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THE NECESSARY ACTS AFFECTING THE INNOCENT PARTY IN CRIMINAL LAW

Theses for doctoral dissertation

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1. Aim of the Research

While the entry into force of Act C of 2012 on the Criminal Code on 1 July 2013 did not renew the system of obstacles of punishability fundamentally, it certainly is a reference point compared to the previous legislation, which provides an opportunity for legal professionals of criminal law to answer questions of different obstacles of punishability arising in practice or in scholarship pro futuro.

In the codification of the criminal law, the legislator primarily intended to strengthen the position of the person assaulted by providing for the possibility of the most extensive defence within the framework of justifiable defence.

The concept of necessary acts affecting the innocent party means a new approach to the examination of the system of obstacles, as it does not presuppose the creation of a system in the context of objective-subjective grounds for exemption. Therefore, only the quality of conflicting interests can be examined in these emergency situations in the broad sense, thus distinction can be drawn between whether these legal interests are based on lawfulness or unlawfulness. Law is conflicting with law in case of acts performed in extreme necessity, under undue influence by coercion or threat, and by the authorization of certain legislative acts, and situations created by installed means of defence can also be included here based on practical experience, which have distinct dogmatic and practical characteristics due to their similar legal nature.

The scope of examination is further clarified by the fact that necessary acts only include situations in which the person at risk is placed against his/her will, and acted out of necessity in the true sense of the world. Therefore, the victim's consent and the cases of allowed risks are not considered to be necessary acts.

The aim of the research carried out is to present necessary acts affecting the innocent party from a criminal law perspective, to define the scope of relevant legal instruments, and to make an in-depth examination of them in terms of content, both at a legal and a legislative level. In parallel, I sought to explore possibilities to further develop and address an issue or a problem being important for practice, and to suggest new ideas to legislation about some of the legal instruments. I strove to cover their criminal policy problems where I had the opportunity to do

so. I also intended to outline the adequate method of interpretation of certain conceptual elements against contra legem interpretation.

I based my examination on the legal definition of criminal offense, I therefore examined the obstacles of punishability in the light of this concept.

In addition to the above, I also aimed to clarify in my paper at the juncture of law and ethics whether there is a legally satisfactory resolution regarding the innocent party's choice between legal interests, given that the ethical position on these situations is of an extremely ambivalent nature. The legal policy reason of answering this question is based to a large extent on the expectation that the fundamental moral view of a society should be reflected in the criminal code. Nonetheless, the express aim of the research was also to flesh out the details and interpret the abstract provisions of the Fundamental Law of Hungary on the restriction of fundamental rights and the protection of human life, and Constitutional Court decisions on this subject from the angle of criminal liability.

Finally, I also covered major foreign, primarily European legislation and jurisprudence, addressing the subject, as the examination of the Hungarian legislative solution would be in a vacuum without this digression, in the absence of a point of reference.

2. Research Methodology and Sources

As, in my treatise, I strove to present the legislative environment of criminal law, and the positions of the legal literature and jurisprudence of the legal instruments of necessary acts affecting the innocent party in its complexity, mainly the methodologies of comparative law and legal history research, and that of classical data gathering were used.

When analysing legal instruments, I revealed the particularities of the Hungarian sentencing practice with describing the facts of the case and the legal status of relative judicial (and, where necessary, Constitutional Court) decisions. In this respect, I examined counteractive decisions available as well. The subject of the treatise required to highlight certain sub-issues not provided for in high court decisions with lower (local and regional) court rulings.

Given the fact that the core components of necessary acts affecting the innocent party were crystallised in the judicature of Hungary at the end of the 19th century, I could use the judicial decisions of the Curia and lower courts found in contemporaneous case-books. The description of Hungarian legal literature is based on using textbooks and academic articles of authors recognised in professional literature.

The fact allowed to discuss the subject with the methodology of comparative law that, both in case of countries following other continental legal system or common law legal system, the regulation of criminal law and practice deal with necessary acts affecting the innocent party, using the same conceptual elements, as they cover similar situations. In this context, I relied mainly on British case-law, and partly on overseas case-law, however I discussed, where possible, the relevant area of legal scholarship of other countries, for instance of Germany. Furthermore, I considered quoting the decisions of the European Court of Human Rights necessary in two cases due to the theoretical positions expressed therein.

