SELF-DEFENCE
DO DIFFERENT CONCEPTUALIZATIONS LEAD TO DIFFERENT SOLUTIONS?

di ALDO PARDI

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1.Introduction

Both Germany and Italian legal systems consider self-defence as a justification which precludes an act, which meets the definition of offence, from being considered unlawful, and as consequence, punishable.[1]

Aim of my analysis is to investigate and understand how the historical, cultural and ideological background has sharpened the requisites of self-defence, leading the two systems to adopt, at least at first sight, many dissimilar solutions. During the discussion, in the light of the considerations emerged, I will attempt to provide a brief comment concerning the draft law[2] presented to the Italian Parliament for the amendment of the current legislation on self-defence.

[1] Joachim Herrmann, *Causing the Conditions of One´s Own Defense: The multifaceted Approach of German Law*, Brigham Young University Law Review (1986) p. 747.

[2] Unified text adopted by the Parliamentary Commission for the draft laws nn. 5,199,234,253,392,412,563,652 the 3 October 2018.

I want to adopt the method described by David J. Gerber, because I want to focus on the influences on the decision-making and describe the operation of both systems, their dynamics, and the background that has affected the concept of self-defence. According to Gerber, the analysis should capture and represent the influences on the decision-making of the legal actor involved; these decisions, which are the choices of the legal actors, then, should be framed into a system. Only in this way it will be possible to predict what legal actors have done and what they will do.

Gerber suggests several influences on the decision-making process, in particular he mentions the texts, institutions, patterns of "communities" and patterns of "thoughts".[3] In line with Gerber, I will take into consideration the provisions of the two Criminal Codes, the European Convention on Human Rights, decisions of the courts, the opinions of the doctrine and the cultural, historical and ideological context which conditions the operation of these legal actors.

The main risk of this method, however, is represented by the fact that the limited sources available do not always consent to operate an in-depth analysis of all the conditioning factors of the decision-making process. Moreover, the limited space I have at disposition imposes me to neglect some aspects of this topic.

Based on these premises, it will be necessary for me to start with a historical overview, in order to emphasize the different conceptualisation of self-defence developed in the two legal systems for a better comprehension of the decisions of the legal actors in relation to the requisite of the self-defence.

2.A historical overview and a different approach.

§ 32 StGB Notwehr "emergency defence".

(1) Who commits a crime in situation when this was appropriate as an act of self-defense does not act unlawfully

(2) Self-defense means defensive action that is necessary to avert a present unlawful attack on oneself or another[4]

Art. 52 c.p.

[3] David J. Gerber, *System Dynamics: Toward a Language of Comparative Law?*, 46 American Journal of Comparative Law, 719 (1998)

[4] German Criminal Code (StGB)

(1) Who has committed an offence because he was forced by the necessity to defend his right or another person right against the present danger of an unlawful offence, provided that the defence is proportionate in rapport to the offence, shall not be punished.[5]

(2) (3) …

The Italian Penal Code (1930) elaborated during the fascist period, still in force, contains a self-defence provision originally limited to the first subsection. With a law reform adopted during Berlusconi government in the 2006, other two subsections were introduced as the core provision was (and still is) not considered suitable to adequately protect private citizens in their domicile.

The Italian Penal Code has adopted an objective approach, result of a doctrine debate of that time. The base of the crime is considered the "harmful event", while intent and neglect are considered only mere limits to the responsibility of the wrongdoer.[6]

This approach is clearly shown also in relation to self-defence. Art. 59 Italian Penal Code states that justifications in general (inter alia, self-defense) are "assessed in favour of the actor, even though he does not know them or believes for mistake that they do not exist." Self-defense hence operates regardless of the *animus* and intention of the attacked person: what is relevant is the factual and objective presence of the requirement of the provision.[7] The principle according to which "there cannot be crime without offence to a legal good" has the value of a constitutional principle, after a sentence of the Italian Constitutional Court.[8]

