SELF-DEFENCE IN SPECIAL SITUATIONS

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Abstract

In the reality of practical cases and in certain special situations, self-defence may present some complex forms consisting either in accidental amplification of the issue in fact when self-defence is claimed, or in the correlation in fact of self-defence to other cases which remove the criminal nature of act[1]*. For these reasons, we decided to analyse few of such special situations.*

Keywords: *self-defense, criminal nature, state authority, acts committed on fault, deviated counter.*

1. Issue of existence or inexistence of self-defence if the attack comes from the representative of a state authority.

In time[2], other specialised works approached the issue of existence or inexistence of self-defence if the attack comes as well from the representative of a state authority.

Although this issue no longer represents a problem currently, we have considered presenting few theories lying on the base of its settlement.

- Abolition theory.

According to this theory, the citizen had the obligation to submit unconditionally to the orders and acts of the representative of authority, enjoying the absolute presumption of legality.

- Liberal theory.

According to this theory, it is deemed that the citizen was entitled to reject the illegal act of authority. As stated in the doctrine, this theory was sustained in France by Armand Carrel[3] in the magazine "National" dated 24 January 1832, as well as in front of the jury of Sena on 13 March 1832 by the lawyer Odillon Barrat. Their assertions relied on the disposals of art. 11 of the Declaration of human and citizen rights[4] stating that *any act exercised by a representative of the state and without the acts claimed by law, is arbitrary and tyrannical.*

- Intermediary theory.

This theory divided however the right to turn to defence depending on the aggressors, more exactly depending on the authority of aggressing agents. Thus, submission is deemed obligatory according to this theory only towards the agents

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[1] V. Dongoroz, S. Kahane, I. Oancea, I. Fodor, N. Iliescu, C. Bulai, R. Stănoiu, Theoretical explanations of Criminal Code, vol. I, Bucharest, ed. Academiei RSR, 1969, p.358.

[2] PhD Thesis of D. Clocotici, entitled "Self-defence – excuse of challenge", under the coordination of prof. Gr. Rîpeanu, 1971.

[3] French journalist, historian and essayist.

[4] Declaration of human and citizen rights, 1789; The main scope of this declaration was to provide to every individual the use and maintenance of its rights.

holding orders, titles, even irregular, since the existence of order and title created a presumption of legality, and the title was owed faith. On the other hand, it was allowed the counter if illegality was *manifested*, for instance if the agent was obviously incompetent[5].

Currently, according to the disposals of the new Code of criminal proceedings (art. 310), in case of flagrant crime, any individual may hinder the criminal and hand it over to the authority. In such a situation, we no longer deal with the unfair nature of aggression which would justify a self-defence counter.

However, as exemplified as well in the recent doctrine[6], if the individual depriving of freedom the criminal "does not take him in front of judicial authorities and does not announce its capture, turning the detention in a private detention, the deprivation of freedom becomes unfair justifying a self-defence of the prisoner."

Another case mentioned in the specialised literature[7] considers the detention of a representative of authority with the breach of the limits stipulated by law. Thus, it is provided as example the situation when an individual with arrest warrant opposes to its enforcement, and the police bodies are using force to immobilise the criminal. If violence exercised in this case is obviously disproportionate and useless, states the author, we shall deal with an unfair aggression, which may determine the occurrence of self-defence. The doctrine stipulates as well[8] that an act of authority may represent an aggression when it is obviously illegal and arbitrary[9].

Currently, the issue of aggression coming from authority no longer generates controversy because, as long as the aggression is unfair, the counter is allowed in terms of law, although it comes from an authority.

2. Issue of solving self-defence by running.

Another issue approached by the specialised doctrine related to self-defence, is the answer to aggression by running.

It is discussed if it is still incident self-defence if under the conditions of such issue in fact, the victim of aggression, having the possibility to run to avoid the aggression, he didn't, on the contrary, he responded.

In time, there were distinct opinions related either to the possibility or to the obligation of running from the aggressor. On this decision depends the consideration of self-defence as justificatory cause.

