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SELF-DEFENSE IN THE ROMANIAN NEW PENAL CODE: REMOVING THE BLAME CAUSE AS AN UNIMPEACHABLE CAUSE

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1. General considerations regarding the causes exonerating the criminal nature of the act and the unimpeachable causes

The penal or criminal nature[1] of an act is defined in the criminal doctrine as a synthetic characteristic of the act, which stems from meeting the essential features of the offense[2].

In Article 17 paragraph 1 of the Penal Code in force, which defines the general notion of offense, the legislator establishes the essential features that an act must meet for it to be considered a felony, namely, it must pose a real social threat, which would

1 Mitrache, C-tin.; Mitrache, C. *Drept penal român. Partea generală*. 5th edition, revised and enlarged. Bucharest: Juridical Universe Publishing House, 2006, p. 139.

2 Bulai, C.; Bulai, B. N. *Manual de drept penal. Partea generală*. Bucharest: Juridical Universe Publishing House, 2007, p. 224; Păvăleanu, V. *Drept penal general. Manual universitar*. Bucharest: Lumina Lex Publishing House, 2007, p. 108.

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justify the use of criminal law sanctions; the act must be committed with guilt[3] and it must be encompassed by the criminal law[4], more specifically to be described in a criminality rule[5].

The Romanian Penal Code in force, in Articles 44-51, unitarily regulates all general causes, which remove the criminal nature of the act under a title, stating that "it is not a felony" the act committed, under the criminal law, if the circumstance of the offense fails to provide the existence of one of these causes. According to one opinion[6], the name of the causes that remove the criminal nature should be replaced with that of causes that remove the guilt, because "causes that remove the criminal nature of the act" can also encompass ones that rule out social danger and causes that remove the requirement that the act be provisioned by the criminal law. According to another opinion[7], these causes that eliminate the criminal nature should be called more correctly, "causes that deter the act from being a crime", because "remove" implies that it initially has a criminal nature, and that would be eventually removed by another cause. However, such acts do not constitute crimes at any time, according to the provisions of Articles 44-51 of the Penal Code in force. According to another view[8], the causes that remove the criminal nature of the act should be divided into two categories: inculpability causes (innocence, irresponsibility or non-impeachment) and justificatory causes (based on the right to perform them). In this sense, the causes that remove the criminal nature of the act should be renamed to justificatory and unimpeachable causes. In the latter category, the minority of the perpetrator, moral coercion, factual error, etc., are encompassed, and in the category of justificatory causes, self-defense cases, emergency state, physical coercion, etc., are included. Some authors[9] disagree with both these classifications and with these names, since this is an artificial classification and it does not delve deep into the matter of the causes' problem, which eliminates the criminal nature of the act, because all these causes implicitly exclude the infraction, the guild and the criminal responsibility. In this way, it is unscientific to give the name of irresponsibility causes (of innocence) only

3 Dongoroz, V.; Kahane, S.; Oancea, I.; Fodor, I.; Iliescu, N.; Bulai, C-tin.; Stănoiu, R. M. *Explicații teoretice ale Codului penal român. Partea generală*. Volume I, 2nd edition. Bucharest: The Romanian Academy's All Beck Publishing House, 2003, p. 297.

4 Lefterache, L. V. *Drept penal. Partea generală*. Bucharest: Juridical Universe Publishing House, 2009, p. 216.

5 Dongoroz, V. *et al*., Vol. I, 2003, p. 297.

6 For more details, see Antoniu, G. Partea generală a Codului penal într-o viziune europeană. *C.L.M*. 2004, (1): 37.

7 Basarab, M. *Drept penal, partea generală.* Volume II, 4th edition, revised and enlarged. Bucharest: Lumina Lex Publishing House, 2002, p. 131.

8 Dongoroz, V. *et al*., Volume I, 2003, p. 304–305.

9 Dongoroz, V.; Kahane, S.; Oancea, I.; Fodor, I.; Iliescu, N.; Bulai, C-tin.; Stănoiu, R. M. *Explicații teoretice ale Codului penal român. Partea generală*. Volume I, 2nd edition. Bucharest: The Romanian Academy's All Beck Publishing House, 2003, p. 304–305.

to a part of these causes. On the other hand, all the causes eliminating the criminal nature of the act operate under a provision of the law, so, in relation to the rule of law, they are all "justificatory causes"[10].

On the contrary, another part of the doctrine[11] has a different view on the notion of the "cause that eliminates the criminal nature of the act", claiming that our legislator, due to a regrettable regulating error, does not individualize the justificatory causes, not even under a different name, preferring to prescribe them together with the ones that remove guilt (the non-impeachment causes), under the general name of "causes eliminating the criminal nature of the act", without making any distinction between them, a distinction that would be absolutely necessary even though they would still be called "causes that remove the criminal nature of the act".

The author of this paper believes that the idea of distinction in the Romanian penal literature is a historical one, dating back from the Code of 1937, which, without explicitly adopting the classification of the causes that protect the cases of non-impeachment and the justificatory ones from criminal liability, however, implicitly enshrines this division, using in the texts, regarding the causes that defend against penalties, the expression "not accountable" for the offense in the case of inculpability causes (of non-impeachment, as it is used by some authors) and the expression "does not count as" for an offense in the case of justificatory acts[12]. The author of this paper believes that another argument on the idea of distinction has its origins in the tendency of Romanian criminal legislation to be in harmony with the ones of the countries from the European Union – Italian, Spanish, German, French, Belgian, etc., to which Romania also belongs.

The European doctrine[13] distinguishes between two categories of causes that determine the absence of the crime, namely justificatory causes (based on the right to perform them, also called objective irresponsibility causes, or which remove the illegality of the act) and unimpeachable causes (inculpability causes or subjective irresponsibility causes, based on the lack of guilt).

The Penal Code in force uses the phrase "causes exonerating the criminal nature of the offense". Therefore, most of the authors from Romania use the phrase provided by the Penal Code. These causes may just as well be properly called as "causes hindering the criminal elements to be met" or "causes that remove or exclude the blame"[14].

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10 Ionescu, V. A. *Legitima apărare și starea de necesitate*. Bucharest: Scientific Publishing House, 1972, p. 22–27.

11 Streteanu, F. *Tratat de drept penal. Partea generală*. Volume I. Bucharest: C.H. Beck Publishing House, 2008, p. 471.

12 Dongoroz, V. *et al*., Volume I, 2003, p. 305.

13 Jescheck, H.H.; Weigend, T.; Munoz Conde, F.; Garcia, A. M., *apud* F. Streteanu, Volume I, 2008, p. 470–472.

14 Hotca, M. A. *Dicționar de drept penal.* Bucharest: Publishing House, 2004, p. 82.

It must be mentioned that the institution of justificatory causes and the one of unimpeachable causes have been introduced in the new Penal Code's project[15]. Consequently, the causes exonerating the criminal nature of an offense are those situations, conditions, circumstances or settings, existing at the time of committing the act, which hinders the fulfillment of an essential feature of the offense and thereby exonerates the criminal nature of the act.

In the current Penal Code, in chapter V (Articles 44-51) of Title II of the General part, "the causes exonerating the criminal nature of the offense" are regulated under the same title, whereas in the new Penal Code, a clear and well-founded distinction of these causes can already be noticed[16]. The new Penal Code regulates the justificatory causes in Chapter II (Articles 18-22) of Title II of the General Part, and Chapter II (Articles 23-31) of Title II of the new Penal Code is reserved for the regulation of the unimpeachable causes.

In Article 15 of the new Penal Code, titled "The essential features of the offense", the offense is defined as "the act under criminal law, committed with guilt, unjustifiable and imputable to the person who committed it". The above mentioned definition takes into account both the tradition of the Romanian interwar criminal law, as well as the European regulations, which establish such a definition in the Penal Code[17]. In this regard, it is notable that even in 1923 the offense was defined as an antijuridical act, imputable and punishable by the criminal law[18].

The text proposed by the project has, as a starting point, this doctrinal definition and, taking into account the regulation of Article 14 of the Greek Penal Code, it retains four general features of the offense, supported by the majority of the European penal system: the provision in the criminal law, the guilt, the unjustifiable (anti-juridical) character and the imputable character[19].