On the other hand, a subjective approach has been adopted by the German Criminal Code (StGB), which, subject to major reforms in the 1871, is rooted upon the Reich Criminal Code of 1871, highly based, in turn, on the Prussian Criminal Code of 1851.[9] The ideological and cultural context of the Romantic period, the idealism philosophy and the German Historical School

[5] Italian Penal Code

[6] Giorgio Marinucci and Emilio Dolcini, *Manuale di Diritto Penale – Parte Generale*, Giuffre` Editore, (2017) p.5-7; 290-296

[7] *Ibid.*

[8] *Ibid.*

[9] Michael Bohlander, *Principles of German Criminal Law*, Bloomsbury Publishing, (2008)

inevitably influenced its drafting and it is reflected in its emphasis on the individuality and the subjectivity.[10] Today, there is a general agreement that, for the operation of self-defence, not only the objective requirements of the justification must subsist, but also that the person who wants to avail of the justification has to be aware of it.[11]

Differently from Italian legal system, the German one requires, therefore, a further analysis focused on the subjectivity and the animus of the individual involved.

Regarding the origin of art. 52 c.p., the previous Italian Penal Code of the 1889 (Zanardelli Code) followed, with some amendments, the Code Napoleon: self-defence in both codes were excluded in case of attack to property. [12] The extension of self-defence in case of danger to property goods was operated by the Rocco Code. The more effective protection of goods was in line with the fascist ideology, which wanted to "strengthen the cornerstones of the social organisation"[13] and security, by also increasing the punishments in cases of robberies and thefts, and it was coherent with the relevance attributed by the Albertine Statute[14] to the property right defined as "inviolable"[15]; as a consequence, recourse to self-defence in case of attack to property goods was allowed, if the other requirements were fulfilled.

Both in the Rocco Penal Code and in the Zanardelli Penal Code, where the self-defence was restricted only to attacks to life and safety, honor included, the self-defence was conceived in individual terms as a principle of self-protection. Today, the prevailing doctrine identifies the reason of the provision in the necessity of the unlawfully attacked person to defend his own

[10] Thomas Vormbaum (author) Michael Bohlander (editor), *A Modern History of German Criminal Law*, Berlin:Springe; [Hannover]:VolkswagenStiftung, (2014) p.78

[11] Markus Dirk Dubber and Tatjana Hörnle, *Criminal law: A Comparative Approach*, Oxford University Press, (2014)

[12] Federico Bellini, *La difesa legittima*, G. Giappichelli (2006) p.25-26.

[13] Ministerial Commission Report on the preliminary draft of the Rocco Penal Code.

[14] Italian Constitution in force since 1848, replaced by the actual Constitution in the 1948.

[15] Giancarlo Scarpari, *Legittima Difesa?* , Il Ponte (2016).

interest, which has for the community a predominant value compared to the one of the aggressor.[16] Therefore, there is no the social damage that justifies the punitive sanction by the State.[17] The minority doctrine instead, highlights a delegation of the police authority to the private individual for necessity reasons.[18] Both views, however, are clearly based upon the assumption that the attacked person protect nothing more than an individual interest.

On the other hand, the German self-defence provision (sec. 32) accepts, modernising in the language, the equivalent provision of the Reich Criminal Code of the 1871, which did not modify the rule of the Prussian Criminal Code of the 1851.[19] It reflects, as a consequence, the concept of "liberales Notwehrrecht" developed in the 19th century. The debate of the 18th and 19th century was in particular focused on the proportionality requisite of self-defence, especially in case of an attack to property. The predominant doctrine in 1770, represented by the authority of Boehmer, believed that the proportionality should have been considered not in relation to the harm inflicted but in the light of the security; in this way, it tried to defend the right of the owner to defend his goods with the killing of the thief.[20] Against this conception, von Globig, Huster and Von Soden, illuminist jurists, argued that the deadly force in self defence for the protection of property goods should have been admitted only in case of "loss of the entire or at the limit of most of the patrimony": a loss that would entail the loss of enjoyment of life and freedoms.[21]

However, the concept of "liberas Notwehrrecht" soon superseded these illuminist theories. Several factors contributed to its development. First of all, the politics adopted in Prussia whose aim was to "guarantee to the subjects the peaceful enjoyment of

[16] Francesco Antolisei, *Manuale di Diritto Penale – Parte Generale,* Giuffre´ (2003).

