

TRANSGRESSION OF THE RIGHT OF LEGITIMATE DEFENCE. A LEGAL – ANALYTICAL – COMPARATIVE STUDY

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ABSTRACT

The study deals with researching the issue of what is the transgression of the right of legitimate defence by explaining its definition, forms, and the conditions for the transgression of the right of legitimate defence and distinguishing it from what is similar to it, as well as researching the responsibility for the transgression of the right of civil and criminal legitimate defence.

The study included a conclusion that showed the most important results of the study and some recommendations and proposals that the researcher found necessary in the field of this study.

Keywords: The right to Legitimate Defence, Transgression of the Right of Legitimate Defence; The Liability of Transgression

INTRODUCTION

Unanimity, in the past and present, has become inevitable for the illegality of the transgression of legitimate defence, because the defence is only a means to protect legal interests, and therefore it is not characterized at all by the nature of revenge, retribution, or punishment, and if the reason for permitting legitimate defence is to protect the interest by preventing danger and aggression with the necessary amount of force, this cause by itself brings the action back to the field of illegality when it is no longer there, and there is no doubt that it is neglected if the defender transgresses the appropriate reaction to resist danger or aggression according to the circumstances (Al-Mashahadi, 1990).

Transgression of defence is an unlawful fact, so when it is an actual or imminent situation, it can create a state of legitimate defence for the aggressor, regardless of the extent of the responsibility of the transgressor in his defence or the role of the aggressor in raising the defence and causing the transgression, that is because the state of legitimate defence does not depend on personal elements, and the presence of an illegal event risk is sufficient for its emergence in general, provided that the emergence of a state of legitimate defence with regard to the aggressor is one thing and what is permissible for him to use force to resist the transgressor in his defence is another, because the only increase in the act of defence is the unlawful amount, which is an act of transgression, that's when it is necessary that there is a correlation between this amount and the violence the aggressor uses to resist it.¹

According to the opinion of some jurists, there is a rule that says: (Whoever defends himself becomes an unlawful aggressor if he transgresses the limits necessary for defence). This opinion is broadly in agreement with the position of Islamic jurisprudence, because the use of force is only permissible by means of defence, and because what is permissible is the sufficient amount to respond to the assault, and what exceeds is a transgression that does not create a state of legitimate defence, i.e. if this transgression becomes a state, then the transgressor has the right to defend himself against this aggressor, and the jurisprudence believes that the aggressor initially loses his right of defence even if the defender transgresses

the limits of his right to permissibility, because the risk of transgression to which the aggressor is exposed to only arose as a result of his attack, so he had to anticipate this danger, and he could have avoided it had he refrained from attacking.(Baker, 1950)²

Problem of the Study

The problem of the study is focused on determining what is transgression of the right of legitimate defence and its cases and distinguishing it from other cases, as the issue of separating the right of defence and what may turn into an abuse of this right is a delicate matter and needs precise criteria for the purpose of determining the existing situation.

Importance of the Study

The importance of the study is highlighted by the fact that the state of legitimate defence is not considered a crime and is not punishable by law, while transgression may lead to an act worthy of punishment or lead to civil and criminal liability. From here, the importance of the study and the distinction between the two cases appears (Al-Dahabi, 1960).

Methodology of the Study

The researcher will depend in his study on several methodological methods, the most important of which are the following (Kirah, 1960):

- 1) Descriptive Approach, by defining the nature of the subject of the study and distinguishing it from other cases.
- 2) Analytical Approach, by analysing the elements and pillars of the subject of study.
- 3) Comparative Approach, by relying on comparing Jordanian, Iraqi and other legislations whenever possible.

Chapter One

The Definition of the Transgression of the Right of Legitimate Defence

We will discuss in the study the definition of the transgression of the right of legitimate defence, where we will divide this topic into two sections. In the first section, we will deal with the definition of transgression and its forms, while the second will be devoted to studying the conditions of transgression and distinguishing it from what is similar to it according to the following (Obaid, 1953):

Section One

The Definition and Forms of Transgression

We deal with the definition of transgression and its forms according to three subsections: the first on the definition of transgression, the second on the jurisprudential and judicial trends in regards to the definition of transgression, and the third on cases of transgression (Al-Saeed, 1953).

Subsection One

The Definition of the Transgression of Legitimate Defence

Transgression is achieved when there is no proportionality between the power that the defender used and the degree of danger he faced when he repelled the danger, and the state of transgression is achieved after legitimate defence, that is, the defender is in a state of legitimate defence of himself or money, but it transgresses the limits legally established for him to become a case of transgression, where he exaggerates in responding to the assault by excessive use of the response method, or he may use a dangerous method that transgresses the possible least dangerous method to respond to the assault, and the transgressor may deliberately transgress it at other times, being wrong in choosing the appropriate method to respond or wrong in how or when to use it (Harba, 1988).

First: The Definition of Transgression Linguistically

Transgression is a noun derived from transgress, meaning (excess), thus, transgression means excessiveness,³ transgressing a place means transgressing its permissibility and trespassing it, or “he is transgressing something”.⁴

Second: The Definition of Transgression Idiomatically

Transgression, means overstepping the boundaries of the use of the state of legitimate defence, and the disproportion between the strength of the defence reaction and the severity of the assault, as the acts of violence and force must be issued by the aggressor in order to respond to the assault that transgressed the amount of the risk of assault directed by the aggressor in a way that a normal person would estimate if surrounded by the same circumstances (Mahmoud, 2005).⁵

Here, some go to define transgression as the lack of proportionality between the act of defence and the danger threatening the aggressor.

