



The act of *Noodweer Exces* in the crime of murder as a form of self-defence

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Abstract

The defense is forced to go beyond the limits or in the Criminal Code (KUHP) it is known as *noodweer* excesses. This arises because of a situation where a victim of a crime is in a situation or condition of urgency so that he is forced to fight to defend and save his property, honor, or life. This study highlights two problems related to *noodweer*. First, the form of a criminal act which can be regarded as a forced defense. Second, the basis for the abolition of the crime against the perpetrators of forced defense. To uncover this issue, the research was conducted using a qualitative method with a juridical normative approach through a statutory approach and a conceptual approach using secondary data and then qualitatively analyzed. The results of the study show that a forced defense does not mean that this action is justified but because there is no other way to avoid it and there must be a previous violation of the law. So that people who do this are not subject to a violation of the law according to the concept contained in Article 49 paragraph (1) of the Criminal Code which is interpreted as *noodweer excesses* aiming to protect themselves and others, honor, decency, or their own or other people's property. In addition, the basis for the abolition of the crime against *noodweer excesses* is the legal conclusion on the facts revealed at the trial as well as the values that follow and understand the sense of justice that lives in society according to the judge's point of view

Keywords: *Noodweer* defense, murder, law, criminal

Introduction

The emergence of more well-organised groups of people and intellectuals within them, which eventually gave birth to the state, further confirmed the existence of the field of criminal law because the state needs criminal law in addition to other fields of law. The development of criminal law from simple societies to today's modern society has not changed the nature of criminal law, but has only emphasised the nature and extent of the field of criminal law. Therefore, for both past and present societies, criminal law can be defined as all legal regulations that determine the acts for which perpetrators should be punished and the punishments that should be imposed. This definition includes four points that are closely related to one another, namely regulations, acts, perpetrators, and punishment ^[1].

In Indonesian criminal law, there are several forms of forced defence, namely *overmacht* (Article 48 of the Criminal Code), *noodtoestand* and *noodweer* (Article 49 Paragraph (1) of the Criminal Code) A person cannot be convicted if he commits an act of forced defence either for himself or for another person where the forced defence is carried out as an effort to protect the honour of decency (*eerbaarheid*), property (*goed*), and life from unlawful acts committed by someone ^[2].

R. Soesilo gave an example of "emergency defence" which is regulated in Article 49 of the Criminal Code, namely a thief who is about to take someone else's goods, or a thief who is caught taking someone else's goods and then attacks the person who has the goods with a dagger and so on. Here the person may fight back in defence of himself and his stolen goods, because the thief has attacked against his rights. Furthermore, the attack must be sudden or threatening at the time. But, if the thief and his goods have been caught, then one may not defend by beating the thief,

because at that time there is no attack at all on the part of the thief, either on the goods or the person ^[3].

In this regard, R. Soesilo explains that for example, a police agent who sees his wife being raped by someone, then pulls out the gun he is carrying and fires several times at the person, it can be said that he exceeded the limits of emergency defence, because usually by not having to shoot several times, the person has stopped his actions and runs away. If it can be shown to the judge that the overstepping of the limits was due to extreme anger, the police agent cannot be punished for his actions ^[4].

Involuntary Defence (*Noodweer*) is a justification that removes the "Unlawful" element from the act of the person defending himself. For example, if a mugger pulls a knife on us, criminal law justifies our action to fight the mugger. For example, by immediately kicking the mugger's hand until the knife falls, even though kicking is considered as mishandling ^[5].

However, it is not uncommon for victims of criminal acts to become suspects in cases where the orientation is similar in the context of *noodweer* or *noodweer exces*. This of course becomes a question of how a victim of a criminal act who wants to protect his property, soul and honour by fighting back on the basis of wanting to protect himself from attacks that can harm him or others against criminal acts, but the victim can turn into a perpetrator of criminal acts as a result of his actions also injuring or injuring the person suspected of being the perpetrator of the criminal act against him.

From the above of course raises another question as far as the proportionality requirement (balanced) which means that the interests of others sacrificed in forced defence must be balanced with the interests protected, and or the subsidiary requirement means that the defence must be carried out in the lightest way.

