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### **Thoughts on the relation between the right to life and the reasons for excluding criminal responsibility\***

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#### 1.1. Preface

The right to life, which protects human life being the greatest value, is a basic constitutional right in modern civil democratic states. In a possible hierarchy of basic rights, the right to life would be set definitely among the most valuable rights on the top of such a hierarchy. In modern societies, the acknowledgement and the protection of this right has unquestionably absolute priority and any acts against human life are strictly sanctioned by criminal law. Despite this fact, the issue of the possibility of limiting the right to life may emerge in several cases.<sup>1</sup>

In this essay, I will present how the right to life has been included in the Constitution and I will mention the innovations introduced by the Fundamental Law, then I will present the relation between self-defense and necessity both being reasons for excluding criminal responsibility and the right to life.

Finally, I will draw my conclusions whether in the light of the reasons for excluding criminal responsibility, the right to life is a basic right that may be limited or not.

#### 1.2. Human life and dignity in the Constitution and the Fundamental Law of Hungary

The Constitution of 1989,<sup>2</sup> discussed the part about human dignity at the beginning of the chapter: “*Basic rights and obligations*”: „*In the Republic of Hungary, everyone shall have the inherent right to life and to human dignity. No one shall be arbitrarily denied of such rights.*”<sup>3</sup>

In the Fundamental Law of 2011, human dignity is mentioned in several passages. First, it appears in the preamble thereof as follows: „*We hold that human existence is based on human dignity.*” Secondly, it appears in Chapter “*Freedom and responsibility*” Article II: *Human dignity shall be inviolable. Every human being shall have the right to life and human dignity; the life of the fetus shall be protected from the moment of conception*”. Then Section (3) of Article XVII sets out as follows: „*Every employee shall have the right to working conditions which respect his or her health, safety and dignity.*” Finally, in Section (4) of Article 37 it is stated as follows: „*As long as the state debt exceeds half of the Gross Domestic Product, the Constitutional Court [...] may review the Acts on the central budget, the implementation of the central budget, central taxes, duties and contributions, customs duties and the central conditions for local taxes for conformity with the Fundamental Law exclusively in connection with the rights to life and human dignity [...] and it may annul these Acts only for the violation of these rights.* This means that the Constitutional Court has

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\* A tanulmány az Igazságügyi Minisztérium jogászképzés színvonalának emelését célzó programjai keretében valósult meg (IX -14/6/2/2017. iktatószámú szerződés).

<sup>1</sup> Paulovics Anita: Az élethez való jog korlátozhatósága, [The possibility of limiting the right to life], Publicationes Universitatis Miskolcensis. Sectio Juridica et Politica, (2007.) XXV/2., 415.

<sup>2</sup> Act XXXI of 1989: on the amendment of the constitution that renewed Act XX of 1949 regarding its content.

<sup>3</sup> Act XX of 1949: Section of Article 54.

limited powers, as the constitutional body has made the revision of the laws on the central budget subject to certain conditions and the only exceptions of this limit have been the protection of human dignity or some further fundamental rights. Other rights concerning dignity, however, such as the protection of privacy, prohibition of torture, inhuman or degrading treatment or punishment and especially equality before law and prohibition of discrimination were excluded from the scope of any possible constitutional revision.<sup>4</sup>

The Fundamental Law states that all the fundamental rights shall be inviolable and inalienable.<sup>5</sup> This provision is of particular importance as the Fundamental Law does not include the statement of the Constitution that “*everyone shall have the inherent right to life and to human dignity. No one shall be arbitrarily denied of such rights*”<sup>6</sup>. With no consideration of Section (1) of Article I, we could believe that the right to life and the right to human dignity are more unprotected than before.<sup>7</sup>

