„NICOLAE TITULESCU" UNIVERSITY

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DOCTORAL SCHOOL

PHD THESIS

SELF-DEFENSE AND PROVOCATION IN THE REGULATION OF THE NEW CRIMINAL CODE . CONNECTIONS IN THEORY AND JUDICIAL PRACTICE

SUMMARY

SCIENTIFIC COODINATOR

Prof. univ. dr. VASILE DOBRINOIU

PHD STUDENT

HĂRĂTĂU LAMYA – DIANA

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By this work, we intend to investigate self-defence and excuse of instigation, representing one of the most important institutions ruled by the legislator of Criminal code since antiquity.

The institution of self-defence is closely related to the theory of offence, since its incidence entails the removal of criminal nature of act and, consequently, the removal of criminal liability. We appreciate that from this perspective the study of self-defence must be refined. The fact that in jurisprudence it has been noticed in time that the courts have faced difficulties in enforcing sometimes self-defence in certain cases determined us to perform a complex analysis of the conditions that must be met in this respect, since the contradictory solutions passed sometimes affected the liberty of individual.

Also, the selection of the object of study of this work relied as well on the similarities existent between the institution of self-defence, justifying cause and non-imputability and the institution of legal mitigating circumstances, more exactly, of the excuse of instigation. We have showed that these apparent similarities may sometimes create confusions in solving some cases, therefore, we have considered beneficial and opportune the analysis including of the conditions of enforcement of the excuse of instigation.

We have also approached in an exhaustive manner issues presenting difficulties of enforcement on practical level such as those related to the existence or inexistence of premeditation of defence in self-defence, of the existence of mutual self-defence, of self-defence to self-defence, of deviated riposte in case of defence, as well as of defence on fault in case of attack.

The scientific demarche undertaken by analysing the excuse of instigation considered controversial issues both in practice and in the doctrine related to co-existence of recidivism with the excuse of instigation, of self-defence with the

excuse of instigation as well as of instigation on fault or instigation with premeditation.

Not less important for this study is the comparative and detailed analysis of the institutions of self-defence and excuse of instigation made in the light of the international disposals of 42 states from Europe, Asia, Africa and United States of America.

The new Criminal Code rules self-defence in article 19 general part.

According to this article:

(1) It is justified the act stipulated by criminal code committed in self-defence.

(2) It is in self-defence the individual committing the act in order to remove a material, direct, immediate and unfair attack, which endangers its person, a third party, their rights or a general interest, if defence is proportional with the gravity of attack.

(3) It is presumed to be in self-defence, under the conditions of paragraph (2), the one who commits the act to reject the entry of an individual in a dwelling, room, appurtenance or surrounded place thereof, without right, by violence, ruse, effraction or other similar illegal means or during the night.

According to the most important opinions expressed in the doctrine of Romanian criminal law, the need of ruling the institution of self-defence relied on the reality of social life expressed by the existence of some extreme situations, when the rule of law is troubled pursuant to an aggression of an individual over another and when, only by immediate riposte it is possible to remove the attack and reinstate the lawful order violated by the aggressor.

On the other hand however, in situations of conflict, even when these are caused or accompanied by illicit conducts, no one is allowed to administer justice

by itself, to turn to acts or procedures incompatible to rule of law to protect the legitimate interests, against the individuals with who are in conflict. Therefore, ”the only way to riposte would be to turn to the intervention of competent bodies to reinstate the rule of law. However, the same reality of social life proved that the salvation from a danger threatening the individual is not possible but by an action of immediate defence, committed by the one in danger or by other individuals coming on time to help”.

Until the new ruling of self defence, in the doctrine it was accepted that the right to defence does not result from the disposals of law, stipulating self-defence, since neither self-defence, nor the other causes excluding the criminal nature of act entitles anyone to breach the law. Moreover, the inexistence of fault and of criminal liability, in case of act committed in self-defence is not the consequence of any natural or legally created right, but of the fact that the one in self-defence is forced by immediate need to defend, to act for the rejection of attack.

