# The Subjective Component of Self-Defence in Polish Criminal Law: Between Dogmatics, Axiology, and Social Intuitions

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***Abstract*— This article examines the subjective component of self-defence (obrona konieczna) as regulated in Article 25 §1 of the Polish Criminal Code, with a focus on its interpretation in case law and legal doctrine. Despite its longstanding presence in Polish criminal law, this issue has not been subject to systematic and in-depth analysis, even though judicial practice reveals considerable divergence. Three main interpretative approaches are identified: maximalist, requiring both awareness of an attack and the will to protect a legal interest; moderate, limiting the subjective element to the intention to repel the attack; and minimalist, which reduces it to mere awareness of the unlawful and imminent assault. The analysis demonstrates that while maximalist and moderate views dominate in case law and doctrine, the terminology employed is often inconsistent, with "will to defend" and "intention to repel" used interchangeably. Furthermore, drawing on insights from experimental philosophy and moral psychology (e.g., the Knobe effect), the article highlights the axiological underpinnings of these disputes. It argues that societal acceptance of self-defence does not depend on the presence of morally praiseworthy motives, but rather on the awareness of real danger and effective defensive action. Finally, the study suggests the need for clarification of the subjective component, both in interpretation and de lege ferenda.**

**Keywords— self-defence, subjective component, criminal law, intention, motivation, countertypes,**

## I. INTRODUCTION

The subject of this study is an analysis of the subjective component in the structure of self-defence as regulated in Article 25 § 1 of the Polish Criminal Code, with particular emphasis on its interpretation in case law and legal scholarship. Although this issue has long been present in Polish criminal law, both under the 1969 Code and the current statute, it has not yet been the subject of an in-depth and systematic analysis, despite evident divergences in the jurisprudence of the common courts and the Supreme Court. The purpose of the article is to systematise the various positions, capture their interrelations, and identify the possible sources of divergence—both at the linguistic and axiological levels.

It is assumed here that self-defence constitutes a countertype, that is, a circumstance excluding the unlawfulness of an act in the strict sense of the term (Majewski, 2013, p. 32-33). The focus of this study is on those conceptions which require that the perpetrator exhibit a certain mental attitude—whether in the form of an intention to repel an attack, an intention to protect a legal interest, or an awareness of the conditions of self-defence and the absence of motivations contrary to its rationale.

The key question, therefore, is whether the subjective component of self-defence—understood as a set of features relating to the perpetrator's awareness and will to act—is presented in a consistent manner in case law and in the literature. Of particular importance is whether notions such as "the will to defend," "the intention to repel an attack," or "awareness of the unlawful assault" function as synonyms, or whether they represent distinct concepts differing in the scope of requirements imposed on the defender.

Interpretative divergences may result from the lack of clear reference to the general provisions on the subjective element of the offence (in particular Articles 9 § 1 and 115 § 2 of the polish Criminal Code), as well as from extra-legal factors—psychological or moral. For this reason, alongside dogmatic analysis, the article also takes into account selected findings of experimental philosophy.

The research method applied is mixed in character: it is based primarily on the interpretation of criminal law provisions, supplemented by an examination of case law and doctrinal

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views, as well as by interdisciplinary reflection. This makes it possible not only to demonstrate the existing divergences but also to attempt to explain and evaluate them from an axiological perspective.

## II. The "Dispute" over the Subjective Component in the Structure of Self-Defence

The presence of a subjective element in the structure of self-defence raises virtually no doubts in the jurisprudence of the Supreme Court and the common courts. Although it is observed that Article 25 § 1 of the Criminal Code formulates the countertype's elements without explicitly enumerating a subjective component, both the courts and the vast majority of legal scholarship present a uniform view that an appropriate mental attitude on the part of the defender is an indispensable condition for the existence of self-defence (Zontek, 2017, p. 259. See also Supreme Court judgment of 24 August 2023, case no. II KK 112/23, LEX no. 3614141). It should be noted, however, that this (generally) universal consensus ends at this point.

### 1) Judicial Terminology: Intention, Awareness, Desire, Will, and Motivation

In the jurisprudence of the Supreme Court and the common courts, the subjective element of self-defence is expressed through various terms: "intention to repel the attack," "awareness of repelling the attack," "will to defend," or "defensive motivation." There is, however, no consistent reflection on the semantic scope of these terms, which are often used interchangeably. What follows is a review of the most widespread terms and constructions employed by the Supreme Court and the common courts to describe the subjective element of the countertype of self-defence.

#### a. Conduct "Motivated" by the "Will to Defend a Legal Interest"

First, it is necessary to discuss the judgments in which a person invoking self-defence is required to demonstrate a mental attitude characterised by "awareness of the attack" or "awareness of repelling the attack" together with the "will to defend."

In this respect, two Supreme Court judgments rendered under Article 22 § 1 of the 1969 Criminal Code should be cited. In its judgment of 30 December 1972, case no. Rw 1312/72 (OSNKW 1973, No. 5, 69), the Court stated: "In the established case law, it has long been held that an indispensable subjective element of self-defence is that the action of the defender results from the awareness that he is repelling an attack and is dictated by the will to defend."

