

Justifiable Defence: A Comparison of Polish and Hungarian Solutions with an Outlook on the COVID-19 Pandemic

Abstract

The main question which this article seeks to answer is what justifies justifiable defence in substantive criminal law; what is the main reason for the existence of this exclusion of criminal liability? The focal notion of this paper is a presumption, according to which the justifications for the existence of justifiable defence are mostly self-preservation and natural law. We choose to compare the Polish and Hungarian solutions because of the historical and social similarities between Poland and Hungary (particularly in terms of the post-socialist characters of these countries) and the fact that, at least according to the present authors, the question of the justification of this legal institution was, arguably partially, resolved in Hungarian law. Finally, according to the COVID-19 pandemic that arose in 2020, we will observe in a separate chapter whether criminal liability would be excluded by justifiable defence in any cases of transmission of coronavirus.

Keywords: comparative criminal law, coronavirus, justifiable defence, obstacles of criminal liability, pandemic

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I Introduction

The subject of this article is a comparison of Polish and Hungarian solutions concerning the institution of justifiable defence (defence against an assault on a legally protected interest also known widely as self-defence). The main question which this article seeks to answer is what justifies justifiable defence in substantive criminal law; what is the main reason for the existence of this obstacle to criminal liability? The focal notion of this paper is a presumption that the justifications for the existence of justifiable defence are mostly self-preservation, and natural law.

The lateral propositions of this article are the following: 1) the institution of justifiable defence has been regulated in a very similar manner in the Polish and Hungarian legal orders; 2) the justification for the existence of justifiable defence is identical in Poland and Hungary; 3) the question of the justification for the existence of justifiable defence has been, at least partially, explicitly resolved in the Hungarian law; although the expansion of this legal institution has been uninterrupted in Hungary in the last decade; 4) in Poland, there is no explicit answer to the question of what is the justification of justifiable defence.

We choose to compare the Polish and Hungarian solutions because of the historical and social similarities between Poland and Hungary (particularly in terms of the post-socialist characters of these countries) and the fact that, at least according to the present authors, the question of the justification of this legal institution was, arguably partially, resolved in Hungarian law. Therefore, the comparison of Polish and Hungarian legal resolutions may be an additional argument in favour of particular views for Polish authors, and perhaps even a model for adopting new legal methods. For Hungarian academics and lawmakers, in turn, this analysis might be a valuable and synthetised source of information on legal answers used in Poland.

Finally, according to the COVID-19 pandemic that arose in 2020, we will observe in a separate chapter whether criminal liability would be excluded by justifiable defence in any cases of transmission of coronavirus.

II Research Method

In this article, the authors first made a comparison of legal regulations in Poland and Hungary concerning justifiable defence, and second showed the similarities and differences between them.

As part of the project, the authors decided to use a model of the comparative process developed for the use of comparative legal literature by Zweigert and Kötz. As a consequence, the process of comparing Polish and Hungarian solutions will be divided into five stages: 1) formulating the problem; 2) choosing material for the comparison; 3) proper comparison (an objective description of selected legal concepts and their comparison, using

assessments of them in the categories of variability, similarity and identity); 4) building a system that takes due account of the comparison's results (creation of a new legal institution or modification of an existing one); 5) a critical assessment of the results obtained by means of comparison.¹

The main research method used in this work is a legal-dogmatic approach. Thus, the comparison of Polish and Hungarian legal solutions concerning justifiable defence was made (primarily) through a comprehensive analysis of the normative material which refers to all the questions mentioned, particularly through the analysis of legal sources as 1) the Polish Penal Code (the Act of 6 June 1997 the Penal Code, Journal of Laws from 2019, item 1950, as amended, hereinafter 'the Polish Penal Code'); 2) the Constitution of the Republic of Poland dated 2 April 1997 (Journal of Laws No. 78, item 483, as amended, hereinafter 'the Polish Constitution'); 3) the Hungarian Penal Code; and 4) the Hungarian Fundamental Law.

