

FEAR AND AGITATION AS THE NORMATIVE ELEMENTS OF LEGITIMATE SELF-DEFENCE EXCESS

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ABSTRACT

The authors of this publication have explored the importance of justifying fear and agitation underpinning the transgression of necessary self-defence. According to Article 25 § 2 and 3 of the Criminal Code, they identified five scenarios, differing in how a perpetrator's mental state is determined, affecting the criminal law consequences of unlawfully infringing on or exposing the aggressor's legal interests. The authors validated the preliminary hypothesis that the legislator assumed legitimate self-defence excess results from fear or agitation due to the circumstances of the assault, necessitating procedural confirmation. Their occurrence leads to the defender's impunity, regardless of the type of legal interests infringed and the extent of legitimate self-defence excess. A shortfall in the mental state circumstances of a defender, as referred to in Article 25 § 3 of the Criminal Code in a specific factual state, opens the possibility of applying a general, complementary provision, i.e., Article 25 § 2.

Keywords: criminal law, justification, self-defence, self-defence excess, fear and agitation

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INTRODUCTION

The issue of legitimate self-defence is among those in criminal law that evoke significant emotions, not solely due to the complexity of interpreting its justification criteria. These emotions stem from the reality that, in scenarios described in Article 25 of the Criminal Code, anyone can find themselves involved at any moment,¹ not only as a crime victim but as a deliberate perpetrator of a major *malum prohibitum*. The situation of a direct attempt on a legal interest, especially one's own or that of someone close, and the legitimate decision to fend off such an attempt, is not an everyday occurrence, nor is it comfortable. In some cases, it may be an extreme situation, exceeding what an average person can bear.² While it has been decided to allow fending off such attempts under the justification of legitimate self-defence, which cannot be deemed lawless, it has also been restricted by requiring self-defence in a manner proportional to the threat posed by an attempt (Article 25 § 2 of the Criminal Code). This requirement may often be challenging to meet, considering being caught by surprise; hardly anyone is prepared to face such situations. For this reason, Article 25 § 2 of the Criminal Code stipulates that in the case of a perpetrator who exceeded the limits of legitimate self-defence, either extraordinary mitigation of punishment or waiver is possible. A more favourable regulation, resulting in excluding the punishability of legitimate self-defence excess, is set forth in Article 25 § 3 of the Criminal Code. It becomes applicable in cases where legitimate self-defence excess occurs under the influence of fear or agitation justified by the circumstances of an attempt. Thus, it is important to highlight that the provision in § 3 constitutes another level of a cascade view of circumstances modifying criminal responsibility in cases of legitimate self-defence excess.³ The legislator, addressing this circumstance, used rather vague language that requires precise interpretation, a challenging task given the conflict between the legal interests of the assaulted and those of the assailant. Moreover, it is significant that the legislator set no limits on the subject matter scope of the provision based on the type of interest violated during legitimate self-defence excess. In other words, killing an assailant does not preclude the possibility of exemption from penalty, warranting a particularly detailed examination of the criteria mentioned in § 3. It is noteworthy that the provision set out in Article 25 § 3 of the Criminal Code is the only construction of its kind in criminal law, providing an unconditional exemption from criminal liability despite not fulfilling the conditions of secondary legality due to a specific mental state of a perpetrator.

¹ Cf. Grudecki, M., Kleszcz, M., 'Pozbawienie życia napastnika w obronie koniecznej a katalog dóbr prawnych podlegających ochronie', *Roczniki Administracji i Prawa*, 2020, Issue 3, p. 140.

² See: Borys, B., 'Sytuacje ekstremalne i ich wpływ na stan psychiczny człowieka', *Psychiatria*, 2004, Issue 2, p. 98; decision of the Administrative Court in Szczecin of 20 June 2013, II AKA 100/13, LEX No. 1324778.

³ Clear cascade has been somewhat distorted by the introduction of the provision set forth in Article 25 § 2a of the Criminal Code, although that issue is essentially beyond the scope of the present research.

This article focuses on analysing Article 25 § 3 of the Criminal Code, particularly in relation to its connection with Article 25 § 2 of the Criminal Code. It is crucial to address the question: In what situations is the circumstance excluding punishability applicable? It may be hypothesised that the legislator initially presumed that legitimate self-defence excess results from fear or agitation due to the circumstances of an assault (which, however, requires confirmation in court proceedings). Thus, emphasis will be placed not on a comprehensive presentation of legitimate self-defence excess but rather on its subjective element in the form of fear or agitation emotions and their impact on a defendant's mental state.

THE ESSENCE OF LEGITIMATE SELF-DEFENCE

Legitimate self-defence is a justification wherein the unique features of this criminal law institution are more visible than in any other.⁴ Based on it, the legislator allows the assaulted to fend off an attempt, thereby infringing on the assailant's legal interests, which, at that moment, continue to hold particular value for society. Their protection is diminished but remains. Formally, the defendant's action meets the statutory criteria of *malum prohibitum*.⁵ Its scope matches that of a regulated norm but differs in application.⁶ This is because legitimate self-defence, tolerated by societies and the legislator, represents the choice of 'the lesser evil' in conflicts between two legally protected interests. This choice is justified in various ways, ranging from the belief that every individual inherently has the right to self-defence within the bounds of values important to them, to the notion that legitimate self-defence upholds the principle that law must not yield to lawlessness (defending the abstract idea of law),⁷ including the solidarity aspect of enabling individuals to protect others' interests, and even the controversial idea of individuals taking public order protection into their own hands.⁸ Hence, it can be argued, as M. Mozgawa and A. Marek do, that the rationale behind legitimate self-defence stems from two reasons: individualistic, and generally preventive (social).⁹ It is a subjective (natural) right of a human being to protect their own interests, and the motion of that law has

⁴ On the features of justifications: Grudecki, M., *Kontratypy pozaustawowe w polskim prawie karnym*, Warszawa, 2021, p. 302.

⁵ Marek, A., *Obrona konieczna w prawie karnym: teoria i orzecznictwo*, Warszawa, 2008, p. 20.

⁶ Grudecki, M., Kleszcz, M., 'Pozbawienie...', op. cit., p. 139.

⁷ Legutko-Kasica, A., 'Eksces w obronie koniecznej', *Przegląd Sądowy*, 2011, Issue 5, p. 81.

⁸ Mozgawa, M., 'Obrona konieczna w polskim prawie karnym (zagadnienia podstawowe)', *Annales Universitatis Mariae Curie-Skłodowska Lublin-Polonia Sectio G*, 2013, Issue 2, pp. 175–176; Gurgul, J., 'Psychiatryczno-psychologiczne aspekty związane z wersją obrony koniecznej', *Palestra*, 2003, Issue 5–6, p. 103; Marek, A., 'Obrona konieczna w nowym polskim kodeksie karnym', in: Wolf, G. (ed.), *Przestępczość przygraniczna. Tom 2. Nowy polski kodeks karny*, Frankfurt (Oder)–Ślubice–Poznań, 2003, pp. 93–95.

⁹ Mozgawa, M., 'Obrona...', op. cit., p. 175; Marek, A., *Obrona konieczna w prawie...*, op. cit., p. 19.

been extended to include the possibility of the self-defence of the others' interests, *ipso facto*, contributing to the prevention of the public order violations.¹⁰

Regardless of the justification for the existence of legitimate self-defence within the criminal law system, based on the provisions of Article 25 of the Criminal Code, the following elements, constituting conditions for this justification and, *ipso facto*, the circumstances limiting the application of a particular sanctioned norm that protects an assailant's legal interests, can be identified:

1. A lawless and direct attempt on any legally protected interest.
2. A conscious (intentional) act of fending off that attempt by incarceration in a manner that infringes on the assailant's legal interests, meeting the criteria for that type of *malum prohibitum*, i.e. self-defence.
3. A manner of self-defence proportional to the threat posed by the attempt.