Third: The Definition of Transgression Legally

Roman legislation defined transgression as (crossing the lines of defence proportional to the gravity of the danger and the circumstances in which it was achieved). Likewise, Indian law defined it as (inflicting harm beyond the extent necessary for the purpose of defence) and according to that, the transgression is concerned with more than the amount sufficient or necessary to protect the offended interest). The Soviet Penal Code showed the meaning of transgression as (transgressing the limits of the legitimate defence is that the defence does not clearly conform to the nature and seriousness of the assault), so, the transgression under this text is the clear disparity between the force used and the severity of the assault and its social seriousness (Kurdi, 2005).

The Iraqi legislator did not define the transgression of legitimate defence on the grounds that the definition was within the speciality of jurisdiction and jurisprudence. However, he clarified the conditions and forms of the transgression and referred to the authority of the subject court in regards to that transgression. From this, we can see that Article (45) of the Iraqi Penal Code has decided not to permit the right of legitimate defence if it causes damage More severe than this defence requires and if the defender, deliberately or negligently, transgresses the limits of this right or mistakenly believes that he is in a state of legitimate defence, as he is here responsible for the crime he committed, and the court in this case may impose a misdemeanour penalty instead of a felony sentence, and impose a penalty for the violation instead of a misdemeanour penalty (Al-Sanhouri, 1952).⁶

From the aforementioned article, we conclude the definition that the Iraqi legislator adopts, so we say: transgressing the right of legitimate defence, as far as he is concerned, is

the defender deliberately, negligently or mistakenly transgressing the limits of legitimate defence in a way that harms the aggressor more than what this defence requires.

Therefore, the proportionality of the acts of defence with the act of aggression is one of the conditions for achieving the state of legitimate defence. Whenever this condition is unmet and the rest of the conditions were met, the defender would have transgressed the limits of his right to defence, and we're faced with what is called idiomatically (transgressing the limits of legitimate defence) (Al-Sarraj, (n.d.)).

Jordanian law has stipulated that if a violation in defence is committed, the crime can be exempted from punishment, provided that it is to keep away an imminent, grave danger that he did not intentionally cause. This means that the transgression, if it was in good faith and without criminal intent, and the act was proportionate as much as possible according to the circumstances surrounding it, could lead to the exemption of the defender who transgressed the penalty (Othman, 1986).⁷

Subsection Two

Jurisprudential Trends Regarding the Concept of Transgression in the Legitimate Defence

There is a wide difference in jurisprudence and judiciary in the determining of the scale of the increase that is validated by the meaning of the transgression of legitimate defence. Therefore, it is necessary to make a balance between defence and assault in the means used or consequential damages or between the reality resulting from the defence that was necessary in terms of the actual means of defence, and the method available or in terms of defence and adequate damage. These trends were distributed as follows (Al-Jaf, 2001):

- First: The Method of Balancing the Damages Caused by the Defence and the Damages Caused by the Assault.
- Second: The Method of Balancing the Means of Defence and the Means of Assault.
- First: The Method of Balancing the Damages Caused by the Defence and the Damages Caused by the Assault

This trend sees the transgression being achieved whenever there is a discrepancy between the damage inflicted by the defender on the aggressor and the remedial damage that was likely to be caused. Therefore, in order to avoid this transgression, damage should not occur disproportionately to the damage the defender suffers and wants to remedy. Likewise, this trend requires that there be a correlation between the amount of assault and the amount of force used by the defender; in other words, there should be a correlation between the force of the attack and the physical force that was used to keep it away (Khalaf et al., 1982).⁸

This method achieves a balance between the harms of defence and the harms of aggression, and it does not require absolute equality as a condition for non-transgression, meaning that the act of defence should not be identical to the act of aggression, but it is sufficient that there is proportionality, that is, the person is in a legitimate defence position if the difference between the two actions (defence and aggression) is reasonable. Even though this trend is clearly keen to maintain the balance between conflicting interests without compromising one in order to protect the other, the defect that appears in this method is that it evaluates the balance on the basis of absolute proportionality without relative proportionality, and should take into account the sudden onset where the person falls victim to the assault, leaving him no room for reflection and estimation of the harm that will result in the danger was inflicted unto him, and the strength he needs to resist it, especially since the harm is a probabilistic and not realistic matter that can be easily estimated, and on the other hand, if the

aggressor breaks the law, breaches security, and harms society, then (justice and reconciliation) will side with the defender not only because of the safety of his position as a guardian of security, interest and law, but also for the importance of preserving his interest from attacks, and therefore it is not correct to rely on a balance between opposing damages. Finally, this trend means that killing – for example – as a defence against crimes of sexual rape, kidnapping, or indecent assault, is considered transgression and this is contrary to the explicit legal texts (Al Moujaz, (n.d.)).⁹

Second: The Method of Balancing the Means of Defence and the Means of Assault

This trend sees that transgression is achieved when the means used for defence are not commensurate with the nature and gravity of the means taken for assault. Transgression is achieved whenever the method of defence is more dangerous than the method of assault, regardless of the competing interests and the considerations and circumstances associated with the transgressive incident, but this trend is reproached by the fact that it cares about the interest of the victim, as it gives him opportunities to use the means equivalent to the aggressive means without being, in such cases, transgressing the expense of the aggressor, and it may be the opposite, as this trend sometimes leads to an outrageous abandonment of interests, so whoever enters a house in which the owner of the house is ignorant to his intention and while he carries deadly weapons, how can he protect his interests and rights without transgressing, while being obligated to use a similar method, since the response may lead in most cases to transgression, due to the difference of means (Ramadan, 1968).¹⁰