It is deemed that, regardless the degree of legal coercion exercised by attack over consciousness and will of perpetrator, it is obvious, in the opinion of the author, that its reaction does not meet the condition of a guilty intent, that is of a criminal deceit characterized by animus nocendi, but that of a conscious attitude of self-defence characterized by animus defendendi and that this subjective position, far from expressing a state of anti-sociability, manifests both as a normal psychical reaction of any individual facing a serious danger.

There have been authors that interpreted the institution of self-defence in ruling the prior Criminal Code as having a character socially useful since by this it is rejected an unfair attack, representing an offence. And this opinion was rejected as it cannot be deemed useful from a social perspective the kill or serious harm of an individual, even aggressing individual. Therefore, the act committed in self-defence is harmful for the society, and the removal of guilt does not rely on a

claimed social utility, but on the absence of freedom of action of the one under the threat of attack.

We add to the foregoing as well the idea of some specialists according to which, in the contents of self-defence it is circumscribed as well the protection of goods, however, according to the European Convention of Human Rights, this protection is limited, meaning that the protection of a good cannot justify the impairment of the right to life of the aggressor.

An issue that preoccupied the jurists was that of explaining the basis on which self-defence relies, as a cause removing the criminal nature of the act.

As showed in the older foreign doctrine, in justifying self-defence in time, different opinions and theories have been emphasized such as the theory of natural law (naturalis ratio permittit se defendere) or it has been stated that the reaction by force to an aggression would be generated by the nature of things.

In the light of the rulings existent in the prior criminal code, self-defence relied on the idea that the action of committing the act stipulated by criminal law was determined by the moral coercion by impossibility of free determination of the will of the one who answers to an attack.

In this conception, self-defence represents a cause for removing guilt, the act continuing to represent an act stipulated by criminal law.

In the legal literature under the prior criminal code, prof. Vintilă Dongoroz outlined that there were authors stating that self-defence is a right, a justifying cause and thus, there cannot be an illicit conduct, there is not fault when an individual exercises a right, when it claims a justifying cause. The professor rejected this argument stating that ”the act stipulated by criminal law committed in self-defence is committed without fault, but not because the individual who performed the defence would be entitled to commit that act, but because the perpetrator, under the pressure of coercion exercised by the need to defend lacked

the possibility to determine and freely manage its will; or, without this possibility, there is no fault or offence.

The new criminal code supports the opinion which considers self-defence a justifying cause.

As outlined in the doctrine, the controversy related to the base of self-defence was to end upon the enforcement of the new criminal code which includes self-defence among the justifying causes.

In the older Romanian legal literature, prof. I. Tanoviceanu, referring to the institution of self-defence, the justifying cause removing the offence, stated that the perpetrator of an act committed in self defence may say after committing the act ”feci sed iure feci” meaning ”I was entitled to do this”

Opposite to the ruling of prior Criminal Code, in the ruling of the new criminal code, self-defence is argued otherwise that in the prior approaches (natural law), being acknowledged on legal plan that under certain conditions, the legal order may allow to any individual to defend itself by force when subject to an aggression, to reinstate thus the rule of law breached by the aggressor.

Prof. George Antoniu, performing a detailed analysis of art.15 par.(1), referring to the unjustified nature of act as essential trait of crime, shows that this trait is an innovation of the new criminal code, the legislator wanting to express by this that the absence of justifying causes “would represent”, on its turn, an essential trait of offence.

Such a trait is not stipulated by the prior criminal code in art.17 considering that such Code did not rule the institution of justifying causes and the doctrine denied the use of this concept on the consideration that there is no difference between these justifying causes and the causes that remove the criminal nature of act ruled by the disposals of art.44 – 51 prior criminal code.

The unjustified nature of act stipulated by criminal law involves that it is not allowed by legal order. However, it is possible that such an act committed does not become illicit, since committing it in actual case is allowed by a legal norm (justifying causes). For instance, committing of homicide in self-defence.

As outlined in the doctrine, the common element of justifying causes "is that the perpetrator, although aware of the effects and consequences of act, does not proceed because it follows an advantage, a personal interest etc., but because it is determined by the situation, state, pre-existent circumstance that justifies the committing of incriminated act.