In my dissertation, primarily English and Spanish works were used as the basis for foreign literature sources. Works in other languages were used in the form of works translated into the latter two languages.

In the comparison, I reviewed the necessity and proportionality elements of the above-mentioned obstacles of punishability, and differences and similarities — compared to Hungarian legal particularities – were drawn up as constructive criticism.

3. Summary of Research Results

I proved in my paper that variations in taxonomic position of obstacles of punishability infringing the innocent party's legal interest are considerably large. Such circumstances can be found in criminal code and other written sources of law as well. From a different perspective, grounds precluding danger to society, compliance with the statutory provision and guilt can also affect the innocent party. Deciding that the given necessary act precludes the criminal liability-criminalization due to the lack of which conceptual element — of the above — of the criminal act, is essentially a legal policy issue. Of course, the given situation's nature and the degree of lack of ontological danger should be taken into account, however the elaboration and quality of

conditions (determining the elements of necessity and proportionality) are the dividing line between the grounds precluding unlawfulness and culpability at the same time. Therefore, weighing values and interests in law-against-law situations is an issue of legislative determination.

a. Evolution of exceptions as boundary marks in terms of philosophy of law

First, I reviewed the background of history of ideas for necessary acts affecting the innocent party, and took account of the views expressed by great philosophers in the same area. On the basis of historical investigation, I consider it determinable that certain authors gave the status of principle to these exceptional situations that were initially outside any "system", or at least recognized them as legitimate conduct.

The theory of Hegel and Jhering served as a basis for shaping necessary acts to a specific and enforceable right, which culminated in the views of Kierkegaard and Schmitt. I personally see the merit of this philosophical concept adopted into criminal law in the fact that if the exception determines itself and general as well, the list of punishable acts can be determined with precise and full knowledge of the system of obstacles of punishability. Allowable conduct in borderline situations sets the liability framework of the given branch of law; the mere concept of criminal act and the special part fact patterns are less likely to give a complete picture on this. I have noticed that necessary acts affecting the innocent party are also such boundary marks; being in such situations is not a matter of criminal offense.

b. Extreme necessity

Before the in-depth discussion of extreme necessity, I clarified the conceptual and practical problems of the concept of dire emergency as a prerequisite. As more detailed questioning was requested by the legal assessment of danger arising from an unlawful attack, animal attack or other abstract reasons. In this respect, I believe that the jurisprudential stance cannot be considered to be common or well-developed.

In my opinion, we can say against this background that consequences of an unlawful attack may give rise to an emergency situation, however the risk should be mentioned that others'

battles may also lead to an act affecting innocent parties as collateral damage, such as hostage-taking situations. The decision being made in Strasbourg mentioned in the paper also complies with this legal interpretation, which essentially qualifies the harm caused by third parties to persons held hostage in an effort to avert emergency as extreme necessity.

The question of the possibility of action, defence against unlawful omission is also an aspect of the discussed problem area. I believe the fact can be laid down as a preliminary question that an attack may be active behaviour or omission as well, and its purpose is to alter an existing state or maintain a state, however it is also worth recalling here that justifiable defence can exists only against an aggressor, thus if the person on the defensive prevents the threatening result lawfully, the person acts in extreme necessity.

Attacks against animals also create dire emergency, unless animals are the representation of human rights, that is to say, they can be considered as the extended means of an aggressor; on such occasions the person assaulted is in a lawful defensive situation, and even the fact that the legal status of animals has been moved from the concept of property in the legal system of certain countries does not change this circumstance. Whereas, in cases more abstract than the above, such as the liquidity problem arisen in the business association mentioned in my dissertation does not result in extreme necessity.

In the above issue, I determined that the existence of dire emergency is merely an objective question of fact. I believe the reason for this is that one does not need to wish or emotionally relate to an act not harmful to society. Without that, carrying out unintentional, socially useful conduct would be prevented. The result of the objective nature is that the possibility to offer aid or assistance cannot be subject to the consent of the person at risk, moreover there is ground for it even in case of his/her explicit objection to that.