It is worth mentioning that such a textual approach (formal-dogmatic or legal-dogmatic approach) is distinguished from and opposed to the contextual approach, because it is limited to the given text (textualism), whereas the contextual approach also considers the surrounding conditions and environment of the text (contextualism).² There may be doubt whether this approach is justified. It should be noted that, as Kozak correctly indicates, 'It is said that its [the textual approach's – KB] characteristic feature is textualism (limiting the analysis to the text itself) while the basis for a "typical" interpretation usually is contextualism, therefore grasping the interpreted text through a complex structure of social factors related to its creation and reading – so at different moments of the existence of the text'.³ This is particularly visible on the ground of the derivative concept of legal interpretation by Zieliński.⁴ This concept assumes that the functional (and systemic; the latter only if the legal text is not explicit) interpretation directives should always be considered (regardless of whether the legal text is explicit or not). Therefore, this concept was used to conduct the research. Naturally, it is not the only concept of legal text interpretation, not even in Polish legal science (see *inter alia* the traditional concept of interpretation by Waśkowski; the constructive concept of interpretation by Frydman; the semantic intensional concept of interpretation by Wróblewski; the semantic extensional concept of interpretation by Hertrich-Woleński; the juridical concept of humanistic interpretation by Nowak; the computational concept of interpretation by Studnicki; the LEVEL concept of interpretation by Sarkowicz or the argumentative concept of interpretation by Morawski). Nevertheless, the derivative concept of legal interpretation, according to the present authors, describes

¹ See Roman Tokarczyk, *Komparatystyka prawnicza* (Wolters Kluwer 2008, Warsaw) 70–71. For more, see Konrad Zweigert, Heinz Kötz, *Introduction to Comparative Law* (Oxford University Press 1998, New York).

² See Tokarczyk (n 1) 74.

³ Artur Kozak in Andrzej Bator (ed), *Wprowadzenie do nauk prawnych. Leksykon tematyczny* (Wolters Kluwer 2012, Warsaw) 15–16.

⁴ For more, see Maciej Zieliński, *Wykładnia prawa. Zasady, reguły, wskazówki* (Wolters Kluwer 2012, Warsaw).

the course of interpretation of a legal text most comprehensively and accurately, and is integrated with other concepts of interpretation, which was an important argument in favour of using it.⁵

III Justifiable Defence in Polish Law

According to Article 25 section 1 of the Polish Penal Code, anyone who, in justifiable defence, repels a direct illegal attack on any legally protected interest is not deemed to have committed an offence. Thus, Article 25 section 1 of the Polish Penal Code indicates that if a person commits an act punishable under the law (thus demonstrates behaviour displaying the characteristics specified under criminal law as unlawful; see Article 115 section 1 of the Polish Penal Code), that person shall not face criminal liability due to the commonly accepted thesis that such situations are considered excluded from (or impossible to assign as) unlawful behaviour.

Concurrently, the analysed regulation shows that, for exclusion of the criminal liability of the perpetrator to be possible on the grounds of the institution of justifiable defence, several conditions must be met. More specifically 1) there has to be an assault on a legally protected interest, thus an attack directed at that interest; 2) the assault must be factual, meaning that the assault has to take place in reality and not be the result of a mistaken impression of a person (although in the latter case, it is possible to exclude criminal liability of the perpetrator but only on the grounds of circumstances in which liability cannot be attributed); 3) the assault must be an unlawful assault, meaning that the person's behaviour that led to the assault constituted a violation of a norm sanctioned in criminal law or other sanctioned norms provided for in the legal system; 4) the assault must be direct (unfortunately, the term 'direct' used by the legislator was not properly defined);⁶ the

⁵ See Maciej Zieliński, *Wykładnia prawa. Zasady, reguły, wskazówki* (Wolters Kluwer 2012, Warsaw) 67 ff.; Maciej Zieliński, 'Derywacyjna koncepcja wykładni jako koncepcja integrowana' (2006) 3 *Ruch Prawniczy, Ekonomiczny i Socjologiczny* 93 ff.; Olgierd Bogucki, 'The Derivational Theory of Legal Interpretation in Polish Legal Theory' (2020) 33 *International Journal for the Semiotics of Law – Revue internationale de Sémiotique juridique*, 617–636, DOI: 10.1007/s11196-019-09628-1; Konrad Burdziak, *Prowokacja. Analiza prawnokarna* (Ars Boni et aequi 2018, Poznań) 35. For more on the statutory interpretation, see Frank Cross, *The Theory and Practice of Statutory Interpretation* (Stanford Law Books 2009, Stanford, California); Rupert Cross, John Bell, George Engle, *Cross: Statutory Interpretation* (LexisNexis UK 1995, London); Douglas Walton, Fabrizio Macagno, Giovanni Sartor, *Statutory Interpretation: Pragmatics and Argumentation* (Cambridge University Press 2020, Cambridge) DOI: 10.1017/9781108554572; Kim Yule, *Statutory Interpretation: General Principles and Recent Trends* (Nova Science Publishers 2009, New York).