It was outlined that the operation by which it is appreciated whether the criminal act, under the conditions, states, actual circumstances of being committed have or not an illicit nature is known in specialised literature under the name of anti-juridicity.

The justifying causes appear in legal plan as having a double signification: on the one hand they have the nature of a permissive norm expressing the tolerance of the rule of law overall opposite to an act which corresponds to a legal model determined, but, at the same time, it has also a nature of protection of upper social values promoted by legal order overall, implicitly of social values appeared and developed around such values.

The justifying causes may be defined as being those situations ruled by criminal law in the presence of which an act conform to a norm of incrimination, ceases to be in contradiction with the superior legal order becoming allowed. The appearance of such a conflict cannot allow but the saving of one such value, the law providing priority to the value unfairly attacked by the aggressor.

In our opinion, the act committed in self-defence looses the nature of offence by that it is allowed by the rule of law. If self-defence is deemed a right, then its justified nature would no longer encounter place among its essential traits.

This work deals as well with the analysis of the object of self-defence, an issue approached in time, expressing in this respect several perspectives.

Platon for instance, states that ”anyone who attempts to the decency of a free woman or son of family, will be killed without punishment by the one abused, by his/her father, children or brothers. The man who catches someone raping his woman is authorised by law to kill him”.

In Romania, it was allowed to kill the individual who attempted to chastity, the riposte being assimilated to self-defence. In Romania it was allowed as well self-defence only related to the individual, and not to goods, however the riposte cannot have as effect homicide or even bodily injury. Simultaneously, it is showed that sometimes riposte is possible as well for the attack not committed against the riposting individual.

In the canonic law, it is restricted the right of self-defence to life and body integrity. The patrimony was protected only in the situation when by attack the individual is endangered as well (it was provided as example the theft during the night). A special status was assigned to the goods with a certain value or difficult to be ”regained”.

In the old French law, it is allowed both the protection of life, and the defence of honour or fortune, and, in order to produce effects, self-defence was on the discretion of the king.

In the work of prof. Tanoviceanu quoted by us, are enumerated some of the great criminalists of Europe of XV century, namely Farinaceu, Jul Clarus, Carpzow, Domhauder who considered the existence of self-defence as well in the situation when riposte is determined by the condition of protecting patrimony.

The riposte is admitted as well against the one who watched the victim.

Other objects of self-defence were also considered life, body integrity and fortune. Self-defence may be exercised related to fortune for one year since illicit stealing the goods, the riposte being violent as well for regaining such goods.

Even in Germany, by Visigoth law, besides life, health and honour, another object of self-defence was also the property of individual.

In the law of XVII century however, the owner was not allowed to kill the one attempting to his goods even in self-defence.

In 1673 it was printed a short-form of the work ”Le droit de la nature et des gens” stating that: ”the goods may be protected up to killing the thief, except for a thing of small importance, which doesn’t worth the trouble to hasten to save it. Indeed, the goods are absolutely necessary to be preserved by us and the one who wants to take it unfairly from someone, does not prove to be less enemy if directly attempting to its life. But, in a civil society, where one may ask for the help of magistrate, to regain what has been stolen, no one is allowed, as a general rule, the permission to protect expressly the goods, except for the cases when there is no hope that the thief is summoned. Therefore, it is allowed to kill a thief highway, a night thief, a pirate.”

The same position was adopted in the Hungarian law as well, the property being as well object of self-defence. prof. Tanoviceanu showed in his work that in the criminal law from England, Germany, Hungarian Kingdom, Russia, Switzerland, Sweden, Norway, Netherlands, Japan, the self-defence had as object life, honour, freedom, goods.

And in our older doctrine, V. Dongoroz stated that self-defence should produce effects as well when the attack is directed towards the fortune.

Nowadays, in the modern criminal law, the object of self-defence is represented only by social values protected by criminal law, enumerated by art. 19 par. (2) Criminal code.

The work has approached as well the issue of excuse of instigation.