Some authors additionally suggest that an attempt must be real and actual, meaning it must truly threaten legal interests rather than merely being perceived as such by the person being attacked; otherwise, it would be considered imaginary legitimate self-defence, evaluated according to Article 29 of the Criminal Code.¹¹ However, it seems incorrect (and inappropriate, as it is not specified in any provisions of Article 25 of the Criminal Code) to refer to these conditions specifically because a direct attempt cannot be unreal.¹² This perspective is also supported by the Supreme Court, which found that '[...] situations in which the existence of an attempt threat is solely subjectively presumed should definitely be excluded from the concept of a direct [*emphasis added by MG, OS*] threat of attempt [...]'.¹³ Moreover, an unreal, imaginary attempt is not an attempt at all and, therefore, poses no danger, let alone a direct one.

The specific conditions of legitimate self-defence have been extensively discussed in published works.¹⁴ The aim of this article is not to reanalyse all these conditions but rather to focus on the requirements of directness and the proportionality of self-defence to the threat posed by an attempt. It is the breach of this proportionality that is referred to as legitimate self-defence excess, both extensive and intensive, which is particularly relevant from the perspective of defining the excess of justification discussed herein and significant for this article.¹⁵

¹⁰ Marek, A., *Obrona konieczna w prawie...*, op. cit., p. 19; Marek, A., 'Obrona konieczna w nowym...', op. cit., p. 93.

¹¹ For instance, Mozgawa, M., 'Obrona...', op. cit., p. 180; Marek, A., 'Obrona konieczna w nowym...', op. cit., p. 99; Kilińska-Pekacz, A., 'Nowe ujęcie obrony koniecznej po nowelizacjach Kodeksu karnego z lat 2009–2010', *Studia z Zakresu Prawa, Administracji i Zarządzania UKW*, 2013, Vol. 3, p. 91.

¹² The same observation in: Sosik, R., *Obrona konieczna w polskim i amerykańskim prawie karnym*, Lublin, 2021, p. 142.

¹³ Decision of the Supreme Court of 15 April 2015, IV KK 409/14, LEX No. 1729286.

¹⁴ It is worth citing at least a few of the most recent monographs: Marek, A., *Obrona konieczna w prawie...*, *passim*; Góral, R., *Obrona konieczna w praktyce*, Warszawa, 2011; Pohl, Ł., Burdziak, K., *Praktyka instytucji obrony koniecznej*, Warszawa, 2018; Sosik, R., *Obrona...*, *passim*.

¹⁵ See: Grudecki, M., 'Bezpośredniość zamachu oraz współmierność sposobu obrony – granice obrony koniecznej w najnowszym orzecznictwie Sądu Najwyższego i sądów apelacyjnych', *Problemy Prawa Karnego*, 2017, Vol. 1, p. 91.

THE DIRECTNESS OF AN ATTEMPT AND EXTENSIVE EXCESS

The requirement for an attempt to be direct relates to determining the time interval (*temporis vicinitas*) between an assault and the commencement of defence against that assault.¹⁶ It is presumed that this requirement is met when an assailant begins an assault, indicating a high likelihood of immediate legal interest violation.¹⁷ Therefore, an attempt is considered direct when the infringement of legal interest is imminent unless countered by self-defence.¹⁸ From the perspective of the stages of an attempt, it is sufficient for a perpetrator to initiate it, as its direct outcome will be committing *malum prohibitum*.¹⁹ It is assumed that an attempt remains direct as long as it results in danger to legal interests posed by an assailant, including scenarios where an assailant temporarily halts the assault without abandoning their intention and plan.²⁰ However, it should be emphasised that sustained danger must be direct; if it does not lead to immediate legal interest violation, the attempt itself is no longer direct. In cases of ongoing offences (e.g., unlawful imprisonment), the right to legitimate self-defence is always applicable, and the attempt is always considered direct because a legal interest remains violated.²¹

However, it is worth noting that the term 'direct' has multiple meanings, as it can refer to temporal, spatial, sequential, or causal aspects. It is also important to remember that this concept appears in various laws and is mentioned several times in the Criminal Code itself. In criminal law, 'direct' is used in regulations of different kinds, both expanding criminalisation scope (e.g., defining an attempt) and limiting or excluding liability (as in the case of legitimate self-defence). This means that the term affects the law 'in two directions', and consequently, an interpretation favourable to a defendant based on one regulation simultaneously worsens the defendant's situation according to another regulation (thus, the principle *in dubio pro reo* is completely ineffective even if it is assumed to be permissible in interpretation in the first place).

A problematic issue arises when considering that a direct attempt could involve actions like installing protective systems against potential assaults, such as crossbows or electrified fences, or having house yards patrolled by aggressive animals.²² Some authors do not exclude categorising such behaviours as meeting legitimate self-defence criteria,²³ while others opposing this view argue that such

¹⁶ Sosik, R., *Obrona...*, op. cit., p. 138.

¹⁷ See: Sosik, R., *Obrona...*, op. cit., p. 138; Grudecki, M., 'Bezpośredniość...', op. cit., p. 92; Marek, A., *Obrona konieczna w prawie...*, op. cit., p. 57; Marek, A., 'Obrona konieczna w nowym...', op. cit., p. 97, and references therein.

¹⁸ Decision of the Administrative Court in Warsaw of 7 June 2013, II AKa 152/13, LEX No. 1350431; Iwaniuk, P., 'Obrona konieczna podczas bójki i pobicia na tle orzecznictwa Sądu Najwyższego', *Ius Novum*, 2011, Issue 1, p. 29.

¹⁹ Decision of the Administrative Court in Łódź of 17 December 2013, II AKa 207/13, LEX No. 1416080.

²⁰ Mozgawa, M., 'Obrona...', op. cit., p. 179.

²¹ *Ibidem*.

²² See, e.g., Sosik, R., *Obrona...*, op. cit., p. 142.

²³ Mozgawa, M., 'Obrona...', op. cit., pp. 179–180; Krukowski, A., *Obrona konieczna na tle polskiego prawa karnego*, Warszawa, 1965, pp. 39–40.

a 'protective system' deters potential rather than direct attempts.²⁴ Those advocating for considering such actions as legitimate self-defence counter by stating that the mentioned devices activate only in the event of an actual attempt, making the danger to legal interests direct.²⁵ However, this is a misconception because a perpetrator employing such means is not defending against an attempt but preventing it. Therefore, this viewpoint should be rejected without simultaneously determining the lawfulness of such actions.

However, the aforementioned non-criminal nature does not stem from justification but is inherently primary. As J. Wawrowski correctly points out, questioning the right to install such protective systems would contradict the natural subjective rights of an individual.²⁶ Certain 'anti-burglary' actions do not breach the principle of treating a legal interest, such as health or bodily integrity, respectfully. Society accepts these measures based on civil law, granting every property owner the right to protect their property from unlawful intrusions by third parties (Article 342 of the Civil Code).²⁷ It is debatable whether these principles require warning potential assailants about the dangers they face, for example, by placing a sign that a fence is electrified,²⁸ primarily to prevent harm to non-assailants (e.g., postman, doctor, court enforcement officer, etc.). There is little doubt that such measures should not encompass actions that threaten the life of a person infringing legal interests (e.g., the mentioned crossbows or electrified fences that could be fatal). However, a more comprehensive analysis of this issue is beyond the scope of this article. Nonetheless, it should be noted that if such a viewpoint is accepted, evaluating self-defensive behaviour as more intense than the assailant's actions based on regulations pertinent to legitimate self-defence excess will not be feasible.

Referring to the final moment when an attempt is considered direct, it should be determined that this moment arrives when the imminent threat to a legal interest disappears, for instance, when an assailant is no longer capable of causing harm, or has withdrawn and abandoned the assault.²⁹ However, this does not imply the complete absence of danger. That threat may persist, albeit unlikely to constitute a direct threat to violating legal interest. An attempt may also conclude when it has been completed or reached a stage where it definitively meets the criteria of a specific type of *malum prohibitum*.³⁰ Should actions taken by a person defending against an assailant continue in such a scenario, they would no longer fall within the scope of self-defence and would become unlawful retribution.³¹ This evaluation does

²⁴ Kilińska-Pękacz, A., 'Nowe...', op. cit., p. 89; decision of the Supreme Court of 23 April 1974, IV KR 38/74, LEX No. 18834.

