



THE CONCEPT AND CHARACTERISTICS OF THE NECESSARY DEFENSE

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Article history:	Abstract:
Received: March 10 th 2022 Accepted: April 10 th 2022 Published: May 22 th 2022	This scientific article discusses the concept and characteristics of the necessary defense. In addition, there is a subjective and objective side to the study of the necessary defense, and appropriate recommendations have been developed based on the analysis of the results of scientific research
Keywords: Concept, characteristic, necessary defense, criminal law, subjective, objective, composition, forensic investigation, against a person, crimes	

According to the Concept of improving the Criminal and Criminal Procedure legislation of the Republic of Uzbekistan, over the past years, 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 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 procedure 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 procedure legislation that hinder the effective protection of the rights, freedoms and legitimate interests of citizens, ensuring legality and objectivity during pre-trial and judicial proceedings in criminal cases.

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

The necessary defense is one of the circumstances precluding the criminality of the act. First of 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 grants the right to a citizen to protect his interests and enshrines this right at the constitutional level.

The necessary defense is the subjective right of every citizen. He can use it, avoid using it, or resort to 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 legitimate rights, freedoms and interests, in the fight against crime and its prevention.

In criminal law, it is of great importance to distinguish criminal behavior from non-criminal behavior. The necessary defense, being an unapproachable behavior, is aimed at preventing and suppressing 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 unjustified criminal 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 protected by 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 the use of the necessary defense have not been fully developed. It is necessary to improve the norms of the criminal law regulating the institution of necessary defense.

Using the right to the necessary defense, citizens increase their activity in countering crime. But the above facts negatively affect the activity of citizens in countering crime.

The Strategy of Actions in the five priority areas 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 citizens' rights and freedoms in the activities of judicial, law enforcement and regulatory bodies; strengthening guarantees of the realization of citizens' rights to private property; improving and liberalizing the norms of criminal and criminal procedure legislation; improving the



effectiveness of coordination of activities to combat crime.

At the preliminary investigation, unfortunately, law enforcement agencies still make mistakes in resolving cases related to the necessary defense.

As our President Shavkat Mirziyoyev says: "When evaluating the activities of state bodies and officials, the main criterion for us should be how the rule of law is ensured, the rights and freedoms of citizens are protected, how high-quality and accessible public services are to the population. It is not the people who serve the state bodies, but the state bodies should serve the people"¹.

"No one, except the state, should have and has no right to punish. A citizen cannot assume the role of a punisher, and if he can, he has the right to harm an attacker only for self-defense"².

In criminal law, one of the main problems today is the delineation of criminal behavior from non-criminal.

The necessary defense, being socially useful, is included in the unapproachable behavior. The necessary defense excludes criminal liability due to the absence of corpus delicti.

From birth, a person has such a feeling as self-preservation. The right to the necessary defense is an inalienable right of every person and is included in the natural law. Therefore, such a right is not created by the State itself, it is recognized by the State and is reflected in legislation.

The founder of the concept of "natural law" John Locke has always argued that natural law will never be abolished, because people cannot repeal this law, because they are subject to it, and subjects cannot change laws at will³.

According to A.F.Koni: "Due to the desire for self-preservation, a person tries to avoid danger and takes all measures to avert it; - he has the right to this, which should be considered as innate"⁴.

The right of necessary defense gives citizens ample opportunities to fight crime independently, without stopping even before causing physical harm to the attacker. The provision of such an opportunity by law contributes significantly to the active participation of citizens in the fight against crime and is one of the

means of preventing crimes, because a criminal who knows about the right of a citizen to actively defend himself from an attack can abandon his criminal intentions, not without reason fearing to meet a decisive rebuff⁵.

According to A. A.Lakeev, none of the acts committed under circumstances precluding their criminality is useful, because in any case, objectively, it brings this or that harm to society as a whole or to its individual representatives. However, the State is forced to grant or authorize citizens the right to cause harm. This is due to the need to guarantee the natural right of citizens to life and health or to ensure the achievement of certain socially useful goals⁶.