The excuse of instigation, both in the ruling of the actual criminal code, and in the ruling of the future criminal code, is a general mitigating circumstance for committing any crime under the conditions stipulated by law.

The legislator considered to award this excuse to the criminal instigated because the instigation pushed him to offence, since it its absence, it wouldn't have been committed.

Awarding the excuse of instigation by legislator has also a scientific support meaning that it is medically proved that the state of strong trouble or emotion of the subject determines the power of inhibition of the psychical forces of it entering in the process of determination of the will to commit the act.

Due to its specificity, the excuse of instigation could be confused with self-defence, however the two institutions are radically different from a juridical perspective. Thus, if instigation is only a simple mitigating excuse self-defence in the light of the new criminal code is a justifying cause removing the criminal nature of the act committed.

In terms of the contents of the two institutions, self-defence appears as a defence against an imminent attack or in progress of execution but not consumed, whereas, in case of instigation, we are in the presence of a revenge reaction, of punishment of instigator after its instigation.

On the other hand, the instigating act does not have the intensity, the nature or legal conditions of an attack against which self-defence is admitted. And in the hypothesis when the instigating act could meet the conditions of self-defence, the riposte of the instigated individual could not be deemed self-defence since it was done pursuant to the consumption of attack that is it was directed towards a past attack.

Authors of older criminal law considered instigation as part of the right to defence, explaining thus the reduction of punishment.

It was stated that the one instigated was not protected against punishment, but the punishment should be less drastic since it was supposed that he acted to defend himself, and not to harm himself, or the one instigated committed the offence ”more to defend than to attack”. However, the criminal is not considered to be the one guilty for committing the crime since the instigation itself causes him a state that determines the riposte in such a manner.

Pursuant to analysing the conditions of existence of self-defence and of excuse of instigation, based on comparing the two texts of law, it resulted that between these two institutions of criminal law existed both similarities and differences.

- Among the **similarities**, we identified:

A). If self-defence, as justifying cause, removes the criminal nature of act and consequently the criminal liability, the excuse of instigation has also an influence over criminal liability, meaning that it does not remove but reduces it.

B). The non-incumbent excess of self-defence removes the criminal nature of act based on producing a strong trouble or fear leading to overcoming the defence proportional to the gravity of danger and circumstances of attack. The excuse of instigation is incident and reduces criminal liability when the act stipulated by criminal law was committed under a strong trouble or emotion determined by an instigation caused by the harmed individual, therefore, for both institutions to be incident in an actual cause, the legislator stipulated a condition referring to the internal psychical processes of individual, committing the act stipulated by criminal law.

C). Both in self-defence, when one defends himself against a material attack and in instigating when one ripostes, these are determined by violent actions.

D). Both in the case of self-defence, and instigation, the acts of violence against them must be unfair.

- Among the **differences**, we identified:

A). Self-defence is a justifying cause/of non-imputability and related to the institution of crime, whereas the excuse of instigation is related to the institution of punishment.

B). If self-defence may be presumed in terms of law, the excuse of instigation cannot be presumed, being proved completely during the criminal trial.

C). If self-defence may be incident only in case of violent actions (material attack), the instigation may be incident as well by a serious impairment of the dignity of individual or by another serious illicit action.

D). If self-defence may be incident in case of non-imputable excess, the instigation may be incident only in case of excusable excess.

E). Moment of riposte – whereas instigation involves a started attack, self-defence produces before the attack is started and always before the attack is consumed.

Between self-defence and mediating circumstance of instigation, there is as well a strong correlation, meaning that, in several cases encountered in judicial practice when the courts deemed that the conditions of non-imputable excess were not met they applied the excuse of instigation:

For instance, the High Court of Cassation and Justice decided in 2006 that, if the defendant committed an act of homicide against the victim, after his attack consisting in punches ceased, the conditions of self-defence stipulated by the former art. 44 par. (2) were not met, the current art. 19 new criminal code, s.n., since, on the one hand, the conditions of an immediate attack are not met, and, on

the other hand, the attack of the victim does not present a risk threatening seriously the life of defendant, the means used by the victim in its attack not being meant to justify the riposte of defendant. In this case, are incident however the disposals of the former art. 73 lett. b), the current art. 75 par. (1) lett. a) new criminal code s.n., since the defendant committed the act of homicide under the conditions of a strong emotion and trouble caused by the aggressive manner of acting of the victim.

