

## DELUSIVE SELF-DEFENCE

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### 1. INTRODUCTION

The right of self-defence, in accordance with Article 25 §1 CC, consists in repulsing a direct, unlawful assault on whatever interest protected by law. It consists of an assault and defence. The assault must be unlawful, direct and real, and defence proportionate and contemporaneous with an assault (*argumentum ex Article 25 §1 CC*). In the event a defendant erroneously perceives one of the circumstances which justifies acting in the conditions of the right of self-defence, a problem of liability arises. Thus, a question is raised about legal evaluation of such conduct. Some types of the behaviour are assessed based on the concept of delusive self-defence.

### 2. DELUSIVE SELF-DEFENCE

Delusive self-defence (*inculcata tutela putativa*) consists in the fact that a defendant is in error and believes that he undertakes activities under the right of self-defence. As the elements constituting the right of self-defence exist only in his imagination and are not reflected in reality, there is an error between a defendant's imagination and reality. A defendant's conscience recognises all elements of the right of self-defence, and in reality none of them or only some of them occur (an error of delusion). In the delusive self-defence, there is inconsistency between reality and its reflection in a defendant's conscience. It is rightly pointed out in the judicature that: "An error concerning circumstances constituting the features of justification consists in erroneous belief that such a circumstance occurs, and thus concerns delusion".<sup>1</sup>

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<sup>1</sup> Judgement of the Appellate Court in Warsaw of 13 March 2009, II AKa 3/09, Prok. i Pr. No. 4 – supplement 2010, item 15; Supreme Court judgement of 21 March 2013, II KK 192/12, LEX No. 1298094. Thus also: A. Piaczyńska, *Błędne przekonanie jako postać błędu z art. 29 k.k.*, Prok.

The error must be connected with a perpetrator's belief concerning occurrence of a given factual situation, i.e. being in a situation justifying self-defence. However, the supposition that this justification that results from uncertainty and doubts takes place is not such an error. They constitute negation of the occurrence of a belief, a conviction that a particular state of things is real.<sup>2</sup> There is no error concerning an activity within the right of self-defence in case a perpetrator imagined the features of this justification, while their non-occurrence was objectively and subjectively predictable.<sup>3</sup>

Delusive self-defence does not cover a perpetrator's lack of awareness that his conduct matches the conditions of the right of self-defence; in such a situation, a perpetrator does not realise that he acts within the limits to the right of self-defence (error of unawareness). Although the existence of such an error is negated in the doctrine because it only constitutes a condition for its occurrence,<sup>4</sup> the opinion about two forms of the error: unawareness and delusion is convincing.<sup>5</sup> Negating unawareness of the right of self-defence indicates that it is inconsistency as such because justification is characterised by an attitude aimed at protecting an interest, while unawareness of the features of justification excludes the possibility of occurrence of an intent to save an endangered interest, and decomposes the features of justification.<sup>6</sup> It is emphasised that a perpetrator who realises that the conditions for the right of self-defence are met at the same time does not realise that his conduct preceding an assailant's attack prevents its effects; his intent is not to repulse as assault.<sup>7</sup> In connection with this matter, there is also a different

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i Pr. No. 11, 2016, p. 14; J. Lachowski, [in:] V. Konarska-Wrzošek (ed.), *Kodeks karny. Komentarz*, Warsaw 2016, p. 190.

<sup>2</sup> A. Piaczyńska, *Błędne przekonanie...*, pp. 13–14.

<sup>3</sup> For more see, Sz. Tarapata, P. Zakrzewski, *O funkcjach urojenia okoliczności wyłączających bezprawność. Wybrane zagadnienia teoretycznoprawne*, [in:] J. Giezek, D. Gruszecka, T. Kalisz (ed.), *Nowa kodyfikacja prawa karnego. Księga jubileuszowa Profesora Tomasza Kaczmarka*, Vol. XLIII, Wrocław 2017, pp. 549–566.

<sup>4</sup> J. Giezek, *Funkcja błędu co do ustawowych znamion w nowym kodeksie karnym*, [in:] A.J. Szwarz (ed.), *Rozważania o prawie karnym. Księga pamiątkowa z okazji siedemdziesięciolecia urodzin Profesora Aleksandra Ratajczaka*, Poznań 1999, p. 111.

<sup>5</sup> W. Wolter, *Funkcja błędu w prawie karnym*, Warsaw 1965, p. 13; by this author, *Nauka o przestępstwie. Analiza prawnicza na podstawie przepisów części ogólnej kodeksu karnego z 1969 r.*, Warsaw 1973, p. 220; Z. Cwiakalski, *Błąd co do bezprawności w polskim prawie karnym (Zagadnienia teorii i praktyki)*, Kraków 1991, p. 64; W. Macior, *Błąd jako nieświadomość lub urojenie czy jako nieświadomość lub niewiedza*, [in:] M. Cieślak (ed.), *Zagadnienia prawa karnego i teorii prawa. Księga pamiątkowa ku czci Profesora Władysława Woltera*, Warsaw 1959, p. 112. Attention is drawn in the doctrine that the Criminal Code has still not regulated *expressis verbis* the issue of a perpetrator's error concerning being unaware of justification (A. Wąsek, [in:] O. Górniok, S. Hoc, M. Kalitowski, S.M. Przyjemski, Z. Sienkiewicz, J. Szumski, L. Tyszkiewicz, A. Wąsek, *Kodeks karny. Komentarz*, Vol. I, Gdańsk 2005, pp. 390–391).

<sup>6</sup> A. Zoll, [in:] W. Wróbel, A. Zoll (ed.), *Kodeks karny. Część ogólna. Komentarz do art. 1–52*, Vol. I, part I, Warsaw 2016, pp. 621–622; Z. Cwiakalski, *Błąd co do bezprawności...*, p. 99; K. Buchała, A. Zoll, *Polskie prawo karne*, Warsaw 1995, p. 263; J. Giezek, [in:] M. Bojarski (ed.), J. Giezek, Z. Sienkiewicz, *Prawo karne materialne. Część ogólna i szczególna*, Warsaw 2010, p. 197.

