

— TANULMÁNYOK —

PROPORTIONALITY IN EXTREME NECESSITY

Ervin BELOVICS
professor (PPKE JÁK)

1. The history of the provision of exigency

The fact that the central element of the extreme necessity is the conflict of interests was already recognized by the Roman law, such as Cicero raises the question that if, after a shipwreck there are two passengers on the beam and only one can be maintained by the beam, and therefore the two people's right to life collides: What rule should be established to this situation? Is there a right of the state to intervene at all?

The Roman law considered extreme necessity as clearly a civil legal problem and rated it amongst the injury. So everyone could help himself out “due to a storm disposal of goods from a ship”, “who in case of fire broke down other's house just to protect his own”, “if the ship stuck by alien ropes.”¹

The exigency problem has not escaped the attention of canon-lawyers. Principle from Gratianus, “*neces sitas non habet legem*”, meaning that need does not tolerate the law, prevailed in the case law as well, and although the exigency did not rule the unlawfulness of conduct out, but it was a very significant mitigating circumstance. However, some conceptual elements have already appeared, in so that the danger must be immediate, and that it can not come from fault of the saver in danger, and the rescue was defined as a duty, because “someone who would have been able to save a person from death and did not do so, he killed that person.”²

The medieval Germanic law also appreciated the existence of the exigency as a mitigating circumstance. In 1532 the Constitutio Carolina declared exigency if someone had to damage someone else's property in order to save his life (§ 166), while the German Penal Code from 1871 already provides an extremely precise definition of exigency.³

¹ Kálmán GERŐCZ: *Criminal Exigency*. Budapest, Zemplén Nyomda, 1914. 73–74.

² GERŐCZ op. cit. 79.

³ „The act shall not be punishable, if out of the scope of justifiable defence, the act was committed in a

In contrast, the Penal Code does not contain such a provision and the concept of “irresistible force” was used in an emergency situation.⁴

The Italian Penal Code of 1899 also considered the legal institution of exigency as a reason for exclusion of unlawfulness.

2. Legal Philosophy development

Grotius’s reasoning is that since the exigency does not live up to daily situation, so it can not serve as a base of the rule of law and because the rule of law is absent, the act in extreme necessity can not be punishable. Its position has also been extended to the possibility of damage to property assets provided that the act, the saving was not feasible any other way. “However, the effect of Carolina appears undoubtedly in his perception as he takes as nearly the only case of extreme necessity: the human life’s collision with property assets.”⁵

Fichte considered extreme necessity as a state, which is nothing else than returning to the state of nature in accidentally occurred hazardous moments, that is when the total social existence is still missing. In terms of the law the act in extreme necessity is indifferent – it is neither legal, nor illegal – because the nature makes it impossible at this time the predominance of the rule of law so natural forces must prevail. However, Fichte also points out that only that person who is in extreme necessity can help himself out because for the person who is not in an emergency the rule of law can not be considered terminated, so such a person can not help someone by an illegal act because he can not choose between two lives at his choice.

Kant’s subjective view had a significant impact on the development of the legal institution, whose gist is that the act setting out in exigency can not be considered legitimate, since it is contrary to the *categoricus imperativus*. Such conduct can not therefore be legitimate and not sinless (*impunibile* but not *inculpabile*)⁶, but because the person concerned could not lawfully act because of the irresistible compulsion must remain unpunible.

“As this alleged law should empower me that if my life is in danger I can take someone’s life who did not hurt anything. It is striking that in this matter the law must conflict with itself, because it is not about the case when someone unfairly attacks my life and I precede by that.”⁷

guiltless and no preventable in any other way exigency in order to save the life or limb of the offender or his dependant from an immediate danger.” (Section 54)

⁴ „The act shall not punishable, if it was conducted by the offender in such an exigency which endangers the offender or any other person with personal serious danger if he did not give any cause for that and if he could not have escapes in any other way.” (Section 49)

⁵ GERŐCZ op. cit. 112.

⁶ KANT: *Metaphysik der Sitten Der Philosophischen Bibliothek Band*. Leipzig 1919. 41.

⁷ KANT: *Basics of Morals’ Metaphysics (Outlines of Jurisprudence)*. Budapest, Gondolat, 1991. 33–332.

Kant believes that if the state would threaten the exigency act with punishment that would be ineffective because the threat of punishment could have significantly less power than the fear arising from extreme necessity.

Feuerbach who followed Kant accounts imputableness precluded in the case of someone who acts in extreme necessity, however if the ability of imputableness is excluded, the base of the punishment, the deterrence can not prevail.