The necessary defense is essential in strengthening law and order and public security.

For citizens, the exercise of necessary defense is a right, not an obligation. If they want to, they can exercise this right in action. At the same time, for a certain category of persons, the implementation of the necessary defense and, above all, the protection of state, public interests and the interests of other citizens is a legal obligation.

The defending person uses force against the impending danger, thereby protecting his rights and preserving his interests.

V.V.Merkuryev gives several definitions to the concept of "necessary defense":

Necessary defense is an independent action based solely on the will of the person who was attacked, and does not depend on the activities of the authorities, as well as the ability to evade the encroachment in any other way, without harming the encroaching;

The necessary defense is a legitimate defense against socially dangerous encroachment by harming the attacker;

The necessary defense is a criminal law institution that regulates the right of citizens to protection from socially dangerous encroachments, the most important socially significant interests, among which human life, health and freedom are of exceptional social value and it is not by chance that they occupy the first place in the criminal law norm⁷.

¹Speech at the inauguration ceremony of the President of the Republic of Uzbekistan at a joint session of the chambers of the Oliy Majlis. - Tashkent: "Uzbekistan" NMIU, 2016. - p.45.

² Koni A.F. On the right of necessary defense. — M.: Ostozhye, 1996. — p.47.

³ Locke D. Experience about the law of nature. Essays in three volumes: Vol. 3. — Moscow: Mysl, 1988. — p. 46.

⁴Koni A.F. On the right of necessary defense. — M.: Ostozhye, 1996. — p.2.

⁵ Yakubov A. S., Kabulov R. et al. Criminal law. General part: Textbook. — T.: Academy of the Ministry of Internal Affairs of the Republic of Uzbekistan, 2004. — p. 305

⁶ Lakeyev A.A. Type: monograph. - Ryazan, 2003. - S.113.

⁷ Merkuriev V.V. The composition of the necessary defense. — St. Petersburg: "Law Center Press", 2004. — p.8



To begin with, let's look at what the words "necessary" and "defense" mean. Defense, according to the Explanatory Dictionary of the Russian language by S. I. Ozhegov, is a set of means necessary to repel the enemy⁸. And necessary means one that cannot be dispensed with, necessary⁹.

The right to the necessary defense, first of all, is a constitutional right. Article 27 of the Constitution of our country states: "Everyone has the right to protection from attacks on his honor and dignity, interference in his private life, the inviolability of his home." Thus, in order to protect their rights, the State grants citizens the right to the necessary defense and enshrines this right at the constitutional level.

The action of a person with the necessary defense is not a crime. "An act is recognized as criminal if it has signs of criminal wrongfulness (illegality), public danger, guilt and punishability. The absence of any of these signs means the absence of criminality of the act. None of the listed signs of criminal will exists with the necessary defense: the activity of the defender is determined only by the desire to protect law-enforcement interests from the threat of unlawful danger; since there is no public danger here, legally necessary defense is an action that is not a crime. So, considering the fact that an action performed in a state of necessary defense is devoid of all these four signs of a crime, it is not a crime"¹⁰.

The right to necessary defense is enshrined in article 37 of the Criminal Code of the Republic of Uzbekistan: "An action committed in a state of necessary defense, that is, when protecting the person or rights of the defender or another person, the interests of society or the state from unlawful encroachment by causing harm to the encroaching person, if the limits of necessary defense were not exceeded.

Exceeding the limits of the necessary defense is recognized as a clear discrepancy between the nature of protection and the danger of encroachment.

The right to the necessary defense belongs to a person regardless of the opportunity to seek help from other persons or authorities or to avoid encroachment in another way.

Deliberate provocation of an encroachment with the aim of causing harm is not a necessary defense."

