

DEMOCRATIC ASPECTS OF THE STATE OF EXTREME NECESSITY IN THE CRIMINAL FIELD

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Abstract

The general idea behind the state of necessity as a ground for removing the criminal character of the act in criminal cases resides on the fact that the violation of the nominal criminal prohibition in order to save a legitimate interest of another is legitimate and correct.

To find out the existence of the state of extreme necessity, it is characteristic collision of two interests protected by the law, when rescue one of them is possible only by violating another. The state of extreme necessity is the direct obligation only for a certain category of persons: military, fire-fighting staff, police officers, emergency services workers, medical workers, veterans, etc.

The state of extreme necessity is one of the causes that eliminates the criminal character of the act. This article is dedicated to the study of state of extreme necessity also implying the conditions of the state of necessity regarding the danger and the rescue from danger, the overcoming of the legal limits of other state of extreme necessity and its effects.

Keywords: *state of extreme necessity, existence of imminent danger, causing injury, obstruction of legal norms, rescue*

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1. Introduction.

The current state of criminality in the Republic of Moldova is characterized by extremely negative indices. More than 30.000 criminal offenses are recorded annually, and about 60% are in the category of dangerous, particularly dangerous and exceptionally dangerous (The state of crime in the Republic of Moldova, 2018).

In such situations, when the state is unable to provide effective protection for life, health, patrimony and other public interests, it offers enough

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opportunities to its citizens to be able to afford self-protection within the limits of the law.

The Criminal Code of the Republic of Moldova for this purpose contains several causes that eliminate the criminal character of the facts. It is therefore necessary to know certain aspects of these causes and, in particular, the institution of the state of extreme necessity in order to be able to defend the values protected by the criminal law and not to be judged for an act that doesn't actually represent an offense.

Being an important topic for society, last but not least, it is also a matter of the current stage, because often there are cases when the person has to manifest himself by taking an initiative in his defense, or to defend the social values protected by the criminal law.

The state of extreme necessity presents a structure similar to the institution of legitimate defense. In the current system of criminal law the definition of the state of extreme necessity is the deed/act provided by the criminal law which, in relation to the reality of the state of extreme necessity, can not be an offense.

The purpose of this article is to investigate one of the causes which removes the criminal character of the act, exactly the state of extreme necessity that has a particular importance in the social life.

2. Applied methods and materials.

For drawing up this article we used the next methods: historical method, logical method, statistical method and comparative method. In order to study the field more extensive, we used an adequate complex of specialized literature, both in the country and abroad.

3. Basic content.

From ancient times, the person who commits an act as a result of the need to remove a serious danger either caused by people or by forcible causes can not be held liable.

The state of extreme necessity presents itself as a clash of interests protected by criminal law and occurs if the legislator admits the slaughter of less important value in favor of the most important.

By committing an act which is usually considered illicit but which was necessary to save some social values protected by the criminal law, and can not be saved otherwise, this act is considered to be committed in a state of extreme necessity.

Since antiquity, this state has been considered a cause of exoneration from responsibility of the person who committed an illicit deed for the purpose

of defending an important social value, especially this state of extreme necessity was the physiological necessity.

In canon law (*Corpus juris canonici*) was established the principle as "necessity has no law". What is illicit, necessity is lawful. On the basis of this canonical principle, the stealing thief was not punished, because the thief did not act in order to make a profit.

In the seventeenth and eighteenth centuries, the opinions of the lawyers became divided, some believing that theft of extreme necessity should not be punished, and others on the contrary believed that a punishment should be applied but easier, making exceptions only to the danger threatening the life of the person.

In Islamic law, murder could not be justified by the existence of a state of extreme necessity, considering that every person's life is equal in front the law and no one can be empowered to proceeded danger to another.

In antiquity, it was said that "there is no need for law," where the state of extreme necessity dominates, there is no room for law, the facts are not punished.

The rule of Vasile Lupu, referred to above (as well as that of Matei Basarab and Sturza's killer Condica) contained provisions regarding the failure to impose the act committed in extreme necessity: "what the wrong will do... is called wrong with deception. "

Modern criminal laws recognize the state of extreme necessity as a cause which removes the criminal character of the deed (Criminal Code of the Russian Federation - Article 39, Japan Criminal Code - Article 37, etc.). The actions related to the removal of a danger can be fulfilled by absolutely all the citizens; here it is, in fact, a right and not an obligation of them.

But there is a category of people (doctors, police officers, employees in the fire service) for whom carrying out the actions to eliminate the danger is a duty to work.

The act committed in a state of extreme necessity does not represent an offense, because it is not committed with guilt, the person acting out of necessity and not for purpose of committing an act provided by the criminal law (Botnaru, 2005: 315).

In the Criminal Code of 1961, Article 14 provided that: "A crime doesn't represent an offense which, although it meets the features of an act laid down in the Special Part of the Criminal Code, has been committed in a state of extreme necessity, that is to remove a danger threatening the interests of the Republic Moldova, the public interests of the person or the rights of that person or of other citizens, if, in the given circumstances, the danger could not be eliminated by other means and if the damage caused is less than that avoided " (Criminal Code Republic of Moldova, 1961).

