

STRUKTURA ORAZ ELEMENTY OBRONY KONIECZNEJ W UKRAIŃSKIM PRAWIE KARNYM

Obrona konieczna zaliczana jest do okoliczności wykluczających szkodliwość społeczną oraz przestępczość czynu. Są to działania, które według ich cech zewnętrznych podobne są do tych lub innych przestępstw (na przykład, pozbawienie życia osoby, która jest napastnikiem, w obronie od jego ataku w stanie obrony koniecznej pokrywa się z dowodami zabójstwa), ale w rzeczywistości nie są one społecznie niebezpieczne i przestępcze, ale odwrotnie – uznawane są zazwyczaj za społecznie uzasadnione i korzystne. W związku z tym, artykuł poświęcony jest właśnie zagadnieniu obrony koniecznej. Przeprowadzona została analiza składu samoobrony koniecznej z wyróżnieniem cech, które odnoszą się zarówno do ataku jak i obrony przed takimi atakami. Podana jest również definicja pojęcia obrony koniecznej.

Słowa kluczowe: obrona konieczna, wykroczenie niebezpieczne społecznie, granice obrony koniecznej, warunki ocrony.



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THE STRUCTURE AND ELEMENTS OF NECESSARY DEFENSE UNDER THE CRIMINAL LAW OF UKRAINE

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Annotation. Necessary defense refers to the circumstances precluding wrongfulness and social danger of the act. These are the actions that by their external characteristics although are similar to those or the other criminal acts (for example, taking life of a person, who infringes during the necessary defense, coincides with corpus delicti of murder), but in fact they are not socially dangerous and illegal and are recognized legitimate and usually socially useful. In this regard, the notion of necessary defense is examined in the article. The analysis of the composition of necessary defense, distinguishing of elements regarding both infringement and the defense against such attacks is made. A definition of necessary defense is given in the article.

Keywords: necessary defense, socially dangerous attack, the limits of necessary defense, circumstances of the defense.

Анотація. Необхідна оборона належить до обставин, що виключають суспільну небезпечність і протиправність діяння. Це такі вчинки, які за своїми зовнішніми ознаками хоча і збігаються з тими або іншими злочинними діяннями (наприклад, позбавлення життя того, хто посягає, при захисті від його нападу у стані необхідної оборони збігається з ознаками умисного вбивства), однак по суті вони не є суспільно небезпечними і протиправними, а, навпаки, визнаються правомірними і, як правило, суспільно корисними. У зв'язку з цим, у статті досліджується поняття необхідної оборони. Проводиться аналіз складу необхідної оборони із виокремленням ознак, що стосуються як посягання, так і захисту від такого посягання. Наводиться визначення поняття необхідної оборони.

Ключові слова: необхідна оборона, суспільно-небезпечне посягання, межі необхідної оборони, обстановка захисту.

Legal nature of necessary defense. Necessary defense refers to circumstances precluding wrongfulness and social danger of the act. These are the acts that by their external characteristics although similar to those or other criminal acts (for example, taking life of a person, who infringes, in a state of necessary defense coincides with corpus delicti of murder), but in fact they are not socially dangerous and illegal, but rather are recognized legitimate and usually socially useful.

Circumstances precluding criminality of the act as legitimate actions in terms of legal form can be classified into three groups, namely: 1) the realization by a person of his/her individual subjective rights (necessary defense, extreme necessity, criminal detention, etc.); 2) performance of a legal obligation (in a professional capacity, order or instruction, etc..) 3) exercise of authority (preventive measures, physical force, special means and weapons, force into submission).

Obviously, self-defense in its legal form is considered as the realization of individual subjective rights. The right to self-defense is a natural and inalienable and absolute human right. This means that all other persons are obliged not to interfere with a citizen in the lawful exercise of the right to defense. The right to necessary defense is an independent, not additional (subsidiary) on the activities of state bodies and officials, authorized to protect law and order. In other words, every citizen has the right to necessary defense regardless of ability to seek assistance from the authorities or officials for preventing or stopping attacks. The right to self-defense is also associated with an existing opportunity for an individual to seek assistance from other people. In Part 2 of Article 36 of the Criminal Code of Ukraine it is stated that everyone has the right to necessary defense regardless of ability to avoid socially dangerous attacks or seek help from other persons or bodies.

