

Elimination of Criminal Sanctions in a Forced Defense that Transgresses Limits as a Form of Justice

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Elimination of Criminal Sanctions in a Forced Defense that Transgresses Limits as a Form of Justice

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Abstract

The aim of the article is to prove that not all criminal acts can be punished. There is a rule that states if someone commits a crime for reasons of compulsion that exceeds the limit, it cannot be punished. The urgency of this research is that justice must be upheld, therefore criminals who commit crimes for reasons of *Noodweer Excesses* must be protected and given the opportunity for their rights as citizens to get justice in accordance with existing rules.. This research is a type of normative legal research. Normative research is a process to find the rule of law, legal principles, and legal doctrines to answer the legal issues faced. The form of justice can be seen in the fulfillment of the elements of Article 49 Paragraph 2 of the Criminal Code regarding forced defense that exceeds the limit: the existence of a great mental shock due to attacks carried out by witnesses, causing the forced defense transgresses the limit. The act of defense is balanced with the attack that is threatened. Severe mental agitation is not only limited to *asthenische affecten* as in the form of anxiety, fear, or helplessness, but is a *sthenische affecten* such as anger, wrath or irritation and the consequences of turning self-defense into an attack and excessive or at least using drastical or disproportionate efforts. There is a threat of attack and an ongoing attack or danger is still threatening.

I. Introduction

This article proposes that an approach that is centered on the realization of a sense of justice for perpetrators who commit criminal acts of persecution due to forced reasons that exceed the limit must obtain their rights in accordance with the provisions in the criminal law code which is the basis of positive law in force in Indonesia, which states that a person cannot be convicted for reasons of compulsion that exceed the limit.

Criminal acts are one of the aspects regulated by criminal law in addition to criminal liability and criminal procedures. Criminal acts and criminal liability

are included in the scope of material criminal law, while criminal procedures are included in the scope of formal law. To determine a criminal act, we adhere to the principle of legality, the principle that determines that each criminal act must be determined according to the provisions of the law (Article 1 paragraph (1) of the Criminal Code) or at least by a legal rule that already exists and applies to the defendant before people can be prosecuted for being convicted for their actions.

However, in a forced defense that goes beyond the limits of using a proof system that lies in the fulfilment of the elements in the provisions of Articles of Law Number 1 of 1946 concerning the Criminal Code, the principle of balance in self-defense is excluded when there is a "psychical shock" for a person who conduct self-defense so that the self-defense carried out exceeds the limit (Noodweer exces) as described in the Criminal Code 49 pagraph 2.

Criminal procedural law aims to make suspects or defendants can understand their rights and obligations and can improve the attitude of law enforcement implementers by their respective functions and authorities when carrying out their duties (Samosir, C. D., 2018) Duties and functions in criminal procedural law through tools of its completeness is to seek and find facts according to the truth, conduct appropriate legal prosecutions, apply the law fairly, and implement decisions fairly (Poernomo, B., 1988) (Hidayat et al., 2022)

One form of actions that gets a criminal abolition is an action taken by someone in order to protect himself or others of an emergency threat. Self-defense in a state of emergency (nood-weer) is regulated in Article 49 of the Criminal Code paragraph (1) which reads:

"Whoever commits an act which he is compelled to do to defend himself or another person to defend his own honor or property or property of another from a person who violates the rights and designs immediately at that time shall not be punished" Paragraph (2) reads: "The force defense being exceeding the limit, which is directly caused by a severe mental shock due to the attack or the threat of the attack, is not punished"

Criminal justice employs a system where both the accused and the victim are in some ways marginalized during the various stages of the legal process (Leonard, 2022). Some indeterminacy results from the key standards of necessity and proportionality, concepts that leave ample room for diverse opinions in particular cases. Other sources of uncertainty can be traced to differing interpretations of the events that would permit a forcible defensive action (Schachter, 1989)

Criminal justice employs a system where both the accused and the victim are in some ways marginalized during the various stages of the legal process. This article argues that an approach which focuses on restoring the victims and the offender should be considered (Leonard, 2022)

Regarding the judge's decision on the forced defense case related to these circumstances, this case is Noodweer excesses (excessive defense), excessive defense that was forced to be carried out by the perpetrator since he was harassed. However, due to that his defense caused the perpetrator seriously injured made him charged with criminal persecution but the judge's decision No. 72/Pid.B/2020/PN acquitted the defendant of the charges tried at the Enrekang

District Court, as there was a forced defense that exceeded the limit which was an excuse for forgiveness.