Article 37 of the Criminal Code does not require flight from an attack. "Some courts mistakenly proceed from the fact that a person who has been attacked does not have the right to actively defend himself if he has the opportunity to escape, seek help from citizens, government officials, or choose any other methods that do not have the character of active counteraction to the assailant"¹¹.

Article 37 of the Criminal Code of the Republic of Uzbekistan also gives the right to the necessary defense not only in protecting oneself, but also in protecting another person. A person may not always have sufficient strength to defend himself. And in this case, the law presupposes assistance to a person who defends his right from another person. At such moments, the helping person acts within the law and enjoys the right to the necessary defense, given by the Criminal Code. In such cases, the victim's consent to the defense is not necessary.

The state of necessary defense arises not only in the presence of an encroachment on the life and health of the defender or other persons, but also in the protection of other rights, including property rights.

Speaking about the right of ownership, it is necessary to pay attention to Article 53 of the Constitution of the Republic of Uzbekistan: "Private property, along with other forms of property, is inviolable and protected by the state.

"A.F.Koni states: "Taking away, for example, a thing from the owner, I thereby attack his personality. And in relation to the individual, the necessary defense must be allowed"¹².

The necessary defense is unacceptable against legitimate actions of law enforcement agencies. And if an official abuses power or exceeds his authority, then the person has the right to the necessary defense.

Regarding the legality of the use of the necessary defense, scientists were divided into two camps. While some believe that a person should be given the right to the necessary defense, others argue that the state should not give its citizens the right to use the necessary defense.

For example, B.T.Razgildiev states: "It is quite obvious that the actions of a person in a state of necessary defense, extreme necessity, causing harm when

⁸ Russian Russian Dictionary, S. I. Ozhegov, Moscow: Russian language, 1987, p. 327.

⁹ Ibid. — p. 348.

¹⁰ Merkur'yev V.V. The composition of the necessary defense. — St. Petersburg: "Law Center Press", 2004. — p.36.

¹¹ 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.

¹² Koni A.F. On the right of necessary defense. — M.: Ostozhye, 1996. — p.53.



detaining a criminal are socially useful. It is this circumstance that should be fixed in the relevant criminal law norms"¹³.

V.I.Mikhailov, speaking against granting a person the right to use the necessary defense, states: "It cannot be considered socially useful to deprive another person of life, even if he himself threatened death to another. To agree with such a provision means to reject the principle that human life is the highest value, and the individual, his material interests, rights and freedoms are dominant in the system of values protected by law"¹⁴.

No State can guarantee complete human security. Therefore, each country should give its citizens the right to the necessary defense, that is, to self-defense. The purpose of the necessary defense is the protection of law-enforcement interests, and the infliction of harm to the encroaching person in the process of its implementation is of a forced nature.

I.E.Zvecharovsky and Yu . The seagull is celebrated: "In a state of defense, the interests of the encroaching person are "removed" from criminal protection by his own encroachment; the "offense", without excluding objective, personalized danger for a particular encroaching person, does not contain a sign of public danger, since the actions of the defender are permissible and permitted by the law itself, and the harm is no longer caused to the right as such"¹⁵.

The necessary defense is a circumstance that excludes public danger and illegality, and, consequently, criminality and punishability of the defender's actions. Although these actions formally fall under the signs of an act provided for by criminal law, in fact they are socially useful, since they serve the interests of preventing and suppressing crimes.

V.V.Merkuryev singled out the composition of the necessary defense. According to him, the composition of the necessary defense is what constitutes the defensive activity of the defender, undertaken in response to a socially dangerous encroachment. Its clear definition helps to distinguish legitimate defense, on the one hand, from a grave or especially grave crime against a person, and on the other — from a crime committed when exceeding the limits of necessary defense. He also gives the following, more complete

definition: the composition of the necessary defense is a differentiated legal fact-state, which is a system of interrelated and interacting features that characterize its object, objective side, subject, subjective side, the presence of which forms the legal basis for excluding criminal liability for harm caused to the encroaching person.