[17] *See*, inter alia, Francesco Antolisei, Manuale di Diritto Penale, Parte Generale, Giuffrè Editore, (2003).

[18] *Supra* note 17.

[19] Domenico Siciliano, *Sull´omicidio per legittima difesa a tutela del patrimonio nel diritto penale tedesco ovvero: la rimozione dell´illuminiasmo e le sue conseguenze, Rivista Internazionale di Filosofia Del Diritto*, (2004) p.626.

[20] *Ibid.*

[21] *Ibid.*

their properties and give examples to prevent thefts and robberies".[22] Moreover, great relevance was attributed at the time to the theories of two prestigious jurists, Grattenauer and Berner.[23] In particular, based on a famous case of a prisoner evaded and killed by a miller during an attempt to enter his house in the 1805 (Exner case), Grattenauer reached this conclusion: crimes dissolve the "social contract" between the delinquent and the community, and transform the infringer in a Rechtlos (individual without rights) out of the protection of the State; as a consequence, killing a person who is out of the juridical protection of the State is not a crime.[24] Proportionality between attack and defence becomes juridical irrelevant. On the same way, Berner stated the importance that the right, as right, cannot give way to the wrong.[25]

Today, two basic co-existing ideas are identified in the concept of self-defence: not only a principle of defending the attacked person interests against wrongful violation, but also a principle of preserving and defending the Legal Order.[26] Following the theorisation of Berner, this so called "principle of law protection"[27] is based upon the idea that "the right need not make way for wrong": the attacked is seen as Right and the aggressor as Wrong.[28] In this view, a violation of an individual's rights does betokens a risk and threat for the rights everybody.[29] Self-defense is considered hence to protect a superior interest: the aggressor does not violate the individual's right but attacks also the legal system in his entirety. The autonomy of the defender is identified with the Law [30], and as a consequence self-defence is perceived, by some authors, as a vindication of autonomy: in

[22] *Ibid.*

[23] *Ibid.* p.609.

[24] *Ibid.*

[25] *Ibid.* p.610-621.

[26] Klaus Bernsmann, *Private self-defence and necessity in German penal law and in the penal law proposal – some remarks*. Israel Law Review, (2015) p.172.

[27] *Supra* note 11

[28] George Fletcher, *Proportionality and the psychotic aggressor: a vignette in comparative criminal theory*, Israel Law Review, (1973).

[29] George Fletcher, *Rethinking Criminal law*, Oxford University Press, (2000).

[30] *Supra* note 29.

case in which personal's autonomy is endangered, the defender has a right to expel the intruder.[31]

To summarize, both Codes reflect different approaches to the study of criminal law - one focused exclusively on the harmful event, and the other tending towards introspection - and which are reflected also in the conceptualisation of self-defence, as we will also see below. Not only. The consideration of this justification as a principle to protect exclusively a self-interest or also as aiming at the protection of the legal system as a whole, inevitably shapes the requisites and their interpretation. This brief illustration of the philosophical, ideological and historical context was therefore essential to fully comprehend the concept of self-defence in the two systems.

3.Interests protected. Unlawfulness of a present attack.

My examination of the two legal systems will start from characteristics of the self-defence which present a particular similarity.