The structure, elements and characteristics of necessary defense. General issues. As to the characteristic features of necessary defense there is the most common view, according to which necessary defense is considered in the light of the conditions of legitimacy: scholars distinguish conditions that characterize the attack (it should be socially dangerous, current and valid (real) and conditions that characterize protection (interests of an individual, society and a state should be protected, this protection is carried out by injury to a person who infringes, protection must be timely; protection should not exceed the necessary limits) [4, p. 128].

Obviously, necessary defense is a unity and opposition of actions of two people: one who infringes, and one, who protects himself. In this regard, we propose a different approach to examine the structure of necessary defense, and it stands out a base of the defense and composition of the defense through such elements as subject - purpose - object - the objective side - the subjective control, which have their own characteristics [2, p. 145].

Socially dangerous attack as a basis of defense - this act is directly aimed at causing of socially dangerous harm that is substantial harm to an individual, society or the state. Socially dangerous encroachment does not include lawful and non-criminal acts, including minor acts (Part 2 of Article 11 of the Criminal Code of Ukraine, paragraph 10 of the Resolution of the Plenum of the Supreme Court of Ukraine «On necessary defense» № 1 dated April 26, 2002).

Necessary defense, is indicated in the literature, is only possible from such socially dangerous acts, which fall under the criminal law and meet certain objective elements of a crime [2, p. 229]. It should be noted that most criminologists believe that criminal law provisions on necessary defense are applied only to the defense against attacks that are criminal or conclude elements of a crime [6, p. 106; 8, p. 340-341].

Subject of an assault is an individual, acting alone or in a group. The law does not call the assault a «crime» as the subject of infringing may be even an incapacitated person, or a person, who has not attained the age of criminal liability. Condition of necessary defense is an objective reality, which is caused by objectively dangerous attacks. Therefore, knowledge or ignorance by a defending person the subjective state of a person, who infringes, does not change the nature of the infringement as socially dangerous.

The object of attack. According to part 1 of Article 36 of the Criminal Code of Ukraine it is provided that necessary defense protects not only own rights of a person, but also other lawful rights and interests of other individuals, interests of society or the state. It should be noted that protection of interests of other people is admissible regardless of their valid consent for assistance. Everyone on his own initiative may alienate socially dangerous encroachment on the individual and the rights of other citizens, using the right to necessary defense.

The objective side of socially dangerous attack is the active behavior (action) of a person, who infringes. Studying the materials of judicial practice gives reason to believe that the bulk of such socially dangerous attacks are carried by assault (95%) [13]. In this regard, some scholars propose the term «infringement» to understand as the most common attack in a situation of necessary defense against assault. We believe, however, that the legitimate defense is also possible against socially dangerous act that is not associated with the attack (for example, in the case of termination of theft, non-violent robbery, unlawful taking of a vehicle, destruction or damage to another's property).

The possibility of necessary defense against socially dangerous inactivity is also discussed in the criminal law science. Many authors deny this possibility. However, there are scholars who hold to a different position. Among Ukrainian criminologists P. Andrushko and P. Kobzarenko believe that necessary defense can be carried not only against socially dangerous actions, but also against socially dangerous inactivity [1, p. 67]. Instead, L. Husar and L. Ostapenko indicate that necessary defense is permitted only against the action [3, p. 13-14; 9, p. 503].

From the objective side socially dangerous encroachment must be available, that is the one that has already begun and is not yet finished. The evidence of the reality of an attack defines the limits of necessary defense in time – primary and final points of a socially dangerous attack within which legitimate defense is possible. Attack is presumed to start when it has already begun or imminent threat of which has been so evident that one, who defends understands that attack is to begin immediately. The threat of early attack is indicated by specific threat words, gestures, displaying of weapons or other means. In explaining the presence of such a threat we should consider the attacker's behavior, in particular, the focus of intent, intensity and nature of his actions, giving reasons to a person, who defends to perceive that threat is real [12]. The failure of protective measures in such circumstances puts a person in a clear, immediate and unavoidable danger.

Question of the initial start of a socially dangerous attack that generates the right to necessary defense is debatable. Some scholars relate this issue with the teaching on stages of criminal activity [10, p. 52; 11, p. 4]. The Supreme Court of Ukraine has correct position in this issue and stated that «the state of necessary defense arises not only at the time of committing a socially dangerous attack, but in the case of a real threat of harm. In explaining the presence of such a threat attacker's behavior must be considered, including intent, intensity and nature of his actions, giving a person, who protects grounds to perceive a threat to be real. The transition during the attack of instruments of a crime or other objects from the attacker to a person, who defends does not always indicate the end of the encroachment». It is clear that necessary defense is impossible against an attack, which is not available and can only be more or less distant in future (this is called «premature defense»).