The aim of this research is to find out the imposition of sanctions for perpetrators of self-defense who exceed the limit (*Noodweer Excess*) based on decision No. 72/Pid.B/2020/PN Enr in order to realize the value of justice.

2. Research Method

This research is a type of normative legal research. Normative research is a process to find the rule of law, legal principles, and legal doctrines to answer the legal issues faced (Wibowo, A. M, Sukarmi, S. & Hamidah, S., 2019).(Hidayat et al., 2022). It can be used more than one approach to research. While collecting materials research carried out by studying the data relating to the problems which are obtained from secondary data supported by the primary data in the form of interviews with informants, secondary data is data obtained from library materials (Arrohim & Wahyuningsih, 2020)

3. Results and Discussion

1) Result

Criminal process has yielded an amazing thread of scholarship involving a variety of academic disciplines, linking various topics, offering interesting insights on many criminal justice institutions and phenomena.(Aviram, 2011). In Decision Number 72/Pid.B/2020/PN Enr, the judge has decided that the defendant is proven to have committed the act he was charged with but there is a forced defense that exceeds the limit which is an excuse for forgiveness. Criminal charges by the Public Prosecutor against the defendant in Decision Number 72/Pid.B/2020/PN Enr based on the results of the victim's visum et repertum where the results are as follows: On the top of the head there is a torn wound measuring six times zero point five times zero point five centimeters, looks swollen, bruised and there is blood around the wound. There are no abnormalities on the face. On the body, there were abrasions on the right shoulder and left shoulder, lacerations on the back and abrasions on the buttocks. On the upper part of the left arm there were abrasions. At the bottom there are no abnormalities.

Based on the results of the visum et repertum above, the conclusion is that from the results of the physical examination carried out on the victim, we conclude that it is clear what happened to the victim as a result of contact with a blunt object. The defendant's actions as regulated and threatened with criminality in Article 351 Paragraph (1) of the Criminal Code The defendant did not have any motive or purpose for the victim, it was just that the victim committed an immoral act that made the defendant angry so that there was a forced defense that went beyond the limits carried out by the defendant.

Due to the condition that noodweer excesses have been fulfilled and based on such circumstances, the Panel of Judges considers that the act

committed by the defendant is a "forced defense that exceeds the limit" as stipulated in Article 49 paragraph (2) of the Criminal Code. Even though the Defendant's actions are still against the law or remain a criminal act as regulated in Article 351 paragraph (1) of the Criminal Code, but because it is proven that there is a forced defense that exceeds the limits (*noodweer axces*) for the Defendant, there is excuse which erases the guilt of the Defendant so that the Defendant cannot be sentenced. Literally, the reason for not being sentenced to a person who carried out a forced defense that went beyond the limit, the legislators considered it fair if the perpetrator who faced such an attack was not punished. This is based on the adagium *non tam ira, quam causa irae excusat* which means action for a provocative attack is forgiven.

Based on the explanation above, it can be seen that an attack or threat of attack can affect the inner nature of the other person or the person being attacked. The inner influence can be in the form of extreme anger, extreme annoyance, extreme fear, great confusion and others, which in this situation it is understandable and knowable by everyone if the person commits an act that exceeds the limit as long as it is necessary to defend against an attack or threat of attack against him. In that state of great mental agitation, one cannot and does not have time to think. Another effort more is worthy and balanced on the attack, the defense seemed like a spontaneous reaction. This privilege is basically an exception to the emergency defense in the first verse, which lies in the great agitation of the soul (*bevinge gemoedsbweging*).