If we continue to review these two sources of law in terms of their contents, we can state that Article II of the Fundamental Law has a more universal start. In accordance with the wording of the right to life and human dignity, everyone shall have such a right, while the geographical limits regarding the applicability of such rights, namely the Republic of Hungary, were designated by Article 54 of the Constitution. This phrasing emphasizes the parties affected, the individual and the (Hungarian) state as an obligor against such an individual. This division of roles does not definitely appear in the Fundamental Law and the role of the Hungarian state as an obligor is rather blurred.<sup>8</sup> Another difference between both documents is that in the Constitution, the right to life and the right to human dignity are set forth as everyone’s inherent right, however, the Fundamental Law does not include such a limitation as it does not link human dignity to individual existence as closely as the Constitution did before. What is more, the Fundamental Law has reversed the previous order between life and human dignity. The Constitution has set out the right to life in the first place, however, the separate first sentence of the Fundamental Law says that “*human dignity is inviolable*”. That can be considered as a significant change because the Fundamental Law reverses the relation between life and dignity. On the basis of the spirit of the Constitution, human existence or human life was the base for human dignity but the Fundamental Law states the inverse thereof giving a normative value to it: “*We hold that human existence is based on human dignity*”.<sup>9</sup> Thus, the Fundamental Law establishes a justifiable image of man, according to which human dignity can make human life valuable.

In view thereof, it will be the duty of the Constitutional Court in its future practice to harmonize the old and new values or to eliminate the dangers connected with the paradigm formulating also new expectations.<sup>10</sup>

## 2.1. Relation between the right to life and the reasons for excluding criminal responsibility

It is a main duty of criminal law to enforce the right to life by sanctioning crimes against the life of a person, so it is necessary to demonstrate the protective function of this branch of law. The basic objective of criminal law is to protect the normal functional mechanisms of the areas of life and not to elaborate such mechanisms, in other words, to protect the man’s inviolable and inalienable rights. This protective mechanism comes into action when some dysfunctionality can be experienced in a life situation. Criminal law considers the behaviors in these cases as a crime and attributes penal sanctions if there is no valid

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<sup>4</sup> Dupré, Catherine: Az emberi méltóság a 2011-es magyar Alaptörvényben, [Human dignity in the Hungarian Fundamental Law of 2011], Fundamentum, 2011. (15. évf.) 4. 29.

<sup>5</sup> Fundamental Law, Chapter I Section (1)

<sup>6</sup> Act XX of 1949: Section (1) of Article 54

<sup>7</sup> Deli Gergely-Kukorelli István: Az emberi méltóság alapjoga Magyarországon, [The basic right to human dignity in Hungary], Jogtudományi Közlöny, 2015. (70. évf.) 7-8. 340.

<sup>8</sup> Deli Gergely-Kukorelli István: work cited above 339.

<sup>9</sup> Fundamental Law, National Avowal

<sup>10</sup> Deli Gergely-Kukorelli István: work cited above 347.

reason for excluding criminal responsibility.<sup>11</sup>

As far as the content and the form are concerned, the concept of crime includes penal unlawfulness in terms of criminal law. If an act is not unlawful or it is unlawful but there is a valid ground for exclusion, it means it is not unlawful in terms of criminal law.<sup>12</sup>

In the Hungarian legal system, self-defense and necessity are regulated in the General Part of the Hungarian Criminal Code (Btk.). The basis of their conformity with the legal system is that in terms of ontology, they do not represent any danger<sup>13</sup>, in other words, they are compatible with human nature. Both grounds for exclusion share a particular characteristic that they are special situations where there is a conflict among values and in many cases, certain acts, which otherwise violate the right to life, can be justified when values are weighed up.<sup>14</sup>

### 2.1.1. Self-defense and the right to life

On the basis of the earliest sources of legal history, it can be stated that the right to self-defense can be considered as one of the mankind's ancient rights. It existed as self-help when the state's punitive power did not exist and such behaviors were not considered as a private revenge.<sup>15</sup>