The present criminal code of the Republic of Moldova in art. 38 provides: "The deed shall not represent an offense, provided by criminal law, committed in a state of extreme necessity" (Criminal Code Republic of Moldova, 2002).

According to several authors, the state of extreme necessity eliminates the criminal character of the committed deed, because the author commits the deed without guilt. Apparently, the author deliberately performs the act, but - in fact - his will is constrained by the need to remove the danger, which means that at the time of the act he didn't have the possibility to freely direct his will.

However, we can't talk about the state of extreme necessity when the person causing prejudice to interests protected by the criminal law protects his / her illegal personal interests or the illegal interests of the third person (Morega, 2013: 58).

The state of extreme necessity supposes first the emergence of the danger that causes the rescue act. Based on this, the state of extreme necessity involves two sides:

- 1) risk
- 2) rescue from danger (Botnaru, 2005: 217).

According to some authors, the danger of giving birth to the state of necessity must:

- be imminent, which is in progress or is about to emerge;
- threaten the values indicated in paragraph (2) of Article 38 of the Criminal Code of the Republic of Moldova, which includes the life, the bodily integrity or the health of the person or the other person and the public interest;
- to be inevitable, that the danger can only be eliminated by sacrificing another value protected by the law.

According to other authors the conditions regarding the danger are:

- existence of the source of danger, so that the source of danger can be a natural force, a natural calamity, a social event, a physiological or biological state or the defective mechanisms;
- the existence of the danger itself, it only means that the danger has appeared and there is still not yet passed, and causing the damage after the danger has passed, we can no longer talk about the state of extreme necessity as a cause which removes the criminal character of the deed;
- the reality;
- the danger is that the danger exists in reality not in the imagination of the person (Morega, 2013: 59).

The second side of the state of extreme necessity is the act of rescue of the values included in par. (2) of art. 38 of the Criminal Code of the Republic of Moldova, which must fulfill the following conditions:

1) to be accomplished by committing an act provided by the criminal law, that is to say essentially this act must be an offense involving both the action and the inaction of the person;

2) the act committed in the state of extreme necessity is the only way to remove the existing danger, which implies that the deed must be necessary in order to eliminate the danger threatening the values protected by the criminal law.

If the perpetrator had the chance to remove the danger by other means, without committing an act prescribed by the criminal law, he is forced to apply the other existing methods, provided he has realized them.

The rescue is considered necessary between the time the danger has become imminent and the end of the danger;

3) have not caused obviously more serious consequences than those which could have occurred if the danger was not removed, being a condition provided in art.38 par. (3) of the Criminal Code of the Republic of Moldova.

There must be a certain proportion of the damage caused and the avoidance. If it is established that the perpetrator caused more serious consequences than would have been the case if the imminent danger was not remedied, then he / she shall be liable according to the criminal law (Botnaru, 2005: 211).

Another condition of doctrinaires is that in the state of extreme necessity the damage is caused to third persons. Third persons are people who have no connection with the source of danger (Morega, 2013: 63).

Analyzing what has been said so far, we can reiterate with certainty that "the conditions of the state of extreme necessity concerning the *defense of danger* are as follows:

a) the danger can not be eliminated in circumstances, concrete conditions by other means, by other means than causing damage to another social value protected by the law. This is the maximum method, the only way to save the good. If the person succeeded in removing the danger in another way (called for help, defended himself by running away, etc.), then his actions can not be qualified as committed in a state of extreme necessity.

b) the state of extreme necessity causes damage to third persons - physical or legal, whose activity has not contributed to the creation of the danger but which have suffered as a result of the moral or physical damage caused.

c) the damage caused in the state of extreme necessity must be less than the damage that would have occurred if the danger had not been liquidated, is the value of the goods saved must be greater than the damage caused.

The law treats two kinds of damage: on the one hand, the damage caused in a state of extreme necessity, on the other - the damage that threatens to be caused by the social values protected by law, but which was avoided due to the act committed in an extreme necessity.

It follows that the state of extreme necessity can not exist if the damage caused is equal to the one avoided (for example, salvation of a person's life on account of the death of another person, rescue of his own property on account of the destruction of another foreigner having the same value, etc.)" (Macari, 2002: 241).

4. Effects and proof of the state of necessity

Determining the existence of the state of necessity has the effect of excluding the criminal character of the act provided by the criminal law and, as a consequence, the elimination of the criminal liability. In most cases, rescue work carried out in a state of necessity harms social values of people without any involvement in the triggering of the danger. Sure, there are cases when the saved social value belongs to a third person. We believe that the criteria considered by the savior can not be censored when he choosed to save some people to the detriment of others, unless some of those who were in danger were also those who had the obligation to face the danger.

And the state of necessity can compete with other causes that eliminate the criminal character of the deed, in which case the conditions of their incidence will have to be taken into account.

The state of necessity is in competition with legitimate defense if two or more people are in a common need and are forced to straighten their actions against each other.

Determining the existence of the state of necessity usually excludes any form of legal liability of the author - criminal, contravention, civil, disciplinary, etc. If the act of rescue causes damage to a third party's patrimony, the person in possession of the saved social value may be compelled to respond civilly to the victim.

