



**Copyright:** Original content from this work may be used under the terms of the creative commons attributes 4.0 licence.

## Legal Conditions For The Lawfulness Of Necessary Defense

**Salomat Saparovna Niyozova**

Doctor Of Law, Acting Professor, Department Of Criminal Law, Criminology And Anti-Corruption, Tashkent State University Of Law, Uzbekistan

### ABSTRACT

This article discusses the issues of the terms of the necessary defense and legal conditions. In addition, the opinion of scientists on this issue was studied and the materials of judicial practice were analyzed.

### KEYWORDS

Necessary defense, Crime, Punishment, responsibility, harm, protection, rights, person, illegitimate, aggression.

### INTRODUCTION

According to the Concept of Improving the Criminal and Criminal Procedure Legislation of the Republic of Uzbekistan, over the past years, the domestic criminal and criminal procedure legislation has undergone significant changes aimed at improving its norms, implementing advanced international standards and foreign practices in order to unconditionally ensure the rights and

freedoms of citizens involved in participation in criminal proceedings.

The Concept also states that a number of problems and shortcomings remain in judicial and investigative practice, including those caused by the imperfection of certain norms of criminal and criminal procedural legislation that hinder the effective implementation of the country's criminal law policy. In particular,

there are legal gaps in the system of criminal and criminal procedural legislation that impede the effective protection of the rights, freedoms and legitimate interests of citizens, ensuring the rule of law and objectivity in the course of pre-trial and judicial proceedings in criminal cases.

The Concept in the system of criminal responsibility and punishment provides for the improvement of the rules governing the determination of circumstances precluding the criminality of an act. This suggests that the regulation of circumstances precluding criminality in the legislation of our country is weak.

Necessary defense is one of the circumstances precluding the criminality of the act. Above all, the necessary defense is a natural right. The naturalness of this right is that it is not created by the state, but is recognized and sanctioned by it.

The state, whatever it may be, will not be able to protect every citizen from criminal encroachment. Therefore, it legally provides a citizen with the right to protect his interests and secures this right at the constitutional level.

#### The Main Part

The necessary defense is the subjective right of every citizen. He can take advantage of it, avoid using it, or seek the help of others. The law cannot require citizens to protect themselves and others from unlawful encroachments.

The institution of necessary defense is an important aspect in the protection of citizens of their legal rights, freedoms and interests, in the fight against crime and its prevention.

In criminal law, the delimitation of criminal behavior from non-criminal is of great importance. Necessary defense, being non-criminal behavior, aims to prevent and suppress criminal behavior. Thus, the necessary defense is a socially useful and legitimate protection of rights and freedoms.

But, on the other hand, citizens are sometimes afraid to use this right, they are restrained by the fear of unreasonable prosecution. Indeed, in practice, the defender often acts as a suspect. A citizen, using the right to the necessary defense, must be sure that in the future he will be under the protection of the state. To do this, we need to raise the level of legal awareness of our society in the field of necessary defense.

To date, the issues of applying necessary defense have not been fully developed. It is necessary to improve the norms of the criminal law governing the institution of necessary defense.

Taking advantage of the right to the necessary defense, citizens increase their activity in countering crime. But the above facts have a negative impact on the activity of citizens in combating crime.

The Strategy of Action on five priority directions of development of the Republic of Uzbekistan in 2017-2021 is of great importance in the legal life of our state. The second priority is to ensure the rule of law and further reform of the judicial and legal system. This direction in the institute of necessary defense is of great importance. After all, it is aimed at: ensuring guarantees of reliable protection of the rights and freedoms of citizens in the activities of judicial, law enforcement and regulatory bodies; strengthening guarantees

for the implementation of citizens' rights to private property; improvement and liberalization of the norms of criminal and criminal procedure legislation; improving the efficiency of coordination of activities to combat crime.

During the preliminary investigation, unfortunately, until now, law enforcement agencies make mistakes in resolving cases related to the necessary defense.

