, no. 25, Jescheck, Hans-Heinrich / Weigend, Thomas, *Lehrbuch des Strafrechts. Allgemeiner Teil*, 5. Auf., Berlin: Duncker & Humblot, 1996, § 35, II, 5, Lenckner,

under threat of death or damage of physical integrity, honour or freedom, and that the remaining presuppositions of article 35 of the Penal Code, combined with article 13 of de Code of Military Law[14], are verified. Apart from these cases, an excuse grounded on duress in case of obedience to a criminal order may not be stated.

3. The exclusion of culpability by excusing undue obedience foreseen in article 37 of the Portuguese Penal Code does not derive from duress, but from the *error* the soldier incurs in and which determines the execution of the order that leads to the practice of a crime. It must, however, be clarified which is the type of error herewith in cause and which is the content of the criterion of non censorship. For that, besides the understanding of the reflexion that has been dedicated to excusing undue obedience in Portuguese doctrine, it is important to understand the terms in which in German literature several legal dispositions have been interpreted, as § 5, I of Wehrstrafgesetz (WStG) and § 11, II of Soldatengesetz (SoldG), which redaction is almost the same as article 37 of the Portuguese Penal Code.

3.1. The present debate of German literature regarding exclusion of guilt in case of obedience to illegitimate orders occurs around some legal dispositions in which the debate concerning compulsory illegitimate orders is centred, namely of the § 5, I of WStG and § 11, II of SoldG, which apply to soldiers, and § 7, II of UZwG, directed to execution civil servants. According to theses precepts, it only acts with guilt that soldier or civil servant who commits an unlawful fact which fills the type of a criminal law when knowing that the order implies the practice of an unlawful fact or when that is evident according to the circumstances he is aware of.

Most doctrine associates those legal dispositions to the matter of error. But while some do it directly, considering that they form special regulations of excusing error, some others consider that those precepts embody causes for exclusion of guilt of an autonomous nature which act in situations of error. The lack of consensus occurs, furthermore, regarding the types of error covered by the dispositions in question. Although the dominating tendency is to identify § 5, I of WStG, § 11, II of SoldG and § 7, II of UZwG with mistake of law (*Verbotsirrtum*), it is common to find positions that extend the regulation of these legal norms also to situations of error about the type (*Tatbestandsirrtum*), either expressly[15], or implicitly, considering

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Theodor, *in:* Schönke / Schröder, *Strafgesetzbuch Kommentar*, 26. Aufl., München: C. H. Beck, 2001, before § 32, no. 121, and Ambos, Kai, «Zur strafbefreienden Wirkung des «Handeln auf Befehl» aus deutscher und völkerstrafrechtlicher Sicht», *JR*, 1998, p. 222.

14 Law no. 100/03, of November, 15.

15 Cf. Sch / Sch / Lenckner[26], before § 32, no. 121, and Baumann, Jürgen / Weber, Ulrich / Mitsch, Wolfgang, *Strafrecht Allgemeiner Teil*, 10. Auf., Bielefeld: Ernst und Gieseking, 1995, § 23, no. 52.

cases that in reality set an error about presuppositions of a justification cause (*Erlaubnistatbestandsirrtum*) as cases of error about prohibition (*Verbotsirrtum*)[16].

Part of the doctrine includes, however, the mentioned legal dispositions only in *Verbotsirrtum*. According to Stratenwerth, the knowledge or the evidence those dispositions refer to regards only the juridical valuation of the ordained conduct[17]. In the same sense, Jakobs considers that those precepts intervene when the subordinate ignores the unlawfulness of the fact which is object of the order, softening the general regulation of *Verbotsirrtum* of § 17 StGB[18]. According to Jakobs, exclusion of guilt in those cases when criminal unlawfulness is not evident bearing in mind the circumstances that the subordinate is aware of is due to the need to ensure the speed in the execution of the state decisions, whereas if the risk of error from general rules would be imposed upon soldiers and execution civil servants, the execution of state acts would be affected by possible clarifications about the juridical qualification of the ordained fact which civil servants would be authorised to do or ask.

It is, therefore, granted to the subordinate a bigger margin of error. The law, according to Roxin and Schroeder's understanding, is based on the theory of culpability (*Schuldtheorie*) and acts upon the criterion of error censorship, decreasing the demands of avoidance (*Vermeidbarkeit*)[19].

Therefore, punishment is reserved for those cases in which error about unlawfulness is easily avoidable. So, Roxin considers that law consecrates a solution which may be assimilated in its category of liability (*Verantwortlichkeit*), which comprises guilt and the needs of prevention[20]. From his point of view, as per § 17 StGB, it should be considered unavoidable not only the error committed by complete impossibility of accessing the awareness of unlawfulness, but also the error regarding which one may state that the agent fulfilled the requirements assumed by the normal fidelity to law. Therefore, when awareness of the conduct unlawfulness may only be obtained by extreme efforts, regardless the existence of a low guilt, the fact that those efforts are not demandable to the agent conducts to the exclusion of his criminal liability[21].

