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CONCEPTIONS OF SELF-DEFENSE IN THE CRIMINAL LAW OF THE RUSSIA AND THE UNITED STATES

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Abstract

Purpose: This article is devoted to the analysis of the concepts of self-defense in the criminal law of Russia and the USA. The Russian Federation has developed a negative law enforcement practice in the field of implementation of the norms on necessary defense. Persons protecting themselves and their loved ones from criminals and causing harm to criminals who commit an attack are often prosecuted for violating the principle of proportionality of defense and attack, which under current law qualifies as exceeding the limits of necessary defense.

Methodology: In the United States, criminal law provides citizens with ample opportunity to take defensive actions against criminal attacks. The basic doctrinal provisions of the institution of self-defense in the legal systems of Russia and the USA are considered. Under Russian criminal law, with the help of the institute of necessary defense, less specific rights are protected.

Result: This leaves a wide scope for interpretation; law enforcement officials interpret the necessary defense in a limited way, not in the interests of the defenders.

Implications/Applications: US criminal law proceeds from opposing assumptions, with the help of legitimate self-defense, not abstract rights are protected, but specific benefits: life, health, sexual integrity, the inviolability of the home; which allows for an unambiguous interpretation in the interests of defenders.

Novelty/Originality: The article formulated proposals for the reception of the provisions of American criminal law into Russian law.as a result of which the criminal law should casually fix situations in which the necessity defense is possible and stipulates its limits.

Keywords: *Circumstances that Exclude Crime Acts, Criminal Law, Necessary Defense, Excess of the Limits of Necessary Defense, Rights of the Defender, Comparative Law.*

INTRODUCTION

The criminal law institute of necessary defense occupies a special place in the system of circumstances that exclude crime of an act caused by a history that goes back centuries, the importance of social benefits protected by this institution and the fact that the necessary defense in one form or another is reflected in the criminal law of countries belonging to the most diverse legal systems. The great Roman lawyer, Julius Paul, is credited with formulating the rule on necessary defense, which has remained relevant to this day: Vimvi defendere omnes leges omnia queiura permittunt - all laws and all rights allow a force to be reflected by force (A Casebook on Roman Property Law, 2012).

However, today in the Russian Federation there is a situation in which the rules on necessary defense are not properly implemented, and this legal institution does not always guard the interests of a person defending himself, his relatives, the interests of society and the state from criminal encroachments. Often the defenders themselves are prosecuted for causing harm to the criminal.

The unsatisfactory level of protection of the rights of the defender in Russia is a given, to which the experts in the field of criminal law who have studied the problems of the institute of necessary defense repeatedly drew attention (Orekhov, 2002; Kolosovsky, 2014).

The author of one of the latest dissertation research on the circumstances excluding the criminal act, A.V. Nikulenko emphasizes that the prevailing practice of investigative and judicial authorities against the defendants was not shaken even after a series of amendments to the Criminal Code of 2002 and 2003, expanding the right to necessary defense (Nikulenko, 2019).

It should be noted that it could not fundamentally change the indictment and the Decision of the Plenum of the Supreme Court of the Russian Federation of September 27, 2012, N 19 "On the application by the courts of the law on necessary defense and harm during the detention of the person who committed the crime", which interpreted a number of controversial provisions of the institute of necessary defense in a way favorable for the defender.

If neither the amendments to the criminal law, nor the decisions of the Supreme Court, nor the proposals of the representatives of the science of criminal law can change the situation for the better, and turn the institution of necessary defense in favor of the defender, and not in favor of the offender, it is necessary to analyze the conceptual reasons for this situation affairs. To do this, we will compare the Russian concept of necessary defense with the existing one in US criminal law, since the American Institute of necessary defense has a good reputation, in the sense that it fully protects

the defender from possible criminal prosecution to the extent that some American experts say about the need its limitations (McClellan & Tekin, 2012).

METHODS

The methodological basis of the research consists of general philosophical research methods, such as: analysis and synthesis, deduction and induction, the method of hypothesis construction. The use of private research methods: formal-legal, system-structural, historical-legal is predetermined by the specifics of the material being studied.

The comparative legal or comparative method is widely used, which allows you to correlate conceptual approaches to the institution of necessary defense that exist in the legal systems of Russia and the United States.

RESULTS AND DISCUSSION

The Russian legal system belongs to the continental legal family, while the criminal law of Russia is characterized by the characteristic properties of Romano-German legal systems. The legal technique of the Criminal Code of the Russian Federation in 1996 tends to be as concise as possible, and as a result, abstract and broad formulations of a general nature, designed for use in a variety of cases. One and the same rule applies to a specific, but nevertheless a sufficiently variable group of social relations, which should qualify a number of behavioral acts that take place, albeit in a similar, but far from the identical situation.

