

# LEGITIMATE DEFENCE

What is the 'raison d'être' of legitimate defence? What justifies it? When and under what circumstances?

Self-defence is a right based on common sense because it comes as a natural instinct. It is an inherent right to protect oneself from any personal aggressor and, since we live in a civilized world, we should feel ourselves constrained if not bound by human sympathy to defend others who are unjustly assaulted and in need of help.

This natural right of every individual is not a modern concept of law, but it has been the theme of great philosophers. Cicero the greatest philosopher of Rome, who also happens to be the first known legal writer, writes in 'Pro Milone' Chapter 10 et seq., that the repelling of aggression by force is a natural instinct:

'Est haec non scripta, sed nata lex, quam non didicimus accepimus, legimus, verum ex natura etc.'

HOBBS, a modern English philosopher from the positivist school, again states in his book 'LEVIATHAN' Chapter 27:

'for no human law can oblige a man to abandon his own preservation'.

Legal writers do not justify this defence with a mere philosophical statement, but they produce legal arguments. Carrara looks at it from the subjective point of view. He argues that if the state, because of any circumstance whatsoever, is incapable of protecting the rights of an individual, while that individual himself has that ability, then the right of protection of which the state possesses, passes automatically on to the individual himself. In fact Carrara says:

'Il fondamento della legittima difesa riposa sul principio che, cessi

nella società la funzione del punire allorquando la difesa privata possa essere efficace ed invece si palesi impotente od insufficiente la difesa pubblica.'

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The positivist school bring a different argument to justify the legitimate defence. They say:

'che l'interesse dell'agredito coincide coll'interesse sociale, nel senso che la società ha maggiore interesse alla conservazione dell'individuo agredito, ch'è individuo onesto, in confronto della conservazione dell'aggressore, che'è individuo criminale ed antisociale'.

Other authors disagree with Carrara and the subjective point of view, and they justify the self defence objectively. These authors:

'poserò la ragione della legittima difesa non più nell' elemento soggettivo del reato ma nell'elemento oggettivo, affermando che l'atto con cui si respinge l'altrui ingiusta violenza è conforme al diritto e manca, quindi, di quella antiquiridicità che è necessaria perché un'azione possa venire elevata a reato'.

Thus, in the act of self defence, there is lacking that element which is necessary to make the act a crime, viz, the 'actus reus'.

Florian together with Ferri does not agree with the above arguments and he insists:

'che la giustificazione sia nei motivi determinanti al reato'.

Professor Sir Anthony Mamo seems to agree with Carrara's theory, when he states that:

'Where the hand of the state on account of the time or place in which the aggression takes place cannot intervene to protect him, every person is entitled to resist by force any wanton aggression.'

It would be better, now, before we proceed, to have a look at what the Criminal Code says on the subject of legitimate defence. This topic is first mentioned in section 237 which says that:

'No offence is committed when a homicide or a bodily harm is ordered or permitted by law or by a lawful authority, or is imposed by actual necessity either in lawful self defence or in the lawful defence of another person.'

In the next section the code goes on to give three cases of 'actual necessity', which it must be said, are not exhaustive but exemplary. In fact the first thing that strikes us in this section is the vagueness of this phrase, for the code does not give any hard and fast rules where the self defence is applicable. However, we get a very good idea of what the limitations of this law are from the local jurisprudence.

In the case of *Police vs. Joseph Attard* — 11th November 1963, Judge Harding said:

'L-estremi tal-legittima difesa ma jistgħux jiġu indikati aħjar milli bil-formula klassika tal-Carrara li l-perikolu hemm bżonn li jkun ingust, gravi u inevitabili. Skritturi oħra ma għamlux hliet eleboraw dawn l-e'ementi.'

It is therefore best to consider the three elements arising from Carrara's 'classical formula'.

The first element mentioned is that the evil threatened must be unjust. It is obvious that if the evil threatened is legitimate, then one has to submit himself to it and cannot defend himself, because 'altrimenti' says Florian

'non si tratterebbe p'iu di difesa, ma di offesa o di ribellione.' So a man sentenced to death cannot attack the executioner in trying to escape.

The second distinction Carrara makes is that the evil avoided must be grave. Our law, unlike that of other countries e.g. England and Germany, considers as grave only that which threatens the life, the body or the chastity of the individual. Mere intervention with property will not justify any bodily harm. Section 238 (a) justifies only the case:

'where the homicide or bodily harm is committed in the act of repelling during the nighttime, the scaling or breaking of enclosures, walls, or the entrance doors or any house or inhabited apartment, or of the appurtenances thereof having a direct or indirect communication with such house or apartment'.

