



## Comparative Analysis of the Crimes Committed Under the Provoked Temporary Insanity Legislation of Georgia and Germany

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### ABSTRACT

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The Crime committed under the provoked temporary insanity is one of the most difficult issues of Criminal Law, it does not belong solely to the field of Law, but with it in close interaction are, psychology, psychiatry, public ethics, morality, politics and many other fields, therefore, it requires an interdisciplinary and dimensional approach, i.e. consideration in the context of the Dimension Theory.

The work discusses the Criminal Law approaches of both Georgia, Germany and Common Law countries to the provoked temporary insanity crimes and, with by means of the comparative research method, the interconnection between them is analyzed.

Based on the mentioned studies, such recommendations are offered that will make the attitude of Criminal Legislation and, in general, of the Criminal Law, towards the different types of the provoked temporary insanity crimes reasonably liberal and relevant to modernity.

Number of essential problems were identified when studying the judicial practice and theory on the research topic; for example, regarding the differentiation of necessary self-defense and the provoked temporary insanity crimes. In addition to legal standards, moral standards are also relevant, showing signs of gender discrimination and are irrelevant from a legal point of view.

For the development of the country and to establish our place in the European family, the psychological and moral readiness of the society to form an anti-discriminatory and non-violent ideology is necessary. Legislative and judicial authorities play the leading role in developing all the aforementioned. In addition, if we support this with scientific research, effective educational measures, the public awareness will also be significantly raised.

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**Keywords:** *Provoked temporary insanity, Excess of necessary self-defense, Comparative criminal law.*

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# საქართველოსა და გერმანიის კანონმდებლობის შედარებითი ანალიზი აფექტირებული დანაშაულის კრილში

თამთა წირქვაძე  
სამართლის დოქტორი, ასოცირებული პროფესორი  
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## ა ბ ს ტ რ ა ქ ტ ი

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აფექტში ჩადენილი დანაშაული სისხლის სამართლის ერთ-ერთ ურთულესი საკითხია, ის მხოლოდ საკუთრივ სამართლის სფეროს არ განეკუთვნება, არამედ მასთან მჭიდრო ურთიერთქმედებაშია, ფსიქოლოგია, ფსიქიატრია, საზოგადოებრივი ეთიკა, მორალი, პოლიტიკა და სხვა მრავალი დარგი, შესაბამისად, ის საჭიროებს ინტერდისციპლინურ და დიმენსიოლოგიურ, ანუ განზომილებათა თეორიის კრილში გააზრებას. ნაშრომში განხილულია როგორც საქართველოს, ისე გერმანიის სისხლის სამართლის მიდგომები აფექტში ჩადენილი დანაშაულისადმი და, შედარებითი კვლევის მეთოდის დახმარებით, გაანალიზებულია მათ შორის ურთიერთკავშირი.

აღნიშნულ კვლევებზე დაყრდნობით შემოთავაზებულია ისეთი რეკომენდაციები, რომლებიც გონივრულად ლიბერალურს და თანამედროვეობისათვის შესაფერისს გახდის სისხლის სამართლის კანონმდებლობისა და, ზოგადად, სისხლის სამართლის დამოკიდებულებას აფექტში ჩადენილი პროვოცირებული დანაშაულის ნაირსახეობათა მიმართ.

განსახილველ საკითხზე სასამართლო პრაქტიკისა და თეორიის შესწავლისას გამოიკვეთა არაერთი მნიშვნელოვანი პრობლემა, მაგალითად აუცილებელი მოგერიებისა და აფექტირებული დანაშაულის გამნიჯვნასთან დაკავშირებით. გარდა სამართლებრივისა, აქტუალურია, ასევე, მორალური სტანდარტები, რომლებიც გენდერული დისკრიმინაციის ნიშნებს შეიცავს და არარელევანტურია სამართლებრივი თვალსაზრისით. ქვეყნის განვითარებისათვის და ევროპულ ოჯახში ჩვენი ადგილის დასამკვიდრებლად კი აუცილებელია საზოგადოების ფსიქოლოგიური და მორალური მზადყოფნა ანტიდისკრიმინაციული და არაძალადობრივი იდეოლოგიის ჩამოსაყალიბებლად. ყოველივე ამის გამომუშავებაში უწინარესად როლს თამაშობს საკანონმდებლო და სასამართლო ხელისუფლება. ამასთან, თუ ამ ყოველივეს მეცნიერულ კვლევებსაც შევაშველებთ, საგანმანათლებლო ღონისძიებების ქმედითობის მხრივ, საზოგადოებრივი ცნობიერება საგრძნობლად ამაღლდება.

