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Self-defence and Necessity in Roman Law and in the Hungarian Criminal Code

1. General remarks

In my paper I would like to present some cases, in which in our modern understanding one's action formally constitutes iniuria as it involves *occidere*, described in the first chapter of the Lex Aquilia[1] and *urere frangere rumpere*, described in chapter 3. What is more, from the subjective aspect the action is intentional, nevertheless it is justifiable.

Although the modern terminology of criminal law cannot always be applied in the historical perspective,[2] I would like to show that ancient Roman Law includes cases for which modern criminal theory says that an action may formally be unlawful, but for some reasons, constructed by law, the material side of unlawfulness is missing, so in the end, the action, although it caused injury or damage – probably even homocide – is justified. These reasons – accepting the typology of Nagy Ferenc and Tokaji Géza[3] – basically fall into three cathegories.

Firstly, the defended interest is considerably more valuable than the one it collides with and in such situations law gives priority to the more valuable interest. This is the reason for the legal construction of inevitable necessity.

Secondly there are cases, where legal defence is not necessary, because the disponent of the legal object does not require such defence, he takes the risk of injury or damage in his property or his bodily integrity. In modern terminology this is known as the consent given by the injured and for which there are several cases in The Digest.

Thirdly, there are situations, where it is impossible to list the conflicting interests. So, after all, the reasons excluding unlawfulness may be based on overwhelming, missing, or equal interests.

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[1] For a general introduction of the Lex Aquilia see H. HAUSMANINGER: *Das Schadenersatzrecht der Lex Aquilia.* Wien, 1990.; FRITZ SCHULTZ: *Classical Roman Law.* Oxford, 1951. pp. 587–592; FÖLDI ANDRÁS and HAMZA GÁBOR: *A római jog története és institúciói.* Budapest. 1996. pp. 555–558; FARKAS LAJOS: *A római jog történelme (Alapintézmények az elso alakulás szerint).* Kolozsvár, 1906. pp. 399–407, BUCKLAND MCNAIR: *Roman and Common Law (A Comparison in Outline).* Cambridge, 1936. p. 302.

[2] MOLNÁR IMRE: A jogellenesség és vétkesség kérdése a római jogban. In: *Tanulmányok Benedek Ferenc tiszteletére*, Pécs, 1996. p.209. About contractual and delictual liability in Roman Law, see MOLNÁR IMRE: *A római jog felelősségi rendje.* Szeged, 1993.

[3] NAGY FERENC – TOKAJI GÉZA: *A magyar büntetojog általános része.* Szeged, 1998. p. 147.

Since Roman Law mainly developed as case-law, lawyers – being true to their practical way of legal thinking[4] – did not set up the dogmatic framework of the above-mentioned reasons of justification, but in the light of the presented cases, it is beyond doubt that they constructed the criteria for the exclusion of unlawfulness

2. The reasons excluding unlawfulness in Roman sources

There are several cases in roman sources, where – as Prof. Molnár points out in his essay in honour of Prof. Benedek[5] - unlawfulness was excluded, although occidere or urere frangere rumpere are apparent.

- Paulus says that (D.9,2,45,4) *vim enim vi defendere omnes leges omniaque iura permittunt.*

So those who do damage because they cannot otherwise defend themselves are blameless, for all laws and legal systems allow one to use force to defend oneself against violence.

- According to Ulpian (D.47,10,13,1) *is qui iure publico utitur, non videtur iniuriae faciendae causa hoc facere.*

A person, who does something for the public good, will not be treated as having done it with a view to affront, for there is no wrong in such an act.

- Ulpian writes the following: (D.46,10,1,5) *quia nulla iniuria est, quae in volentem fiat.*

This is the case of consent.

- Ulpian: (D.9,2,7,4) *quia gloria causa et virtus non iniuriae gratia videtur damnum datum.*

If a man kills another in the collucatio or in the pancratum or in a boxing match, (provided that one kills the other in a public bout) the Lex Aquilia does not apply because the damage is seen to be done in the case of glory and valor and not for the sake of inflicting unlawful harm.

- Ulpian (D.9,2,9,4) At sport events the unavoidable conduct of the injured can also exclude iniuria. The typical case from The Digest, is: w*hen other people were already throwing javelins in a field and a slave walked across the same field and he was killed, the Aquilian action fails, because he should not make his way at an inopportune time across a field, where javelin throwing is being practised.*[6]

- *There is a special provision of law about the thief caught at night* (Gai. D.9,2,4,1) *The Law of the Twelve Tables permits one to kill a thief caught in the night, provided, one gives evidence of the fact by shouting aloud, but someone may only kill a person caught in such circumstances at any other time, if he defends himself, with a weapon, though only if he provides evidence by shouting.*

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[4] PÓLAY ELEMÉR: *A római jogászok gondolkodásmódja.* Budapest, 1988. p. 207.