I examined the act of repelling danger (in extreme necessity) in two respects; its necessity elements and proportionality degree were discussed.

Within necessity, when discussing the immediacy of danger, I explained that a distinction can be made between the forms of imminent and imminently threatening danger. In the latter case, the person on the defensive still cannot see the impact of the danger, but the casual process has begun, due to which the occurrence of harm is going to take place with certainty. I mainly justified in my paper that the person on the defensive may carry out a conduct that complies

with the statutory provision against an imminently threatening danger as well, and the person shall not wait for the harm that is going to otherwise occur with absolute certainty with foreign examples. In particular, there may be grounds for that in cases arising from medical or other biological hazards, where determining the distance of hazard in time requires expertise. Nonetheless, it must be taken into account that the adoption of such position attributing broader ratione temporis raises the possibility of purporting mistake more frequently. I consider the attribute "imminent" to be a criterion of guarantee importance, as it excludes retaliatory, potentially abusive acts from the scope of extreme necessity.

By way of derogation, I wanted to stress with regard to inability to prevent the danger otherwise that it is not a merely objective concept, it therefore is interpreted with more freedom in practice, and extreme necessity is not established due to the lack of this very condition in most cases. I believe that it can be considered on the basis of Hungarian decisions available that only the omission of those less severe methods of prevention can be imputed to the perpetrator, and the use of these methods could not be expected from a person with similar competence under the same circumstances. Therefore, it is not compulsory to choose the method of prevention entailing the de facto slightest harm in any event, but, naturally, the individual level of expectability of a person at risk cannot become a general rule.

I concluded on the basis of the examination of practical cases that the issue of inability to prevent the danger otherwise is raised in the context of criminal offenses committed due to social conditions most frequently. I consider the principle laid down in common-law practice on this matter to be guiding in a Hungarian context as well, according to which poverty as a social condition can trigger predictable negative consequences, moreover which can be remedied by social policy instruments without committing a criminal act, that is to say, it is a condition that can be prevented otherwise. A decision taking a different approach unreasonably weakens the protection of legal goods of the innocent party.

I identified the requirement of guiltlessness in being responsible for the danger as the final element of necessity, being the negative prerequisite related to dire emergency. It is worth underlining that only if the culpable person is responsible for the danger in criminal terms, can it exclude purporting to extreme necessity, that is to say, the perpetrator's intentional or negligent conduct, which cannot be merely limited to subjective elements; thus, besides mental

and psychological processes, practical lawyers should examine the perpetrator's expectability as well in a normative context.

I concluded on the basis of the examination both of Hungarian legal literature and foreign practice that negligent creation of danger poses more complex interpretation problems. My position is that, when interpreting the concept in the strict sense, the predictability of the fact of danger and the negligent conduct during emergency can only be analysed, and not the consequences of the already developed danger and the act following that. In addition, reasons that create directly and specifically the danger only fall within this scope, it is therefore indifferent that what the person at risk was doing (even he/she was about to commit a crime) if it did not create the danger directly.

Some noted in legal literature that excluding the negligent creation of danger from extreme necessity, and the establishment of liability arising from criminal act committed as a response to emergency can be unfair for the perpetrator in some situations. In my view, these issues might best be remedied in the scope of practical lawyers with interpreting the concept of his/her expectability correctly (reasonably) on one hand, and providing for possibilities of reducing punishments without restriction de lege ferenda on the other hand. I therefore believe the position should be rejected, which would punish solely the intentional creation of danger or would consider negligent creation of danger only as negligent criminal offense, as another person's irresponsibility or negligence cannot constitute the legitimate case of infringing the innocent party's legal goods.

I discussed the act of rescue from danger in the second part of my examination on extreme necessity in a complex manner, with a special focus on the issue of its proportionality degree.

Given that the legislator regulated extreme necessity on the basis of uniform concepts, the rescue act is not differentiated, however, as I explained, it can be further specified in scholarship and used in practice. In my view, it can be justified in a dogmatic way in this context that a rescue act can mean not only active, but also passive conduct, given that primarily not the change in the mental state (shock) of the person drifting towards dire emergency that is caused by danger should be taken into account, but rather the lack of danger to society of the defensive conduct, which can be achieved by doing nothing as well.

