Paternalism and Criminal Law

Modern Problems of an Old Query

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Self-Defense as a Domain of Moderate Paternalism: The Need for Social Solidarity and Cohesion*

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1. Some Tasks for a 'moderate' paternalism

1.1. Harm to others vs. harm to oneself. A critique of this dualistic approach

Following a tradition which has its origins back to the English political philosopher John Stuart Mill[1], paternalism is still regarded as impermissible and incompatible with the concept of harm to oneself. Disregarding the fact that paternalism has a broader sense, meaning literally in Latin language the action of a father ("paternus": fatherly) who limits a person's or group's liberty or autonomy in view to promote their own good,[2] paternalism is restrained, even nowadays, to a very limited framework: It exists only in cases of harm to others. As a result, paternalism is not acceptable when a person intends to harm himself/herself and the law or competent authorities hinder him/her to realize this intention either overtly and directly (hard paternalism), or in a more flexible and indirect manner (soft paternalism).

The utilitarian John Stuart Mill[3] had once given a famous example of what paternalism signifies, by invoking the case of a person who is about to walk across a damaged bridge. In this example it also becomes clear what the meaning of the two kinds of paternalism, soft and hard, may be: If the person does not speak our language, a soft paternalist would justify forcibly preventing him/her from crossing the bridge in order to determine whether he knows about its condition and to inform the person of the danger. On the contrary, a hard paternalist would, at least sometimes, think it permissible to prevent him from crossing the bridge even if the person knows of its condition and wants to (say) commit suicide. Yet whatever the way, hard or soft, in which paternalism is manifested, it is considered, since the time of John Stuart Mill,[4] as impeding a person's individual

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* Many of the considerations of this paper constitute a brief updating of the dissertation which I elaborated at the University of Freiburg/Br. on the socio-ethical limits of defense: Courakis 1978.

1 See Mill 1859: passim.

2 Cf Grill 2011: passim.

3 Mill 1859: 88; cf. Dworkin 2016: 3.

4 Mill 1859: 13.

autonomy and as a means of imposing to the person a decision about his own life, even in cases in which the person knows presumably better than the others what he/she must do in his/her life[5]. Under this aspect, it would be paternalistic and therefore objectionable to have a legislation which provides the prohibition of drugs use, the compulsory wearing of seatbelts and safety helmets (when driving respectively a car or a motorbike), the purchase of unpasteurized cheese or foods cooked with transfats, as well as the restrictions on tobacco-smoking, gambling, consuming alcohol etc.[6]

However, this approach, based on an absolute dualism between harm to others and harm to oneself is, in my opinion, both inaccurate and obsolete.

Inaccurate, because a lot of actions which are considered as provoking a harm only to a person, eventually do harm also to others, as, for example, when a drug-user tries to find money for his/her dose by becoming a dealer (>harm to other people, who are thus initiated or supported in their own drug abuse) and/or addresses himself/herself to an advisory health service for assistance (>surcharge of the State's budget, funded by the taxpayers). A similar financial burden for taxpayers is created also when a person without a seatbelt or safety helmet gets wounded during a vehicle accident and is thus transported to a hospital, or when there are health problems due to abuse of smoking.[7] Hence, the idea that there exist harms to oneself which do not have any repercussion to the others, is principally not in line with reality.

Furthermore, the approach of this dualism is also *obsolete*. During the 19th century this approach could be acceptable, as an expression of the dominant at that time individualism, which contested state's paternalism and proclaimed that everybody is entitled to exercise his/her own rights in the most absolute manner, provided that he/she does not harm others. Yet, these ideas seem no more to be the prevailing trend. In fact, a new way of thinking and world-view has dominated in the 20th century. Following to this new concept, we are all members of a community which has its own needs and goals, so that our liberties and rights are subject to some socio-ethical limits, depending respectively on these requirements and targetings of the community. In particular, there are concepts such as those of socialization of Law, social rights, social security, social justice, social solidarity and exercise of subjective rights according to their socio-economic purpose (prohibition of the abuse of rights),[8] which are

5 The exact formulation of John Stuart Mill on this topic is as follows: "That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinions of others, to do so would be wise, or even right".

6 For such examples cf. Dworkin 2016: 1 ff. and Kleinig 2016: 321.

7 Cf. McCrudden & King 2015: 93.

8 Cf. Courakis 1978: 60-1, 73 ff.

all linked with this new way of thinking, i.e. with emphasis on the social dimension of the individual within a society. Moreover, these social-related concepts have already found a considerable impact on most of modern legislations, jurisprudences, and legal theories. Even the idea of justice has equally obtained a more social-related, mild, and balanced content than before and has thus influenced the entire complex configuration of modern social ethics,[9] which are ultimately the sensible exponent of ethical needs in a society.