More ancient specialists of criminal law[10] analysed the manner how the victim was forced or not to run, if he had this possibility, and if he doesn't, to what extent may self-defence be claimed.

The author analyses this situation historically, bringing into discussion different opinions of some criminalists dealing with this issue. We shall present further on as well such points of view.

[5] See I.Tanoviceanu, Treaty of law and criminal proceedings, vol. I, Bucharest, p. 900; Pop T. Compared criminal law – general part, Cluj, 1924, p. 519.

[6] Fl. Steteanu, D. Nițu, Criminal law general part, university course, vol. I, ed. Universul juridic, 2015, p.358.

[7] Same, p. 359.

[8] V. Dongoroz, Criminal Law, Bucharest, 1939, p. 450.

[9] In this respect, Chr. Hennau, G. Schamps et J. Verhaegen,'Indispensable responsabilite´ de l'entreprise, inacceptable culpabilite´ collective – A propos de l'avantprojet de loi belge relative a` la responsabilite´ pe´nale des personnes morales', Journal des Tribunaux, 1998, p.194.

[10] PhD thesis of D. Clocotici, entitled "Self-defence – excuse of challenge", under the coordination of prof. Gr. Rîpeanu, 1971.

Thus, some authors stated that, although the victim could avoid the risk by running, however he could have killed the aggressor without being punished[11]. Other authors stated that it was necessary to avoid counter by prays, screams, run, and if the possibility of running imposes its need, no self-defence can exist[12].

In another opinion[13], besides the situation when someone has a position to guard, in general one cannot put in legal precept cowardice, however running is obligatory when the aggressor is a madman, a child or an agent of public force.

Also, it was considered as well that everything was an issue in fact on the discretion of the judge who may enforce an easier punishment or declare innocent the victim who did not run although he had this possibility[14].

Another point of view shows that running, that is the escape of the victim in this manner, does not represent a legal obligation, but only an issue of consciousness[15].

More ancient French doctrine[16] appreciated that the obligation of running depended on the social class of the victim. Thus, there was no obligation of running for the aristocrat, gentleman, soldier, since running for them was shameful. However, "the runt" was even obligated to run if being in such situation.

This idea was rebutted because "never, as we know, in our books of law, this privilege was awarded to noble individuals or militaries". It is asserted that, if the victim may run without being in danger, he cannot claim self-defence[17].

In our opinion, obviously running may be much better than counter in such situations, but we cannot disagree that deciding for counter instead of running as self-defence could lead in fact to not considering this justificatory case.

In our specialised doctrine was decided as well that there is self-defence when the victim may escape by running[18]

[11] Julius Clarus, famous criminalist, counsellor of the king of England Charles V, in George Bowyer, The English Constitution: A Popular Commentary on the Constitutional Law of England, ed. J. Burns, 1841, p. 497.

[12] F. Carrara, Programma del corso di diritto criminale: Parte generale, Vol.1, ed. Fratelli Cammelli, 1897, p. 308.

[13] Luigi Majno, Commento al Codice penale italiano, ed 2, ed. Unione tipografico-editrice torinese, 1912, art. 49.

[14] Vidal quoted by T.Pop in Compared criminal law – general part, Cluj, 1924, p.560.

[15] I. Werbőczy, A. Wagner, Decretum Oder Tripartitum Opus Der LandtsRechten vnnd Gewonheiten des Hochlöblichen Königreichs Hungern, Formica, 1599, p. 19.

[16] Pierre-François Muyart de Vouglans, Les lois criminelles de France, ed. Mérigot, 1780, p.32-33.

[17] Johannes Samuel Fridericus Boehmer, Observationes selectae ad Bened. Carpzovii ... Practicam novam rerum criminalium imperialem Saxonicam quibus Praelaudati Auctoris .... accessit index locupletissimus, Fr. Varrentrapp, 1759, quaestionem XXX nr. 59/64, p. 69 and the following.