<sup>7</sup> G. Rejman, [in:] G. Rejman (ed.), *Kodeks karny. Część ogólna. Komentarz*, Warsaw 1999, p. 804; J. Giezek, [in:] M. Bojarski, J. Giezek, Z. Sienkiewicz, *Prawo karne...*, p. 197.

standpoint.<sup>8</sup> Regardless of who is right in the discourse, the problem is unimportant for the discussion concerning delusive self-defence because, as it has been indicted above, this type of error is not included in its scope.

The error may concern both an assault and defence. Delusive self-defence may occur when a perpetrator is in error that:

- 1) there are grounds for the exercise of the right of self-defence. In the judicature, it is assumed that undertaking an act that might look like repulsing an unlawful attack in an erroneous belief that there is a state of the right of self-defence<sup>9</sup> or that an error concerning the circumstances constituting the features of justification is an erroneous belief that the circumstance occurs, thus it only concerns delusion, is a delusive state of the right of self-defence;<sup>10</sup>
- 2) he repulses a real assault. In the doctrine, in general, an error concerning the reality of an assault is pointed out. The right of self-defence is applicable in case of a real unlawful assault. A real assault takes place when a legal interest is infringed or endangered.<sup>11</sup> A real assault creates objective danger to an interest protected by law,<sup>12</sup> and not one that exists in a defendant's imagination.<sup>13</sup> An error consists in the fact that a perpetrator erroneously believes that he is attacked and he must defend himself. Subjective perception of an assault does not match the objective state of things. This error also concerns the directness of an assault or the necessity of self-defence.<sup>14</sup> It is pointed out that it also occurs when a defendant erroneously assumes, having objective grounds for that, that an assault was more intensive than it really was.<sup>15</sup> It is rightly emphasised in case law that: "The condition for the occurrence of the right of self-defence is the occurrence of a real assault, i.e. one existing in the objective reality. On the other hand, the provision of Article 29 CC concerns delusion of circumstances excluding unlawfulness, e.g. it may concern delusion that there is an assault justifying the right of self-defence. Thus, an assault is not real".<sup>16</sup> It does not concern a simulated assault; then the exclusion of a defendant's liability for repulsing such an assault takes place on the basis of an error concerning the circumstances constituting the features of an act (Article 29 CC);
- 3) an assault is unlawful, i.e. in conflict with the binding legal order;
- 4) an assault is direct, so he does not realise that self-defence is premature;<sup>17</sup>

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<sup>8</sup> W. Wolter, *Funkcja błędu...*, p. 136; by this author, *Nauka o przestępstwie...*, pp. 235–236; J. Majewski, *Okoliczności wyłączające bezprawność czynu a znamiona subiektywne*, Warsaw 2013, p. 103 ff.

<sup>9</sup> Supreme Court judgement of 6 December 1932, II K 1023/32, OSN(K) 1933, No. 2, item 27.

<sup>10</sup> Judgement of the Appellate Court in Warsaw of 13 March 2009, II AKA 3/09, Prok. i Pr. No. 4 – supplement 2010, item 15.

<sup>11</sup> A. Marek, *Obrona konieczna w prawie karnym. Teoria i orzecznictwo*, Warsaw 2008, p. 52.

<sup>12</sup> R. Góral, *Obrona konieczna w praktyce*, Warsaw 2011, p. 38.

<sup>13</sup> S. Śliwiński, *Polskie prawo karne materialne. Część ogólna*, Warsaw 1946, p. 157.

<sup>14</sup> A. Krukowski, *Obrona konieczna na tle polskiego prawa karnego*, Warsaw 1965, p. 95; S. Glaser, A. Mogilnicki, *Kodeks karny. Komentarz*, Kraków 1934, pp. 113–115.

<sup>15</sup> S. Śliwiński, *Polskie prawo karne...*, p. 154.

<sup>16</sup> Supreme Court judgement of 21 March 2013, II KK 192/12, LEX No. 1298094.

<sup>17</sup> Thus, according to A. Błachnio, *Krytycznie na temat tzw. defensio antecedens*, PiP No. 7, 2005, p. 78; A. Piaczyńska, *Błędne przekonanie...*, pp. 12–13.

- 5) an assault still lasts although, in fact, it does not exist; a situation in which an assault has ceased and defence is delayed;
- 6) a method of defence is proportionate to an assault.<sup>18</sup>

In the context of the indicated errors, a question arises about the legal assessment of exceeding the limits to the delusive self-defence in the scope of both extensive and intensive excess. It concerns a situation in which a defendant's conduct would be exceeding the limits to the right of self-defence if the right were real. In the judicature, there was an opinion that:

- “Exceeding the limits to the right of self-defence may take place only in case of real self-defence but cannot take place in case of delusive self-defence where an act is the result of an error concerning a factual circumstance”;<sup>19</sup>
- “Subjective impression of an assault that does not match the objective state of things does not give a perpetrator's action the features of self-defence, and exceeding the limits to the right of self-defence may take place only in case of real self-defence and not in case of delusive self-defence, the one that does not exist”.<sup>20</sup>

It is rightly assumed in literature that unreality of justification makes the discussion of the importance of exceeding its limits within the scope of liability pointless; erroneous perception depending on the scale and scope of delusion determines the limits within which it is justified. At the same time, it is believed that in case of the use of a method of defence disproportionate to the danger of an assault imagined by a perpetrator, an error concerning the justification cannot legitimise exceeding its limits. However, it is assumed that conscious exceeding the limits to delusive justification under the influence of a justified error seems to be *de lege lata* unpunished since a justified error excludes guilt, and it is proposed to solve the problem via legislation because there are no arguments for impunity in such a situation.<sup>21</sup> A different standpoint is right; in such a situation, a perpetrator may not take advantage of the exclusion of guilt on the basis of Article 29 CC but must be liable for excess of the really existing right of self-defence (Article 25 §2 CC).<sup>22</sup>

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<sup>18</sup> Ł. Pohl, *Prawo karne. Wykład części ogólnej*, Warsaw 2012, p. 343; by this author, [in:] L.K. (ed.), Paprzycki, *System Prawa Karnego. Nauka o przestępstwie. Wylączenie i ograniczenie odpowiedzialności karnej*, Vol. 4, Warsaw 2013, pp. 668–669.

