

Brief History of Legitimate Defense

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Abstract: Within our criminal law, committing an offence constitutes a basis for the criminal responsibility (article 17, paragraph 2, from the Criminal Code). Taking into consideration the fact that the general notion of offence, as a fundamental juridical institution of the criminal law, is characterized by three essential characteristics listed within the article 17, paragraph 1 from the Criminal Code (social danger, guilt and the provision in the criminal law), the criminal responsibility will necessarily have as a theme the conjugate existence of these essential characteristics.

1. General aspects on penal responsibility

In our penal law, only one crime represents the grounds for penal responsibility (Penal Code, art. 17, paragraph 2). There are three main characteristics of what we call crime: social danger, guilt and the stipulations in the Penal Code. There are circumstances or states-such as injuries within sport contests, or the case when somebody is forced to commit a crime-which simply removes the penal nature of these offences. That is why in the general part of Penal Code the legislators mention the causes which prevent the identification of the main characteristics of crime. These causes have to be permanent during the crime, although the court identifies them subsequently.

The Penal code-chapter V-general part-art 44-51 calls these circumstances or states causes which remove the penal nature of the offence. We think that it would have been better to call them causes which make the offence not be a crime, because the verb to remove means that there already is a penal nature and something removes it, although we are not dealing with crimes at all.

2. The history of self defense

The analysis above helps us go deeper in studying self defense since ancient times in several areas around the world.

Protecting one's own life within unfair aggression has not been punished since slavery system. The laws in the Old India stipulated that "he who kills for his safety or to protect a woman or a Braham shall not be guilty of murder". Also, the Talmud stipulated that "if someone is trying to kill you, be quicker and eliminate him."

The slavery law of Athens stipulated rules which permitted self defense. Speaking of correctness, we mean that the benefit of defense is allowed only for free people, because "if a slave kills a free man to protect himself, he shall be punished as a killer"

In the Roman law, the principle to use violence against violence has a more precise meaning.. Cicerus invokes the benefit of self defense and supports Milone who was accused

for killing Clodius, proving that "there are several circumstances when killing is legitimate, it becomes necessary when violence is rejected through violence" It is, of course, about an unwritten law, but innate. This law stipulates that any man to save our lives is an honest one, when attacked by the highwaymen. The law of the 12 Tables contained stipulations on the limits of self defense. The simple nocturnal circumstance was enough to be pardoned for killing the thief, no matter the reason of killing. In fact, the real reason is protecting the fortune. In Judeea, killing a thief during night was well justified considering that he could also kill, not only steal.

The stipulations during Justinian's times refer to the subjective consideration of deeds which claim murder. In this case, killing was accepted if the red-handed thief was signaled by the screams of the catcher or if the victim was afraid of death.

Both ancient Rome and the Roman law considered self defense a law of nature with no roots in the civil law.

The German law considered self defense a right with a special nature, the roots of it coming from "a right to immediate and anticipated revenge of the victim" and, on the other hand, stipulates the action of the aggressor outside law. The German law agrees more freely on the violent response to protect life, property, or honor. With no precise notion of self defense, this was considered "against the peace of the aggressor".

The canonical law stipulated self defense for saving lives and fortune, though there was a great Christian influence. Self defense was closely related to natural law and force was due to the need to defend, not to revenge. There was a difference between "homicidium necessitatis" and "evitabilis", that is if there had been other ways to defend except for killing, the killer was considered guilty.

The Feudal law tried a conciliation with Christian moral, self defense was considered a necessity and not a right, without being punished.

This concept can be found during the developed feudalism within the French law.

There were also some tax benefits. The self defendant was considered guilty as if he had murdered in any circumstances, because no one is allowed to make justice for self. But considering the circumstances, the accused could ask for pardoning using the so-called "letters de remissions", waiting for the king's verdict in prison. The pardoning came from the king and not from the judge, after he paid the civil part.

The doctrinaires from natural law school considered that the positive law allows the individual to defend when in danger, even sacrificing others' right, in order that his action could be outside the rules of law.

In modern penal law, not to punish when self defending comes into subjective theories. We can mention "the instinct of self-preservation", "the moral forcing theory". These two theories base on the power of the human instinct to self defend against an attack. The doctrinaires criticize these theories as they allow cold blood killing, even when the attack caused no serious emotion. These critics confuse the voluntary with the free will. So, it must be established if the act was done with free will.

The objective theories contain the theory of reward through evil, the theory of social use, the theory of exercising the public position and others.

Self defense is considered by the objective theories as "in rem", defending is according to the law. In this respect we can mention George Vidal and Giuseppe Penso.

In western law, the theories which treat self defense reject the idea of psychological forcing. It is not the emotion that authorizes the attacked to kill. This would give the murder an honorable nature, it is "a right".

Scientifically speaking, there is no right to self defense. It is about circumstances which remove the penal nature, it is not a right but a state which produces legal consequences.

It follows that self defense is a cause. It removes the moral nature of the crime. Authors who agree on that only mention this right without proving it.

The first writings about self defense on our territory have existed since the 16th century. A

paragraph from a treaty between Sigismund 1st King of Poland and Stefan cel Mare mentions that "if a ravisher is killed during his crime, no accusation shall be made."

Self defense comes in a more precise form and meaning in the later stipulations made by Matei Basarab and Vasile Lupu. Caragea's stipulations, as well as Calimach code contain stipulations on self defense..In Calimach Code we can find references to over reacting.. "he who will step beyond his defense shall be punished."

In transylvania we can find self defense mentioned in Tripartitum- Werboczi, it is applied to "protect body as well as the unmovable things or offsprings."

The class characteristic of feudal law can be noticed in stipulations on self defense.

Any person with a position or lands who has been deprived from his fortune had the right to defend by any means.This was not considered self defense.

In the latter penal codes, both in Ardeal and Bucovina, self defense is stipulated as a cause for removing penal responsibility. The same situation can be found in Penal code in 1937.This one established clear boundaries undertaken by Penal Code in 1969 which has been revised on self defense.

The current Penal Code defines self defense (art.44) as follows:" the act stipulated by the penal law when self defending is not a crime;(2) a self defender is he who acts to reject an attack, direct, sudden and unjust, against him or another, or a public interest; it is assumed that self defendant is the one who acts to reject a break in or entrance using sly means in a room, dwelling or dependency; there is self defense when the limits of a proportional self defense have been passed because of excitement."

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