If a person in need appreciates the danger dangerously, this issue is in line with the factual error.

Exceeding the limits of the state of necessity is a legally attenuating circumstance. For the attenuating circumstance of exceeding the limits of the state of necessity, all its conditions of incidence must be fulfilled, except for the obvious disproportion between the consequences of the rescue activity and those that could have occurred if the danger was not removed.

If the author realized, at the date of the rescue, that it had more serious effects than those which would have occurred in the hypothesis where he remained in passivity, although not benefiting from the effects of the state of

necessity, the attenuating circumstance is nevertheless acknowledged in his favor about exceeding the limits of the state of necessity.

In the theory of criminal law it is argued that the expression "realized that it is causing more serious consequences" must be interpreted in the sense that "it could have realized the procedure of such consequences". This attempt to extend the meaning of the analyzed expression is contrary to law, because the equivalence of the expression "realized" is the phrase "predicted".

The intention of the legislator, unequivocally expressed, was not to include in the expression "he realized" only the psychic attitudes of intention and guilt with provision, which excludes simple culpability. In the case of direct intent, that is to say, when the perpetrator realized that the act of salvation would produce obviously more serious consequences than those which would have occurred had the danger not been removed and pursued the act of salvation to protect the lower social value, we believe that the state of necessity can not be incriminated (Hotca, 2007: 319-320).

5. Damage caused by committing deed in a state of extreme urgency

Between legitimate defense and the state of extreme necessity there are many common features, the research of which allows us, to differentiate between them, because these institutions are very often used in judicial practice.

The actions of legitimate defense and the state of extreme necessity aim at rejecting a danger that threatens the interests of the state and society. Both institutions have the same legal character, namely: exclude criminal punishment.

At the same time, these institutions differ greatly from one another.

The first difference lies in the nature of the danger. Legitimate defense may be a socially dangerous assault on the part of a person, while the state of extreme necessity results from a danger created by both the phenomena of nature and the behavior of people, their state, of events that do not depend on the will of man and which have an accidental character.

The damage to legitimate defenses is caused by the person attacking, while at the extreme need the damage is caused to others. In the case of legitimate defense, the action taken to reject the attack is not the only means, while at the extreme need only certain values can be saved by these actions. Also, the damage of the attacker may be greater than the danger avoided and can not be surrendered, while in the extreme necessity the damage caused must be less and, in some cases, can be equal but in no more case the damage being repayable (Borodac, 1994: 45).

Concerning *"the damage caused in the case of a state of extreme necessity follows to be repaired by the injured party or by the third party in whose interest he has acted*, according to Article 1402 of the Civil Code of the

Republic of Moldova, the damage caused by a person in an extreme necessity is to be repaired by it.

Taking into consideration the circumstances in which the damage was caused, the court may impose on the third party the remedy in whose interest the injured party acted or may exempt from the obligation to repair, in whole or in part, both the injured party and the third person. Damage caused by extinguishing or locating a fire will be repaired by the fireman " (Borodac, 2005: 289).

Finally, the lack of exceeding the legal limits of the state of extreme necessity is a mandatory condition for the lawfulness of actions committed in a state of extreme necessity. In general, this overcoming of the legal limitations of the extreme necessity can occur by failing one or more conditions required by the law, which, in relation to the concrete circumstances of the case, makes the act an offense, implying the criminal responsibility of the author.

Taking into account the doctrine of criminal law and in particular the Criminal Code of the Republic of Moldova, art. 38, we can highlight some situations characteristic of overcoming the legal limits of the state of extreme necessity:

- when there is a clear inconsistency between the damage caused and the character, the degree of the existing danger, the circumstances in which the danger was removed;
- when the damage caused is equal to the one avoided;
- when the damage caused is greater than that avoided;
- when there is a real possibility to remove the existing danger by other means.

Existence of the state of extreme necessity under the conditions required by the law has the effect of removing the criminal character of the committed act in order to rescue from danger.

Conclusions and recommendations

The state of extreme necessity has been known since the ancient times. In present, all citizens have the right and even the duty to act in a state of extreme necessity.

Through this institution, the values set out in Article 38, paragraph 2 of the Criminal Code of the Republic of Moldova, which are the life, health and body integrity of the latter as well as of another person, are defended by the state of extreme necessity. And the conditions in which the state of extreme necessity falls are:

- existence of the source of danger;
- the existence of the danger itself;
- the reality of the danger;

- the danger must be imminent;
- the danger must threaten the values indicated in Article 38 paragraph 2 of the Criminal Code of the Republic of Moldova;
- danger must be inevitable;

The conditions for the rescue operation are:

- the rescue act must be an act provided for by the criminal law;
- the act committed in the necessity of being the only way to remove;
- not to cause more serious damage than if the danger was not avoided;

Analyzing the conditions of the state of extreme necessity, we propose to modify art.38 of the Criminal Code of the Republic of Moldova, according to the criminal code of Romania regarding the state of extreme necessity by introducing in this article besides the salvation of his life, his bodily integrity or his health and of another person the rescue of an important asset of himself or of another person.

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