⁶ For individual authors, the phrase 'direct' may mean: 1) the proximity of the time of violation of a legal interest / putting a legal interest at risk; or 2) the immediate violation of a legal interest / putting the legal interest in danger; or 3) the inevitability of violating a legal interest / putting a legal interest at risk; or 4) lack of intermediate elements between human behaviour and violation of a legal interest / putting a legal interest at risk; or 5) the existence of a real danger of violating a legal interest / putting a legal interest at risk; or 6) entering

defence must be proportionate to the performed action, meaning that it cannot be based on failing to perform a specified action because the subject of interest of criminal law cannot be actions such as *a)* dodging blows, *b)* running away, *c)* hiding, *d)* calling for help, etc. (these are actions that criminal law considers irrelevant); 6) the defence must be directed solely at the perpetrator; it cannot interfere with the legally protected interests of a third party not involved in the assault (the defence should consist only of repelling the perpetrator's assault; in the event of the involvement of a third party, the exclusion of criminal liability is possible only on the grounds of so-called protective force); 7) the defence must be commensurate with the danger of the assault, and thus necessary to maintain the proper balance between the behaviour and effects of the behaviour of the defending party, and the behaviour and the effects of the behaviour of the perpetrator;⁷ 8) the defence must be necessary, meaning the justifiable defence can include only actions that are necessary to repel the assault. In connection with this condition, the question arises as to whether justifiable defence is an independent institution (meaning the defending party can repel the assault at the expense of the legally protected interest of the perpetrator, even if the assault could be avoided in another rational way), a subsidiary institution (meaning the defending party can repel the assault at the expense of the legally protected interest of the perpetrator only if the assault could not be avoided in another rational way) or a relatively subsidiary institution (meaning the defending party can repel the assault at the expense of the legally protected interest of the perpetrator only if the assault could not be avoided in another rational way; yet this does not mean that, for example, the defending party always has an obligation to flee if possible; the defending party can always defend his or her freedom from being obliged to act in a specific way, provided that it does not blatantly violate the balance between the attacked interest and the sacrificed interest). Without going into more details of this particular problem, it has to be stated that, in Polish criminal law doctrine and in Polish jurisprudence, there is a dominant conviction of the independent nature of the institution in question; 9) it is necessary for the perpetrator to be aware of the existence of the assault and

by the perpetrator into the attempted phase of a prohibited act (which is also not explicitly defined); 7) or entering a phase of the assault where it would be necessary to defend against it, the only option to save a legal interest.

⁷ It is correctly pointed out in the literature that the danger of an assault is a complex and dynamic concept. It is determined by a number of circumstances, in particular: 1) the value and nature of the assaulted interest; 2) strength and means of assault; 3) aggressiveness of the perpetrator; 4) threats made by the attacker; 5) features of the perpetrator and the victim; 6) time and place of the assault; 7) element of surprise – see Andrzej Marek, 'Komentarz do art. 25 Kodeksu karnego' in Andrzej Marek, *Kodeks karny. Komentarz* (Wolters Kluwer 2005, Warsaw) 164; and also 8) elements of subjective character: intent, lack of intent, purpose, motivation – see A. Wąsek, 'Komentarz do art. 25 Kodeksu karnego' in Oktawia Górniok et al. (eds), *Kodeks karny. Komentarz I* (Arche 2005, Gdańsk) 331. It should also be that the expectation that the method of defence is commensurate with the danger of assault indirectly introduces the need to maintain a certain proportionality between the defended interest and the interest violated as a result of the defence, not articulated directly in Article 25 of the Polish Penal Code [see Jacek Giezek, 'Komentarz do art. 25 Kodeksu karnego' in Jacek Giezek (ed), *Kodeks karny. Część ogólna. Komentarz* (2nd edn, Wolters Kluwer 2012, Warsaw) 210].

to act to protect a legally protected interest (in principle, it is not possible for the action to be considered justifiable defence if we provoked a person to assault us in order to violate his or her legally protected interest under the guise of justifiable defence). Without going into the broader description of the problem outlined here, it should be stated that, in Polish criminal law doctrine and in Polish jurisprudence, the conviction regarding the self-contained nature of the institution in question prevails; 9) it is necessary for the perpetrator to be aware of the existence of the assault and act to protect an interest protected by law (as a rule, invocation of justifiable defence is excluded in a situation in which we have provoked the person to assault us, so that under the guise of justifiable defence to violate his or her rights protected by law).

