



Constitutional Questions of the Situational Legitimate Defence

Ádám Mészáros

Deputy Head of Division, Senior Research Fellow,
National Institute of Criminology,
Division of Criminal Law Sciences (Budapest, Hungary)
E-mail: meszaros@okri.hu

Abstract. This study examines the problems surrounding legitimate defence as an institution of criminal law, as it is regulated by the Hungarian legislator, in an international and comparative law perspective. It further examines the compatibility of the current regulation with the requirements of the Fundamental Law of Hungary as well as the practice of the Constitutional Court. The author concludes that the pertinent text of Section 22, para. (2) of the Hungarian Criminal Code seems to be unconstitutional, rendering the wide scope of legitimate defence in comparison to the requirements of proportionality as objectionable.

Keywords: legitimate defence, Hungarian Criminal Code, proportionality, Constitutional Court of Hungary, Fundamental Law of Hungary

1. Introduction

Legitimate defence is a well-known cause of justification in Hungarian criminal law. Already the first written criminal code, the so-called *Csemegi Codex*¹ (Act V of 1878) also regulated this institution. Its main rules were almost invariable for long decades.

Significant change was brought by Act LXXX of 2009. This act introduced the so-called *preventive legitimate defence*, trying to satisfy the need for citizens to be able to safeguard their personal security and possessions by establishing different signalling and protection mechanisms. According to the law:²

-
- 1 The law was named in the vernacular after its legislator Károly Csemegi (1826–1899). After working as an attorney, Csemegi became a high-ranking official in the Hungarian Ministry of Justice, where he drafted the Criminal Code of 1878.
 - 2 Translation by the author.

Any person who uses any means of defence for his own protection and/or for the protection of others in the event of an unlawful attack shall not be prosecuted, provided that such means of protection is not recognized as a deadly weapon and if the assailant sustains injury in consequence, furthermore, if the person on the defensive has done everything within his power to avoid the injury (Section 5).

Also, this law made it clear that the person assaulted shall not be required to take evasive action so as to avoid the unlawful attack (Section 4). Before that, the judicial practice required an obligation to implement evasive measures in the event of the assault by an ascending relative, spouse, brother or sister, and persons with serious mental illness.³

The new Criminal Code of Hungary, Act C of 2012, while maintaining this regulation, nevertheless introduced a new legal institution, the so-called *situational legitimate defence*.

Recently, both legitimate and preventive legitimate defence, as well as the regulation of situational legitimate defence, have been at the centre of interest in jurisprudence, criminology, and legal practice. In the following, I will deal only with the latter and will have a look at it from the point of view of constitutionality.

2. Defining the Problem

Section 22, para. (2) of Act C of 2012 on the Criminal Code introduced into Hungarian criminal law with effect from 1st July 2013, the notion of *situational legitimate defence*. According to the text:⁴

The unlawful attack shall be construed to pose an imminent danger of death if committed:

- a) against a person
 - aa) at night,
 - ab) by displaying a deadly weapon,
 - ac) by carrying a deadly weapon, or
 - ad) in a gang;
- b) by way of intrusion into the victim's home
 - ba) at night,
 - bb) by displaying a deadly weapon,
 - bc) by carrying a deadly weapon, or

3 Supreme Court's Directive Decision 15 on the Protection of Life and Physical Integrity through Criminal Law (part III. 2.).

4 Translation by the author.

- bd) in a gang;
- or
- c) by way of illegal and armed intrusion into the fenced area of a home.

Literature⁵ and jurisprudence⁶ on legitimate defence has long been consistent with the fact that, in the event of the ‘basic case’⁷ of legitimate defence, if the unlawful attack is directed against the life of the attacked person, taking of the offender’s life cannot be unlawful. The question of disproportion cannot turn up at all.

In the scope of Section 22, para. (2) of Act C of 2012, cases of unlawful attack should also be considered as if they were aimed at extinguishing the assaulted person’s life when in reality the attack was not directed against life. In these cases, it is also not a criterion that the attack is directed against a person at all [Section 22, para. (2) (b) (c)].

Therefore, it follows from the text that ‘considering an unlawful attack as an attack on life makes lawful the defense which may cause death even if in the concrete situation the taking of life was not necessary’.⁸

In accordance with the law, in the enumerated situations, the proportionality of the defence cannot arise, and the defender still has a legally based right to extinguish human life even though the unlawful attack does not threaten his life, moreover, it does not even target his person.

3. International Kaleidoscope

In most European countries, the Criminal Code does not contain any presumption in the field of legitimate defence. However, some countries regulate such a presumption but not the same way as the Hungarian law does. A rule similar to the Hungarian one is rare. I would like to illustrate these statements with the following examples.

