

Areas of Reformation of the Institution of Necessary Defense in the Russian Criminal Law in the Era of Globalization

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ABSTRACT

The study is devoted to the problem of regulatory content of necessary defense in the modern Russian criminal law. It is noted that the institution of necessary defense in the modern Russian criminal law insufficiently protects the interests of the defender. The reason is the imperfection of the norms of the Criminal Code of the Russian Federation (RF CC) regulating the application of necessary defense in the conditions of non-obvious attack with the use of force or its threat, and as a result, a significant number of judgements of guilt with the punishment in the form of imprisonment for murder and grievous bodily harm in case of exceeding limits of necessary defense. It is emphasized that the institution of necessary defense needs to be improved as soon as possible to protect the interests of defender. According to the author, the unconditional circumstances for recognition of necessary defense as legal must be a threat to life and health of a citizen; invasion of privacy or violation of boundaries of the territory privately owned by citizens; response to attack in the state of heat of passion, fear or fright caused by a sudden offense.

Keywords: *criminal offense, necessary defense, life, health, housing*

1. INTRODUCTION

Current criminal situation in Russia clearly demonstrates that with general decrease in the number of crimes annually recorded by law-enforcement authorities, the number of offenses against person does not change drastically. Moreover, the indicators of criminal statistics evidence that the number of attacks on the housing of citizens that are related to the use of force or its threat with regard to law-abiding citizens annually increases. The problem of use of necessary defense and occurrence of criminal liability for exceeding is the long-standing problem of the criminal law both in Russia, and abroad [1]. Striving to preserve the life and health of oneself and people in ones' life is thought to be taken as a factor having more considerable importance than the desire of the lawmaking body to avoid making knowingly disproportionate harm to abuser by the acts of defender. In our opinion, the offender must be aware that any attack (if it is related to a threat to life or health or not) may entail the defense that can do harm being greater than that involved by the act of attack.

Unfortunately, in the current Russian legal reality, the criminal law sometimes protects the rights of abuser more carefully by prohibiting him/her to do harm that is clearly disproportionate to the nature and degree of public danger of his/her attack. At this, the protection of rights and freedoms of defender remains to some extent a subject of his/her own discretion: the law-enforcement authorities will likely defend the interests of such person only when

the case becomes commonly known to the public. The Russian current practice of inofficious conviction of persons who defended themselves is a consequence of clear and obvious imperfection of the national criminal legislation lacking a single list of circumstances that exclude the degree of crime. The objective of research is the determination of problem aspects of the Russian criminal legislation in the part of the definition of the necessary defense, and the demonstration of the ways of possible improvement of the RF CC norms regulating the application of necessary defense in practice.

2. RESEARCH METHODOLOGY

The research methodology is based on the use of the analysis method of the RF CC norms content devoted to the institution of necessary defense, comparative legal method in study of approaches to the institution of necessary defense in the American criminal law, statistical method in consideration of the litigation practice of the use of norms on murder and grievous bodily harm in case of exceeding limits of necessary defense, as well as theoretical modelling method in formulation of assumptions aimed at improving the regulatory content of the RF CC provisions.

The conducted research allowed the author to come to the following conclusions.

1. The necessary defense is considered today to be a socially useful act as it has good intention - to suppress socially-dangerous infringement, prevent grievous bodily harm, murder, misappropriation. This may be the offense committed by a person, a group of persons in collusion, criminal community, as well as a socially dangerous act of mentally defective persons or the persons under the age of criminal discretion. However, the Russian legislation on necessary defense is lacking general concepts or rules and needs to be improved for the purposes of protection of life and health of defender.

2. One of the possible solutions to problem of imperfection of the legislation on necessary defense can be extending the limits of harm with corresponding narrowing of criminal and legal warranties for abuser. The state of necessary defense is to be codified by law provided that the offense against defender was related to the act of force or its threat creating a danger to life and health of defender or other persons.

3. The prerequisite for recognition of necessary defense as legal should be attack on housing or private property of citizens. For this purposes, P. 2.1, Art. 37 of the RF CC must be supplemented with the following: "The acts of defender committed in the state of protection of his/her housing or property against infringement that does not involve explicit threat to health or life of defender or other persons are not considered as exceeding the limits of necessary defense".

Art. 37 of the RF CC defines necessary defense as infliction of harm by defender to abuser in the situation of the use of force or in case of real threat of its use. At this, P. 2, Art. 37 of the RF CC specifically stipulates that in the situations when the force itself or a threat of its use did not take place, the acts of defender are considered committed in the state of necessary defense provided that the acts undertaken by defender corresponded to a degree and nature of acts of abuser. Consequently, necessary defense means a legal defense expressed in justification of infliction of harm to offending person whose acts result in force or a threat of its use.

Practical use of necessary defense as the circumstance eliminating the criminality and punishability of the act encounters particular problems. The main problem comes down to that the legislative structure of necessary defense in the current RF CC does not contain clear criteria according to which the necessary defense in the conditions of nonobviousness of attack with the use of force or a threat of its use could be recognized as the citizen's right to self-defense, as well as unjustified qualification of the committed offense by exceeding the limits of necessary defense. The nature of criminal threat or method of response to abuser are rather detailed in the studies of the criminal law specialists in the frameworks of this problem. The studies of the foreign scientists point out that the harm done to abuser cannot be justified by the fact of necessary defense without real and clear threat [2].