16 Maurach / Zipf, *DP-PG7*, I, § 38, no. 25.

17 Stratenwerth, *Verantwortung und Gehorsam*, p. 205.

18 Jakobs, Günther, *Derecho Penal. Parte General. Fundamentos y teoría de la imputación*, 2nd ed., Madrid: Marcial Pons, 1997, 19/53. In this direction, *cf.* also Roxin, Claus, *Strafrecht, Allgemeneir Teil, Bd. 1: Grundlagen; Der Aufbau der Verbrechenslehre*, 3. Aufl., München: C. H. Beck, 1997, § 21, no. 73, e Schroeder, Friedrich-Christian, *in:* Jähnke / Laufhütte / Odersky (Hrsg.), *Strafgesetzbuch, Leipziger Kommentar, Grosskommentar*, 11. n. Auf., 14. Lieferung: §§ 15-18, Berlin: Walter de Gruyter, 1994, § 17, no. 52 *et seq.*

19 Roxin, *AT*[3], § 21, no. 73, e Schroeder, *LK*[11], § 17, no. 54. both oppose, therefore, to the position of Maurach / Zipf, *DP-PG7*, I, § 38, no. 29, who see in § 5 I of WStG an expression of the limited theory of *dolus*.

20 Cf. Roxin, *AT*[3], § 19.

21 Roxin, *AT*[3], § 21, no. 37.

Hence, even if there is a lessen guilt, an error about the prohibition may exclude liability when renounce to punishment is compatible with preventive functions of criminal law[22]. Therefore, Roxin's understanding is that, although there are cases in which the subordinate acts with guilt due to the possibility of avoiding error about the unlawfulness of the ordained fact, when unlawfulness is not evident in the frame of circumstances that he knew, law renounces to his punishment as the superior's liability maintenance allows to meet the existing prevention needs[23]. § 5, I WStG, § 11, II SoldG and § 7, II UZwG represent, thus, a solution of culpability statement and of liability denial, which determines the non punishment of the subordinate.

Also Maurach and Zipf refer the issue of obedience to illegitimate orders essentially to the scope of *Verbotsirrtum*[24]. Their standing of principle is that the fact practiced in execution of an illegitimate order is always unlawful, and the order may have effects only in the domain of fact's liability (*Tatverantwortung*) or of the agent's culpability. Therefore, they establish a basic distinction between two types of situations[25]: the illegitimacy of the order is known by the agent; and the subordinate is not aware of the illegitimate nature of the order directed to him for the execution of a typical fact. Only in the latter, according to their understanding, may there be an exclusion of criminal liability, at the level of culpability, by direct effect of the authority order.

The exclusion of criminal liability by obedience occurs, according to Maurach and Zipf, only when the subordinate is not aware of the illegitimacy of the order, grounding, therefore, in an error about prohibition which operates at the culpability stage[26]. The fundament of exclusion of guilt cannot be duress, as it implies a situation of psychic pressure which, by definition, does not exist when the subordinate is not aware of the illegitimacy of the order[27]. Here there is a lack of awareness of the unlawfulness, which, according to Maurach and Zipf's understanding, must be solved at the level of error about prohibition.

Once defined the content of the error about prohibition, Maurach and Zipf address the regulation in this concrete domain of authority's orders. They consider that a distinction should be made between civil servants and soldiers, as the situation of the latter is disciplined by special dispositions.

Regarding civil servants, is applicable the general regulation of error about prohibition foreseen in § 17 StGB, and so that error does not affect the *dolus* nature

22 Roxin, *AT*[3], § 21, no. 43.

23 Roxin, *AT*[3], § 21, no. 73. Close to Roxin, Dias, Figueiredo, *DP-PG*, I, 2004, 24.º Cap., § 12.

24 Maurach / Zipf, *DP-PG*[7], I, § 38, no. 24 *et seq.* So, Maurach, Reinhart, *Deutsches Strafrecht. Allgemeiner Teil*, Karlsruhe: C. F. Müller, 1954, § 36, III, B, although analysing the issue in the context of exclusion of responsibility for the fact.

