

## Stages of Formation and Historical Development of the Institute of Necessary Defense

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**Abstract:** The article deals with investigation of necessary defense as an integrated interdisciplinary institute. The right of necessary defense is regarded as a natural and inalienable human right aimed at protection against abuse (assault) in substantial law or incorporated rights and is associated with the possibility of causing harm to invader. A detailed study of the constitutional, legal and criminal law of the Republic of Kazakhstan in regard to necessary defense is conducted. In-depth review on constitutions and criminal codes of CIS and non-CIS countries, as well as viewpoints on the lawfulness and force application limits in response to the attacks, posing a threat to health and safety for life and property is carried out. Detailed analysis of the defense institute development history is carried out based on the ancient customs and judicial worldview of the Turkic tribes - the ancestors of the today's Kazakhs. The relationship between the necessary defense and blood vengeance folklaw, common in the pre-revolutionary Kazakh society, is shown. The procedure and the principles of referring the deed to the necessary defense are determined. It is shown that the conditions and grounds of self-protection measures require greater certainty because use of unjustified self-protection is qualified as wrong act. The authors substantiates certain proposals to improve the existing scientific approaches to the concerned problem.

**Key words:** Necessary-defense • Historical and legal analysis • Stages of formation • The traditional law of the Kazakh nation

### INTRODUCTION

Following independence acquisition and formation of Kazakhstan as an independent State the need of reorganization of own legal bases of everything that should serve as support for the sovereignty, rights and freedoms of citizens arose. A huge work was done in this direction. A great number of laws and decrees that regulate the state administration, economy, social and political life, culture, public tranquility, national defense, foreign policy relations is adopted and realized.

One of the concept requirements is the need to continue the legislation improvement with strict observance of the principal criminal and legal statuses. In the Concept "Legal policy of the Republic of Kazakhstan for the period from 2010 to 2020" approved by the Decree of the President of the Republic of Kazakhstan No. 858 dated August 24, 2009 it is specified: "2. The main directions of the national right development should be

carried out together with legislative, organizational and other measures of the State and further realization of legal ideas and principles is necessary" [1].

The necessary defense defined in the Constitution of the Republic of Kazakhstan and contained in the criminal, administrative procedure and civil codes has own stages of historical development. The necessary defense available now in the criminal legislation was repeatedly amended and supplemented. If we study the emergence of necessary defense, we will see that it stems from ancient times.

According to Bugybay D.B. "The institute of necessary defense in the theory of criminal law is one of the most ancient and is characteristic for all stages of the society development. Therefore, in the opinion of many authors, the right to necessary defense is a natural human right since the birth time and for this reason it is lawful. According to other authors, the defense is a necessary annex to protecting activity of the state and the harm

done to the attacking party is conformed to the right and the law. The right to defense isn't provided by the state; it is only admitted and allowed by the state". [2, p. 109] Based on the statement of Bugybay D.B. it is possible to draw a conclusion that necessary defense formed with the advent of the human being. It is directly provided and fixed by the Constitution of the Republic of Kazakhstan on this basis as one of the rights and freedoms of the person. However, if to make the review of Constitutions of other states about adoption or non-adoption of this right to necessary defense of the person, we get another presentation.

In particular, though the Article 31 of the Constitution of the Republic of Azerbaijan specifies that every person is entitled to protect own rights and freedoms with the methods and procedures not forbidden by the legislation, the necessary defense doesn't find its place in it [3, p. 11]. It is possible to draw a conclusion on this basis that necessary defense isn't provided and not fixed by the Constitution of the Republic of Azerbaijan.

And according to the Article 38 of the Constitution of the neighboring Kyrgyz Republic adopted on May 5, 1993, though it is specified that the rights and freedoms of citizens are subject to complete, unconditional, urgent protection, suppression of offenses and restoration in case of violation in this sphere is a duty of the state, all its bodies and officials, however the right of necessary defense of citizens isn't considered independently [4, p. 204]. We can conclude on the basis of the review of the Constitution of the Kyrgyz Republic that fixation of necessary defense under the Constitution will be pertinent.

According to the Article 45 of the Constitution of the Russian Federation, the rights and freedoms of the person and citizen in the Russian Federation are protected by the state. It is noted that each person is entitled to protect own rights and freedoms with all means not prohibited by the legislation [5, p. 270]. It is possible to say that the right of necessary defense of people isn't fixed also in the fundamental law in the Russian Federation.

The Article 14 of the Constitution of the Republic of Tajikistan provides that the rights and freedoms of the person and citizen are protected by the Constitution, legislation of the Republic, international legal acts adopted by Tajikistan; however it doesn't specify the right to necessary defense of the person and citizen [6, p. 299].