²⁵ Wawrowski, J., 'Obrona konieczna a zabezpieczenia techniczne', *Prokuratura i Prawo*, 2006, Issue 9, pp. 36–37.

²⁶ *Ibidem*, p. 38.

²⁷ Similarly, Gardocki, L., *Prawo karne*, Warszawa, 2021, p. 121.

²⁸ Different view expressed, e.g., in: Wawrowski, J., 'Obrona...', op. cit., pp. 36–37.

²⁹ Grudecki, M., 'Bezpośredniość...', op. cit., p. 93.

³⁰ Gubiński, A., *Wyłączenie bezprawności czynu (O okolicznościach uchylających społeczną szkodliwość czynu)*, Warszawa, 1961, p. 19.

³¹ Grudecki, M., 'Bezpośredniość...', op. cit., p. 93; decision of the Administrative Court in Katowice of 30 October 2013, II AKA 363/13, LEX No. 1391901.

not apply to exceptional situations where an assailant temporarily halts their assault without relinquishing their intent. An example is when an assailant, slightly injured by a defending individual, runs to their bag to retrieve a knife and resume their assault on a victim. The imminent threat to the legal interest persists, necessitating the perception of the attempt as direct.³² Similarly, if an assailant, having initially abandoned their attempt, resumes their assault upon noticing the victim's departure, thereby rendering the same attempt direct once again. This assessment should also apply to scenarios where an attempt evolves into a continuous act or a crime comprising multiple actions, involving sequential rather than constant activity, and thus, a danger. The right to legitimate self-defence is exercisable only when the involved danger can be deemed direct.

According to doctrinal representatives, extensive excess is characterised by premature self-defence (*defensio antecedens*) or, alternatively, delayed self-defence (*defensio subsequens*), referring to situations where an attempt cannot be considered direct.³³ It is assumed that such cases involve a breach of the temporal correlation between an attempt and self-defence,³⁴ leading a defending individual to surpass the boundaries of legitimate self-defence, rendering their behaviour no longer secondarily lawful by virtue of justification. The scope of application of a sanctioned norm prohibiting causing specific harm to an assailant's legal interests begins to encompass the actions of a defendant once again. It is noteworthy that the act's regulations themselves do not apply to this form of legitimate self-defence excess.

Considering the perspective within the doctrine, which suggests that legitimate self-defence excess can only be acknowledged if the conditions of legitimate self-defence are met, it is questionable whether it is appropriate to distinguish extensive excess as a form of legitimate self-defence,³⁵ given the absence of a direct attempt in such cases. The lack of a direct attempt implies absence of actions within the scope of legitimate self-defence, thereby precluding the possibility of committing an excess of justification.³⁶ Adopting this view leads to categorising cases falling under extensive excess not as instances of legitimate self-defence excess but rather as actions erroneous in terms of justification (Article 29 of the Criminal Code).³⁷

Nevertheless, it warrants consideration whether, under current law, it is indeed inappropriate to distinguish extensive excess as a form of legitimate self-defence. Accepting the notion that intensive excess is the sole type of excess would contravene the prohibition of interpreting matters *per non est*. However, the legislator, in Article 25

³² See decision of the Administrative Court in Cracow of 6 October 2004, II AKa 183/04, LEX No. 143005.

³³ See, instead of many, Kulesza, J., in: *System...*, op. cit., p. 279; or Marek, A., *Obrona konieczna w prawie...*, op. cit., p. 134 et seq.

³⁴ Szczepaniec, M., 'Przekroczenie granic obrony koniecznej motywowane strachem lub wzburzeniem usprawiedliwionym okolicznościami zamachu', *Prokuratura i Prawo*, 2000, Issue 9, p. 13.

³⁵ See: Zontek, W., in: Królikowski, M., Zawłocki, R. (eds), *Kodeks karny. Tom I. Część ogólna. Komentarz. Artykuł 1–116*, Warszawa, 2021, p. 592; Grudecki, M., 'Bezpośredniość...', op. cit., pp. 93–94.

³⁶ Zontek, W., in: *Kodeks...*, op. cit., p. 592.

³⁷ Ibidem, pp. 592–593; Grudecki, M., 'Bezpośredniość...', op. cit., p. 95.

§ 2 of the Criminal Code, employs the term ‘in particular’, indicating that employing a manner of self-defence disproportionate to the danger posed by an attempt is one of the forms of legitimate self-defence excess. Consequently, there must be another kind of excess, namely, extensive excess, which takes the form of premature self-defence when an attempt occurs but has yet to become direct. An example is a scenario where an assailant is finalising their preparations for an attempt. Engaging in self-defensive actions in such a situation would constitute legitimate self-defence excess in the form of extensive excess. Concurrently, it is established that exceeding the limits of legitimate self-defence through so-called delayed self-defence is not feasible, since in such instances an attempt is no longer underway, thus lacking the conditions for legitimate self-defence and, *ipso facto*, its excess.

THE PROPORTIONATE CHARACTER OF THE MANNER OF SELF-DEFENCE TO THE DANGER POSED BY AN ATTEMPT AND INTENSIVE EXCESS

The requirement for the manner of self-defence to be proportionate to the danger posed by an attempt arises directly from the nature of this justification, ultimately serving as a basis for permitting the violation of particularly valuable legal interests of an assailant. It is asserted that behaviours classifiable as legitimate self-defence are socially acceptable if their outcome is less harmful than the damage that would result from assailant’s actions.³⁸ However, self-defence resulting in harm or mistreatment comparable to that intended by an assailant is also deemed socially acceptable. This is because, commonly, saving a life at the cost of an assailant’s life is justified, and the same principle applies to health. Furthermore, the legislator does not strictly require a balance between the inflicted result and the value of the interest threatened by an assailant’s actions but rather invokes the concept of ‘proportionate character’. Nevertheless, it is crucial to acknowledge that absolute and unrestricted self-defence, in terms of fending off an attempt, would transform into a mechanism for inflicting harm on an assailant, thus serving as a means rather than an end, and consequently violating Kant’s categorical imperative.³⁹

By establishing the aforementioned requirement, the legislator specifically demanded that the chosen methods of self-defence ensure minimal harm to an assailant’s health, if feasible.⁴⁰ The manner of self-defence is proportionate to the danger posed by an attempt when it enables a defendant, through its application,

³⁸ Peno, M., ‘Obrona konieczna – granice i moralne uzasadnienie instytucji’, in: Łaszewska-Hellriegel, M., Kłodawski, M. (eds), *Granice Prawoznawstwa wobec etyki, prawa człowieka i prawa karnego*, Zielona Góra, 2018, p. 187.

³⁹ Radecki, W., ‘Podjęcie obrony koniecznej w świetle prawa and moralności’, *Nowe Prawo*, 1976, Issue 7–8, pp. 1017–1018; Grudecki, M., Kleszcz, M., ‘Pozbawienie...’, *op. cit.*, p. 143.

⁴⁰ Grudecki, M., Kleszcz, M., ‘Pozbawienie...’, *op. cit.*, pp. 143–144; Wawrowski, J., ‘Obrona...’, *op. cit.*, p. 35; Kilińska-Pękacz, A., ‘Nowe...’, *op. cit.*, p. 86; Marek, A., ‘Obrona konieczna w nowym...’, *op. cit.*, p. 101.

to gain the necessary advantage to counteract the attempt,⁴¹ thereby legitimising the action.⁴² Thus, to successfully fend off an attempt, self-defensive actions should slightly surpass the intensity of the assailant's behaviour.⁴³ It is important to remember that in most instances an assailant benefits from the element of surprise and is generally better prepared for a confrontation than a defendant.⁴⁴ If multiple self-defence methods are available, a defendant should opt for the most effective yet least harmful approach towards an assailant.⁴⁵ Determining a method effectiveness is challenging based solely on objective criteria, as the subjective perception of a defendant and their personal capabilities also merit consideration.⁴⁶

The degree of danger posed by an attempt is influenced by several factors, including the type and manner of utilising dangerous means during the attempt, the assailant's characteristics (e.g., the intensity of their aggressive behaviour), the circumstances of the attempt (e.g., location and time, presence of minors, rapid progression, etc.), and the nature (value) of the threatened interest.⁴⁷ It is worth indicating that the more valuable the legal interest under assault, the greater the danger posed by the attempt.⁴⁸ Consequently, proportionality of the manner of self-defence to the danger posed by an attempt is also determined by the value of the threatened interest.⁴⁹

Significantly, a person subjected to assault may be unaware of the means an assailant intends to use, even if their assessment is conducted during the attempt. A victim of armed robbery cannot ascertain whether a perpetrator is prepared to 'merely' intimidate, injure, or even kill to seize money. It should also be emphasised that such an assessment is sometimes unfeasible even *ex post*, particularly if a perpetrator's intended result was not realised. In such cases, the materialisation of the danger posed by an assault represents a hypothetical future scenario, impossible to definitively ascertain even during legal proceedings.