In the decision no. 23/1990 of the Constitutional Court, the issue of self-defense is discussed in detail in the concurring opinion of László Sólyom regarding the fact that „the abolition of capital punishment requires the revision of the entire penal system. [...]The uniform approach to right to life and dignity has indeed made a new explanation for justifiable defense unavoidable, at least in cases where the person attacking life is killed.”<sup>16</sup> Sólyom draws the conclusion that the right to life cannot be restricted and in self-defense, necessity or under the orders of a principal, a condition beyond the law, which he calls a natural condition, develops. This situation requires a choice between lives and it is not a human right but the natural laws that are also valid for animals are applicable. I personally cannot agree with this view as I believe it is rather difficult to consider a situation to be beyond the law if in a constitutional state, the lawfulness of a situation is guaranteed by law. On the other hand, it has been a statement accepted in practice for a long time that courts did not examine proportionality for attacks against the life of a person, in other words, such an attack could be even prevented by killing the attacker. It is difficult to declare that the courts involved in the given legal proceedings acted like that because they wanted to give approval of killing somebody under certain circumstances by acknowledging this situation to be beyond the law. This was rather an approval for the victim or the person acting in support of the victim and if the assailant threatened the victim's life, such an attack can be prevented even by killing the assailant.<sup>17</sup>

The Fundamental Law has integrated a significant innovation in the field of self-defense by raising it to the level of a basic right. In accordance with Article V „*everyone shall have the right to repel any unlawful attack against his or her person and/or property, or one that poses a direct threat to the same, as provided for by an Act.*” The right to life can be restricted in attacks against the life of a person. It is important that in accordance with

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<sup>11</sup> Mészáros Ádám Zoltán: Az élethez való jog a jogellenességet kizáró okok tükrében, [The right to life in the light of the reasons for excluding criminal responsibility], *Jogelméleti szemle*, 2013. 1. 96.

<sup>12</sup> Mészáros Ádám Zoltán: Gondolatok az élethez való jog korlátozhatóságának kérdéséről, [Thoughts on the issue of the possibility of limiting the right to life], *De iurisprudentia et de iure publico*, 2013. (7. évf.) 1. 4.

<sup>13</sup> Tokaji Géza: A bűncselekménytan alapjai a magyar büntetőjogban, [The basics of crime science in the Hungarian criminal law], KJK. Budapest, 1984. 245.

<sup>14</sup> Mészáros Ádám Zoltán: Az élethez való jog a jogellenességet kizáró okok tükrében, [The right to life in the light of the reasons for excluding criminal responsibility], 99.

<sup>15</sup> Mészáros Ádám Zoltán: Gondolatok az élethez való jog korlátozhatóságának kérdéséről, [Thoughts on the issue of the possibility of limiting the right to life], 4-5.

<sup>16</sup> Decision 23/1990. (X. 31.) of the Constitutional Court.

<sup>17</sup> Ujvári Ákos: A jogos védelem, [Self-defense], *Ügyvédek lapja*, 2010. (49. évf.) 2. 36.

the Constitution, the old version of Btk.<sup>18</sup> and Directive no. 15 of the Supreme Court, it was beyond any doubt that an unlawful attack against the life of a person could be repelled even by killing the attacker as the legal objects to be protected were homogenous, thus they are comparable.

The legal objects to be protected will not be always the same. It is especially true for unlawful attacks against property “only” or against public interest as such attacks can be repelled mostly if the facts provided by the relevant law concerning the crimes against physical integrity occur. The problem is if there is an attack against property but not against the life of a person is repelled by assault, it is nonsense from a conceptual aspect to expect a proportional protection from the person in a situation of self-defense due to the heterogeneity of the adverse legal objects.<sup>19</sup>