Both legal systems allow self-defence in order to protect individual interests of one person or another. This clearly emerges from art. 32 c.p. which mentions "rights" of the attacked person, including as consequence every kind of individual interest protected by the law.[32] The German provision does not indicate which interests justify self-defence; however, German doctrine and courts recognise a great number of protected individual interests: not only life, honor or property, but also, for instance privacy and freedom of movement.[33]

Also the requisite of the "unlawfulness" of the attack is shared by the two provisions: self-defence is not allowed in case of dangers crated by the excise of a right or fulfilment of legal duties.[34]

A difference, not without consequences, concerning the source of danger between the two provisions should be noticed. Art. 59 c.p. requires only "a danger", implicitly allowing the possibility of self-defence also in case of an omission, at least when there is a legal duty to impede a harmful event (ex art.

[31] *Supra* note 30.

[32] *Supra* note 6.

[33] *Supra* note 27.

[34] *Supra note 6.*

40.2) or when the omission itself can constitute a crime (e.g. if a driver fails to provide assistance in case of seriously injured person, obliging him with force could be allowed).[35]

Sec. 32 StGB instead mentions an "attack", by implying that self-defence can be allowed only in case of an active action originating by a person, and not in case of omission; in the latter case, the prevailing doctrine provides a positive answer at least when a duty to act is not observed.[36]

The "presence" of the danger is shared by both legal systems and implies that the danger should be temporarily imminent - implying that has not begun yet – or should be in act but not already consumed.[37]

It is remarkable to notice that the prevalent German doctrine in the 1770, represented by Boehmer, founded the right to kill the thief by invoking the need of "security", and this doctrine was difficulty eroded by the German illuminist jurists who tried to condemn the use of lethal force to kill thieves.[38] In the same way, the self-defence provisions, as stated above, was coherent with the purpose of the Reich and the fascist government to prevent robberies and reduce thefts. In supporting the extension of self-defence to the protection of property rights, the underlying theme seems to be the necessity of security, at least when the state with a general duty to guarantee it, is momentarily unable to provide it. The requisite of "presence" of the danger could be understood in the same way. It wants to underscore the fact the self-defence is conceived as a situation of emergency, which allows exceptions to the monopoly of force of the State. But as soon as this situation of emergency ceases, the State regains his right and duty to punish.

4.Necessity. Duty to retreat. Proportionality

The different conceptualisation of self-defence is patently reflected in the elaborations of these three requisites.

[35] *Ibid.*

[36] *Supra* note 27 p.173.

[37] *Supra* note 6.

[38] *Supra* note 20.

NECESSITY. Both art. 52 and sec. 32 explicit the requirement of necessity, without, however, providing a definition; doctrine and case law have supplied to this gap.

Basic idea of necessity seems to be shared in both legal systems: a defence cannot be considered necessary if the attack could be ended with other lawful conduct or with other less harmful available means.[39] This has been repeated by the German Federal Court of Justice in several judgements [40]: the defender has to threaten the use of the weapon, in case this is not sufficient to make the attacker desist, before killing the attacker, he has to attempt a less harmful use of the weapon, for instance, by shooting at the legs.[41] Similar solutions are reached by the Italian case law and doctrine: every defensive conduct different from the less harmful one is not necessary.[42]

DUTY TO RETREAT. Differences between the two legal systems, however, arise in relation to the duty to retreat. In the Italian legal system, the duty of retreat is considered as inseparable from the necessity requirement.[43] The defence is not necessary if the attacked person can escape without endangering her physical integrity.[44] The Court of Cassazione is clear: commission of harmful act as "extrema ratio" and flight as a mandatory solution. Mandatory even though the defendant has to sacrifice his honor. [45]

In the light of the fact that the Right can never leave any space to the Wrong and the defendant has to protect the legal order, the German legal system denies the existence of a duty to retreat.[46] However, recently, the case law has attempted to introduce some exceptions, when an absence of duty to retreat could bring to tragic consequences. In particular, restrictions, on the base of the

[39] *Supra* note 6.

[40] German Federal Court of Justice 4 StR 505/86, BGH NStZ 1987,172 (October 30,1986); BGH, NTtZ 25, 229.230; BGH, NJW 1980, 2263.

[41] *Supra* note 11.

[42] *Supra* note 6.

