

ASPECTS ON LEGITIMATE DEFENCE IN THE CURRENT CRIMINAL CODE AND IN COMPARATIVE LAW

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Abstract:

The current Criminal Code places special emphasis on the justifying causes. The justifying causes remove the illicit character of the act provided by the criminal law, and not the guilt represented by the imputability of the act. The legitimate defence removes the criminal character of the act. It is very important that its conditions are met: there must be a direct, immediate and unjust material attack, as well as a defence directly proportional to the severity of the attack.

The effects of justifying causes occur in rem, consequently extending on all the participants.

If a justifiable cause is retained, punishments, educational measures or safety measures may be applied. The civil liability of the perpetrator is removed.

Upon developing the current codes, concerning the legitimate defence, the opinions expressed in the literature have been taken into account, as well as the laws of other states.

As a rule, in the European legislation, there is no division in justifiable cases (which also includes the legitimate defence) and causes of non-immutability (e.g. the French, Spanish and German Penal Codes), with the exception of the Belgian criminal code, where there is the same classification as in the Romanian Criminal Code.

Key words: *legitimate defence, criminal nature of the deed, justifying causes or causes*

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The justifying reasons were introduced in the current Criminal Code in order that the Romanian criminal legislation be aligned with the European one. In fact, one reverted to the existing provisions in the Criminal Code of 1937.

The current Criminal Code enshrines four justifiable causes, stipulated in article 19-22, namely: the legitimate defence, the state of necessity, the exercise of a right or the fulfilment of an obligation and the consent of the victim.

The justifying causes eliminate the illicit character of the deed provided by the criminal law, and not the guilt represented by the imputability of the deed.

Furthermore, the criminal character of the deed is removed, the justification cause having an effect on the deed, in rem, it acquires licit character.

The effects of the justifying causes occur in rem, consequently they extend to all the participants (accomplices or instigators), not only to the author(s) or co-author(s).

No punishment, educational measures or safety measures can be applied in case of retention of a justifiable cause. The civil liability of the perpetrator is removed. On the criminal side of the case one may order the classification under the stage of criminal prosecution or the acquittal in the trial stage on the basis of article 16-17 Code of Criminal Procedure.

The justifying causes can be defined as those situations governed by the criminal law in the presence of which an act according to an incrimination rule ceases to be in contradiction with the superior legal order becoming permissible (Niculeanu, 2010).

I. Legitimate defence. Notion

Legitimate defence is a cause that removes the criminal character of the deed and is stipulated in article 19 Criminal Code. The Criminal Code provides that *the deed provided for by the criminal law committed in legitimate defence is justified* (paragraph 1 of Article 19 of the Criminal Code), *and in paragraph 2 it is mentioned that it is legitimate defence for the person who commits the act to remove a direct, immediate and unjust material attack,*

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endangering his or her person or another's, their rights or a general interest if the defence is proportionate to the severity of the attack.

In paragraph 3, the Criminal Code provides for a relative presumption of legitimate defence in which the deed is committed *"to reject a person's entry into a dwelling, room, dependency, or place enclosed belonging to it, without the right to do so, through violence, guile, burglary or other such unlawful ways or during the night."* In the current Criminal Code, it is good to note that there is a limitation of the spaces in which a person can penetrate and also an extension of the penetration actions or penetration attempts (Udroiu, 2014).

Excess justified by defence is not assimilated to legitimate defence, but it is stipulated in article 26 of the Penal Code as a cause of non-immutability and is entitled unimputable excess.

In the current Criminal Code, as in the old Criminal Code, the legislator considered that guilt, according to the criminal law, is excluded in situations in which the perpetrator is aware of his/her deeds, or is under the pressure of a constraint (Niculeanu, 2003).

II. The conditions of legitimate defence

Regarding legitimate defence, there are two categories of conditions, namely, conditions of attack and defence related conditions.

Conditions of the attack:

a) There is a material attack

The attack is material when committed by physical violence or when physically threatening the social value protected by the criminal law (for example, a person's life, health, integrity or other rights or a general interest).

The attack is not material if verbal or written aggressions are used, such as insults, injuries, but there is the possibility of retaining a legitimate attenuating circumstance, the challenge.

It is possible that the attack is material and at the time of its committing through omission, the condition being that the social value protected by the norm of incrimination is impaired.

