

BOOK REVIEWS

SELF-DEFENCE IN CRIMINAL LAW. By Boaz Sangero. Hart Publishing, Oxford and Portland, 2006. Pp. viii, 228. \$99.95 (cloth).

In his book, *Self-Defence in Criminal Law*, Dr. Boaz Sangero conducts a comprehensive and fundamental analysis of self-defense from both a general, theoretical, as well as a detailed and practical perspective. Apart from its introduction and epilogue, the book is comprised of five interwoven chapters, each laying the groundwork for the chapter that follows. Two of these chapters constitute the very heart of the book: “The Rationale of Private Defence” (ch. 1) and “The Elements of Private Defence” (ch. 3). (Despite the book’s title, the author uses the expression private defense throughout the text of his book, since, in his opinion, this is a more precise term for describing the concept that he is discussing. Private defense includes not only self-defense, but also defense of another person, defense of property, defense of another person’s property, and defense of the dwelling.)

The author views the underlying rationale of self-defense, presented in the first chapter, as a key to understanding the remaining chapters of his study and as the basis for a solution to the issues that he discusses later on. This approach for justifying the recognition of self-defense is considered by the author, and for good reason, to be “the main thesis” of his study.

Before turning to an internal analysis of self-defense as a unique concept in criminal law, Dr. Sangero presents the general foundation—both accepted and disputed—upon which the criminal law defense is based, and its place in relation to similar concepts. Thus, the author starts by noting the two most fundamental distinctions of criminal law in this regard: the distinction between justification and excuse and the distinction between an offense and a defense. The author first discusses the generally

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accepted distinction between justification and excuse and then presents the differences of opinion surrounding the implications ascribed to this distinction. He concludes that this distinction is justified according to his approach, whereby, in criminal law, it is proper to make reasonable distinctions of social-moral significance, and that the “pure” exception of self-defense has the clear nature of a justification. To avoid any doubt, the author makes it clear that it is not his intention to use this classification in order to derive an automatic solution for the issues raised later on, since, according to his approach, the solution is to be found in the underlying rationale of self-defense. The author does not dwell on the distinction between an offense and a defense—since it is determined quite clearly by the legislator—proceeding instead directly to an analysis of the primary implications ascribed to this distinction.

As already indicated, the entire analysis is conducted in order to reach an understanding of the rationale of self-defense. The author arrives at the proposed rationale primarily through an historical and philosophical perspective. In this first chapter, he offers a comprehensive view of both the legal and the philosophical literature. However, the integration of the various factors and the ultimate weight attributed to them reflect the author’s unique approach. This is mostly so concerning the role that the factor of protecting the social-legal order plays in shaping the defense. Before reaching this conclusion, the author reviews the main theories justifying self-defense, both as a whole and individually, as well as their critiques, to which he adds his own critique, directing it at the approach that he develops later on.

In the author’s opinion, the uniqueness of self-defense is to be found primarily in the combination of the act of aggression and the aggressor’s culpability; in his view, abandonment of the requirement of culpability would be incompatible with the essence of this defense. The dual nature of self-defense, as a safeguard for protecting both the legitimate interest of the person attacked and the social-legal order, is derived from this combination.

Dr. Sangero offers a particularly sophisticated approach for understanding the rationale of self-defense, which weighs the interest of protecting public order, in general, and of the legal system, in particular, in shaping the defense from a very broad perspective of the public interest (“protection of the social-legal order”). This approach allows him to also consider the viewpoint of the aggressor and not only that of the defender. The illegal act of the aggressor not only constitutes an injury to the person

attacked but also is a malicious, harmful attack on the social-legal order. The two essential factors for the justification of private defense are the culpability of the aggressor and the protection of the social-legal order. The author presents the relation between these two elements as follows: the weight of the factor of the social-legal order stands in a direct relation to the weight of the endangered interest and the culpability of the aggressor. In the author's opinion, the autonomy of the attacked individual is a third essential factor. However, the interest of the state may sometimes be perceived as replacing the factor of individual autonomy. Despite the considerable importance that the author ascribes to the factors that he has presented as a rationale for recognizing the justification, he does not abandon the other approaches presented and proposes a test that includes all of the central factors and strikes a balance between them, in which the force and weight of each factor derives directly from that of the others.

