

Specific Features of Necessary Defence As A Circumstance Precluding the Criminality of An Act

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Abstract

This article examines the specific features of necessary defence as a circumstance precluding the criminality of an act, as well as the problems involved in determining the limits of lawful defensive conduct. It analyses the criteria for the existence and nature of a socially dangerous attack, the proportionality of defensive measures, as well as issues concerning exceeding the limits of necessary defence and putative defence. The article substantiates the need, in the legal assessment of defensive conduct, to take into account not only the consequences of defensive actions but also the specific circumstances of the attack, its suddenness, intensity, the relative strength of the parties involved, and the psychological state of the person acting in defence. A situational and contextual approach to determining the lawfulness of defence is proposed, aimed at ensuring a balance between the legally guaranteed right to defence and the impermissibility of causing manifestly excessive harm.

Keywords: Necessary defence; exceeding the limits of necessary defence; putative defence; socially dangerous attack; proportionality.

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1. Introduction

Necessary defence occupies a special place within the system of circumstances precluding the criminality of an act. Its distinctive feature lies in the fact that a defensive act may, on its face, correspond to the objective elements of causing harm to an interest protected by law, however, where the conditions prescribed by law are satisfied, such conduct is recognised as lawful. Accordingly, it is methodologically incorrect to regard necessary defence as a form of subsequent exemption from criminal liability. Where the defence is lawful, no offence arises, the infliction of harm upon the aggressor constitutes permissible conduct from the outset.

Article 35 of the Criminal Code of the Republic of Uzbekistan includes necessary defence among the circumstances precluding the criminality of an act, while Article 37 establishes its principal conditions. Pursuant to Article 37, an act committed in defence of the person or rights of the defender or another person, or of the interests of society or the state, against an unlawful attack by causing harm to the aggressor does not constitute an offence, provided that the limits of necessary defence have not been exceeded. Exceeding the limits of necessary defence is defined as a manifest disproportion between the defensive measures employed and the nature and danger of the attack. The law also expressly provides that the right to defence exists irrespective of the

possibility of seeking assistance or avoiding the attack by other means.[1]

This approach is of fundamental importance. The right to defence is not a privilege afforded to a person involved in a conflict, but a legally recognised means of protecting legally protected interests. In its Resolution No. 39 of 20 December 1996 “On the Application by Courts of Legislation Ensuring the Right to Necessary Defence against Socially Dangerous Attacks”, the Plenum of the Supreme Court of the Republic of Uzbekistan emphasises that the right to necessary defence constitutes an important guarantee for the implementation of constitutional provisions concerning the inviolability of the person, the home, and citizens’ property. At the same time, the Plenum points to errors committed by courts that had restricted the right to active defence or assessed defensive conduct primarily on the basis of the severity of the harm caused.[2]

In her work “The Specific Nature of the Theoretical and Practical Aspects of Necessary Defence,” L.Zh. Otegenova distinguishes between conditions relating to the attack and those relating to the defence, and emphasises that, in the exercise of necessary defence, harm must be inflicted specifically upon the aggressor.[3] This position should be endorsed. However, merely enumerating the relevant conditions does not, in itself, resolve the principal practical problem: each of these conditions involves an evaluative assessment and must be applied to the particular circumstances of the conflict.

A.K. Choriyev draws attention to the absence in criminal legislation of a more detailed differentiation of the types of socially dangerous attacks.[4] This proposition merits support: an armed attack, a group attack, an encroachment upon property, and an attack posing an immediate threat to life do indeed entail different degrees of actual danger. However, legislative classification alone cannot resolve the problem. Even an attack receiving the same legal classification may vary in its actual intensity depending on the place and time of the incident, its suddenness, and the relative strength of the parties involved. Necessary defence should therefore be understood as situationally conditioned lawful conduct, while exceeding the limits of necessary defence should be regarded as an exceptional circumstance requiring a finding of a manifest, rather than merely any quantitative, disproportion between the defensive measures employed and the danger posed by the attack.

The first issue is to establish the legal basis giving rise to the right to defence. The Plenum of the Supreme Court of the Republic of Uzbekistan proceeds from the position that a socially dangerous attack constitutes an act falling within the scope of the Special Part of the Criminal Code, irrespective of whether the person concerned is subject to criminal liability, for example, due to mental incapacity or failure to attain the age of criminal responsibility.[2] Accordingly, the existence of the right to defence is not contingent solely upon the possibility of subsequently imposing punishment on the attacker.