An encroachment is the basis for a necessary defense, thus defense is a defense, that is, a response to an encroachment.

The essence of necessary defense ultimately lies in causing harm to the infringer in order to protect law enforcement benefits. But since the law equally protects all citizens, then the one who breaks the law by committing illegal acts is subject to legal protection. Therefore, harm to a person violating the law in a situation of necessary defense is strictly and strictly regulated. Failure to comply with the requirements of the law, the person defending against socially dangerous encroachment may become a criminal himself. Therefore, it is important to take into account the requirements (conditions) that apply to the person exercising the right to the necessary defense<sup>1</sup>.

Necessary defense is legitimate protection against socially dangerous encroachment on the interests of citizens and the state protected by criminal law by causing harm to

the encroaching person, subject to certain conditions<sup>2</sup>.

The necessary defense cannot be immeasurable. The intruder has his own rights. He leaves the area of protection of the criminal law when he commits a socially dangerous act. Nevertheless, if the defender exceeds the limits of necessary defense, the attacker becomes the object of protection. Protection against trespass is lawful subject to the conditions of lawfulness, which are divided into two groups: conditions of lawfulness related to the attack and conditions of lawfulness related to protection (defense).

«Necessary defense is a unity of two opposites: encroachment and defense. Each of these opposites has its own property, which is determined by the corresponding conditions. The conditions relating to the encroachment determine the state of necessary defense, and the conditions related to defense determine the lawfulness of actions to protect the affected good in the state of necessary defense»<sup>3</sup>.

S.V. Borodin believes that “the resolution of the issue of the legality of the harm caused to the attacker by the person conducting the defense depends on the nature (value) of the protected interest; the proportionality of the means of defense and attack, the intensity of the means of defense and attack; a number of other circumstances characterizing the balance of forces of the attacker and the

---

<sup>1</sup> V.V.Orekhov Necessary defense and other circumstances precluding the criminality of the act. – St. Petersburg: "Piter Publ", 2008. – P.46.

---

<sup>2</sup> V.V.Orekhov Necessary defense and other circumstances precluding the criminality of the act. - St. Petersburg: "Piter Publ", 2008. – P.44.

<sup>3</sup> Kozak V.N. The Right of Citizens to Necessary Defense. – Saratov: "Publishing house Sarat", 1972. – P.41..

defender, and the situation of encroachment"<sup>4</sup>.

In order for the defending person to have the right to the necessary defense against socially dangerous encroachment, the latter must have certain characteristics. In the doctrine of criminal law, the combination of these features is called the conditions of the legitimacy of necessary defense related to encroachment:

1) The encroachment must be valid, that is, real, and not imaginary.

The condition of the reality of the attack makes it possible to distinguish the necessary defense from the imaginary defense. Sham defense is defense against non-existent encroachment. An imaginary defense occurs as a result of the defender's mistake. "The error can be caused by an incorrect assessment of the victim's behavior, the victim's personality or the moment the assault ends"<sup>5</sup>.

"The courts must distinguish between the state of necessary defense and the so-called sham defense, when there is no real socially dangerous encroachment and the person only mistakenly assumes the existence of such an encroachment.

In cases where the situation of the incident gave reason to believe that a real attack was being made and the person who took the means of protection was not aware and could

not recognize the erroneousness of his assumption, his actions should be considered as committed in a state of necessary defense.

If a person causes harm, not realizing the fictitious encroachment, but according to the circumstances of the case should and could have been aware of this, the actions of such a person are subject to qualification under the articles of the Criminal Code, which provide for liability for harm caused by negligence<sup>6</sup>.

In the Criminal Codes of countries such as Latvia, Ukraine, Belarus, the concept of imaginary defense is given and criminal liability for the consequences of committing a crime in this state is explained.

2) The encroachment must be in cash, that is, already begun or immediately forthcoming. The law does not give us the right to use the necessary defense against the past action. Thus, the necessary defense is not allowed for future actions.