1. 2. Criminal law paternalism in relation to the notion of harm to oneself

A similar change has taken placed equally with the concept of paternalism: There are nowadays scholars who refute the aforementioned dualistic approach (harm to oneself vs. harm to others) and prefer to regard paternalism not as the opposite of a person's individual autonomy, but rather as the expression of social goals. According to John Kleinig10, referring to the work of Simester and von Hirsch (2011),

> "Criminal paternalism should serve two purposes. On the one hand, it should act as deterrent to wrongful self-harming behavior that compromises the flourishing of its citizens. Those who are tempted to seriously jeopardise their opportunities for flourishing are put on notice that this will attract sanctions. On the other hand, it should acknowledge the personhood of self-harming offenders, seeing them not only as responsible for the wrong they do to themselves but also as being of no less concern to the state than others who are wrongfully harmed".

A crucial question is how to combine paternalism with the concept of harm to oneself. Methodologically, it seems that a balancing of interests ('Interessenabwägung')[11] may be the appropriate instrument which can be used to strike the right balance between a person's autonomy, on the one hand, and, on the other hand, the socially protected values such as his health and life. In practice, this could mean, e.g., to fix the point up to which a boxer is allowed to knock another playmate who consents to be beaten, given that a willful blow, which can cause a serious disability or even more the death of the playmate, would not be allowed by the dominant ethical values of society.

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9 The idea of Justice has certainly a specific content, which consists in rendering to everyone his due ("Justitia est constans et perpetua voluntas ius suum cuique tribuendi": the well-known definition of Ulpianus in Digestae I, I, 10). However, the exact meaning of what everyone's due is depends mainly on the general ideological currents in a given period. Within the framework of liberal capitalistic systems, the emphasis is given to what a person has done or can do according to his capacities and talents, whereas among the proponents of social reforms, priority is granted to what a person needs, in order to enjoy a decent standard of living – cf. Hoerster 1974²: 116 and Perelman 1967: 18; see also, Courakis 1978: 47 and footnote 101.

10 Kleinig 2016: 320.

11 Cf. Courakis 1978: 77 ff. and footnote 197, 101 ff. and footnotes 261, 264, 273.

Joel Feinberg in his opus "Harm to Others"[12] mentions a number of factors to be taken into account and to be balanced when the legislator proceeds to the criminalization of a harming to others behavior: gravity of a possible harm, probability of harm, magnitude of the risk of harm, etc. Yet, such factors, according to John Kleinig,[13] should not only be used when assessing harm to others, but also when exploring and elaborating the paternalistic principle of harm to oneself, so as to fix every time the "golden ratio" between the conflicting interests of individual and society.

1. 3. Moderate paternalism as an expression of social ethics

What we need in the above cases is, therefore, a new kind of paternalism, a so-called "*moderate paternalism*", which can cope with the needs and expectations of the 21st century. This type of paternalism can function as a worthy opponent to an extreme individual autonomy, such as the one which has recourse to the maxim "it is my right and I do what I want".

As regards the enforcement of this moderate paternalism, its ingredients should not be coercion of the involved person, nor his/her manipulation (as is the case respectively with hard paternalism and nudges[14]), but rather the act of adopting voluntarily by him/her some basic norms embedded in social ethics. This means that, by enjoying freedoms and rights, one should be self-restrained not because he obeys a restriction imposed by the law or the jurisprudence, but for another, more personal, reason: Because his/her conduct is prescribed and confined by some socio-ethical rules and values which are more or less admitted by the members of a society and, thus, consolidated both in their social ethics and in their Constitution.[15] Among such values, one can mention life, physical integrity, honor, property etc. Besides, these values are regularly crystallized into laws through a democratic parliamentary procedure and therefore one cannot easily say that these laws, even when they are connected with paternalism and harm to oneself, involve an element of authoritarianism regarding to the citizens.[16]

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12 Feinberg 1984: 216; cf. Simester & Von Hirsch 2011: 45.

13 Kleinig 2016: 321.

14 Some examples of nudges are mentioned by Dworkin 2016: 6 ff.). For a more detailed approach on this topic, see: McCrudden and King, 2015: passim, which is mainly a criticism to the ideas of C. R. Sunstein in his book: *'Why Nudge? The Politics of Libertarian Paternalism'* (Yale UP, 2014), as well as in other relevant previous books and articles of this author, also in collaboration with R. H. Thaler.