The justificatory causes were introduced in the new Penal Code, reverting to the existing provisions in the Code of 1937, the legislator aligning the Romanian criminal legislation to the European one. The new Romanian Penal Code distinctly systematizes these causes, compared to the unimpeachable ones, emphasizing at the same time the objective nature of the former, in that they operate in rem and are transmitted to the participants, as well, and the subjective, *in personam* nature of the other causes, in that they are not transmitted unto the participants, exceptions being made only in fortuitous cases[20].

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15 Law No. 286 of July 17th 2009, regarding the Penal Code. July 24, 2009. *Official Gazette*. No. 510.

16 Streteanu, F. *Tratat de drept penal. Partea generală*. Volume I. Bucharest: C.H. Beck Publishing House, 2008, p. 471.

17 Pagarin, M. S. *The Definiția și trăsăturile infracțiunii în proiectul Codului penal, în Culegere de studii juridice*. In honorem prof. univ. dr. Antoniu, G. Craiova: Ed. Sitech, 2009, p. 252–254.

18 Pop, T. *Drept penal comparat. Partea generală*. Volume II. Cluj, 1923, p. 189.

19 Pagarin, M. S., 2009, p. 252–254.

20 Boroi, A. *Drept penal. Partea generală-conform noului Cod penal*. Bucharest: C.H. Beck Publishing House, 2010, p. 238.

The Penal Code of 1969 excluded the institution of the justificatory causes utilized till then (in the sense that it was understood from the text of law), claiming that all the causes that eliminate the criminal nature of the act are justificatory, implicitly excluding the offense, the guilt and the criminal responsibility[21].

There have also been discussions about the institution of the justificatory causes in the 2004 Penal Code project (Law No. 31/2004)[22] and a clear distinction was made, similar to a "criminal dogma", referring to the fact that those justificatory causes must be delimitated from the causes that exonerate the criminal nature of the offense (unimpeachable causes).

The project of the new Penal Code regulates the justificatory causes in Article 18, stipulating that the act is not an offense under the criminal law if it is committed under any of the conditions supported by the justificatory cases (self-defense, emergency state, executing a right or fulfilling an obligation, as well as the consent of the victim). Therefore, the justificatory causes are circumstances, which remove the second one of the essential features of the offense – the unjustified character[23]. Talking about the presence of justificatory causes, an act, according to an incrimination norm, ceases to be in contradiction with the entire order of law, becoming lax[24].

Acknowledging this influence of the justificatory causes, intervention of which may remove the unlawful nature of the act, even if the other features of the act are met in order for it to constitute a crime, it should have been necessary that the anti-juridical nature be listed as well in the enumeration of the crime features, because only by meeting these features (typicality[25], guilt and illegality[26]) in the content of the actual act, one could have spoken about the criminal nature of the act.

The justificatory causes emphasize the conflict between typicality (meeting all the necessary elements stipulated by the standard incrimination) and illegality. The latter is not a concept specific to the criminal law, but a unitarian concept, valid for the whole juridical order[27], and, as it is mentioned in the juridical literature[28], it expresses the contradiction between the act and the entire legal order, resulting from that lack of a justificatory act.

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21 Duțu, T. *Cauzele care înlătură carcterul penal al faptei și cauzele justificative.* Constanța: Europolis Publishing House, 2007, p. 2–4.

22 Antoniu, G. *Noul Cod penal comentat*. Bucharest: C.H. Beck Publishing House, 2006, p. 10.

23 Boroi, A. *Drept penal. Partea generală-conform noului Cod penal*. Bucharest: C.H. Beck Publishing House, 2010, p. 238.

24 Streteanu, F. *Drept penal. Partea generală*. Bucharest: Rosetti Publishing House, 2003, p. 404.

25 Antoniu, G. *Tipicitate și antijuridicitate*. *C.L.M*. 1997, (4): 23–30. According to the author, the tipicality consists in the harmony of the actual act with the incrimination norm.

26 Boroi, A., 2010, p. 239 – by *illegality,* the author understands the contradiction of the act with the whole legal order.

27 *Ibid.*

28 Pagarin, M. S. *The Definiția și trăsăturile infracțiunii în proiectul Codului penal, în Culegere de studii juridice*. In honorem prof. univ. dr. Antoniu, G. Craiova: Ed. Sitech, 2009, p. 255.

The typicality of the act constitutes an illegality indicator, for a typical act is illegal to the extent that it is not authorized by a juridical norm, namely when a justificatory cause does not intervene. If only the typicality of the actual act exists and not its illegality, the act will not objectively constitute an offense[29].

Unlike the Penal Code in force, which regulates only two of the justificatory causes (self-defense and the emergency state), the new Penal Code has explicitly established two other justificatory causes in Articles 19-22, which have not been considered extralegal causes up till now – the consent of the injured person and the exercise of a right and the fulfillment of an obligation[30].

In the new Penal Code, the concept of "causes exonerating the criminal nature of the offense", used by the Penal Code in force, is replaced with "unimpeachable causes", a change somewhat insignificant from a certain aspect, because the impeachment, being a characteristic of the offense, in the new definition provided in Article 15 of the new Penal Code, acts as an essential feature of the offense, which is why the act under the criminal law is not an offense, as long as it was committed under the circumstances of any of the unimpeachable causes.

The notion of unimpeachable causes is new to the Romanian criminal law. The Penal Code of 1864 used the term "causes that remove or reduce the punishment" and in the Penal Code of 1973 the unimpeachable causes appeared as "causes that defend against liability or decrease it".

The notion of unimpeachable causes still was not used by the Penal Code of 1969, which included them, alongside with the justificatory causes, in the general category of the causes that exonerate the criminal nature of the offense[31].

Chapter III, Article 23 paragraph 1 of the new Penal Code's Title II is dedicated to the unimpeachable causes. According to this article, the legislator shows that "If an act provisioned by the criminal law has been committed under any of the unimpeachable causes, it does not constitute an offense, due to the fact that they nullify the third essential feature of an offense – the impeachment. The effect of the unimpeachable causes does not extend unto participants (as opposed to the justificatory causes that produce effects in rem and extend unto participants as well), they produce *in personam* effects[32], except for the fortuitous case which implies a general and objective provision impossibility, operating in rem"[33].

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29 Lefterache, L. V. *Drept penal. Partea generală*. Bucharest: Juridical Universe Publishing House, 2009, p. 217–218.

30 Streteanu, F.; Moroşanu, R. *Instituţii şi infracţiuni în noul Cod penal – manual pentru uzul formatorilor SNG*. Bucharest, 2010, p. 58.

31 Streteanu, F.; Moroşanu, R. *supra* note 30, p. 78.

32 Boroi, A. *Drept penal. Partea generală-conform noului Cod penal*. Bucharest: C.H. Beck Publishing House, 2010, p. 270.

33 Streteanu, F.; Moroşanu, R., *ibid.*

2. Self-defense[34] – the cause exonerating the criminal nature of the act by removing the blame

It is a known fact that life, corporal integrity, freedom, health, people's wealth are protected by incriminating those actions that affect them. Therefore, a human being is preemptively protected from any violation of his rights or by incriminating all the acts that might prove injurious to him, and, when threatened, he can resort to the support of the state authority to eliminate the risen threat[35].

However, there are exceptional situations, in which a person is the victim of an offense and, in the face of imminent danger, without the possibility of appealing to the authorities' intervention, has no other means to prevent his/her injury than the commission of an act provisioned by the criminal law. Therefore, there are certain situations, in which defending ones' self against an attack or aggression is considered "self-defense" by the legislator, so that even if the act is provisioned by the criminal law, it has not got a criminal character and does not constitute an offense[36].

Given these legal provisions, the act of self-defense appears as riposte generated by a person against an attack, which gravely endangers the person, his rights or the public interest, a retaliation determined by one's need to protect the social values at risk[37].

He, who retaliates against the attack in order to safe-keep the endangered social values, commits an offense under the criminal law. However, this act is not committed with guilt, due to the fact that the wrongdoer did not act willingly, but constrained by the need to defend the social values gravely endangered by the vicious attack. This is the basis of exonerating the guilt and criminal nature of the offense committed in self-defense[38].

Since the earliest times until the modern era, with no cohesive penal theories, the protection of the life in terms of an unjust aggression, even with means that lead to the suppression of the aggressor's life, has not been punished[39].

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34 Regulated in Article 44 of the Penal Code in force.