Any dynamic purposefully operating social system, including crime and punishment, encroachment and necessary defense, has in its composition such elements as object, objective side, subject, subjective side¹⁶.

An object in the general philosophical sense is something that opposes the subject in its actual activity. The subject is the carrier of subject-practical activity and cognition, the source of activity directed at the object. The very same subject-practical and cognitive activity acquires the property of the objective side in the social system, with the help of which the subject influences the object. The subjective side in such a system characterizes the human factor, revealing consciousness, psychology, inner world, motives, goals and emotions of a person acting on an object or acting as a kind of object of influence, but within another system. These elements perform such functions while being part of almost any social system, regardless of its nature. Consequently, the allocation of the necessary defense as relatively independent elements of the object, subject, objective and subjective sides is methodologically not only possible, but also necessary¹⁷.

The object of the necessary defense should be considered public relations protected by criminal law, providing a set of benefits (interests of the individual, society or the state)¹⁸.

The objective side of the necessary defense, according to V.V.Merkuryev, is the external side of a criminal conflict arising as a result of socially dangerous activities of individuals, which initiates the emergence of a state of necessary defense.

Consequently, the objective side of the necessary defense consists of the following signs:

- 1) socially dangerous encroachment, which is the basis of the necessary defense;
- 2) lawful violent actions of the defender, forcibly carried out by him to protect the individual, her rights and

¹³ Razgildiev B. T. Socially useful acts provided for by the Criminal Code // *Legality*. 1993. No. 12. p. 19.

¹⁴ Mikhailov V. I. On the socio-legal aspect of the content of circumstances excluding the criminality of the act // *State and law*. 1995. No. 12. p. 63.

¹⁵ Zvecharovsky I., Chaika Yu. Legislative regulation of the Institute of necessary defense // *Legality*. 1995. No. 8. p. 34.

¹⁶ Merkuryev V. V. The composition of the necessary defense. — St. Petersburg: "Law Center Press", 2004. — p.11.

¹⁷ Merkuryev V. V. The composition of the necessary defense. — St. Petersburg: "Law Center Press", 2004. — pp.50-51.

¹⁸ Ibid. — p.85.



legitimate interests, the rights and legitimate interests of other persons, the legally protected interests of society or the state from socially dangerous encroachment;

3) the means (harm caused to the encroaching person) by which the actions of the defender achieve the necessary result is the elimination of the danger threatening legal benefits;

4) the situation of a criminal situation.

The causal relationship between the actions of the defender and the consequences of the necessary defense acts as a mandatory sign of the objective side of the necessary defense. The absence of such a connection excludes proceedings in cases of this category, since in this case the actions of the defender lose their significance in the criminal-legal sense¹⁹.

A subject of necessary defense is a sane individual who has reached a certain age of criminal responsibility, who is able to realize the fact of encroachment and defend himself meaningfully, who has performed socially useful actions in protecting the personality and rights of the defender, other persons, society or the state and has caused harm to the encroaching person, commensurate with the nature and degree of public danger of encroachment. Due to the lawful nature of these actions, such a person is not subject to criminal liability²⁰.

A mandatory feature of the subjective side, according to V.V.Merkuryev, is the purpose of the behavior of the subject of defense: the protection of the personality and rights of the defender or other persons, the interests of society or the state protected by law.

Other signs of the subjective side of the general composition of the necessary defense, for example, the motive and emotions of the defender, are optional. Optional signs of the subjective side, in our opinion, include the guilt of the encroaching person, which in a certain situation affects the subject of defense and determines the nature of the public danger of encroachment²¹.

¹⁹ Merkuryev V. V. The composition of the necessary defense. — St. Petersburg: "Law Center Press", 2004. — pp.116-117.

²⁰ Ibid. — p.148

²¹ Merkuryev V. V. The composition of the necessary defense. — St. Petersburg: "Law Center Press", 2004. — pp.202-203.