<sup>19</sup> Supreme Court judgement of 16 May 1935, II K 323/35 OSN(K) 1935, No. 12, item 530; Supreme Court judgement of 7 May 1937, I K 150/37, OSN(K) 1937, No. 12, item 335.

<sup>20</sup> Supreme Court judgement of 9 July 1968, IV KR 117/68, OSN(KW) 1969, No. 2, item 16.

<sup>21</sup> J. Giezek, [in:] M. Bojarski, J. Giezek, Z. Sienkiewicz, *Prawo karne...*, pp. 198–199.

<sup>22</sup> J. Giezek, *Przekroczenie granic rzeczywistej oraz mylnie wyobrażonej obrony koniecznej*, [in:] L. Leszczyński, E. Skrętowicz, Z. Hołda (ed.), *W kręgu teorii i praktyki prawa karnego. Księga poświęcona pamięci Profesora Andrzeja Wąska*, Lublin 2005, pp. 141–149; M. Królikowski, [in:] M. Królikowski, R. Zawłocki (ed.), *Kodeks karny. Część ogólna. Komentarz do art. 1–31*, Vol. I, Warsaw 2010, p. 566; M. Królikowski, R. Zawłocki, *Prawo karne*, Warsaw 2015, p. 309, A. Piaczyńska, *Błędne przekonanie...*, p. 12.

### 3. LEGAL ASSESSMENT OF DELUSIVE SELF-DEFENCE

Delusive self-defence that does not match the features of the right of self-defence cannot lead to exculpation of a perpetrator on the basis of this justification. Such defence does not result in consequences laid down in Article 25 §1 CC, i.e. it does not lift the unlawfulness of an act.<sup>23</sup> It is rightly stated in literature that subjective perception of an assault does not match the objective state of things and does not give an activity the features of self-defence.<sup>24</sup> In the judicature, it is rightly emphasised that:

- “The right of self-defence is applicable in case of real, not only existing in a perpetrator’s conscience, unlawful and direct assault on interests protected by law”;<sup>25</sup>
- “Delusive self-defence differs from real self-defence because in this case we deal with delusion that there is an assault justifying self-defence, thus this assault is not real because it does not exist in the objective reality”.<sup>26</sup>

However, a problem arises what type of error may justify it: an error concerning a fact (*error facti*) or an error concerning the law (*error iuris*). The former concerns factual circumstances, and the latter refers to legal evaluation of an act.

The issue used to be solved in different ways based on the Criminal Codes of 1932 and 1969 (henceforth: CC). The Codes did not contain a provision regulating the issue of criminal liability for an error concerning justification. The justification for the Criminal Code Bill of 1968 directly stated: “The Bill does not attempt to decree the standpoint on the importance of acting in ‘an error of justification’ for criminal liability. The issue is theoretically controversial and due to that, the Bill leaves it open whether delusion of ‘justification’ should be *in concreto* treated in the same way as an error concerning the features of an act (Article 24 §1) or in the same way as an error concerning unawareness of unlawfulness (Article 24 §2)”.<sup>27</sup>

The error was assumed to be concerning a circumstance constituting the feature of a prohibited act on the basis of generally unapproved theory of negative

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<sup>23</sup> T. Bojarski, *Polskie prawo karne. Zarys części ogólnej*, Warsaw 2002, p. 144; by this author, [in:] T. Bojarski, A. Gimbut, Cz. Gofroń, A. Wąsek, J. Wojciechowski, *Prawo karne*, Lublin 1994, p. 145.

<sup>24</sup> W. Świda, *Prawo karne*, Warsaw 1989, p. 183; W. Makowski, *Prawo karne. Część ogólna. Wykład porównawczy prawa karnego, austriackiego, niemieckiego i rosyjskiego obowiązującego w Polsce*, Warsaw–Lublin–Łódź–Poznań–Kraków, no date, p. 304; by this author, *Kodeks karny. Część ogólna. Komentarz*, Warsaw 1932, p. 88; M. Siewierski, *Kodeks karny i prawo o wykroczeniach. Komentarz*, Warsaw 1958, p. 52; A. Marek, *Obrona konieczna...*, pp. 52–53; Supreme Court judgement of 9 July 1968, IV KR 117/68, OSNKW 1969, No. 2, item 16; Supreme Court judgement of 31 August 1981, Rw 258/81, OSN PG 1982, No. 4, item 40.

<sup>25</sup> Judgement of the Appellate Court in Kraków of 28 May 1992, II AKr 62/92, KZS 1992, No. 3–9, item 43.

<sup>26</sup> Judgement of the Appellate Court in Gdańsk of 10 January 2017, II AKa 400/16, LEX No. 2252819.

<sup>27</sup> Criminal Code Bill and regulations introducing the Criminal Code (Projekt kodeksu karnego oraz przepisów wprowadzających kodeks karny), Warsaw 1968, p. 104.

features of a prohibited act,<sup>28</sup> i.e. treating circumstances constituting the features of justification as the negative features of a prohibited act.<sup>29</sup>

The Supreme Court believed that:

- “Article 24 §1 CC [at present Article 28 §1 – comment by B.J. S.] is applicable to delusive self-defence, like to other forms of error concerning justification”.<sup>30</sup> The Court substantiated this stating that unawareness of unlawfulness is, in such a situation, a secondary phenomenon, i.e. a derivative of an erroneous evaluation of a factual situation. A perpetrator’s erroneous belief that there is a special circumstance justifying his particular conduct, i.e. eliminating a general criminal law ban, determines an erroneous legal assessment of one’s own act.
- “Repulsing an inexistent assault matches the concept of delusive self-defence that should be evaluated from the point of view of an error (Article 20 CC) [at present Article 28 CC, comment by B.J. S.]. Thus, undertaking an act that may look like repulsing an unlawful attack, in an erroneous belief that there is a state of the right of self-defence, may result in criminal liability only for an unintended offence, provided the error resulted from carelessness or negligence”.<sup>31</sup>