Intensive excess refers to instances of legitimate self-defence excess arising from employing a manner of self-defence disproportionate to the danger posed by an attempt. At the outset of discussions on this topic, it must be highlighted that disproportionate character should not be determined solely based on the consequences of a defendant's actions (e.g., harm to health or the loss of life of an assailant).⁵⁰ The evaluation should

⁴¹ Decision of the Supreme Court of 14 May 1968 II KR 44/68, LEX No. 112062; Grudecki, M., 'Bezpośredniość...', op. cit., p. 95.

⁴² Wawrowski, J., 'Obrona...', op. cit., p. 34.

⁴³ Decision of the Administrative Court in Cracow of 5 December 2012, II AKA 165/12, LEX No. 1312606; Grudecki, M., 'Bezpośredniość...', op. cit., p. 95; Wawrowski, J., 'Obrona...', op. cit., p. 35; Iwaniuk, P., 'Obrona...', op. cit., p. 31. Other responsibilities of the defendant in terms of the manner of defence are detailed in: Gurgul, J., 'Psychiatryczno-psychologiczne...', op. cit., p. 106.

⁴⁴ Tabaszewski, T., 'Eksces intensywny obrony koniecznej w orzecznictwie', *Prokuratura i Prawo*, 2010, Issue 12, p. 80.

⁴⁵ *Ibidem*, p. 72.

⁴⁶ *Ibidem*, p. 78.

⁴⁷ Decision of the Administrative Court in Warsaw of 4 November 2013, II AKA 350/13, Legalis No. 747199; Grudecki, M., 'Bezpośredniość...', op. cit., p. 95; Grudecki, M., Kleszcz, M., 'Pozbawienie...', op. cit., pp. 143–144; Sosik, R., *Obrona...*, op. cit., p. 203.

⁴⁸ Grudecki, M., Kleszcz, M., 'Pozbawienie...', op. cit., pp. 143–144.

⁴⁹ Sosik, R., *Obrona...*, op. cit., p. 205.

⁵⁰ Decision of the Administrative Court in Cracow of 30 July 2012, II AKA 115/12, LEX No. 1235622.

encompass the entire range of actions undertaken or potentially feasible in a given situation, rather than just their outcomes.⁵¹ Therefore, assessing the danger posed by an assault and the appropriateness of the chosen method of self-defence should occur *ex ante*, at the moment of the attempt, rather than *ex post*, based on the resulting consequences.⁵² Intensive excess may involve infringing on an interest beyond what is indispensable to thwart an attempt or harming an interest of the assailant that was not legitimately necessary for effective self-defence.⁵³

LEGITIMATE SELF-DEFENCE EXCESS

Initially, the Criminal Code of 1997 addressed issues related to legitimate self-defence excess through two provisions: according to Article 25 § 2, in instances of legitimate self-defence excess, particularly when a perpetrator adopted a manner of self-defence disproportionate to the danger posed by an attempt, the court could either apply extraordinary mitigation of punishment or decide against imposing any punishment. Meanwhile, based on Article 25 § 3, the court would opt for the latter approach if legitimate self-defence excess resulted from fear or agitation justified by the circumstances of an attempt. M. Wantoła notes that, in its original wording, Article 25 § 3 of the Criminal Code was unique compared to the rest of the Criminal Code because it mandated judges to forego punishment, only allowing for the imposition of punitive measures for crimes resulting from legitimate self-defence excess.⁵⁴ This framework underwent modification in 2009⁵⁵ when legitimate self-defence excess stemming from fear or agitation justified by the circumstances of an attempt became a factor excluding criminal liability. The most recent amendment related to legitimate self-defence excess occurred in 2017,⁵⁶ introducing Article 25 § 2a into the Criminal Code, which stipulates that any legitimate self-defence excess in the context of repelling an attempt involving unlawful entry into a dwelling, premises, house, or a fenced area adjacent to any of those, or countering an attempt preceded by such an action in any of those locations, unless the legitimate self-defence excess was egregious, should not result in punishment. Given that this article focuses on legitimate self-defence excess resulting from fear or agitation justified by the circumstances of an attempt, the 2017 amendment falls outside the scope of the present research.

⁵¹ Zajac, D., 'Naruszenie reguł postępowania z dobrem prawnym jako kryterium określenia stopnia przekroczenia granic obrony koniecznej', *Gdańskie Studia Prawnicze – Przegląd Orzecznictwa*, 2014, Issue 2, p. 75; Wawrowski, J., 'Obrona...', op. cit., p. 35; Giezek, J., 'Glosa do postanowienia Sądu Najwyższego z 3 I 2002, IV KKN 635/97', *Państwo i Prawo*, 2002, Issue 11, pp. 107 and 109; Szczepaniec, M., 'Przekroczenie...', op. cit., p. 18; decision of the Supreme Court of 14 June 1984, I KR 123/84, LEX No. 17585.

⁵² Tabaszewski, T., 'Eksces...', op. cit., p. 72.

⁵³ Decision of the Supreme Court of 6 September 1989, II KR 39/89, LEX No. 18000.

⁵⁴ Wantoła, M., 'Materiałnoprawny charakter instytucji przekroczenia granic obrony koniecznej pod wpływem lęku lub wzburzenia i karnoprosocowe konsekwencje jej zastosowania', *Internetowy Przegląd Prawniczy TBSP UJ*, 2016, Issue 2, p. 184.

⁵⁵ Journal of Laws, No. 206, item 1589.

⁵⁶ Act of 8 December 2017 amending the Criminal Code (Journal of Laws of 2018, item 20).

Although it is indisputable that legitimate self-defence necessitates defendant's conscious effort to repel an attempt, it is worth contemplating whether this requirement is also relevant to excess justification, thus addressing whether involuntary excess is possible. J. Giezek correctly observes that a defendant often navigates 'a thin red line' between acknowledging a result that inflicts harm on an assailant's particular interests (e.g., life or health) and lacking deliberate action in this regard,⁵⁷ likely manifesting as so-called recklessness. The abuse of permission granted by legitimate self-defence does not hinge on the subjective stance since it exists independently of their judgment.⁵⁸ A defendant may either intend to exceed those boundaries and accept such a consequence or merely foresee the possibility of exceeding them.⁵⁹ However, it should be noted that these considerations are somewhat misplaced. The applicability of a norm does not depend on the actions of the individual subject to it but on its stipulations. Therefore, the question arises whether the provisions of Article 25 § 2–3 of the Criminal Code impose limitations on the subjective aspect. In our opinion, they do not. No normative restriction is placed on this aspect, and Article 8 of the Criminal Code is irrelevant in this context.

LEGITIMATE SELF-DEFENCE EXCESS RESULTING FROM FEAR OR AGITATION JUSTIFIED BY THE CIRCUMSTANCES OF AN ATTEMPT

Fear (encompassing fear, anxiety, or panic) is an inherent emotion accompanying individuals in situations presenting danger or at moments of sudden exposure to external stimuli, complicating the appropriate assessment of a new situation.⁶⁰ Fear influences human behaviour in various ways.⁶¹ In certain instances, it may lead to overestimating an adversary's capabilities and the potential threat posed by an attempt.⁶² Fear constitutes a rational response to an external and objective threat, prompting an individual to either seek escape or engage in self-defence, thereby enhancing preparedness.⁶³ Conversely, it is arguable that had the legislator intended for the term fear to signify a rational reaction, it would not have been applied in the context of legitimate self-defence excess. Therefore, it appears that the term was employed in its colloquial sense to denote intense anxiety associated with 'a clear and present danger' and uncertainty regarding the unfolding event.⁶⁴

⁵⁷ Giezek, J., 'Glosa...', op. cit., p. 107.