According to Hegel's reasoning in a collision between a person's life being in ultimate threat, and "with other's legitimate property rights, the person can take a necessary right, but not as equity but as law because on one side there is the infinite injury of existence included a total injustice, on the other side there is only the violation of a certain limited existence of freedom which the law is also recognized as such, and the ability of the person suffering harm only in his property."⁸

Hegel concludes that the law for life has a right or primatus over the abstract law. Therefore, if stealing bread is required to maintain life, however this act violates another person's property, but if in a life-threatening situation that would not be allowed "it would be determined without law, and questioning his life would be negotiation of his whole freedom."⁹ In an emergency, therefore the law is finite and accidental, so when the collision of two rights takes place and only one can exist onwards, the lower value right is to be sacrificed, because from the principle of justice, who chooses the less injury of interest in such a situation, acts lawfully.

This theorem has been further developed by Hälschner that extreme necessity as right also should be extended to cases, when equal values or interests are in collision with each other.

To the second half of the 19th century that notion prevails which deems that exigency rules the unlawfulness of act out. Thus, according to Merkel we can speak about exigency only in the case when there are colliding lawful interests, but the offender's act enjoys protection of the law only when it was put up for protection of the greater interest. Like Merkel, Stammler recognises definitely the legality of the act in exigency, but only in the case of legal based colliding interests.

In summary, to the beginning of the last century, two issues are clearly clarified in relation to the legal institution of exigency. Namely, that the exigency rules out the unlawfulness of the act complying with statutory provisions and the injury caused during the rescue from emergency and the consequence could be caused by the emergency should be in some proportion.

3. Characteristics of the Hungarian legislation

Act No. 5 of 1878 (hereinafter referred to as Codex Csemegi) made it possible only to save the life in extreme necessity, but only for person in life-threatening situation and for his dependants.¹⁰ Analyzing the text of the law, Pál Angyal suggested that

⁸ HEGEL: *Base-line of Jurisphilosophy*. Budapest, Akadémia Kiadó, 1983. 144–145.

⁹ HEGEL op. cit. 145.

¹⁰ „The act shall not be punished if it was committed in a guiltless and no preventable in any other way

the concept of necessity already expressed the idea that the actual human act was inevitable, because it could not be done anything other than what was realised, because in emergency, exercising a right or fulfilling a duty is possible only if other's right is violated or our legal duty is failed to fulfill.

“The state of emergency is therefore the situation arose by accident, in which the person can save his right, fulfill his duty only if he or other person violates other's right, committing a crime by that.”¹¹

The conditions of extreme necessity under the terms of the Codex Csemegi are the following:

- direct life-threatening situation for the offender or his dependents
- the danger of life can turned away only by committing a crime.

However, if these conditions were met, because of the absence of unlawfulness, the criminal accountability of the person committing an act correspond to statutory provision was not possible.

Act No. 2. of 1950 (hereinafter referred to as Bta.) already defined the term of extreme necessity in detail.¹²

According to the rules of Bta. person acting in extreme necessity could act not only to protect to save his own or a dependent 's life, but even to protect public interest, or to save either his or other's life, physical integrity or goods. However, in causing the danger the fleeing person must have been innocent and the legal definition of proportionality also was appeared, that is, committed an act in extreme necessity is not punishable only if it does not cause greater injury than that for the prevention of which he made efforts. So Bta. made it possible to cause an injury as big as injury to turn away.

With regard to the issue of proportionality it is interesting to recall Miklós Kádar thoughts, “it should be noted that the act committed in extreme necessity, which seems to conflict with the objective law, is unpunishable in the Bta. even if the person causes the same harm as the one he tried to turn away. The Soviet criminal law regulates this question differently because it does not allow, for example extinction of other person's life in order to save the life of the person acting in extreme necessity. In fact, passing identical danger on other person and fleeing from danger by that is contrary to socialist morality. It is clear that this referred resolution of the Soviet socialist criminal law arises from the perception that was established by the socialist

exigency in order to save the life of the offender or his dependants.” (Section 80)

¹¹ PÁL ANGYAL: *Coursebook of Hungarian Criminal Law*. Budapest, Athenaum új Irodalmi és Nyomdai Rt., 1909. 439.

¹² Section 16 (1) The act is committed in extreme necessity if the offender saves either the public basic interest or the life or limb or properties of his or any other person from a direct danger that is no preventable in any other way.

(2) The act committed in extreme necessity is not 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.

(3) The extreme necessity cannot be established if taking on the danger was the duty by occupation of the offender.

revolution, the socialist humanity's principles of the Soviet patriotism and it is the tool of education to heroism. However, the new general part of our Penal Code in its referred provisions took into consideration that the development of the citizens of our people's democratic state is below the level of the development of Soviet citizens. However – in our opinion – the application of criminal law should be one which disciplines to heroism, increase the citizens' willingness to help each other."¹³

I think the above speak for themselves.