25 Maurach, *AT*, § 36, III, B, e Maurach / Zipf, *DP-PG*[7], I, § 34, no. 20.

26 Cf. Maurach, *AT*, § 36, III, B, 3, e Maurach / Zipf, *DP-PG*[7], I, § 38, no. 24 *et seq.*

27 Maurach, *AT*, § 36, III, B, 3, e Maurach / Zipf, *DP-PG*[7], I, § 38, no. 27.

of the subordinate's conduct, and it may exclude guilt if it is inevitable. Military subordination is ruled by the aforementioned § 5, I WStG, which determines the subordinate's liability in those cases he is aware of the order's criminal illegitimacy or that illegitimacy is evident through circumstances he knew. The second condition is, according to Zipf, a special rule of the error about prohibition, which constitutes an expression of the limited theory of *dolus* (*eingeschränkte Vorsatztheorie*)[28]. According to this theory, error about prohibition determines the exclusion of intent, but in the event that the agent reveals law blindness he will deserve a reproach, according to which the penalty corresponding to the *dolus* crime is to be applied to him[29]. It is precisely in this sense that Zipf interprets § 5, I WStG.

Zipf applies § 5, I WStG to the situations of error about prohibition in which the subordinate incurs when executing an illegitimate order. However, as he expands the content of error about prohibition, § 5, I WStG works also in cases of error about the presuppositions of a justification cause. While the applicability of this disposition to cases of error about the type is implicitly admitted by Zipf, in Lenckner we find a clear and express defence of that application.

Regarding compulsory illegitimate orders, Lenckner places himself in the justificationist theory, defending in what concerns the compliance of criminally illegitimate orders, a set of solutions which determine a wide range in the exclusion of unlawfulness of the respective execution conduct[30]. The situations that do not benefit from the exclusion of unlawfulness are object of a dogmatic treatment evidenced by clear distinction between the several hypotheses in which the subordinate may benefit from an exclusion of criminal liability at the level of guilt[31]. As in most German literature, to Lenckner the whole problem regards *error*. Lenckner clearly separates the cases of error about typical factuality and of error about the material presuppositions of a justifying type of the cases of lack of awareness of the ordained conduct's unlawfulness. Within each of those groups, he distinguishes also the general civil servants from the execution civil servants and soldiers, given that § 7, II UZwG, § 11, II, 2 SoldG and § 5, I WStG are applicable to the latter.

These last precepts dictate a special discipline of excuse for execution civil servants and for soldiers, which reflects *both on error about the typical factuality and about the objective presuppositions of a justifying type, and on error about unlawfulness*[32].

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28 Maurach / Zipf, *DP-PG*[7], I, § 38, no. 29.

29 Cf., in detail, Correia, Eduardo, I, p. 408 *et seq.*

30 Sch / Sch / Lenckner[26], before § 32, no. 10 *et seq.* and 86 *et seq.*

31 Sch / Sch / Lenckner[26], before § 32, no. 121.

32 Sch / Sch / Lenckner[26], before § 32, no. 121. In this sense, *cf.* also Baumann / Weber, *AT*[10], § 23, no. 52, who consider that such dispositions represent a change benefiting the agent of the error general regulation of §§ 16 and 17 of StGB.

Also Jescheck and Weigend detach from the main doctrine and consider that unlawful acting in fulfilment of service orders forms an excusing cause for excuse of an autonomous nature, although it represents simultaneously a special rule of error about prohibition[33]. The legal fundament of excuse by obedience to superior orders for execution civil servants and for soldiers lays, according to Jescheck and Weigend, in § 7, II UZwG, in § 11, II, 2 SoldG and in § 5, I WStG. Like the other excusing causes, the reason why the fulfilment of a conduct threatened with a penalty in case of execution of an order may be excused lays in a substantial decrease of the unlawful of action and of the culpability of the fact. The excuse may occur either in those cases when, acting with the intention of fulfilling the duty of obedience which lays on him, the subordinate trusts that he acts according to the law, being notwithstanding wrong in what regards the mandatory nature of the order[34], or when the subordinate is not aware of the criminal relevance of the ordained fact. Legal order admits excuse given the limits to the ability of controlling the legality of the order imposed upon the subordinate and the hierarchical structure of the state, which inspires in the subordinate a spirit of trust in the authority of the superior and the custom of obeying and which transfers to the superior the responsibility for the material validity of the issued orders. In any case, Jescheck and Weigend point out to the fact that a non compulsory order may be a cause for excuse only when it is considered by the subordinate as compulsory and it could be so[35]. Criterion that corresponds, *grosso modo,* to the presuppositions in which exclusion of guilt depends on according to the mentioned legal dispositions.

3.2. Contrarily to what happens in German literature regarding § 5, I WStG and similar precepts, it is extremely scarce in Portuguese doctrine the reflexion hat has been dedicated to excusing undue obedience, foreseen in the general part of the Penal Code, since it was enforced, over twenty five years ago. The poor attention that excusing undue obedience has earned did not prevent, however, the appearance of different doctrinal positions concerning its fundament and field of application.

It must be pointed out that most doctrine considers, correctly, that excusing undue obedience has nothing to do with duress and it rather concerns the problem of error, regardless the fact that not always it is possible to understand what kind of mistake is concerned here.