Proposed Meaning of the Transgression of Defence

It appears from the jurisprudential and judicial trends that balancing the harms between assault and defence or the means used in them leads to results that are not in the interest of society and are not in harmony with the law. In addition, the balance between the used method and the available one or between the harm achieved and the adequate harm may not achieve adequate protection for the interest protected by the law, especially when the value of both interests is not taken into consideration, which may result in an excess or neglect of the protected interests. transgression of legitimate defence means (The amount of the apparent increase in criminal activity over what is legally necessary to ward off danger in the circumstances of defence). This connotation seems to show that the transgression is not all the power that the transgressor used, but rather it is necessary to deduct from it what was necessary for the act of defence and was permissible, and the excess from it is transgression. This connotation also shows that the necessary amount is linked to the law in order to combine and reconcile the requirements of a personal and realistic attitude to assault and defence on the one hand, and what the law may specify in other ways in which killing is not permitted, even if it is the only way required by the situation. On the other hand, this connotation did not neglect the qualitative and quantitative values of the conflicting interests in light of the objective, personal and realistic circumstances of the defence, by linking it to the estimation of the increase in the conditions of defence, which is when the defence is undertaken, not when the danger appears nor after the excess has been achieved and its results that may go beyond the intention of the defender. At this point only, it is necessary to specify that the connotation, while setting specific parameters for determining the increase and then estimating the transgression, it also allows the judge of the matter through its flexibility to investigate and assess the facts on one hand, and decide the legal description of the moral element of the transgressor and adapt his psychological state on the other, based on what the defence circumstances reveal (Al-Hadithi, 1992).¹¹

The Egyptian Court of Cassation states that (the lack of proportionality between the act of assault and the act of defence is only seen to assess whether the force used to ward off the assault transgressed the necessary limit required by law and the extent of this increase ...). The Court of Cassation in Iraq also issued a ruling stating that a person is in a state of transgressing legitimate self-defence if he shoots and kills the victim who provoked him by constantly hitting him with the stick (bamboo), and the court sentenced him to five years of imprisonment; however, the Court of Cassation reduced the penalty to two years (Ma'alouf, 1986).¹²

The juristic view also agrees with this connotation, saying that it is certain that proportionality does not mean the correspondence between the assault and the force used for defence, neither in terms of type nor in terms of magnitude, but rather what is meant is that it is not clear – given the facts and circumstances - that this force transgressed the necessary amount to ward off the assault, and at that time, the matter is related to the facts of each case, and its assessment is left to the judge of the matter (Al-Fadhel, (n.d.)).¹³

Article (341) of the Jordanian Penal Code No. (16) of 1960 stipulates that: “The following acts are considered legitimate defence (Najm, 2007):

The act of killing or injuring another, or by any effective act in defence of himself, his honour, the soul of another, or his honour, provided that (Al-Halabi, 1997):

- a) The defence takes place in the event of the assault,
- b) The assault is not rightful,
- c) The assaulted person is not able to get rid of this assailant except by killing, wounding, or an effective act.

Subsection Three

Cases of the Transgression of Legitimate Defence

There are three cases of transgression of legitimate defence (the right of legitimate defence does not allow causing more harm than what this defence requires, and if the defender deliberately or neglectfully transgresses the limits of this right or mistakenly believed that he is in the case of legitimate defence, then he is responsible for the crime he committed, but the court may, in this case, impose a penalty for misdemeanour instead of a punishment for a felony and a penalty for a violation instead of a penalty for a misdemeanour) (Mustafa, (n.d.)).

The division of these three cases will be according to the criminal intent or the extent of the defender's intention to cause more severe harm to the aggressor, and it is in accordance with the general rules, and to clarify the liability of the transgressor, we must distinguish between these forms (Hosni, 1977).

First Case: The Defender Using More Force Intentionally

The defender deliberately transgresses the limits of legitimate defence when he is aware of the enormity of the danger and is able to ward it off by an appropriate means in his disposal, but he uses more force than that.¹⁴ If the transgression was intentional, i.e. the defender had deliberately resorted to a force in excess of that, then he is responsible intentionally, as if he takes advantage of the counter of this assault merely for beating.¹⁵ The Iraqi Court of Cassation ruled this by stating: (The accused transgresses the limits of legitimate defence if the victim stabs with a knife a stab that leads to his death as a result of the victim's assault on the accused by beating the accused with the stick.¹⁶

Second Case: Neglect of the Defender

If the defender transgresses on the basis of his carelessness or negligence, wrongly believing that there is a state of defence when determining the gravity of the danger or an incorrect act of assault while he was able to correctly determine the danger, then the defender in this situation has committed a mistake when defending by transgressing the limits set forth in the law (Saleh, 2004).¹⁷

If he incorrectly determines the gravity of the danger or the gravity of the defence act, knowing that he could have the correct determination, then he is responsible for an unintentional liability (Al-Majali, 2005).¹⁸

The Kurdistan Region Court of Cassation ruled in its decision that if (the suspect's belief that he was in a state of legitimate defence that was justified, but his belief was based on error where the accused was not required to cause more harm than what is required by the right of legitimate defence, the accused erroneously transgresses the limits of defence, and is responsible for the murder he committed).¹⁹

Subsection Four

Forms of the Transgression of Legitimate Defence

First: The Real Danger and the Imaginary Danger

The basic principle is that the real danger is the factor relied upon in establishing the right to legitimate defence, not the fictitious or imaginary danger that the defender fancy or thinks he is exposed to, except that some penal legislation has taken into account the situation of some people, and decided the availability of the right to legitimate defence whenever some believe that, contrary to the truth and reality, there is a danger threatening them, provided that this delusional belief is based on reasonable reasons, and the example of a justified delusional belief is the case of someone who was walking in complete darkness and saw a person coming toward him, so he shouts at him asking who he was, and instead of telling him who he is, he fired a shot at his side with the intention of joking with him, so this person thought that the one who fired was nothing but his enemy, who was lying in wait for him with the intent to kill him, so he shoots at him, thinking that he was defending himself, and the person was killed.²⁰