In literature, the error was rightly assumed to be *sui generis* neither an error concerning a fact nor an error concerning the law but, due to the lack of its separate regulation, *per analogiam* the application of Article 24 §1 CC of 1969 envisaging an error concerning a circumstance constituting a feature of a prohibited act was assumed to be the solution most favourable to a perpetrator.<sup>32</sup> The error was closer to an error relating to statutory features because it refers to an error concerning a particular situation, and because by analogy it is a situation favourable to a perpetrator, the application of a provision on an error relating to circumstances constituting a feature of a prohibited act was admitted.<sup>33</sup>

The Supreme Court believed that: “Undertaking an act that might look like repulsing an unlawful attack, in an erroneous belief that there is a state of the right of self-defence (delusive state of self-defence), may result in liability only for unintended offence, provided the error resulted from carelessness or negligence”.<sup>34</sup>

<sup>28</sup> W. Wolter, *Funkcja błędu...*, p. 132; by this author, *Wokół problemu błędu w prawie karnym*, PiP No. 3, 1963, p. 92.

<sup>29</sup> A. Zoll, [in:] W. Wróbel, A. Zoll (ed.), *Kodeks karny...*, p. 621.

<sup>30</sup> Supreme Court judgement of 31 August 1981, Rw 258/81, LEX No. 17380; Supreme Court judgement of 22 June 1979, IV KR 112/79, OSNKW 1979, No. 11–12, item 113 with glosses by S. Frankowski, PiP No. 8, 1981, p. 148 ff; W. Wolter, NP No. 9, 1980, p. 152 ff; K. Rozentel, NP No. 2, 1981, p. 138 ff; S. Dałkowski, OSP No. 9, 1981, item 149; Z. Mirgos, OSP No. 2, 1981, item 29. Thus, also J. Makarewicz, *Kodeks karny z komentarzem*, Lwów 1938, p. 110.

<sup>31</sup> Supreme Court judgement of 12 July 1966, IV KR 89/66, OSNKW 1967, No. 1, item 2.

<sup>32</sup> I. Andrejew, *Unormowanie błędu we współczesnym prawie karnym*, PiP No. 5, 1979, pp. 30–50; A. Zoll, *Okoliczności wyłączające bezprawność czynu*, Warsaw 1982, p. 153; by this author, [in:] K. Buchała, Z. Cwiakalski, M. Szewczyk, A. Zoll, *Komentarz do kodeksu karnego. Część ogólna*, Warsaw 1994, p. 196.

<sup>33</sup> W. Świda, *Prawo karne...*, p. 183; K. Buchała, *Prawo karne materialne*, Warsaw 1989, p. 346; K. Buchała, A. Zoll, *Polskie prawo karne...*, p. 264; M. Filar, [in:] A. Marek (ed.), *Prawo karne. Zagadnienia teorii i praktyki*, Warsaw 1986, p. 114; T. Bojarski, [in:] T. Bojarski, A. Gimbut, Cz. Gofroń, A. Wasek, J. Wojciechowski, *Prawo karne...*, p. 145; L. Gardocki, *Prawo karne*, Warsaw 1996, p. 130.

<sup>34</sup> Supreme Court judgement of 6 December 1932, II K 1023/32, OSN(K) 1933, No. 2, item 27.

The issue was approached from the standpoint that a perpetrator acts being in error as to the belief that his conduct is within the limits laid down as the right of self-defence in criminal law and, thus, does not realise that his conduct violates the statutory requirements, which justified the assumption that it was an error concerning the law.<sup>35</sup> The Supreme Court expressed such an opinion and stated that an error concerning circumstances constituting a feature of justification, in the same way as an error concerning evaluation assuming that a given situation is recognised in the legal system as justification, should be treated as an error concerning legal evaluation of an act.<sup>36</sup> However, the problem is that in case of delusive self-defence, a perpetrator's error mainly concerns a specific element of the right of self-defence that does not exist in reality, which indicates that it is an error concerning a fact.

An opinion has been presented that it may be an error concerning the law in a situation when a perpetrator errs as far as unlawfulness of an attack is concerned, because a perpetrator is not in error concerning circumstances of an act but its legal evaluation, or an error concerning a fact in case a perpetrator undertakes defensive activity despite non-existence of a real assault.<sup>37</sup>

In the present legal state, such a controversy does not occur because the issue is regulated in Article 29 CC, in accordance with which, whoever commits a prohibited act in a justified erroneous belief that there is a circumstance excluding unlawfulness, he does not commit a crime. It is not difficult to notice that the Criminal Code adopted the latest conception. It is a right approach because the issue, as it is rightly noticed in literature, is neither an error concerning a circumstance constituting a feature of a prohibited act nor an error concerning legal evaluation of an act.<sup>38</sup> It constitutes a special kind of error relating only to a circumstance excluding unlawfulness.

In the doctrine, it is called a type of an error concerning the law.<sup>39</sup>

It is also indicated that an error concerning justification has a double nature because it concerns a fact, which is an original error, that results in an error concerning the law to such an extent that a perpetrator believes he may undertake activities repulsing an assault. The latter error is a secondary one in relation to the error connected with the defective recognition of the factual state.<sup>40</sup> It is right to make an observation that, in accordance with Article 29 CC, an error is not erroneous

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<sup>35</sup> K. Mioduski, [in:] J. Bafia, K. Mioduski, M. Siewierski, *Kodeks karny. Komentarz*, Vol. 1, Warsaw 1987, p. 115; A. Zębik, [in:] J. Waszczyński (ed.), *Prawo karne w zarysie. Nauka o ustawie karnej i o przestępstwie*, Łódź 1975, pp. 236–238.

<sup>36</sup> Supreme Court judgement of 13 March 1974, I KR 362/73, OSPiKA 1975, No. 4, item 79.