35 Ionescu, V. A. *Legitima apărare și starea de necesitate*. Bucharest: Scientific Publishing House, 1972, p. 50; Boroi, A., 2010, p. 242.

36 Dongoroz V.; Kahane, S.; Oancea, I.; Fodor, I.; Iliescu, N.; Bulai, C-tin.; Stănoiu, R. M. *Explicații teoretice ale Codului penal român. Partea generală*. Volume I, 2nd edition. Bucharest: The Romanian Academy's All Beck Publishing House, 2003, p. 312.

37 Mitrache, C-tin.; Mitrache, C. *Drept penal român. Partea generală*. 5th edition, revised and enlarged. Bucharest: Juridical Universe Publishing House, 2006, p. 142; Predescu, O. Din nou despre legitima apărare. *The Law Magazine*. 2004, (2): 130.

38 Mitrache, C-tin.; Mitrache, C., 2006, p. 142.

39 For details regarding the history of this juridical institution, see Ionescu, V. A. Legitima apărare și starea de necessitate. Bucharest: Scientific Publishing House, 1972, p. 31; Antoniu, G.; Daneș, Șt. *Codul penal comentat și adnotat pe înțelesul tuturor*. Bucharest: Tempus Publishing House, 2002, p. 82; Popa, Gh. *Scurt istoric al legitimei apărări*. In: Scientific Bulletin, "George Bacovia" University, Bacău: Sedecom Libris Publishing House, No. 2/2005, p. 232; Vârban, A. *Legitima apărare. Considerații teoretice și practică judiciară*. In: Documentary Bulletin, Ministry of

Particularly important consequences that self-defense has, by exonerating the guilt and criminal nature of the act, have imposed the need for a detailed regulation of the conditions, under which an action can be considered as a self-defense act. These conditions are stipulated in Article 44 of the Penal Code, which regulates self-defense. By examining these provisions, it can be noted that the existence of self-defense implies, on the one hand, an attack that creates the legitimate defense state and, on the other hand, an act committed in defense. Consequently, the prerequisites for self-defense refer to *attack* and others to *defense*.

In order to claim self-defense, first of all, there must be an act of attack, i.e., an action or inaction, socially dangerous, unleashed by the assailant[40] and characterized by violent human behavior, an aggressive attitude that usually takes shape in a form of an action against the protected social values[41].

The author of this paper concurs with the opinions of the majority of the authors[42], who consider that inaction too may constitute an attack, especially when there is an obligation to act. In this respect, an aggressively active attack, when a person points a knife or a gun at another person with intent to kill or injure. There is also a passive attack (through inaction), for example, in the case of the offense of destruction and false signaling, provided in Article 276 of the Penal Code in force; if the switchman does not fulfill his service obligation of changing the railroad switch needles to avoid a railway catastrophe and the station chief threatens or brings harm to the switchman that was passive, his act would not be a felony.

2.1. The elements capable of characterizing the attack, according to Article 44 paragraph 2C of the Penal Code in force, are the following: it must be material, immediate, unjust; it must target the person who is defending himself/herself against another, or against a public interest and the attack must put in grave danger the attacked person or the public interest.

The material nature of the attack assumes that it must be exercised through physical means and must be directed against the physical existence of the protected social value. As shown in the doctrine[43], the attack is a material one when, in order to perform it, one resorts to physical violence, with or without the use of offensive means (weapons, narcotics, animals, etc.). Verbal aggression (threat or injurious language) does not constitute a physical act. Such acts may constitute the mitigating circumstance provided by Article 73 letter b of the Penal Code in force (the excuse

Internal Affairs and Administrative Reform Publishing House, No. 1/2008, p. 23; Grotius, H. *Despre dreptul războiului și al păcii*. Bucharest: Scientific Publishing House, 1968, p. 222.

40 C. A. Craiova, pen. sec., December, No. 585/2003. *The Law Magazine*. 2004, (7): 168.

41 Mitrache, C-tin.; Mitrache, C. *Drept penal român. Partea generală*. 5th edition, revised and enlarged. Bucharest: Juridical Universe Publishing House, 2006, p. 143.

42 Bulai, C.; Bulai, B.N. *Manual de drept penal. Partea generală*. Bucharest: Juridical Universe Publishing House, 2007, p. 241; Mitrache, C-tin.; Mitrache, C., 2006, p. 143.

43 Antoniu, G. *Noul Cod penal comentat*. Bucharest: C.H. Beck Publishing House, 2006, p. 229–230; Bulai, C.; Bulai, B.N., 2006, p. 242.

of the challenge)[44]. In the case of inaction, the attack is a material one if the omission created a physical danger, threatening the protected values.

In the specialty literature, some authors[45] have a different opinion regarding the conditioning of self-defense in relation to the material attack. In this respect, the cited authors believe that there are also possible attacks under nonviolent forms that can create a moral hazard for the person subject to the aggression. In this sense, a case can be imagined, when, for example, a person X, who one night goes around town putting up posters discrediting, slandering and swearing Y. If self-defense is possible in this case, Y will have the possibility of preventing X from continuing his action, even by using violence. Given the requirements of the material attack, this would be impossible, the only possibility for Y is to lodge a criminal complaint for slander and insult, a complaint that would most likely be solved in a couple of months. Meanwhile, the moral damages awarded in favor of Y after several months since X's crime took place would not constitute a genuine "rehabilitation" of Y's dignity and honor, because the number of those, who find out about that particular sentence, is much smaller than that of those, who could read the posters set up by X.

In reality, the requirement for the material nature of the attack is reminiscent of the period, in which self-defense was a special cause of exonerating the criminal nature of the offense, incidental only in the case of offenses against life and corporal integrity. From the moment, in which it is accepted that self-defense may intervene in the case of any of the person's fundamental rights, this condition has no further reason to exist[46].

In the older Romanian doctrine, self-defense was also considered viable to uphold the law of chastity, an attack against the latter, according to the author, being similar in nature to an attempt on the health or against one's physical integrity or honor[47].

The jurisprudence[48] decided that the attack is material if the defendants who came to the injured party with the intent of taking the key of the building, from which the latter was evicted as a result of a lawsuit won by the defendants, hit her, stating that they felt threatened by the injured party, who broke into the courtyard of

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44 Streteanu, F. *Drept penal. Partea generală*. Bucharest: Rosetti Publishing House, 2003, p. 478; C. A. Bucharest, pen. sec., December, No. 102/2003.

45 Antoniu, G. *Vinovăția penală*. Bucharest: Romanian Academy Publishing House, 1995, p. 280–281; Streteanu, F. *Drept penal. Partea generală*. Bucharest: Rosetti Publishing House, 2003, p. 479.

46 Streteanu, F., 2003, p. 479–480 – in this respect, the author gives as an example jurisprudence of Spain and other European countries, which admit that without reservations there is the possibility of resorting to self-defense in order to protect certain individual rights, such as honor, dignity, the right to an image, etc.

47 Lefterache, L.V. *Drept penal. Partea generală*. Bucharest: Juridical Universe Publishing House, 2009, p. 229.

48 Satu Mare Court, criminal division, Decision No. 592/2000. *The Law Magazine*. 2003, (4): 173–175.

the property with two bottles of gasoline in her hands. They thought the injured party would pull out the lighter to light it up. This solution is criticized by the doctrine, on the grounds that the attack lacks a material nature and the imminence, as the mere presence of the gasoline bottles in the hands of the injured party does not amount to a physical action meant to jeopardize the protected social values[49].

The attack must be direct, i.e., it must directly endanger the values, against which it is conducted. The attack is always direct, when there is direct physical contact between the aggressor and the victim, such as when the aggressor points the weapon towards a person. The attack can also be considered a direct one, when it targets one of the protected social values, even if it has no direct contact with that value. Such a situation arises when a person wanting to kill another, situated in a cabin hanging from a certain height, tries to cut the cable that supports the said cabin[50], or if the aggressor tries to poison the food of the victim[51].

The attack can no longer be considered direct, when an obstacle interposes between the aggressor and the victim, an obstacle, such as a closed gate, a fence, a wall as the protected social value is in no direct danger; it is the same when there is a more significant distance in space between the aggressor and the value in question. For example, the abuser throws an axe at another person from a distance of 100 meters[52]. It is important to mention that in both cases, the assessment will be made concretely, depending on the specifics. It is done so, because, for example, a closed door can be an obstacle when talking about a regular attack, but it can no longer be so in the case of a bomb attack; a certain distance may render a regular attack ineffective, but in the case of an attack with a firearm, it is insignificant[53].