A person may think that he is threatened by a current danger and perform the legitimate defence, then it turns out that this danger did not exist except in his imagination, so here it is not permissible for him to invoke the legitimate defence for the permissibility of his action. For example: a person who sees another person coming towards him in the dark with something in his hand that is, contrary to the truth, a weapon that is directed at him, so he deals with him by shooting him and kills him.²¹

As for the criterion of distinguishing between an imaginary danger and a real danger, it is an objective criterion, as is the case for permissibility. The objective criterion requires the availability of the reasons for permissibility in order to produce their effects, so if the danger is stipulated for it to be a real situation, then this means that the danger must exist in reality and not in the imagination of the defender, and this condition is due to the nature of the legitimate defence and its philosophical content, because it fulfils a certain social function.²²

The general division of the position of the jurisprudential trends towards the imaginary danger can be seen in the case of credit or lack thereof, but those who give it credit have differed among themselves. Some considered it real danger, while others denied it completely, and others considered that it influences liability, regardless of the form of action taken by the defender, whether intentional or unintentional.²³ This can be explained according to the following jurisprudential trends:

The First Trend: The Imaginary Danger is Irrelevant

The followers of this trend believe that the danger must be real. If it is imaginary or hallucinatory, it is not sufficient to justify the legitimate defence. Likewise, it is not sufficient to mistakenly think that the attack has occurred, and not to fully believe what happened to the will when the perpetrator believed that there was a danger facing him, and he committed the act based on the belief, and the necessary arrangement of the effect of this unnatural formation of the will that would not have arisen on what it arose out of it, were it not for the external influences.²⁴

The Second Trend: Considering the Imaginary Danger as Real Danger

The followers of this trend believe that the perpetrator here is in a state of legitimate defence, if he has legitimate and serious motives to believe that there is a threat that threatens him, even if it is not within the conditions of legitimate defence, if he does not commit a mistake on his part. This trend is judged for its extremism in regard to invoking the psychological state of the perpetrator, despite the imaginary danger, as it is known, being nothing but an illusion.²⁵

Second : Positive Assault and Negative Assault

Positive assault occurs through voluntary organic movement, and it creates a state of legitimate defence. If all the elements of its emergence are available, for example someone who points his weapon in another's face in a form of aggression, or holds his neck or insults him... etc. So does the aggression by insults arise, if the aggressor's position is represented by mere abstinence. As a matter of fact, there is a side of jurisprudence that states that the danger must be positive for the establishment of a state of legitimate defence, whereas some jurists believe that it is conceivable that the danger or assault arises with mere abstention or purely negative attitude, as (by stopping a person in front of the door of another person's house to cut off access to his home). In such a case, the state of legitimate defence arises and the householder has the right to resist the aggressor. But it seems that the true representation of this aggressive attitude is that it is positive aggression, as it is an organic movement. A person standing and preventing the owner of the house from entering is not a negative assault or purely abstention, because refraining from a person's reluctance to do a positive act is legally binding, as if the judge refrained from taking the procedures specified by law to look into the case before him, or the witness' reluctance to testify in the lawsuit filed to the court. Nevertheless, it is conceivable that the danger or aggression would be realized in the form of refrain, as if a passer-by wanted to cross the road and is followed by a dog that is trying to bite him, and the owner of the dog was refraining from tying his dog, which creates a state of legitimate defence of the passer-by, allowing him to act in an appropriate manner towards the refraining man.²⁶

Section Two

Conditions and Distinctions of the Transgression of the Right of Legitimate Defence

In this section, we present the conditions of the right of legitimate defence, its distinction, and considerations for assessing the transgression of legitimate defence in three independent subsections, as follows:

Subsection One

Conditions of the Transgression of the Right of Legitimate Defence

One of the conditions for achieving legitimate defence is that the act of defence be proportional to the act of aggression, so that the defender uses only the necessary amount of force to repel the danger. Only then does the act of the defender become permissible, but the defender may transgress the limits of his right to defence by using more force than is required by the defence to prevent assault, and in this case, we are faced with transgressing the limits of the right to legitimate defence. In Article (45), the penalties for an Iraqi when he said (The right to legitimate defence does not permit juveniles...)²⁷

The act is permissible as long as the perpetrator does not deviate from the limits established for permissibility, and if he transgresses them, his action becomes unlawful. The Iraqi Penal Code did not regulate the permissibility of legal texts pertaining to it, rather it stipulated the case of the transgression of the right to legitimate defence when Article (45) of it dealt with that by saying (The right of legitimate defence does not permit causing more harm than what this defence requires ...), and the case of transgression of legitimate defence means (the amount of the apparent increase in the act of defence over what is legally necessary to ward off danger in the circumstances of the defence). From this, it becomes clear that transgression is not all that the defender has used forcefully to ward off the risk of aggression. Rather, what was necessary for defence should be deducted from it and it is permissible, and what is more than it should be considered transgression, and that transgression in the right of legitimate defence requires the availability of a number of conditions.