[43] *Ibid.*

[44] *See*, inter alia, *supra* note 6; Cass.Sez.V., 15 maggio 2008, n.25653.

[45] Cass.Sez.V,sent. n. 33837/18.

[46] *Supra* note 30.

requisite of "appropriateness" of the sec. 32, have been developed in the case of children mentally impaired and provoked attacks.[47]

Family Tyrant Case is worth-mentioning.[48] In a domestic abuses context, during a quarrel a battered wife extracted and showed to the husband a knife; as he started to run in the direction of the daughter, she decided to stumble him several times as she was afraid that he could get up. Interestingly, the German court considered whether the defendant had a duty to retreat; in fact, the defendant shoed a knife aware that it could increase the husband's rage and therefore, it might be considered as a provocation, which limits her self-defence.[49]

The two systems, hence, reach different solutions in relation to the duty to retreat, even though they seem to start from the same idea of necessity. As duty to retreat is considered part of necessity in the Italian legal system, it is possible to infer that it is considered as one of the less harmful "means" to end the attack. As the self-defence is considered to protect an individual interest, and that individual interest can be protected also by escaping, Italian legal system cannot justify the harm, because there was a way to avoid it. It clearly emerges the conception of a situation of self-defence perceived as a balance between individual interests involved, the one of the attacked and the one of the aggressor. No consideration seems about the fact the aggressor is violating other people rights. This consideration seems instead be accepted by the German legal system that, only by accepting the idea of a super-individual interest, justifies the harm that is inflicted even though it could have been avoided by escaping and no other means were available. The emphasis on the German legal system is, as Grattenauer denoted in a radical and inflexible way, on the fact the law has been or being violated. Remarkable is also the attenuation of the principle according to which the "Right cannot give way to the Wrong" when, at least in the case of provocation, the Right is not completely innocent and pure, but has contributed to the existence of the wrong.

[47] *Supra* note 9.

[48] German Federal Court of Justice 3 StR 503/01, BGH NStZ-RR 2002,203; BGH NStZ 2001, 509 (April 18,2002).

[49] *Supra* note 9.

PROPORTIONALITY. The requisite of proportionality is explicitly mentioned in the art. 59 Italian Criminal Code and subject to various criticism. Proportionality imposes a comparative assessment between the legal good harmed of the aggressor and the legal good threatened of the defender.[50] Doctrine and case law both agree that the defendant can harm a more valuable legal good, but the gap between the two goods must not be excessive.[51] For instance, a girl who is about to be raped is allowed to kill the aggressor to defend her "sexual freedom". The comparative assessment is based upon ethical and social perception of the goods, perception which is in general reflected by the Constitution: as a consequence, based on the premise that property is limited by a "social function" according to art. 42 Constitution, the protection of property goods with the sacrifice of human life is always disproportionate.[52]

The law n. 59/2006 has introduced in case of unlawful entrance into domicile, other places of private dwellings, places where a commercial, professional or entrepreneurial activity is practised), a presumption of proportionality (which does not admit proof to the contrary)[53] if a weapon legitimate detained or other adequate means is used to defend (a) - own or other people integrity (b) - own or other people property but only if there is no desistence and there is danger of aggression (art. 52.2 and 52.3).[54]

However, as the doctrine and jurisprudence have underlined, for the operation of the justification, the requirements of the "actual danger of an unlawful crime" and the "necessity" of defence must be fulfilled.[55] The Court of Cassazione has already stated that for the application of the provision, in case of danger to property goods, it is necessary that the trespasser has not desisted from committing the crime and there is "an actual danger for the physical integrity of the person".[56] Otherwise, without

[50] *Supra* note 5.

[51] Cass.Sez.1,10 Novembre 2004,n.45407, Podda,in CED Cassazione n.230392.

[52] *Supra* note 6.

[53] *Ibid.*

[54] Art. 52.2 and art. 52.3 Italian Penal Code

[55] *Supra* note 6.