The Act No. 5. of 1961. clarified, explained the text of law¹⁴ but it did not change the essence of the regulations, so proportionality appeared to the same extent, and as the Kádár–Kálmán co-authors point out, “Here already the law – contrary to the provision of justifiable defence – accurately determines the extent of proportionality.”¹⁵ However, according to legal doctrine “like as justifiable defence, proportionality can not be considered as respects the threats to human's life.”¹⁶

The Act No. 4. of 1978 ¹⁷(hereinafter referred to previous Btk.), brought a major change about it. The active person in extreme necessity could only quit of criminal liability if his act caused a smaller injury than he aimed to prevent. The previous Btk. recognised lawful only the act that causes smaller injury, so causing the same injury developed from the dangerous situation, was against criminal law.

The proportionality appeared almost in all criminal codes and the legal doctrine also acknowledges its necessity. With regard to the proportionality issue, Kálmán Gerőcz points out “There is no doubt that the law should not hinder itself from its own enforcement, but the opposing right also wishes respect, which will be greater if the proportion between them is not equal.

¹³ Miklós KÁDÁR: *Hungarian Criminal Law. General Part*. Budapest, Tankönyvkiadó, 1953. 193.

¹⁴ Section 26 (1) The person who committed an act in extreme necessity shall not be punishable.
(2) The act is committed in extreme necessity if the offender saves either the public interest or the life or limb or properties of his or any other person from a direct danger that is no preventable in any other way, provided that the occurrence of the danger is not imputable to him and his act does not cause a greater injury than that for the prevention of which he made efforts.

(3) The extreme necessity cannot be established for the offender if taking on the danger was his duty by occupation.

¹⁵ Miklós KÁDÁR – Kálmán GYÖRGYI: *General Doctrines of Criminal Law*. Budapest, Közgazdasági és Jogi Könyvkiadó, 1996. 335.

¹⁶ Imre BÉKÉS et al.: *General Part of Criminal Law*. Budapest, Tankönyvkiadó, 1974. 181.

¹⁷ Section 30 (1) 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.

(2) That person is not punishable either who causes an injury of the same or grater 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.

(3) The punishment will be mitigated without limitation, if fright or justifiable excitement restricts the offender in the recognition of the magnitude of the injury.

(4) No emergency may be established to the benefit of the person, whose professional duty is the undertaking of exposure to danger.

So also this justifies the limitation of proportionality in an act in extreme necessity.¹⁸ Gerőcz expressed also the view that “How to set up this proportionality, the law can give only guidance to the judges but not firm rule.”¹⁹ Csemegei Codex – as I already mentioned – did not contain the proportionality criterion, but this – having regard to the text of the law only saving life from direct danger will be legitimate – did not cause any problem in the judicial practice, and it was possible to escape from life-threatening situation by sacrificing other’s life. As a result of the creation of the previous Btk., the Hungarian legislation came to the solution that to justify the turning away action causing lesser injury is a critical condition.

So, the requirement of proportionality appears either as a legal condition in some criminal codes or – according to the legal practice – the action which is clearly disproportionate response to turn away the danger is outside of the scope of extreme necessity.

The cases of so-called risk communities have significance in this problem. Risk community arises when more than one person gets in a position where their lives are in direct danger and there are two possible solutions. The one is that the persons concerned let the course develop to its natural end resulting everybody loses his life. The other solution is that by sacrificing one or more persons’ life, all the other persons survive. A shining example for this is the case when two alpinist connected to each other by ropes and one of them crashes, but the rope holds him in the air, but because of the conditions, it is necessary to pull with him down the other climber. The question arises as what is the criminal responsibility of the other climber who cuts the rope so as not to fall into the precipice together causing both climbers’ death.

As according to the former Btk.’s regulation, the condition of extreme necessity, so remaining unpunishable is the proportionality that is the harm caused by the act is less significant than the harm aimed to prevent, so in extreme necessity same harm should not be caused because causing this consequence is exceedance.

In the example brought up, the person saving his life from the life-threatening situation by extinguishing other’s life, so this kind of act was qualified as exceedance and because the fleeing person caused a harm as significant as he aimed to prevent, he avoids the criminal liability only if he was unable to recognise the magnitude of the harm due to shock or justifiable aggravation. In our example described this provision (Section 30. (2) of previous Btk.) can not be applied because the act of the cutting the rope, so perpetrator carried out act of homicide with the aim of escaping from death, so he was absolutely aware of the fact that his act causes harm of the same extent than the one for the prevention of which he made efforts.