On the other hand, we see that the Jordanian legislator has shown in the text of Article (341) the cases that are considered lawful defence and the conditions for considering a case as a legitimate defence.²⁸

First: The State of Legitimate Defence

The search for transgression only occurs when we are looking for a legitimate defence. It is evident that we will not be faced with a case of transgression if the conditions for establishing the state of legitimate defence are not met in the first place, except for the condition of proportionality between the act of defence and the act of assault. The Court of Cassation in Iraq ruled that (the state of legitimate defence ends by taking the pistol from the hands of the attackers, and that shooting from the aforementioned pistol will be firing at the attackers with wilful killing).²⁹ In this case, it is possible to speak of transgressing the legitimate defence as long as the pistols remain in the hands of the aggressors while they are shooting at the victim, but the danger of the situation disappears after removing the pistols from their hands. Thus, it is necessary to stop talking about transgression because the originally permissible act has lost one of its conditions, which is the current danger.³⁰

If the accused has not been subjected to any assault, then he may not invoke the legitimate defence or transgress it.³¹ Likewise, the act of assault must include an immediate and unlawful danger.³²

Second: The Defender Transgressed the Limits of Legitimate Defence (The Physical Condition of Transgressing)

If the defender's act is contemporaneous and proportional to the gravity of the danger of the strength of the aggressor, then we are faced with a state of legitimate defence, because

the defender's act was in conformity with the provisions of the permissibility and outside the scope of criminalization.³³

The Iraqi Penal Code referred to this condition in the text of Article (45), as we've seen before previously when it prevented causing more severe harm than is required by the legitimate defence. Accordingly, the material component is in the event that the limits of legitimate defence are exceeded when the aggressor's power exceeds the required amount of force to repel the assault, and in this regard, the Iraqi Court of Cassation decided that: (If the accused got up from his sleep at night and saw the aggressor inside his home naked and killed him, it would be in a state of legitimate defence, but it is considered to be in violation of the right of defence if the killing took place outside the home after the victim escaped from it).³⁴ The accused is considered transgressing the limits of legitimate defence if he kills the victim while fleeing.³⁵

The accused transgresses the legitimate defence limit for killing the victim during the exchange of fire, as long as the accused was able to prevent the victim's evil by hiding in one of the low points in the location of the accident, or injuring the victim in a non-lethal position to force him to abandon the assault (Article 45) Iraqi penalties.³⁶

Subsection Two

Distinctions of the Transgression of the Legitimate Defence with Similar Cases

Distinguishing the Transgression of Legitimate Defence from Abuse of Force

Whoever uses more force than what is in proportion to the danger according to the circumstances of the defence, transgresses the limits of legitimate defence, and this increase, of course, is unlawful mainly because it took place outside the limits of permissibility. The case has abused his right to defence. The transgression or abuse of the right has supporters and opponents, as the difference in its standards has been the subject of controversy among the jurists. Some see that the abuse of the right does not deviate its owner from the limits of the right, and that the act is legitimate in itself because it is one of the powers that the perpetrator enjoys. However, if the act deviates from the purpose of the right or its result, then it becomes unlawful, thus, the difference is apparent between the arbitrary act and the act that transgresses the right, as while the first is legitimate in itself, but it is defective in its purpose or result, and the second is unlawful in itself.³⁷

The opposing trend believes that (it is not what prevents a single act from being in agreement with a right, because it falls within its scope and content and at the same time violates the law as a whole, and this is the essence of the idea of abuse of the right, and its meaning). Supporters of this opinion, with their opposing stance, do not deny the existence of limits to rights, but they fail to observe that these limits are a violation of rights, and it is not conceivable that they can be abused and remain within their limits.³⁸

This opinion is criticized because limiting the transgression in two forms is not based on evidence and makes the transgression a departure from the right beyond its limits, thus making it part of the idea of abuse or an aspect of it. While others see the need to distinguish between the abuse of the right and the abuse. Whereas, they see that the use of the right means committing the crime of revenge after the disappearance of the right to defence. If the right to legitimate defence has arisen, the defender may use it in good faith, as the defender responds aggressively to the attack, directing it to the source of the attack with the intention of repelling it or warding it off, even if the danger remains or to stop the attack, he continues to use force with the intention of revenge, and then the case is not transgressing the right of legitimate defence, but rather a picture of an abuse of the right.³⁹ Likewise, it is necessary to

differentiate and distinguish between the two ideas of abuse and excess in defence, on the basis that transgression in defence is a departure from the limits of permissibility, while abuse of the right is a form of deviation from the cause of permissibility. It follows from this difference that the transgression is unlawful for itself as a crime, while abuse of the right is unlawful and its illegality is an emergency and not subjective.⁴⁰

Distinguishing the Transgression of Legitimate Defence from Permissibility Error

In view of the difference in the meaning of the transgression of legitimate defence from the meaning of the error in the permissibility, it is easy to make a distinction between the two cases in terms of the act, and if the act in both cases is characterized by illegality, then in the case of transgressing the legitimate defence, it started lawfully, because it was basically a defensive act and then it transgressed the limits of permissibility. While the act in the case of a mistake in permissibility, it began to be unlawful and ended as such, because there is no permissible reason except in the imagination of the perpetrator.⁴¹

Subsection Three

Considerations for Assessing the Transgression of Legitimate Defence and Its Criterion

In this section, we will explain the considerations for assessing the legitimate defence and the criterion for assessing this transgression that the trial judge must rely on in the determination of transgressing the legitimate defence through the following two points: the first: considerations of assessing the transgression of legitimate defence, and the second is the criterion of the transgression of legitimate defence.

First: Considerations of Assessing the Transgression of Legitimate Defence

The assessment of the transgression of legitimate defence is up to the court's discretionary authority, depending on some considerations.