[56] Cass.Sez.I, 8 marzo 2007 n.16677

this interpretation, the provision would be probably unconstitutional as the Constitution does not tolerate injuries to defend property[57] and imposes a superior value of "life" compared to "property".[58]

On the other hand, German provision does not state the requirement of proportionality. Based on the lack of the requirement in sec. 32, a comparative assessment between the two legal goods involved seems superfluous, and using deadly force to prevent an attack to property goods seems allowed.[59] This is the position of the prevalent Germany doctrine.[60] This conclusion could be explained only by referring to the conceptualisation of self-defence permeated in the German legal system: averting an attack to property by killing the aggressor could be justified by the super-individual principle of law protection and preservation of legal order.[61]

In the Fruit Thief Case (RGSt 55, 82 (1920)), the Imperial Court of Justice reached the same conclusion: judges justified a man who had shot, seriously wounding, a small thief who stole some fruits from his tree.[62]

However, it should be underscore that the courts have progressively introduced some restrictions, "social ethical" limitations, reached by interpreting the requisite of "appropriateness" (geboten) [63] in the sec. 32 or general principles such as "the abuse of rights"[64], when at least the reaction could be bring to "extreme unfair" consequences towards the aggressor. In particular, self-defence could be restricted in case of mere nuisances [65] Moreover, it could be restricted if the aggressor acts without responsibility or culpability, as the disobey of the law cannot be compared to the ordinary one which justifies self-defense. [66] If

[57] Art. 32.1 Cost. defines health as a fundamental right of the individual and interest of the community.

[58] *Supra* note 6.

[59] *Supra* note 27.

[60] *Ibid.*

[61] *Supra* note 11.

[62] *Ibid.*

[63] *Ibid.*

[64] *Supra* note 9.

[65] *Supra* note 27.

[66] *Supra* note 9.

there is a special relationship between the aggressor and the defendant (e.g. hustand and wife), at least lethal force should be considered to be excluded [67] Moreover, self-defence does not seem to operate if the harm inflicted is patently and grossly disproportionate compared to the aggressor's interest.[68] This however does not preclude the recourse to deadly force in order to protect property.[69] In fact, the jurisprudence has applied this restriction in a narrow way: the majority view seems in fact to consider the value of the property in danger as a crucial factor in the recognition or denial of self-defence. [70]The attack to valuable piece of property - e.g. diamonds - could legitimate recourse to lethal force.[71] In the light of this jurisprudential orientation, the Fruit Thief Case above mentioned could today be solved in a different way, as the value of properties concerned was not remarkable.[72]

The use of deadly force to defend property have become even more controversial and disputed in the light of the art. 2(2)(a) ECHR[73] ,due also to the fact the ECtHR has not yet ruled on this issue.[74] Even though there is a minority of the Italian doctrine according to whom the article refers only to the lethal force in the relation between State and authorities and citizens, the prevailing doctrine and courts consider that article perfectly applicable in a self-defence situation between private citizens: it states the protection of the right to life, regardless of the subject that infringes it.[75] As a consequence, the use of lethal force to protect property is clearly denied. On the other hand, German doctrine, represented by Claus Roxin, rejects the application of

[67] *Ibid.*

[68] *Supra* note 27.

[69] *Supra* note 11.

[70] *Supra* note 27.

[71] *Ibid.*

[72] *Supra* note 11.

[73] Art.2(2)(a)"Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary: (a) in defence of any person from unlawful violence"

[74] Jan Arno Hessbruegge, *Human Rights and Personal Self-Defense in International Law*, Oxford University Press, (2017).