Ending of infringement should be distinguished from its suspension in order to continue with greater intensity. For example, not being able to overcome the resistance of a person, who defends, the attacker goes away from him/her and tries to pick up a stick or break down a fence in order to use it as a weapon. In this case the infringement should be deemed to be extended, that is available.

Subjective side of an attack. Analysis of judicial practice shows that people mostly protect against intentional attacks. But is there any basis for necessary defense against reckless assault? B. Mercuryev in this regard indicates that society, by and large, equally applies useful activities at preventing both intentional and reckless crimes. In addition, a person who defends may not be aware of the subjective side of an attack [5, p. 96].

Analysis of the elements and attributes of a socially dangerous encroachment should consider the requirements of Article 36 of the Criminal Code of Ukraine for the circumstances of the defense that should indicate the necessity of harm to anyone who infringes, in order to prevent immediate suspension or assault. This necessity takes place when the delay of immediate injury to a person, who infringes, for preventing or stopping attacks, threatens to cause direct and irreparable harm to the protected interests. Thus, the analysis makes it possible to conclude that socially dangerous attack as a legitimate ground for the defense is the action of a person or a group of persons, aimed at promptly and directly causing of substantial harm to legally protected rights and interests of individuals, society or the state if such action causes the need for immediate prevention or cessation of attacks by causing harm to anyone who infringes.

Composition of lawful defense. The subject of necessary defense is the first element of the defense. Since Article 36 of the Criminal Code of Ukraine indicates that «any person» can be a subject of necessary defense, science and practice face two defined positions on the issue. According to the first - the subject of necessary defense is only an individual, whom the law does not impose a legal duty to protect the interests of law enforcement by causing harm to anyone, who infringes on these interests [7, p. 94]. Another position is that the provisions of Article 36 of the Criminal Code of Ukraine extend on officials and officers, who according to certain laws have the authority to use physical force, weapons, special tools, etc. in defense of the protected rights and interests [3, p. 8].

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It appears that the provisions of the Criminal Code are applied only to individuals, while powers of officers on the use of physical force, weapons, special equipment for the protection of the interests are foreseen by special laws of Ukraine (for example, «On Police», «On Operational Investigative Activity», etc.)

The purpose of the defense. According to part 1 Article 36 of the Criminal Code of Ukraine necessary defense are the actions taken to protect the lawful rights and interests of a person, who defends, or other persons, as well as the public interest and the interests of the state against socially dangerous attacks. It seems that the lawful defense can provide three goals: 1) immediate – to cause harm to anyone, who infringes; intermediate - immediate prevention or cessation of attacks and final - the protection of legally protected interests.

The object of harm from someone, who is only protecting are the interests of a person, who infringes on the protected interests, but not the third parties. However, in the course of necessary defense injuries to the individuals, who had not committed assault, are possible. This particularly happens when protective remedies of indiscriminate action are used, such as explosives, poisonous or potent substances; causing of harm during the defense against group attack to a person, who mistakenly was considered as a gang member; rejecting actions (for example, while shooting the attacker, a person injures or kills another person, or while destroying property of a person, who infringes, simultaneously property of another owner is destroyed).

Committed in such cases can not be classified as necessary or as its excess, because one of the its essential elements is missed.

In some cases, injury to third (external) parties under certain circumstances may be considered by the rules of emergency. In other cases, the injury must be assessed taking into account the subjective attitude towards the actions:

- 1) if a person did not foresee and could not foresee that during necessary defense harm will be caused to third parties, we have accident and criminal liability is excluded;
- 2) when there is an error in good faith, that is the perpetrator did not foresee harm to third parties, but with proper attention he/she could have done it, or he/she carelessly hoped that third parties will not suffer – this should be qualified as negligent crime;
- 3) one, who was defending, foresaw the injury to third parties, but had careless attitude to that - there is a deliberate crime;
- 4) defense against the actions of a person, who was mistakenly perceived as a member of the gang, is estimated in accordance with the rules of qualification of alleged defense.

The objective side of defense. Peculiarity of protective action in necessary defense is its active nature: the defense is counter-attack, which is reflected in the injury to a person, who infringes.