Nevertheless, the main present doctrine formed in the context of excusing undue obedience separates distinctly between error about typical factuality and error about prohibition, understanding some that this is a special case of error about the

33 Jescheck / Weigend, *AT*[5], § 46, I, 4.
34 Jescheck / Weigend, *AT*[5], § 46, I, 34.
35 Jescheck / Weigend, *AT*[5], § 46, II.

circumstances of the fact of article 16 of the Penal Code, and some others that it is a case of a specific regulation of error about unlawfulness of article 17 of the Penal Code.

Cavaleiro de Ferreira[36] and Germano Marques da Silva identify excusing undue obedience with error about the circumstances of the fact or, at least, of one of it its modes.

In fact, in the sense that excusing undue obedience sets a case of error about the circumstances of the fact, more precisely of error about the presuppositions of a justifying type, Germano Marques da Silva states that «due to error about the order imposition, *dolus* would be excluded, pursuant to article 16, no. 2 of the Penal Code, but if error is unforgivable the liability by negligence, if that would be the case, would maintain»[37]. Therefore, «error excludes now culpability itself and not only *dolus*»[38].

Diverging from the approach of excusing undue obedience to error about the circumstances of the fact of article 16 of the Penal Code, Figueiredo Dias places it in the domain of error about unlawfulness of article 17 of the Penal Code. According to this author, article 37 of the Penal Code aims at compensating the rigueur of the legal solution at the level of unlawfulness, as if, in tribute to the citizen's rights and freedoms the justification is denied to the civil servant who executes an order not knowing that it is illegitimate, «it is the duty of the State to also care about the efficacy of the services it is required to render; and this will be jeopardized if the hierarchical subordinate who receives the order is always, by executing it, with «a foot in prison»»[39].

Figueiredo Dias discards the hypothesis that excusing undue obedience is a matter of duress, considering that article 37 of the Penal Code has rather to do «with error about unlawfulness in which, because of the official or of the service order, the agent may have incurred. Here the legislator introduced a special regulation concerning which would result from the provisioned in article 17. What is present here is, ultimately, a special regulation of the problem of lack of awareness of the unlawful from the subordinate who received and executed the order»[40]. The

36 Ferreira, Cavaleiro de, *Lições de Direito Penal*, Verbo, 1992, p. 358.

37 Silva, Germano Marques da, *Direito Penal Português. Parte Geral*, II, Lisboa: Verbo, 1998, p. 218.

38 Silva, Marques da, *DP-PG*, II, p. 218.

39 Dias, Figueiredo, *DP-PG*, I, 2004, 24.º Cap., § 2.

40 Dias, Figueiredo, *DP-PG*, I, 2004, 24.º Cap., § 5. In the same sense, Palma, Maria Fernanda, *A Justificação por Legítima Defesa como Problema de Delimitação de Direitos*, AAFDL, 1990, p. 233 *et seq.*, to whom article 37 of the Penal Code «seems to regard only error about the second enunciated kind [error about the legitimacy of the order] *(indirect error about unlawfulness)*, constituting a special norm concerning article 17 of the Penal Code or simply one concretization of it», and Carvalho, Américo Taipa de, *Direito Penal – Parte Geral, Volume II: Teoria Geral do Crime*, Universidade Católica, 2004, § 922 *et seq.*

specificity of article 37 of the Penal Code regarding the general regulation of error about unlawfulness is its criterion of error censorship. Comparing with article 17 of the Penal Code, the censorship scope defined by article 37 of the Penal Code is less tight, hence resulting a bigger range of exclusion of guilt. In any case, the criterion of censorship of article 37 of the Penal Code also participates of the idea of «maintenance in the agent of a *straight* — however wrong — ethical-juridical conscious, grounded in an attitude of fidelity or correspondence to ethically relevant requirements or points of view»[41] and does not identify with a minor error avoidance, as per the understanding, for example, of Roxin regarding § 5 WStG.

Although Figueiredo Dias tries to escape here to avoidance as a criterion of censorship of error about unlawfulness, which he has always refused in the general context of the issue of the lack of unlawfulness awareness, the fact is that article 37 of the Penal Code causes the exclusion of culpability to be dependent from the *evidence* of the illegitimacy of the order. Therefore, as the author himself admits, it is difficult to articulate the thought of straight conscious with an idea of evidence. That articulation is proposed in the following terms: whenever in the frame of the circumstances known by the subordinate «the issue of unlawfulness of the fact reveals *questionable*, *controversial*, *obscure* or even just *little clear* a cause of exclusion of culpability is verified» [42].