I believe the possibility of causing harm of the same (not greater) extent, and the quantitative and qualitative comparison of legal interests can be justified in a dire emergency, on the basis of the sources of Hungarian legal literature and legal history, and foreign practical cases, and from a constitutional viewpoint as well. I primarily deduced its justification from human nature, knowing that counter-arguments with moral aspects can also be set out with good reason, however it does not provide a basis for contra legem application.

I derived the raison d'être of the method of weighing values from the system of values of fundamental rights that may be deduced from the practice of the Constitutional Court with regard to conflicts between heterogeneous legal interests. Hierarchy starts with rights that may be directly deduced from human personality, and, in my view, further order is determined by weighing the criminal sanctions of the conduct complying with the statutory provision that was caused by the rescue act and the harm caused by potential danger according to the Criminal Code, as the legislator assesses a priori the weight (danger to society) of the two harms by determining the level of sentence.

Making some comments on the topic of proportionality, I rather discussed the possibility of posing an imminent danger of death to the innocent person in extreme necessity, as an important issue from a theoretical viewpoint. I believe it can be stated on the basis of the decision of the Constitutional Court that governs this question that the right to life may be restricted in exceptional, non-arbitrary cases. Life may compete with life. However, there ought to be limits to the degree of the lack of punishability; a mean for which is the requirement of proportionate conduct of rescue in extreme necessity, which supposes the application of numerical criteria.
Providing foreign philosophical examples of these questions, I consider that utilitarian approach using the comparison of lives in quantitative terms is justifiable, however I also believe that it is important to draw attention to the fact that, in case of a positive result in arithmetic terms, the principle of pure proportionality can be jeopardised by moral aspects. Law does not always coincide with morality. Furthermore, the approach outlined above begins to come to the light in foreign practice and legislature.

After the examination of necessity and proportionality factors of extreme necessity, I discussed the public interest and other legal interests (defensible in extreme necessity), which have been left in the shadows in legal literature so far, even though they can be considered as the most suitable area for the development of law.

It can be established in principle that the concept of public interest ought to be maintained, as rescue acts carried out for this purpose are based on social solidarity today. But life situations covered by the concept should not be restricted merely to all personal and property interests; the key issue is deciding whether there is a risk of harming community interest specified by name and socially recognised. Based on practical cases, mainly conducts complying with the statutory provision that were carried out for the protection of healthy environment can be included in cases of extreme necessity in point.

Besides the exhaustive list of the Criminal Code, I also analysed two possible cases of extending the scope of application of extreme necessity to cover other legal interests. I believe it is aimed at the fact that it is justified to open the way to purporting to extreme necessity in situations where other rights that may be deduced from, besides life and physical integrity, human dignity are at risk. As, in addition to physical injury, the need for exemption on the ground of extreme necessity in case of physically sensible harms offending against human dignity has emerged in more foreign cases. Therefore, the area of grounds for exemption can be extended by appropriately assessing and interpreting the concept of person on one hand. The other way of development of law may be the legislatorial decision, that is to say, if legislative texts do not list exhaustively other interests, defensible legal interests are determined in a more general manner which is suitable for development of law. The legislator has chosen this alternative in several cases regarding European criminal laws I examined.

Finally, I discussed the problem area of taking risk as an issue closely relating to the instrument of extreme necessity. The case of risk taken as a ground for excluding dire emergency can be considered as a negative prerequisite de lege lata, which is vague and creates a situation of uncertainty in the light of the two decisions concerning the issue by the Constitutional Court.

Against this background, I would emphasise the statement that solely the cases of risk taken voluntarily can exclude purporting to extreme necessity, as the issue under discussion should be interpreted according to the concept of the victim's concept, into which requirements that unilaterally oblige to do so cannot be integrated. As the right of self-determination mentioned above cannot be without limits, it only covers professions with statutory conditions for assumption of risks, and without that the objective useful to society and public interest cannot be reached or is substantially difficult to reach (e.g. life, property, public security or protection of internal order). Naturally, an exhaustive list is unnecessary, however determining the nature

of said professions would be desirable. I also consider it important to emphasise the requirement of meeting the criterion of proportionality in this context, that is to say, only the rescue of legal interest having equal weight with the legal interest at risk can give rise to an obligation to assume risks.