15 Besides, according to Jellinek 1878: 42, "Law is the ethical minimum of a society". In a similar way, Tur 1985: passim, asserts that law can be seen as community morality.

16 Cf. Jakobs, 2011: passim, especially at 96.

2. Lawful defence and moderate paternalism

2. 1. In search for socio-ethical limits in lawful defense

However, to find the limits in the exercise of a certain liberty or right is not always simple. Take the case of a farmer who has a serious problem with his foot. Suppose furthermore that this farmer decides to shoot a child or a mentally disabled person who tries to steal something trivial from his garden, because the farmer cannot run and has no other way to react against the thief.[17] Question: Is this reaction permissible according to social ethics?

Ultimately, the question is about how far exercising the subjective right of self-defense or other's defense is allowed, in case of a wrongful and present attack by persons who do not pose a real danger to the attacked person.

During the 19th century and as a result of the then dominant individualism (usually attached to utilitarianism), the "right of defense" was considered to be unlimited and absolute, almost "sacred": It was not only a means to defend one's own goods against a wrongful attack; it was equally a means to defend the idea per se of Justice against the persons who would dare to dispute it by their wrongful attack. Consequently, Schopenhauer,[18] Jhering[19] and other distinguished German philosophers and jurists of the time, based on the relevant provisions of the German Penal Code (whose formulation has not changed essentially until now: § 53 Penal Code 1871 and § 32 Penal Code 1975[20]), affirmed in a bellicose rhetoric that Justice must not yield before Injustice ("Das Recht braucht dem Unrecht nicht zu weichen")[21]. This meant, in view of the example of von Buri mentioned above, that even in cases where the danger emanating by the aggressor is

17 This example was first formulated by the German jurist von Buri; see von Buri 1873: 93.

18 Schopenhauer 1968: § 62 (464).

19 Von Jhering 1906[16]: 49 and 92 ff.; von Jhering 1904[4]: 201.

20 The wording of the legal provision of § 32 of the German Penal Code 1975 is as follows: "Whoever commits an act, required as necessary defense, does not act unlawfully. Necessary defense is the defense which is required to avert an imminent unlawful assault from oneself or another". Of course, there have been many attempts by scholars to enlarge the conceptual domain of this narrow provision, so that it encompasses also marginal cases, similar to the ones in the aforementioned classical example of von Buri. The main concept of the provision which was considered appropriate to be the legal basis for this broader interpretation was the term "required" (in German: 'geboten' in the first subparagraph, and 'erforderlich' in the second). Cf. Courakis 1978: 89 ff. However, leading German scholars of the 20th century like Hans Welzel, P. Baldus, R. Maurach, H.-H. Jescheck, Eb. Schmidhäuser, P. Bockelmann, J. Baumann and others have held the opinion that when the attacked person has at his disposal a milder but less secure means for his defense, then he has instead to use a sharper and safer available means, even if in this way he/she would be in need to attack and strike higher-value goods of the aggressor, as for example his life. Cf. Courakis 1978: 90 and footnote 232; see also ibid: 43, footnote 93.

21 The exact formulation of this quotation goes back to the German jurist Berner; see Berner 1848: 554. Cf. Courakis 1978: 42–3.

unimportant (for example, by a child) or the value of the attacked object is insignificant (for example an apple), the aggressor should nevertheless be counter-attacked, also by means of gunshots, if other means of defense are not available. Of course, this way of thinking had as a result to protect whatever interests of the attacked person. But what happens if the goods and interests to be protected are in obvious disproportionality to some more important goods of the aggressor, as for example his own life? Do social ethics, in such cases, place some limits?

2. 2. Old and new tendencies about the right defense in European legislations

A characteristic example of the above-mentioned individualistic mindset is art 328 of the earlier French Penal Code 1810 (so-called "Napoleonic"), in force until 1992. According to the provisions of this Code, going back to 19th century, "There is neither crime [felony], nor delict [misdemeanor], when the homicide, wounds and blows [verbally: assault and battery] were commanded by the actual necessity of lawful self-defense, or defense of another person" (some specifications of this provision were included in the following art. 329). One can easily observe that this regulation has no restriction nor limits in regard to the exercise of defense against an aggressor, something which is typical of the individualistic culture of this era.