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*საკვანძო სიტყვები: აფექტირებული დანაშაული, აუცილებელი მოგერიების ფარგლების გადაცილება, შედარებითი სისხლის სამართალი.*

## 1. Introduction

The research issue is significant in multiple ways. As long as it is directly related to such adjacent fields as law, psychology, psychiatry, social ethics, etc., many aspects requiring new understanding have accumulated. The study of emotional feelings is more or less necessary in all fields of jurisprudence, although Criminal Law requires it the most, where it is needed to consider the emotional sphere in relation to a much wider range of theoretical and practical issues.

First of all, we must determine to what extent psychology should be used in Law, so that its role is neither exaggerated nor diminished. If we follow this path, the role of emotion in general and in particular, of the Provoked Temporary Insanity state in Law will be clearly seen; it will be clarified in what relation it is with other psychological functions; what purpose it has in the structure of behavior and how does it affect issues of guilt and responsibility.(Tsirkvadze, 2019).

The Crime committed under the provoked temporary insanity needs a consistent solution of several levels of issues, which are arranged in three layers:

1. A psychological layer that requires an answer to the question - what is happening in the human psyche at such time?
2. The context of social ethics - how does public morality evaluate the relevant processes taking place in the psyche?
3. The last - legal institution that is to give the legal assessment to a behavior/action, if there is enough moral sanction for it - is the conduct legally reprehensible?

Only after scientific answers to all these questions are given, it will be possible to verify the complete or partial validity of the construction of responsibility for the crimes committed under the provoked temporary insanity in modern Criminal Law and then - to develop appropriate recommendations for introducing optimal results.

Affectus is a word of Latin origin, denoting spiritual anxiety. (Chabashvili, 1989). It is an extremely intense, sudden, and quickly passing emotion which takes over a person at a specific moment and directs his behavior. Affective state complicates the situational comprehension of the created situation, which is why a person usually gives an inappropriate, unrestrained, chaotic reaction. The affective state significantly takes over human consciousness. Consciousness narrows, restricting space for any other feelings and emotions. During the affective state, a person is not able to fully reason and make a sound assessment of the given circumstances or his behavior. A person loses the ability of fully conscious regulation of his actions, but this situation does not last long. It is called “explosive” as it arises suddenly and also passes quickly. Usually, the affective estate is accompanied by apparent physical manifestations: a person turns pale, turns red, turns blue, heart rate increases, breathing intensifies, facial expressions change dramatically, etc. For example, an affective state is, a strong rage that takes over a person and may cause him to do something that he would never consciously do. The affective state is divided into two types: sthenic (rage) and asthenic (fear) affective states. (Imedadze, 2007; Fontaine, 2007).

Psychometric intervention is necessary to determine whether the person was acting out of rage or fear since rage is associated with revenge, and fear is associated with self-defense.

People perceive the processes underway in the outside world in different ways. These processes are reflected in the human psyche. The intensity of emotional processes depends on a person's character, type, temperament, etc.

During the affective state, the human psyche requires satisfaction from the passion aroused by this feeling, and after it is satisfied, the emotional state of a person stabilizes again. Action taken during the affective state serves to satisfy the impulse, but the value of the action is expressed right in this urge. Certain facts of conditions are necessary for a person to develop a physiological affective state, but when or what effect they will have, depends on the personality of the person. It is largely determined by his temperament.