In the jurisprudence[54], the victim, the defendant's son-in-law, had previously had many conflicts with the latter's family (with whom he lived together), due to alcohol consumption, which fueled his aggression towards them. On the day the act was committed, a trial also took place between the defendant's wife (the victim's mother-in-law) for serious injury of the latter by the victim. In this context, the victim, with an alcohol level of 2.5% g., armed himself with a knife, with which he cut his mother-in-law's arm while she was in the tub. Then, he turned his attention

49 Nedelcu, I. *Codul penal*. Revised and enlarged edition by Bodoroncea, G.; Kuglay, I.; Lefterache, L. V.; Matei, I.; Nedelcu, I.; Vasile, Fr. Bucharest: C.H. Beck Publishing House, 2007, p. 139.

50 Zolyneak, M.; Michinici, M.I. *Drept penal. Partea generală*. Iași: "Chemarea" Foundation Publishing House, 1999, p. 263.

51 Dongoroz, V., Kahane, S.; Oancea, I.; Fodor, I.; Iliescu, V.; Bulai, C-tin.; Stănoiu, R. M. *Explicații teoretice ale Codului penal român, Partea generală*. Volume I, 2nd edition. Bucharest: The Romanian Academy's All Beck Publishing House, 2003, p. 5.

52 Mitrache, C-tin.; Mitrache, C. *Drept penal român. Partea generală*. 5th edition, revised and enlarged. Bucharest: Juridical Universe Publishing House, 2006, p. 144.

53 Pașca, V. *Codul penal comentat. Partea generală*. Volume I, by Basarab, M.; Pașca, V.; Mateuț, Gh.; Butiuc, C. Bucharest: Hamangiu Publishing House, 2007, p. 276.

54 C. A. Craiova, pen. sec., December, No. 585/2003. *The Law Magazine*. 2004, (7): 168–169.

towards the defendant, who was in the courtyard. Knowing his aggressive behavior and being scared, the defendant took refuge in the kitchen and tried to prevent the victim from entering the room by pushing the door from the inside. As the victim was much younger (50 years) than the defendant (75 years), and therefore had a superior physical force, he managed to open the door halfway. Under these circumstances and because the victim had the knife in his hand, the defendant grabbed another knife that was in the kitchen and stabbed him twice in the chest area. The injuries resulted in the death of the victim.

The attack must be immediate, meaning that it must be ongoing (the current attack) or about to occur (imminent attack). Therefore, the immediacy of the attack derives from the very small time interval, separating the moment the attack began from the moment the danger that threatens the attacked social value appeared[55]. If the above mentioned time interval is greater, a legitimate self-defense cannot be justified, because, under these circumstances, there is no immediate attack, because it leaves no room for a current threat, but only creates the possibility of a hazard that might occur later on (in the future)[56] and in this case the threatened party could ask for the authorities' intervention to prevent the threat from materializing. As such, the terms for a legitimate defense cannot be met against an attack that is only in the stage of preparation (a possible attack) or against an attack, which is only in the perpetrator's mind, or against one that has already been consumed (in this case, the retaliation would be consistent with a vengeance and one would only benefit from the mitigating circumstance of provocation)[57].

In characterizing an attack as an immediate one, one must take into account all the facts of the case and, particularly, the nature and intensity of the attack, the delay and gravity of the danger, the existing possibilities to neutralize the attack. If the act provided by the criminal law occurred after the attack took place, the perpetrator's reaction takes the shape of a riposte and not that of a necessary defense, so that the act in question is classified as an offense[58].

The defense loses its legitimacy when it occurs after the attack took place, by disarming the aggressor, and reengaging in the attack is no longer a possibility. A

55 Dongoroz, V.; Kahane, S.; Oancea, I.; Fodor, I.; Iliescu, V.; Bulai, C-tin.; Stănoiu, R. M. *Explicații teoretice ale Codului penal român, Partea generală*. Volume I, 2nd edition. Bucharest: The Romanian Academy's All Beck Publishing House, 2003, p. 315; Mitrache, C-tin.; Mitrache C., 2006, p. 144; Boroi, A. *Drept penal. Partea generală-conform noului Cod penal*. Bucharest: C.H. Beck Publishing House, 2010, p. 243; Bulai, C.; Bulai, B.N. *Manual de drept penal. Partea generală*. Bucharest: Juridical Universe Publishing House, 2007, p. 243.

56 Boroi, A., 2010, p. 244.

57 Antoniu G.; Daneș, Șt. *Codul penal comentat și adnotat pe înțelesul tuturor*. Bucharest: Tempus Publishing House, 2002, p. 182–183; Lefterache, L.V. *Drept penal. Partea generală*. Bucharest: Juridical Universe Publishing House, 2009, p. 230–231.

58 Boroi, A. *Drept penal. Partea generală-conform noului Cod penal*. Bucharest: C.H. Beck Publishing House, 2010, p. 244.

view is shared that[59] in reality the disarming of the aggressor is just an indicator of the attack ceasing, but in no way is it irrefutable proof in this sense. When the attacker is superior in strength and is engaged in a struggle with the victim, being able to take the knife, of which he had previously been disarmed, in order to use it again, the attack is ongoing and continues to seriously jeopardize the person being attacked[60].

Therefore, it can be talked about self-defense if the defendant, aged 66, applied to the victim (who broke into his home at night, by escalading the fence and started to hit him over the head with a cudgel) several blows to the head with an axe, even if the victim was in retreat towards the fence, but kept on threatening to rearm himself and resume the attack[61].

On the contrary, since the disarmament of the injured party, the defendant is no longer in the situation of an immediate and present attack. Thus, the attack is not of an immediate nature if the injured party hit the defendant with a cudgel over his leg, the latter knocks the victim down to the ground, immobilizing him/her, removing the cudgel from his/her hand and immediately striking the injured party over the head[62].

It has been shown in the jurisprudence[63] that there is no immediate attack when, after a contradictory discussion between the injured party and the defendant, the former arms himself/herself with an axe, trying to hit the defendant's head with it, but the latter, with the aid of a witness, disarms the former and with the same axe hits the injured party with it over the head, body and limbs several times[64].

At the same time, the conditions for self-defense are not met in the case of the person who commits the act provided by the criminal law after a certain amount of time elapsed since the attack took place, whilst the victim was running towards his retreat, as the attack was neither imminent, nor current[65].

In the case of an ongoing offense, the defense can intervene at any moment up to the point of exhaustion. For instance, in the case of unlawful deprivation of liberty, one can intervene at any time to release the sequestered victim[66].

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59 Streteanu, F. *Drept penal. Partea generală*. Bucharest: Rosetti Publishing House, 2003, p. 482.

60 *Ibid.,* p. 482.

61 H.C.C.J., the panel of 9 judges, December, No. 429/2003.

62 Nedelcu, I. *Codul penal*. Revised and enlarged edition by Bodoroncea, G.; Kuglay, I.; Lefterache, L. V.; Matei, I.; Nedelcu, I.; Vasile, Fr. Bucharest: C.H. Beck Publishing House, 2007, p. 142; C. A. Craiova, pen. sec., December, No. 227/2003. *The Law Magazine*. 2003, (12): 198.

63 C. A. Craiova, pen. sec., December, No. 458/2003. *The Law Magazine*. 2004, (7): 166–167.

64 Lefterache, L.V. *Drept penal. Partea generală*. Bucharest: Juridical Universe Publishing House, 2009, p. 231.

65 H.C.C.J., pen. sec., Decision No. 945/2009.

66 Streteanu, F., 2003, p. 482; Mitrache, C-tin.; Mitrache, C. *Drept penal român. Partea generală*. 5th edition, revised and enlarged. Bucharest: Juridical Universe Publishing House, 2006, p. 145.

The doctrine[67] identifies a particular situation in relation to the attack's immediate nature requirement. The issue is raised whether to allow the preemptive use of some devices or means of protection (trained guard dogs, traps, electric fence, etc.). If a person installs such measures in order to protect himself against possible attacks by certain aggressors, the former will be able to claim self-defense in case of injuring or killing the perpetrator to the extent that these measures, though installed in advance, are only activated at the onset of the attack. For example, when the perpetrator tries to break into the yard by climbing over the fence, he is gravely injured by a guard dog and will require several days of medical care. Here a future attack cannot be talked about because the defense does not precede the attack, but rather the preparation of the possible defense.