Personal Considerations

First of all, it cannot be said that a transgression has been achieved within the limits of legitimate defence without regard for the personality of both the aggressor and the defender, and that the most important things that need to be taken into consideration are age, gender, physical strength, physical health, and psychological state. It is clear that what is sufficient to resist an elderly by a young man is less than enough to ward off a giant aggressor by an elderly, and that what is sufficient to resist an adult man is more than necessary to repel a minor's aggression, and that what is sufficient to use of a man's force when resisting a woman is certainly less than enough for a woman to defend herself against a villain.⁴²

The two parties to the conflict may be of equal age and gender, but one of them differs from the other in terms of physical strength, so the power to resist a muscular aggressor won't be sufficient for someone who is lean in body; they may also differ in terms of health, then the strength necessary to resist a vigorous and energetic person must be greater than what is motivated by a sickly aggressor, and if the defender is a sick girl, then what she needs to defend herself or her honour is much greater, or when the aggressor is a lunatic, it differs than if the aggressor was a gentle girl who wanted to ward a boy off of herself. On the other hand, there is a degree of fear, confusion and terror that the defender suffers when

danger comes to him, which affects his psychological state, and his nerves may then be disturbed, so he no longer weighs things with calm atonement, or he can't weight the circumstances with calmness and balance, and this psychological situation in turn affects the assessment of the severity of the attack and what is sufficient to resist it.⁴³

The Position of Islamic Law

Islamic jurisprudence has decided that the defender must adhere to the least possible strength to ward off danger, and what is added is a transgression in defence. Nevertheless, the jurists took two rules into consideration: the first is gradual by force in terms of severity and the second: respect for personal and real circumstances. For example, the thief being so weak that he cannot not defend himself at all, or he defends in a manner where he is certain that he is not able to kill the owner of the house, so the owner of the house killed him with the effect of force, and because he is able to prevent him without killing, then he is a transgressor. What the Muslim jurists have agreed upon is the necessity of gradual use of force, and overcoming that is considered a transgression in defence.⁴⁴

Second: The Criterion of the Transgression of Legitimate Defence

The criterion for the increase in the defensive strength that is considered transgression is the standard of the ordinary person in the circumstances of the committed event, and this direction is objective, that is, the objective criterion, or he is the defender of himself in personal or real circumstances, and this is the personal direction, that is, the personal criterion, and therefore we will address the two criteria as follows:

Objective Criterion

Supporters of this criterion argue that the assessment of whether the defence is appropriate or transgressing should be made on an abstract personal basis, as the conditions of the defence are associated with it. If the defender did not exceed in the strength that this person used when surrounded by the same circumstances that surrounded the defender, the defence is proportionate, but if he transgresses that, he is considered transgressing, because he did not estimate matters correctly weight and did not act in the usual manner consistent with general human experience.⁴⁵

Accordingly, the standard in its origin is objective and based on the ordinary person, but this criterion is not purely objective, as it is not permissible to overlook the circumstances that surrounded the defender and made him behave in the way he acted, but rather it is necessary to assume that the ordinary person is surrounded by the same conditions that surrounded the defender, and finally it can be said that this trend combines objectivity and realism in this criterion.⁴⁶

Personal Criterion

Supporters of this trend argue that the severity of the assault must be assessed personally. This estimate should not be based on what actually results in the assault, nor even on the extent of the real danger present, but only on the danger that the person reasonably anticipates, and the judge must examine and verify the circumstances, the crime, and review the sequence of the facts that have been achieved to determine the psychological impact caused by the unlawful assault on the accused in reference to what was issued by him, i.e. the horror caused by the assault, according to which it is necessary to determine the necessity of defence. Therefore, the extent necessary to respond to the assault is a matter of discretion.

The subject will be evaluated according to the circumstances of each crime and the aggressor, and the impact of the assault on himself.⁴⁷

Linking Between the Two Criteria

Proponents of the objective criterion recognize the personal and factual circumstances of the defender, and the proponents of the personal criterion reject all expectations of the defender if they are not acceptable. Therefore, the area of disagreement between them has disappeared, so if the defender anticipates the assault and estimated what is sufficient for him in an unacceptable manner, he will go beyond, according to the proponents of the personal criterion, and this judgment itself is issued by the supporters of the objective criterion, because the defender, according to their direction, did not expect the attack and did not estimate enough force as the usual person does.⁴⁸ This is because the condition in which the defender's behaviour is permissible and acceptable narrows the scope of the personal criterion, and the regard for personal and realistic circumstances expands the scope of the abstract objective criterion, and therefore it is not conceivable that there is a wide difference between the two directions in practice.⁴⁹

Hence, the criterion for transgressing the legitimate defence must be relative and realistic, as it is relative. The assessment of the standing defender is a reasonable and acceptable basis. Thus, the assessment of the transgression differs from one person to another, and it is realistic because of his regard for the real circumstances, and the conditions of assault and defence.

Chapter Two

The Liability of Transgression

In the chapter, we will discuss the issue of civil liability resulting from the transgression of the right of legitimate defence and the criminal liability resulting from the transgression, by dividing this chapter into the following two sections:

- Section One: Civil Liability of the Transgression of Legitimate Defence
- Section Two: Criminal Liability of the Transgression of Legitimate Defence

Section One

Civil Liability of the Transgression of Legitimate Defence

This section will address the position of comparative civil legislation on the establishment of civil liability for transgressing the legitimate defence first, and then the position of comparative jurisprudence and judiciary regarding the establishment of civil liability for transgressing the legitimate defence.

First: The Position of Comparative Civil Legislation

Various civil legislation stipulates the establishment of civil liability for the act of the defender in the event that the limits of the right to legitimate defence are transgressed. The Iraqi Civil Code stipulates in Article (212) that (1- the necessities allow prohibitions, but they are estimated by their extent, 2- Whoever caused harm while he was in a state of legitimate defence of himself or someone else is not responsible, provided that he did not transgress that

necessary amount, or else he would be bound to compensation that takes into account the requirements of justice). It is noted on this text that it is limited to a state of self-defence without money, so it is therefore narrower in scope than the criminal text that both included Article (42) of the Iraqi Penal Code.⁵⁰ (There is no crime if the act is committed using the right of legitimate defence, and there is in this right if the following conditions are met: 1- If the defender faces an immediate danger of a crime on himself or on money, or if he believes that this danger exists and his belief is based on reasonable reasons...). It should have referred to the state of the legitimate defence of the money as well, as the Egyptian legislator did in Article (166) by saying: (Whoever caused harm while he was in a legitimate defence of himself and his money or the soul or money of others was not responsible provided that it does not transgress in his defence, as much as is necessary, otherwise he becomes bound to make a statement that takes into account the requirements of justice).⁵¹