⁵⁸ Ibidem, pp. 107–108.

⁵⁹ Ibidem, p. 108.

⁶⁰ Kolasiński, B., 'Szczególny wypadek przekroczenia granic obrony koniecznej (art. 25 § 3 k.k.)', *Prokuratura i Prawo*, 2000, Issue 1, pp. 65–66; Szczepaniec, M., 'Przekroczenie...', op. cit., p. 14.

⁶¹ Szczepaniec, M., 'Przekroczenie...', op. cit., p. 14.

⁶² Kolasiński, B., 'Szczególny...', op. cit., p. 66; Szczepaniec, M., 'Przekroczenie...', op. cit., p. 14.

⁶³ Korpysz, A., 'Przekroczenie granic obrony koniecznej w wyniku lęku lub wzburzenia usprawiedliwionych okolicznościami zamachu z art. 25 § 3 k.k. z perspektywy psychologicznej', *Annales Universitatis Mariae Curie-Skłodowska Lublin Polonia. Sectio G*, 2020, Issue 2, pp. 115 and 119.

⁶⁴ On a side note, it should be mentioned that in the wording of Article 190 § 1 of the Criminal Code the legislator used the term 'apprehension' (*obawa*), to which – as it seems –

Agitation should be understood as a fleeting, intense emotion (impulse) that disrupts mental equilibrium and diminishes the capacity for rational thought (logical reasoning) in human behaviour.⁶⁵ It is a physiological phenomenon⁶⁶ where emotions overshadow logic.⁶⁷ Both fear and agitation can impede the rational evaluation of one's situation.⁶⁸ The reality perceived by such individuals becomes significantly narrowed as their mind absorbs less external information.⁶⁹ Consequently, when countering an attempt, they struggle to choose self-defence means appropriate to the threat⁷⁰ and to gauge the risk to their legal interests. According to A. Limburska, the terms 'fear' (*strach*) and 'agitation' (*wzburzenie*) are so broadly defined that they encompass almost all negative emotions experienced by a person subjected to an attempt.⁷¹

It is noteworthy that, unlike Article 148 § 4 of the Criminal Code, Article 25 § 3 of the Criminal Code does not include the adjective 'strong' in reference to agitation. This implies that the intensity of this state of unrest, where emotions dominate intellect, need not be as severe as in situations of physiological affect, the basis of Article 148 § 4 of the Criminal Code.⁷² The regulations do not specify any particular degree of intensity for these negative emotions to render the institution under discussion applicable.⁷³

In academic literature, one encounters assertions that fear or agitation, as described in Article 25 § 3 of the Criminal Code and leading to the exclusion of punishability for a perpetrator's act, must maintain a cause-and-effect relationship with legitimate self-defence.⁷⁴ According to some doctrinal and judicial interpretations, invoking the aforementioned condition is only feasible when the specific circumstances of a given attempt justify such a perpetrator's reaction, namely their fear or agitation.⁷⁵ Some contend that these emotions must be exceptionally intense,⁷⁶

a more rational meaning should be ascribed, namely the assumption that the foreboded event will actually occur.

⁶⁵ Kilińska-Pękacz, A., 'Nowe...', op. cit., pp. 95–96; Kolasiński, B., 'Szczególny...', op. cit., p. 66; Korpysz, A., 'Przekroczenie...', op. cit., p. 120.

⁶⁶ Decision of the Administrative Court in Warsaw of 8 November 2022, II AKa 102/22, LEX No. 3451128.

⁶⁷ Kilińska-Pękacz, A., 'Nowe...', op. cit., p. 96; Kolasiński, B., 'Szczególny...', op. cit., p. 67.

⁶⁸ Szczepaniec, M., 'Przekroczenie...', op. cit., p. 17.

⁶⁹ Ibidem; Legutko-Kasica, A., 'Eksces...', op. cit., p. 87.

⁷⁰ Szczepaniec, M., 'Przekroczenie...', op. cit., p. 17; Legutko-Kasica, A., 'Eksces...', op. cit., p. 88.

⁷¹ Limburska, A., 'Niekaralność przekroczenia granic obrony koniecznej w świetle art. 25 § 2a k.k.', *Czasopismo Prawa Karnego i Nauk Penalnych*, 2017, Issue 4, p. 15.

⁷² Raj, Ł., 'Przekroczenie granic obrony koniecznej pod wpływem lęku lub wzburzenia usprawiedliwionych okolicznościami zamachu (art. 25 § 3 k.k.), a zabójstwo pod wpływem silnego wzburzenia usprawiedliwionego okolicznościami (art. 148 § 4 k.k.) – wzajemne relacje', *Przegląd Ustawodawstwa Gospodarczego*, 2019, Issue 3, p. 200; Korpysz, A., 'Przekroczenie...', op. cit., p. 121.

⁷³ Kulesza, J., in: *System...*, op. cit., p. 303.

⁷⁴ Kolasiński, B., 'Szczególny...', op. cit., p. 65; Kilińska-Pękacz, A., 'Nowe...', op. cit., p. 95.

⁷⁵ Kilińska-Pękacz, A., 'Nowe...', op. cit., p. 96; Korpysz, A., 'Przekroczenie...', op. cit., p. 122; Zoll, A., in: *Kodeks karny. Część ogólna. Tom I. Komentarz do art. 1–52*, Warszawa, 2016, p. 572; Gensikowski, P., 'Problematyka karnoprawnych skutków przekroczenia obrony koniecznej', *Przegląd Sądowy*, 2010, Issue 11–12, p. 136.

⁷⁶ Szczepaniec, M., 'Przekroczenie...', op. cit., p. 21.

a position not supported by the legal text. L. Gardocki emphasises the importance of determining whether a defendant had grounds to react in such a manner under those conditions;⁷⁷ presumably, the author referred to fear or agitation inducing legitimate self-defence excess. Therefore, fear or agitation must be typical in such contexts.⁷⁸ Doctrinal discussions emphasise the need for findings to be based on objective criteria, utilising the concept of a model, rational, and mentally stable citizen.⁷⁹ K. Cesarz notes, '[...] invoking these states must [...] be rationally explainable through an objectified (external) assessment [...]'.⁸⁰ Some authors, for instance, point to factors that could elicit such reactions, including surprise, a large number of assailants, nighttime, and uncertainty regarding an assailant's intentions or the nature of the attempt.⁸¹ This view was also shared by the Supreme Court in its decision of 14 February 2002, which is worth quoting *in extenso*: 'The situation described in Article 25 § 3 of the Criminal Code must be confined to those cases where it is presumed that the objectively assessed circumstances of the attempt rationally justify the induction of a state of fear or agitation, and that state dictates the manner of repelling the attempt.'⁸² However, in another decision, the Supreme Court emphasised that:

'A direct, unlawful, and actual attempt on a protected legal interest necessitating legitimate self-defence to repel such an attempt invariably induces a certain level of mental agitation, apprehension, or unrest, rendering it difficult to envisage a lawless attempt that would not evoke fear or agitation in the person assaulted. However, this does not imply that the conditions listed in Article 25 § 3 of the Criminal Code are met in every instance.'⁸³

Fear or agitation are acknowledged as negative emotions accompanying the act of repelling an attempt but do not always justify the application of the institutions referred to in Article 25 § 3 of the Criminal Code.⁸⁴

⁷⁷ Gardocki, L., *Prawo...*, op. cit., p. 126. Similarly, Zontek, W., in: *Kodeks...*, op. cit., p. 598 and Administrative Court in Warsaw in decision of 20 December 2018, II AKa 447/18, LEX No. 2622686.