"The state of necessary defense arises not only at the very moment of a socially dangerous encroachment, but also in the presence of a real threat of attack. The state of necessary defense can also take place when the defense immediately followed the act of at least a completed encroachment, but due to the circumstances of the case, the moment of its end was not clear to the defender. The transfer of weapons or other items used in the

---

<sup>4</sup> S.V.Borodin Responsibility for murder: qualification and punishment under Russian law. — M: Jurist, 1994. — P. 93.

<sup>5</sup> Kochoi S.M. Criminal law. General and Special parts: Textbook. Short course. — M.: "CONTRACT", 2009. — P.78.

---

<sup>6</sup> Resolution of the Plenum of the Supreme Court of the Republic of Uzbekistan "On the application by courts of legislation providing the right to necessary defense against socially dangerous encroachments" dated December 20, 1996, — No39.

attack from the attacker to the defender in itself cannot indicate the end of the attack”<sup>7</sup>.

3) The attack must be illegal, unjust, and socially dangerous. The grounds for causing harm permitted by the criminal law to the infringer is the commission of a socially dangerous encroachment by him. An encroachment is only an action aimed at causing damage to interests protected by criminal law and threatening immediate harm.

Some believe that the right to the necessary defense against the insane should be excluded. In our opinion, this would contradict the very notion of necessary defense. If the attack is valid and inevitable, then it makes no difference who the attacker is: sane or insane. In turn, the defender at the moment of danger will not be able to distinguish a sane person from an insane one. Regarding this, the resolution of the Plenum of the Supreme Court gives the following explanation: “Under a socially dangerous encroachment, protection from which is permissible within the limits of Article 37 of the Criminal Code, one should understand the act provided for by the Special Part of the Criminal Code, regardless of whether the person who committed it was brought to criminal responsibility or exempted from it in connection with insanity, failure to reach the age of criminal liability or on other grounds”<sup>8</sup>.

---

<sup>7</sup> Resolution of the Plenum of the Supreme Court of the Republic of Uzbekistan "On the application by courts of legislation ensuring the right to necessary defense against socially dangerous encroachments" dated December 20, 1996, –No.39.

<sup>8</sup> Resolution of the Plenum of the Supreme Court of the Republic of Uzbekistan "On the application by courts of legislation ensuring the right to necessary defense against socially dangerous encroachments" dated December 20, 1996, –No.39.

We completely agree with A.V. Naumov, who believes that “a person who has taken all measures to evade the encroachment of an insane person (runs away, calls for help), of course, deserves moral approval, not condemnation, by his behavior, because in this case it does so not out of cowardice, but for reasons of humanism and with the utmost circumspection.”<sup>9</sup>.

For a citizen to have the right to the necessary defense, encroachment must be prohibited by the Criminal Code. Necessary defense does not work against other offenses.

“The person who provoked the attack in order to use it as a pretext for causing harm (starting a fight, committing violence, committing an act of revenge, etc.) cannot be recognized as being in a state of necessary defense. Deed in such cases must be qualified on a general basis”<sup>10</sup>.

4) The unpredictability of the attack. This condition is not included in the traditional list of conditions for the legitimacy of necessary defense. However, we decided to include it, as it is of great importance.

A.F. Koni believes in this regard: “Indeed, if the necessary defense was allowed in all cases when an attack could be foreseen in advance, then there would be a lot of abuse. So, instead of a court of public authority, which should act fairly and without being carried away, the offender would be subjected to the court of interested private persons - merciless and

---

<sup>9</sup> A.V.Naumov Russian criminal law. A common part. Lecture course. – M.: BEK, 1996. – S. 509.

<sup>10</sup> Resolution of the Plenum of the Supreme Court of the Republic of Uzbekistan "On the application by courts of legislation ensuring the right to necessary defense against socially dangerous encroachments" dated December 20, 1996, –No.39.



usually biased. Knowing that a person wants to attack me, instead of warning the public authorities about this, which could punish him for preparing for a crime, I decide to arbitrarily subdue this person myself. Aware of my strength, I wait ... finally wait for the attack I foreseen and - I strike the enemy to death. Thus, with my silence, I kind of move the enemy to a crime. In addition, if there is an opportunity to anticipate an attack, that is, there is an opportunity to prevent an attack, then there is an opportunity to prevent public authorities, that is, assistance from public authorities is possible, and, therefore, there is no longer the right of necessary defense in its true sense.<sup>11</sup>.