Similarly, in its judgment of 19 February 1997, case no. IV KKN 292/96 (LEX no. 29547), the Supreme Court observed: "The Provincial Court was correct in holding that (…) 'the conduct of Z.W., despite the unlawful and direct nature of the attack, does not meet the requirements of self-defence. For this state to arise, it is essential that the perpetrator act with the intention of defending the directly attacked legal interest. Any actions undertaken to retaliate for previously suffered harms (…) do not have a defensive character' (…). The indispensable subjective element of self-defence is conduct motivated by the will to defend, not by the will to retaliate (…). The existence of this subjective factor is emphasised in practice. (…) It may further be added that the necessity of such an acceptable attitude—one realising the countertype—also fits within the understanding that the matter consists in repelling, that is, opposing or counteracting. The absence of this in the perpetrator's awareness deprives his conduct of legal character, rendering it wrongful (…)."

It may be observed that in both judgments the psychological factor in self-defence was interpreted analogously to the subjective element of intentional offences, as defined in Article 7 of the 1969 Criminal Code, namely through the division into an intellectual aspect (awareness) and a volitional aspect. In relation to the attitude of the person acting in self-defence, both Rw 1312/72 and IV KKN 292/96 emphasised that the perpetrator must be characterised, first, by awareness that through his conduct he is repelling an unlawful and direct attack (i.e. opposing or counteracting it), and second, in the volitional aspect, by acting with the "intention"/"will" to defend, that is, to protect the legal interest directly threatened by the attack.

These passages are frequently cited in the reasoning of judgments and decisions of both the Supreme Court and the common courts issued under the current wording of Article 25 § 1 of the CC. For instance, the judgment Rw 1312/72 (often cited together with IV KKN 292/96) has been referred to by, inter alia, the Court of Appeal in Poznań (judgment of 5 March 2025, II AKa 264/24, LEX 3856805), the Court of Appeal in Gdańsk (judgment of 21 November 2024), as well as by the Supreme Court (judgments of 4 July 2018, III KK 430/17, LEX 2522970). References to the Supreme Court judgment of 19 February 1997, IV KKN 292/96, may in turn be found, for example, in the Court of Appeal in Szczecin (judgment of 10 May 2022, II AKa 17/22, LEX 3512082), the Supreme Court (decision of 17 January 2022, III KK 460/21, LEX 3369845.

Nevertheless, it should be noted that in the vast majority of cases the courts merely state that a perpetrator acting under the conditions of self-defence should be guided by the "will to defend" or by the "purpose of defence," without specifying in detail the precise content attributed to this notion (see, e.g., Court of Appeal in Białystok, judgment of 5 Feb. 2024, II AKa 241/23, LEX 3791191; Court of Appeal in Warsaw, judgment of 25 Apr. 2022, II AKa 265/21, LEX 3347799; Supreme Court, judgment of 12 Mar. 2020, III KK 194/19, LEX 3124997; Court of Appeal in Kraków, judgment of 4 Mar. 2020, II AKa 243/19, KZS 2020, No. 5, item 36).

As a representative example of more recent case law grounded in terminology referring to the specific purpose of the person invoking self-defence, one may cite the judgment of the Court of Appeal in Warsaw of 22 June 2022, case no. II AKa 515/21 (LEX 3400150), which merits quotation in extenso: "For self-defence to arise, it is necessary that the perpetrator act with the intention of defending the directly attacked legal interest. (…) An indispensable subjective element of self-defence is that the action of the defender result from the awareness that he is repelling an attack and be dictated by the

will to defend. The measures undertaken must therefore have a defensive character and must be motivated by the will to defend, not, for example, by retaliation for a previous blow (…). - author's translation".

The combination of expressions employed—"awareness of repelling an attack," "intention to defend the attacked legal interest," and motivation based on the "will to defend"—indicates that the court refers both to the intellectual element (awareness that the perpetrator's conduct opposes the attacker's assault) and to the volitional element (the desire to achieve a specific result in the form of defending a legal interest). Importantly, the reference to "defensive motivation" introduces an additional, axiological component of the perpetrator's attitude, going beyond the typical structure of intent under Article 9 § 1 of the Criminal Code (i.e. awareness and will to realise the prohibited act, which may stem from various motivations). In this view, self-defence cannot be based solely on the awareness of the attack and the usefulness of the perpetrator's conduct in repelling it; it must also be inspired by a socially approved motivation.

As a result, the judgments analysed confirm the existence of a long-standing and firmly established line of case law that links the admissibility of self-defence with an intentional—indeed, morally approved—attitude of the perpetrator. In the next part of this study, an alternative line of jurisprudence will be presented, one that emphasises above all the fact of repelling the attack, rather than the particular motivations of the defender.

b. Conduct "Motivated" by "Repelling the Attack"

In contrast to the judgments discussed above, which emphasise the need to establish a particular purpose of the person invoking self-defence—such as the protection of a legal interest—in numerous other decisions the Supreme Court and the common courts limit the subjective element of the countertype of self-defence to the awareness of the existence of an attack (or, alternatively, awareness of repelling the attack) and the intention to repel it, without examining additional motivations, purposes, or their axiological evaluation. Within this line of jurisprudence, the "intention to repel the attack" is not equated with intentions of an explicitly positive axiological character (such as saving a legal interest).