[75] Francesco Diamanti, *Il diritto incerto. Legittima difesa e conflitto di beni giuridici*, Rivista Italiana di Diritto e Procedura Penale, Anno LIX, Fasc. 3, (2016).

the ECHR in private self-defence. First of all, as art. 2(2)(b) admits the use of deadly force "in order to effect a lawful arrest", so after the offence, the Convention cannot prohibit it before the commission of the offence for self-defence.[76] Secondly, ECHR prohibits the intentional homicide, but not the one characterised by *dolus eventualis* typical in the reaction in self-defence.[77]

The two systems provide opposite solutions to the same problem: could be used lethal force towards a thief entered the house to steal a valuable piece of property without threatening human life? Italian system answer is radical: no. The value of life cannot be sacrificed to protect material goods. The social consequences of this statement should be mentioned. In particular, with the increasing of robberies in shops and houses[78] and the media clamour, the perception of insecurity has risen. As a consequence, the actual legislation has been considered unsuitable to defend properly citizens, especially in their domicile. Even though the reform of 2006 has introduced a presumption of proportionality, the Supreme Court has always tried to give an interpretation conform to the Constitution and the ECHR, by requiring that in order for the substistence of a presumption of proportionality in case of attack to property, the personal safety has to be endangered. Therefore, not only a duty to retreat is imposed, because it is part of the requirement of necessity, but the attack to property is not sufficient to react with deadly force. Not only. But the presumption of proportionality does not allow an "indiscriminate reaction towards the person who fraudulently enter other house.[79] The situation, therefore, is radically different from the one in Germany. The Supreme Court has therefore deprived the reform of its original intent. This example shows how strong the ethical and cultural values are able to bind the legislator. Several draft laws have been deposited in the Parliament and they have been unified in one unique, by the Parliament Commission for the draft laws. A draft law which tries to introduce a presumption of self-defence which does not admit proof to contrary, in the case in which "a person commits an act to impede the intrusion

[76] *Ibid.*

[77] *Ibid.*

[78] Analysis carried out by CENSIS. *See* 52esimo Rapporto sulla situazione sociale del Paese/2018.

[79] Cass.Sez.I n.12466/2007.

carried out with violence or threat of the use of weapons or other means of physical coaction, by one or more people."[80]

Personally, I do not believe, in light of the analysis carried out, that this draft law could radically revolutionize the situation. Self-defence as a protection of an individual personal interest, and not of a superior one, inevitably imposes a reasonable balance between the interests involved, and the right of life prevails over the right of property, as the Court of Cassazione has stated.

In the today Italian society, proportionality is more and more perceived as associated with idea of security. The draft law attempts to give a solution to the feeling of unsafety perceived by citizens. The less room is left to proportionality, the safer the citizen feels himself.

Another observation attracts my attention. While Italian legislator attempts to neutralise the requisite of proportionality, German courts and doctrine goes in the opposite direction, by trying to state restrictions and reject disproportionality. Proportionality seems, therefore, to be an essential requisite, towards which both the legal systems verge. Interestingly, it is the reverse path that the two legal systems under consideration are undertaking. While Code Napoleon did not recognise self-defence in case of attack to property,[81] and the illuminist German jurists, such as Von Globig and Huster, attempted to limit the use of deadly force in case of attack to a huge considerable amount of property goods,[82] Germany seems to go back to accept the illuminist principles replaced by the "liberales Notwehrrect", while Italy legislators go in the direction of denying this balance between the harm of the two goods in the name of a major security and a social perceived need to protect the person attacked.

5.Putative and excessive defence

For a complete comprehension of the dynamics of the legal system, errors about the existence of a self-defence situation, or about the degree of force necessary are worth-mentioning. First

[80] *Supra* note 2.

[81] *Supra* note 12.

[82] *Supra* note 20.

of all, putative defense is an error about the existence of justifying circumstances.[83] According to art. 59.4 c.p. putative defense excludes the intent but, if the mistake is determined by negligence, punishability is not excluded.[84] German law does not contain an equivalent provision; however, German courts and doctrine opt for applying §14 StGB concerning mistake of fact, which excludes intention.[85] Even though, therefore, German Code does not deal with this issue, both systems reach the same solution: if the error is not negligent, the attacked person cannot be punished.

More attention should be paid to § 33 of the German Criminal Code.