The attack is unjust when it has no legal or factual basis to justify it. An unjust attack consists of any action or inaction that tends to strike or, indeed, strikes with or without a right, one of the values protected by the law. Thus, when the act takes place within the confines of the law, one cannot talk about an unjust attack. Even if the act itself is sanctioned by the law, the just character is maintained only as long as it stays within the limits imposed by the law. For example, in the case of a flagrant offense, any person may withhold the offender and bring him before the authorities. Depriving the person caught in the act of his liberty will be a justified attack, against which the defense cannot be legitimate[68].

The same happens when the act that exceeds the limits prescribed by the law is committed by a representative of the authority. For example, if the person who issued a legal arrest warrant resists the enforcement thereof, the competent authorities may use force to immobilize the offender. However, if the police authority uses excessive force, which would be manifestly disproportionate and unnecessary, an unjust attack will be witnessed, which can generate a legitimate self-defense[69].

The riposte to a public authority's attack was normatively recognized for the first time in the Declaration of Human and Civil Rights of 1791, with the following words: "Any act exercised against a person, except for the cases and natures that the law determines, is arbitrary and tyrannical; the person subjected to violence has the right to repel it by use of force". In this sense, the doctrine rightly stated[70] that an authority's act can constitute an attack when it is manifestly illegal and arbitrary, the entity in question abusing its power[71].

67 Lefterache, L.V., 2009, p. 231–232.

68 Antoniu, G.; Daneş, Şt. *Codul penal comentat şi adnotat pe înţelesul tuturor*. Bucharest: Tempus Publishing House, 2002, p. 184.

69 Bulai, C.; Bulai, B.N. *Manual de drept penal. Partea generală*. Bucharest: Juridical Universe Publishing House, 2007, p. 243.

70 Dongoroz, V.; Kahane, S.; Oancea, I.; Fodor, I.; Iliescu, V.; Bulai, C-tin.; Stănoiu, R. M. *Explicaţii teoretice ale Codului penal român, Partea generală*. Volume I, 2nd edition. Bucharest: The Romanian Academy's All Beck Publishing House, 2003, p. 316.

71 Antoniu, G.; Daneş, Şt., 2002, p. 184.

The attack is lawful if the aggression occurs in a sports game that is taking place according to its own rules of conduct, or when the state's institutions intervene to restore public order, respecting all legal requirements for such interventions.

The reaction of the person who initially provoked the victim, provided the latter reacts to the provocation, can be legitimate, under the conditions of an attack that fulfills the law's terms. For instance, a person threatens another with a slap, and the latter reacts by brutally striking the inciter. This counter-riposte is legitimate, because the slandered victim's reaction is an unlawful one. Therefore, a person's counter-reaction can be legitimate too if the initial victim's riposte appeared to be illegal, provided that the inciter did not seek to create this illegal situation, necessary for such an intervention[72].

Based on the unlawful character of the attack, the doctrine and jurisprudence have concluded that the attack can only come from a person, self-defense being ruled out when the attack is performed by an animal[73]. It should be noted that here a spontaneous action of an animal is talked about and not one caused by a person; in this case, the person under distress may invoke the state of emergency[74].

However, the problem is a different one if the animal is controlled by the aggressor and is used in triggering the attack. Because it would be an unlawful attack, a legitimate retaliation against the owner can be talked about[75], the animal playing a mere role of an instrument[76]. The doctrine states that the defender is not obliged to retaliate against the animal; he can retaliate directly against the owner[77].

In this sense, a situation can be imagined, in which the attacker has a well-trained guard dog on a leash. Due to the fact that the animal is being incited to the attack by the one, who is defending himself, the latter throws stones at the animal, trying to deter it from attacking. The assailant, being a good trainer as well, encourages the animal to press on with its attack. In this case, he, who is defending himself, feels compelled to retaliate against the aggressor by throwing stones and hitting him in the head. The retaliation of a person defending himself against the attacker will be a legitimate one, and self-defense can be claimed.

In the doctrine, opinions are divided when talking about a situation, in which the act is committed by an incompetent person (an alienated or irresponsible person,

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72 Dongoroz, V. *et al*., 2003, p. 316.

73 Paşca, V. *Codul penal comentat. Partea generală*. Volume I, Basarab, M.; Paşca, V.; Mateuţ, Gh.; Butiuc, C-tin. Bucharest: Hamangiu Publishing House, 2007, p. 277.

74 Dongoroz, V. *et al*., 2003, p. 316.

75 Antoniu, G.; Daneş, Şt. *Codul penal comentat şi adnotat pe înţelesul tuturor*. Bucharest: Tempus Publishing House, 2002, p. 184.

76 Streteanu, F. *Drept penal. Partea generală*. Bucharest: Rosetti Publishing House, 2003, p. 485.

77 *Ibid.*

a minor without discernment). Some authors[78] claim that in this case, the attacked person will be in a state of emergency and not in self-defense; others[79] argue that when the attacked person knows the irresponsibility state of the attacker, he will be in a state of emergency, unless he does not know it, then he will be in a state of self-defense because the attacked person is not compelled to seek a less dangerous solution, as in the case of the state of emergency, and has no obligation to verify the mental state of the perpetrator.

Conversely, when a person in a state of irresponsibility repels an attack that originated from a responsible person, the first person's retaliation is not in self-defense, but in a state of irresponsibility, because they lack the will to defend themselves (*animus defendendi*)[80].

The attack can be considered unlawful and irrespective of whether a criminal offense is performed or not; it is enough for it to infringe the subjective rights of another. For example, the owner of a building demolishes it under conditions that are hazardous for a neighbor's house that reacts in a manner of stopping the demolition.

The jurisprudence has concluded that the circumstance where a victim pulls out a pocket knife to defend himself against an attack by the defendant does not constitute such an attack to warrant hitting the latter over the head with a stone, causing him injuries that would result in his death.

Finally, it can be concluded that the determination of the unlawful character of the attack must take into consideration the nature of the attack, the perpetrator's psychological behavior aspect, the nature and particularities of the social value, against which the attack was directed, the existing relationships between the aggressor and the attacked person and any other data that could offer an explanation of the aggressor's attitude[81].

The attack must be directed against one of the social values[82] particularly protected by the regulation of the self-defense. Here, values related to the human being are considered, such as life, physical integrity and health, freedom, the inviolable right

78 Bulai, C.; Bulai, B.N. *Manual de drept penal. Partea generală*. Bucharest: Juridical Universe Publishing House, 2007, p. 243.

79 Mitrache, C-tin.; Mitrache, C. *Drept penal român. Partea generală*. 5th edition, revised and enlarged. Bucharest: Juridical Universe Publishing House, 2006, p. 146.

80 Basarab, M. *Drept penal, partea generală*. Volume II, 4th edition, revised and enlarged. Bucharest: Lumina Lex Publishing House, 2002, p. 140; otherwise see, Streteanu, F., 2003, p. 486–487.

81 Lefterache, L.V. *Drept penal. Partea generală*. Bucharest: Juridical Universe Publishing House, 2009, p. 232.

82 By using this sintagm, in the juridical literature, some authors consider that we are talking about the object of the attack; see, Dongoroz, V.; Kahane, S.; Oancea, I.; Fodor, I.; Iliescu, V.; Bulai, C-tin.; Stănoiu, R. M. *Explicații teoretice ale Codului penal român, Partea generală*. Volume I, 2nd edition. Bucharest: The Romanian Academy's All Beck Publishing House, 2003, p. 316–317.

to private property. Also, certain rights granted by the law to individuals and legal entities, as well as general interests are talked about[83].

Every person is guaranteed the right to life and physical and mental integrity (Article 22 of the Constitution) and this right may not be restricted except by law and only if it is imperative (Article 49 of the Constitution).

Therefore, the object of the attack may be the very person, who is defending himself, and any other person that is present when the attack is taking place. For example, such is the case of the third party, who takes defense against the aggressor, defending himself against an attack, even if originally it was not directed against him[84].

In an opinion, the notion of "public interest" is imprecisely characterized, because it is not always simple to define the scope of the concrete values that can be legitimately defended by reference to this notion[85]. Some authors[86] have defined the public interest as any situation, state, relation, activity connected to an interest of a state's entity or another's, performing a socially useful activity, of the ones referred to in Article 145 of the Penal Code, or of any other's private law legal entity. Other authors[87] consider that the public interest may consist of a state of being, a situation, a relationship, an activity of interest to a public organization.