<sup>37</sup> A. Marek, *Obrona konieczna w prawie karnym na tle teorii i orzecznictwa Sądu Najwyższego*, Warsaw 1979, pp. 50–51. K. Buchała, *Prawo karne materialne...*, p. 346; W. Wolter, *Prawo karne. Zarys wykładu systematycznego. Część ogólna*, Kraków 1947, p. 197; M. Cieślak, *Polskie prawo karne. Zarys systemowego ujęcia*, Warsaw 1994, p. 329.

<sup>38</sup> A. Zoll, *Okoliczności...*, p. 153; by this author, [in:] W. Wróbel, A. Zoll (ed.), *Kodeks karny...*, p. 621; Z. Cwiakalski, *Błąd co do bezprawności...*, p. 101; T. Bojarski, *Polskie prawo karne...*, p. 144; by this author, [in:] T. Bojarski (ed.), *Kodeks karny. Komentarz*, Warsaw 2006, p. 78; G. Rejman, *Zasady odpowiedzialności karnej. Art. 8–31 k.k. Komentarz*, Warsaw 2009, p. 674; M. Królikowski, R. Zawłocki, *Prawo karne...*, p. 307; A. Grześkowiak, [in:] A. Grześkowiak, K. Wiak (ed.), *Kodeks karny. Komentarz*, Warsaw 2018, p. 266.

<sup>39</sup> R.A. Stefański, *Prawo karne materialne. Część ogólna*, Warsaw 2008, p. 177.

<sup>40</sup> G. Rejman, [in:] G. Rejman (ed.), *Kodeks karny...*, p. 804.

perception of reality in which a perpetrator of a prohibited act is, but it constitutes evaluation formulated by another person from the point of view of justification of a perpetrator's conduct or its lack.<sup>41</sup>

It is rightly assumed in the doctrine that a perpetrator makes an error concerning circumstances constituting the features of justification admitted in a given legal system because he inappropriately perceives a circumstance being an element of the object of legal assessment. And it is not an error concerning the assessment establishing whether a situation is treated in a given legal system as justification, because a perpetrator properly perceives the reality but errs in the legal assessment of the properly perceived reality, and thus he separates liability from real facts in favour of normative approach to provisions that determine criminal liability.<sup>42</sup> The solution strikes with artificiality because in case of delusive self-defence, a perpetrator refers to another person's real conduct and remains in error concerning the real situation. It seems to him that an attack is aimed at him, while in fact it does not occur, and thus an error concerns the factual aspect and not the legal one. In one case of delusive self-defence, a perpetrator errs as far as legal assessment is concerned, namely when he believes that intent against him is unlawful, while in reality it does not have such nature. It is rightly assumed in case law that: "A perpetrator's subjective belief of having the right of self-defence, even after an assailant's retreat from his flat, is not subject to protection under Article 29 CC. Imagination (called delusion) that one acts legally, i.e. acting in circumstances excluding criminal liability, requires, however, certain objective conditions justifying such imagination. Otherwise, the limits to law and unlawfulness would be developed based on strictly subjective assessment, impossible to develop common norms, uniform and equal for everyone. This would mean blurring the legal limits".<sup>43</sup>

It is possible to make a double error in case of an unjustified error. A perpetrator may be in error concerning the objective features of a prohibited act and, at the same time, concerning the objective conditions for circumstances excluding criminal liability. In the justification for the Criminal Code Bill of 1997, it was pointed out that: "Because in case of such an error, it is the plane of guilt that matters, one cannot exclude a possibility of double error, i.e. a person acting within delusive justification may also err as far as the circumstances constituting a feature of a prohibited act are concerned, e.g. a person acting in unjustified delusive belief in the right of self-defence unintentionally causes an assailant's death instead of a light injury. The construction of the Bill allows in such cases the application of extraordinary mitigation of statutory punishment for an unintentional offence".<sup>44</sup>

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<sup>41</sup> G. Rejman, *Zasady odpowiedzialności karnej...*, p. 676.

<sup>42</sup> A. Zoll, *Regulacja błędu w projekcie kodeksu karnego*, [in:] L. Tyszkiewicz (ed.), *Problemy nauk penalnych. Prace poświęcone Pani Profesor Oktawii Górniok*, Katowice 1996, p. 248; by this author, [in:] W. Wróbel, A. Zoll (ed.), *Kodeks karny...*, p. 620.

<sup>43</sup> Judgement of the Appellate Court in Warsaw of 16 May 2014, II AKa 120/14, LEX No. 1477366.

<sup>44</sup> I. Fredrich-Michalska, B. Stachurska-Marcińczak (ed.), *Nowe kodeksy karne – z 1997 r. z uzasadnieniami*, Warsaw 1997, pp. 133–134. Thus, also: G. Rejman, [in:] G. Rejman (ed.), *Kodeks karny...*, pp. 802–803.

It is controversial whether a perpetrator, acting within delusive self-defence, may be attributed intent to commit a prohibited act. In the doctrine, admitting such a possibility is followed by arguments that the essence of an error concerning circumstances excluding unlawfulness of an act suggests that it does not lead to the exclusion of intent because it concerns justification. An act committed under the influence of an error remains an unlawful act, and what is decisive in attributing guilt to the perpetrator is not the recognition of his belief concerning the occurrence of circumstances excluding unlawfulness as justified or unjustified.<sup>45</sup> Such a possibility is rightly dismissed and it is emphasised that it results from the separation of guilt from psychical factors accompanying the perpetrator at the moment an act is committed; and, indeed, a person in such a situation first of all wants to avoid an assault and only then he commits a prohibited act.<sup>46</sup> Such a perpetrator acts in order to defeat an assault and not with intent to commit a prohibited act. An error cannot be treated as one concerning a circumstance constituting a feature of a prohibited act but an error concerning justification.<sup>47</sup> The last one is, as it has been mentioned above, a *sui generis* error.