It required posing more detailed questions whether the consent of the person in danger extends only to endangerment, or necessarily implies the possible material abusive result (e.g. personal injury or death). The two decisions in that regard by the Constitutional Court adopted the former position, that is to say, assuming risk does not mean the case of restriction on the right to life. However, in my view, this position cannot be upheld in practical terms and with regard to the relevant provisions of the Criminal Code. As the possibility of abusive result forms an immanent part of imminent danger; the person who will be in danger undertakes his/her profession knowing this. The artificial disruption of this process is pointless and impracticable, which I also illustrated with regard to a concrete practical case.

Therefore, according to my conclusion that can also be used in judicature, the interpretation method would be desirable, which would create the legitimate case of even the surrender of life subject to the victim's consent as regards persons assuming danger by virtue of their special profession.

In my explanation, I discussed the cases of extreme necessity excluding the perpetrator's punishability due to the complex approach to the legal instrument, outside the system of extreme necessity excluding the punishability of the action. The premise is that exceedance can be divided into two distinct forms; cases of mistake in proportionality (Section 23 of Criminal Code) and in necessity factors (Section 20 of Criminal Code).

I believe the position of regulation in force on the exceedance of proportionality whereby the examination of the actual impact on accountability is not necessary for excluding punishability — thus practical lawyers can guarantee impunity even for perpetrators with the slightest diminished accountability — may infringe disproportionately the legal goods of the innocent party. Taking the circumstance in particular into account that the emphasis has been solely on the examination of subjective factors (shock or justifiable aggravation). Thus, judges may not apply the provisions at hand to impose a sentence, or may leave a margin too large for applying extreme necessity, without limits. As a solution to this practical problem, it would be more

appropriate in practice to examine the case of exceedance of proportionality in the context of the lack of expectability on one hand, and to deal with the so-called “in-between” cases as an issue of imposition of a sentence with providing opportunity to reduce sentences without limits. However, it would be justified for the purposes of a more consistent regulation to treat mistakes both in proportionality and necessity factors — the latter ones are now to be judged under the rules of mistake — in an integrated way, specifying shock and justifiable aggravation as grounds for exemption, being a legitimate circumstance on the side of the person.

Finally, I also analysed special cases that bear similarities with dire emergency. I consider it can be established in this matter that the conflict of obligations as a ground for excluding criminal liability that is present in judicial practice has now lost its differentia specifica, and can be considered as a special case of extreme necessity by a third party, given that causing harm of the same extent is also a proportionate method of prevention under the Criminal Code in force. It is indifferent that a professional requirement or the Christian love of fellow men compels the third party to rescue someone from danger, as the necessity-proportionality criteria of extreme necessity are the same in both cases.

Further to the above, in contrast, the case of the victim’s putative consent under discussion cannot be within the scope of extreme necessity, as even acts that are based on presumption, meddling in or committed in favour of bona fide purposes can stretch the framework of extreme necessity. In view of this, I consider it would be appropriate to find its own future, independent taxonomic status of the legal instrument in the legislation as well. One way of doing this might be to codify the victim’s putative consent outside the concept of extreme necessity, under rules like negotium gestum in private law.

c. Coercion and threat

It can be laid down as a basic principle that the legal instruments of coercion and threat are unresolved and unduly developed both at a taxonomic and a content level in Hungary, theses set out below therefore largely are de lege ferenda suggestions at the same time.