⁷⁸ Gardocki, L., *Prawo...*, op. cit., p. 126.

⁷⁹ Zöll, A., in: *Kodeks...*, op. cit., p. 572; Gensikowski, P., 'Problematyka...', op. cit., p. 137; Kulesza, J., in: Paprzycki, L.K. (ed.), *System Prawa Karnego. Tom 4. Nauka o przestępstwie. Wylączenie i ograniczenie odpowiedzialności karnej*, Warszawa, 2016, p. 291.

⁸⁰ Cesarz, K., 'Przekroczenie granic obrony koniecznej w wyniku lęku lub wzburzenia usprawiedliwionych okolicznościami zamachu (art. 25 § 3 k.k.) w świetle orzecznictwa Sądu Najwyższego', in: Majewski, J. (ed.), *Okoliczności wyłączające bezprawność czynu. Materiały IV Bielańskiego Kolokwium Karnistycznego*, Toruń, 2008, p. 57. Similar view expressed in the decision of the Administrative Court in Poznań of 7 July 2017, II AKa 97/17, LEX No. 2663233.

⁸¹ Kilińska-Pekacz, A., 'Nowe...', op. cit., p. 96; Kolański, B., 'Szczególny...', op. cit., p. 68; Korpysz, A., 'Przekroczenie...', op. cit., p. 122; Mozgawa, M., 'Obrona...', op. cit., p. 188; Sosik, R., *Obrona...*, op. cit., p. 256.

⁸² Decision of the Supreme Court of 14 February 2002, II KKN 337/01, LEX No. 53735.

⁸³ Decision of the Supreme Court of 22 February 2007, WA 6/07, LEX No. 257827. Very similarly on these feelings as invariably characterising the person assaulted: Filar, M., 'Podstawy odpowiedzialności karnej w nowym kodeksie karnym', *Palestra*, 1997, Issue 11–12, p. 15, and Legutko-Kasica, A., 'Eksces...', op. cit., p. 87.

⁸⁴ Decision of the Administrative Court in Warsaw of 11 October 2022, II AKa 413/21, LEX No. 3435750.

It is also conceivable to encounter perspectives suggesting that while fear or agitation should objectively exist, the personality and mental attributes of a perpetrator must also be considered.⁸⁵ P. Gensikowski argues that Article 25 § 3 of the Criminal Code should not apply in scenarios where fear or agitation are exacerbated by alcohol or another intoxicant consumption, or, alternatively '[...] when, among other factors, the basis of an attempt arises from a conflict between an assailant and a victim, the assailant is unarmed, and the victim is not, or when a victim anticipates an attempt and prepares to counter it, for instance, by arming themselves with a firearm'.⁸⁶

P. Gensikowski further clarifies that not every case of legitimate self-defence excess stems from fear or agitation, and even when these emotions are present, they are not always linked to the threat posed by an attempt.⁸⁷ It is also untenable to claim that any instance of agitation or fear justifies employing the most injurious means of self-defence, thus precluding the possibility of intensive excess.⁸⁸ Nevertheless, it is accurate that individuals under assault rarely 'keep a cool head' and defend themselves without experiencing the aforementioned emotions.⁸⁹

To comprehend the essence of legitimate self-defence excess, a novel approach to examining several specific model cases is proposed,⁹⁰ with each scenario evaluated differently. These cases primarily differ in the mental state of a defendant (including affect and mood, impulse for action, cognitive processes, identity, behaviour, and self-perception),⁹¹ which was described in detail in the third section, leading to varied legal consequences for such self-defence from a criminal law perspective (based on different legal grounds).

1. A perpetrator exceeds the boundaries of legitimate self-defence without experiencing fear or agitation. An illustrative scenario could involve a defendant repelling an attempt by disarming an assailant and causing them to fall, then, as the latter (now unarmed) attempts to rise, presumably to retrieve a dangerous tool, slowly and acting 'in cold blood' stabs them in the neck with the assailant's knife. Although such situations may not be common, their occurrence cannot be entirely ruled out, as it is plausible that fear or agitation inherently accompany every defendant due to the assault itself.⁹² Rarely does an assaulted individual remain emotionally unaffected in their response.⁹³ However,

⁸⁵ Gensikowski, P., 'Problematyka...', op. cit., p. 137.

⁸⁶ Ibidem.

⁸⁷ Gensikowski, P., 'Nowelizacja art. 25 § 3 kodeksu karnego', *Prokuratura i Prawo*, 2009, Issue 9, p. 135. Similarly: Raj, Ł., 'Przekroczenie...', op. cit., p. 201.

⁸⁸ Szczepaniec, M., 'Przekroczenie...', op. cit., p. 17.

⁸⁹ Filar, M., 'Podstawy...', op. cit., p. 15; Korpysz, A., 'Przekroczenie...', op. cit., p. 113–114.

⁹⁰ The discussed provision of Article 25 § 2 and 3 of the Criminal Code allows for the identification of 4 cases, however – for the sake of a complete normative scope – a fifth case was also indicated, based on Article 25 § 2a, which essentially lies outside the scope of the present research. A similar view is put forward in: Kulesza, J., *System...*, op. cit., p. 303.

⁹¹ https://www.aptelia.pl/czytelnia/a380-Czym_jest_stan_psychiczny_jak_wyglada_dobry_a_jak_zly [accessed on 23 August 2022].

⁹² Gurgul, J., 'Psychiatryczno-psychologiczne...', op. cit., p. 108; Szczepaniec, M., 'Przekroczenie...', op. cit., pp. 16 and 21; Gensikowski, P., 'Nowelizacja...', op. cit., p. 135.

⁹³ Cf. Szczepaniec, M., 'Przekroczenie...', op. cit., p. 21.

the possibility that a defendant may not experience the discussed circumstances due to their personal reaction to a legitimate self-defence situation being influenced by their temperament cannot be discounted.⁹⁴ This category also encompasses scenarios where the attempt is made by someone familiar or dear to the defendant, thereby not triggering fear or agitation; nonetheless, the assaulted individual decides to counter the attempt, committing legitimate self-defence excess.

2. A perpetrator oversteps the limits of legitimate self-defence influenced by fear or agitation, which are instigated by the occurrence of a lawless and direct attempt and can be justified by such an attempt. It can be presumed that such emotions are justified when deemed explainable and rational.⁹⁵ An example could be a scenario where a defendant, due to aforementioned emotions, shoots an assailant in the chest instead of the hand holding a dangerous weapon. In this case, Article 25 § 3 of the Criminal Code, which excludes punishability for an action undertaken by a defendant committing legitimate self-defence excess, should be applied. As P. Gensikowski notes, besides these feelings, other emotions, such as anger, may be experienced, although it is unlikely they would predominate over fear or agitation in a defendant's emotional experience.⁹⁶ Thus, the occurrence of an attempt generally justifies fear or agitation, under which influence a defendant surpasses the confines of legitimate self-defence.
3. A perpetrator surpasses the boundaries of legitimate self-defence under the influence of fear or agitation, with these emotions triggered by the event of a lawless and direct attempt, yet they cannot be justified by such an attempt. This category encompasses an exceedingly rare scenario where fear or agitation induced by an attempt leads to legitimate self-defence excess but cannot be deemed justified. For instance, this might occur in situations where fear for one's life is incited by an attempt to tarnish one's good name through insult, ultimately resulting in the adoption of a disproportionately aggressive self-defence tactic relative to the threat posed by the attempt. It is the prosecution's responsibility to demonstrate such circumstances. In these instances, Article 25 § 3 of the Criminal Code does not apply, but the court may resort to Article 25 § 2 of the Criminal Code, considering the directives and rules of administering a penalty.⁹⁷ Nevertheless, the conditions stipulated by these directives and principles must be met, implying that the comprehensive context of the factual situation should support the conclusion that imposing a penalty is unwarranted.⁹⁸

⁹⁴ Korpysz, A., 'Przekroczenie...', op. cit., p. 118.

⁹⁵ It is worth referring again to Article 190 § 1 of the Criminal Code, which concerns a **justified** apprehension.