The German *Strafgesetzbuch* regulates legitimate defence as follows:

- § 32 (1) A person who commits an act in self-defense does not act unlawfully.
- (2) Self-defense means any defensive action that is necessary to avert an imminent unlawful attack on oneself or another.

5 Földvári 2003. 139; Belovics 2009. 110, 117; Ujvári 2009. 101; Horváth 2014. 183; Nagy 2014. 216–217.

6 Supreme Court’s Directive Decision 15 on the Protection of Life and Physical Integrity through Criminal Law (part III. 4.); the Curia of Hungary’s Uniformity Decision No 4/2013 (part I. 2.).

7 No penalty shall be imposed upon a person for any action that is necessary to prevent an unlawful attack against their person or their property or against the person or property of others, against the public interest or an unlawful attack posing a direct threat in respect thereof.

8 Belovics 2017. 253.

§ 33 A person who exceeds the limits of self-defense out of confusion, fear or terror shall not be held criminally liable.⁹

According to the Swiss *Code pénal*:

Art. 15. If any person is unlawfully attacked or threatened with imminent attack, the person attacked, and any other person are entitled to ward off the attack by means that are reasonable in the circumstances.

Art. 16. If a person in defending himself exceeds the limits of self-defense as defined in Article 15 and in doing so commits an offence, the court shall reduce the sentence.

If a person in defending himself exceeds the limits of self-defense as a result of excusable excitement or panic in reaction to the attack, he does not commit an offence.¹⁰

The French *Code pénal* contains a legal presumption after defining the right to defence in case of an attack against a person or property. However, this is not like the Hungarian regulation. According to the Code:

Art. 122-5. A person is not criminally liable if, confronted with an unjustified attack upon himself or upon another, he performs at that moment an action compelled by the necessity of self-defense or the defense of another person, except where the means of defense used are not proportionate to the seriousness of the attack.

A person is not criminally liable if, to interrupt the commission of a felony or a misdemeanor against property, he performs an act of defense other than willful murder, where the act is strictly necessary for the intended objective and the means used are proportionate to the gravity of the offence.

¹¹

According to the presumption:

Art. 122-6. A person is presumed to have acted in a state of self-defense if he performs an action 1° to repulse at night an entry to an inhabited place committed by breaking in, violence or deception; 2° to defend himself against the perpetrators of theft or pillage carried out with violence.¹²

⁹ <https://www.gesetze-im-internet.de/stgb/StGB.pdf>

¹⁰ <https://www.admin.ch/opc/fr/classified-compilation/19370083/index.html>

¹¹ <https://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006070719&dateTexte=20181016>

¹² Id.

Similar to the French Code pénal, the *Criminal Code of Romania* also regulates a legal presumption to be used in certain situations. But not even this is similar to the Hungarian norm. In accordance with the Code:

Art. 19 (1) An act stipulated by criminal law is justified when committed in legitimate defense.

(2) A person is in legitimate defense when committing an act to remove a material direct, immediate and unjust attack that endangers their own person, or another person, their rights or a general interest, if the defense is proportional with the seriousness of the attack.

(3) A person is presumed to have been in legitimate defence as defined by par. (2) when they committed an act so as to repel an individual having entered a domicile, room, annex or enclosed structure appertaining to such domicile, without any right to do so, by violence, deception, breaking in, or other such unlawful procedure, or during the night.¹³

Only the Ukrainian and the Bulgarian laws contain a similar rule as the Hungarian Criminal Act, but without a presumption. By the text of the *Criminal Code of Ukraine*:

Art. 36

1. The necessary defense shall mean actions taken to defend the legally protected rights and interests of the defending person or another person, and also public interests and interests of the state, against a socially dangerous trespass, by inflicting such harm upon the trespasser as is necessary and sufficient in a given situation to immediately avert or stop the trespass, provided the limits of the necessary defense are not exceeded.

2. Every person shall have the right to necessary defense notwithstanding any possibility to avoid a socially dangerous trespass or request assistance of other persons or authorities.

3. The excess of necessary defense shall mean an intended causing of a grievous harm to the trespasser, which is not adequate to the danger of the trespass or circumstances of the defense. The excess of necessary defense shall entail criminal liability only in cases specifically prescribed in articles 118 and 124 of this Code.

4. A person shall not be subject to criminal liability where that person was not able, due to high excitement, to evaluate if the harm caused by that person was proportionate to the danger of the trespass or circumstances of defense.