§ 33 StGB

A person who exceeds the limits of self-defence out of *confusion, fear* or *terror* shall not be held criminally liable.[86]

Majority doctrine and courts consider the provision applicable only to the intensive excess i.e. the attacked person exceeds the degree of force necessary to repel the attack; the defender is excused if he makes errors of judgement due to physiological threatened state of mind. [87] The act is still unlawful, but the offence is not punishable.[88]

In art. 55 c.p., the Italian Code provides instead that, if the limits set by the law are exceeded by negligence, provisions concerning negligence offences apply.[89] According to the Supreme Court, the negligence excess described by art. 55 c.p. cannot subsist in absence of one of the prerequisite of self-defence, and it is characterised by an erroneous assessment of the danger and of the suitability of the means used.[90]

Differently from the putative defence, therefore, excessive defence is dealt by the two systems in a not equal way. Both systems agree that a situation of self-defence must subsist for the

[83] *Supra* note 11.

[84] *Supra* note 6.

[85] *Supra* note 11.

[86] § 33 German Criminial Code. Cursive is mine.

[87] *Supra* note 9.

[88] Cristina Pugnoli, *La legittima difesa: un'analisi di diritto comparato, Servizio Studi del Senato*, (2018).

[89] *Supra* note 6.

[90] Cass.Sez.V,n. 26172/2010.

application of both § 33 and art. 55 c.p. However, if the attack person exceeds the degree of force necessary, in the Italian legal system assessment is based upon the negligence of the attacked person, while the German one seems focused on the existence of human states of minds. Therefore, the analysis that the judge will have to operate appears in the Italian system less investigative of emotions.

This solution reflects the subjective approach that permeates the German Criminal Code [91] and, as mentioned above, emphasizes the individual and his subjectivity.

It could be interesting how the draft law, previously mentioned, wants to reduce the scope of application of art. 55 by excusing the attacked person who acts in "serious disturbance derived from the situation of the present situation in danger".[92]

This solution resembles the one adopted by German system and wants to valorise the psychological status of the defender. It is based upon the assumption that the threatened person in a situation of danger could hardly behave in a lucid and rational way, and wants to broaden the margin of impunity of the attacked person. Overreactions out of serious disturbance might be justified even though they do not meet the requirement of absence of negligence.

6.Conclusion

To conclude, the topic of self-defence has been shaped in the two legal systems under comparison by different approaches adopted towards criminal law and by the different balance operated between the interests involved. The distinction between the objective and subjective approach to the Code is reflect not only in the further analysis of the animus of the defender, required by the legal system, but also in the emphasis attributed to the emotional status in the excessive defence. However, it is more relevant and note-worthy, also in relation to the consequences derived, the balance operated between the interests involved in a situation of self-defence. The Gerber method has imposed me to analyse the decision-making process and in order to fully comprehend the position of legal actors involved – in this analysis,

[91] *Supra* note 89.

[92] *Supra* note 2.

doctrine, courts and legislators – the evolution of the historical and ideological context has been object of examination. This in fact could help, as Gerber required, to represent influences on the decisions and could be included in the pattern of "communities" and "thoughts".[93] It fact that context has led the two systems to develop radically opposite concepts of self-defence. One, that emphasizes the individual interest of self-protection; the other, the protection of the legal system as a whole. These different conceptualisations of the same notion are so rooted in the mindset of the legal actors that, even the attempt of the Italian legislator of 2006 to reduce the scope of application of the proportionality requirement has been deprived of meaning. As we have seen, this different consideration of interests involved is especially reflected in the application of the duty to retreat and proportionality. However, it could be observed that there is a general tendency in both systems to deny disproportionate reactions and imposing a minimum of duty to retreat. Even though the two systems are based on different premises, therefore, they tend to converge. Dissimilarities gradually, as a consequence, are reducing. The requisite of an unlawful attack to an individual interest in case of necessity coexist with a more and more need of proportionality and an attenuation of duty to retreat.

[93] *Supra* note 3.