Delusive self-defence is close to an error concerning legal assessment of an act because similarly to this error, it is connected with attributing guilt as an element of a crime.<sup>48</sup>

Article 29 CC concerns existing justification and is not applicable to what is called indirect error concerning unlawfulness, which occurs in a situation where a perpetrator erroneously believes that the one exists. A perpetrator does not err as far as circumstances in which he acts are concerned; he erroneously assumes that the law gives them the nature of circumstances excluding unlawfulness or erroneously extends its limits.<sup>49</sup> The problem is solved on the plane of an error concerning legal evaluation.<sup>50</sup> A different opinion, applying the scope of Article 29 CC also to a delusive circumstance excluding criminal liability that is not laid down in Polish statute, is wrong. It is substantiated by the existence of a general provision mentioning an erroneous belief that there is a circumstance excluding unlawfulness or guilt.<sup>51</sup>

<sup>45</sup> A. Zoll, [in:] W. Wróbel, A. Zoll (ed.), *Kodeks karny...*, p. 621.

<sup>46</sup> G. Rejman, [in:] G. Rejman (ed.), *Kodeks karny...*, p. 805.

<sup>47</sup> K. Indeck, A. Liszewska, *Prawo karne materialne. Nauka o przestępstwie, karze i środkach penalnych*, Warsaw 2002, p. 198.

<sup>48</sup> A. Zoll, *Regulacja...*, p. 249; M. Szczepaniec, *Regulacja błędu co do kontratypu w polskim prawie karnym*, CzPKiNP No. 2, 2000, p. 99; A. Wąsek, [in:] O. Górniok, S. Hoc, M. Kalitowski, S.M. Przyjemski, Z. Sienkiewicz, J. Szumski, L. Tyszkiewicz, A. Wąsek, *Kodeks karny...*, p. 391.

<sup>49</sup> Z. Jędrzejewski, *Błąd co do okoliczności wyłączającej bezprawność*, WPP No. 4, 2006, p. 68.

<sup>50</sup> A. Wąsek, [in:] O. Górniok, S. Hoc, M. Kalitowski, S.M. Przyjemski, Z. Sienkiewicz, J. Szumski, L. Tyszkiewicz, A. Wąsek, *Kodeks karny...*, p. 392; A. Zoll, *Regulacja...*, p. 248; M. Budyn-Kulik, [in:] M. Budyn-Kulik, P. Kozłowska-Kalisz, M. Kulik, M. Mozgawa (ed.), *Prawo karne materialne. Część ogólna*, Kraków, 2006, p. 275; W. Wróbel, A. Zoll, *Polskie prawo karne. Część ogólna*, Kraków 2012, p. 394; M. Królikowski, R. Zawłocki, *Prawo karne...*, p. 308; J. Majewski, *Błąd co do kontratypu jako podstawa wyłączenia winy*, [in:] J. Majewski (ed.), *Okoliczności wyłączające winę. Materiały VI Bielańskiego Kolokwium Karnistycznego*, Toruń 2010, pp. 24–25; P. Kozłowska-Kalisz, [in:] P. Kozłowska-Kalisz, M. Budyn-Kulik, M. Kulik, M. Mozgawa (ed.), *Kodeks karny. Komentarz*, Warsaw 2017, p. 110.

<sup>51</sup> J. Lachowski, [in:] V. Konarska-Wrzošek (ed.), *Kodeks karny...*, p. 188.

#### 4. CONSEQUENCES OF ACTING IN DELUSIVE BELIEF IN THE RIGHT OF SELF-DEFENCE

Acting in the justified delusive belief that there is a circumstance excluding unlawfulness of an act, thus also in the event of acting in compliance with the delusive right of self-defence, in accordance with Article 29 CC, results in the commission of a crime but only when an error is justified. In such a situation, a perpetrator's act is unlawful but non-culpable. This is a circumstance excluding guilt.<sup>52</sup> Delusive self-defence excludes criminal liability only when it results from a justified error. A justified delusive self-defence action excludes a possibility of charging a perpetrator with unlawful conduct.<sup>53</sup> Thus, this error does not defeat intentionality or unintentionality but the ability to charge, i.e. it excludes guilt completely, provided it is justified.<sup>54</sup> In the doctrine, it is assumed that what causes the problem of legal consequences of an error concerning justification is Article 29 CC, which is defectively formulated because a circumstance of this type should, in each case regardless of whether an error is justified or unjustified, exclude liability for an intentional offence. Then, there would be an issue of a perpetrator's liability for an unintentional offence to be dealt with in accordance with general rules, i.e. when criminal statute envisages a particular unintentional type and a perpetrator's error is unjustified.<sup>55</sup>

“An attack against an interest protected within justification, as one can read in the justification for the Criminal Code Bill of 1997, is always an assault on a legal interest, which can be justified or even desired due to the occurring collision of interests. An error concerning circumstances constituting the features of justification (delusion of such a circumstance occurrence) does not result in the automatic exclusion of intent. Intent refers to the implementation of an act having the features of a particular type and such intent, regardless of whether the discussed error occurs, takes place. The Code solves the problem of liability for this error concerning guilt. In case of a justified error, the possibility of charging a perpetrator for violation of law is excluded, which results in the exclusion of guilt. In case of an unjustified error, a circumstance that diminishes guilt occurs, which results in a possibility of extraordinary mitigation of punishment”.<sup>56</sup> It is rightly highlighted in the doctrine that the role of that error is the same as of an error concerning the law (Article 30 CC):

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<sup>52</sup> A. Marek, *Prawo karne*, Warsaw 2009, p. 155; F. Ciepły, [in:] A. Grześkowiak (ed.), *Prawo karne*, Warsaw 2009, p. 135; D. Jagiełło, *Prawo karne materialne*, Skierniewice 2013, p. 68; M. Królikowski, R. Zawłocki, *Prawo karne...*, p. 308; A. Grześkowiak, [in:] A. Grześkowiak, K. Wiak (ed.), *Kodeks karny...*, p. 266.

<sup>53</sup> R. Góral, *Kodeks karny. Praktyczny komentarz*, Warsaw 2007, p. 66.

<sup>54</sup> A. Grześkowiak, [in:] A. Grześkowiak, K. Wiak (ed.), *Kodeks karny...*, p. 267.

<sup>55</sup> J. Majewski, *Funkcja urojenia sytuacji kontratypowej w prawie karnym*, [in:] J. Giezek (ed.), *Przestępstwo – kara – polityka kryminalna. Problemy tworzenia i funkcjonowania prawa. Księga jubileuszowa z okazji 70. rocznicy urodzin Profesora Tomasza Kaczmarka*, Kraków 2006, p. 448.