The contrast to the modern way of thinking becomes more emphatic if we bear in mind the current French provision on lawful defense, as it was introduced as art. 122-5 in the new Penal Code 1992. It principally repeats the old provision of the Napoleonic Code, but with two noteworthy modifications/ limitations, which make the difference. Firstly, that a person exercising the right of defense is criminally liable if the means used for the defense "are not proportionate to the seriousness of the offense" (principle of proportionality/'Proportionalitätsprinzip').[22] And secondly, that in case of an attack against property, a person who makes use of this same right, must perform his act of defense without willfully murdering the aggressor and without exceeding the strictly necessary limits for the intended objective (principle of inappropriateness/ 'Unangemessenheitsprinzip');[23] a similar but broader formulation can be found in § 3.1 in fine of the Austrian Penal Code 1974. Besides, the term 'angemessen' is also used by the Swiss Penal Code 1937 (art. 15), following a recommendation of Professor Carl Stooss.[24]

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22 Courakis 1978: 76 ff.

23 Cf. Courakis 1978: 52 and footnote 116.

24 Cf. https://www.admin.ch/opc/de/classified-compilation/19370083/201709010000/311.0.pdf The meaning and function of the term 'angemessen' (inappropriate), according to the Explanatory Memorandum to the Preliminary Draft of this Code in 1893 (Motive zum VorE): 31-2, was to "impede a brutal and inhuman maintenance of the law", in particular "when the defense is completely disproportional to the importance of the good to be defended"; cf. Courakis 1978: 63.

It must be noted that this moderate approach of the new French provision, based mainly on the principles of proportionality and inappropriateness, had been already elaborated by the French jurisprudence before the enactment of the new Code in 1992, and mainly after the Second World War,[25] when a spirit of humanism and commonality (as the opposite of individualism[26]) started prevailing in the so-called Western World of the time.

The same tendency for a moderate socio-ethical approach of lawful defense, or, according to a Latin maxim, for a "moderatio inculpatae tutelae", i.e. for restriction of violent defense to excusably reasonable limits (Justinian's Code, VII.4.1),[27] as a token of the aforementioned moderate paternalism, is equally observed in other legislations, introduced since the beginning of the 20th century.

In particular, one can mention the case of the Norwegian Penal Code of 1902 (§ 18, formerly section 48.II), which states: "An act that would otherwise be criminal, is legal when a) is undertaken to avert an unlawful attack, b) do not go longer than necessary, and c) does not go obviously beyond what is justifiable having regard to how dangerous the attack is, what kind of interest that attacked infringe, and the attacker's guilt".[28]

Besides, there are similar examples,[29] by way of illustration, and in chronological order, from the Penal Codes or other legislations of:

- Italy (1930), art. 52 P.C., which contains the limitation: "sempre che la difesa sia proporzionata all' ofesa", meaning that the defense is to be always proportional with the attack.[30]

This clause of proportionality can certainly have a double meaning: It may concern either the available means to be used by both sides or the value of the goods to be attacked and defended. However, both of these meanings can also be implemented at the same time, and this has been usually the view of many Italian scholars,[31]

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25 See for example some interesting decisions of the French High Court in: Codes Dalloz, Code penal 1810/1832, nouveau Code penal, Paris: Dalloz 1992-1993, art. 328: 401 ff. Concerning the theoretical approach on this issue, cf. Courakis 1978: 65 and footnotes 148-9.

26 Cf. Friedmann 1967[5]: 89-91, on philosophical approaches about these two concepts.

27 Cf. Courakis 1978: 25 and footnote 46.

28 See in: http://www.wipo.int/wipolex/en/text.jsp?file_id=453434.

29 Within this framework of comparative remarks which will follow, there are at least two useful online sources for such comparisons. The one is a 'Translation of National Legislation into English', edited by the American Law Library of Congress (https://www.loc.gov/law/find/pdfs/2012-007612_RPT_website.pdf) and the other is the data basis 'Criminal Codes § LegislationLine', edited by the Office for Democratic Institutions and Human Rights (ODIHR) (: http://www.legislationline.org/documents/section/criminal-codes).

30 See in: http://www.kmlegalnet.com/self-defence-under-italian-law/.

31 Cf. Courakis 1978: 66 and footnotes 150-2.

- Denmark (initially 1930 and nowadays in the version of 2005), § 13 P.C., according to which acts committed in self-defense are not punishable (...), "provided that such acts do not manifestly exceed what is reasonable with regard to the danger inherent in the attack, the aggressor and the importance of the interests endangered by the attack",[32]

- Iceland (1940), art. 12.I P.C., where there is a similar clause of limitation: "provided that the defensive measures taken were not obviously more dangerous than were warranted by the attack and the injury or damage it could be expected to cause",[33]