Property rights are on the lowest level of the hierarchy of the values protected by the Fundamental Law and the reason for it is that, with few exceptions, property rights can be expressed in monetary terms, consequently, they can be repaired if they are violated. Assets can be replaced, so it would be most justified to require proportionality especially in this case, which cannot be required due to the difference between legal objects.<sup>20</sup> Act C of 2012 (hereinafter referred to as Btk)<sup>21</sup> or BJE no. 4/2013<sup>22</sup> do not provide any guideline concerning the borderlines of repelling attacks against property only. The great legal scientists in the last century held it is a pure moral requirement that the repelling behavior shall fulfil a requirement of proportionality to a certain extent for attacks against property only, however, today, legal literature has a common approach by saying that it is definitely unacceptable to kill the attacker in attacks against property only.<sup>23</sup> However, the Supreme Court took a decision contrary to this approach when a defendant, who tried to get back his bag stolen by causing the attacker’s death, was acquitted of all charges referring to self-defense.<sup>24</sup>

The new Btk. has introduced the institution of so-called situational self-defense. It states an irrebuttable presumption that if an unlawful attack under certain circumstances or in a certain way is against the life of the victim, the requirement of proportionality shall not be fulfilled, so such an attack can be repelled even by killing the assailant. I do believe this is particularly questionably because this irrebuttable assumption is valid for the behavior of a person intruding into a flat at night, in other words, the fact of intrusion can be assumed as an attack against life, which provides a reason for killing the assailant. I agree with the approach, which says it is correct to strengthen the victim’s position, but this view fails to consider proportional tools, so it would be more appropriate to allow judicial discretion in these cases.<sup>25</sup>

## 2.1.2. Necessity and the right to life

Necessity is one of the least discussed issues in the legal literature.<sup>26</sup>

Acts of necessity have been adjudicated differently from self-defense in terms of criminal law or morally,

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<sup>18</sup> Act IV of 1978: on the Criminal Code

<sup>19</sup> Ujvári Ákos: Az élethez való jog és a jogos védelem összefüggései, [Connections between the right to life and self-defense], *Iustum Aequum Salutare*, 2006. (2. évf.) 1-2. 91.

<sup>20</sup> Ujvári Ákos [2006.]: work cited above. 94.

<sup>21</sup> Act C of 2012: on the Criminal Code

<sup>22</sup> Ujvári Ákos: A jogos védelem és az arányosság kérdései a 4/2013. Büntető jogegységi határozat tükrében, [The issues of self-defense and proportionality in the light of the resolution 4/2013 for the uniformity of the criminal law], *Magyar jog*, 2014. (61. évf.) 4. 215.

<sup>23</sup> Belovics Ervin: A büntetendőséget kizáró okok, [Reason for excluding criminal liability], HVG-Orac Lap-és Könyvkiadó, Budapest, 2009. 118-119.

<sup>24</sup> The written decision of the Supreme Court was not available at the time when this manuscript was concluded (18 December 2017).

<sup>25</sup> Mészáros Ádám Zoltán: Gondolatok az élethez való jog korlátozhatóságának kérdéséről, [Thoughts on the issue of the possibility of limiting the right to life], 7-8.

<sup>26</sup> Gerőcz Kálmán: A büntetőjogi végszükség, [Act of necessity in the criminal law], Grill, Budapest, 1914. 24.

mainly in view of allowing the restriction of the right to life.<sup>27</sup>

Compared to the previous versions, the new Btk. introduced a change in the regulation of necessity as the act itself is examined and not the attacker acting in necessity when a decision is taken on the existence of any obstacle to culpability. The necessity according to the second paragraph regulates the acts exceeding necessity (in view of proportionality only) where the act is a behavior deemed as a threat to society but it cannot be punished due to the attacker's legitimate situation. As far as the scope of legal objects to be protected is concerned, the new Btk. has preserved the three previous groups to be protected such as persons, assets and public interest.<sup>28</sup> According to the determination by József Földvári, public order, public safety, public tranquility, the smooth functioning of public administration and judicial system as well as political climate can be involved into the scope of public interest.<sup>29</sup>