Conditions for the eligibility of necessary defense relating to defense:

1) Only the infringer should be harmed. Doing harm to third parties is prohibited. If a group of persons commits the attack, the defender has the right to apply to any of the attackers such protective measures that are determined by the danger and nature of the actions of the entire group."<sup>12</sup>

The same is said in the decision of the Plenum of the Supreme Court: "When an attack is committed by a group of persons, the defender has the right to apply protection measures to any of the attackers, which are determined by the danger and nature of the actions of the entire group."

<sup>11</sup> Koni A.F. On the right of necessary defense. – M.: Ostozhie, 1996. – P.73.

<sup>12</sup> Resolution of the Plenum of the Supreme Court of the Republic of Uzbekistan "On the application by courts of legislation ensuring the right to necessary defense against socially dangerous encroachments" dated December 20, 1996, – No.39.

2) The proportionality of protection to the nature and degree of public danger of the encroachment. Its object and the degree determine the nature of the encroachment - by the amount of threatening damage.

Defense must not exceed the limits of necessary defense. Exceeding the limits of necessary defense is recognized as a clear inconsistency of protection with the nature and danger of encroachment. "When deciding on the presence or absence of signs of exceeding the limits of necessary defense, the courts should take into account not only the conformity or inadequacy of the means of defense and attack, but also the nature of the danger that threatened the defender, his strength and ability to repel the encroachment, as well as all other circumstances that could influence the real balance of forces of the invader and the defender (the number of invaders and defenders, their age, physical development, the presence of weapons, the place and time of the encroachment, etc.) "<sup>13</sup>.

"Courts should keep in mind that in a state of mental agitation caused by an encroachment, the defender cannot always accurately weigh the nature of the danger and choose proportionate means of defense. The actions of the defender cannot be considered as committed in excess of the limits of necessary defense and in the case when the harm caused by him turned out to be greater than the harm prevented and that which was sufficient to prevent the attack, unless there was an obvious inconsistency of the defense

<sup>13</sup>Resolution of the Plenum of the Supreme Court of the Republic of Uzbekistan "On the application by courts of legislation ensuring the right to necessary defense against socially dangerous encroachments" dated December 20, 1996, –No.39

with the nature and danger of the encroachment"<sup>14</sup>.

Persons, who are attacked, in most cases, are in a state of fright, in a state of strong emotional excitement, that is, passion. That is why the person is not able to fully assess the current situation. In addition, you cannot demand from him to correctly measure the nature and danger of an attack. It proceeds from this that it is always necessary to take into account the mental state of the person, which was caused precisely by the encroachment.

In Holland, a person who exceeds the limits of necessary defense, if such an excess was the direct result of strong emotional agitation caused by the attack, is not subject to criminal liability. The Criminal Code of Ukraine also provides for the release from criminal liability of a person who, due to emotional excitement caused by a socially dangerous encroachment, could not assess the compliance of the harm caused to him by the danger of encroachment or the environment of protection.

If we turn to the practice of other states, then, for example, in Russia a person will be liable if the limits of necessary defense are exceeded, if the encroachment was not associated with violence dangerous to the life of the defender or another person.

According to article 987 of the Civil Code of the Republic of Uzbekistan: "Damage caused in a state of necessary defense is not subject to compensation, if its limits were not exceeded.

---

<sup>14</sup> *ibid.*

If, while defending against an unlawful attack, the defender harmed a third person, the attacker must compensate him.

The harm caused to a person in connection with the suppression of his criminal acts or his arrest and delivery to the relevant authorities is not subject to compensation".