If the attack comes from an animal, and in order to remove it we have committed a deed stipulated by the criminal law, we are in the presence of a state of necessity (Article 20 Criminal Code) (Boroi, 2010).

b) The attack is direct

For the attack to be direct there must be no obstacle between the victim and the aggressor that the latter cannot overcome. The attack is not considered direct when an obstacle (e.g. a closed gate, a fence, a wall) is placed between the aggressor and the victim, causing the attack not to create a threat to the injured value (Niculeanu, 2001).

c) Attack to be immediate

By the phrase "immediate attack" is meant the ongoing attack, i.e. the current danger, as well as the attack on the point of triggering, that is the imminent danger. The immediate nature of the attack is reflected in the very short time that exists between the triggering of the threat and the defence.

As an exception to this rule, this character may be absent in the case of an attempted offense, for example in the case of an attempted imperfection in committing the crime of murder, when the criminal activity was interrupted by the intervention of the public cry or persists in the case of offenses with a reversible result, for example when the victim, after being robbed, exerts violence on the offender in order to recover his/her stolen good (Udroiu, 2010).

If the victim is disarmed by the object capable of causing an aggression, the attack is not immediate.

d) The attack is unfair

The attack is unfair when it is deprived of any legal basis. If there is a legal framework (for example, a boxing match), the attack is no longer illicit and the legitimate defence cannot be retained.

In the doctrine, it was argued that (Niculeanu, 2001) if the person who invokes the legitimate defence knows that the attacker is irresponsible, he/she will be in a state of necessity, and if he/she does not know this, he/she is in the situation of legitimate defence because in the first situation it is necessary that the one in danger can only be saved by committing the deed provided by the criminal law, which is not necessary in the situation of legitimate defence.

e) The attack to endanger the person or rights of the attacker or of another person or the general interest.

The danger can cause an evil that cannot be remedied or irremediable, such as loss of life, permanent or temporary disability, harm, destruction of an important asset of the victim.

In the old regulation, legitimate defence could not be maintained unless the attack did not create a serious danger. When determining the severity of the hazard, account shall be taken of the object of the aggression, the value of the injured object, the place, the time of the aggression, as well as the situation of the attacker.

In the current regulation, if the other conditions of the attack are met, even if the danger is not considered serious, the state of legitimate defence can be retained.

Defence related conditions:

a) The defence by which the attack is denied is an act provided by the criminal law

The form of guilt by which the defence is carried out may be intentional, faultless or praiteral, and the deed can be done in the form of an attempt or in a consumed form.

The legal framing of the deed is irrelevant.

b) Defense is required to reject the attack

The deed committed in legitimate defence must relate to the person of the aggressor, not to another person. It is also important that the deed stipulated by the criminal law be committed between the time when the attack became imminent and the moment when it was consumed. If the deed is placed outside this time, the legitimate defence cannot be retained.

In the recent doctrine (Zlati, 2015) it was appreciated that "(...) Fighting back in the digital/computer environment should not be neglected by doctrine and judicial practice. Since traditional crimes are beginning to gain more and more technical/informational valences, we strongly believe that an assessment/reassessment of current justifications is needed to see to what extent they are in line with current needs.

We also consider it somewhat paradoxical that the legislator felt the need for a quantitative expansion of the criminal law by introducing some computer cybercrimes, without considering it necessary to observe to what extent the justifiable causes - in their current form - raise any problems applicable to these new types of criminal behaviour."

c) The defence action should be proportional to the attack

This condition implies that the need for defence corresponds to the aggressiveness of the attack, that is, it is necessary to have some equivalence (Boroi, 2010) between attack and defence.

The current Criminal Code no longer assumes the excess defence of the legitimate defence, which is included in the causes of impunity. Excessive defence is the situation in which the perpetrator, due to disturbance or fear, voluntarily or involuntarily exceeded the limits of a defence proportionate to the severity of the danger and the circumstances in which the attack occurred.

In case of exceeding of the limits of proportional defence is determined by other causes, the excusable excess will be retained (Article 75 letter b of the Criminal Code). The excuse for provocation is a legally attenuating circumstance both in the current Criminal Code

and in the previous Criminal Code; it is the situation in which, due to a strong disturbance caused by injuries brought by the injured parties, violence, serious prejudice to dignity or other serious unlawful action the perpetrator commits a deed prescribed by the criminal law. It is medically proven that the strong state of disorder or emotion in which the perpetrator is establishes the inhibition of the psychic forces and is determined to commit the deed prescribed by the criminal law.

There is the possibility that the excuse of the challenge can be confused with legitimate defence. The two institutions are very different from a legal point of view. The excuse of the challenge is a legitimate attenuating circumstance, while legitimate defence is a justifiable cause that removes the criminal nature of the deed. Legitimate defence appears to be a response to an imminent attack or on the point of unfolding, but not consumed. The excuse of the challenge is a reaction to revenge, punishing the provocateur after the injuries. That is why the provocative act does not have the intensity, the character and the legal conditions of an attack to which legitimate defence is allowed.