According to one of the points of view given in the studies of the Russian criminal law specialists, the current RF CC could be supplemented by the norm stating: "A socially-dangerous infringement related to the use of force or a

threat of its use endangering the life and health of defender is:

- a situation inflicting harm to defender by a person or a group of persons really endangering his/her life and health, creating the danger of injuries, traumas and other damages;
- a threat of force by a person or a group of persons expressed orally or confirmed by demonstration of a weapon or items that, in the situation of attack and due to objective or subjective factors, can be treated as creating danger to life and health of defender, as well as making real the danger of injuries, traumas and other damages;
- demonstration of weapon or items and means that, in the situation of attack and in certain conditions, can be perceived by defender as a weapon creating real danger of injuries, traumas and other damages, as well as endangering the life and health of defender;
- attempt of actuation of explosive devices or other items that in the conditions of mass public events create a real threat of explosion and, as a consequence, create a real danger of injuries, traumas and other damages, as well as endanger the life and health of considerable number of citizens;
- attempt of offense against sexual freedom and sexual immunity of a person if an abuser really predominates a defender by his/her biophysical, gender, age-related or other characteristics, and the attack itself is fairly perceived by a defender as such that creates a threat to his/her honor, life and health;
- other offenses directly or indirectly related to the use of force or a threat, as well as capable of involving real danger of injuries, traumas and other damages to defender" [3].

By assessing the content of this statement, the following should be noted. Traditionally, the list of circumstances that are related to elimination of criminality and punishability of a certain act is of universal nature in the Russian criminal legislation. In this case, a certain set of case study situations that due to objective reasons cannot cover the entire variety of life circumstances the law-enforcement bodies and executors of law face in practice is offered to us. For this reason, it is not possible to agree with the assignment of some "general" list that would comprehensively define the nature of criminal threat when necessary defense becomes legal. Alternatively, such approach holds high probability of that the use of necessary defense will be unreasonably narrowed in the

situations covered by this list. Therefore, the right to necessary defense will be extremely narrow that explicitly contradicts the general principles of criminal law.

However, the statements above bring us back to aforesaid discussion in the science of criminal law that relates the issue whether a defender should foresee the nature of attack against him/her and whether he/she should pace him/herself and commensurate the methods of protection depending on the nature and situation of attack that is being committed or is planned to be committed with regard to him/her. Unfortunately, very often the situation of attack develops too fast, thus leaving too little time for a person attacked to make proper decision based on the circumstance and nature of the attack made. Also, it should be taken into account that all people are different by psychosomatic perception of reality, and light confrontation associated by some hits to each other will be perceived as something usual by one man, and as a threat to health by the other one. Correspondingly, the reaction of people in the same situation can be different: some will take the force shown as intent of endangering their health and life and will use the force in response, and the others will not take any force in response and thus provoke more dangerous violence. Besides, it should be taken into account that the purposes can change in the consciousness of abuser in the course of attack: sometimes, indifferent abuses and quarrels can grow to violence by punching the body, and even in real beating with the injury to vital organs [4].

This is the reason, we think, why we should not hope that abuser stops his/her acts or his/her offense does not inflict serious harm to defender. In our opinion, the position of G.N. Kolmakova is getting warm, namely that it is virtually impossible to foresee the acts of abuser. In view of this, all responsibility for consequences of the offense must be borne by abuser, but not defender. In other words, G.N. Kolmakova calls for presumption of innocence of defender [5].

The above makes it possible for us to formulate, at a minimum, one sentence concerning legislative definition of necessary defense given in Art. 37 of the RF CC. It seems justified that the wording of P. 1 and P. 2 of Art. 37 of the RF CC can be changed by extending the effect of necessary defense to cover the offenses not only of life but health of defender. Thus, in particular, P. 1 of Art. 37 of the RF CC should relieve a person from responsibility for doing harm to abuser in case of necessary defense if the offense against defender was related to the act of force or its threat creating a danger to life and health of defender or other persons. P. 2 of Art. 37 of the RF CC should relieve a person from responsibility for doing harm to abuser in case of no limits of necessary defense if the offense against defender was related to the act of force or its threat creating a danger to life and health of defender or other persons. Therefore, one of the possible solutions is not to extend the situations of criminal threat or introduce a list of "universal" criteria of the nature of offense against defender, but also to extend the limits of abuse with corresponding narrowing of criminal and legal warranties for abuser.

Also, it is reasonable to consider such problem as sudden offense that in itself, we think, should cover the act of necessary defense. Very often, a person could hardly ever understand not only the severity of offense against him/her or other persons but also to acknowledge that the offense has already started. His/her response having the nature of defense is very often reflexive. Its sole purpose is to make oneself and loved ones safe [6]. For this purpose, P. 2.1 of Art. 37 of the RF CC is reasonable to be supplemented by adding the following: "The acts of defender committed in the state of passion, fear or fright caused by a sudden offense that does not involve explicit threat to health or life of defender are not considered as exceeding the limits of necessary defense of defender".