Condition of necessary defense justifies harm to a person, who infringes, only if protective action is not beyond necessity. Exceeding these limits (excess of the defense) is a socially dangerous act. While necessary defense is almost always forced, there is a limit for a person, who defends, when trespass of that limit changes his/her action into illegal behavior. Although the concept of limits of necessary defense is not directly determined in the Criminal Code, but the conclusion about these limits can be drawn from a systematic interpretation of Part 1, Article 36, Articles 118 and 124 of the Criminal Code of Ukraine. That is, part 3 of Article 36 of the Criminal Code provides: «The excess of necessary defense shall mean an intended causing of a grievous harm to the trespasser, which is not adequate to the danger of the trespass or circumstances of the defense. The excess of necessary defense shall entail criminal liability only in cases specifically prescribed in Articles 118 and 124 of this Code».

The crucial feature is a degree of social danger of attack, which defines the limits of permissible harm in necessary defense. There is a direct correlation: the more dangerous attack is, the wider is the limit of acceptable damage inflicted on the attacker. Obviously, causing severe damage to the attacker is comparable with those encroachments that pose great danger to society (for example, the protection of life, health, personal freedom, sexual integrity, public safety, etc).

In addition, the caused damage should be commensurate with the circumstances of the defense. The circumstances of the defense are determined by the actual capabilities and means of a person, who defends for preventing or stopping attacks. The nature of this situation depends on the real balance of forces, capabilities and tools that have both a person, who infringes, and a person, who is defending. Therefore, J. Baulin distinguishes two types of circumstances of the defense: relatively favorable for a person, who is defending and unfavorable to him/her. Given the fact that socially dangerous attacks may have varying degrees of danger, and one, who is defending, may be in a different circumstances of defense, it is proposed to provide two types of limits of necessary defense: the limits of acceptable injury and limits of sufficient injury to anyone, who infringes.

Subjective control in defense is that defense is not recognized as legitimate only because of the objectively caused harm to someone, who infringes, but with adequate subjective relation to the infliction of harm. In particular, a subject, who is defending should properly be aware of the fact that socially dangerous attack is committed, and he/she is in certain circumstances of the defense. However, due to various objective or subjective reasons, the one, who is defending can 2

make factual error in the evaluation of objective evidence of assault or defense, which is important for the criminal-legal evaluation of caused harm. One of the most significant errors is the reality of attack. We know that the defense is only possible from the real, not imaginary attack that is the attack should exist in objective reality, not just in the imagination of a person, who is defending. Error in reality of attack makes it possible to distinguish necessary from alleged defense. Alleged defense is a defense against an imaginary, non-existent infringement in reality. Legal consequences of alleged defense are determined by the rules of the actual error (Article 37 of the Criminal Code of Ukraine). In addressing this issue, there are two main options: 1) if the actual error excludes intent or negligence, the criminal liability for acts committed in a state of alleged defense is excluded. In this case, a person not only does not understand, but under such circumstances should not and could not understand that there is no socially dangerous encroachment [12]; 2) if under certain circumstances a person did not understand, but could have understood the lack of real socially dangerous encroachment, he/she should be criminally liable for causing harm through negligence.

Anyone, who is defending, may also make a mistake either in assessing the degree of danger of encroachment, or in the nature (type) of the circumstances of defense, which can lead to injury incommensurate with the danger of encroachment or circumstances of the defense. If the cause of this error is a strong emotion, the law provides the exclusion of criminal liability for causing of incommensurate harm. Thus, in accordance with Part 4 of Article 36 of the Criminal Code: «A person shall not be subject to criminal liability where that person was not able, due to high excitement, to evaluate if the harm caused by that person was proportionate to the danger of the trespass or circumstances of defense».

The definition of necessary defense. The foregoing makes it possible to summarize the basis and elements of defense and determine the concept of necessary defense. *Its basis* is a committed socially dangerous attack that requires immediate termination by preventing or causing harm to anyone, who infringes; *signs of lawful defense*: subject - an individual; goal - causing harm to anyone, who infringes (immediate goal) for preventing or stopping attacks (intermediate goal) to protect secured legal rights and interests of the individual and the public interest or the interests of the state (the ultimate goal); object - the one, who infringes, his rights and interests; objective side - actions causally linked with causing harm to someone, who infringes and that harm corresponds the danger of the assault and circumstances of the defense; subjective control - the proper understanding by a subject of the basis and elements of the defense and desire to cause someone, who infringes a commensurate damage.

Thus, *necessary defense is a legitimate defense of an individual of his/her protected interests, society or the state against a social and dangerous attack in order to prevent its immediate suspension or by causing someone, who infringes, damage, which corresponds to the danger of an assault and circumstances of the defense.*

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