The second element is the immediacy of the attack. The Plenum clarifies that a state of necessary defence may exist not only directly at the moment of the attack, but also where there is a real threat that the attack is about to commence. This substantially extends the temporal boundaries of the right to defence, while at the same time requiring the precise determination of the point at which the danger ceases. The formal cessation of a particular act by the aggressor does not necessarily mean that the threat has objectively ceased.

Yu.V. Krasnova, in examining the exceeding of the limits of necessary defence, identifies timeliness alongside proportionality and raises the question of the possibility of exercising defence at the stage of an attempt.[5] This formulation of the issue appears productive; however, the concept of “timeliness” should not be transformed into a mechanical test applied independently of the circumstances. It is essential to establish whether, at the time the harm was inflicted, there existed an objective and reasonably perceptible threat.

The third element is the reality of the attack. Putative defence arises where no objective attack exists, but the person mistakenly perceives the situation as constituting an attack. The Plenum of the Supreme Court requires the courts to determine whether the circumstances provided grounds for such an assumption and whether the person could have realised that their perception was erroneous.[2] Accordingly, it is necessary to establish what information was available to the person acting in defence immediately before the defensive act was undertaken.

Russian legal scholarship concerning the immediacy and reality of an attack likewise emphasises the significance of factual error.[6] However, subjective perception should not become a universal justification for defensive conduct. It must be assessed against objective circumstances, including the distance between the

parties, lighting conditions, the aggressor's conduct, the number of persons involved, the presence of weapons, and the nature of the threat.

The most contentious aspect of the doctrine of necessary defence is the determination of the limits of permissible defensive conduct. Article 37 of the Criminal Code employs the concept of a "manifest disproportion" between the defence and the nature and danger of the attack.[1] The word "manifest" is legally significant: the law does not require complete equivalence between the harm inflicted upon the defender and the harm caused by the defender to the aggressor.

The Plenum of the Supreme Court expressly cautions against assessing defensive conduct solely on the basis of the severity of the harm resulting from it. A court must take into account the nature and danger of the attack, its suddenness and intensity, the defender's capabilities, the number of persons involved, their age and physical strength, the presence of weapons, the place and time of the incident, and other relevant circumstances.[2] In substance, this position already provides the foundation for a situational and contextual approach to the assessment of necessary defence.

In Russian-language legal scholarship, proportionality is often defined as the correspondence between the harm caused and the nature and danger of the attack.

This understanding is necessary, but it may create the illusion that there is a predetermined scale of permissible harm. In reality, the same object may pose entirely different levels of danger depending on the distance between the parties, their respective positions, the number of attackers, and the possibility of the attack continuing.

D.A. Maslyukov and O.F. Vospiakova, in examining the exceeding of the limits of necessary defence, reasonably point to the difficulty of distinguishing necessary defence from an excess of defence and to the need to refine the concept of exceeding its limits.[7] However, a more formalised definition should not be transformed into a set of mechanical quantitative criteria. The more detailed the permissible means of defence are specified in advance, the greater the risk that the legal rule will fail to correspond to the diversity of real-life situations.

P.D. Simashenkov proposes defining excess by reference to the deliberate infliction of harm greater than that which was prevented.[8] The strength of this position lies in its attention to the subjective element of the offence.

However, this construction appears overly narrow. An intention to cause greater harm may indeed indicate an excess of defence, but the legal assessment must also take into account the objective necessity of the defensive response. The concept of "greater harm" has no universal meaning without an assessment of the threat against which the defence was directed.

A.A. Maslov and Z.A. Chochuyeva emphasise the significance of the subjective elements of homicide in cases involving the exceeding of the limits of necessary defence and draw attention to the possible forms of culpability.[9] This position should be supported insofar as it requires the direction and purpose of the conduct to be established. However, subjective intent should not substitute for an objective assessment. Subjective intent explains the conduct, whereas the nature of the threat determines its context. K.B. Khakimov likewise examines the distinction between homicide committed in excess of the limits of necessary defence and homicide committed in a state of intense psychological agitation.[10] This research is significant in demonstrating

the relevance of the defender's psychological state. However, the concept proposed in this article is broader: the psychological factor should already be taken into account when determining whether the defensive act was manifestly disproportionate to the nature and danger of the attack, rather than only when distinguishing between the completed offences of homicide.