The greatest innovation of new Btk. is the change in the extent of proportionality concerning the conduct to avert an attack. Causing the same harm is considered as a reason excluding criminal responsibility by the legislature, which means that proportionality to an appropriate extent shall be assessed only if there are the same legal objects such as life against life or property against property. In different cases, there is a quality conflict where the interest protected by a more significant right shall prevail.<sup>30</sup>

In jurisprudence, there are two kinds of acts of necessity, namely risk pool and risk transfer. In the first case, two rights are at risk that both are destroyed or one survives sacrificing the other one so the same or another right is protected by causing the same harm.<sup>31</sup> Ferenc Nagy mentions a case<sup>32</sup> when a person throws another person from the airship to avoid crash thus he escape death as there is no overweight any more. A conflict of life between mother and fetus can be a risk pool situation when the risk can be eliminated if the life of one person is saved due to an intervention in accordance with medical rules.<sup>33</sup> In this case the possibility of restriction of the right to life can be justified. In transfer of risk the situation is different. It is true that self-sacrifice cannot be expected of anybody, but the risk is transferred to a person who was not at risk before so the forced choice between both lives exists only due to such a transfer. In the light of this, the person who transfers emergency has a higher responsibility.<sup>34</sup>

Section (3) of the provision on necessity included in the new Btk is to be mentioned hereby that is about persons who cannot refer to necessity because it is their duty to assume risks due to their jobs. According to Ferenc Gárdus the person who assumes responsibility expressly or by a certain behavior cannot refer to necessity against the person regarding whom he assumed such responsibility.<sup>35</sup>

For soldiers, assuming responsibilities is replaced by higher aspects of the state. In decision no. 46/1994 of the Constitutional Court,<sup>36</sup> the issues of Act CX of 1993 on national defense not in force actually raising certain dilemmas of constitutionality were reviewed. One of the proposers challenged among others the provision relating to offering the soldiers' own life included in the soldiers' oath, according to which they cannot be exempted from liability due to self-defense or necessity and he believed that violates among others the right to life and human dignity. According to the Constitutional Court, this provision

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<sup>27</sup> Mészáros Ádám Zoltán: A végszükség szabályozásának alakulása, tekintettel az új Btk.-ra, [The history of the regulation of necessity, with regard to the new Btk.], *Jogelméleti szemle*, 2012. 4. 88.

<sup>28</sup> Mészáros Ádám Zoltán [2012.]: work cited above. 99.

<sup>29</sup> Földvári József: *Magyar Büntetőjog Általános rész*, [Hungarian Criminal Law General Part], Osiris, Budapest, 1997. 127.

<sup>30</sup> Mészáros Ádám Zoltán [2012.]: work cited above. 93.

<sup>31</sup> Mészáros Ádám Zoltán [2012.]: work cited above. 93.

<sup>32</sup> Nagy Ferenc: A végszükségről európai kitekintéssel, [About necessity with a European vision], In: Györgyi Kálmán special edition, KJK, Budapest, 2004. 438.

<sup>33</sup> Mészáros Ádám Zoltán: Gondolatok az élethez való jog korlátozhatóságának kérdéséről, [Thoughts on the issue of the possibility of limiting the right to life], 9.

<sup>34</sup> Mészáros Ádám Zoltán: Gondolatok az élethez való jog korlátozhatóságának kérdéséről, [Thoughts on the issue of the possibility of limiting the right to life], 9.

<sup>35</sup> Gárdus Ferenc: A végszükség a magyar büntetőjogban, [Necessity in the Hungarian criminal law], Ludvig Ny., Miskolc, 1938. 61.

<sup>36</sup> Decision 46/1994 (X. 21.) of the Constitutional Court.

does not violate the Constitution. With reference to the decision on capital punishment, it stated that the essential substance of this right is deemed as an unrestricted basic right but the reasons thereof included the statement as a base that a soldier does not have to sacrifice his life but has to assume the risk of losing his life, which is not a provision that violates the Constitution.