In a recent judgment of 30 May 2023, case no. V KK 36/23 (OSNK 2024, No. 3, item 13), the Supreme Court explicitly rejected interpretations that expand the scope of the subjective element beyond the level derived from what it considered to be the literal wording of Article 25 § 1 of the CC: "Unlike Article 26 of the Criminal Code, Article 25 does not explicitly articulate a requirement to act with a specific purpose (e.g. the purpose of defence, protection of legal interests, or public order). Identifying requirements going beyond mere awareness of the attack and the intention to repel it constitutes a manifestly erroneous interpretation of the features of self-defence." – author's translation. The same position was taken in the judgment of 24 August 2023, case no. II KK 112/23 (LEX 3614141).

The requirement that the person exercising self-defence possess the intention/will/desire to repel the attack was also expressed in a number of earlier decisions (see, e.g., Court of Appeal in Wrocław, judgment of 24 Mar. 2022, II AKa 423/21, LEX 3455555; judgment of 16 May 2018, II AKa 86/18, LEX 2505796; Supreme Court, judgment of 4 July 2018, III KK 430/17, LEX 2522970; Court of Appeal in Warsaw, judgment of 6 June 2014, II AKa 143/14, LEX 1483857; Court of Appeal in Poznań, judgment of 20 Mar. 2014, II AKa 25/14, LEX 2674848; Court of Appeal in Szczecin, judgment of 21 Feb. 2013, II AKa 9/13, LEX 1286618), though, notably, this view has been articulated using a variety of terminology.

From the perspective of the subjective element of the countertype, this means that, according to the above view, it is sufficient for the existence of self-defence that the perpetrator be aware: (a) that an unlawful, direct attack is occurring, and (b) that his conduct constitutes a form of opposing that attack. In addition, it is required that the perpetrator volitionally strive (intend) to repel the attack—regardless of what other motivations may have accompanied him. It is therefore not examined whether the perpetrator sought, as a result of his conduct, to save a particular legal interest, or whether he merely aimed to stop the attacker's behaviour and neutralise him, treating any additional effects, such as the preservation of the threatened legal interest, as indifferent from the perspective of his motivational process. In this sense, the "intention to repel the attack" appears as a technical-functional concept (Zontek, 2017, p. 263), not conditioned by an axiological assessment of additional, socially accepted purposes of action.

2) Scholarly Views on the Interpretation of the Subjective Factor in the Structure of Self-Defence

As in case law, divergent positions have also emerged in criminal law doctrine regarding the scope and meaning of the subjective component of self-defence. An analysis of the literature reveals significant differences in answering the question whether—and if so, which—mental element on the part of the actor should be regarded as a necessary feature of the countertype under Article 25 § 1 of the Criminal Code.

First, attention should be drawn to those authors who clearly adopt a "maximalist" stance, requiring that the person acting in self-defence not only be aware of the existence of the attack and that his responsive conduct functionally constitutes opposition to that attack, but also that self-defence in its subjective features contains a volitional component, namely the intention/will/desire to protect the legal interest threatened by the attack.

Among these authors are undoubtedly Ł. Pohl and K. Burdziak, who, through an interpretation of the term "defence" contained in Article 25 § 1 of the Criminal Code, conclude that from a dogmatic perspective "self-defence is not merely (objectively, externally perceived) the repelling of an attack (…), but only such repelling of an attack that constitutes the defence of the attacked legal interest, that is, conduct motivated by the will to protect that interest." – author's translation (Pohl, Burdziak, 2017, p. 46). In their work, Ł. Pohl and K. Burdziak also cite earlier authoritative statements by A. Gubiński (1961, p. 20), A. Krukowski (1965, p. 93), and A. Marek (1979, p. 64 et seq.), as well as referencing other scholars who emphasise that the subjective element of self-defence requires, in addition to awareness of the attack, an appropriate volitional attitude on

the part of the perpetrator.

What is significant, however, is that Ł. Pohl and K. Burdziak seem to treat the will/intention to protect the directly endangered legal interest as synonymous with the will/intention to repel the attack (Pohl, Burdziak, 2017, p. 49). The axis of the dispute they outline rests on their polemic with authors (especially J. Majewski) who deny the necessity of a subjective element in the structure of the countertype altogether, or with the inconsistency—highlighted by them in case law—concerning whether the subjective component of self-defence requires only the perpetrator's awareness that an attack is taking place (thus entitling him to undertake defensive action), or whether a specific volitional element in the form of the will to repel the attack is additionally indispensable (ibidem).

There are, however, also statements by criminal law scholars who explicitly stress the requirement that the person exercising self-defence act with the intention/will to protect the endangered legal interest as the only acceptable (or at least the predominant) motivation (e.g. Kolasiński, Korecka, 2004, p. 58). On this point, the view of M. Budyn-Kulik deserves particular attention: she argues that the clear and categorical requirement of self-defence is that the perpetrator undertakes his conduct being aware of the attack and desiring to repel it (Budyn-Kulik, 2018, p. 81). She further contends that such conduct corresponds to the features of direct intent (even in the form of dolus directus coloratus) within the meaning of Article 9 § 1 of the CC. According to M. Budyn-Kulik, in the case of attacks against life and health, "the dominant, and often the sole, motive is the desire to defend oneself, to create a situation in which the physical safety of the defender is no longer endangered," (ibidem) while she also notes that the defender "wants the attack to cease (or not to occur, when in a given case the directness of the attack means that it is highly likely to occur in the immediate future)." (ibidem) – author's translation.