4. In a broad vision of the Portuguese doctrine and of the German literature, one observe that, in face of legal precepts with a similar literal content, determinants of the exclusion of guilt in case of obedience to illegitimate orders, three tendencies are formed in the definition of the juridical nature. Some think that it is a special regulation of error about unlawfulness or of error about prohibition. Others point out to error about the circumstances of the fact. A maximalist thesis, directly or indirectly through an enlargement of the scope of error about prohibition, encompasses in these dispositions either situations of error about prohibition, or of error about the type. That broad vision cannot, however, ignore the profound differences between the Portuguese system and the German one, either in the context of superior orders, or in the scope of the theory of mistake.

Regarding superior orders, German experience reveals a bigger tendency to admit the exclusion of unlawfulness of the typical fact committed while executing an illegitimate order[43], through special concepts of unlawfulness, the application of the theory of error on the material presuppositions of a justification cause or the compulsory illegitimate orders. Hence, in a significant part of the situations,

41 Dias, Figueiredo, *DP-PG*, I, 2004, 24.º Cap., § 10.

42 Dias, Figueiredo, *DP-PG*, I, 2004, 24.º Cap., § 11.

43 Cf. Brandão, Nuno, *Justificação e Desculpa por Obediência em Direito Penal*, p. 179 *et seq.*

the criminal liability is excluded on the ground of fact's lack of unlawfulness. It is essentially there that, therefore, the safeguard of the subordinate's position is promoted. Generally, one does not wait for the judgement on the culpability to —using the image of Figueiredo Dias— give the civil servant the signal that he can act without fearing going to prison in consequence of the execution of the order.

A possible detachment from the German doctrine is also suggested by the deep theoretical divergence that separates Portuguese and German comprehension about mistake in criminal law, and which is evidenced in the interpretation of articles 16 and 17 of the Portuguese Penal Code and of §§ 16 and 17 StGB[44]. While the German regulation lays on the error about the type and error about the prohibition dichotomy, the Portuguese regulation parts from the distinction between the intellectual or knowledge error and the moral or valuation error, which expresses the essential of the model proposed by Figueiredo Dias in his *O Problema da Consciência da Ilicitude em Direito Penal*[45]. Because of this basic difference, error about prohibition of § 17 StGB has a broader range than error about unlawfulness of article 17 of the Portuguese Penal Code. In fact, the situations that falls in the scope of the German error about prohibition is split in the Portuguese regulation between the pure error about unlawfulness of article 17 and error about prohibitions of article 16-1, 2nd part of the Portuguese Penal Code.

The aforementioned differences impose caution in possible transpositions from the German thought to the exegesis of excusing undue obedience defined in the Portuguese law, where precisely the whole problematic of obedience to superior illegitimate orders and the essential of the issue of error converges. Caution which must be doubled in face of the ambiguity of the redaction of article 37 of the Penal Code[46], which, as the homologous German precepts, (§ 7, II UZwG, § 11, II, 2 SoldG and § 5, I WStG), may allow the most diverse interpretations.

The legal text of the excusing undue obedience does not allow to immediately associate it to error about unlawfulness. What is decisive for considering that one is towards an error about unlawfulness is the consequence of the error presupposed by excusing undue obedience, the exclusion of culpability. If law establishes a general

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44 Therefore, Dias, Jorge de Figueiredo, *Temas Básicos da Doutrina Penal*, Coimbra Editora, 2001, p. 288, states that «there is, between the aforementioned §§ 16 and 17 of the German Penal Code and articles 16 and 17 of the current Portuguese Penal Code, notorious redaction differences, which traduce relevant doctrine divergences».

45 Dias, Figueiredo, *Temas Básicos*, p. 291, but also Silva, Marques da, *DP-PG*, II, p. 204, and Beleza, Teresa Pizarro / Pinto, Frederico de Lacerda da Costa, *O Regime Legal do Erro e as Normas Penais em Branco (Ubi lex distinguit…)*, Almedina, 1999, p. 22 *et seq.*

46 Palma, Maria Fernanda, *A Justificação por Legítima Defesa*, p. 233, pointed to the ambiguity of the redaction of article 37, and Dias, Figueiredo, *DP-PG*, I, 2004, 24.º Cap., § 4, considered that «the regulation included in article 37 is very far from being clear and free from founded doubts».

regulation in which it distinguishes the error that excludes *dolus*, which it calls error about the circumstances of the fact, and the error that excludes culpability, which it calls error about unlawfulness, then one may think that, being the exclusion of culpability the effect of the error present in excusing undue obedience, this is a sort of the kind of error about unlawfulness[47].

We do not consider, however, that excusing undue obedience is a specific regulation of error about unlawfulness of article 17 of the Portuguese Penal Code.

The acceptance that the error implied in excusing undue obedience has the nature of error about unlawfulness helplessly compromises the internal coherence of a theory of error based in the difference between error of the psychological conscious and error of ethic conscious, defended precisely by Figueiredo Dias, and which we understand to be the one that is most consistent with articles 16 and 17 of the Penal Code. Seen as a case of error about unlawfulness, article 37 of the Penal Code becomes a strange body inside that theory, which is very hardly able to explain it.