Similarly, the High Court decided in 2009 that, firstly, self-defence involves that the material, direct and unfair attack for the removal of which the individual commits an act stipulated by criminal law, is immediate - imminent or current. It is not in self-defence the individual committing the act stipulated by criminal law pursuant to elapsing an interval from the consumption of attack, while the victim was running, since the attack was neither imminent nor current. Secondly, the legal mitigating circumstance of instigation involves the committing of crime under a strong trouble or emotion, determined by an instigation of the harmed individual, and not other third party, by violence, by serious impairment of dignity or by another serious illicit action. Consequently, we share the opinion that the legal mitigating circumstance of instigation cannot be considered if the perpetrator did not have the certitude that violence was exercised by the harmed individual.

The delimitation of self-defence from the excuse of instigation may be deducted as well from the comparative analysis of the two texts of law.

Firstly, is has to be noticed that in case of both institutions, the riposte is determined by violent actions against the one who defends himself or the one instigated. If in case of self-defence, defence is against a violent material attack which ***seriously endangers*** (according to former criminal code, s.n.) the individual or rights of the one attacked or the public interest, in case of the excuse of instigation, the legislator speaks only about **violence** without stating other things, as in case of self-defence. Consequently, it may be concluded that what delimits

self-defence from the excuse of instigation is the **intensity of violence**, **of the means by which it is produced and circumstances** of happening.

Thus, if the acts of violence **did not endanger** the individual or rights of the one attacked and one riposted by committing an act stipulated by criminal law in this situation we are no longer in the presence of self-defence, but eventually in the presence of excuse of instigation. Consequently, **the intensity** of the acts of violence in committing the attack and their risk regardless the form of manifestation is that it makes difference between self-defence and instigation. If the acts of violence do not present an intensity or risk of seriously endangering under actual conditions of committing the act the individual or the rights of the one attacked, we do not deal with self-defence.

For instance, the High Court of Cassation and Justice decided in 2004 that the act of an individual of entering in the home of the former concubine, of insisting to resume the cohabitation, grabbing her clothes and tearing it, followed by punching in face her husband interfering to defend the woman does not represent an attack meant to seriously endanger its person. The riposte of the woman's husband of hitting in head by hatchet the aggressor does not meet, under this aspect, the conditions of self-defence by overcoming the limits due to trouble or fear, stipulated by the former art. 44 par. (2) and (3), current art. 19 new criminal code s.n., due to the lack of gravity of risk caused by the attack of the victim. In such a situation, we consider as well incident the disposals of the former art. 73 lett. b), the current art. 75 par.(1) lett.a) s.n., the act being committed under a strong trouble determined by the instigation of the harmed individual, produced by violence.

Another common element of the two institutions and which delimits self-defence from the excuse of instigation consists in committing the act stipulated by

criminal law pursuant to some reactions appeared in the psychical processes of the individual attacked or instigated.

In case of justified self-defence, the legislator asks for the condition that committing the act stipulated by criminal law is the consequence of trouble or fear determining the overcoming of a defence proportional to the gravity of risk and circumstances of attack, whereas in case of excuse of instigation, the act stipulated by criminal law was committed under a trouble or emotion. In case of the excuse of instigation, it must be noticed that the legislator no longer speaks about fears as in case of self-defence, but about emotions.

This differentiation marks in our opinion the difference between justified self-defence and excuse of instigation.

If in case of justified self-defence the one who defends himself overcomes the proportion between attack and defence, this is due to the dread or fear determined by the material attack endangering his life being scared, in case of excuse of instigation, the challenging individual by violent action surprises the instigated individual creating it not a fear but an emotion based on which it ripostes by committing a fact stipulated by criminal law.