It should therefore be noted that in the views of criminal law scholars the distinction between the will/intention to repel the attack and the will/intention to protect the endangered legal interest is even less pronounced than in case law. In the works of a significant number of authors, as well as in numerous decisions of both the common courts and the Supreme Court, both expressions used to describe the subjective component of the countertype under Article 25 § 1 of the Criminal Code function synonymously. It appears, however, that the actual content of this component is understood as the socially acceptable motive of the perpetrator's conduct, manifesting itself in the desire to protect the legal interest endangered by the direct and unlawful attack.

## III. Practical Consequences of Adopting Different Conceptions of the Subjective Element

### 1) Conceptions of the Content of the Subjective Factor in the Countertype of Self-Defence

The positions of case law and criminal law scholarship discussed in the first chapter of this study reveal noticeable terminological divergences. In light of the arguments cited in the Supreme Court judgments of 30 May 2023 (V KK 36/23) and 24 August 2023 (II KK 112/23), it is possible to distinguish, prima facie, three separate interpretative lines concerning the subjective element of countertypical conduct within self-defence.

The first of these approaches may be described as maximalist: it requires of the defender not only awareness of the attack and of repelling it, but also a dominant (or even exclusive) desire characterised by a specific purpose, namely the will to protect the legal interest directly endangered by the attack. The second, clearly moderate, approach equates the subjective element with the intention to repel the attack, while the motivation to preserve the legal interest is treated as irrelevant under Article 25 § 1 of the Criminal Code. The third position, which can be described as minimalist, reduces the subjective requirement for justification in self-defence solely to the awareness of an unlawful and direct attack and of undertaking actions to repel it, without the need to establish any form of will in relation either to the attack itself or to the potential result of protecting the endangered legal interest.

As already noted in the preceding chapter, only the first two approaches—the maximalist and the moderate—predominate in case law and legal writing, while the minimalist approach, although occasionally noted (Zontek, 2017, p. 262), remains marginal in the discourse.

The Supreme Court's diagnosis in judgments V KK 36/23 and II KK 112/23, namely that the moderate position has become established in jurisprudence, is therefore not entirely accurate. On the basis of the preceding analysis, it must be emphasised that there is no clearly dominant line of authority that explicitly and consistently equates the subjective element of self-defence solely with the intention to repel the attack, disregarding the motivation of protecting the legal interest.

Indeed, the opposite situation may be observed: in the reasoning of many judgments, the subjective component of self-defence appears only incidentally, as a statement that the defender must act "with the will to defend" or with the "intention to repel the attack," without further clarification as to how these notions are understood by the adjudicating court. In a number of other judgments, moreover, the "intention to repel the attack" and the "intention to defend (protect) the legal interest" are treated synonymously, without any deeper dogmatic reflection on distinguishing these concepts. For example, in the judgment of the Court of Appeal in Kraków of 21 July 2015, case no. II AKa 124/15 (KZS 2015, no 9, item 37) it was stated: "The condition for recognising self-defence is acting with the intention to repel the attack, which presupposes awareness of the occurrence of a direct and unlawful assault and the will to defend the attacked legal interest." (author's translation).

### 2) The Justification for Distinguishing the Maximalist and Moderate Positions Regarding the Subjective Element in the Countertype of Self-Defence

This subsection considers whether it is justified to distinguish between what in the previous section was termed the "maximalist" and the "moderate" positions. There is no doubt that both these conceptions stand in clear contrast to the

"minimalist" position, which is based de facto solely on the intellectual aspect, namely the perpetrator's awareness at the time of the act that a legal interest is subject to a direct and unlawful attack by an assailant, and that any action taken by the perpetrator would constitute an attempt to neutralise that attack.

Far more questionable, in light of existing case law and scholarly views, is the juxtaposition—or at least the attribution of distinct meanings—to the notions of the "will/intention to repel the attack" and the "will/intention to defend/protect the legal interest endangered by the attack."

As M. Budyn-Kulik (2018, p. 81) points out, the mental attitude of a person acting under the conditions of self-defence corresponds to direct intent, usually accompanied by the motivation of striving to defend oneself and to neutralise the real danger posed by the assailant. According to her, the defender typically does not analyse the situation in detail, does not consider the possible effects of his conduct, and acts under strong emotions (fear, agitation), which makes the reconstruction of that person's thought processes in criminal proceedings a problematic issue (ibidem). She adds that the motivation of wanting to defend oneself manifests itself most vividly in cases of attacks on the life and health of the defender (ibidem).

Indeed, when analysing classical examples of self-defence, the interpreter usually has in mind a situation with a clear relational structure: defender versus assailant. Such attacks are naturally visualised as assaults on a person's life or health, against which the defender reacts in accordance with the instinct of self-preservation. In typical instances of self-defence, such attacks are imagined as unprovoked, and the decision-making dilemmas of the defender are perceived as understandable and justified from the perspective of social evaluation. Consequently, in such model cases, the intention to repel the attack is often intuitively equated with the intention to protect the endangered legal interest. Beyond these typical situations, however, lies a wide range of other factual configurations in which the relationship between the two concepts becomes less obvious, and their distinction more significant for legal assessment.