If we examine the protection of rights and freedoms of the person in the Republic of Uzbekistan, the Article 43

of the Constitution of the Republic of Uzbekistan adopted on December 8, 1991, provides that the rights and freedoms of the person fixed in the Constitution and legislation are provided by the state [7, p. 344].

Though the Article 55 of the Constitution of the Republic of Ukraine specifies that the rights and freedoms of the person are subject to protection against violation and illegal intervention by any means not prohibited by the legislation, the necessary defense isn't considered separately [8, p. 376].

As it appears from the above presented review of the Constitutions of the neighboring countries, though they provide that the rights and freedoms of the person and citizen are subject to protection, however they don't specifically indicate that each person is entitled to protect own rights and freedoms in all ways not forbidden by the legislation as it is provided and fixed in the Constitution of the Republic of Kazakhstan [9, p. 162].

Many criminal codes of non-CIS countries in the legal regulations on the necessary defense contain direct instructions on protection of individual's property, life and health.

Thus, in-common law countries - the United States [10. p.745-753.], the UK [11, p. 342] South Africa [12, pp. 234-265] and Australia [13, pp.213-234], the necessary defense is defined in details in quite casuistic manner.

S.Z. Zimanov, B. Zh. Kuandykov, K.U. Bayzhanova and K.N. Dautaliyev say that "Historians refer the emergence of Kazakh state as such to the XV-XVI centuries. And emergence of "Kazakh administration" occurred much earlier, it developed before the ethnic integrity of the Kazakh people. The ancient right of the Kazakhs developed on the basis of legal world-view and regulatory assets of a great number of the nomadic and semi-nomadic communities consisting of Old Turkic tribal and state formations that replaced each other" and specify that emergence of the right of the Kazakh people originates not from the moment of the Kazakh state formation, it is much more deep-rooted on time, i.e. our country was the constitutional state [14, p. 38]. If we proceed from the opinion of Zimanov S. Z., Kuandykov B. Zh., Bayzhanova K.U., Dautaliyev K.N., the rights in our country existed during the era of ancient Turkic-Kazakh tribes. Therefore it is possible to say that conclusion about deep roots of the institute of necessary defense finds its confirmation. Because the abovementioned statement of Zimanov S. Z., Kuandykov B. Zh., Bayzhanova K.U., Dautaliyev K.N. that the ancient right of the Kazakhs developed on the basis of legal world-view

and regulatory assets of a great number of the nomadic and semi-nomadic communities consisting of Old Turkic tribal and state formations that replaced each other, corresponds to the truth. Because there is a difference between formation of the Kazakh state and history and formation of the Kazakh right. There are enough proofs that the right emergence on the Kazakh earth occurred before formation of the Kazakh state. That's why the history of the Kazakh right demands deep searches. In this connection, since the historical development of the Kazakh right has deep roots, the stages of historical development and formation of considered necessary defense as legislative regulation should be investigated and proved by considering them more deeply on the basis of legal world-view and regulatory assets of a great number of the nomadic and semi-nomadic communities consisting of Old Turkic tribal and state formations that replaced each other.

A number of authors notes: Manky biy created the code of laws on the rights from the secret legend of Mongols "Altyn topchy" and it consisted of seven charters, the charter about human rights said "Murder for murder is cancelled; Kun (compensation for murder and serious injuries) or penalty is to be paid out. Payment of double Kun (twice more than for an ordinary person) for ancient tore, bai and bek is also cancelled"; they specify that the case of murder for murder is comparable with today's necessary defense [14, p. 207]. Here it is necessary to pay attention to the fact that responsibility for blood vengeance, i.e. the crime with a view of revenge, wasn't provided. However there is a question by itself: whether we can correlate the blood vengeance i.e. the crimes with a view of revenge to the modern institute of necessary defense. Now, if we look for the answer to this question, the blood vengeance i.e. the crime on the basis of revenge can be considered in two directions. The first, we want to specify that if blood vengeance, a revenge is taken at the moment of this crime, i.e. then it corresponds with one of the characteristic features of the legal rule of necessary defense. There is also the conclusion that revenge taken during the blood vengeance is an intended crime, from this point of view it won't be coordinated with intention of necessary defense. The second, the blood vengeance, the crime on the basis of revenge can be committed after an action of the person who has committed a socially-dangerous infringement, after the end of crime. Therefore, there is a difference between necessary defense and revenge, blood vengeance in that harm to socially dangerous infringer is donó after the

crime termination from his/her part and at the same time the harm in case of revenge, blood vengeance can be directed not only to the person who committed a socially-dangerous infringement but also to other people or other property. For example, in case of cattle-lifting with a view of revenge there can be cattle-lifting directed to the cattle of aggressor. It is possible to see on this basis that there is an interrelation between the necessary defense in action now and custom of revenge used in pre-revolutionary Kazakh society.