### 3. Summary

In a possible hierarchy of basic rights, the right to life would be set definitely among the most valuable rights on the top of such a hierarchy in modern civil democratic systems.

In Hungary, the wording of the Fundamental Law demonstrates that Hungary acknowledges and protects the right to life of every human being but contrary to the Constitution, reversing the order, it acknowledges human dignity in the first place as the basic right adding value to life.

Self-defense and necessity both being reasons that exclude criminal responsibility are definitely limits of the right to life. The innovation introduced by the Fundamental Law is that self-defense has been raised to the rank as a basic right. It was beyond any doubt in the Constitution and the old Btk. that an unlawful attack against the life of a person can be prevented even by killing the assailant. There is a problem, however, if the legal interests involved and the legal objects are heterogeneous, which is true for attacks against property only. A special case of the situational self-defense introduced by the new Btk. is especially problematic, which approves to kill the person intruding into a flat illegally at night. In this case, it is not clear whether the attack was against life or assets, I do believe it would have been more appropriate to allow judicial discretion. Another problem concerning necessity is the assessment of persons having a certain job as the persons whose responsibility is to assume a risk due to their job are precluded by the law from the scope of this right. The Constitutional Court has an opinion that the provision does not violate the Constitution because the law does not expect that anybody sacrifice his life but he assumes the risk of the possibility of losing his life.

#### Gondolatok az élethez való jog és a jogellenességet kizáró okok viszonyáról – Összefoglaló

A modern polgári demokratikus berendezkedésű államokban az élethez való jog alkotmányos alapjog, mely a legnagyobb értéket, az emberi életet védi. Bár e jog elismerése és védelme megkérdőjelezhetetlen a modern társadalmakban, mégis számos esetben merülhet fel az élethez való jog korlátozhatóságának problematikája.

*Munkámban arra a kérdésre kerestem a választ, hogy az élethez való jog a jogellenességet kizáró okok tükrében korlátozható alapjognak tekinthető-e, avagy sem.* Miután megvizsgáltam e jog megjelenését az Alkotmányban, illetve az Alaptörvényben, illetve megvizsgáltam a kapcsolatát a jogos védelemmel és a végszükséggel, arra jutottam, hogy ezek a jogellenességet kizáró okok kétség kívül az élethez való jog korlátait jelentik.

Az Alaptörvény újítása, hogy a jogos védelmet alapjogi szintre emelte. Az Alkotmány és a régi Btk. hatálya alatt sem volt vitás, hogy az élet ellen irányuló jogtalan támadás a támadó életének kioltása árán is elhárítható. A problémát az jelenti, ha az egymásnak feszülő jogi érdekek, a védett jogi tárgyak heterogének, mely eset fennállhat a tisztán vagyon elleni támadások esetén. Különösen problematikus az új Btk. által bevezetett szituációs jogos védelemnek az az esete, mely felhatalmazást ad a lakásba éjjel történő jogtalan behatolás esetén a behatoló életének kioltására. Mivel ebben az esetben nem tisztázott, hogy a támadás az élet, avagy a vagyoni javak ellen irányul, véleményem szerint helyesebb lett volna meghagyni a bírói szabad mérlegelés lehetőségét.

A végszükséggel kapcsolatban a bizonyos hivatást űző személyek megítélése a problematikus, ugyanis a törvény kizárja e jog hatálya alól azokat, akiknek a veszély vállalása foglalkozásuknál fogva kötelességük. Tekintettel arra, hogy mind a jogos védelem, mind a végszükség megengedhetőségének indoka az, hogy az emberi természettel összeegyeztethető, jómagam nem látom indokát annak, hogy ebből a jogból bárki is ki legyen zárva.

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Act XXXI of 1989: on the amendment of the Constitution

Act C of 2012: on the Criminal Code

Decision of the Constitutional Court used for this essay:

Decision of the Constitutional Court 23/1990 (X. 31.)

Decision of the Constitutional Court 46/1994 (X. 21.)