[18] V. Ionescu, Self-defence and state of need, ed. Ştiinţifică, Bucharest, 1972, p.37-49; In the same respect, C. Mitrache, Romanian criminal law, general part, 3rd edition reviewed and added, publishing house and press ŞANSA, Bucharest, 1997, p.108; during the year 2002, p.125; In judicial practice, it was decided that one cannot claim to the victim of an aggression to run from agression; see, T.S.col.pen., dec.no.394/1961, p. 424 and dec.no.925/1965 in CD/1965, p. 321. On the contrary, I. Dobrinescu, in J.N. no. 4/1957, p. 641; I. Pascu, Criminal law general part, 2nd edition, Hamangiu, 2009, p. 289 states: "it is discussable in the doctrine if there is self-defence when the victim has the possibility to run from the aggressor. Quoting Antoniu (Criminal guilt, p. 272) states that " modern doctrine accepts that running, in this case, is not a proof of cowardice, but of wisdom, a proof of cooperation for the extinction of conflict".; V. Dongoroz, Criminal law, Bucharest, 1926, p.181: "If the victim under the condition of self-defence had the possibility to escape from aggression by running, is he in self-defence if he decides not to run and to attack the aggressor? Controversy. We believe that it is, since no text of law, no principle of law or moral proclaims as rule of conduct running in front of danger, cowardice. On the contrary, the one who faces a material, actual and unfair aggression against himself or another deserves not only our admiration for his courage but the gratitude of a society to which it has done a veritable favour. If the aggressor runs without attacking we do no longer deal with self defence, but with revenge from the victim". Attention" in the same work, p.187-188, V. Dongoroz wonders if "Challenge excludes self-defence?" and gives the following example: A slaps or curses B; B being thus challenged to take out

The alternative of running is not possible in all situations, and this decision depends from one individual to another, but also on the real circumstances of the issue in fact.

4. May self-defence be incident for the acts committed on fault?

Considering the act of defence committed on fault, French practice stipulated that self-defence cannot be incident but for the actions with intent but not for the acts committed on fault in self-defence[19]. Authors of specialised literature[20] rejected such direction, in the judicial practice, the victims of an aggression even stating that they rebutted with intent and not on fault in order to enjoy the effects of self-defence.

The supporters of the possibility that defence is done as well on fault appreciate that the presence of subjective element in case of defence has nothing incompatible with the possibility of committing an act on fault, the victim being aware of the existence of aggression and commits an action meant to remove it. The result appeared in such situation is not the one anticipated.

It is provided as example to these arguments the situation when the accused followed with the axe by the victim sees a vehicle parked in the neighbourhood and tries to get rid of the aggressor leaving with that car. The accused handles however mistakenly the gearshift therefore, instead of driving ahead, the vehicle drives backwards and hits thus the aggressor who is heading towards the car, causing him a seriously body injury or death.

In the opinion of the author[21] of example, there is no reason to refuse the justificatory effect of self-defence under the conditions that the same act would be justified in case of act with intent.

We support as well this point of view and the idea according to which as long as the justification is allowed and indeed considers in principle a defence and a result with intent, this however does not remove the same justification in case of a guilty result as well.

Indeed, we consider as well that the contents of art. 19 par. (2) of the new criminal code is controversial since the expression of the legislator ”act to remove an aggression” tends to lead to the interpretation that the act committed in defence must be with intent. However, as other authors showed as well, an extensive interpretation of this formulation is not opportune, as it must be understood in strict sense, namely that of the action committed to remove an aggression, and not of fact overall[22]. Even a judgement of the former Supreme Court admitted self-defence even in case of praeterintentionate defence [23].

We appreciate that the proposal of de lege ferenda in terms of amending the legal text in the version ”act to remove an aggression committed with intent or on fault” is opportune for the legislator to uniform such different points of view related to this interpretation.

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the weapon. A the challenger is in self-defence, if, for avoiding the bullet of B kills B. If B had taken out the weapon without a previous challenge, obviously A would have been in self-defence, but the fact that A challenges B excludes for A self-defence.”

[19] J.H. Robert quoted in F. Streteanu, quoted work, p. 364.