Thus from the above that there are legal problems in the context of coercion (*noodweer* and *noodweer excès*), especially in terms of protecting property rights against a series of crimes that require a person to take action under duress. Where in the concept of criminal law this kind of action cannot be punished because of the existence of justification and excuse, then why in reality the judge in deciding a case that has similarities in this context is very different, which should be determined by legal certainty that this kind of action is not a criminal act committed by the victim because it is based on protecting and maintaining his dignity as a form of basic human rights.

Research Method

In conducting research, accurate data is needed, both primary data and secondary data. In order to obtain the data required for this writing that meets the requirements, both quality and quantity, certain research methods are used. The research method in this writing is a normative juridical method, where normative juridical research is legal research carried out by researching library materials or secondary data [6]. Based on the background above, the problem formulation in this research focuses form of criminal act which can be said to be a forced defense and a basis for abolition of criminal penalties the perpetrator is forced to defend himself.

Result And Discussion

In Dutch, criminal offences are translated by the word *strafbaar feit*, but the government has not formally regulated the translation of the Dutch translation. Flexibly, there are several opinions or multiple perspectives in Indonesian such as criminal offences, criminal acts, criminal events, and also delicts [7].

Criminal offences can be defined as unlawful acts committed by a person where each act has sanctions or causes a punishment to ensnare the perpetrator. Although these unlawful acts have clear sanctions, not all offences can be punished due to the existence of reasons for criminal expungement. Criminal offences in the Criminal Code, which are known as reasons for criminal offences in the law, consist of: (a) Article 44 which is incapable of responsibility; (b) Article 48 which is force or overmacht; (c) Article 49 which is forced defence or *noodweer* (Article 49); (d) Article 50 which is implementing a provision in the law; and (e) Article 51 which is implementing an official order [8].

This reason makes it impossible to punish the perpetrator even if the offence has been proven. There are three reasons, among others: (a) justification. This reason can eliminate or nullify and eliminate the unlawful nature of the perpetrator where the perpetrator's action according to this reason is a justified and appropriate action; (b) excuse. The reason that erases the offender's guilt. The unlawful act committed by the perpetrator is not subject to criminal punishment due to the absence of the element of guilt; and (c) reasons for eliminating prosecution. The main issue in this reason is not justification or excuse but the basis of benefit to the community, because the consideration is the public interest, it is expected that no prosecution will be held [9]. Article 49 paragraph (1) of the Criminal Code states, "Whoever is compelled to commit an act, which is necessary for the defence of himself or another, the defence of his honour or property or the property of another, against an attack which

is unlawful and immediately threatening, shall not be punishable. The Dutch *Wetboek van Strafrecht* (WvS) is different from the concept of defence by force as stipulated in the Indonesian Criminal Code. This arises because the Indonesian Criminal Code adapts to the European class. The KUHP accommodates the notion of attack (*oogenblikke lijke*) by extending it to *onmiddellijke dreigende* (immediate threat). This occurred with the argument that the situation in the Dutch East Indies was different from the situation in the Netherlands itself [10].

The following four elements of the defence of necessity (*noodweer*) will be discussed one by one as follows. First, the defence is involuntary. Forced defence is a lawful defence because if a person is subjected to an attack that is instantaneous and unlawful while the person must ask for help to negate the attack to the apparatus that functions to protect the community, in this case the Indonesian National Police, but because the attack is instantaneous and it is not possible for the person to avoid the attack.

It is permissible for the person to negate the attack even if it is against the law, because the state cannot protect every citizen against attacks that come at once. A self-defence to be considered a forced defence must be forced. Criminal law experts propose two requirements that must be met, namely (a) the proportionality requirement.

The proportionality requirement (balanced) means that the interests of others sacrificed in a forced defence must be balanced with the interests being protected; (b) the subsidiarity requirement. The subsidiarity requirement means that the defence must be made in the lightest possible manner. Exceeding this subsidiarity requirement may only be acceptable in the case of forced defence that exceeds the limit (*noodweer excès*) as stipulated in Article 49 paragraph (2) of the Criminal Code.