- Spain (initially 1944 in art. 8 Nr. 4 II P.C. and nowadays in the version of 1995, art. 20. IV. 2 P.C.), where the exercise of defense may take place under the requisite that "rational need [is used] for the means employed to prevent or repel it [=the unlawful aggression]".[34] According to the Spanish jurisprudence, such a rational need ('necesidad racional') exists when the means used by the aggressor and the person attacked are equal or similar ('paridad de armas'); In case that exists an obvious disproportionality, then defense is considered as excessive and therefore not permissible.[35]

- Greece (1951), art. 22.3 P.C., pursue to which "the necessary extent of the defense is measured by the degree of dangerousness of the attack, the type of harm threatened [by the attack], the manner and the intensity of the attack, and all other circumstances".[36]

- Sweden (1962), Chapter 24, section 1.1 P.C., where an act committed by a person in self-defense is not allowed only in cases in which "having regard to the nature of the aggression, the importance of its object and the circumstances in general, it is clearly unjustifiable",[37]

- United Kingdom, where there is a provision in Criminal Law Act 1967, Chapter 58, Part I.3 (1), according to which "a person may use such force as is reasonable in the circumstances in the prevention of crime, or in effecting or assisting in the lawful arrest of offenders or suspected offenders or of person unlawfully at large".[38] This provision concerns mainly public defense, whereas the protection of a person's own rights (private defense) is regulated by the common law, except if the latter is in contradiction to the written law. In any case, the principle of "reasonableness" plays also in these cases of private defense a primordial role, in the sense that one exercising this right should take into account the totality of circumstances, including the kind and extent of the force

32 See in: https://www.scribd.com/document/261684665/Danish-Criminal-Code- 07052012.
33 See in: http://www.parliament.am/library/Qreakan/islandia.pdf.
34 See in: http://www.parliament.am/library/Qreakan/ispania.pdf.
35 Cf. Courakis 1978: 66 and footnote 155.
36 For this translation see Billis 2017: 71.
37 See in: http://www.government.se/contentassets/5315d27076c942019828d6c36521696e/swedish-penal-code.pdf.
38 See in: https://www.legislation.gov.uk/ukpga/1967/58.

used by the aggressor, the importance of the damage to be averted and the possibility to avert the aggression by other means.[39]

3. Social-related limits of the right of defense and the need for social solidarity and cohesion

Hence, there is in modern legal orders (at least in Europe) a tendency to restrict the subjective right of self-defense, either legislatively, or by means of interpretation by the courts and scholars, especially when the exercise of this right runs counter to its socio-economic purpose (abuse of rights!) and its confinement does not put seriously into question the authority of law.

It is true that this restriction of individual autonomy creates problems for persons who prioritize their wishes or needs and thus leave behind what can be characterized as common good. The ideas of political philosophers who belong to the libertarianism, such as Robert Nozick,[40] are a typical example of this way of thinking. However, nowadays times have changed. Immense economic and social problems (unemployment and impoverishment of great parts of population, especially in countries of Southern Europe) have risen after the '90s, mainly as a result of the rampant globalization and the subsequent ruthless competition of the emerging markets in Asia. As a matter of fact, our societies need now more than ever cohesion and social solidarity, so that they can overcome barriers in achieving shared values and thus in reaching better solutions to their problems. As Plato once said,[41] the man forms a part of the social whole and may be well only when this whole is equally well. In other words, when society as a whole is flourishing, then also its members are prospering.[42] Under this aspect, the restrictions laid by a legislation in relation to our individual autonomy, to the extent that they are in line with social ethics, are, in my opinion, not a kind of unacceptable paternalism intervening to our personal affairs, but rather, in order to use a sophisticated parallelism from Greek mythology, the "thread of Ariadne" which can lead us outside of the complicated labyrinths of our time. To become more concrete, if, for socio-ethical reasons of moderate paternalism, it is not legitimate to cut a person's healthy hand, so that he/she become a more effective beggar,[43] for similar reasons it is not permissible that persons of diminished capacity for imputation like children, mentally disabled etc., be harshly attacked when trying to steal an object of little value or showing offensive behavior. Besides, as has been aptly stressed,[44]

39 Cf. Courakis 1978: 67.
40 See e.g. Nozick 1974: passim.
41 In his dialogue Crito (51 a-b); cf. Cicero, De officiis, I.VII, 22.
42 Cf. Thucydides, II, 60.
43 The 'Wright's Case', mentioned by Kleinig 2016: 323.
44 By Fateh-Moghadam & Gutmann 2014: 385.

"[E]ven the most determined antipaternalists recognize that it can be legitimate to protect persons against their own conduct, for instance, when it involves minors, people lacking critical judgment and the ability to understanding the consequences, or even competent adults, who, due to information deficits, do not know exactly what they are doing".

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