Accordingly, rather than relying on the notion of "equality of harm," it would be more appropriate to employ the concept of situational adequacy. Defensive conduct is adequate where the means of response selected can be objectively explained by the nature and intensity of the attack in the particular circumstances, and where there is no manifest disproportion between the threat and the defensive response.

The court and the investigating authorities assess the incident after it has ended and have access to information concerning its consequences, the injuries sustained, and the actual nature of the attack. The person acting in defence, by contrast, makes a decision under conditions of limited time and incomplete information. Accordingly, an assessment based exclusively on the circumstances known after the event creates a risk of retrospectively reassessing the defensive conduct.

Resolution No. 39 of the Plenum already provides a basis

for a different model: owing to the emotional distress caused by the attack, a person acting in defence may not always be capable of correctly assessing the nature of the danger and selecting a proportionate means of defence. Therefore, the fact that the harm caused exceeded the harm prevented does not, in itself, establish that the limits of necessary defence were exceeded.[2]

Russian legal scholarship likewise emphasises the significance of emotional distress. Yu.V. Krasnova associates some of the difficulties surrounding the doctrine with the lack of uniformity in judicial practice.[5] Contemporary studies concerning the legal classification of acts performed in necessary defence demonstrate that the assessment of specific defensive conduct should take into account the circumstances in which it occurred, rather than merely its consequences.[10]

The German approach is particularly noteworthy. Section 32 of the German Criminal Code (Strafgesetzbuch, StGB) recognises as necessary defence conduct that is necessary to avert an imminent unlawful attack, while Section 33 provides for exemption from punishment where the limits of defence are exceeded as a result of confusion, fear, or fright.[11] The significance of this model lies in its recognition that the emotional state of the defender may affect the legal assessment of an excess of defence.

Putative defence and the infliction of harm after the attack has ended require a clear distinction. Where no objective attack existed, the issue is not one of exceeding the limits of necessary defence in the strict sense; rather, it is necessary to examine the person's mistake and whether that mistake could have been recognised by the person concerned. Where an attack did exist but had definitively ceased, the subsequent infliction of harm may indicate a transition from defensive conduct to conduct motivated by another purpose.

The point at which an attack ends cannot be determined solely on a formal basis. Resolution No. 39 of the Plenum requires the actual circumstances of the situation to be taken into account. The fact that the object used in the attack has come into the possession of the defender does not, in itself, necessarily signify that the threat has ceased if, in the circumstances of the case, the defender could not have realised that the danger had ended.[2]

If, after the threat has ceased, a person pursues the aggressor and inflicts harm for the purpose of punishing

him, the legal nature of the conduct changes. Here too, however, it is necessary to reconstruct the sequence of events: the emergence of the threat, the development of the attack, the defensive response, the change in its intensity, and the cessation or continuation of the danger.

Accordingly, necessary defence should be assessed dynamically. The right to defence does not exist at some abstract point in time, but within the framework of the particular development of the attack. This is particularly important in cases in which only seconds or even fractions of a minute elapse between the active phases of a conflict.

States belonging to the Romano-Germanic legal tradition employ different models, but recognise common principles concerning an ongoing or imminent unlawful attack, the necessity of defensive action, and certain limits on permissible harm. In Germany, Sections 32–33 of the Strafgesetzbuch (StGB) combine the doctrine of necessary defence with consideration of fear, fright, and confusion. In France, Article 122-5 of the Code pénal links the lawfulness of defensive conduct to its necessity and to the absence of disproportionality between the means of defence and the seriousness of the attack.

In Italy, Article 52 of the Codice penale is based on the necessity of defence against an ongoing danger arising from an unlawful attack and on the proportionality of the defensive response. In Portugal, Articles 31–32 of the Código Penal establish necessary defence as a circumstance precluding unlawfulness and link it to the necessity of repelling an ongoing unlawful attack.[11–14]

Comparative legal experience confirms that necessity and proportionality are inherently evaluative concepts. For Uzbekistan, the German emphasis on the defender's psychological state is particularly instructive; the French and Italian approaches are relevant to the assessment of necessity and proportionality, while the Portuguese approach is useful for distinguishing lawful defence from an excess of defence.