Firstly, it should be noted that legal doctrine recognises that, alongside the socially approved intention of protecting a legal interest, the defender may also be driven by other motivations—for example, the desire to apprehend the assailant, an instinctive urge for retaliation, or a wish to demonstrate physical superiority over the attacker. Although case law contains extreme views excluding the possibility that the defender might act with such attitudes, in most instances it is accepted that, in addition to the intention to repel the attack or to protect the legal interest, the person invoking self-defence may also be guided by other motives (not necessarily always positively assessed from the standpoint of social utility). For example, in its judgment of 15 July 2004, the Court of Appeal in Katowice (II AKa 200/04, LEX No. 148536) observed that "it must be emphasized that for the application of the justification of self-defense it is necessary that the act be committed solely for the purpose of defense, and not for the settling of personal scores," whereas Małecki (2015) notes that "even if the defendant's decision to defend himself was accompanied by other feelings, such as negative emotions of anger or a sense of grievance, since these did not dominate his psychological experiences and did not become the main motive of the chosen conduct, there are no grounds to exclude that his action was taken with the will to defend." – author's translations.

The answer to the question of whether it is important to distinguish between the will/intention to repel the attack and the will/intention to protect legal interests must be sought in an analysis of normative constructions and factual scenarios that do not fit neatly within the classical model of self-defence. In particular, reference may be made here to instances of so-called necessary assistance (pomoc konieczna).

Consider the following scenario: Iksiński, a resident of a housing estate and a supporter of a football club, notices that a resident of a rival estate and supporter of a competing team—here called Igrekowski—has appeared on "his" territory. Iksiński observes Igrekowski pulling at an elderly woman, attempting to snatch her handbag, to which she visibly resists. Iksiński is aware that the woman is most likely the victim of a prohibited act currently codified in Article 280 § 1 of the CC (robbery). From a legal perspective, one may say that Iksiński realises that the circumstances most likely justify the use of necessary assistance in defence of the elderly woman against Igrekowski.

In the circumstances of this case, however, Iksiński is entirely indifferent to the fate of the woman: he dislikes her, having recognised her as a neighbour he detests, and would not object if she were to fall victim to the robbery, provided the assailant were someone other than Igrekowski. What he cannot tolerate is the fact that Igrekowski is strutting around on "foreign" turf. He therefore decides to "teach him a lesson," and it should be noted that he would have acted in the same way had Igrekowski merely been passing by without engaging in any unlawful behaviour. Iksiński is aware that if he attacks Igrekowski with his fists at this moment, the latter will likely cease his assault on the woman, allowing her to withdraw safely with her belongings. At the same time, Iksiński neither wants the elderly woman to become the victim of the robbery nor wants her to avoid harm and financial loss.

In the case described, if Iksiński were in fact to attack Igrekowski with his fists and thereby put an end to his use of violence against the elderly woman, at the same time preventing him from committing the theft, supporters of the most rigorous, "maximalist," position would of course deny justification for his conduct. This view assumes that acting within the framework of self-defence requires not only awareness of the attack but also a motivation in the form of striving to protect a legal interest. In Iksiński's situation, although he was aware that certain legal interests (freedom from violence and the neighbour's property) were threatened by an unlawful and direct attack, and although his behaviour would lead to preventing a successful attack on her property and bodily integrity, his conduct lacked a socially approved purpose. His actions were determined solely by the desire to demonstrate superiority over the assailant, while the possible "rescue" of the

victim was a matter of indifference to him.

A similar result follows from the assessment made from the perspective of most positions falling within the "moderate" approach. Case law emphasises the requirement that the defender be "motivated" by the will to repel the attack. In the circumstances of this example, however, it is difficult to discern such a specific impulse, since Iksiński interrupts the attack only "incidentally," while pursuing his own objectives unrelated not only to the protection of the victim's legal interests but also indifferent to him as to what activity of Igrekowski he was interrupting (he would have attacked Igrekowski even if the latter had behaved in a legally neutral manner).

The assessment would look different, however, if one followed the views expressed in the Supreme Court judgments of 22 June 2023 (II KK 112/23) and 30 May 2023 (V KK 36/23). In light of these rulings, Iksiński's conduct could be justified, since he acted with awareness of the circumstances giving rise to self-defence and undertook an action functionally suitable to repel the attack.

Moreover, if the subjective element of the countertype is to be understood analogously to the construction of intent described in Article 9 § 1 of the CC, and if Iksiński was aware that his behaviour would necessarily interrupt the attack carried out by Igrekowski (and thereby protect the legal interests of his neighbour in personal security and property), one could argue that he acted with direct intent both to repel the attack and to protect the legal interests directly endangered by it.

Naturally, it must be borne in mind that the possibility of applying self-/necessary assistance lasts only until the moment when the direct attack on the protected legal interests ceases. Iksiński may be aware that his behaviour will necessarily, at least temporarily, interrupt Igrekowski's assault on the elderly woman (thus "repelling" the attack), but not necessarily that it will neutralise it completely.

As the Court of Appeal in Wrocław has observed: "The beginning of an attack is the creation of a state of danger to a legal interest or the commencement of a process of maintaining that danger, and the end of an attack is the cessation of the assailant's behaviour that creates or maintains such danger. A break in the commission of such violations does not deprive the attack of its direct character if the circumstances indicate that the assailant will continue the conduct endangering the legal interest." – author's translation (Court of Appeal in Wrocław, judgment of 24 Mar. 2022, II AKa 423/21, LEX 3455555).