The question is whether the law let choose between lives. If the cord is not cut, both persons necessarily lose their lives, while by committing the homicide behaviour, one of them escapes. Is the law hurt when the person getting to a risk community but having the possibility of choices chooses life and not death?

¹⁸ GERŐCZ op. cit. 253.

¹⁹ Uo.

There is a reasoning from the legal doctrine of the era according to which “The solution in the question that whether the caused harm or the threatening harm is a less extent (greater or equal), primarily the collation of property, property values gives the solution. The quantitative comparison hardly can be applied to human life: who saves his life from danger so that closes the way to escape for the other (he embarks to the lifeboat and there is no place for the other, he climbs out first from the burning tenth-floor apartment and the others were already reached by the fire), we believe that he can successfully rely on extreme necessity. Human life can not be ranked and everyone’s own life is the most important disproportionately.”²⁰

László M. Bodnar tried to answer this question referring to subjective characters. By analyzing the previous Btk. he concluded that the law does not recognize the legality of life saving at the cost of other’s life. “That is another question, however [...] that the fact is not correct that current law normally does not give possibility to exoneration if somebody in life-threatening situation saves his life by sacrificing other lives, simply because it goes against human nature. However, this contradiction can be eliminated only by codifying the criteria of requirement, so only in legislative way.”²¹

The legislature has done it in the codification of the Act No. 100 of 2012. (hereinafter referred to Btk.), when the provisions of extreme necessity were changed in such a way that the act of saving from danger may also cause the same harm.²²

So the Btk. excludes the criminality in the event of risk community. However it requires a comment that a number of legal scholars think that in those cases where one person’s life gets into danger at the same time together with another person’s life it is against good morality to evaluate human lives as arithmetic puzzles. So Welzel expresses his view that a legal reasoning according to which legal values are not only utilitarian, but the law build on the base of moral cultures can not be satisfied with such a mode of thinking. It is contrary to the Christian moral doctrine if we apply the principle of the lesser evil for the preservation of things when human lives are at stake. Roxin’s opinion that taking away the life of a person in an emergency, involving the occurrence of inevitable death, should be considered as arbitrary shortening of life on every account.

In his view, if the law permits killing of the helpless person, the position, according to which the incurable person’s life is under the protection of law, should be given

²⁰ Jenő LÁSZLÓ et al.: *Commentary of Criminal Code. First Book*. Budapest, Közigazgatási és Jogi Könyvkiadó, 1986. 96.

²¹ László M. BODNÁR: *The Extreme Necessity in the Criminal Law*. Szeged, JATE, 1981. 37.

²² Section 23 (1) 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 his act does not cause a greater injury than that for the prevention of which he made efforts.

(2) That person is not punishable who causes an injury of grater 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.

(3) No emergency may be established to the benefit of the person, if the occurrence of the danger is imputable to him or whose professional duty is the undertaking of exposure to danger.

up. If taking away someone's life is not unlawful in the situation of risk community, there is no answer to the question: Why the act killing of an incurable person in order to save other people's lives with his transplanted organs is considered as a crime? From this point of view, it has no relevance that the passive subject would have lived perhaps only minutes, hours, since the exposure of necessity of death is only a mental construction which is based on an assumption because in reality you never know in advance what will happen exactly in the future.²³

Roxin therefore rejects the possibility of application of exigency ruling out unlawfulness in the question of killing of life. Welzel's and Roxin's reasoning equally intends to provide guidance to the legislature but while Welzel on ethical grounds, citing the Christian moral doctrines rejects the extension of application of extreme necessity to the case of saving of life by taking other's life, Roxin comes to the same conclusion by comparative law.

It is evident that on the basis of the example of Roxin it is difficult to answer that question why does law protect the life of an incurable person if this passive subject is killed in order to save other people's lives by transplanting his organs.

In my opinion, there is only one view that can distinguish between the two cases brought up. Notably in extreme necessity the danger – as an element of the statutory provision – is objective, and absolute and also direct *id est* focusing a person limited in time and space, by that the occurrence of the instant offense is expectable. In contrast, the incurability is subjective and – quite often – relative. However, in any case, the determining difference is that the time of death is uncertain, even in the case of an agonizing person. Although Roxin does not attach importance to this, but the legislature had to take this, and the differences described as a basis when it decided the legal designation of the scope of the proportionality.

In my view, the legislature made the right decision because the law can not expect self-sacrifice from anyone, and its absence can not be punished.

²³ ROXIN: *Höchstrichtliche Rechtsprechung zum Allgemeinen Teil des Strafrechts*. München, Beck, 1998. 168–169.