The incompatibility of excusing undue obedience with error about unlawfulness and its threat to the internal coherence of a model of error based on the intellectual error / moral error dichotomy derives firstly from the fact that article 37 of the Penal Code allows that guilt can be excluded in those situations in which the circumstances known by the agent do not correspond to those that are actually verified. The reference of article 37 of the Penal Code to the evidence in the frame of the circumstances known by the civil servant forces the conclusion that the precept leads to situations in which the agent is not aware of the whole factuality which forms unlawfulness and he is not, therefore, in a condition to even be able to assess the unlawfulness of the act that he commits.

The non evidence of the fact unlawfulness as a criterion of non censorship origins another difficulty in the understanding of an excusing undue obedience connoted with an error about unlawfulness grounded in the intellectual error / moral error dichotomy. What is determinant in this dichotomy in order to speak about a true lack of unlawfulness conscious is the unconformity of the agent's ethic conscious regarding valuation recognized by the legal order[48]. Therefore, while being at stake not a lack of science, but a true lack of conscious, the criterion of non censorship of error about unlawfulness does not lay on the inevitability of the error[49], as it is generally defended by the theses which part from the error about the type / error about the prohibition dichotomy. While being that one the content of error about

47 *Cf.* Dias, Figueiredo, *DP-PG*, I, 2004, 24.º Cap., § 8.

48 Dias, Jorge de Figueiredo, *O Problema da Consciência da Ilicitude em Direito Penal*, 4th ed., Coimbra: Coimbra Editora, 1995, § 15, II, 3.

49 *Cf.* Dias, Figueiredo, *O Problema da Consciência da Ilicitude*, § 12, III and § 17, and *DP-PG*, I, 2004, 23.º Cap., § 4 *et seq.*

unlawfulness, the non censorship may only be stated when «the mistake or the error of ethical-conscience, which is reflected in the fact, does not found in an worthless and juridically reproachable quality of the agent's personality, for which he has to answer»[50].

We do not see how the criterion of non censorship foreseen in article 37 of the Penal Code may be encompassed on that criterion of non censorship proposed by Figueiredo Dias, summarized in the idea of straight conscious, characterized by the persistence in the agent of a general attitude of fidelity towards the requirements of the legal order. In fact, regardless the way how one conceives the criterion of non censorship of article 37 of the Penal Code, one cannot extract any conclusion from it concerning the attitude that the agent documents in the fact. Circumstance which, naturally, makes it impossible for article 37 of the Penal Code to work, as the criterion defined in the norm so that it may trigger a juridical effect is not adequate to respond the problem raised by those cases which, according to the hypothesis, must be subsumed in it.

All points, therefore, to the conclusion that excusing undue obedience does not represent a form of error about unlawfulness. It seems to us that only a pure conceptualism, held to the idea that any error which excludes culpability has to be an error about unlawfulness, may justify the qualification of excusing undue obedience as a case of mistake about unlawfulness.

In our perspective, those situations in which the soldier assumes that the order is transmitted under a legal authorization which in reality does not exist or wrongly assumes that the order is issued still within the boundaries of a legal authorization (error about the existence or the boundaries of a justification cause) do not have to do with article 37 of the Penal Code, but rather with article 17 of the Penal Code, as they represent cases of error about unlawfulness. And we are also still in the domain of article 17 and not of article 37 when the soldier, representing notwithstanding all the factuality important for the formation of a correct judgment about the unlawfulness of the ordained fact, acts with no awareness of the unlawfulness of that same fact, or despite having that conscious, he thinks, however, that obedience is due as he considers that any order whatsoever must be executed, regardless its conformity to the criminal law[51].

5. The compatibility of article 37 of the Penal Code with a general theory of error firmed in the contraposition between knowledge error and valuation error is a

50 Dias, Figueiredo, *O Problema da Consciência da Ilicitude*, § 17, II, 2.

51 Most German doctrine rightly considers that this latter case sets an error about the prohibition in principle unforgivable – *cf.*, by all, Stratenwerth, *Verantwortung und Gehorsam*, p. 183 *et seq*., and Jescheck / Weigend, *AT*[5], § 46, I, 46.

necessary condition for the definition of the regulation of excusing undue obedience and for the determination of its juridical nature. However, the frames of the error doctrine are insufficient for a complete and accurate understanding of excusing undue obedience.

Excusing undue obedience cannot be detached from the problem of the existence or the non existence of the so-called compulsory illegitimate orders in criminal matter. In fact, together with article 31st-2, *c)*, of the Penal Code and with article 36-2 of the Penal Code, article 37 of the Penal Code embodies a normative frame which forms a coherent whole and which parts may only be adequately understood parting from a fundamental principle which is reflected in them: the principle that an order may only justify the typical fact carried out in its execution if it is according to the law, *i. e.*, legitimate.