The well-known scientist V. Sergeyevich draws a conclusion also that the necessary defense couldn't exist as a special lawful institute in the ancient time during origin and emergence of revenge, since the revenge as a wider concept comprised also the right of necessary defense [38, p. 164]. We agree with V. Sergeyevich's opinion and we draw a conclusion that the concept of revenge had a wider interpretation and comprised also the rule of law of necessary defense in the ancient time. Because the possibility of necessary defense existence isn't excluded during revenge implementation as during the necessary defense the injured person recourses to revenge for the purpose of restoration of the violated rights. And he restores the violated rights by means of revenge. It is explained by the fact that in the former times when the revenge was widespread with the Kazakhs, in case of non-realization of revenge by the offended party, they considered that its rights were violated and while it did not revenge, it would be carried out into the category of those who couldn't provide own rights. The conclusion follows that in this regard the right to revenge was considered as the necessary defense and was regulated by the rule of law.

Thus, it is known that in the traditional right of the Kazakh people, along with realization of necessary defense in the presence of encroachment, it was allowed to do the harm to an aggressor both after completion of encroachment and after eliminating a threat to the victim or his relatives [38, p. 164].

Criminal Code of the Russian Soviet Federative Republic dated 1922 acting in Kazakhstan contained the necessary defense formulated more clearly and specifically in legal terms than it was provided in the "Guiding principles". The article 19 if the RSFSR Criminal Code dated 1922 provided that the necessary defense, along with the application against attack or violence, should be applied as against unlawful attacks on any individual or the rights of defendant or another person [38, p. 164]. Thus, in our opinion, it can be concluded that

there is a relationship between the similarity of the necessary defense, under Article 19 of Kazakhstan Criminal Code of the Russian Soviet Federal Republic that was in force in 1922 and legislation-defense under article 32 of the current Criminal Code of the Republic of Kazakhstan. As the necessity of defense against the direction of the attacker, invader in the criminal law in 1922 is different in the ancient law of the Kazakhs, on the other hand can be an attack not only against the defender, but also to the rights of any person. There is reason to conclude that this difference occurs in the legislative provisions in force today. Because in today's legislative rule provides that, in the course of defense harm should be caused only attacks, that is, invader and defense is to protect not only their rights but also the rights and legitimate interests of another person, the interests of society and the state, protected by law.

Y.M. Tkachevskiy points that Article 19 of the Criminal Code in 1922 indicated that the criminal act committed in the course of self-defense against unlawful attacks on the person or rights of defendant or other persons shall not be punished if they do not exceed the limits of self defense. He also notes that under part 1 of Article 13 of the Criminal Code of 1926-defense repeatedly been changed by the editorial board, under the Penal Code of 1922. Self-defense as provided in this Code, was unsuccessful. Activities for the implementation of self-defense is considered to be socially useful, so no offense, there are no grounds for declaring it "a criminal offense". Also this does not address the legal standard features that characterize excessive force. As a result, the courts were given the opportunity to bring to justice those who have not exceeded the limits of self defense and on the contrary, to release those who exceeded the limits of self-defense. Y.M. Tkachevskiy undertaking the comparative analysis of the differences between the necessary defense in the criminal law of 1922 and the criminal law in 1926, said that in the criminal law in 1926 excessive force was not regulated by law, such an omission had led to the fact that some courts have attracted on cases related to self-defense and for excluding criminal responsibility, while others were released from criminal responsibility, although there was a clear excess of the limits of self defense. The excessive force for under Article 32 of the Criminal Code of the Republic of Kazakhstan defense did not obtain its determination either. On the basis of this we can conclude that at the present time can not be cases based on omissions in criminal law in 1926, taking place from our side, the prosecutor, investigator, the inquiry and of the court, which are by the prosecution.

Y.M. Tkachevskiy also notes that, under Article 13 of the main criminal law Union of Soviet Socialist Republics in 1958, an act committed in self-defense is not considered a crime even harming endanger public safety if there was excessive force on the basis of the nature of non-compliance and the risk of Defense encroachment. In the theoretical model of the Criminal Code of 1987 and the Basic Criminal Law as amended in 1991 is already an indication that the actions in the case of self-defense is not considered a crime [15, p. 450-451]. We, in agreement with the critical conclusion by Y.M. Tkachevskiy following a comparative analysis of the nature of the legislation necessary defense in the criminal law in times of self-defense express our opinion that any change or interpretation in different ways to the newly adopted criminal laws - the development of necessary protection to the exercise of its place in the criminal law. However, one can not conclude from this that the legal provision of necessary defense immediately formed in the criminal law of the Soviet period. On the basis of this conclusion, recognizing the vital importance of the legal norms of self-defense, we believe that it is still necessary to explore and refine.