<sup>56</sup> I. Fredrich-Michalska, B. Stachurska-Marcińczak (ed.), *Nowe kodeksy karne...*, pp. 133–134.

it does not exclude intentionality because a perpetrator may be liable for the commission of an intentional offence, provided the error is unjustified.”<sup>57</sup>

The consequence of the occurrence of a circumstance excluding guilt is expressed with the use of a phrase “does not commit a crime”. With regard to that phrase, it is hard to agree with the opinion that such an act does not constitute a crime.<sup>58</sup> The Criminal Code uses the phrase in order to indicate that this act is socially harmful to a small extent (Article 1 §2 CC).

In literature, in order to recognise an error as justified, the following criteria are adopted:

- objective criterion based on the ability to recognise factual significance of given circumstances.<sup>59</sup> It concerns circumstances occurring at the time when a perpetrator is committing an act, which every ordinary citizen being in a similar situation would also undertake and make an error.<sup>60</sup> An example of such a model citizen (a reasonable man) might be a person characterised by “very good professional preparation, accepting a system of values underlying the binding legal system and acting in an even-tempered way”.<sup>61</sup> It is indicated in case law that: “A justified error (Article 29 CC) is a situation which, based on the analysis of the state at the time of the given conduct, unambiguously indicates that a perpetrator had the right to erroneously recognise the actual state. Within the scope of a justified error concerning self-defence, there is a situation in which there was a certain probability of a violation of the interest protected by law but it was not high enough to let one speak about a direct assault. However, if the probability of an assault occurrence is lower (but not non-existent), an error should be recognised as unjustified, and thus providing grounds for extraordinary mitigation of punishment”.<sup>62</sup> However, it is highlighted that those objective circumstances must concern a subjective situation, in which a perpetrator is at the time of an act, e.g. an intellectual state or an emotional state.<sup>63</sup>
- objective-subjective criterion<sup>64</sup> based mainly on the normative criterion of a reliable (model) citizen also taking into consideration a subjective criterion that is characteristic of an error when a perpetrator had an opportunity to avoid this error.<sup>65</sup> It is required that, apart from the objective criterion, a perpetrator’s

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<sup>57</sup> A. Wąsek, [in:] O. Górniok, S. Hoc, M. Kalitowski, S.M. Przyjemski, Z. Sienkiewicz, J. Szumski, L. Tyszkiewicz, A. Wąsek (ed.), *Kodeks karny...*, p. 391.

<sup>58</sup> A. Zoll, [in:] W. Wróbel, A. Zoll (ed.), *Kodeks karny...*, p. 623; M. Szczepaniec, *Regulacja...*, p. 108.

<sup>59</sup> W. Wróbel, A. Zoll, *Polskie prawo karne...*, p. 394.

<sup>60</sup> M. Budyn-Kulik, [in:] M. Mozgawa (ed.), *Prawo karne...*, pp. 276–277; K. Indecki, A. Liszewska, *Prawo karne...*, p. 198.

<sup>61</sup> K. Wytrykowski, *Błąd co do okoliczności wyłączającej winę (art. 29 k.k.)*, *Iustitia* No. 2, 2013, pp. 78–79.

<sup>62</sup> Judgement of the District Court in Tarnów of 24 January 2008, II Ka 536/07, KZS 2008, No. 3, item 56.

<sup>63</sup> A. Zoll, W. Wróbel, A. Zoll (ed.), *Kodeks karny...*, p. 623.

<sup>64</sup> J. Warylewski, *Prawo karne. Część ogólna*, Warsaw 2015, p. 350.

<sup>65</sup> Supreme Court ruling of 14 May 2003, II KK 331/02, OSNwSK 2003, No. 1, item 969; judgement of the Appellate Court in Katowice of 29 November 2006, II AKA 96/06, LEX No. 297315.

individual features and characteristics should be taken into consideration. It is important whether a perpetrator could avoid an error. The assessment whether a perpetrator could avoid an error must be based not only on the circumstances of a given event but also on the in-depth analysis of a perpetrator's personality, his ability to evaluate an actual situation and to anticipate events.<sup>66</sup> The Supreme Court rightly states that: "The condition for the advantage of Article 29 CC is the establishment that an error was justified. It concerns an erroneous opinion that in a given situation it is excusable from the point of view of social perception, and a perpetrator cannot be charged with failure to use diligence to recognise the situation properly. Thus, 'justified' means 'non-indictable', i.e. preventing charging a perpetrator with being unintentional in the meaning of Article 9 §2 CC. What decides whether justification is possible is an analysis of a particular event, especially whether a perpetrator could avoid an error using the required diligence in a given situation. 'A justified error' concerns a state of a perpetrator's awareness at the moment of an act. Thus, it is a subjective aspect of an act and it obviously constitutes an element of establishing facts with all resulting consequences".<sup>67</sup>

The latter criterion should be recognised as the correct one. It is rightly indicated in literature that the decisive criterion is the objective one, the use of which consists in reasonable comparison of the accused with the "model citizen", and only then, when he could not avoid an error although he used diligence, an error is justified. On the other hand, the subjective criterion plays a less important role, as it requires that an error should be recognised as justified also when a model citizen avoided it and the accused, because of his personal features, could not avoid it.<sup>68</sup> It is pointed out that evaluation should be made, first of all, based on the recognition that it is necessary to have adequate information, and only then through the prism of the possibility of recognising an error.<sup>69</sup>

An error is justified when a perpetrator cannot be accused of a blameworthy conduct.<sup>70</sup> This concerns a situation in which a perpetrator could not avoid an error, although he was diligent.<sup>71</sup> One cannot blame a perpetrator for failure to use diligence, which was the reason why he did not avoid an error.<sup>72</sup> In the judicature, it is pointed out that:

- "Distortion of the perception of reality resulting from the state of insobriety or being under the influence of narcotic drugs excludes the recognition of the commission of a prohibited act in a justified erroneous belief that there is a circumstance excluding unlawfulness, and as a result, it excludes a possibility of

<sup>66</sup> Supreme Court judgement of 13 March 1974, I KR 362/73, LEX No. 20863.