[5] MOLNÁR: *Jogellenesség...* pp. 219–220.

[6] For further analysis of the case see MOLNÁR: *A római jog felelősségi rendje.* p. 132.

- We can find cases of emergency in The Digest. Some of them are so called fire cases, (D.43,24,7,4) others involve ships getting caught in vessels and trying to escape (D.9,2,29,3).

Trying to fulfill the requirements I set to myself with the title of this paper, in the following my main goal is to compare the Roman rules of justifiable self defence and inevitable necessity[7] and the applicable rules of the Hungarian Criminal Code (Btk.)

3. Self-defence

According to the Hungarian Criminal Code:

> *The person, whose act is necessary for the prevention of an unlawful attack against that person, his own goods, or those of other persons, or against the public interest, or of an unlawful attack menacing directly the above, shall not be punishable.* [Btk., Section 29, Par. (1)]

It is evident, that this principle originally stems from the vim vi repellere postulate, which says : *vim vi repellere cuique licet.* This axiomatical rule was handled by Roman lawyers as part of the *ius naturale*, as well as the *ius gentium.*[8] *Ius naturale est quod natura omnia animailia docuit*, which means that the law of natural reason covers the rules, that seem evident by natural reason for every human being.

Taking the situation of self defence into consideration, it is a typical example for the ius naturale, where the instinct of protecting one's life or property from an unlawful attack, using violence can be justified. This means that for the time of acting in self defence, the defending person is in some ways beyond the general princples of law, in other words, natural instinct comes first in such a situation.

In the case of self defence there is violence on both sides, but only one side is unlawful.[9] So to be more precise, there is an unlawful position against a lawful one. This is the case in The Digest, when A stabs B's slave, who is lying in ambush to rob him to death. (Gai.D.9,2,4 pr.)

> *If I kill your slave, who is lying in ambush to rob me, I shall go free, for natural reason permits a person to defend himself against danger.*

So, as it is the case today, lawful self-defence provided a position to disregard the requirements of law in defence of one's life. But there must be very strict limits to this beneficial legal situation, and such limits are carefully drawn in modern criminal codes and by modern criminal theory.

Accepting the modern theoretical limits of self defence as a framework, let us consider, which criteria are outlined for the person causing harm in self-defence in Roman Law.

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[7] See REINHARD ZIMMERMANN: *The Law of Obligations.* Cape Town, Wetton, Johannesburg, 1990. pp. 998–1004; ANDREAS WACKE: *Defence and necessity in Aquilian Liability.* 1987. 20 De Jure 83 sqq.

[8] D.43,16,1,27: *Vim vi repellere licere Cassius scribit, idque ius natura comparatur.* See WACKE: op. cit. p. 383 for the phylosophical background of the *vim vi repellere* principle.

[9] NAGY – TOKAJI: op. cit. p. 149., MAKAI LAJOS and TARR JÓZSEF: *Vázlat a Büntető Törvénykönyv (1978. évi IV. törvény) általános részének a bírósági fogalmazóképzés keretében történő megbeszéléséhez.* Budapest, 1997. p. 26.

Self-defence can only be justified between the offender and the defender. If innocent others get involved self-defence is no more lawful. Paulus says (D.9,2,45,4): ...if in order to defend myself I throw a stone at my attacker, and I hit not him, but a passer-by, I shall be liable under the Lex Aquilia, for it is permitted only to use force against an attacker.

In respect of the third innocent party involved, obviously lawful self-defence cannot be applied so there is iniuria in respect of the passer-by, who is in a lawful position as well as the defender, and modern law would most probably apply the rules for inevitable necessity to this situation. Another condition to the application of lawful self-defence is that it should be imminent. Roman Law follows this principle, because it considers force used against the attacker after the attack revenge, rather than self-defence. The above quoted section from Paulus continues: *...and even then only so far as it is necessary for self-defence and not for revenge.*

Another vitally important criterion of the lack of liability is that the chosen form of defence must be necessary under the given circumstances.