## **2. Punishment Sphere in the Context of the Crimes Committed Under the Provoked Temporary Insanity**

Justification for the punishment for affective state action is sought by the fact that affective action is not a conduct that cannot be overcome. Affective state does not completely eliminate a person's conscious control, but only reduces it. Crime committed under the provoked temporary insanity seems like a case of assumed self-defense, which excludes actual negligence but involves legal negligence; it excludes the intention, although it does not exclude the conscious (deliberate) implementation of the objective part of the action without the desire to commit a specific criminal conduct.

Assumed self-defense, like provoked temporary insanity state, is considered at the stage of guilt. In the case of assumed self-defense, a person perceives his action as a circumstance that excludes the violation of law, although in reality, there is no unlawful attack at all, and it is only in the imagination of the self-defender. In this case, we are facing a legal mistake - a "mistake in prohibition." If there is no possibility to avoid this kind of mistake, then guilt is excluded, but if objectively there is a possibility to avoid it, according to the German Criminal Law, the degree of guilt will be reduced, and according to the Georgian Criminal Law, the intention will be excluded and only responsibility for negligence will be possible. In assumed self-defense, a person makes a mistake at the stage of criminal conduct, which excludes intention at the stage of guilt. The case may be similar at the moment of the Crime committed under the provoked temporary insanity when there is an "assumed provocation." For example, a person mistakenly thought that his spouse was unfaithful, which is not true and appears only in the imagination of the person in provoked temporary insanity state. In this case, there is a legal mistake, although not a "mistake in prohibition," but a mistake - in the mitigating circumstances of the composition of the conduct. Criminal responsibility is not affected by mistake about the mitigating circumstances of the composition of the conduct; therefore, during the Crime committed under the provoked temporary insanity, if a person is mistaken about the existence of the mitigating circumstances of the crime and there is an "assumed provocation", his action, if we are dealing with a pardonable mistake, will still be a privileged composition. According to the German Criminal Code, in such a case, the crime is qualified by the Part

2 of Section 213, namely - "another less serious case", but I believe, according to the Criminal Code of Georgia, this should not be considered a privileging provoked temporary insanity state, if there is no "fixed attitude". For example, if a person was abused, he or she develops a fixed attitude towards the abuser, and seeing that person in the future may lead to a temporary insanity state, even if the abuser does not intend to carry out any unlawful action. In the imagination of the person in a temporary insanity state, there is an assumed provocation, an assumed self-defense, during which the person thinks that the aggressor is going to carry out a violent action again. "Fixed attitude" leads to a pardonable case, that is, makes a mistake pardonable, and premeditated murder is qualified under Article 111 or Article 113. Otherwise, if there is no fixed attitude, the question must be decided based on the principle of a reasonable man; what another person of the same characteristics would have done under the same circumstances and the act qualified as in a case of assumed self-defense, where the intentional crime is qualified as a crime committed by negligence, which is a legal fiction. And if the signs of necessary self-defense are not present and the temporary insanity state is caused by grave insult or other serious immoral behavior, then it is considered premeditated murder (108,109).

### **3. Comparative Analysis**

Section 213 of the German Criminal Code provides for murder in mitigating circumstances, which can be compared to "manslaughter" in Common Law countries, which means killing rather than murder, as it is a less serious crime. Like in the Common Law countries, in Germany, there is no separate article on the Crime committed under provoked temporary insanity, although we can compare the above-mentioned Section 213 with the article 111 of the Criminal Code of Georgia - murder committed under the provoked temporary insanity, which is a privileging circumstance of the action. In the aforementioned Section, both the Crime committed under the provoked temporary insanity and exceeding necessary self-defense are considered, which, according to the Criminal Code of Georgia, is also regulated by a separate article. Section 213 of the German Criminal Code reads as follows:

If the murderer was provoked to rage by maltreatment inflicted on him or a relative or was seriously insulted by the victim and immediately lost self-control and committed the offence, or in the event of an otherwise less serious case, the penalty shall be imprisonment from one to 10 years. (German Criminal Code, 1998).

This article applies only to cases of murder and not to serious injury to health. Other less serious cases are considered, for example, the premeditated murder of a newborn by a mother, which was covered by Section 217 of the German Criminal Code and was repealed. It is also necessary to go beyond the limits of self-defense if there are no mitigating circumstances provided in Section 33, such as assumed self-defense, assumed provocation (when the perpetrator mistakenly perceives provocative circumstances), or executing an order.