A.A. Piontkovsky indicates that the disclosure of the concept of self-defense was the case in Article 13 of the Basic Criminal Law of 1958. He notes that in the said law-defense is not a crime, that is, deducts that it contains a provision neotnesenii criminal act in the category of offense if it is committed in the course of self-defense. [16, p. 348]. We want to point out that the findings by A.A. Piontkovsky and Y.M. Tkachevskiy and coincide. However, if we analyze the findings by A.A. Piontkovsky and Y.M. Tkachevskiy, it is possible to establish that in the initial phase, that was in the first years of Soviet power, self-defense was not perfect, so that it was not defined, refers to the category of self-defense crime or not.

Some authors have noted that, according to Article 9 of the main initiatives in 1924 and the Criminal Code of the Soviet Republics, Article 13 of the Criminal Code of the Russian Soviet Federal Republic, to the persons who committed the act in the case referred to the criminal law of self-defense does not apply only measure of social protection. Because of the definition of the grounds for exemption from punishment in such a legislative statement, its meaning was unclear what led to controversy in the Soviet legal literature about whether the crime action in the case of self-defense [17, p. 466]. This case is consistent with the conclusion by Y.M. Tkachevsky.

Under article 16 of the Decree of the Supreme Council of the Union of Soviet Socialist Republics on strong accountability for disorderly conduct July 26, 1976, provided that the actions of citizens to curb criminal assault and detention of criminals, even if they had to harm the perpetrator of these actions are recognized as legitimate in accordance with the laws of the Union of Soviet Socialist Republics and the legislation of the Union republics and the ones not subject to criminal or other liability, [18, p. 34]. Thus, there is every reason for the claim that there has been a classification of human actions caused harm in trying to suppress the criminal actions committed disorderly persons who are not in the category of crimes and to the case of self-defense.

On the 15th of October 1993 Legislative rule of self-defense under Article 13 of the Criminal Code of the Kazakh SSR, has been changed in the new edition.

In accordance with Part 1 of Article 1 of the Law of the Republic of Kazakhstan N 363-II of 21 December 2002 on amendments and additions to the Criminal Procedure and the Penal Code of the Republic of Kazakhstan, the third part of Article 32 of the Criminal Code of the Republic of Kazakhstan has been added the second paragraph to read "injury to at repelling attacks on human life, or any other infringement involving weapons or attempt to use, is not excessive force." [19]. If you try to go deeper, to go through the addition, the first, there is reason to believe that an amendment from part three of Article 32 of the Criminal Code of the Republic of Kazakhstan, one step closer to the main purpose of this legislative rule, that is, the Institute of Defense. Why say so, because the main purpose of self-defense is to ensure that the rights of the defender and defenders to protect their rights and interests and to protect the legitimate interests of another person or the state and society. It is repeated once again here we are talking only of the human rights. However, it may be a view does not agree with the phrase "only the rights of citizens." Because you are the persons to whom the line of duty the duty to protect the rights and freedoms and legitimate interests of the state and society and officials not to protect their rights, but only in order to fulfill their duties.

Secondly, the impression that one of the main goals of making additions to self-defense is a human life and health. Because it states that a socially dangerous invader action with a weapon or attempt to use primarily directed against human life and health.

At that, in a number of countries, for example in the U.S., the criminal law researchers believe that with sufficient damage to the property (if the aggressor tried to

steal a suitcase and its content costing over 100 U.S. dollars), the defender could use deadly violence [20, p. 75]. Such violence is necessary to prevent inevitable unlawful seizure of his property by another person [21, p. 199.]

In this case the U.S. Model Penal Code provides existence of a danger to the individual [22], a number of state criminal laws allow the use of deadly force, even if there is no threat [23, p. 703].

But pro rata principle [24, p.34] and the limits [25, p.1235-1308] of using such violence in the U.S. are considered as one of the main problems of the necessary defense.

To be fair, it should be noted that other North American researchers - W. La Fave and A. Scott argue that "the preservation of human life is more important for society than protection of the property" [26, p. 466.]