After presenting the theoretical survey and its resulting conclusions, Dr. Sangero turns, in chapter 3, to a comprehensive analysis of self-defense. At the outset of this chapter, he sets two goals for himself (and subsequently meets both of them): (1) to divide self-defense into its component elements, exposing the reader to each one in its entirety; (2) to examine the degree to which these elements should be set forth in detail in the governing statute. Dr. Sangero then examines the secondary legal issues related to self-defense, one by one, in light of the elements of the underlying rationale for the justification as he has presented them.

The author derives the characteristics of the defense from its underlying rationale. Regarding the factual element of self-defense, the author draws the following conclusions: (1) in general, the scope of application of the defense should not be restricted a priori to specific offenses, and it should apply to omissions as well; (2) the social values that may be justifiably defended should not be restricted a priori; (3) the source of the danger must be a criminally liable aggressor who commits an illegal attack; (4) the term "attack" includes any injury that is liable to harm the legitimate interest of an attacked person; (5) there is no reason to require a minimum severity of danger; (6) the necessity of the action to repel the aggressor is measured both qualitatively and quantitatively; (7) the expected danger must be immediate; (8) proportionality is an essential requirement but should be flexible and reflect all of the factors justifying self-defense; (9) the duty to retreat derives from the requirement of proportionality and, therefore, it too should be applied flexibly.

Regarding the requisite mental element in light of the underlying rationale of self-defense, Dr. Sangero argues that someone acting within the bounds of the defense, while unaware of the existence of circumstances justifying his action, is not committing an offense out of compulsion but rather for criminal considerations. His criminal act injures the social-legal order. From this reasoning, the author concludes that, in addition to the actor's awareness of the justifying circumstances, it is also imperative that the actor's purpose be to defend or protect against the unlawful aggression, even if this is not his sole purpose.

In chapter 4, the author presents various internal distinctions regarding self-defense, primarily by focusing on the defense of another person, the defense of the dwelling, and the defense of property. This examination as well is conducted by presenting the link between these concrete aspects of self-defense and the characteristics and rationale of self-defense that the author has discussed in the previous chapters.

Chapter 5 covers the topic of "Additional Issues in Private Defence." In this chapter, consistent with his approach and in light of the underlying rationale of self-defense, Dr. Sangero screens out those same issues that, in his opinion, are sometimes mistakenly viewed as private defense, such as repelling an innocent aggressor, defending oneself against an uncontrolled attack, injuring an innocent passerby, and terminating a high-risk pregnancy. In this chapter, the author also examines the following issues: putative self-defense, deviation from the conditions of self-defense, a situation of self-defense caused by an actor bearing guilt, and the defensive action of battered women.

The author's conclusions are well founded. His points are consistent and illustrative and, for the most part, convincing. Even so, the innovation of the book is not in any particular conclusion regarding these detailed issues—for the questions raised have already been dealt with extensively in case law and legal literature, and there is almost no conceivable logical position that has not yet been expressed by someone else—but rather in the use that the author makes of his conclusions regarding the underlying rationale of self-defense in order to answer the numerous questions posed. The author demonstrates that the theoretical construction he has built is stable enough to support a detailed system of legal arrangements. In this last context, we should note in particular the use the author makes of the factor of the social-legal order—which, as indicated, lies at the center of his approach—to resolve the dispute whether self-defense

should be made contingent on the fact that the defender is acting knowingly in order to defend against an aggressor or, rather, that it is sufficient that his actions actually protect the person being attacked. The author argues, justifiably, that an act incidentally protecting an attacked individual, but not intended as such, does not serve the social-legal order, and even harms it. This is a very good point and, to the best of our knowledge, it is one that has not been raised by other scholars.

The methodology, content, and style of the book are appropriate. It contains the requisite theoretical investigation, while drawing balanced conclusions from the theoretical framework. It also contains a balanced treatment of general and specific questions. The writing is fluent, clear and easy to follow.

Special note should be made of the extensive reference to sources of Jewish law. Naturally, Jewish law has dealt more with self-defense than it has with many other subjects of law. Even in this modern age, researchers have written about self-defense within the context of Jewish law more than they have written on other aspects of Jewish law. The author has made fitting use of the research in this field. His success demonstrates that Jewish law can be helpful as a legal source.

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