In order for murder to be considered a less serious crime, it is necessary to have the fact of provocation on the part of the victim, and such provocation should not be caused by the perpetrator. The Law defines two cases of provocation that mitigate ordinary murder and make it "manslaughter," a less serious case

of killing. These are - maltreatment and serious abuse committed directly by the victim against the perpetrator or his relative. In the case of provocation, the behavior of the victim and all the circumstances that caused and conditioned such development of events should be studied. (Fischer, 2021). At the same time, it is necessary that the provocation causes a strong emotional anxiety of the perpetrator. German Criminal Law does not make a qualitative differentiation between the strong emotions generated during necessary self-defense and the Crime Committed under the Provoked Temporary Insanity - but the difference is in the details. That is, according to German Criminal Law, a Temporary Insanity state may arise even in the case of necessary self-defense, although, in such a situation, we may not have a Temporary Insanity state at all. According to Section 213 of the German Criminal Code, only serious infringement is considered as maltreatment, although it does not have to be expressed only through physical violence, both physical and psychological, moral and property violence, as well as any other significant violation that involves harming a person, will be considered maltreatment. Accordingly, the aforementioned actions include unlawful violence, which is the reason for the necessary self-defense.

According to German Criminal Law, if there is a conflict of norms, I think the mentioned situation should be resolved as follows. We know that there are intensive and extensive excesses of necessary self-defense. In case of an intensive excess, the action will be considered as exceeding the limits of necessary self-defense, and if in case of extensive excess, the murder should be qualified as the Crime Committed under the Provoked Temporary Insanity only if the perpetrator acts in the condition of sthenic (rage) affective state.(Fischer, 2021). In extensive excess, the state of asthenic affective state must be qualified as an excess of necessary self-defense.

Based on all of the above, Part 1 of Section 213 of the German Criminal Code is related to the fact of an already completed provocation, which, although it occurred at that moment, has already been completed, and the Temporary Insanity state of rage caused by the said provocation. As for the second case of provocation - serious insult as a mitigating factor for murder, it includes not only indignity but also any kind of immoral and degrading treatment of a serious nature. At the same time, the act must be assessed as a serious offense based on all relevant circumstances, objectively and not only based on the subjective perception of the perpetrator. Both the personal characteristics of the perpetrator and the victim are important, as well as the social community where these persons work, as well as the relationship between them before committing the crime. The insult may not be so severe in a specific situation, but due to its continuous, regular nature, it will cause the Provoked Temporary Insanity state of the perpetrator because it was the last straw for the psyche of the provoked. (Schneider, 2001).

Sexual abuse and marital infidelity occupy a big place in the category of serious insult. However, severe sexual abuse should be unexpected for the partner, and this kind of provocation should not be caused by abusive actions carried out by the provoked person during the partnership (for example, the husband constantly cheats on his wife, abuses her... and as a result, cheating on the part of the wife should not be considered as a privileging circumstance for the action). Therefore, when discussing serious insults, it is important to assess the general attitude between the parties and not directly the cause-and-effect relationship at the moment of the commitment of crime. (Tsirkvadze, 2024). The act committed by the perpetrator in the past, which led to the encouragement of the provocation, excludes the privileging circumstance of the conduct if the provocation and its causes are proportionate to each other. (Fischer,

2021). Article 20 of the German Criminal Code, known as "Actio libera in causa", says that any person who at the time of the commission of the offence is incapable of appreciating the unlawfulness of their actions or of acting in accordance with any such appreciation due to a pathological mental disorder, a profound consciousness disorder, debility or any other serious mental abnormality, shall be deemed to act without guilt. However, if a person finds himself in the above-mentioned psychological state by his own free will and choice, then the criminality of the action cannot be ruled out. (Hettinger, 1988). In the mentioned Article, we can think of a pathologically affective state in which a perpetrator, due to the pathological state of the psyche, has a completely limited ability to control oneself. As for the formulation of the details of when the perpetrator brought himself to an uncontrollable state by his own will and intention, for example, he took alcohol or a narcotic substance, which led to a complete breakdown of his psyche, etc., this is provided by German judicial practice and is not explicitly stated in the Legislation. (Beck, 2018). However, there is an opinion that if the perpetrator's mental disorders were caused by the socially reprehensible act of the victim and, therefore, his response is justified according to social views, this should not exclude responsibility and should be considered only as mitigating circumstances. (Roxin, 2006). In this case, it is possible to consider both pathological and physiological affective states, although it is less likely that pathological affective state will not be considered as a circumstance excluding responsibility.