I should be noted that the legal aspects [27, p. 46], as well as social [28, p. 432] and humanistic aspects [29, pp. 357-359] of this phenomenon are extensively investigated in western literature. Foreign authors consider necessary defense to be a socially useful activity [30, p. 67], an effective means of preventing criminal attacks [31, p. 231], as well as a manifestation of civic duty, civic intolerance for crimes [32, p.334] and striking power and morality [33, p.531].

D.K. Nurpeisov notes that an essential element of the constitutional relationship between the state, the person and the citizen is the constitutional rights and freedom. For a man and a citizen such relations are in the possession of the protection of his rights and freedom and for the state - to ensure the protection of such rights and freedom. However, the direction of the rights and freedom of the man and the citizen holds them responsible for the improper performance of such rights and freedoms [34, p. 56].

In our view, D.K.Nurpeisovs conclusion is close to the truth, because, as pointed by D.K. Nurpeisov the rights and freedom of man and citizen in such a relationship are provided and secured in the constitution of our country - the Constitution and the state should adopt a binding its regulations. However, we can not claim that these rights and freedom of a man and a citizen, enshrined in the constitution, in turn, fully secured and provided for in the law. As an example this can be considered as the legal norm of self-defense provided for under Article 32 of the Criminal Code of the Republic of Kazakhstan. Although the regulations of necessary defense is fully provided for by the Constitution of our country, we can not say that it is considered to be

disclosed and found its solution in legislation. Because, when people use the right of self-defense, they still do not exceed the limits of their given right. Used in case of excessive force, that is, the existence of facts to bring death or serious body injuries, provides for liability. Based on this, we explored the history of self-defense provided for in the criminal law and considered its formation. However, in our view, an analysis of the stages of historical development and establishment of the institute in the criminal law of self-defense should be that in the future it is necessary to ensure the establishment of a legislative rule that ensures your goals and objectives.

T.J. Karataev expresses his thoughts on the human rights and freedoms in the following way: "The issue of human rights - the main goal of each state sets, so no investigation of the history of human rights and freedoms and the various ideas put forward in respect of, without an analysis of their achievements, also without knowledge of the principles, would be a cornerstone for the development of human rights and freedoms, it is impossible to understand the need to ensure the rights of individuals in criminal proceedings"[35, pp. 193-194].

One can not but agree with the conclusions by T.J. Karataev that without the study of the history of human rights and freedoms and the various ideas put forward in respect of, without any analysis of their achievements and without knowledge of the principles that served as the cornerstone for the development of human rights and freedoms, it is impossible to understand the need to ensure the rights of individuals in criminal procedure. Therefore, to ensure the protection of human rights and freedoms, we need to take a deeper look at their history and consider their main objectives. A major focus of the current criminal justice policy is the need to educate the violators the whole society, expressing concern over the lack of compensation for the damage caused to the victim in the crime, considering the alternative penalties instead of criminal responsibility and punishment. Because, for the now defunct of our country's legal standards in the criminal law for exemption from criminal liability in connection with the reconciliation of the parties is a compensation for the harm caused to the injured person and the prevention of excessive hostility between the perpetrator and the injured person.

We are aware that according to the statistics undertaken in our country the damage caused in the course of the crime, is not refundable. This means that it is not implemented one of the areas of criminal law policy of our country - compensation for damage caused to the injured person. On this basis, to provide for the

possibility prevent harm from a crime for the failure to redress the crime, it should be the direction of penal policy. As set forth by law defense institute can be seen as one of the measures by the state to prevent any violations and prevent harm in it.

Summarizing this section, it can be concluded that the appearance embodied in Article 32 of the Criminal Code of the Republic of Kazakhstan of the Institute "necessary defense" goes back to the origin of man. Self-defense has been reflected in the law of the Kazakhs and its development shows that it was known in the period of formation of the Kazakh-Turkish tribes as states.

## CONCLUSION

The conclusion follows, the thesis that the rights and freedoms of every person by the Constitution, the law of the country, must be protected in the case of self-defense, provided for and adopted in the basic law - the Constitution of our country, the first compared to the neighboring countries of the near abroad. This means that the rights and freedoms of the individual are considered as the main asset of our country and should be protected by both the state and the citizenry.

Periods of development of the institution of self-defense can be divided into several stages. We shall consider them by the following periods:

- Period of the Kazakh-Turkish tribes as states;
- Time of adoption the Islamic religion by the Kazakh government;
- Period after the Mongol invasion;
- Period of the Kazakh State;
- Period before the October Revolution;
- The Soviet period;
- Period since gaining independence by the Republic of Kazakhstan to the present.

Our conclusion is the following: we can not say that during the period of the institute of self-defense just perfected. Because for the period of the formation of self-defense is characterized both the growth and decline.

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