In such a situation, one could argue that during Iksiński's use of "defensive" measures, Igrekowski temporarily posed no danger to the elderly woman. However, if the circumstances indicate that Iksiński's use of force against Igrekowski would be brief, and that Igrekowski would then be able to once again assault the woman, who in the meantime would not have had the opportunity to reach a place of safety, then the claim that Igrekowski initiated a new unlawful attack against her appears unwarranted. In such circumstances, it seems natural to conclude that he was continuing his previously initiated but temporarily interrupted assault.

If Iksiński is indifferent to the woman's further fate, he may anticipate that after the temporary cessation of violence against him, Igrekowski may still be capable of continuing the assault on the victim.

This example illustrates that the distinction between the will to repel the attack and the will to protect the legal interest is not merely theoretical but may lead to radically different legal evaluations of the same conduct. In particular, adopting the maximalist or the moderate conception (in its common variant, which requires that the person acting in self-defence be "motivated" by the will to repel the attack) would in this situation result in denying that Iksiński's act fell within the bounds of self-defence. By contrast, the position reflected in the Supreme Court judgments V KK 36/23 and II KK 112/23—approaching de facto the minimalist view, based solely on the perpetrator's awareness of the countertypical situation—would provide grounds for justifying his conduct.

These differences become particularly evident in factual scenarios that depart from the classical model of self-defence, which calls for a broader analysis of their practical consequences.

## IV. Intent, Motivation, and the "Side Effects" of Self-Defence – an Axiological and Psychological Perspective

The considerations developed in Chapter Two regarding the distinction between the maximalist approach (the intent to infringe the attacker's legal interests motivated by the will to protect a legal interest), the moderate approach (a motivation consisting in the aim of repelling the attack), and the minimalist approach (awareness of the existence of an unlawful, direct attack and repelling it through one's conduct regardless of the defender's accompanying motivations) revealed that the dispute over the meaning of the subjective component de lege lata among those who situate the psychological factor within the structure of the countertype does not end at the level of theory or the dogmatics of criminal law. Behind these interpretative disagreements one can discern an axiological evaluation of the motivation accompanying the person invoking self-defence, as well as a particular sensitivity to the side effects of defensive actions. In other words, whether a given act is recognised in criminal liability as justified often depends on how the various intentions with which the actor may operate are understood and evaluated, and on what status is accorded to the actual harm or injury inflicted on the assailant—whether it is perceived as the aim of the "defender's" action, a means to achieve a socially approved objective, or a side effect of the justified result of protecting the legal interest directly under attack.

Accordingly, in this chapter the focus of the discussion on the divergences concerning the content of the subjective element of self-defence must shift from the dogmatic plane to that of its axiological foundations.

This appears to be a necessary step in the debate on the issue at hand. As J. Giezek notes, when faced with a dilemma concerning a particular institution of criminal law, the interpreter does not so much follow or construct a coherent

theory that then leads him to a conclusion he must accept, but rather intuitively "senses" the solution to the problem that coheres with his system of moral convictions, and only thereafter seeks logical and persuasive reasoning to support that solution (Giezek, 2014, p. 31). Traces of such a reasoning mechanism can be found in certain studies (eg. Pohl, Burdziak, 2017, pp. 45-46). These authors most often justify their views by appealing to unverified intuitions or general social beliefs (Robinson, Darley, 1988, pp.1098-1099).

Interestingly, with respect to countertypes, it is argued that they constitute circumstances precluding the attribution of both the formal and material aspects of wrongfulness. The consequence may be the conclusion that conduct undertaken, for example, in self-defence is legally neutral while at the same time socially beneficial from the perspective of social evaluation (Zoll, Wróbel, 2014, p. 343). Such an approach may result in treating this type of behaviour merely as tolerated by the legal order, insofar as it entails the infringement of the attacker's legal interests (Zoll, 2009, pp. 110-111).

A different view conceptualises countertypes as desirable behaviour, worthy of praise and representing a manifestation of civic virtue that ought to be promoted (Kaczmarek, 2009, p. 93). From an axiological perspective, such conduct is positively assessed, which highlights its normative lawfulness, even though prima facie it corresponds to the features of a criminal offence. In this view, in cases of self-defence, the attacker's interests that are sacrificed are not afforded legal protection (ibidem).

As J. Majewski (2017, p. 418) observes, conduct undertaken within the framework of a countertype cannot be regarded as violating the rules of dealing with a legal interest or as a typical attack on a legally protected good. Referring to certain intuitions and attitudes present in society, he notes that if society, at the moral level, considered countertypical conduct to be merely tolerated manifestations of the so-called "lesser evil," it would not honour as war heroes those soldiers who, risking their lives in defence of their homeland, killed members of an enemy army (ibidem, p. 419).

Case law likewise emphasises that self-defence is a subjective right of every individual (judgment of the Court of Appeal in Wrocław of 16 November 2022, II AKa 135/22, LEX No. 3485901), the ratio legis of which lies not only in the need to protect legal interests endangered by an attack (decision of the Supreme Court of 27 April 2017, IV KK 116/17, LEX No. 2284193), but also in preserving the primacy of law over unlawfulness, and even—in line with the legislator's intent—in mobilising society for this purpose (Projekt kodeksu karnego oraz przepisów wprowadzających kodeks karny, Warsaw 1968, p. 103, cited in: Mozgawa, 2013, p. 174).