As for Article 21 of the German Criminal Code, it is about mental abnormality, when for the reasons provided in Article 20, a person has a limited understanding of the illegality of an action. The mentioned case is considered to be a mitigating circumstance, and it is possible to change life imprisonment to imprisonment for up to three years. (German Criminal Code, 1998). That is, when a person, due to a mental disorder, profound consciousness disorder, intellectual disability, or other serious psychological disorder, cannot fully understand the illegal nature of an action, the committed action will be mitigated at the stage of sentencing. Article 35 of the Criminal Code of Georgia provides for the mentioned content. Interesting provisions are in Section 33 of the German Criminal Code, which deals with exceeding the limits of necessary self-defense and is known as the excess of necessary self-defense. The said Section states that a person who exceeds the limits of self-defense out of confusion, fear, or terror shall not be held criminally liable. (German Criminal Code, 1998). This is due to the special emotional state of a perpetrator, which was caused by the victim, and in such a state, it becomes impossible for the perpetrator to consider the limits of the law. (Herman, 1986). The Criminal Code of Georgia does not provide for the mentioned norm; however, Professor Otar Gamkrelidze had prepared an alternative draft of Criminal Law, in which, in the form of Article 38, the similar content of the norm of the German Code was provided, and it was formulated as follows: "caused by confusion, fear or other pardonable circumstances". Due to the difference of opinions, legislators did not consider the position of the alternative project and did not include it in the Criminal Code. (Turava, 2011). In the German Criminal Law literature, excess of necessary self-defense is considered as a pardoning circumstance excluding guilt. Some of the authors relate it to the issue of insult due to the strong reduction of control of their own will by self-defender, while other authors - due to the special mental state of self-defender, consider it next to the extreme necessity of pardoning, at which time, due to the mistake in the prohibition, we face the moment of pardoning that excludes guilt. In the excess of necessary self-defense, the degree of injustice is already reduced and if this is added to the asthenic affect, during which self-defender has

limited control of his own will, it will reduce the degree of guilt to such an extent that it will lead to pardoning.(Roxin, 2006). All of this implicitly implies the exclusion of the Crime Committed under the Provoked Temporary Insanity arising on the basis of unlawful violence from criminal responsibility, which I have repeatedly emphasized and the above-mentioned entry of the German Criminal Code and the positions of German authors confirm my opinion. However, according to the German Criminal Law, Crime Committed under the Provoked Temporary Insanity based on unlawful violence is pardonable only if there is an affective state of fear present. In the case of the affective state of rage - it only leads to diminished responsibility.

According to the established opinion in German Criminal Law studies, the excess of necessary self-defense may be pardonable, both in case of intensive excess and delayed extensive excess, since even in the latter situation, the self-defender had the right to necessary self-defense, although the response was delayed in time.(Heinrich, 2010). In addition, according to German Criminal Law, in cases of intense excess, it does not matter whether the person exceeds the limits of necessary self-defense knowingly or unknowingly if the act of the self-defender is caused by fear, confusion or mistake, exceeding the limits of necessary self-defense is still considered pardonable, except in cases where the self-defense is clearly disproportionate and was disproportionate to the harm caused or to be caused. (Kindhauser, 2009). I think there is no difference between the Crime Committed under the Provoked Temporary Insanity reasoned by unlawful violence provided by the Criminal Code of Georgia and the excess of necessary self-defense provided by the German Criminal Code since, in both cases, we have conditions of necessary self-defense and a state of strong emotional anxiety. Such a situation leads to a limitation of a person's consciousness, a decrease in will control and it is impossible to determine the limits of the norm and the illegality of their actions. Finally, the Criminal Codes of Georgia and Germany are very similar in this matter, although there are minor differences. For example, the definition of the Crime Committed under the Provoked Temporary Insanity norm. As a privileging condition for strong spiritual anxiety, the Criminal Code of Georgia requires unlawful violence, grave insult, or other grave immoral act and the German Criminal Code - maltreatment and serious insult. As for the Temporary Insanity state caused by unlawful violence, as I mentioned earlier, we can compare it with the case provided for by Section 33 of the German Criminal Code, only in terms of asthenic affect, when a person is completely freed from criminal liability.