Legitimate defence removes the criminal nature of the deed and, consequently, the criminal liability. The excuse of the challenge does not remove the criminal liability, but it contributes to reducing the amount of the punishment.

The unreasonable excess of legitimate defence removes the criminal nature of the deed based on the disturbance or fear caused by the severity of the attack. The excuse of the challenge diminishes the criminal liability when the deed was committed under the influence of a strong disorder or emotion caused by the injuries, offenses committed by the injured party to the perpetrator. Both institutions are related to the internal psychic processes of the perpetrator of an act of criminal law.

Both in the case of legitimate defence and in the situation of the excuse of provocation the defence is a result of a violent attack. In both situations, acts of violence directed at the defending party must be unfair.

There are a number of differences between legitimate defence and excusable excess.

Legitimate defence is a justifiable cause of the institution of punishment, while the excuse of the provocation is related to the punishment institution. In the case of legitimate defence, there is a possibility that it may be presumed, while the excuse of provocation must be proven in the criminal proceedings.

Within the legitimate defence, the attack must be material, that is, achieved by physical violence or by means that physically endangers the protected social value. The challenge can also be achieved by a serious attack on the person's dignity or by another serious offense.

Legitimate defence takes place before the attack is consumed, while the challenge involves a beginning attack.

The correlation between the two institutions has been reflected over time in judicial practice.

Thus, the High Court of Cassation and Justice, the criminal section, by decision no. 945 of March 17, 2009 decided that legitimate defence implies that the material, direct and unjust attack for the removal of which the person commits a deed prescribed by the criminal law shall be immediately - imminent or actual. There is no legitimate defence to the person committing the criminal law offense after a period of time has elapsed since the attack was consumed while the victim was withdrawing because the attack was neither imminent nor actual. Secondly, the lawful attenuating circumstance of the challenge involves committing the offense under the control of a violent disorder or emotion, caused by a challenge from the injured person rather than from another person through violence, through a serious dignity or other unlawful serious action.

The Supreme Court also decided in 2006 (High Court of Cassation and Justice, Criminal Division, Decision No. 785 of February 7, 2006) that if the defendant committed the act of killing the victim after the attack of the victim (Article 44 paragraph 2 of the previous Criminal Code, Article 19 of the current Criminal Code), because on the one hand the conditions of an immediate attack are not met, and on the other hand, the attack of the victim does not present a danger that seriously threatens the defendant's life, the means used by the victim in his/her attack are not able to justify the defendant's retaliation. In this case, the provisions of article 75 letter a) Criminal Code (Article 73 letter b) of the former Criminal Code) because the defendant committed the act of murder in the conditions of a strong disturbance and emotions determined by the aggressive behaviour of the victim.

There is also the possibility that legitimate defence can be confused with excusable excess (overcoming the limits of legitimate defence). Excusable excess is a general legal attenuating circumstance. It consists in committing an act provided by the criminal law by a person who is not under the control of any strong disturbance or fear. It is necessary to overcome the limits of a defence proportionate to the severity of the danger. The attack must be direct, material, immediate and unjust, endangering the person or rights of the attacked person or of the other or the general interest, and the defence constitutes an act prescribed by the criminal law necessary to reject the attack by the aggressor. In fact, it is necessary to fulfil the conditions of legitimate defence, except for that of the proportionality of defence with the attack. Exceeding the limits of legitimate defence must not be determined by the existence of a state of disorder or fear of the defending person.

III. Conditions of legitimate defence

In article 19 paragraph 3 of the Criminal Code stipulates that *"it is presumed to be legitimate defence, under paragraph 2, the one committing the act to reject a person's entry into a dwelling, room, dependency or enclosed place, without the right to do so, through violence, cunning, burglary or other such illegal means or during the night. "*

Attack related conditions:

The necessary conditions for the attack are a relative presumption, the contrary evidence lies with the criminal prosecution bodies.

- a) The attack consists of an act of penetrating into a dwelling, room, dependency, or enclosed space through violence, cunning, burglary or other unlawful abuses;

The action of entering a house, room, dependency or enclosed space unlawfully, that is to say to be unlawfully committed, should not be based on a legal basis;

Infiltration or attempted unreasonable penetration by night, regardless of the means used or during the day, only if it is carried out through violence, cunning, burglary or other such means;

It is necessary to have an attempt to penetrate or the actual penetration into these spaces, namely, dwelling, room, dependency or enclosed space belonging to it.

Defence related conditions:

- a) The action to reject a person's entry into a dwelling, room, dependency, or enclosed space belonging to it is committed by an act prescribed by a criminal law;
- b) Defence is necessary to reject the attack;
- c) Defence is directly proportional to the attack.