In the event of a criminal act, the perpetrator still has human rights attached to him. On the other hand, however, other commentators and activists hold the exact opposite opinion. They argue that the Court often does not do enough to help protecting and effectively implement human rights in a consistent and principled manner (Tsarapatsanis, 2021)

In the formulation of Article 49 paragraph 2, it can be concluded that the cause of the great mental shock is an attack or threat of an unlawful attack against its legal interests. So here there is a causal relationship between attack or threat of attack and severe mental agitation. What kind of attack or threat of attack or what size of attack or threat of attack can directly cause the severe mental shock? It can not be determined in general terms, but based on the case of the event, whether from the concrete event according to reason and experience of people in general can immediately cause a great mental shock or not? So here it is casuistic. A great agitation of the soul must be seen in the minds of people in general in certain concrete cases. If according to normal people's minds in general, the attack or threat of attack can cause a great mental shock, then there is a great mental shock.

Article 351 paragraph (1) reads, "Malmage is punishable by a maximum imprisonment of two years and eight months or a maximum fine of four thousand five hundred rupiah". Article 351 paragraph (3) reads, "If it results in death, it is punishable by a maximum imprisonment of seven years". Article 49 paragraph (2) reads, "A forced defense that exceeds the limit, which is directly caused by severe mental shock due to the attack or threat of attack, is not

punished". There are several articles demanded by the Public Prosecutor to the Defendant, but in the end the legal facts obtained in the trial, became the judge's consideration that the defendant's actions could be forgiven because the element of *noodweer excess* or the forced defense exceeded the limits was fulfilled, in this case that the defendant experienced a great mental shock when the victim abused his honor, so that the Defendant was forced to go beyond the limit after making other self-defense efforts.

There are similarities between a forced defense (*noodweer*) in Article 49 paragraph (1) of the Criminal Code and a forced defense that exceeds the limit (*noodweer excess*) in Article 49 paragraph (2) of the Criminal Code, both of which require an attack against the law and those who are defended also have something in common like body, honor, decency, and property, both for themselves and for others. However, there is a difference between the two, if a forced defense (*noodweer*) is the basis for justification; this is because it is against the law. Meanwhile, the forced defense that goes beyond the limits (*noodweer excesses*), is the basis for forgiveness. Although in reality sometimes in discussing criminal procedural law specifically relating to human rights, there is a tendency to explore matters relating to the rights of the suspect without regard to the rights of the victim (Susanti et al., 2019)

Sanctions given to people who have murdered under forced circumstances or *Overmacht* are protected by Article 48 of the Criminal Code, which reads: Whoever has committed an act under the influence of a coercive condition. It means that in a situation that is beyond human capacity, and it threatens his life or his own life, in a state of stress that cannot be resisted, or in a situation where there is no way out other than doing this, and it can be proven, then the person is legally free and gets criminal abolition. Even though there is the principle of *Lex specialis derogat legi generali*, they are still forgiven in a state of urgency. (Mahendra & Tantimin, 2022) A criminal act committed by a person is not merely the act that can be punished. Committing a crime can be based on an urgent need, someone's orders, and protecting himself. In practice, all the reasons committed by the perpetrators of criminal acts must be sanctioned, seeing that there are actions that have legal consequences so that they can be accounted for (Anak Agung Gede Agung et al., 2021)

With this initial distinction between sociological and moral legitimacy in place, some additional remarks are in order. To begin with, the concept of legitimacy appears flexible enough to be applicable to a wide range of different entities. These may include some particular institution, a set of related institutions forming a regime or system, and piecemeal political decisions. Secondly, since the sociological and the moral concepts of legitimacy are not coextensive, an institution might lack sociological legitimacy but possess moral legitimacy and vice versa. Likewise, a legitimate institution in any of the two senses might issue an illegitimate decision and vice versa. Thirdly, it appears that legitimacy in Laws 2021, 10, 77 14 See Article 46(1) ECHR.