However, any borrowing of foreign approaches should be functional rather than literal. Article 37 of the Criminal Code of the Republic of Uzbekistan already provides a broad guarantee of the right to defence, including the independence of that right from the possibility of avoiding the attack. It is therefore advisable not to reproduce foreign statutory provisions verbatim, but rather to improve the methodology for applying the

domestic rule.

A consistent situational and contextual test is proposed. The first stage is to establish whether a socially dangerous and unlawful attack existed, or whether there was an immediate and real threat of such an attack occurring. The second stage is to determine whether the threat continued to exist at the moment the particular harm was inflicted.

The third stage is to establish whether the harm was inflicted specifically upon the aggressor and whether the defensive response was directed at repelling or terminating the attack.

The fourth stage involves an assessment of the objective circumstances: the nature and intensity of the attack, the number of persons involved, the presence of weapons,

the physical capabilities of the parties, the place and time of the incident, its suddenness, and other relevant factors. The fifth stage involves a subjective reconstruction: what state of fear, fright, or confusion may have existed and what information was actually available to the defender. The sixth stage is to determine whether there was specifically a manifest disproportion between the defensive response and the nature and danger of the attack.

Such a test does not turn the court into a “proportionality calculator.” Rather, it disciplines judicial discretion and follows directly from Article 37 of the Criminal Code and the clarifications provided by Resolution No. 39 of the Plenum. Its advantage lies in simultaneously taking into account the objective characteristics of the attack and the actual capabilities of a person compelled to make a decision under conditions of danger.

It would be advisable to supplement the judicial guidance by expressly providing that, when determining whether a manifest disproportion existed, courts should primarily proceed from the circumstances existing at the time of the defensive act, taking into account the suddenness of the attack, the objective balance of the parties’ physical capabilities, the presence of weapons, and the psychological state of the defender.

It is also necessary, as a matter of methodology, to distinguish clearly between four situations: lawful necessary defence; putative defence; exceeding the limits of necessary defence; and the infliction of harm after the attack has definitively ceased. This would improve the quality of the reasoning provided in procedural and

judicial decisions.

The proposed model preserves a balance between two extremes: an excessive expansion of the right to defence and an excessive restriction of the right to protection. The severity of the consequences should not automatically be treated as evidence that the limits of necessary defence have been exceeded; at the same time, reliance on the existence of an attack should not automatically justify any subsequent infliction of harm.

2. Conclusion

In terms of its legal substance, necessary defence constitutes the lawful exercise of the right to defence rather than a subsequent exemption from criminal liability. Article 37 of the Criminal Code of the Republic of Uzbekistan establishes such a model and provides important guarantees, including the absence of any duty to retreat or to seek assistance in advance.

The principal problem lies in determining the boundaries of permissible defence. The foregoing analysis demonstrates that the discussion should shift from a formal enumeration of the relevant conditions to the methodology for applying them. Proportionality cannot be reduced to a quantitative comparison of the harm caused; the criterion of “manifest disproportion” requires an assessment of the circumstances of the attack as a whole.

A situational and contextual approach is proposed, combining objective and subjective assessment. The court should take into account the nature, intensity, and immediacy of the attack, its suddenness, the number and armament of the attackers, the relative physical capabilities of the parties, the place and time of the incident, the defender’s actual capabilities, the means of defence employed, and the defender’s psychological state. The assessment should be conducted predominantly *ex ante*.

The comparative analysis of Germany, France, Italy, and Portugal confirms the commonality of the fundamental principles and demonstrates different approaches to assessing necessity, proportionality, and the emotional state of the defender.

For Uzbekistan, the most promising approach is not mechanical transplantation of foreign rules, but further development of Article 37 of the Criminal Code and Resolution No. 39 of the Plenum.

The practical outcome of the study is the proposed six-

stage test: establishing the reality of the attack; determining its immediacy; establishing the direction and purpose of the defensive response; reconstructing the objective circumstances; taking the defender's psychological state into account; and determining whether there was a manifest disproportion between the defensive response and the nature and danger of the attack. This approach may promote greater uniformity in judicial practice while simultaneously strengthening citizens' right to defence.

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