3) Causing harm in order to protect objects protected by criminal law. The law gives us the right to defend ourselves against unlawful encroachment while protecting the individual or the rights of the defender or another person, the interests of society or the state. These are all objects of protection. It is impossible to apply the necessary defense when protecting objects not protected by law. For example, we can include narcotic drugs and so on to such objects.

4) Timeliness of defense. This condition is intertwined with the condition of cash. For the defense to be timely, the encroachment must be in cash. The necessary defense is possible during the time that the socially dangerous encroachment itself takes: from the initial to the final moment. The beginning is an attempt, and the end is the actual end of the crime.

If the above conditions are not met, the defender may become a criminal himself.

If we analyze the existing criteria of legitimacy, then we can conclude that different factors dominate in different criteria (to one degree or another) - either objective or subjective.

By objective factors, we mean signs of a situation of necessary defense that have objective, generally recognized, assessment criteria that do not depend on the subjective

opinion of a particular law enforcement officer. By subjective factors, we mean such signs of a situation of necessary defense that do not have objective generally recognized assessment criteria, and to a large extent their assessment depends on the subjective opinion of a particular law enforcement officer.<sup>15</sup>.

S.F. Milyukov asserts: "The number of conditions for the lawfulness of causing harm to the infringer should be minimal. This is primarily due to the transient and stressful nature of the defender's situation. He is not able to take into account too many factors, even if they have a certain legal significance".

The legal nature of the necessary defense is the opposite of the legal nature of the crime. The right to the necessary defense is included in natural law. By securing this right in legislation, the state grants the citizen the right to defend himself, another person, the interests of society or the state. The necessary defense is a circumstance that excludes social danger and unlawfulness, thereby, the criminality and punishment of the actions of the defender. Necessary defense is socially beneficial and precludes criminal liability if the limits of necessary defense have not been exceeded. According to the resolution of the Plenum of the Supreme Court "On the Judgment", there is no corpus delicti in acts committed in a state of necessary defense.

## CONCLUSION

Thus, the necessary defense is a legitimate defense against socially dangerous encroachment by inflicting harm on the

attacker, enshrined at the constitutional level. The purpose of the necessary defense is to protect the law-protected interests, and causing harm to the infringer in the process of its implementation is forced.

It is necessary to propagate among the population the provisions of necessary defense in the legislation of the Republic of Uzbekistan. Raising public awareness is an important aspect. Citizens should not have fear of unjustified criminal prosecution.

It is necessary to improve the level of professionalism of law enforcement agencies in the investigation of crimes related to necessary defense. Practice has shown that during the investigation the factual circumstances of the case are examined superficially.

## REFERENCES

1. V.V.Orekhov Necessary defense and other circumstances precluding the criminality of the act.– St. Petersburg: "Piter ubl", 2008. – P.46.
2. Kozak V.N. The Right of Citizens to Necessary Defense. – Saratov: "Publishing house Sarat", 1972. – P.41..
3. S.V.Borodin Responsibility for murder: qualification and punishment under Russian law. – M: Jurist, 1994. – P. 93.
4. Kochoi S.M. Criminal law. General and Special parts: Textbook. Short course. – M.: "CONTRACT", 2009. – P.78.
5. Resolution of the Plenum of the Supreme Court of the Republic of Uzbekistan "On the application by courts of legislation providing the right to necessary defense against socially dangerous encroachments" dated December 20, 1996, – No39.

<sup>15</sup>Pertsev D.V. Criminal-legal and criminological problems of necessary defense: monograph. — Kaliningrad: Publishing house of the RSU im. I. Kant, 2009. — P.102.



6. A.V.Naumov Russian criminal law. A common part. Lecture course. – M.: BEK, 1996. – S. 509.
7. Koni A.F. On the right of necessary defense. – M.: Ostozhie, 1996. – P.73.
8. Pertsev D.V. Criminal-legal and criminological problems of necessary defense: monograph. – Kaliningrad: Publishing house of the RSU im. I. Kant, 2009. – P.102.