6 of 23 both senses can come in varying degrees. To begin with, it is clearly the case that a belief regarding an institution's right to rule or the moral appropriateness of its decisions can vary among subjects. They can also be held with degrees of robustness. In a similar if somewhat more controversial vein, moral legitimacy also appears to be a matter of degree. It is common place to distinguish between moral legitimacy and justice as different, albeit perhaps related, dimensions of moral evaluation of political institutions (Kyritsis 2018, pp. 7–10). In particular, legitimacy is widely thought to be a less stringent requirement than justice. This entails that a relatively unjust regime may nonetheless be legitimate. Moreover, political institutions may differ with respect to the degree to which they realize justice. Such institutions would then be deemed legitimate as regards their right to rule subjects, but not equally legitimate. The regime or institution that is more just has a superior claim to legitimacy than the less just one. Hence, in this view, moral legitimacy would be a scalar concept. Last, even though sociological and moral legitimacy are different concepts, they are connected in various ways. This is mainly because a certain degree of sociological legitimacy of an institution or regime might be important for its moral legitimacy. In the absence of sociological legitimacy, a reasonably just regime could become unstable and end up by being replaced by a less just or even unjust regime. Conversely, the moral legitimacy of an institution or regime that is confidently and publicly ascertained by subjects might also tend to foster its sociological legitimacy and hence its stability.(Tsarapatsanis, 2021)

2. Discussion

One result of studying the way crime is defined and handled in different jurisdictions by legislatures, criminal agencies and the media (and others) is to the discover-yet-again-the crucial need to relate the study of crime to that of criminal justice. (Nelken 2012 Ch5 Ox Hdbk.Pdf, n.d.) Crime is a human act that is against the law, which deserves to be punished and done wrong. Crime is a violation of norms (disruption to the rule of law) that has been intentionally or unintentionally committed against an offender, where the imposition of law on the perpetrator is for the sake of maintaining legal order and guaranteeing legal interests. The definition of a criminal act is not found in the laws and regulations in Indonesia. The definition of a crime that has been understood so far is a theoretical creation of criminal law experts who still include the " schuld " error as part of the definition of a criminal act.(Suardika et al., n.d.)

Judges are one of the important elements in law enforcement and justice. Consequently, judges may not refuse to examine, hear, and decide on a case brought on the pretext that the law does not exist or is not clear. The law cannot be complete, the law is only one stage in the process of forming the law and we are forced to look for completeness in the practice of law judges. Judges must have the ability of *rechtsvinding* with interpretations and be adjusted to the norms, principles, and beliefs of the applicable law and be responsive to every growth of law. In every decision, the judge must include legal considerations.

The panel of judges considers the facts revealed during the trial, starting from the indictment, demands, exceptions from the defendant which are connected with evidence that meets formal requirements and material requirements, which are presented in evidence, *pledoi*. The legal considerations also include articles of legal regulations that are used as the basis for the decision. Thus, the decisions to be made can be based on a sense of responsibility, fairness, wisdom, professionalism and are objective. According to Rusli Muhammad, the judge's legal considerations are divided into two: *First*, Juridical Considerations, considerations based on juridical facts revealed in the trial and the Act stipulated as things that must be included in the decision. The matters referred to are among others: 1) the Indictment of the Public Prosecutor; 2) Statement of the Defendant; 3) Witness testimony; 4) Evidence; 5) Articles in the Criminal Law Regulations. *Second*, non-juridical considerations such as 1) the background of the defendant; 2) Consequences of the Defendant's Actions; 3) The Defendant's Personal Condition; 4) Defendant's Religion (Gumelar, 2021). The conflict perspective supplies a format to test for inequality in the legal system (Problems, 2016)

From the formulation of Article 49 paragraph 1 of the Criminal Code, two important things can be analyzed, they are:

a. Elements regarding the conditions for a forced defense

The defense must be carried out because it is very forced, to overcome any attack or threat of immediate attack that is against the law. Attacks or threats of attacks which are aimed at 3 legal interests are legal interests over the body, honor, decency, and own or other people's property. It must be done when there is a threat of attack and the attack is ongoing or danger is still threatening. The act of defense must be balanced with the attack that is threatened.

b. The element in what (kind of) the defense is forced. In the case of defending himself or others, it also means that the attack is of a nature and is directed at the physical or human body. In the case of defending the honor of decency, it means that the attack is aimed at the honor of decency, and in the case of defending one's own property or the property of others; it means that the attack is directed at the property or material.