5. The use of weapons or other means or things for protection against an

13 www.just.ro/wp-content/uploads/2016/01/Noul-cod-penal-EN.doc

attack of an armed person or an attack of a group of persons, and also to avert an unlawful violent intrusion upon a dwelling place or other premises, shall not be treated as the excess of necessary defense and shall not entail criminal liability irrespective of the gravity of harm caused to the trespasser.¹⁴

According to the Criminal Code of Bulgaria:

Art. 12 (1) An act shall be considered not dangerous to society where it has been committed in situation of inevitable defense against immediate unlawful attack on state or public interests, on the person or the rights of the person defending himself or of another person, by inflicting harm on the attacker within the framework of the necessary limits.

(2) The limits of inevitable self-defense shall be considered exceeded where the defense obviously did not compare to the nature and danger of the attack.

(3) The limits of inevitable defense shall not be considered exceeded where the attack took place through violent penetration into premises or through violent housebreaking.

(4) The acting person shall not be punishable if he has committed the act of exceeding the limits of inevitable self-defense due to fright or confusion.¹⁵

4. Constitutional Requirements

Returning to the Hungarian legal system, the Fundamental Law of Hungary (25 April 2011) explicitly defines the right to defend against unlawful attack: ‘Everyone has the right – in accordance with the law – to use reasonable force to protect his or her person or property from imminent bodily harm or against the peril with which he or she is threatened at the hands of an aggressor’ (Article V).

At the same time, the Fundamental Law at the beginning of its chapter entitled *Freedoms and Responsibilities* states, on the one hand, that everyone shall have the right to life and human dignity (Article II). As specified by its explanation, the right to human dignity is shaped by the law as the foundation of human existence with the right to life and recognizes the right of every person to life and to human dignity.

On the other hand, the Fundamental Law provides for fundamental rights and obligations as follows:

¹⁴ <https://www.legislationline.org/documents/action/popup/id/16257/preview>

¹⁵ https://www.legislationline.org/download/action/download/id/7578/file/Bulgaria_Criminal_Code_1968_am2017_ENG.pdf

The rules relating to fundamental rights and obligations shall be laid down in an act of Parliament. A fundamental right may only be restricted in order to enforce another fundamental right or to protect a constitutional value, to the extent that is absolutely necessary and proportionate to the objective pursued, and with respect to the essential content of the relevant fundamental right [Article I (3)].

4.1. The Practice of the Constitutional Court

In a previous decision, the Constitutional Court of Hungary noted that:

Human life and human dignity form an inseparable unity and have a greater value than anything else. The rights to human life and human dignity form an indivisible and unrestrainable fundamental right, which is the source of and the condition for several additional fundamental rights. The constitutional state shall regulate fundamental rights stemming from the unity of human life and dignity with a view to the relevant international treaties and fundamental legal principles in the service of public and private interests defined by the Constitution. The rights to human life and dignity as an absolute value create a limitation upon the criminal jurisdiction of the State [Decision 23/1990 (X. 31.) on capital punishment, part V. 2.].

In another previous decision, the Court held the following statement:

The State may only use the tool of restricting a fundamental right if it is the only way to secure the protection or the enforcement of another fundamental right or liberty or to protect another constitutional value. Therefore, it is not enough for the constitutionality of restricting the fundamental right to refer to the protection of another fundamental right, liberty or constitutional objective, but the requirement of proportionality must be complied with as well: the importance of the objective to be achieved must be proportionate to the restriction of the fundamental right concerned. In enacting a limitation, the legislator is bound to employ the most moderate means suitable for reaching the specified purpose. Restricting the content of a right arbitrarily, without a forcing cause is unconstitutional, just like doing so by using a restriction of disproportionate weight compared to the purported objective [Decision 30/1992 (V. 26.), part III. 2. 2.].

4.2. Reasoning

By regulating situational legitimate defence, the Criminal Code, giving a general authorization, allows the defender to kill the attacker in such a case when the attack is not directed at taking life (even if it is not against a person).

In my opinion, this rule cannot be necessary nor proportionate (like the smallest measure) to achieve the stated goal of the legislator.

The mentioned purpose of the law is fixed by its explanation:

The law extends the limits of legitimate defence to ensure a more effective action against serious, violent crimes, and establishes a presumption for those cases when the attacked person may assume the attack is directed against his life. The circumstances of the unlawful attack create the opportunity to overcome the necessary level of defence. In these cases, the court does not have to examine the extent of the necessity. The law provides that a person attacked by a weapon or by night may think that the attack is aimed at the extinction of his life and that he may choose the mode of the defence accordingly. This assumption can be justified by the number of the attackers.¹⁶

In my judgement, strengthening public security cannot justify a restriction of the right to life. In other words, such a widening of the right to defence cannot be a necessary tool for more effective action against serious, violent crime.

In addition, the current regulation does not comply with the constitutional requirement that a fundamental right may be restricted only by respecting the substantive content of another fundamental right. With regard to all constitutional fundamental rights, it is an important question whether and under what conditions they may be restricted, limited and, in the event of their conflict, which criteria should be prioritized.