This principle has, however, as consequence the possibility of a criminal charge against the subordinate who carries out that illegal order. This is nothing but a natural consequence in a State governed by the rule of law, which completely disregards any irresponsibility reserve for the plain circumstance that the agent acts under superior orders (article 271 of the Portuguese Republic Constitution). Nevertheless, it is common the understanding that it is not fair that State requires its soldiers an obedience as quick and complete as possible to the orders issued to them and afterwards abandon them, exposing them to the roughness of criminal justice, if it is concluded that, after all, the order was not of due obedience for contradicting criminal law. As Eduardo Correia concludes, without a precept as article 37 of the Penal Code «the servants would be in a very difficult position towards the criminal law»[52].

Between the problem of (non) justification by fulfilment of illegitimate orders and the excusing undue obedience there is an entangled relationship, which from our point of view implies that the application field of excusing undue obedience is formed by those *situations in which criminal unlawfulness is stated in the context of the issue of compulsory illegitimate orders by the principle of termination of the duty of obedience in criminal matter*: situations in which there is the practice of a unlawful criminal fact in the fulfilment of an illegitimate order by unawareness of its illegitimacy.

The hypothesis of article 37 of the Penal Code —«executes an order without knowing that it leads to the practice of a crime»— respects, then, to those cases of unlawfulness which derives from the practice of a typical fact in obedience to an illegitimate order in which the subordinate is not aware of the fact that the presuppositions of the legal authorization which would legitimate that order do not verify.

52 *Actas das Sessões da Comissão Revisora do Código Penal, Parte Geral*, I, 1965, p. 255. In the same direction, Dias, Figueiredo, *DP-PG*, I, 2004, 24.º Cap., § 2 *et seq.*

Excusing undue obedience represents, thus, a special regulation in face of the general regulation of error about the presuppositions of a justification cause foreseen in article 16-2[53] of the Penal Code. The justification of the typical fact executed by the soldier who acts in fulfilment of an order depends on the legitimacy of that order. Therefore, when the order is illegitimate, the typical fact is also unlawful. This conclusion is valid even in those cases when the subordinate acts thinking that all the material presuppositions of which the legitimacy of the order depends are met. The positive law expressly establishes that, in such circumstances, there is no duty of obedience that may be alleged to justify the executed fact. While the legitimacy of the order is a presupposition of the justification of the typical fact committed in its execution, the fulfilment of an illegitimate order determined by an erroneous trust in its legitimacy would always benefit from an exclusion of the *dolus* on the stage of culpability, by application of article 16-2 of the Penal Code. It is here, however, that article 37 of the Penal Code intervenes, closing the door to a possible negligent censorship.

The error found in excusing undue obedience is, therefore, an error of knowledge and not an error of valuation. It is then understood that the criterion of non censorship we find in it is related to the avoidance of the error. According to article 37 of the Penal Code, error is not censured when the illegitimacy of the order is not obvious in the frame of circumstances known by the civil servant. This criterion slows down the requirements which could be imposed for the exclusion of the kind of negligent guilt should the issue be solved in the frame defined by article 16-3 of the Penal Code: violation by the agent of the «duty to seek information, with the imposed care, about the circumstantial reality of the situation in which he acts»[54].

The law assumes that in those cases when the illegitimacy of the order is not evident from the subordinate's point of view, he will not feel an impetus to check out if the situation of fact which would legitimate the issue of the order is verified, and by rule will trust in its legality. The assumption of the opposite would be far from the real world, as normally the careful and considerate soldier carries out the order transmitted to him with no further delay and questions whenever he has not reasons to doubt its illegitimacy in face of the circumstances which are known to him. For this reason it is considered not censurable the error about the legitimacy of the order when the facts known by the agent do not alert him towards the criminal unlawfulness of the ordained fact and do not dissuade him from executing it.

This means, however, that not all the subordinate's error may escape from a censorship judgement. The soldier who receives an order which, according to his perspective of the facts, is notoriously incompatible with criminal legality has

53 In this direction, as aforementioned, in text, Silva, Marques da, *DP-PG*, II, p. 217 *et seq.*

54 Dias, Figueiredo, *O Problema da Consciência da Ilicitude*, § 21, I, 3.

the duty of taking the necessary and possible measures in order to check out that unconformity. If, notwithstanding the warning for the illegitimacy of the order that derives from the frame of circumstances known by him, the soldier does not withdraw its execution, he deserves, in principle, censorship for the violation of the duty of clarification which is imposed upon him under those circumstances. This censorship is not grounded in an attitude of opposition or hostility in face of the legal interest protected by the incrimination, once the agent does not get to know the whole circumstantial reality from which the illegitimacy of the order results. What determines censorship is rather the attitude of carelessness manifested in the fulfilment of the order, once, before the evidence of illegitimacy, the average soldier placed in his position would certainly have grasp the knowledge of that reality, using due care.