IV. The effects of legitimate defence

The deed committed in a state of legitimate defence presents all the constitutive elements of a crime, but the criminal nature of the deed is removed and then the deed is lawful. Penalties, educational measures or safety measures cannot be applied to the perpetrator.

Effects occur in rem and also affect the participants.

If the state of legitimate defence is discovered during the prosecution, the prosecutor orders the filing, and in the course of the trial the court may order the acquittal. Criminal liability is removed and so is the civil liability. Article 1360 of the Civil Code states that: "A person who, in legitimate defence, caused the aggressor some damage, does not owe to compensation."

V. Some Considerations on the institution of legitimate defence in the legislation of other European states

Once with the entry into force of the current Criminal Codes (Criminal Code - General and Special Part and Code of Criminal Procedure), our criminal legislation has been aligned with the European legislation in this area. The current Criminal Code was considered to be a modern European Criminal Code.

As regards legitimate defence, the opinions expressed in the literature as well as the legislation of other states have been taken into account.

Thus, Article 15 of the Swiss Criminal Code, Article 20 of the Spanish Penal Code and Articles 122-125 of the French Criminal Code were taken into consideration. In the old Criminal Code it was stipulated that the danger of attack must be serious. By removing the notion of serious danger in the Criminal Code, it can no longer be applied to the legitimate defence.

As a rule, there is no division in justifiable cases (which includes legitimate defence) and causes of non-immutability (e.g. the French, Spanish, German Criminal Code), with the exception of the Belgian Criminal Code, where there is the same classification as in the Romanian Criminal Code.

Regarding the condition that the attack be material, it is not found in the European criminal law.

In the legislation of some states, for example the French Criminal Code, among the values jeopardised by the attack there are also the assets of the person, something that is not found in our legislation. In the Romanian Criminal Code, in terms of legitimate defence, the attack may concern one or more natural or legal persons, their rights or a general interest. The Romanian Criminal Code emphasizes the defence of the values based on the attributes of the individual or natural person.

Some European laws (e.g. the Maltese Criminal Code) regulate legitimate defence from the perspective of crimes against life, health and bodily integrity.

Legitimate defence presumed or committed during the night is not found in all European laws, but there are some states (e.g. Spain) that have much more consistent regulation than the one in our Criminal Code.

Compared with the European and Romanian legislation, the United States of America has similar regulations. The American lawmaker distinguishes between the force and the armed force with which he/she can respond, emphasizing the need to oblige the victim, in some situations, to withdraw to avoid the attack. It is also stipulated that legitimate defence cannot be withheld if the aggressor was challenged by the victim who repudiated.

As for the other justifying causes, there are similarities with the legislation in other European states. The exercise of a right or the fulfilment of an obligation is found in most of the legislations (Article 20 point 7 of the Spanish Criminal Code, Article 51 of Italian Criminal Code, Article 36 of the Portuguese Criminal Code, etc.). This institution was also enshrined in the Criminal Code of 1936 under the title "order or authorization of the law and command of the legitimate authority" (Boroi, 2010).

Also, the consent of the injured person is also found in other legislations - article 50 of the Italian Criminal Code, article 38 of the Portuguese Criminal Code, etc.) (Boroi 2010).

As regards the judicial practice at European level, the European Court of Human Rights underlined by its judgments (Mugurel Soare Case and Others vs. Romania, judgment

of 23 February 2011) that there are numerous gaps in the Romanian legislation regarding the use of the armed force by the agent of the authority in case of legitimate defence.

Because in my study I have also referred to two attenuating circumstances (the excuse of the challenge and the overcoming of the limits of legitimate defence), I consider it necessary to introduce some comparative law references.

therefore, with regard to attenuating circumstances, the Italian Criminal Code provides that the judge, in addition to the circumstances set out in the Code, may also take into account other circumstances justifying the reduction of the penalty. The French Criminal Code (the general part) does not list the causes of the attenuation of punishment, only in the special part there are such references (Boroi, 2010).

The Spanish Criminal Code provides for mitigating circumstances, but also provides for the Court to be able to retain other circumstances. In this Code there are two legal attenuating circumstances, which in our law are assimilated to mitigating circumstances:

- when the accused confesses his/her deed to the authorities before he/she becomes aware of the legal consequences of his/her deed;
- when the accused commits the reparation of the damage caused to the victim or the mitigation of his/her effects at any time of the proceedings and prior to the conclusion of the oral hearing (Boroi, 2010).

In the end of my study, I emphasize that, with regard to the institution of legitimate defence, the condition that the attack be material is not found in the European criminal law. The other conditions set forth in our Criminal Code are found in other laws, even in other forms, but many similarities are found in the American legislation.

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