The actions of people who meet the elements of article 49 paragraph 1 above, in fact meet the formulation of certain criminal acts, can be persecution (351) for example in the form of hitting a man who is trying to rape a woman, it can even take the form of murder (338), for example the police shot dead a robber at a bank who by using a firearm had strafed an officer who was trying to arrest him with a shot that could kill the Criminal Code. However, on the basis of a forced defense, the act which is in fact contrary to the law has lost its unlawful nature; therefore the maker is not punished. Here is a justification.

The principle of balance in self-defense above is excluded when there is a "mental shock" for someone who is defending himself so that the self-defense carried out exceeds the limit (*noodweer exces*) as described in 49 paragraph 2 of the Criminal Code.

However, there are different interpretations of the meaning of "soul shaking". Prof. Satochid Kartanegara interprets with a very stressful mental state,

Tiraamidjaja interprets with "very soul movement", Utrecht interprets with "very hot feelings", and marapaung interprets with "in abnormal thinking conditions

Due to differences in interpretation, it can be explained that the element of *Noodweer excesses* is exceeding the required defense limit, this can happen because the tools used to defend themselves are tougher than they should be or the party being attacked actually has the opportunity to escape, but he chooses to defend himself, defend themselves, and there was a great mental shock.

R. Soesilo gave an example of an "emergency defense that went beyond the limits due to a mental shock" as referred to in the Criminal Code 49 paragraph 2 as follows "For example, a police agent who saw his wife being raped by someone, then pulled out his gun and fired it several times at the person, one might say he overstepped the bounds of emergency defense, since usually it does not need need to shoot a few times when the person had stopped what he was doing and fled. If it can be stated to the judge that it is permissible to exceed these limits due to extreme anger, then the police agent cannot be punished for his actions. The causal relationship between the attack and mental shock as explained above, that forced defense that exceeds the limit, even though it harms others and cannot eliminate the nature of breaking the law, but in the event of a mental shock, it can be a justification or excuse for forgiveness which can abolish the criminal, so that those who defend themselves can be free from lawsuits.

If so far the attention to the perpetrators of criminal acts is not too significant because the priority is more on the victim. Then in cases of forced defense that exceeds the limit, it is necessary to re-observe the position of the perpetrator and the victim. For most of the twentieth century the role of the victim within the criminal process has been peripheral at best (Dignan & Cavadino, 2017). Most of us would probably agree that we ought to protect the invisible victims just mentioned. Many would also nod approvingly to ideas saying that states, or Governments, or other authorities ought to stop stealing fines, and instead let the poor victim receive this money. We at least would approve such an arrangement, but We will not go into that problem area here and now. Material compensation is not what We have in mind with the formulation "conflicts as property". It is the conflict itself that represents the most interesting property taken away, not the goods originally taken away from the victim, or given back to him. In our types of society, conflicts are scarcer than property and they are immensely more valuable. They are valuable in several ways. Let's start at the societal level, since here We have already presented the necessary fragments of analysis that might allow us to see what the problem is. Highly industrialized societies face major problems in organizing their members in ways such that a decent quota takes part in any activity at all. Segmentation according to age and sex can be seen as shrewd methods for segregation. Participation is such a scarcity that insiders create monopolies against outsiders, particularly with regard to work. In this perspective, it will easily be seen that conflicts represent a potential for activity, for participation. Modern criminal control systems represent one of the many cases of lost opportunities for involving citizens in tasks that are of immediate importance to them. Ours is a society of task-monopolists (Christie, 1977).

Therefore, as previously explained that the honor of decency according to the Hoge Raad January 8, 1917 includes feelings of sexual shame, because the Defendant is proven to be sexually normal, of course the sudden hug and kiss from Witness Eko Patrio is a form of attack on the Defendant. Moreover, in accordance with the legal facts at trial the Defendant and the Witness explained that prior to this incident; the two had never had any problems or disagreements. Thus, the Panel of Judges assessed that based on the agreement between the statements of the Witness and the statements of the Defendant and observations at the trial, there was an indication that without a cause, it was impossible for the Defendant to beat the Witness. It is very clear that the attack is an unlawful act where decency and propriety in society, the act of kissing someone without consent and suddenly being added again by same-sex lovers is not recognized. Thus, the first requirement of *noodweer excess* according to the Panel of Judges has been fulfilled.