According to the doctrine, values, such as the state security, the capability to defend the country and certain public property assets, can also be legitimately defended. For example, the state may be defended by means of self-defense when a person is preparing to cross the border with secret state documents[88].

The grave character of the danger threatening the protected social values is assessed according to the attack's intensity, the irreparable or difficult to repair damages that may occur if no one intervenes, such as the loss of life, causing a serious injury that involves great suffering, the destruction of important goods and any other damage that cannot be remedied by compensations[89].

In the older penal doctrine[90], it was reported that the balance of power between the attacker and the person defending himself has no bearing, because the danger

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83 Bulai, C.; Bulai, B.N. *Manual de drept penal. Partea generală*. Bucharest: Juridical Universe Publishing House, 2007, p. 244.

84 Griga, I. *Drept penal – Partea generală, Teorie. Jurisprudență și aplicații practice*. 2nd edition. Bucharest: Tomorrow's Romania Foundation Publishing House, 2007, p. 375

85 Streteanu, F. *Drept penal. Partea generală*. Bucharest: Rosetti Publishing House, 2003, p. 488.

86 Bulai, C.; Bulai, B.N., 2007, p. 244.

87 Mitrache, C-tin.; Mitrache, C. *Drept penal român. Partea generală*. 5th edition, revised and enlarged. Bucharest: Juridical Universe Publishing House, 2006, p. 146.

88 Antoniu, G. *Vinovăția penală*. Bucharest: Tempus Publishing House, 1996, p. 268.

89 Bulai, C.; Bulai, B.N., 2007, p. 244.

90 Dărângă, Gh. *Comentariu, în Codul penal comentat și adnotat*. By T. Vasiliu. Bucharest: Scientific Publishing House, 1972, p. 334.

for the defendant exists just because of the simple fact of him being attacked. On the contrary, the modern penal doctrine[91] considers that, at least in some cases, this balance of forces is decisive for the existence of the danger's gravity.

In this sense, it has been shown that applying a punch in the facial area cannot seriously jeopardize the attacked person, taking into consideration the fact that that hit could not have caused irreparable damages or difficult ones to remedy in relation to its intensity and the physical condition, both of the aggressor's (elderly and inebriated) as well as that of the attacked person's (22 year old person, in a good physical condition).

Likewise, it has been shown that if the defendant committed the murder act on the victim, consisting of fist blows, after its attack stopped, the conditions for self-defense, provided in Article 44 paragraph (2) of the Penal Code, are not met because, on the one hand, the conditions for an immediate attack are not met and, on the other hand, the victim's attack does not represent a danger grave enough to jeopardize the defendant's life; the means used by the victim in his attack are not enough to justify the defendant's response. In this case, the provisions of Article 73 letter b of the Penal Code are incident because the defendant committed the murder under the conditions of strong emotions and distress caused by the aggressive manner, in which the victim behaved[92].

The doctrine[93] suggested the *de lege ferenda* renunciation of the grave danger condition, showing that many petty crimes that are committed extremely often, excluded *ab initio* the possibility of invoking self-defense, even if the attack was an unlawful, immediate and direct one. According to the current Romanian criminal law, when a person is faced with such an attack, he is left with nothing else to do but notify the authorities that he has been the victim of an aggression.

The doctrine[94] considers unjust the refusal to acknowledge self-defense on the grounds that the attack has not created a grave danger, for example, in a case where the defendant, alerted by his granddaughter's screams, pushed the victim that was hitting her aside, the latter fracturing his femoral bone by falling on the sidewalk's kerb. Based on these suggestions and also taking into consideration the experience of other legislations (French, German, Italian, and Spanish Penal Codes), such views were introduced in formulating the 2004 Penal Code's preliminary draft, through the Law 301/2004 and later in the New Penal Code.

Also, in the same regard, other authors have shown that, compared to the current phrasing of Article 44 of the Penal Code, the condition that the attack gravely

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91 Streteanu, F., 2003, p. 487.

92 H.C.C.J., pen .sec., December, No. 785/2006

93 Bogdan, S. Legitima apărare. Caracterul atacului. *C.L.M.* 2002, (2): 70–72.

94 The Supreme Court, criminal section, Ruling No. 589/1981. In: F. Streteanu. *Drept penal. Partea generală*. Bucharest: Rosetti Publishing House, 2003, p. 488 – the author considers that this type of situations should not be excluded from the application scope of the self-defense situation.

endangers the person or the rights of the one in question, or the public interest, drastically limits the situations that would justify the self-defense[95].

The author of this paper concurs with the views of the above-cited authors, as it is not fair that an act should be incriminated as presenting a social danger unless the same act, if presented like an attack, gives claim to self-defense. Only when faced with a grave, irreparable or difficult to remedy danger, the attacked person or the one who came to his aid can be considered to have been deprived of the possibility to freely express their will[96], thus being able to invoke self-defense, as provided by the law.

Thus, there is a grave danger in the case where the victim, after punching and insulting the defendant, pulled out a knife and headed towards him with the intent of hitting him. In this context, the defendant's reaction of hitting the victim with his fist and knee is a natural defensive reflex or, in other words, a necessary act committed in self-defense[97].

On the contrary, the instance noted that there is no self-defense when the defendant is hit over the face and insulted by the victim, in the context of a conflicting discussion that took place between them in a bar, the defendant dropping a brief with documents from his hand, and it does not constitute an attack that gravely endangers the attacked person. The absence of this nature is maintained even when whilst the defendant was gathering his documents, the victim approached him, both of the parties pushing one another. In this context, the defendant punching the victim in the face does not stand for self-defense[98].

Self-defense can also be invoked when a legitimate right or an interest pertaining to a legal entity is threatened. In such cases, the defense can be performed by the employees of the legal entity, whose rights are endangered, as well as any other persons outside of that framework[99].

2.2. Conditions related to defense. Defense conducted to annihilate an attack that meets the above-analyzed conditions takes shape in a form of a normal reaction, against an aggression jeopardizing the social values. Defense in the case of self-defense is an act provided by the criminal law, by which a person repels an immediate, direct, unlawful, dangerous and material attack against the rights of a person or those of the

95 Făt, Șt. Legitima apărare. Considerații privind caracterul atacului. *The Law Magazine*. 2006, (2): 159.

96 Dongoroz, V.; Kahane, S.; Oancea, I.; Fodor, I.; Iliescu, V.; Bulai, C-tin.; Stănoiu, R. M. *Explicații teoretice ale Codului penal român, Partea generală*. Volume I, 2nd edition. Bucharest: The Romanian Academy's All Beck Publishing House, 2003, p. 317.

97 C.A. Bucharest, pen.sec., December, No. 804/2002.

98 C.A. Craiova, pen. sec., December, No. 462/2003. *The Law Magazine*. 2003, (12): 204–205.

99 Dongoroz, V.; Kahane, S.; Oancea, I.; Fodor, I.; Iliescu, V.; Bulai, C-tin.; Stănoiu, R. M. *Explicații teoretice ale Codului penal român, Partea generală*. Volume I, 2nd edition. Bucharest: The Romanian Academy's All Beck Publishing House, 2003, p. 318; Streteanu, F. *Drept penal. Partea generală*. Bucharest: Rosetti Publishing House, 2003, p. 489.

public interest[100]. The reaction may be individual or collective and can originate from the victim or a third party, meeting, of course, certain requirements[101] that will be analyzed later on.

However, in order for it to be legitimate, the defense must meet certain requirements, or otherwise it loses its legitimacy.

The defense must be preceded by the attack. In this sense, the doctrine argues that[102] in order to satisfy this requirement, the acts committed during the defense must be made after the start of the attack or when it becomes imminent. The condition is understood, because, in the absence of an attack, there can be no defense either, the two elements being linked by a cause-effect type relation[103].

In this respect, it has been shown in the jurisprudence that repeatedly hitting a person that has broken into a defendant's home at night, by climbing over the fence/wall, and hit the defendant with a stick over the head, represents an act of self-defense. The fact that the victim was also hit when trying to fall back and after he had dropped the stick from his hand is irrelevant since the threat had never stopped. The victim could have rearmed himself at any time, with one of the clubs in his hand[104].