Considering these psychical processes already explained, we notice that the excuse of instigation derives from non-accomplishment of the conditions concerning the justified excess in case of self-defence.

Thus, if the overcome of the limits of a proportional defence is not owed to a state of trouble or fear, caused by attack, then we are no longer dealing with self-defence.

It is possible that the attack has not caused a state of trouble or fear but due to surprising the one attacked, the latter ripostes by committing a crime under an emotion created by what happened, therefore, there may be incident the disposals related to the excuse of instigation.

Since not all individuals are similar in terms of internal feelings, it results that certain acts of violence no matter how small may produce different effects, depending on the category of the individual instigated.

The legislator, speaking in case of the excuse of instigation about committing a crime under a **strong trouble or emotion**, admits that this institution will be selectively incident, that is not for any trouble or emotion, but only when noticed that they were strong. Thus, if the violent act did not cause in the psyche of the individual a strong trouble or emotion, the disposals of art. 76 par. (1) lett. a) will not be incident.

The work has dealt as well with analysing some special situations related to self-defence and the excuse of instigation. I have analysed self-defence as well from ECHR perspective.

Our research has approached as well the presentation of the ruling of self-defence and excuse of instigation from the perspective of 42 states of the world such as from Europe, Asia, Africa, and United States of America.

Eventually, pursuant to this complex analysis of the two institutions I have drawn up conclusions, and proposals of lege ferenda.

- As noticed that on practical level, one approached some issues related to existence or inexistence of premeditation of defence in case of self-defence, existence of mutual self-defence, of self-defence to self-defence, of deviated riposte in case of self-defence, as well as of defence on fault in case of attack, of co-existence of recidivism with the excuse of instigation, of self-defence with the excuse of instigation, as well as of instigation on fault or instigation with premeditation, we consider that our scientific demarche brings an important contribution to the theoretical and practical activity of delimiting it, given the high number of opinions expressed in specialised literature, many of them share by us as well.

• Analysing self-defence from the perspective of European Court of Human Rights in construing the disposals incident from the European Convention of Human Rights we have noticed that Romania has a defective legislation when used armed force by the ***agent of authority*** in case of self-defence, as well as in the situation of using it in case of a revolt, therefore, we have considered to draft was well a proposal of lege ferenda in this respect.

• In this study, we have analysed comparatively and in detail the institutions of self-defence and excuse of instigation in the light of international disposals of 41 states from Europe, Asia, Africa and United States of America. Consequently, we have drawn up the following conclusions:

• In the countries the legislation of which we have presented, we haven't encountered the bipartite classification (justificatory and non-imputable causes, for self-defence) removing the crime or the criminal nature of act, except for Belgium where self-defence is included among the justificatory clauses.

• When stating the conditions of attack, in no country is stated the materiality of the attack, which in our opinion leaves place for interpretation.

• In the legislation of some states, in case of self-defence, among the values endangered by the attack the goods of individual are included as well, assertion absent in our legislation, the values protected being related to the attributes of natural person.

• In some countries, (Malta and Grand Duchy of Luxembourg) self-defence is ruled based on crimes against life, health and body integrity.

• Not all countries mentioned in our study rule self-defence presumed or committed during night whereas other countries have a much more consistent ruling opposite to that from our legislation in terms of "presumed self-defence".

- Not in all countries analyses we encounter a complete ruling of ”justified excess” and ”excusable excess” in the field of self-defence, and consequences of overcoming self-defence in such situations.
- In some countries, we have encountered very important ruling in the field of self-defence, and consequences of overcoming its limits.
- The institution of self-defence is ruled in all countries analysed being universal, and with some nuances specific to each country.
- Considering some countries, we appreciate that the ruling of self-defence in Romanian criminal code is superior, but perfectible in terms with some ECHR situations and requirements.
- The United States of America have both distinct and similar ruling to that of other countries, including Romania, the American legislator making a distinction between force and armed force used to riposte, imposing sometimes as well the obligation of withdrawal of victim, of avoiding the riposte against the attack. Another ruling is also stipulating expressly that self-defence is not enforced if the attack is the consequence of instigation of the victim that has riposted.