In accordance with Art. 37 of the Criminal Code of the Russian Federation, the necessary defense is the protection of the individual and the rights of the defender or other persons protected by the law of the interests of society or the state from socially dangerous encroachment (The Criminal Code of the Russian Federation of 13.06.1996). That is, we can talk about defense against a wide range of heterogeneous crimes: against the individual, property, public safety and the state. The Criminal Code does not specify the specifics of the application of this institution and the criteria for its legitimacy in relation to various types of crimes, although it is obvious that defensive actions against protection from pickpocketing and rape cannot be different, just as these crimes themselves differ.

The legislator in part 2 of article 37 of the Criminal Code of the Russian Federation offers the only criterion on the basis of which the law enforcer must distinguish between the permissible intensity of defensive actions - their relevance to the nature and danger of the attack.

In the Russian doctrine of criminal law, the correlation between assault and defensive actions is usually considered as such a criterion of the legality of the necessary defense, as the proportionality of the attack and defense. The absence of such proportionality entails the qualification of defensive actions in the form of exceeding the limits of necessary defense, which constitutes the privileged composition of the murder and infliction of grievous bodily harm, provided for by Art. 108, and Art. 104 of the Criminal Code of the Russian Federation, respectively.

The greatest number of problems with the use of the necessary defense arises precisely from the misinterpretation of the requirement of proportionality by the law enforcer. The Supreme Court of the Russian Federation qualifies as a deviation from proportionality only the apparent discrepancy of the protection to the nature and danger of the offense, adding that when determining the proportionality, the object of the offense, the method of the offense, the place and time, the number of the offending persons, the person's ability to repel the attacks, taking into account his physical condition and others, should be taken into account circumstances. But all these recommendations are still of a general nature, and with practical refraction, they are not able to give a definite answer to the questions that arise in legal reality.

An example of such a question is the following problem: Does the requirement of proportionality of the actions of the person who caused the death of the assailant while protecting against rape, or other encroachment on sexual freedom? In our opinion, based on the principle of justice and taking into account the recommendations of the Supreme Court, such defense should be considered legitimate, in judicial practice, there are precedents for the opposite interpretation (Sentence of self-defense, 2019).

The abstractness of the legal wording is a consequence of yet another conceptual attribute inherent in the Russian institute of necessary defense, also characteristic of the continental criminal law systems as a whole. J. Fletcher and A.V. Naumov noted that the institution of necessary defense in the countries of the Romano-German legal family protects not so much the life and security of a particular person, but a certain legal field surrounding the individual, a set of depersonalized rights (Fletcher, 1998). In this regard, the position of the science of Soviet criminal law, which has become the modern Russian doctrine, that the object of any crime is public relations regulated by law, and not specific benefits such as life, health, property, etc., is quite indicative.

In our opinion, a comparison of the rather abstract rights of the defender on the one hand and the attacker on the other brings us into the field of abstract theorizing, which prevents a fair decision from being made. At first glance, the abstracted right to life may seem more valuable than abstracted sexual freedom, especially since the criminal codes of a number of states (including Russia) consider encroachment on life as more dangerous crimes than crimes against sexual freedom and inviolability. This leads to unfair decisions when a woman who protects herself from rape by causing death

to an attacker is convicted of exceeding the limits of necessary defense as violating the principle of proportionality of defense and attack.

The American doctrine of self-defense is based on a different theoretical basis.

J. Fletcher notes that the question of establishing the proportionality of the actions of the defender and the attacker, and the problem arising from it, are established cases in which, to protect against attack, the deprivation of an encroaching person is lawful, but which are not, have never been so problematic in the legal doctrine and practice of countries of the Anglo-Saxon legal family. English lawyers did not compare the values of abstract rights and social relations but tied the issue of proportionality to the specific corpus delicti. Great Blackstone formulated a general rule that should be followed in determining the proportionality of defense and attack, quite simply: the action "cannot be prevented by death, except for exactly the same, which, if committed, will also be punished by death" (Fletcher, 1998).

This rule, with certain reservations, has not lost its relevance today. Of course, at present it should not be interpreted literally, referring to the possibility of imposing the death penalty, it is more likely that the criminal law of the United States is characterized by the casual fixing of cases in which the death of a criminal during defensive actions is recognized as lawful.