Secondly, what is being defended is one's own or another's person, honour or property. Article 49 (1) of the Criminal Code has limited the interests that can be defended in the context of a forced defence. These interests are the self (*lijf*) of oneself or another person, the honour of morality (*eerbaarheid*), and the property (*goed*) of oneself or another person. *Lijf*, translated as: self, includes both human life and body. An attack on life is an attack to deprive a person of life (murder), while an attack on the body is, for example, an attack for the purpose of assault. Utrecht explains what is meant by "*eerbaarheid*" is the integrity of the human body in terms of sexuality. A woman who resists an attempt to rape her has a defence of "*eerbaarheid*" under Article 49(1) of the Criminal Code. Thus, "*eerbaarheid*" in Article 49(1) of the Criminal Code is not "*eer*" in the general sense. This opinion is reinforced by Article 310 paragraph (3) of the Criminal Code, which stipulates that "it cannot be said to defame or insult with a letter, if it is evident that the act was committed in defence of the public interest or out of necessity for self- defence". The Dutch terms for "defamation" and "defamation by letter" are "*smaad*" and "*smaadschrift*". Thus, what is meant by "*eerbaarheid*" is moral honour, i.e. honour in the sexual sense. An example would be an assault with the intent to rape a woman. Thus, an attack on a person's good name, i.e. defamation, does not fall within the scope of a defence of necessity within the meaning of Article 49 paragraph (1) of the Criminal Code [11].

Third, there is an imminent threat or attack. According to this element, self-defence can be made against an "attack" or

against a "threat of attack". Regarding the meaning of "instantaneous attack" (ogenblikkelijk aanranding) the following explanation is given by Moeljatno: It is not necessary to explain what "attack" means. What needs to be emphasised is the moment of commencement of the attack and of course also the moment when the attack ceases. The commencement of an attack in the article in question is determined to be "instantaneous". Instantaneous means that at the time of the attack, there is a defence at the same time, and there is no long period of time. Moeljatno interprets "instantaneous attack" from the perspective of the time between attack and defence. Self-defence must be made when the attack begins, there is no long time gap. Thus the instantaneous attack referred to here is an attack that has begun and has not ended. If the defence is forced to be made before the attack begins or after the attack ends, then it is not permissible to make a defence. Van Hamel says that a defence can be made against an instantaneous attack in the event that the attack has begun and during the course of the attack, then one is justified in committing *noodweer*. However, if the attack is over then the *noodweer* excess cannot be done again. Many considerations that a person who performs this forced defence must have the condition that the attack is instantaneous, with the word instantaneous, a person who gets the attack can no longer ask for help either to law enforcement officials or to the surrounding people so that the person who gets the attack instantly is justified to repel the attack even though it is against the law. Fourth, in performing forced defence, the attack must be against the law. If the attack is not an unlawful act, then the defence of necessity cannot be invoked. An example of an attack that is not against the law is a police officer who is assigned to arrest someone based on an arrest warrant. Other examples are animal attacks and insane people. Regarding animal attacks, H.B. Vos said that there are two types of animal attacks, namely: a. the animal attacks because it is instigated by someone; and b. the animal attacks without being instigated by someone. If the animal attacks because someone instigated it, then the animal can be seen as an instrument of the person who instigated it. So self-defence against an animal attack instigated by a person can be seen as a defence of necessity (*noodweer*) against the attack of the person who instigated the animal attack. However, self-defence against an animal attack that is not instigated by a person cannot be seen as a self-defence in terms of *noodweer*. The juridical consideration is that the animal cannot be said to have committed an unlawful act. Self-defence against an unprovoked animal attack can be seen as an *overmacht*, specifically a form of duress (*noodtoestand*)^[12].

Conclusion

Defences made against self, property, honour or others must be balanced or equal to the attack. A person is not allowed to be excessive in making a defence against an attack that befalls him. *Noodweer* excess committed is a reason for criminal expungement as stipulated in Article 49 paragraph (1) of the Criminal Code. This action is a form of defence against aggression against the rules to secure oneself, honour or property of both oneself and others. When excessive self-defence is carried out in conditions of mental shock, then it can be used as a justification or excuse that can eliminate the punishment.

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