#### **4. Conclusion**

In conclusion, we can say that several aspects should be considered regarding the Crime Committed under the Provoked Temporary Insanity:

- In criminal legislation, there should be a differentiation of punishments for crimes committed under the Provoked Temporary Insanity state caused by unlawful violence and serious insults. So that there is no threat of making decisions based on unlimited views.



- The crime committed under the Provoked Temporary Insanity state caused by unlawful violence should not consider imprisonment at all and it should be limited only to house arrest or Useful work for society.
- Crime committed under the Provoked Temporary Insanity caused by life-threatening physical violence and sexual violence, in the case of intense excess of necessary self-defense, should exclude criminal liability, because in such a case, with the intentional actions of the provocateur, a person receives such a severe emotional trauma that it is difficult to maintain control and refrain from excessive misconduct. At this time, we can compare the action with the assumed self-defense, at which point there is a pardonable case. I believe, the mentioned issue should be resolved as follows: if we have an intense excess of necessary self-defense, any type of affective state, be it fear or rage, should lead to the exclusion of guilt. Otherwise, it turns out that a person is being punished for falling into an affective state. For example, we can cite one of the cases discussed above, where a violent son systematically abused his father. During one of the conflicts, he stabbed his father in the throat with a knife; despite this, the father tried to avoid his intoxicated son and went to the kitchen, where the son followed him and was about to make another attack with the knife; at that moment the father took one of the knives in the kitchen and stabbed his son to death 24 times. The court verdict was that although the father was in a situation of necessary self-defense, the multiple types of wounds were not proportional, which is why the action was qualified as exceeding the limits of necessary self-defense. In the event that the father inflicted only 1 or 4 wounds on the violent son, which would be enough for the necessary self-defense, he would not have been punished at all due to the absence of unlawful action. We know that in a Provoked Temporary Insanity state, a person experiences a strong emotional attack and cannot stop until he gets rid of this emotion. If, in the above-mentioned case, the father would only inflict one wound on his son and stop since he was sure that his life was no longer in danger and there was no more scope for necessary self-defense, then there would be a Temporary Insanity state either.. Exceeding the limits of necessary self-defense might have occurred if the son had not had a knife and the infliction of fatal wounds by the father would have been clearly disproportionate to the degree of the attack. Otherwise, it turns out that the person is given the necessary self-defense right but, at the same time, forbidden to fall into the Temporary Insanity state. A person is legally punished for having experienced intense emotional distress at the time of the fatal assault or rape.

As for the extensive excess of necessary self-defense, the above opinion should be applied only if we are dealing with the affective state of fear. When in the background of strong mental anxiety caused by fear and confusion, the victim cannot perceive the fact that the attack is over and feels himself in danger again. In such a case, the action can be compared to a situation of apparent self-defense since, in the perception of the victim, the aggressor is still a source of danger. And if, during extensive excess, a person commits a criminal act under the Temporary Insanity state of rage, he should be punished in all cases according to Article 111 or Article 121 of the Criminal Code.

- The privileging Provoked Temporary Insanity state should be extended to such crimes, which are caused not only by the unlawful violence of the victim but also by other illegal actions. Articles 111 and 121 should be formulated in the following way: "In a state of sudden, strong mental anxiety, which was

caused by victim's unlawful act, severe insult, or mental trauma caused by repeated unlawful or offensive behavior of the victim towards the perpetrator or his close relative."

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