Assuming that self-defence is perceived in society as the right of every person, and that conduct undertaken in defence of one's own or another's valuable interests attacked by an unjustified assault is commendable and represents a desirable, even expected, attitude for any individual in the defender's position, it is worth considering whether, in light of available studies on social intuitions, the right to invoke self-defence depends on a particular mindset with which the actor operates.

In this respect, attention should be given to what in experimental philosophy (Piekarski, 2017) and moral psychology is referred to as the Knobe effect (Knobe, 2003) and the intensification effect, the latter consisting in the asymmetry between mechanisms of attributing blame and praise depending on whether the person acted intentionally or not.

Since these phenomena and their potential links to countertypes have already been extensively discussed elsewhere (Grzęda, 2021), the present text will limit itself to highlighting their most important aspects, which may bear on the preference for the maximalist conception of self-defence in case law and in the views of criminal law doctrine.

In the broadest terms, the so-called Knobe effect points to the existence of an asymmetry in the intuitive attribution of intentionality to an actor's conduct which, in addition to the result directly intended, also produces side effects—depending on whether the side effect is morally evaluated as good or bad (Knobe, 2003).

As L.M. Solan observes, the outcome of J. Knobe's study may be interpreted as reflecting basic social expectations regarding intentional actions. Through linguistic analysis and by applying the maxims of communication developed by P. Grice (in particular, the so-called principle of cooperation), Solan notes that in ordinary language the automatic association of an act with intentionality arises when sufficient information reveals that the actor's mental attitude diverges from a certain expected norm—namely, behaviour consistent with the rules of social coexistence and the pursuit of socially approved aims. Hence, in everyday life it is easier for people to attribute intent to another person if the side effect of their conduct is morally evaluated as negative, rather than in cases where the conduct "incidentally" produces a result that is evaluated positively (Solan, 2009, p. 522, 524-529).

Analyses of the Knobe effect are accompanied by attempts to explain the asymmetry in attributing blame and praise depending on whether positively or negatively evaluated outcomes were brought about intentionally (the so-called mens rea asymmetry). As I. Douven, F. Hindriks, and S. Wenmackers define it: "Mens Rea Asymmetry (MRA): Praise requires an intention to bring about a good outcome, while blame does not require an intention to bring about a bad outcome." (2023, p. 421). As the authors note, existing theoretical attempts to explain this asymmetry refer to the reasons on the basis of which a person acts. Reconstructing the arguments invoked in this discourse, the authors state: "The most straightforward defense of MRA appeals to the reasons for which someone acts. A praiseworthy person does the right thing for the right reasons (Wolf 1990: 84; Sher 2009: 142). A blameworthy person flouts the reasons she has, either by ignoring them or by defying them and acting contrary to those reasons (Scanlon 1998: 271). These two claims directly bear on the agent's motivation. The first claim entails that an agent has to be motivated to bring about a good outcome in order to be praiseworthy. Blame, on the other hand, does not require being motivated to bring about the bad outcome, as a lack of motivation for avoiding it will do (Hindriks 2008: 632). These two claims imply that praise requires intent, whereas blame does not." (ibidem, p. 421).

Empirical research, however, suggests that people attribute blame and praise in a manner that diverges from the assumption of mens rea asymmetry, relying to a greater extent on cognitive biases (ibidem, pp. 438-439). Indeed, experimental results indicate that whether the actor acted intentionally or not plays only a secondary role in attributing praise for morally positive outcomes.

The issue of mens rea asymmetry (both its confirmation and attempts at its explanation) has attracted the attention of many scholars (eg. Guglielmo, Malle, 2019; Malle, Bennett, 2002; Malle, 2006). J. Knobe, in seeking to explain the asymmetry he identified in the attribution of intentionality to different kinds of side effects, observed that people display a markedly greater tendency to assign blame or condemnation (and to a greater degree) for the intentional production of bad outcomes than to praise an actor for achieving positive outcomes in the same way (Knobe, 2003, p. 193). This hypothesis (analysed as the "enhanced condemnation hypothesis") has, with some hesitation, also been accepted by, among others, S. Guglielmo and B.F. Malle, who noted that the mechanisms of moral judgment resulting in condemnation and praise are not mirror images of one another but differ systematically (Guglielmo, Malle, 2019).

In another study, B.F. Malle together with R.E. Bennett (2002) explained the asymmetry effect in the attribution of blame and praise, depending on the actor's mental state (unintentional/intentional action), as a phenomenon embedded in the cultural patterns of Western societies and rooted in a subconscious fear of potentially costly errors in evaluating a person's conduct. As the authors point out, if one fails to properly recognise the "bad" intent of a given actor, one may either become the victim of an unexpected attack or unjustly ascribe bad will to someone who produced negative outcomes merely by accident. In both scenarios, the consequences of such misjudgment may be severe, which calls for close scrutiny of the mental state of a potential actor in such cases (ibidem). By contrast, as Malle and Bennett argue, no such risk exists in rewarding positive behaviour: whether an actor has achieved a good result deliberately and intentionally or only accidentally. Failing to praise someone who intentionally produced a good outcome, or praising someone who merely accidentally brought about a positive effect, does not constitute as costly an error as mistakes committed in the mechanism of condemnation (ibidem). According to the authors, cultural patterns of Western societies have only reinforced these tendencies.