The criterion of non censorship defined in article 37 of the Penal Code passes, thus, the idea that when the illegitimacy of the order is not evident in the frame of circumstances known by the civil servant or by the soldier, the unlawful criminal fact committed by him does not represent the expression of a careless or precipitated attitude towards the legal interest protected by the incrimination which characterizes the negligent culpability. That is the reason for the law to determine the exclusion of the agent's guilt. However, what is herewith in cause *is not exactly a denial of culpability, but rather a denial of the substrate on which a judgment of culpability may be based*. The error about the illegitimacy of the order necessarily implies the detachment of the *dolus* type of guilt. Culpability may, however, be grounded on a type of negligent guilt, which materiality «resides in the *careless* or *inconsiderate* attitude revealed by the agent and which fundaments his fact and, hence, in the person's worthless qualities which express in the fact»[55]. Therefore, if the soldier's error is not censurable, besides the *dolus* type of guilt, also the type of negligent culpability should be considered excluded, and consequently will not subsist any material content on which culpability shall be grounded. This is, from our point of view, the exact meaning of the exclusion of culpability foreseen in article 37 of the Penal Code.

An excusing undue obedience thus conceived is perfectly compatible with a theory of error grounded in the knowledge error / valuation error dichotomy and avoids the difficulties of an excusing undue obedience identified with error about unlawfulness.

This is also a model which finds parallel in the interpretation given to similar legal dispositions of other rules. We have seen that, in German doctrine, Lencker and Baumann / Weber, although giving § 5, I WStG a much wider range than the one we have pointed out to article 37 of the Penal Code, also indicate it as a

55 Dias, Figueiredo, *Temas Básicos*, p. 376 *et seq.*

special case of error about the presuppositions of a justifying type which reflects in the definition of negligent censorship[56]. Also in Italian doctrine it is usual the understanding that article 51-3 of the *Codice Penale* — according to which, besides the superior, «risponde del reato altresì chi ha eseguito l'ordine, salvo che, per errore di fatto, abbia ritenuto di obbedire a un ordine legittimo» — regulates a situation of error about the presuppositions of a justification cause[57], that, according to some, embodies a special regulation of that error in obedience matter, which determines the exclusion of culpability, by contraposition to the general regulation of article 59-4 of the Italian Penal Code, from which only an exclusion of *dolus* results[58].

Finally, this conception is the one that best suits the legal decision of – by eliminating the figure of compulsory illegitimate orders in criminal matter and consequently denying the justification to the typical facts performed in the unawareness of the order's illegitimacy – joining the long tradition of recognizing only excusing nature to that error which determines the obedience to illegitimate orders.

56 *Cf.* Sch / Sch / Lenckner[26], before § 32, no. 121, and Baumann / Weber, *AT*[10], § 23, no. 52. In a close direction, *cf.* Maurach / Zipf, *DP-PG*[7], I, § 38, no. 25, and Jescheck / Weigend, *AT*[5], § 46, I, 3.

57 So, Santoro, *L'Ordine del Superiore*, p. 254 *et seq*., Padovani, «Ordine Criminoso…», p. 478, Viganò, *Codice Penale Commentato*, art. 51, no. 92 *et seq*., Fiore, *DP-PG*, p. 416, Marinucci / Dolcini, *DP-PG*, p. 188 *et seq*., Mantovani, *DP-PG*[4], p. 188 *et seq*., and Bartolo, «Il Caso Priebke…», p. 1064 *et seq.*

58 *Cf.* Santoro, Arturo, *L'Ordine del Superiore nel Diritto Penale*, UTET, 1957, p. 255 *et seq*., Padovani, Tullio, «Ordine Criminoso e Obbedienza Gerarchica nel Diritto Penale Italiano», *Dei Delitti e Delle Pene*, 1987, no. 3, p. 479, Viganò, Francesco, *Codice Penale Commentato. Parte Generale* (coord. Emilio Dolcini / Giorgio Marinucci), Milano: IPSOA, 1999, art. 51, no. 94, and Bartolo, Pasquale, «Il Caso Priebke e la Sentenza della Corte Militare di Appello di Roma», *L'Indice Penale*, 1999, p. 1066. Against, defending that article 51-3 is a mere listing of the general principles of error of fact, persisting the possibility of an accountability for negligence, Mantovani, Ferrando, *Diritto Penale. Parte Generale*, 4th ed., CEDAM, 2001, p. 254 *et seq*., Marinucci, Giorgio / Dolcini, Emilio, *Diritto Penale. Parte Generale*, Milano: Giuffrè Editore, 2002, p. 189, and Fiore, Carlo, *Diritto Penale. Parte Generale*, I, UTET, 1993, p. 416.