This sets two requirements towards the person in defence. The means has to be in proportion with the attack and if in the given situation there are several possible ways to avert the attack, the mildest has to be chosen. Naturally, proportionality cannot be universally defined , it should be verified in each and every case with careful attention of all the specific conditions. Nevertheless there is a universal principle, that if one's life is threatened, one is allowed to kill the attacker. With respect to proportionality there is an important rule in the Digest under Ulpian's name:

(D.9,2,5) *If someone kills anyone else, who is trying to go for him with a sword, he will not be deemed to have killed unlawfully and if for fear of death someone kills a thief, there is no doubt, that he will not be liable under the Lex Aquilia. But if, although he could have arrested him, he preferred to kill him, the better opinion is, that he should be deemed to have acted unlawfully (iniuria), and therefore he will also be liable under the Lex Cornelia.*

In this last case the person acting in self-defence failed to apply the principle of proportionality, because he could have chosen a milder way to protect himself.

Another example, where proportionality holds, is (Alf D.9,2,52,1) when a shopkeeper placed a lantern above his display counter and a passer-by took it down and carried it off. The shopkeeper went after him calling for his lantern , soon a brawl developed, in which the thief began to hit the shopkeeper with his whip with a spike on it, with which the shopkeeper pricked the eye of the thief. Alfenus says, that if the shopkeeper was provoked by the thief, the defence was proportionate, but if he had been the one to hit first, he would appear to be accountable for the loss of the eye.

In connection with proportionality modern criminal codes tolerate the special psychological and emotional status of the person acting in self defence, who can be frightened and overwhelmed by the attack.

The Hungarian Criminal Code says:

That person shall not be punishable either, who exceeds the necessary measure of prevention because he is unable to recognize it due to fright or justifiable excitement. The punishment may be mitigated without limitation, if the perpetrator is

restricted in recognizing the necessary degree of prevention by fright or justifiable excitement. [Btk. Section 29, Par. (2) and (3)]

If we take a close look at the second case mentioned in the text of Ulpian, cited above, it is apperant that the applicability of the Lex Aquilia failed when it was proven that the person acting in self defence exceeded the requirements of proportionality for fear of death (*...et si metu quis mortis furem occiderit...*).

In summary we can establish, that from The Digest of Justinian it is obvious, that all the principles, that are followed in modern criminal law concerning self-defence, were already outlined by Roman lawyers. Once again they are: (1) the unlawfulness of the attack, (2) the imminence and (3) the necessity of the defence, including the criteria of (3/a) proportionality and (3/b) the obligation to choose the mildest way of defence. Self-defence can only be justified on behalf of the person who had been attacked if all these elements concur.

4. Necessity

In the next part of my talk I would like to focus on the question of necessity as another kind of justification. In the Hungarian Criminal Code, under *Btk. Section 30, Par. (1),* necessity is defined in the following way:

The person who rescues his own person or goods or the person or goods of other people from a direct danger otherwise not preventable, or acts so in the defence of the public interest, shall not be punishable, provided that the occurrence of the danger is not imputable to him and his act causes a smaller injury than that for the prevention of which he made efforts.

While in the case of lawful self-defence there is unlawfulness against lawfulness, in the case of necessity there is a lawful position on both sides. As far as modern legal systems are concerned, the question arises, whether necessity excludes unlawfulness or only wrongfulness of the action.

The construct of the Hungarian Criminal Code only applies if inflicting minor injury averts a more serious one, because diverting the danger to some other person in a lawful position, brings about social benefit only in this case. The Swiss Criminal Code for example considers necessity as an exclusion of wrongfulness. And finally the German Criminal Code defines necessity excluding unlawfulness and wrongfulness separately.[10]

In one of these cases (D.9,2,29,3) Labeo writes, that

when a ship was blown by the force of the wind into the anchor ropes of another vessel and the sailors cut the ropes, no action should be allowed, if the vessel cvould be extricated in no other way, than by severing the ropes. In another case both Labeo and Proculus thought the same about fishermen's nets in which a fishing boat got caught.

[10] About the legal nature of necessity in an internatonal comparison see NAGY – TOKAJI: op. cit. pp. 155–156.

There are in fact two cases related to necessity presented by Ulpian. In the first one a boat was carried away by the wind and then tangled into the ropes of another ship. The crew of the boat entrapped cut the ropes but because it was the only possible way to save the boat, we cannot consider it illegal.

In the second case, which seems fairly similar, Proculus agreed with Labeo that if a fishing boat gets entangled in the nets of another one, and the crew can only free the boat by cutting the net, they cannot be held liable under the Lex Aqulia, provided that the crew had not caused the emergency.

In these cases Roman lawyers acknowledged necessity as a reason for excluding unlawfulness for the benefit of the person causing the damage.