[20] M.L. Rassat, J.H. Robert, F. Desportes, F. Le Gunehec, J.P. Delmas Saint Hillaire quoted in F. Streteanu, quoted work, p.364.

[21] Fl. Streteanu, quoted work, p. 365.

[22] In the same sense, same.

[23] T.S., s.pen., dec. no. 2515/1976, in RII, p. 235.

5. Deviated counter (error in personam / aberatio ictus)

In time, the doctrinaires analysed the situation when defence was directed towards an innocent third party, as a consequence either of the error of the victim over the aggressor, or of the deviation of hit. The solutions may be obviously different. It may be stated that there is no self-defence but a state of need of the victim, or an irremovable error which determines the absence of liability.[24]

The specialists[25] decided for the variant when the defence committed under such conditions entails a state of need.

If the victim hits mistakenly another individual than the aggressor, it should be examined if a fault may be incumbent upon the one who rebuts or if the deviation of defence is accidental. In the first situation, since it is determined that the victim acted with obvious fault towards the third party (s.n.), it will be enforced the punishment for manslaughter for a manslaughter on fault or bodily injury on fault and in the second situation, the hit of the third party must be deemed as caused in state of need.

A supported opinion must be analysed if the victim hits a third party obviously imprudently or has taken advantage of the fact of being aggressed using afterwards self-defence.

If the victim is forced by the conditions of defence to react in such a manner as endangering a third party, his act will be deemed committed in a state of need[26].

In another opinion, it is considered that self-defence represents only a particular enforcement of the general theory of need, the murder or assault committed in case of deviation of the hit or error over the individual must be considered as self-defence[27].

The former Supreme Court decided that an individual facing a material, direct, immediate, unfair attack, while defending himself, instead of hitting the aggressor, hits mistakenly a third party, and this error is not incumbent upon him under any circumstance, the act must be considered committed in self defence[28].

It was omitted the opinion according to which self-defence cannot be claimed in such situations since firstly considering the drafting of the legal text defence must be always directed only against the aggressor.

Also, the same opinion shows that one cannot support either the state of need, because in such situation the imminent risk faced by the individual who rebuts must be avoided only by such counter.[29]

Analysing as well the disposals related to the error of fact, these cannot be enforced either. The hitting of third party on the occasion of counter, due to causes not incumbent upon, states the same author, cannot lead to the conclusion that the one who rebuts is in one of the situations ruled by the criminal code. Also, the deviation of assault cannot represent either an error of fact.

We do not agree with the arguments of the said opinion.

Thus, one of the essential traits of the crime is that the act is committed on fault.

Or, if it is determined that the act of the victim and with consequences on a third party lacks a subjective element, then the act is not a crime.

[24] PhD thesis of D. Clocotici, entitled "Self-defence – excuse of challenge", under the coordination of prof. Gr. Rîpeanu, 1971.

[25] V. Dongoroz, Criminal law, 1939, p.433; Tanoviceanu, Treaty of law and criminal proceedings, vol I, ed. a II-a, 1924, p. 920.

[26] Same.

[27] P.I. Pastion, M.I. Papadopolu, Criminal code annotated, ed. Librăriei Socec&Comp., 1922, p. 448.

[28] T.S.Col.pen.decision no. 888 dated 26 June 1962 in J.N. no. 1/1963, p.173.

[29] PhD thesis of D. Clocotici, entitled "Self-defence – excuse of challenge", under the coordination of prof. Gr. Rîpeanu, 1971.

In our opinion, if the one who defends himself commits the act, although he could have anticipated, but he ignored without reason a potential result, although he didn't anticipated although he should have and could anticipate such result, he may be held criminally liable for a crime committed on fault. The form of guilt of intent is no longer debated since it would remove from the beginning the argument of error or deviation of assault.

Conclusion

It isn't discussable the fact that self-defence may be corroborated with the error of fact and also that the victim assaults mistakenly another individual than the aggressor or appreciates erroneously the gravity of assault committing mistakenly an excess of defence.

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