Second: The Position of Comparative Jurisprudence and Judiciary Regarding the Establishment of Civil Liability of the Transgression of Legitimate Defence

Civil liability for transgressing the legitimate defence is not complete for damages, even if it is a result of the fault of the transgressor in his defence, because the error on his part in this case is matched by a mistake on the part of the aggressor, so the responsibility of the one who crossed the limits of the legitimate defence is a reduced liability.⁵²

The multiplicity of participants in the transgression does not prevent the assumption of liability for each one of them for the damages that have occurred, and each of them bears what is appropriate for the error attributed to him and according to the circumstances of the transgression as a matter of solidarity, provided that civil liability does not necessarily require full compensation for the damages.⁵³

Section Two

Criminal Liability of the Transgression of Legitimate Defence

Criminal liability arises when the crime of trespassing in the forensic defence fulfills its two pillars, and the objective element is left behind, or one of its elements fails to attribute material. And the failure of the moral element, or the failure of one of its components, the moral attribution is absent, and in the two forms there is no criminal liability even if an incident detrimental to an interest protected by the penal code is realized. Thus, we will discuss criminal liability in two paragraphs.

The first relates to the establishment of criminal liability, while the second relates to its failure to implement it.

First: Cases of Criminal Liability of the Transgression of Legitimate Defence

We deal with this topic according to the following divisions:

1) Criminal Liability of the Defender in Case of Intentional Transgression

After the right of legitimate defence has been established and its legal conditions are fulfilled for the right to be established, the defender has the right to confront the assault he faces by responding to it, but if the defender uses force greater than the extent necessary to ward off the danger and he is aware of all the conditions of defence and the results that it leads that may prejudice the rights of others and can reply with an act less than that, but preferred to resort to more force, then he is responsible for intentional transgression and is punished for it.⁵⁴

2) Criminal Liability Arising from Unintentional Transgression:

The defender benefits from the excuse of mitigating the obstacle when he unintentionally transgresses the limits of the legitimate defence, after this right is established for him, and because it is not possible to speak within the scope of the legitimate defence or transgress it unless the same right arises, and accordingly, if the criminal liability of the defender is achieved by violating the restrictions of the legitimate defence when he uses this right unintentionally, he undoubtedly benefits from the same excuse to reduce his sentence if he is not completely exempt from punishment, because the defender was not aware of all the elements of defence and the results that lead to it as a result of his defensive action. Without intending to transgress, that is, it took place unintentionally.⁵⁵

If the defender wanted the act without the criminal result, it is accompanied by negligence, and the perpetrator could rectify it, and the incident would be an unintentional crime and lead to an unintentional consequence.⁵⁶

CONCLUSION

The researcher reached several results in his study regarding the issue of the transgression of legitimate defence, and also presented several proposals and recommendations on the topic as follows:

First: Study Results

- 1) Transgression of the legitimate defence occupies a prominent position in postural legislation because it combines legality and illegality, and the transgression of defence is not achieved unless the defender violates one of the conditions of legitimate defence, the foremost of which is (the requirement of proportionality). A case of transgression of the limits of the legitimate defence arises if the defender did not transgress it in bad faith.
- 2) In regards to the criterion that needs to be counted in order to know whether or not the transgression has been achieved, there are two criteria, namely, the objective criterion that relates to the circumstances of the perpetrated incident, and the personal criterion, which relates to the personal and legal circumstances of the defender. It is desirable to reconcile these two criteria.
- 3) Criminal liability is assumed according to general rules if the moral attribution fails due to the absence of one or more elements of the moral element of the transgression crime. In cases where civil liability rises before the transgressor, the error and the damage are achieved, but this liability is null and void if the link between the transgression of defence and the harm achieved is broken, as if it occurred based on a sudden accident or force majeure.

Second: Recommendations and Proposals

- 1) The Iraqi and Jordanian legislators did not indicate the ruling on transgression if the defender was in a state of anger or a raging psychological revolution, while other laws dealt with it, and therefore we suggest that the state of provocation be added to the other cases mentioned in Article (45) of Iraqi penalties, and Article (341) of Jordanian penalties.
- 2) The need to expand the interpretation of the legal texts regulating the state of legitimate defence and the transgression in which the defender occurs in order to reach the desired goal behind the permissibility of the defensive crime if its conditions

are fulfilled, especially as it is negative and not positive rules. Therefore, there would be no worries about the broad interpretation creating crimes and penalties that conflicts with the legality principle.