If we are to draw a comparison between Roman law and present day legal practises, we should pay more attention to the conditions of establishing extreme necessity as they appear in the cited text.

The Hungarian Criminal Code – as it was shown in the case of justifiable self defence – prescribes that the emergency should be direct. Emergency can be considered direct if it threatens certain people or possessions and if the injury would possibly shortly ensue, provided that delaying the interference would make the prevention of the harmful result unlikely. It is beyond any doubt, that in both of the above cited cases of the Digest the two entrapped boats are threatened by imminent and direct danger. Moreover in the first case the crew are probably indangered, too, because the high winds point to the possibility of shipwreck.

In the first case the source of danger is the force of the wind (*vis venti*), which can be considered as vis maior in relation to liabilty (i.e. none can be held responsible) provided, however that the captain and the crew had taken every effort they were expected to take in order to avoid taking unnecessary risks.

When discussing the case, Wacke remarks that although there was no official weather forecast in Roman times, an experienced sailor was able to infer whether a storm was likely to break out, if he examined the skies.[11]

Searching for the cause of the emergency situation, besides *vis maior* it is necessary to examine the possibility of *imperitia*, as a specific form of *culpa*, which in this certain case means, that the captain might have decided not to sail on the basis of his expertise, experience and the insight expected of him, as a prudent and professional person.[12]

The lack of responsibility in the infliction of the source of danger was an essential condition to the exemption from liability, as our text points out: *...plane si culpa nautarum id factum esset, lege Aquilia agendum.*

The other issue to be examined when identifiing inevitable necessity, is the nature of the fending act. As we saw above Hungarian criminal law admits the necessity of such an act if the danger is imminent and cannot be fended in any other way.

Looking at the cited cases of the fishing boats, there is no need to prove the imminence of the danger, as it was discussed above. Ulpian describes the latter requirement as follows: *nullo alio modo... explicare se potuit.* Hereby he mentiones the requirement of the necessity of the act, which was an essential condition to justifiable self defence as well. In our modern understanding it means that a person engaging in

[11] WACKE: *op. cit.* p. 394.

[12] For the introduction of imperitia and infirmitas, as the two special forms of culpa see MOLNÁR: *A római jog felelősségi rendje*. pp. 163–166.

inevitable necessity carries out a formally illegal act, which however is necessary for avoiding danger, either because this is the only solution, or there may be other solutions, but they are for some reason are not applicable in the certain situation (e.g. they are less effective, or because delay would lead to more danger or to the direct possibility of the injury).

In the cases discussed the criterion of necessity holds, since cutting the ropes of the other ship, or the fishing net seems to be the only possible way of freeing the entangled boat.

It follows from the above that the person acting in inevitable necessity to fend off imminent danger is engaged in a deliberate act, to be precise his act is dolorous as a result of which – as we have seen – certain damage or grievance is inflicted. There is however one more condition to the exemption from liability, which, according to the Hungarian Criminal Code is that the preventive measure should inflict less harm, than the danger it was ment to avert would have done.

It is beyond any doubt that in the Roman cases cited the value of the fishing net or the ropes chould not have been compared to the value of the boat entangled, let alone the life of the crew, also endangered by the storm.

A ship constitutes far more value so necessity stands. In this case the crew of the vessel are not responsible for getting trapped and in their efforts to save the ship they were lawfully acting in a case of inevitable necessity, so any action under the Lex Aquilia would fail.

From the presented cases one has the impression that Roman lawyers looked at the conditions of inevitable necessity in a very similar manner to our modern understanding, concerning both the causes of the emergency and the means of the fending act as well as the legally acceptable results of such an act.

And now let us turn our attention to a case described in The Digest and consider the approach of Roman lawyers to inevitable necessity. In the case, where A pulls down his neighbour's house in order to save his own, we cannot say, that he applies lawful self-defence, since his neighbour did not inflict any unlawful attack on him. Nevertheless his action is not necessarily unlawful, because he acts in a case of emergency.

Necessity involves a hard choice between competing values, and a sacrifice of one to the other. This means, that the neighbour loses his house through A's action, although he himself did not commit any unlawfulness.

Naturally as is the case in lawful self-defence, the lack of unlawfulnes can only be established under certain special circumstances. The question of these circumstances was disputed among Roman lawyers. There are two possible ways to approach the problem.

First, if we examine the circumstances from an ex post facto point of view, pulling down the house is not unlawful, provided the fire in fact reached the neighbour's piece of land. Servius prefered this opinion (D.43,24,4,7).