<sup>67</sup> Supreme Court ruling of 11 October 2016, V KK 117/16, LEX No. 2135555.

<sup>68</sup> K. Janczukowicz, *Okoliczności usprawiedliwiające nieświadomość bezprawności*, LEX/el. 2015.

<sup>69</sup> R. Kubiak, *Pojęcie usprawiedliwionego błędu w nowym kodeksie karnym*, *Palestra* No. 7–8, 1998, p. 33 ff.

<sup>70</sup> A. Wąsek, [in:] O. Górniok, S. Hoc, M. Kalitowski, S.M. Przyjemski, Z. Sienkiewicz, J. Szumski, L. Tyszkiewicz, A. Wąsek, *Kodeks karny...*, p. 391; G. Rejman, [in:] G. Rejman (ed.), *Kodeks karny...*, p. 802.

<sup>71</sup> R. Góral, *Kodeks karny...*, p. 66.

<sup>72</sup> P. Daniluk, [in:] R.A. Stefański (ed.), *Kodeks karny. Komentarz*, Warsaw 2017, p. 283.

referring to the construct of justification laid down in Article 29 CC providing immunity from criminal liability".<sup>73</sup>

- "It concerns an erroneous opinion, which in a given situation is excusable from the point of view of social perception, and a perpetrator cannot be blamed for failure to use diligence in order to properly recognise a situation".<sup>74</sup>

In case a perpetrator's error is unjustified, a court may apply extraordinary mitigation of punishment. In such a case, an error diminishes the degree of guilt.<sup>75</sup> The application of extraordinary mitigation of punishment is within the competence of a court. In literature, it is rightly assumed that the application of extraordinary mitigation of punishment may be justified by extraordinary circumstances, in which a perpetrator happened to be, i.e. the contribution of the aggrieved to that error, the level of a perpetrator's psychical development, his age or qualifications. Moreover, the closer a perpetrator's conduct is to the conduct of a model citizen, the more justifiable the use of this instrument will be.<sup>76</sup>

Extraordinary mitigation of punishment is not applicable, in accordance with Article 29 *in fine* CC, in a situation when a perpetrator commits a crime assuming that there is a circumstance excluding unlawfulness; the circumstance, as it is indicated in literature, may only potentially influence the type of penalty in accordance with general rules. Therefore, there is a *de lege ferenda* proposal to make it possible to apply extraordinary mitigation of punishment to a perpetrator acting in the conditions of doubts whether there is a circumstance excluding unlawfulness by the introduction of a provision stipulating that a court may apply extraordinary mitigation of punishment to a perpetrator who commits a prohibited act on the justified erroneous supposition that there is a circumstance excluding unlawfulness or guilt. The proposal does not seem to be correct because it excessively extends the consequences of erroneous recognition of justified situations.

## 5. CONCLUSIONS

- 1) Delusive self-defence consists in the commission of a prohibited act by a perpetrator who is convinced that he undertakes action within his right of self-defence, which in reality does not take place. He is conscious of all the elements of self-defence, which, or some of them, do not occur in reality. The error concerns the reality of an assault.
- 2) Delusive self-defence is the type of self-defence that does not match its necessary requirements and cannot result in a perpetrator's exculpation based on this justification because it does not match the objective state of things. Self-defence takes place only when it exists objectively and not only in a perpetrator's conscience.

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<sup>73</sup> Judgement of the Appellate Court in Wrocław of 31 May 2017, II AKa 111/17, LEX No. 2329079.

<sup>74</sup> Supreme Court ruling of 11 October 2016, V KK 117/16, LEX No. 2135555.

<sup>75</sup> Ł. Pohl, *Prawo karne...*, p. 343.

<sup>76</sup> J. Lachowski, [in:] V. Konarska-Wrzošek (ed.), *Kodeks karny...*, p. 191.

- 3) A perpetrator undertaking defensive activities in an erroneous belief that it matches all the requirements of the right of self-defence does not commit a crime, unless the error is justified (Article 29 CC). This concerns a *sui generis* error, which is neither an error concerning a circumstance constituting a feature of a prohibited act nor an error concerning the legal assessment of an act.
- 4) A justified action in self-defence is a circumstance constituting grounds for exclusion of guilt, i.e. a perpetrator's act is unlawful. If an error concerning self-defence is unjustified, taking into consideration special circumstances in which a perpetrator has been, a court may apply extraordinary mitigation of punishment.

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## DELUSIVE SELF-DEFENCE

## Summary

The article discusses the issue of liability for acting in the delusive self-defence, which takes place when a perpetrator commits a prohibited act in an erroneous belief that he exercises the features of the right of self-defence. Due to the fact that a perpetrator is in a special situation, the Criminal Code treats this error as a circumstance excluding guilt, provided that the error is justified; and in case it is unjustified, taking into consideration special circumstances in which a perpetrator has been, a court may apply extraordinary mitigation of punishment.

Keywords: error, justification, extraordinary mitigation of punishment, right of self-defence, delusive self-defence, guilt

## UROJONA OBRONA KONIECZNA

## Streszczenie

Przedmiotem artykułu jest problem odpowiedzialności za działanie w tzw. urojonej obronie koniecznej, która zachodzi wówczas, gdy sprawca dopuszcza się czynu zabronionego w błędnym przekonaniu, że realizuje znamiona obrony koniecznej. Ze względu na to, że sprawca znajduje się w szczególnej sytuacji, kodeks karny błąd ten traktuje jako okoliczność wyłączającą winę pod warunkiem, że błąd ma być usprawiedliwiony, a w przypadku gdy jest nieusprawiedliwiony, sąd może zastosować nadzwyczajne złagodzenie kary, mając na uwadze szczególne okoliczności, w których znalazł się sprawca.

Słowa kluczowe: błąd, kontratyp, nadzwyczajne złagodzenie kary, obrona konieczna, urojona obrona konieczna, wina

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