With regard to the taxonomic positions of coercion and threat, they cannot be determined as grounds for preclusion of accountability, contrary to the position that can be considered prevalent, but rather as an obstacle excluding compliance with the statutory provision in the

former case, and an obstacle excluding expectability in the latter case. However, on the basis of foreign examples (see for instance Criminal Code of Croatia or Italy, or the Statute of the International Court of Justice), I consider it expedient to regulate threat de lege ferenda on the basis of the same reasons of legal theory as that characterising extreme necessity, partly as ground for excluding material unlawfulness, partly as ground precluding guilt. I see the reason for the above in the fact that the current practice of putting subjective aspects at centre stage (the coerced or threatened person's power of resistance) place the protection of the victim's legal interests on a ground breaching legal security.

In practice, the shift of liability towards a more objective direction would result in the fact that it would mean a more predictable requirement both for practical lawyers and parties involved in a proceeding on one hand, and the defence against, for example, a person carrying out preventive conduct would be based solely on the rules of extreme necessity, and not on the rules of justifiable defence on the other hand.

It would be justified to draw up the two grounds for exemption, having regard to their different legal nature, as distinct from one another and in the context of necessity and proportionality factors appearing in practice. Therefore, as in extreme necessity, the fact that inability to prevent a great danger otherwise, and its directly threatening nature as well are required. It is appropriate to prescribe faultlessness in causing danger, as if someone commits himself/herself to any criminal activities due to his/her association with other persons, the danger arising from that is also foreseeable.

In a coercive or threatening situation, limits should be set for the degree of acts preventing great damage from the point of view of protection of the innocent party's legal interests. In this context, both the Hungarian and foreign practice are ambiguous, and it cannot be answered in the lack of an exact standard, whether, for instance, an imminent danger of death can be posed in the above situations. Therefore, de lege ferenda, a proportionality standard similar to the so-called flexible standard of justifiable defence — necessarily required for averting great damage – ought to be required against the person acting under coercion, while causing proportionate harm corresponding to extreme necessity in the case of threat.

In addition to the above, it would be necessary to make the list of protectable legal interests a part of regulation; ensuring as wide-ranging defence as possible appears justifiable due to its simple practical applicability.

d. Statutory Authorization

I considered the discussion of statutory authorizations as the newly determined grounds for excluding criminal liability necessary, as most of them give authorization to infringe the innocent party's legal interests, so that the conditions for its application are not very clear or sufficient. In this context, I expressed my views on the principle of the unity of the legal system as a preliminary issue. In my opinion, a conduct authorised in an area of law does not exclude the unlawfulness of a conduct complying with the statutory provision in all circumstances; legal system shall withstand tensions that this entails. Consequently, the examination of the content of special provisions in separate norms is justified, and not their formal investigation, to find the lack of infringing legal interest, and its method therefore can only be that of evaluating as fits the practical lawyers' competence (thus the existence of authorization does not entail impunity ipso facto).

As regards the regulation in force, it is concerned from a constitutional viewpoint, therefore it is not sustainable if statutes in a lower level of the hierarchy of sources of law (decrees of different types) provide exemption from prohibitions under criminal law. While on the other side the list of authorizations is to be extended, for instance EU Regulations, towards international conventions.

I see the greatest practical problem of channelling authorizations into the area of criminal law in authorizations obtained and used in a fraudulent manner. Detecting them by practical lawyers may lead to the disruption of criminal and administrative unlawfulness.

I also explained some statutory necessary acts affecting the innocent party that raise most questions in the context of the treatise. In the examination of these acts, I consider to be possible to establish rules including special proportionality and necessity factors due to the special connection between mother and fetus with regard to abortion, however the cases of extreme necessity and coercion cannot be applied. Although the list of covert investigators' acts that can remain unpunished (which can even cover negligent homicide for law enforcement purposes) gives rise to constitutional concerns. It would be preferable to narrow the possibility of defence in this regard due to the danger of innocent parties suffering harms.

e. Justifiable preventive defence

I also examined the problematic area of the so-called justifiable preventive defence (protection with means of defence) on the basis of practical experience, given that defensive conducts carried out in a significant number of cases initiated in this regard affect innocent parties. I took the view that only those conditions can be imposed which restrict defending in such a way with certain guarantee limitations, however given that the case of illegal and legal intrusion cannot be separated at a practical level, I therefore believe that the usage of means of defence and their current legal framework make additional conditions in relation to traditional justifiable defence inapplicable and meaningless.

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