⁹⁶ Gensikowski, P., 'Problematyka...', op. cit., p. 136.

⁹⁷ Ibidem, pp. 131–132, 136.

⁹⁸ Teleszewska, M., 'Konsekwencje prawne przekroczenia granic obrony koniecznej', *Przełąd Sądowy*, 2014, Issue 7–8, pp. 162–163.

4. A perpetrator breaches the limits of legitimate self-defence influenced by fear or agitation, yet these emotions are not provoked by a lawless and direct attempt.⁹⁹ A conceivable scenario involves an individual already in a state of agitation prior to the assault, possibly due to familial discord, workplace issues, or distress over their favourite football team's loss, subsequently facing an assault. By committing legitimate self-defence excess, the perpetrator channels their negative emotions (effectively 'taking it out' on the assailant), which, however, do not justify the attempt as these emotions stem from the perpetrator's external environment. Another example of unjustified fear concerning the circumstances of an attempt involves apprehension towards an assailant as an individual, not triggered by the assault per se, but rather by the widespread belief that the assailant is dangerous.¹⁰⁰ It also seems feasible to interpret the actions of a defendant exceeding the limits of legitimate self-defence, driven by a different type of fear (phobia), hence emotional tension unjustified by the situation, in a similar manner.¹⁰¹ In such cases, Article 25 § 3 of the Criminal Code does not apply, but the court may invoke Article 25 § 2 of the Criminal Code, taking into account the directives and rules of administering a penalty.¹⁰² However, fulfilling the criteria outlined in these directives and rules is essential; the totality of the factual circumstances should underpin the view that penalty imposition is unnecessary.¹⁰³
5. A perpetrator exceeds the boundaries of legitimate self-defence influenced by fear or agitation, yet these emotions arise not from a lawless and direct attempt, or commits legitimate self-defence excess without being driven by those emotions while repelling an attempt involving unlawful entry into a dwelling, premises, house, or an adjacent fenced area, or countering an attempt preceded by such an action in any of those locations, unless the legitimate self-defence excess was egregious, which should not result in punishment. An illustrative case might involve an individual encountering a burglar in their home at night and, as the burglar attempts to flee the scene, striking the burglar's head with a heavy vase, causing destruction and creating a situation where the burglar could die or suffer significant health damage. This action, however, is not performed under the influence of fear or agitation resulting from the attempt's circumstances but, for example, due to a desire for revenge against the burglar. In such instances, Article 25 § 2a of the Criminal Code should be applied. Often, the application scopes of the institutions mentioned in Article 25

⁹⁹ Also referred to in: Gensikowski, P., 'Problematyka...', op. cit., p. 136. See also: decision of the Administrative Court in Gdańsk of 21 September 2016, II AKa 261/16, LEX No. 2157821.

¹⁰⁰ See decision of the Administrative Court in Warsaw of 25 April 2022, II AKa 265/21, LEX No. 3347799.

¹⁰¹ Raj, Ł., 'Przekroczenie...', op. cit., p. 12; Korpysz, A., 'Przekroczenie...', op. cit., pp. 114–115. According to Ł. Raj, we are then dealing with imaginary legitimate self-defence.

¹⁰² Cf. Gensikowski, P., 'Problematyka...', op. cit., pp. 131–132, 136.

¹⁰³ Teleszewska, M., 'Konsekwencje...', op. cit., pp. 162–163.

§ 2a, and Article 25 § 3 of the Criminal Code may intersect¹⁰⁴ because an attempt on domestic peace typically evokes the aforementioned emotions in a defendant.

Consequently, the regulatory significance of this provision may be questioned.¹⁰⁵

It is imperative to assert that in case of scenarios outlined in points 2 and 3 one should not attempt to assess the influence of an attempt's circumstances on the mental state of a defendant committing self-defence excess by employing the concept of a model or an average citizen, etc. Such an approach leads to the absurdity of querying what reaction is standard/average in the face of a present danger, as if each individual did not react differently.¹⁰⁶ The objective of the institution under discussion is to exclude the punishability of legitimate self-defence excess in every instance where the excess results from fear or agitation justified by the attempt's circumstances. Importantly, justification is feasible in virtually all cases of excess due to these reasons, unless specific considerations suggest otherwise. As K. Cesarz points out, it is conceivable to encounter situations that induce fear or agitation, which, however, cannot be justified by the attempt circumstances due to a lack of 'equilibrium' between those emotional states and their triggers.¹⁰⁷ Generally, the absence of punishability in cases delineated in Article 25 § 3 of the Criminal Code is linked to the low degree of guilt of a defendant who, overwhelmed by emotions stemming from a direct and unlawful attempt on any legally protected value, struggles to comply with the law by selecting an appropriate self-defence tactic (specific motivation).¹⁰⁸ When a defendant is taken by surprise during an assault, their reaction time is limited, making it unreasonable to expect them to weigh various motivational factors that could enable them to choose a self-defence method aligned with the posed threat, thus, demanding impartiality or even sheer self-control is similarly unreasonable.¹⁰⁹ Fear or agitation represent a fully justified, innate response to experiencing a lawless attempt on a legal interest.¹¹⁰ Although not explicitly stated, it is generally accepted that a perpetrator is justified by the mere fact that the attempt triggered their fear or agitation.¹¹¹ Less is expected from such an individual than from someone whose experience of an attempt did not elicit such a state. Consequently, this person does not warrant criminal liability.¹¹² These assertions align with the rationale behind the 2009 amendment, which suggested that the change '[...] will facilitate avoiding unnecessary legal proceedings and the associated traumatic experiences for an individual who committed an excess, including a conviction with exoneration.'¹¹³ An individual who exceeds

¹⁰⁴ Limburska, A., 'Niekaralność...', op. cit., p. 16; Sosik, R., *Obrona...*, op. cit., p. 270.

¹⁰⁵ Sosik, R., *Obrona...*, op. cit., p. 270.

¹⁰⁶ Szczepaniec, M., 'Przekroczenie...', op. cit., p. 19.

¹⁰⁷ Cesarz, K., 'Przekroczenie...', op. cit., p. 58.

¹⁰⁸ Gensikowski, P., 'Nowelizacja...', op. cit., pp. 133–134; Wantoła, M., 'Materiálnoprawny...', op. cit., p. 189; Filar, M., 'Podstawy...', op. cit., p. 15; Korpysz, A., 'Przekroczenie...', op. cit., pp. 117–118.

¹⁰⁹ Korpysz, A., 'Przekroczenie...', op. cit., p. 114; Sosik, R., *Obrona...*, op. cit., p. 255.

¹¹⁰ Sosik, R., *Obrona...*, op. cit., p. 255.

¹¹¹ It seems a similar view is expressed in: Mozgawa, M., 'Obrona...', op. cit., pp. 187–188.

¹¹² Gensikowski, P., 'Nowelizacja...', op. cit., p. 132.

¹¹³ *Ibidem*, p. 127. See also: Barczyk-Kozłowska, J. et al., 'My home is my castle – czyli słów kilka o rozszerzeniu granic obrony koniecznej w polskim kodeksie karnym', in: Gurdek, M. (ed.), *Badania nad źródłami prawa i efektami jego stosowania. Tom I*, Warszawa, 2020, p. 19.

the limits of legitimate self-defence due to fear or overwhelming emotions triggered by an attempt simply does not merit punishment, thereby avoiding the stigma associated with criminal proceedings.

M. Szczepaniec highlights the subjective element in terms of a defendant's emotional resilience, personality, and response to stressful situations.¹¹⁴ She asserts that legitimate self-defence excess induced by fear or agitation stemming from emotional or neurotic hyperactivity of the individual who committed the excess should be evaluated differently than excess triggered by the particularly threatening nature of an attempt.¹¹⁵ This perspective holds validity when considering the aforementioned correlation; if a perpetrator exceeded limits due to their neurotic personality and frequent temper loss, with agitation not arising from the attempt itself, Article 25 § 3 of the Criminal Code is inapplicable. Conversely, if the attempt provoked agitation, the neurotic personality or excessive hyperactivity of the individual committing the excess are irrelevant for excluding punishability based on Article 25 § 3 of the Criminal Code.