It is assumed that the circumstances legitimizing necessary defense in the Russian criminal law must include invasion of privacy or violation of boundaries of the territory privately owned by citizens. The USA has rather interesting experience in this regard: invasion of housing or privacy is considered here as offense against personal immunity and assumes the right to protect the property using all available means, including weapon. Of course, such situation excludes criminal responsibility of defender [7].

One of the criteria of recognition of necessary defense as legal and absolute right of a citizen similarly with the US criminal law should be the armed attack against housing when the fact of demonstration (use) of weapon by abuser endangers life and health of a person. Probably, the prerequisite for justified use of necessary defense should be an obvious possibility of killing the citizens who live in the dwellings in the attempt of invasion of such dwelling with the use of weapon (or items simulating it). For this purpose, in our opinion, P. 2.1, Art. 37 of the RF CC must be supplemented with the following: "The acts of defender committed in the state of protection of his/her housing or property against infringement that does not involve explicit threat to health or life of defender or other persons are not considered as exceeding the limits of necessary defense".

One more circumstance that, in our opinion, should be considered as unconditional circumstance legalizing the lawfulness of use of necessary defense is the protection of citizens against unlawful encroachments during mass campaigns [8]. Surely, any such situation holds a threat to life and health of civilians, and the law-enforcement authorities rather often do not use the force and wait for order from their commanders. As a result, the situations appear in practice when harm to health and life of civilians is done due to untimely response of law-enforcement officers. It might be that in the situation of real threat to life and health of a number of citizens during mass campaigns the use of force should be possible both by the law-enforcement officers and the citizens who have to get the right to oppose abuser taking in hand a weapon or items capable of doing harm as indicated [9].

For this purpose, it is thought that P. 2.1, Art. 37 of the RF CC must be supplemented with the following: The acts of defender committed in the situation of real threat to life and health of a number of citizens during mass campaigns,

although not involving explicit threat to health or life of defender but creating a danger of doing harm to property, public order and constitutional system of the Russian Federation are also not considered as exceeding the limits of necessary defense of defender”.

Finally, the final and conclusive problem of application of legislation on necessary defense is the possibility of punishment in the form of imprisonment for death or grievous bodily harm in case of exceeding the limits of necessary defense [10]. Thus, according to forensic statistics for 2018 published on site “Forensic Statistics of the RF”, P. 1 of Art. 108 of the RF CC (Homicide Committed in Excess of the Requirements of Justifiable Defense), 221 persons were convicted, and 1 declared not guilty. Among the persons who were criminally sentenced in 2018, the measures of punishment were as follows: real imprisonment - 41 persons, suspended jail sentence - 21 persons, supervised release - 115 persons, penalty - 1 person, corrective labour - 21 persons. The statistical data for 2018 show that according to the components as stipulated by P. 1 of Art. 114 of the RF CC (Malicious Grievous Bodily Harm Committed in Excess of the Requirements of Justifiable Defense), 499 persons were convicted, while 6 persons declared not guilty. For the punishments made by the court, the situation is as follows: real imprisonment - 80 persons convicted, suspended jail sentence - 84 persons, supervised release - 151 persons, penalty - 3 persons, corrective labour - 113 persons, community service - 1 person [11]. Currently, the Russian justice is not ready to make criminal sentence in the form of penalty for homicide or grievous bodily harm committed in excess of the limits of necessary defense.

The imprisonment for a period of up to 2 years for homicide of a person who is a potential offender or performs criminal activities is thought to be unfair. In our opinion, the state does not motivate the citizens in this case to be subordinate to law and does not strengthen their trust in the court as a body being responsible for restoration of violated course of law and justice. Punishment for intentional homicide and grievous bodily harm in excess of the limits of necessary defense should provide a penalty, corrective labour for up to 1 year period or imprisonment for up to 1 year period.

3. CONCLUSION

The problem of delimitation of the criminal offense from the non-criminal, i.e. socially useful and appreciated behavior is one of the fundamental problems of the science of criminal law. Unfortunately, the Russian criminal legislation is not always capable of recognizing the defense as lawful because in practice a defender very often exceeds its limits (most often in the situations of offense not endangering the life of defender).

In its criminal law, the Russian Federation sets forth the limits of necessary defense according to which the harm done to abuser is to be proportionate to the nature and degree of public danger of the attack committed in reality. In other words, if you are attacked with thuggish force but

without explicit violence, using the firearms to kill an abuser will be disproportionate to the nature of the attack against you. And it should be remembered and taken into account that the Russian criminal law is not perfect in this aspect and does not make the fact of attack against you a prerequisite for using any means of self-defense. Such position seems to be reviewed in future, and the norms of necessary defense reformed in the part of protection of interests of defender. A criminal offender must know that he/she will meet with a lawful rebuff, and a defender must not be fear of offering such rebuff to an abuser.

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