It is quite clear that unless an aggressor is attacked at one of these stages there is no legitimate defence. Once he is on one's property and he is merely tampering with it then one cannot use force to send him out. In fact in the case of *Police vs. Joseph Micallef* on the 25th June, 1955, Judge Harding gave this interpretation:

'Id-dispożizzjoni tal-liġi li tiskuża lil min jikkaguna offiża lil persuna oħra in difeża tal-proprietà tal-feritur, tirrikiedi li l-azzjoni, biex tkun skużabbli, għandha tiżvolgi ruħha dak il-mument stess li tkun qiegħda tigi invarja l-proprietà u in difeża attwali tagħha. Jekk meta l-feritur irrejeggixxa, il-ferut għa kien daħal fil-proprietà tal-feritur, ma hemmx kwistjoni ta' attwalità ta' rezistenza kontra l-vjolazzjoni waqt li qiegħda ssir il-vjolazzjoni.'

The English law does not agree with this principle of ours, but on the contrary it allows a person to force out

any trespasser on his property, provided he does not kill him. Archbold, in fact, tells us that the owner can pursue the aggressor until his property is completely out of danger. He also goes on to say that:

'In defence of a man's house, the owner or his family may kill a trespasser who would forcibly dispossess him of his property, in the same manner, as he might by law kill in self defence a man who attacks his person.'

Florian agrees with our Code, that the defence of property is not legitimate. In fact he says:

'Quanto alla difesa dei beni, il legislatore ha dittato norme speciali per cui, l'attacco ai beni giustifica la reazione solo in quanto presenti pericolo alla persona.'

It is worth noting that if the attack mentioned above is done at night the legitimate defence falls under section 237 (a) and is justified. If however, the same attack is done in broad daylight, the same act of defence falls under section 241 (b) and is not justified but merely excusable.

Carrara's third disposition, that of the inevitability of the act, again branches out into three other requisites namely that the danger must be sudden, actual and absolute.

If the danger were not sudden, that is, if it had been anticipated then it is not right that a person ignores such a threat so that he is then forced to kill when he could have avoided all this before.

The danger threatened must be actual, because if the danger had already passed then the person assaulted cannot pursue the aggression. Indeed this would be cold blooded revenge. However, at the same time one is not expected to let the aggressor strike first. If the danger is imminent and certain one can anticipate. In *Police vs. Grezio*

*Mallia* on the 22nd February, 1930, it was said by Judge Ganado that we may accept the rule.

'Nemo tenetur expectare donec percutiatur.'

The third disposition, is that the danger threatened must be absolute, that is, it could not be avoided by any other means. This brings us to a very controversial argument. Should the person assaulted try to retreat before inflicting any bodily harm or even killing the aggressor? The superior courts of the United States and continental writers hold that one is not obliged to do so because one cannot, in those circumstances, reason out what is best for his assailant. Florian in fact argues:

'noi crediamo che codesta condizione non debba ammettersi, non potendo la legge imporre la fuga: d'altronde l'animo agitato dell'agredito difficilmente potrebbe discernire i casi, in cui la fuga fosse possibile ed utile.'

Some English jurists do not agree with the above statements. Thus Archbold states:

'To show that it was homicide in self defence, it must appear that the party killing had retreated either as far as he could by reason of some wall, ditch or other impediment or as far as the fierceness of the assault would permit him.'

Our courts also had occasion to give its own interpretation on this point in the cases *Police vs. Saver Agius*, on the 7th November, 1953 and in the case *Police vs. Carmelo Cassar* on the 2nd April, 1927. Both these cases agree with the English point of view and oblige the person assaulted to retreat. In the case *Police vs. Carmelo Cassar*, Judge Camilleri said:

'Fu esclusa la legittima difesa..... fra altro sul motivo della mancanza della necessità attuale di respin-

gere la violenza, avendo potuto il citato schivare il pericolo da lui preteso ricoverandosi in una vicina bottega e chiamando la gente vicina a proteggerlo.'

Finally in order to obtain full justification, the means adopted to ward off an apprehended danger must be proportionate. That means if one is assaulted he cannot go beyond that which is necessary to resist the aggression and he cannot take it upon himself to punish his aggressor.

Our jurisprudence abounds in the above reasoning. The typical case of excess in self defence is when the person assaulted uses some weapon to defend himself. This excess is particularly stated in the case Police vs. Saver Aguis, 7th November, 1953. However we must take into consideration the actual state of mind the person who has suddenly been attacked would be in and one cannot but agree with the

statement that:

'Detached reflection cannot be demanded in the presence of an uplifted knife'.

This theory is in fact applied by Judge Harding in the above case Police vs. Saver Aguis.

'Dan l-eccess però mhux soġġett għal piena għax hu ovvju li l-imputat ġie meħud għall-għarrieda u nħasad u beża'.'

The last question which provokes an immediate answer is: Who can put forward such a plea of self defence? Our courts have left no doubt that this plea can only be put forward by the person assaulted and never by the aggressor himself.

'Il-provokatur mhux intitolat għall-iskriminanti tal-liġittima difesa'.

Police vs. Sidor Caruana 3rd Feb. 1955.