In my view, the right to defence (the right of the defendant to oppose an unlawful attack directed against themselves or their property) – if there is no explicit threat to life – must remain underneath the right to life even if the attacker entered the ground of illegality and basically had to bear the risk of the unlawful attack.

Article V of the Fundamental Law stipulates the right to defence as defined by law (see Criminal Code); however, in my view, by allowing the possibility of extinguishing an assailant's life in the event of attacks which are not life threatening, Section 22, para. (2) of the Criminal Code seems to run contrary to Article I (3) of the Fundamental Law.

¹⁶ Paragraphs 5–6 of the ministerial explanation attached to Section 22. Translation by the author.

4.3. Conclusion

Accordingly, in my opinion, Section 22, para. (2) seems to be unconstitutional as it unnecessarily and disproportionately restricts the right to life.

5. Epilogue

It is not closely related to the examination of the constitutionality of the provision cited, but it is perhaps worth mentioning that Section 22, para. (2) of the Criminal Code does not provide an explanation for the extension of the ‘right of defence’, except for the list of different situations, and does not impose any requirements on the defender (such as shock or justifiable aggravation). These circumstances are mentioned in Section 22, para. (3),¹⁷ which, however, by leaving the reference in the previous regulation to the ability to recognize the necessary measure of prevention, leaves a fairly wide scope for exemption from liability.

The earlier Criminal Code, Act IV of 1978 – before being modified by Act LXXX of 2009 –, neglected the criminal responsibility of a person who exceeded the necessary measure of prevention on that score because he was unable to recognize it due to shock or justifiable aggravation [Section 29, para. (2)]. The lack of recognition ability (a capacity to recognize the socially dangerous consequences of someone’s conduct) leads to the lack of capacity to be adjudged guilty, which excludes criminal liability (especially the guilt of the offender).

The new Criminal Code (2012) maintained the 2009 amendment. The ministerial explanation for both laws is the same: ‘Shock or justifiable aggravation [...] is still a subjective reason to exclude criminal liability, regardless of the actual effect on the capacity to be adjudged guilty.’¹⁸

The commentary of Criminal Code written by the judges of the supreme court (the Curia of Hungary) also indicates that shock or justifiable aggravation cannot be a consciousness that excludes the perpetrator’s recognition, will, or appreciative ability in the application of the new law but is an everyday emotional reaction that can be judged by referring to general life experience. It is a reaction to the unlawful attack; it has a causal connection with that and cannot be identified with the strong induction required for privileged manslaughter (voluntary manslaughter, see Section 161¹⁹).²⁰

17 Any person who exceeds the reasonable force of self-defence due to shock or justifiable aggravation shall not be prosecuted.

18 Paragraph 1 of the ministerial explanation attached to Section 4 of Act LXXX of 2009; paragraphs 5–6 of the ministerial explanation attached to Section 22 of Act C of 2012.

19 Any person who commits homicide with provocation or in the heat of passion is guilty of a felony punishable by imprisonment between two to eight years.

20 Kónya 2017. 122.

Based on the above, apart from being unconstitutional, the rule contained in Section 22, para. (2) is practically largely unnecessary because if someone under an unlawful attack exceeds the necessary degree of the defence for reasons of shock or justifiable aggravation, they cannot be held liable, even if these circumstances do not affect their capacity to be adjudged guilty [CC. Section 22, para. (3)].

References

- BELOVICS, E. 2009. *A büntetendőséget kizáró okok*. Budapest.
2017. *Büntetőjog I. Általános rész*. Budapest.
FÖLDVÁRI, J. 2003. *Magyar büntetőjog. Általános rész*. Budapest.
HORVÁTH, T. 2014. A büntetőjogi felelősségre vonás akadályai. In: *Magyar Büntetőjog. Általános rész*. Budapest.
KÓNYA, I. 2017. A büntetendőséget kizáró vagy korlátozó okok. In: *Magyar büntetőjog. Kommentár a gyakorlat számára I*. Budapest.
NAGY, F. 2014. *Anyagi büntetőjog. Általános rész I*. Szeged.
UJVÁRI, Á. 2009. *A jogos védelem megítélésének új irányai*. Budapest.

Online Sources

- <https://www.admin.ch/opc/fr/classified-compilation/19370083/index.html>
<https://www.gesetze-im-internet.de/stgb/StGB.pdf>
<https://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006070719&dateTexte=20181016>
<https://www.legislationline.org/documents/action/popup/id/16257/preview>
https://www.legislationline.org/download/action/download/id/7578/file/Bulgaria_Criminal_Code_1968_am2017_ENG.pdf
www.just.ro/wp-content/uploads/2016/01/Noul-cod-penal-EN.doc