In the process of improvement of Romanian criminal legislation related to the ruling of self-defence or excuse of instigation, we appreciate that few proposals of lege ferenda may be considered.

- Related to the act of defence committed on fault which may be done in case of self-defence.

As already mentioned, it was supported the idea in the doctrine according to which as long as the justification is allowed and considers in principle a defence and a deliberate result, this however would not remove the same justification in case of a faulty result.

We appreciate as well that the contents of art. 19 par. (2) of new criminal code is controversial since the formulation of the legislator ”the act that removed an attack” entails the interpretation that the act committed in defence must be deliberate.

As outlined, an extensive interpretation of this formulation would not be however opportune, it must be understood strictly namely as action to be committed in order to remove an attack, and not as act overall. As shown before, even a judgement of the former Supreme Court admitted self-defence even in case of praeterintentionate defence.

Therefore, we propose lege ferenda to amend the legal text in the version ”*act to remove an attack committed deliberately or on fault*”, this being opportune for the legislator to harmonise these different perspectives related to this interpretation.

• Considering that the European Court of Human Rights outlined constantly by the judgements passed that the legislation of Romania includes deep lacunae related to clear rulings and without equivoque concerning the use of armed force by the ***agent of authority*** in case of self-defence, as well as upon using force in case of revolt, we consider necessary to elaborate a proposal of lege ferenda in this respect. Thus, we consider that such mentions should be expressly stipulated by legislator in a future ruling by a special law to avoid confusions or distinct means of interpretation and enforcement of the disposals concerning self-defence in the above circumstances.

• Considering the apparent (putative) self-defence as we have expressed our point of view in analysing the conditions of attack in the contents of the work, and as we have noticed as well that in the Latvian Criminal Code the legislator expressly ruled such a circumstance, we appreciate to make a proposal of lege

ferenda for putative self-defence, debated however in our doctrine, is expressly stipulated as well by our criminal code.

We provide as example here the situation when ”apparent” attack comes from an individual threateningly handling a rubber snake or any other instrument, but who has all attributes to be considered by the victim a real one. In this situation we consider that the riposte of the victim is in self-defence even the attack was apparent.

- As shown in the section dedicated to self-defence in special situations, un there is a point of controversy in the situation when the victim of an attack may avoid the riposte by running, or by asking for the aid of a third party/authority. We have already expressed our opinion that although in a given situation such circumstances may appear, they will not exclude self-defence if the one attacked chooses to riposte.

Moreover, even the legislator of criminal code from Armenia, in the contents of par. (3) stipulates that the individual is entitled to riposte in self defence although it has the possibility to avoid the attack or ask for the help of another individual or authority, regardless is statute or official position of it.

Considering that this circumstance is expressly ruled as well by other criminal legislations, for instance Armenia, Estonia, in order to unify the disputes from the doctrine related to the existence or inexistence of self-defence in such situations, we express our intention to make a new proposal of lege ferenda so this disposal is included in art. 19 of Romanian criminal code.

- The most interesting ruling is that of the criminal code of the Great Duchy of Luxembourg. The legislator stipulated an innovation from our point of view, consisting in that self-defence is not applicable if the perpetrator committed

the crime-riposte against its parents or other legitimate ascendants, or against its natural parents.

We support this disposal and we propose de lege ferenda to be adopted by the Romanian criminal legislator in the same form, given the high number of crimes committed in Romania in the last years against parents or other ascendants, the perpetrators using sometime this justifying cause. We agree with the interest and protection that the legislator from Luxembourg awards to them by such legal disposals.

- Related to admitting the instigation on fault in the doctrine several points of view were expressed already presented in the work.

We consider that as long as the act of instigation, even committed on fault on subjective plan, was able to produce a strong trouble to the victim, considering such legal mitigation is incident.

Consequently, in order to unify the doctrine disputes expressed in this respect, we consider opportune the amendment of the legal text referring to the subjective element of the instigating act, meaning that it may appear both in the form of intention and fault. Thus, both the doctrine, and practice of courts will be uniform in solving such cases.

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