Simultaneously, it should be noted that failing to meet the conditions specified in the third paragraph results in a defendant being evaluated under criminal law according to the second paragraph, which broadens the category of behaviours identified as legitimate self-defence excess.¹¹⁶ This regulation (§ 2) does not establish any prerequisites for availing the privileges contained within and not assured otherwise. The legislator presumed that any attempt might limit the decision-making options available to a defendant, thereby diminishing the seriousness of their guilt. The ultimate appraisal of excess, while considering the distinct nature of legitimate self-defence, must be grounded in the general principles of penalty imposition.

Furthermore, doctrinal discussions have not addressed whether the condition described in Article 25 § 3 of the Criminal Code, following the 2009 amendment, eliminates unlawfulness, guilt, or perhaps punishability itself.¹¹⁷ The answer to this query depends on the adopted model of crime and the understanding of the punishability framework. The assertion that, in such cases, a perpetrator's guilt is especially minimal remains uncontroversial.¹¹⁸ Detailed deliberations on this topic exceed the scope of the issues broached in this article. It is merely advisable to note that any act of legitimate self-defence excess will always be unlawful, thereby entitling its victim to exercise their right to legitimate self-defence. Moreover, irrespective of the adopted theoretical framework, legitimate self-defence excess resulting from fear or agitation provoked by the attempt's circumstances leads to either not initiating or discontinuing proceedings based on Article 17 § 1(4) of the Code of Criminal Procedure. Consequently, the sole practical distinction between self-defence within statutory boundaries and legitimate self-defence as outlined in

¹¹⁴ Szczepaniec, M., 'Przekroczenie...', op. cit., p. 18.

¹¹⁵ Ibidem.

¹¹⁶ Bearing in mind, of course, that the second special circumstance is excess for the sake of defending domestic peace, therefore, the above-mentioned § 2 completes the two normatively singled out excesses.

¹¹⁷ Wantoła, M., 'Materialnoprawny...', op. cit., p. 186.

¹¹⁸ See, among others, Szczepaniec, M., 'Przekroczenie...', op. cit., pp. 13–14.

Article 25 § 3 of the Criminal Code, is that, in the latter scenario, an assailant is entitled to such justification.¹¹⁹ Naturally, the difference in legal proceedings should not be overlooked; if a court determines during criminal proceedings that a perpetrator's act remained within the limits of legitimate self-defence, it is obligated to acquit the accused. However, if it is established that the conditions set forth in Article 25 § 3 of the Criminal Code are met, the court should terminate the proceedings,¹²⁰ which, as M. Wantoła observes, is perceived as a less definitive resolution by public opinion than an acquittal.¹²¹ This perspective is accurate since such a procedural outcome based on Article 17 § 1(4) of the Code of Criminal Proceedings, due to the 'not amenable to penalty' clause, signifies that although all criteria for classifying an act as a crime are satisfied, the legislator deems neither necessary nor justifiable to impose punishment on the perpetrator.¹²²

RECAPITULATION

To summarise the discussions presented in this article, the main theses highlighting the correlation between paragraphs 3 and 2 in Article 25 of the Criminal Code are outlined as follows:

1. Contrary to common assertions in doctrine and jurisprudence, it is unfeasible to employ the notion of a model (average) citizen, frightened or agitated, in evaluating legitimate self-defence excess; such a standard does not exist as each individual reacts uniquely to threats and defines danger differently.
2. Fear or agitation are emotions commonly experienced by individuals when facing danger; often, a defendant who remains within the confines of legitimate self-defence will experience these emotions.
3. It is imperative not to disregard scenarios where repelling an attempt does not evoke fear or agitation; a defendant might decide to protect their (or another person's) legal interests rationally, for example, when the attempt is made by an acquaintance known to be non-threatening. Even in such circumstances, legitimate self-defence excess is not precluded; here, Article 25 § 2 of the Criminal Code might be applicable.
4. A defendant experiencing fear or agitation while countering an attempt does not always result from the assault itself. For instance, repelling an attempt by a spouse under the influence of alcohol, where a defendant exceeds the bounds of legitimate self-defence due to agitation sparked by marital strife (partner's alcoholism), rather than the assault per se, typifies such a scenario. In this situation, legitimate self-defence excess may be governed by Article 25 § 2 of the Criminal Code, or, extending beyond the primary discussion, Article 25 § 2a of the Criminal Code.

¹¹⁹ Similar view expressed in: Filar, M., 'Podstawy...', op. cit., p. 16.

¹²⁰ See also: Gensikowski, P., 'Nowelizacja...', op. cit., p. 133.

¹²¹ Wantoła, M., 'Materialnoprawny...', op. cit., p. 194.

¹²² Sitarz, O., in: Dukiet-Nagórska, T., Sitarz, O. (eds), *Prawo karne. Wykład akademicki*, Warszawa, 2021, p. 436.

5. When fear or agitation stemming from an assault trigger legitimate self-defence excess, the provisions of Article 25 § 3 of the Criminal Code are applicable if justified. Entities adjudicating such conduct should not investigate the intensity of these emotions or employ the concept to ascertain whether 'a model citizen' would surpass legitimate self-defence boundaries in a given case. Nor is it relevant if the individual who did exceed them exhibited emotional hyperactivity.¹²³ In Article 25 § 3 of the Criminal Code, the legislator mandates that fear or agitation should be justified by the circumstances of the attempt, rather than – as pointed out by R. Sosik – '[...] justified by circumstances resulting [emphasis added by MG, OS] from an already executed attempt'.¹²⁴ It should be added that justification pertains to fear or agitation, not the conduct of the individual committing the excess. The latter's justification is a secondary matter, addressed under Article 25 § 3 of the Criminal Code.

Thus, it is essential to reiterate that the distinctions in Article 25 § 3 and 2, primarily concern the depiction of a defendant's mental state, which consequently influences the legal treatment of such self-defence. However, it is crucial to emphasise that the legally prescribed spectrum of responses relevant to criminal law does not hinge on the value of the violated interest by a defendant, nor on the discrepancy between the preserved and sacrificed values, nor even on the degree of deviation from the principle of proportionality or simultaneity between the posed threat and self-defence. The differentiating criterion between these two provisions is a specific atypical motivational circumstance experienced by a defendant: (1) initially presumed by the legislator (based on empirical and psychological insights), yet requiring verification by the specific factual situation, leading to non-punishability; or (2) not delineated by the legislator, alternative (distinct) from § 3,¹²⁵ allowing for a deviation in penalty imposition (§ 2). Each case necessitates an examination of the mental state of the individual committing the excess to determine which of the aforementioned scenarios occurred, thereby establishing whether the act was influenced by fear or agitation and, if so, attributing these emotions to either the attempt or another cause.

It should be acknowledged that M. Filar's perspective, which suggests that the discussed institution effectively precludes the application of Article 25 § 2 of the Criminal Code, is correct. This results in a scenario where it becomes practically impossible to punish a perpetrator who commits an excess in almost every instance of legitimate self-defence.¹²⁶ This approach, however, embodies humanitarianism within criminal law. It would be unduly harsh for the state to penalise someone who was defending the legal order but struggled to meet the criteria for justifying self-defence due to emotions elicited by an assault. In essence, it would lead to the punishment of the individual wronged by the crime, who, in most cases, due to

¹²³ Cf. Korpysz, A., 'Przekroczenie...', op. cit., p. 114.

¹²⁴ Sosik, R., *Obrona...*, op. cit., p. 257.

¹²⁵ And, of course, in § 2a of the analysed provision.

¹²⁶ Filar, M., 'Podstawy...', op. cit., pp. 15–16.

the spontaneous nature of the attack, has limited control over the unfolding situation and is unable to rationally determine what constitutes lawful self-defence.¹²⁷ Thus, the assailant-perpetrator bears the risk that any unlawful harm inflicted on them might remain unpunished by criminal law (or that the punishment could be substantially reduced).

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¹²⁷ Barczyk-Kozłowska, J. et al., 'My home...', op. cit., pp. 18–19.

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