Celsus approaches the case differently. He takes A's perspective, when he says (D.9,2,49) that there is no action under the Lex Aquilia, because he pulled down the adjoining house in the reasonable fear that the fire would reach his own house.

The Hungarian Criminal Code also takes reasonable fear into account under Btk. Section 30, Par. (2) and (3), where it says that:

That person is not punishable either, who causes an injury of the same or greater extent than the one for the prevention of which he made efforts, because he is unable to recognize the magnitude of the injury due to fright or justifiable excitement.
The punishment may be mitigated without limitation, if fright or justifiable excitement restricts the perpetrator in the recognition of the magnitude of the injury.

However, we should note, that the solution for the fire cases given by Roman jurisprudence cannot be applied generally for all cases. We can easily say that the neighbour's house was barely protected by the provisions of law.

But before we come to that hasty conclusion, we must take a short look at contemporary housing conditions. In some estates of ancient Rome houses were built extremely close to each other, so a fire could make devastating damage in these areas.

Only August established the body of the vigiles, who acted partly like a fire brigade.[13] So in this context a special approach is required, since, without a fire brigade anyone who had the courage to fight the fire must have been handled as a local hero, risking his own life in order to save the lives and properties of other people. In the above shown fire case we can say, that the neighbour was not only acting in necessity, but furthermore, he was causing damage in order to save the public interest as well, which in our modern legal understanding is an accepted reason for excluding material unlawfulness by itself.

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JOGOS VÉDELEM ÉS VÉGSZÜKSÉG A RÓMAI JOGBAN ÉS A MAGYAR BÜNTETŐ TÖRVÉNYKÖNYVBEN

A dolgozat olyan tényállásokat mutat be a Lex Aquilia által szabályozott esetkörből, melyeknél a törvény első részében szereplő *occidere*, illetve a harmadik részben szabályozott *urere frangere rumpere*, vagy dologrongálás formálisan megvalósul, de a szándékos elkövetés ellenére sem kerül megállapításra a cselekmény jogellenessége.

A szerző célja e jogesetek bemutatásán keresztül a történeti jogösszehasonlítás módszerének segítségül hívásával annak bizonyítása, hogy a római jog ismerte azokat a szituációkat, melyekben a modern büntetőjogi dogmatika azt mondja, hogy bár az adott cselekmény formailag jogellenes, a materiális jogellenesség bizonyos, a jog által konstruált okok alapján mégis hiányzik. Az elkövető felelősségre vonása tehát elmarad annak ellenére, hogy megölt valakit, vagy más súlyos sérelmet okozott.

Hangsúlyozandó, hogy a római jogi kazuisztikában nem találjuk meg tehát a jogellenességet kizáró okok dogmatikai rendszerét, mégis a jogesetek fényében rendkívül tanulságos áttekinteni, hogy a római jogászok milyen kritériumok fennállta esetén állapították meg a jogellenesség hiányát.

[13] According to the *Encyclopedia Britannica* CD ROM 1998, there was a devastating fire raging in Rome in 6. a.d. This had led to the establishment of the body of the vigiles, as part of many reforms of August.

A jogellenességet kizáró okok római jogi rendszerének felvázolását követően a dolgozat a jogos védelem és a végszükség szabályozásának mikéntjét teszi részletes vizsgálat tárgyává.

Az idevágó kázusok elemzése eredményeként levonható az a következtetés, hogy a modern büntetőjog által elfogadott alapvető követelmények a jogos védelem megállapításával kapcsolatban már a római jogászok számára ismertek voltak, nevezetesen: (1) jogos védelmi helyzet csak a támadó irányában állhat fenn, (2) a támadás jogellenessége, a védekezés (3) azonnalisága, és (4) szükségessége, ami magában foglalja (4/a) az arányosság és (4/b) a lehető legenyhébb elhárítási mód választásának követel-ményét.

A végszükség tekintetében a dolgozat szerzője azt a konklúziót vonja le, hogy a római jogászok a mai felfogásunkhoz nagyon hasonlóan látták a végszükség megállapíthatóságának feltételeit mind a veszélyhelyzet keletkezése, mind pedig az elhárító cselekmény és annak a jog által még tolerálható következményei tekintetében.

Végül a dolgozat egy némileg speciális, és a római jogtudósok körében sem egységesen megítélt, tűzvésszel kapcsolatos jogesetet mutat be, melynek megoldása mind a végszükség, mind a köz érdekében történt károkozás szabályainak segítségül hívásával elképzelhető.