By contrast, research conducted by I. Douven, F. Hindriks, and S. Wenmackers (2023) has shown that in everyday reasoning people attribute praise solely on the basis of the favourable outcomes achieved by the actor. This, however, is not an adequate mechanism for encouraging others to engage in behaviour leading to positively valued results and discouraging them from harmful activities, and may stem from cognitive errors in ordinary reasoning and in how people assign evaluative judgments (ibidem, p. 438). The conclusion that people also attribute praise for unintended beneficial outcomes (the so-called praise bonus) clearly undermines, in the authors' view, the mens rea asymmetry emphasised in moral philosophy (ibidem, p. 440).

The results of empirical studies indicate that the requirement of intentionality in self-defence is more of a dogmatic and axiological construct than a reflection of society's understanding of responsibility. In the context of criminal law, this means that social acceptance of self-defence does not require the presence of a socially approved motive on the part of the actor invoking it. The sufficient premises of the subjective component of self-defence should rather be regarded as the awareness of a real threat to given legal interests and the fact that the actor undertook conduct functionally suitable to repel the attack.

Thus, while one may argue that the requirement of intent motivated by the will to protect a legal interest directly endangered by an attack finds its roots in moral philosophy (mens rea asymmetry), the achievements of experimental philosophy provide grounds for concluding that, in light of social evaluations, it is sufficient to establish on the part of the actor both an awareness of the real threat and the positive effect of the conduct in order to attribute recognition to the actor and thus to treat the act as justified, falling within the bounds of social tolerance. Of course, the mere fact that in everyday practice people display attribution mechanisms of praise and blame that differ from those posited by philosophical models need not automatically translate into criminal law solutions—especially since the norms of this branch of law are also meant to serve general-preventive functions, including reinforcing in members of society the need to respect the law established by the state.

## V. Conclusions

The considerations undertaken in this study have provided grounds for the observation that in Polish case law and criminal law literature three distinct interpretative approaches to the subjective component of self-defence de lege lata can be identified, which may be described as maximalist, moderate, and minimalist.

In both jurisprudence and doctrine, the first two positions—maximalist and moderate—predominate, while the minimalist view remains marginal to the ongoing discourse. It should be noted, however, that an analysis of the terminology used in the judgments and doctrinal writings discussed here reveals a certain inconsistency, as within the same argument judges (or authors) very often employ phrases such as "intent to repel the attack" and "will to defend (protect) a legal interest" interchangeably, without specifying whether they perceive a distinction between them. As a result, it must be stated that there is no uniform interpretative line in this respect and no general consensus in criminal law doctrine.

The analysis in Chapter Two showed that the choice of a particular conception of the subjective element of self-defence translates into radically different legal evaluations in atypical factual scenarios that depart from the model situation, in which an actor repels an unprovoked, direct, unlawful attack on his or her own legal interests. In such a model scenario, the subjective

element of self-defence corresponds to the assumptions of each of the positions observed in jurisprudence, since awareness and intent to repel the attack are usually accompanied by the motivation of preserving the threatened interest as part of an instinct for self-preservation.

This means that the practical consequences of adopting the maximalist or moderate position (in its variant requiring a defensive motivation) may be very strict, as certain acts that objectively counter unlawful attacks under Article 25 § 1 of the Criminal Code would not be recognised as self-defence if it were established that the actor did not, at the time of the act, display the desired mental attitude. The minimalist conception, by contrast, encompasses a broader range of defensive situations within the countertype, focusing on the objective premises of threat and defence, but risks instrumentalisation of the institution of self-defence by actors manifestly acting in bad faith.

For this reason, Chapter Three turned to the axiological dimension, which may serve as an indicator of which solution concerning the subjective element of self-defence de lege lata appears most accurate. The classical approach presented in moral philosophy assumes that full moral approval for an act of self-defence requires the "right" reasons—that is, action based on positively evaluated motives (protecting an interest, defending values). This is captured in the so-called mens rea asymmetry, according to which praise is due only to one who does good for the right reasons, while condemnation for harmful conduct does not require bad motivation (it suffices to disregard or negligently fail to fulfil one's obligations).

However, the analysis of experiments conducted by, inter alia, the authors discussed in Chapter Three demonstrated that social perceptions of intentionality and evaluations of conduct diverge from these normative assumptions. Social acceptance of self-defence therefore does not appear to depend on the presence of any particularly commendable impulse on the part of the defender. Rather, awareness of the real threat and the undertaking of an effective defensive act seem sufficient. The requirement of a positive intention to protect a legal interest has its roots in the moral postulate of rewarding "good motives," but from a social perspective it appears to be a redundant criterion.

De lege ferenda, it would be advisable to pursue a clearer unification and refinement of the approach to the subjective element of self-defence (both at the interpretative level and in possible legislative amendments). At the dogmatic level, it seems reasonable to favour the moderate approach in its more liberal interpretation—or even the minimalist approach—as best harmonising with the statutory text and the social understanding of the countertype. In other words, what should be confirmed is the requirement that, for self-defence to arise, it suffices that the actor was aware of the existence of an attack and intended to repel it, without the need to inquire into the dominant motives for the actor's conduct. Such a conception would guarantee protection to those repelling unlawful assaults even when accompanied by emotions and impulses far removed from idealised frames of social approval (at least as perceived by representatives of criminal law doctrine and jurisprudence).

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