Furthermore, in the second condition, there must be a great mental shock due to the attack so that the defense is forced to exceed the limit. Hazewinkel Suringa explained that severe mental shock is not only limited to *asthenische affecten* such as in the form of anxiety, fear, or helplessness, but is a *sthenische affecten* such as anger, wrath or irritation and the consequences of that as the forms of *noodweer excess* that have been described previously then change self-defense becomes an attack and is excessive or at least uses drastical or disproportional efforts.

Although there are differences between the parties, namely the perpetrator and the victim, the Panel of Judges considers that there are similarities in the fact that there were events committed by the Witness to the Defendant. As explained in the first condition, that the kiss was an attack on the honor of decency and against the law against the Defendant, and made the Defendant feel threatened so that the Defendant defended himself with an attack by hitting the Witness using a piece of wood excessively and disproportionately made Witnesses sick and injured. Therefore, from the description, the Panel of Judges assessed that the conditions for the two *noodweer excesses* had been met. However, according to the facts at trial, it was known that even though the Defendant had abused the Witness, the Defendant through his family had gone to the Witness to apologize.

Because the two conditions for *noodweer excesses* have been met and based on such circumstances, the Panel of Judges considers that the actions committed by the defendants are "forced defenses that go beyond the limits" as stipulated in Article 49 paragraph (2) of the Criminal Code. Even though the Defendant's actions are still against the law or are still criminal acts as regulated in Article 351 paragraph (1) of the Criminal Code, but because it is proven that there is a forced defense that exceeds the limits (*noodweer excesses*) on the Defendant becomes the reason for forgiveness to eliminate fault of the Defendant so that the Defendant cannot be convicted. Literally, the reason for not being sentenced to a person who carried out a forced defense that went beyond the limit, the legislators considered it fair if the perpetrator who faced such an attack was not punished. This is based on the *adagium non tam ira, quam causa irae excusat* which means the act of a

provocative attack, is forgiven. As there is a reason for forgiveness, therefore the Defendant must be released from all lawsuits

The judge applied Article 49 paragraph 2 of the Criminal Code which was very appropriate because several elements of the article were very clearly fulfilled. Whereas the defendant experienced a mental shock due to an attack or threat of attack can affect the inner nature of the other person *or the person being attacked*. The inner influence can be in the form of extreme anger, extreme annoyance, extreme fear, great confusion and others, which in this situation it is understandable and knowable by everyone if the person commits an act that exceeds the limit as long as it is necessary to defend against an attack or threat of attack against him. In that state of great mental agitation, one cannot and does not have time to think. Another effort more is worthy and balanced on the attack, the defense seemed like a spontaneous reaction.

4. Conclusion

The form of justice can be seen in the fulfillment of the elements of article 49 Paragraph 2 of the Criminal Code regarding forced defense that exceeds the limit, the existence of a great mental shock due to attacks carried out by witnesses, causing the forced defense exceed the limit. The act of defense is balanced with the attack that is threatened. A sense of justice can be based on two types of considerations: juridical considerations and non-juridical considerations. The juridical considerations revealed in the facts of the trial were that the Defendant was proven to have committed acts of persecution but the Defendant was acquitted because the actions committed by the defendant fulfilled the elements of Article 49 Paragraph 2 of the Criminal Code that the Defendant was forced to go beyond the limit as an excuse for forgiveness, while the non-juridical considerations were: The judge's considerations were obtained from looking at the condition of the defendant when the crime occurred and the consequences of the defendant's actions, in which the Defendant experienced a mental shock at the time the crime occurred and as a result the victim suffered serious injuries due to the persecution carried out by the defendant. Based on the judge's considerations above, the application of Article 49 paragraph 2 of the Criminal Code regarding the forced defense beyond the limit can be applied as an excuse for forgiveness, based on the facts that occurred at trial, this is solely to create a sense of justice in applicable positive law.

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