The necessity of the defense action in order to repel the attack is a requirement that most authors[105] claim should be analyzed with the one described above. The defense, reflected in an action under the criminal law, can be considered as necessary in order to remove the attack, only if it was committed between the time when the attack became imminent and when it was consumed. In other words, as long as a danger that can result from an imminent or ongoing act exists, so does the necessity to remove it[106]. Also, the judiciary practice is unanimous in determining that there is no self-defense if the defendant administered the fatal blows to the victim after he had disarmed him and the attack was over, as this would constitute a vengeance[107].

At the same time, it is considered that the necessary requirement of the defense must have an idoneous nature[108], i.e., it must be able to remove the attack[109].

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100 *Ibid.*, p. 244–245.

101 Streteanu, F., 2003, p. 489–490.

102 Mitrache, C-tin.; Mitrache, C. *Drept penal român. Partea generală*. 5th edition, revised and enlarged. Bucharest: Juridical Universe Publishing House, 2006, p. 147.

103 Paşca, V. *Codul penal comentat. Partea generală*. Volume I, Basarab, M.; Paşca, V.; Mateuţ, Gh.; Butiuc, C-tin. Bucharest: Hamangiu Publishing House, 2007, p. 279.

104 *Ibid.,* p. 279.

105 Streteanu, F., 2003, p. 492

106 Jurcă, I.V. Folosirea legitimă a forţei sau a armelor de foc. *C.L.M*. 2005, (3): 14–18.

107 C. A. Bucureşti, pen. sec., December, No. 22/2005.

108 Streteanu, F., 2003, p. 492.

109 Lefterache, L.V. *Drept penal. Partea generală*. Bucharest: Juridical Universe Publishing House, 2009, p. 235.

The defense must be directed against the aggressor – a requirement of the defense in order to determine the aggressor to cease the attack and to save the endangered social values. The acts committed in defense may be directed against the aggressor's life, health, freedom, but not against his possessions[110]. For example, the person who, whilst being chased by the aggressor with an axe, destroyed his automobile parked where the incident was taking place, and he will not be able to claim that he did so in self-defense[111].

On the contrary, the condition was satisfied when the defendant caught three persons red-handed, including the victim, stealing corn from his land, which is why he asked them to accompany him to the police station. Irritated by this, the three persons threatened him, hit him with a shovel and one of them strangled him. Under these circumstances, the defendant defended himself against the assailants, using a scythe, handle of which hit the injured party, the latter sustaining physical injuries that led to the loss of their spleens[112].

The existence of self-defense does not require that the only way to remove the attack be by committing an act provided by the criminal law. Therefore, self-defense can be spoken of even if the attacked person could have saved himself by running away, hiding or avoiding the encounter with the aggressor, the former not being compelled to resort to this method[113], because if they were, they would be positioned in a situation of inequality compared to the aggressor, who is carrying out an unlawful attack. But the legislator did not limit the defense to an act provided by the criminal law, only as a last resort of removing the attack, by using expressions such as "and that could not be otherwise removed", as the act was conditioned in the state of emergency (Article 45 paragraph 2 of the Penal Code in force), or "that could not be removed otherwise", as is the case when talking about moral coercion (Article 45 paragraph 2 of the Penal Code in force), situations in which the only way to prevent the damages from occurring is to commit an offense provided by the criminal law[114].

The act committed in self-defense should be of an approximately equal gravity to that of the attack, namely to meet the defensive needs, which the attack creates[115]. The proportionality between the attack and the defense is not of a mathematical nature;

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110 Mitrache, C-tin.; Mitrache, C. *Drept penal român. Partea generală*. 5th edition, revised and enlarged. Bucharest: Juridical Universe Publishing House, 2006, p. 147.

111 Streteanu, F. *Drept penal. Partea generală*. Bucharest: Rosetti Publishing House, 2003, p. 492.

112 Nedelcu, I. *Codul penal*. Revised and enlarged edition by Bodoroncea, G.; Kuglay, I.; Lefterache, L. V.; Matei, I.; Nedelcu, I.; Vasile, Fr. Bucharest: C.H. Beck Publishing House, 2007, p. 146.

113 Streteanu, F., 2003, p. 493.

114 Mitrache, C. Reflecţii privind prezumţia de legitimă apărare. *The Law Magazine*. 2008, (3): 159.

115 Bulai, C.; Bulai, B.N. *Manual de drept penal. Partea generală*. Bucharest: Juridical Universe Publishing House, 2007, p. 246.

it is not evaluated rigidly[116], but rather needs an overall assessment, as it could have been done under the attack's conditions[117].

The proportionality requirement between the gravity of the attack and the defense is neither enunciated, nor does it specifically result from the text of Article 44 of the Penal Code. It is deduced, by way of interpretation, from the text of Article 44 paragraph 3, which refers to the possibility of exceeding the limits of a defense proportionate with the gravity of the attack and the circumstances, in which it occurred. The rationale is the following: as long as the text of Article 44 of the Penal Code regulates, as an exception, the lack of proportionality between the attack and defense, one can logically infer that the general self-defense law is that of the existence of a scale between the gravity of the attack and the defense[118].

The doctrine[119] considers that the proportionality exam must begin by assessing the consequences of the two actions, i.e., the most likely result that the attack would have produced and the result desired by the person defending himself. There is no rule to determine where the proportionality between the attack and the defense ends and where the disproportionality begins. The author of this paper believes, along with other authors[120], that the jeopardized social values, the means used in the attack and defense, the physical force and mental state of the combatants and any other circumstances that might help establish the truth must be taken into consideration.

Given the conditions in which the attack took place and the mental state in which the person invoking self-defense was in, the defendant's act can meet the proportionality's requirements, who, going home after work late at night, after ten hours of physical labor, is knocked down on the ground and kicked and punched by four people; in order to defend himself against the attack, the defendant hits one of the aggressors with the pocket knife he had with him, causing serious physical damage or his death. Otherwise, it has been decided[121] that there was no self-defense because the defendant's act was disproportionate in relation to the gravity of the attack when, due to some heated discussions between the defendant and the victim, they insulted each other, after which the victim hit the defendant with the whip over his head. In his reaction, the defendant grabbed the victim by his chest, both falling

116 Mitrache, C-tin.; Mitrache, C., 2006, p. 148; Basarab, M. *Drept penal, partea generală*. Volume II, 4th edition, revised and enlarged. Bucharest: Lumina Lex Publishing House, 2002, p. 145–146.

117 Streteanu, F., 2003, p. 493.

118 Griga, I. *Drept penal – Partea generală, Teorie. Jurisprudență și aplicații practice*. 2nd edition. Bucharest: Tomorrow's Romania Foundation Publishing House, 2007, p. 377.

119 Streteanu, F. *Drept penal. Partea generală*. Bucharest: Rosetti Publishing House, 2003, p. 493.

120 Basarab, M. *Drept penal, partea generală*. Volume II, 4th edition, revised and enlarged. Bucharest: Lumina Lex Publishing House, 2002, p. 145–146; Boroi, A. *Drept penal. Partea generală-conform noului Cod penal*. Bucharest: C.H. Beck Publishing House, 2010, p. 246.

121 C. A. Pitești, pen. sec., December, No. 37/R/2004. *B.J.* 2004: 85.

to the ground. After they got up, the defendant resumed the attack on the victim, by punching him in the face.

The doctrine discusses whether the riposte must always constitute an intentional act or it can also be a transgression. For example, the one threatened with a gun stumbles and falls over the aggressor, thus causing the gun to discharge in his chest. Most of the doctrine has a positive response, the riposte being able to be constructed as an intentional act or a reckless one, with *praeterintention*[122]. It has been pointed out that there is an actual self-defense, when the act committed to remove the attack is proportionate with the graveness of the danger and the circumstances, in which the attack took place[123].

Therefore, it can be concluded that it is not allowed to use graver restraint measures when the attack can be removed by less violent, easier ones. At the same time, if the act committed in the state of self-defense is disproportionately graver than the danger created by the attack, it cannot be regarded as legitimate because it exceeds the limits of self-defense.