At the same time, the doctrine of self-defense in the United States is based not on the legitimacy of self-defense of impersonal and poorly specified rights, but on specific objects of the material world that are subject to widespread self-defense with the possibility of causing death to the attacker. This is reflected in the United States Model Penal Code, which art. 3. 04. Establishes that it is possible to inflict fatal violence in order to defend oneself against causing death, grievous bodily harm, kidnapping or sexual intercourse forced by violence or threat (Model Penal Code, 2019).

Among these crimes, we can add a violation of the inviolability of the home, in the language of Russian legal technology. We are talking about the old principle of common law (common law) - the doctrine of the fortress (Castle Doctrine). According to this doctrine, a defender who is in his home can legitimately use any violence, including death, against a person who is illegally in the house of the defender (Carpenter, 2002).

This rule applies in most US states, found expression in a number of court decisions. By way of illustration, we give the position of Judge Benjamin Cardoza in the case of People v. Tomlins, obeyed by the New York Court of Appeals in 1914: "There are no laws that require a person attacked in his home to retreat ... if he is attacked here (in his home), he can stand on his land and reflect attack". (It is not now and never has been the law that a man assailed in his own dwelling is bound to retreat ... If assailed there, he may stand his ground and resist the attack) (People, 1914).

However, US criminal law, of course, cannot be reduced to just casual, highly specialized rules. Behind these norms, there is a general principle, which in essence differs little from the similar principle of the rules on lawful defense in the countries of continental law - causing death in the course of defensive actions is permissible in cases where such causing is really necessary.

As a general rule, the use of life-threatening violence in defensive actions is legitimate if the defender reasonably believes that such violence is necessary to prevent the threat of murder, causing serious bodily harm, or commit a violent felony

It is noteworthy that if representatives of the Russian criminal law science are concerned that the institute of necessary defense does not adequately protect defenders from criminal prosecution, as a result of which it needs legislative expansion; then some American experts often talk about the need to limit the right to self-defense because the applicable rules and doctrines provide citizens with too broad defensive capabilities, which leads to abuses of the right to self-defense and to increase the level of armed violence (Cheng & Hoekstra, 2013). Although more conservative US criminal doctrine representatives point out that even if widespread self-defense rights increase the level of armed violence and the total number of murders, such killings result in criminals and law-abiding citizens being protected from crime, while limited rights to self-defense would lead to the opposite result (Gelman, 2019;), which is what happens in Russia.

SUMMARY

The study of US criminal law is of practical interest to Russian legal science. In our opinion, in order to fundamentally change the negative situation in the field of law enforcement on the necessary defense in the Russian Federation, it is necessary to adopt the approach of American law based on the causal listing of crimes, defending against which it is impossible to exceed the limits of the necessary defense: killing, causing grievous bodily harm, rape and so on. Other authors point to the need for such a reform (Orekhov, 2002; Nikulenko , 2019).

The Russian legislator partially accepted the American approach when, by the amendments of July 1, 1994, in the Criminal Code of the RSFSR 1960, he divided all the encroachments from which defense is only possible, into those encroaching on life and not being such. In the first case, the law allows the implementation of defensive actions by causing death to the attacker, without the possibility of exceeding the limits of the necessary defense. Despite the fact that the legislator, when adopting the Criminal Code of the Russian Federation of 1996, refused this division, in 2003 he returned to it and the current criminal law allows "unlimited defense" against encroachments aimed at life.

In conclusion, one more point should be reflected, which we see as fundamental. The legitimacy of causing death during defensive actions is not an excuse for unreasonable cruelty. Often causing death to the attacker is the only truly accessible way to protect yourself from criminal assault. If the victim is physically weaker than the attacker, not mentally prepared for resistance, then using lethal means of defense for her is easier than not lethal ones. Shooting a criminal, inflicting a fatal wound with a sharp object is much easier than neutralizing him without causing significant harm, using a gun against a resisting person is easier than handcuffing him. And if we expect police officers to have some care for all members of society, even criminals, and to avoid the use of lethal means during detention, then the state should not require such accuracy from an unprepared person who faced violence. Thus, the use of deadly violence in defense is a matter of necessity and protection, not cruelty and retaliation.

CONCLUSIONS

In this article, we attempted to analyze the features of the legal regulation of self-defense in the United States, which makes this tool truly accessible to ensure the security of an ordinary citizen. Unlike Russian law, which operates in rather abstract categories, U.S. criminal law by name secures assaults, the reflection of which allows the use of lethal force, which leaves no uncertainty and does not allow the law enforcer to limit the application of self-defense standards in specific cases of legal practice.

It remains for us to express the hope that in the near future the legislator will heed the voice of theorists of criminal law, pay attention to the experience of the United States and continue to casually fix the objects of criminal law protection, under the protection of which causing death to the attacker is completely and unconditionally lawful.

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