

On Issue of Executing Illegal Orders of the Officials

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Abstract

An official may commit a crime while executing an order from the superior officer. If the order is legal either in form or in substance, the official may justify his act by applying Paragraph 2 of Article 21 of R.O.C. Criminal Code. However, if the order is illegal, it is questionable whether the official can make the same assertion.

In Germany, scholars have published quite a few dissertations to discuss this issue in depth. Generally speaking, there are two opposing theories which have approximately equal strength: Justification Theory and Excuse Criminal Liability Theory. The bases of both theories are quiet worthy to be introduced. Furthermore, at the stage of determination of justification, the criminal scholars traditionally emphasize the principle of “Consistency of Legal Order.” It means that different laws, including civil laws, criminal laws and administrative laws, should make the same decision on the legality of the same conduct. However, this principle has been gradually revised in Germany in these days. Therefore, the issue regarding the legality of an official’s execution of an illegal order can be a touchstone of the above-mentioned principle.

This research project will try to clarify the influence of other areas of laws in determining the criminal legality in theory. Nevertheless, when we interpret Paragraph 2 of Article 21 of Criminal Code, the duty of obedience and the elements of excuse liability provided by the Officials Act cannot be neglected either based on the principle of “Consistency of Legal Order” or “the measure of last resort” of criminal law. If we compare Paragraph 2 of Article 21 of Criminal Code with Article 2 of Officials Service Act, Article

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16 of Officials Protection Act, Article 29 of Bill of Officials Norm drafted by Executive Yuan, or Paragraph 2 of Article 11 of Administrative Sanction Act, we can discover the differences between criminal law and administrative laws regarding the elements of excuse liability an official. Therefore, it is necessary to consider the statues, regulations and theories of administrative laws while drawing up a harmonious standard to be followed by officials regarding Paragraph 2 of Article 21 of Criminal Code. At last, this study project will also discuss how to interpret the phrase of “knowing” of Paragraph 2 of Article 21 of Criminal Code to prevent the conflicting with the general subjective element of Justification.

Keywords: officials (amtsträger), order (weisung, befehl), execution, duty of obedience (gehorsampflicht), ground of legal justification (rechtfertigungsgründe), ground of excuse (entschuldigungsgründe), conflict of duties (pflichtenkollision), consistency of legal order (einheit der rechtsordnung), criminal unlawfulness (strafrechtswidrigkeit), subjective element of justification (subjektives rechtfertigungselement)