3. The regulation of self-defense in the new Penal Code

Regarding self-defense, the new Penal Code encompasses both the opinions expressed in the doctrine as well as the experience of other legislations (Article 15 of the Swiss Penal Code, Article 122-5 of the French Penal Code). Therefore, the self-defense in the new Penal Code is a question of grounds and is regulated in Article 19. According to Article 19 paragraph 2, "the person who commits the act in order to remove an unlawful, direct, immediate and material attack that jeopardizes their person or another, their rights or a public interest, if the defense is proportionate with the graveness of the attack, is in self-defense".

By comparing these measures with the ones in Article 44 paragraph 2 of the Penal Code in force, some differences can be noticed, which target the replacement of the expression "public interest" with "general interest", the explicit description of the defense's proportionality condition in relation to the attack and the renunciation of the grave danger generated by an attack condition, its graveness and that of the actions committed for its removal being appreciated on the grounds of proportionality.

In Article 19 paragraph 3, another self-defense hypothesis is regulated. This text states that "One is presumed to be in a state of self-defense, under the provisions of paragraph 2, that person who commits the act in order to prevent another person

122 Lefterache, L.V. *Drept penal. Partea generală*. Bucharest: Juridical Universe Publishing House, 2009, p. 236.

123 Dongoroz, V.; Kahane, S.; Oancea, I.; Fodor, I.; Iliescu, V.; Bulai, C-tin.; Stănoiu, R. M. *Explicații teoretice ale Codului penal român, Partea generală*. Volume I, 2nd edition. Bucharest: The Romanian Academy's All Beck Publishing House, 2003, p. 318.

from breaking into the residence, room, outbuilding or enclosed area pertaining to it, without any right, by violence, burglary or other such illegal means, or also during the night."

Relevant differences can be noticed between these provisions and the ones regulating the same self-defense hypothesis in Article 44 paragraph 2 of the Penal Code in force. The first difference is that the new Penal Code has explicitly stipulated that in order to claim self-defense, both breaking and entering of a person into a residence, room, outbuilding or enclosed area pertaining to it, by violence and/or fraud, as well as the action repelling this intrusion must occur under the circumstances of self-defense, regarding its two elements – the attack and the defense.

The second difference concerns the description of the situations under which the presumption of self-defense operates. The new Penal Code provides two situations: the first one, when the residence of a person is broken into with dangerous means; and the second, when a person's residence is broken into during the night, by any means. The latter situation is not provided in the Penal Code in force.

The third difference refers to the fact that the new Penal Code has ceased to provide the presumption of self-defense in the case of repelling a breaking and entering by a person using fraudulent means in an enclosed area or one bordered by markings, leaving the self-defense to operate under the conditions provided in Article 19 paragraph 2.

Moreover, in Article 19 of the new Penal Code, the justified excess, regulated by Article 44 paragraph 3 of the Penal Code in force, was repealed. It was moved into the category of unimpeachable causes.

Instead of conclusions

The legal entity of self-defense is of particular importance to the Romanian criminal law. It has undeniable theoretical and practical implications, regarding the existence of a crime or its lack thereof. By studying the regulations of the current Penal Code, which came into force on February 1st, 2014, and comparing them to the provisions of the old legislation, a reformulation of the causes that remove the criminal nature of the act is noticed, being divided into justificatory causes and unimpeachable causes, self-defense being basically included in the justificatory causes category, however, the justified excess of self-defense is bound to the same institution, constituting an impeachable cause. Consequently, in Article 19 of the new Penal Code, the justified excess regulated by Article 44 paragraph 3 of the old Penal Code was not mentioned anymore, passing on to the category of unimpeachable causes. In reality, a cause that removes the criminal nature of the act by removing the guilt is talked about.

Also, the legislator took into consideration both the opinions expressed in the doctrine as well as the comparative law – Article 15 of the Swiss Penal Code, Article 20 of the Spanish Penal Code, Article 122-5 of the French Penal Code, and thus, the grave danger condition generated by an attack was waived, its graveness and that of the actions committed for its removal being appreciated on the grounds of proportionality.

This approach of introducing the justified self-defense excess in the category of unimpeachable causes and not in the one of justificatory causes is accepted by numerous European systems, namely Articles 33 and 35 of the German Penal Code, Article 16 paragraph 2 and Article 18 paragraph 2 of the Swiss Penal Code or Articles 33 and 35 of the Portuguese Penal Code, and this approach is justified by the fact that in those certain situations people are faced with causes of a personal nature, which do not impact the participants in any way, unlike the justificatory causes. If, for example, two persons in the same situation together commit an act of self-defense, but in a disproportionate manner and with only one acting under distress, only that person will benefit from the effects of the unimpeachable excess, unlike the other person, who knowingly exceeded the limits of self-defense.

Therefore, it can be concluded that under the current penal regulation, self-defense falls in the category of justificatory causes and the unimpeachable self-defense excess falls under the unimpeachable causes category, so that the essential difference between the two categories of causes is the effect, which in the case of the justificatory causes extends unto the participants, whereas in the case of the unimpeachable causes it does not, in the case of committing an offense in self-defense.

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SAVIGYNA NAUJAJAME RUMUNIJOS BAUDŽIAMAJAME KODEKSE: KALTĘ ŠALINANTI PRIEŽASTIS – NEGINČYTINA PRIEŽASTIS

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Anotacija. *Straipsnyje analizuojama kaltę šalinančių aplinkybių problematika šiuo metu galiojančio Rumunijos baudžiamojo kodekso bei Baudžiamojo kodekso projekto turinyje. Nagrinėjama baudžiamosios teisės teorijoje ir teismų praktikoje egzistuojanti nekaltumo (kaltės trūkumo) bei priežastinio ryšio tarp veikos ir padarinių nebuvimo kazuso problema.*

Reikšminiai žodžiai: *savigyna, baudžiamąją atsakomybę šalinančios aplinkybės, neginčijama priežastis, naujasis Baudžiamasis kodeksas.*

SELF-DEFENSE IN THE ROMANIAN NEW PENAL CODE: REMOVING THE BLAME CAUSE AS AN UNIMPEACHABLE CAUSE

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Summary. *The elaboration, adoption and entry into force of the new Romanian Penal Code on February 1st 2014 represented a crucial moment in the legislative evolution of any state, and in Romania, like in all countries of the world, the elaboration of the new Penal Code was not simply a whim of the political will, but it was equally a corollary of the social and economic evolution of the national doctrine and jurisprudence, without disregarding the European states' jurisprudence and legislation.*

The decision of drafting a new Penal Code was based on a number of existing shortcomings in the former legislation, which were highlighted both by the practice as well as the legal doctrine. By meeting all the requirements of the European's Commission monitoring process, the new Penal Code is based on the necessity of maintaining the elements that can be salvaged from the previous Penal Code and to integrate them, based on a unitary conception, together with elements from other reference systems and from regulations adopted in the European Union, to create an area of freedom, security and justice.

With the current criminal reform, self-defense, unlike the old provision, where it represented a cause to remove the criminal nature of the offense, is part of the so-

called justificatory causes. The justificatory causes were introduced in the new Penal Code, reverting to the existing provisions in the Code of 1937, the legislator aligning the Romanian criminal legislation to the European one. The new Romanian Penal Code distinctly systematizes these causes, compared to the unimpeachable ones, at the same time emphasizing the objective nature of the former, in that they operate in rem and are transmitted to the participants as well, and the subjective, personal (in personam) nature of other causes, in that they are not transmitted unto the participants, exceptions being made only in fortuitous cases.

On the contrary, the unjustifiable nature of the act under criminal law implies that it is not permitted by the legislation, in other words, it is illegal. Thus, it is possible that an act, even if provided by the criminal law, may not be unlawful since its perpetration is permitted by a legal norm, e.g., killing a person in self-defense corresponds to the letter with the description issued by the legislator in the text incriminating murder, but the act is not unlawful in its nature, because the law authorizes it under the given circumstances. The circumstances removing the unlawful nature of an act are established by the new Penal Code as justificatory causes, which also include self-defense. The legislator also takes into account both opinions expressed in the doctrine as well as the comparative law – Article 15 of the Swiss Penal Code, Article 20 of the Spanish Penal Code, Article 122-5 of the French Penal Code, and the grave danger condition generated by the attack was waived, its gravity and that of the actions committed for its removal being judged proportionally.

The legal entity of self-defense is of particular importance to the Romanian criminal law. It has undeniable theoretical and practical implications regarding the existence of a crime or its lack thereof.

***Keywords*:** *self-defense, removing the blame, unimpeachable cause, the new Penal Code.*

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