ENDNOTES

- 1) Dr. Daoud Al-Attar, *Transgressing the Sharia Defence*, 1st Ed., Islamic Centre, 1983, Place of Publication Unspecified, p. 247.
- 2) *ibid.* p. 248.
- 3) Mouhammad Murtada Al-Husseini Al-Zubaidi, *Taj Al-Arous*, Issue 15, p. 81.
- 4) Louis Ma'alouf, *Vol. in Language*, 35th Ed., Dar Al-Mashriq, Beirut, 1986, p. 109.
- 5) Mouhammad Ali Salem Ayad Al-Halabi, *Explanation of the Penal Code*, Amman, 1997, p. 129.
- 6) Article (45) of the Iraqi Penal Code No. (111) of 1969, as amended.
- 7) Dr. Mouhammad Ali Al-Salem Ayyad Al-Halabi, *ibid.* p. 205.
- 8) Dr. Raouf Obaid, *Principles of the General Department*, Baghdad, Year of Publication Unspecified, p. 481.
- 9) Dr. Daoud Al-Attar, *ibid.* p. 214.
- 10) Dr. Daoud Al-Attar, *ibid.* pp. 214 et seq.
- 11) Dr. Daoud Al-Attar, *ibid.* pp. 220 et seq.
- 12) the Iraqi Court of Cassation, on 09/02/1972, the Judicial Bulletin of the Iraqi Ministry of Justice, No. 1, 1973, p. 192.
- 13) Ali Rashid, Al Moujaz, p. 363; also see Dr. Mouhammad Al-Fadhel, *General Principles*, p. 288 et seq.
- 14) Dr. Fakhri Abd Al-Razzaq Salbi Al-Hadithi, *Explanation of the Penal Code*, General Department, Baghdad, Al-Zaman Press, 1992, p. 177.
- 15) Dr. Nitham Tawfiq Al-Majali, *Explanation of the Penal Code*, General Department, Dar Al-Thaqafa for Publishing and Distribution, Amman, 2005, p. 201.
- 16) Court of Cassation Decision No. (946/Felonies/1975) on 15/06/1976, published in *Al-Ahkam Journal*, Citing Tariq Siddiq Rashid Kurdi, in *Restrictions on Sharia Defence in the Iraqi Penal Code*, 1st Ed., Erbil, 2005, p. 72.
- 17) Dr. Ali Hussein Al-Khalaf and Dr. Sultan Abdul Qadir Al-Shawi, *General Principles in the Penal Code*, the Legal Library, Baghdad, 1982, p. 282.
- 18) Dr. Mahmoud Najeeb Hosni, *ibid.* p. 243.
- 19) Court of Cassation in the Kurdistan Region of Iraq Decision No. 7/Criminal Commission/2001 on 18/01/2001, published in *Terrazzo Quarterly Journal*, Issue (11), p. 228.
- 20) Dr. Kamel Al-Saeed, *Explanation of Rulings in the Penal Code*, A Comparative Study, Baghdad, 2002, p. 148.
- 21) Dr. Mouhammad Subhi Najm, *Penal Code*, General Department, *Theory of Truth*, 1st Ed., Dar Al-Thaqafa for Publishing and Distribution, Amman, 2007, p. 148.
- 22) Dr. Aboud Al-Sarraj, *Syrian Penal Code*, General Department, Damascus, Year of Publication Unspecified, p. 337.
- 23) Dr. Daoud Al-Attar, *ibid.* p. 132.
- 24) *ibid.* p. 133.
- 25) *ibid.* pp. 133 et seq.
- 26) *ibid.* p. 144.
- 27) Dr. Ali Hussein Al-Khalaf and Dr. Sultan Abdul Qadir Al-Shawi, *ibid.* p. 282.
- 28) See the text of Article (341) of the Jordanian Penalties that were previously mentioned in this section.
- 29) Dr. Daoud Al-Attar, *ibid.* pp. 206 et seq.
- 30) *Journal of Parezarany*, issued by the Kurdistan Bar Association, Issue (8), Erbil, 2001, p. 309.
- 31) Abd al-Sattar al-Bazerkan, *ibid.* p. 337.
- 32) Dr. Dhari Khalil Mahmoud, *Al Wajeez in Explaining the Penal Code*, General Department, Dar Al-Qadisiyah, p. 98.
- 33) Tariq Siddiq Rashid Kurdi, *Legitimate Defence Restrictions in the Iraqi Penal Code*, 1st Ed., Erbil, 2005, p. 70.
- 34) Decision No. (259) on 15/03/1978, *Journal of Judicial Rulings*, Issue 1, 9th Year, p. 186.
- 35) Decision No. 3302/Felonies/72 on 11/10/1972, *Judicial Bulletin*, Issue 4, 3rd Year, p. 235. Citing Ibrahim Al-Mashahadi, *Legal Principles in the Judiciary of the Iraqi Court of Cassation*, Al-Jahesh Press, Baghdad, published by Shihab Ahmed Al-Hamid, 1990, pp. 76-77.
- 36) Iraqi Court of Cassation Decision No. (3239/Felonies/73) on 06/03/1974, *Judicial Bulletin*, Issue 1, 5th Year, p. 406. Citing Ibrahim Al-Mashahadi, *ibid.* pp. 76-77.
- 37) Dr. Daoud Al-Attar, *ibid.* p. 231.

- 38) Dr. Hussein Kirah, Brief in the Introduction to Law, 1st Ed., Baghdad, 1960, p. 346.
- 39) Dr. Daoud Al-Attar, *ibid.* pp. 228-231.
- 40) *ibid.* p. 230.
- 41) Dr. Daoud Al-Attar, *ibid.* p. 231.
- 42) Dr. Daoud Al-Attar, *ibid.* p. 222.
- 43) *ibid.* p. 222.
- 44) *ibid.* p. 224.
- 45) Dr. Mahmoud Najeeb Hosni, Explanation of the Penal Code, General Department, 4th Ed., Dar Al-Nahda Al-Arabiya, Cairo, 1977, p. 217.
- 46) Dr. Daoud Al-Attar, *ibid.* p. 225.
- 47) Journal of Parezarany, *ibid.* p. 316.
- 48) Dr. Daoud Al-Attar, *ibid.* p. 227.
- 49) *ibid.* pp. 225 et seq.
- 50) Tariq Siddiq Rashid Kurdi, *ibid.* p. 189.
- 51) Tariq Siddiq Rashid Kurdi, *ibid.* pp. 189 et seq.
- 52) *ibid.* p. 271.
- 53) Dr. Daoud Al-Attar, *ibid.* p. 272.
- 54) Tariq Siddiq Rashid Kurdi, *ibid.* p. 185.
- 55) *ibid.* p. 187.
- 56) Dr. Dawoud Al-Attar, *ibid.* p. 252.

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