It does not matter whether the assault is intentional (meaning whether the perpetrator intends to violate a legally protected interest, meaning whether he or she considers the possibility of violating a legally protected interest / exposing a legally protected interest to danger and wants this or agrees to this) or not. Similarly, the sanity of the perpetrator is not relevant; a relevant assault can be made by both a sane person (who considers the significance of the act while performing it and is able to control his or her conduct) and an insane person. The age of the perpetrator is also irrelevant; a relevant assault may be committed by both a juvenile perpetrator (a perpetrator who was less than 17 years of age at the time of the act) and an adult perpetrator. The legislator does not impose any restrictions on this matter.

However, the question of justification for distinguishing between the institution of justifiable defence and the effects of its application remains unresolved in the Polish literature in an explicit manner. Naturally, it was indicated above that Article 25 section 1 of the Polish Criminal Code indicates that, if a person commits an act punishable under the law (thus demonstrates behaviour displaying the characteristics specified under criminal law as unlawful; see Article 115 section 1 of the Polish Penal Code) in defence of a legal good, that person shall not face criminal liability due to the commonly accepted thesis that such situations (situations of acting in defence of one's own or another's goods) are considered to be excluded from (or impossible to assign as) unlawful behaviour. It should be stressed, however, that in Poland some authors claim that justifiable defence is a formally unlawful and materially lawful action, and some authors claim that it is a lawful action from the beginning. To be precise 1) according to some authors, in the case of justifiable defence, fulfilment of the features of an act prohibited under the law is only apparent (performing no acts in justifiable defence is, according to these authors, a feature of individual types of particular acts prohibited under the law); 2) according to some authors, in the case of justifiable defence, the perpetrator fulfils all the features of the act prohibited under the law but at the same time, there is the situation in which the norm sanctioned in the criminal law cannot be updated (the norm which orders the court to impose a penalty for unlawful conduct); 3) according to some authors, in the case of justifiable defence, the perpetrator fulfils all the features of an act prohibited under the law but the perpetrator does not

violate the norm sanctioned in criminal law (prohibiting a particular entity in particular circumstances of a particular behaviour).

The only way to resolve the above difference in views would be to determine (resolve explicitly) the question of justification for the existence of the institution of justifiable defence. In the Polish literature – as mentioned above – this issue is not clearly resolved.

The question is also not explained by the justification of the Polish Penal Code, which only indicates that the chapter on circumstances excluding criminal liability includes provisions regulating the circumstances that exclude criminal liability and their legal nature varies; more specifically, it regulates the circumstances that exclude the unlawfulness of an act (justifiable defence, the protective force provided for in Article 26 section 1, acceptable novelty risk⁸), circumstances that exclude liability and circumstances causing the perpetration of the prohibited act to be incomplete.⁹

Some authors claim that the justification of performing acts within justifiable defence may be influenced by the following circumstances: 1) the necessity to sacrifice one of the conflicting interests; 2) confirmation, by acting in justifiable defence, of the rule that the law cannot give way to unlawfulness; 3) contributing to maintaining the legal order by acting in justifiable defence; 4) contributing to developing a sense of solidarity in society by acting in justifiable defence; 5) supplementing the activities of relevant state bodies by acting in justifiable defence; 6) social benefit of the perpetrator's behaviour; 7) self-preservation.¹⁰

It would be valuable to refer to the solutions of other legal orders, particularly to the Hungarian legal order, in which, in the present authors' view, the question of justifying the existence of the institution of justifiable defence resulting in the exclusion of criminal liability of the perpetrator of the prohibited act has been, at least partly, explicitly resolved. The comparison of Polish and Hungarian solutions may be an additional argument in favour of particular views of Polish authors, and perhaps even a model for adopting new solutions in Poland.

⁸ An acceptable novelty risk is the situation referred to in Article 27 of the Polish Criminal Code, according to which: 'One does not commit an offence who acts for the purpose of conducting a cognitive, medical, technical or economic experiment which is presumed to yield results of significant cognitive, medical or economic value, and the expectation of achieving them, the purpose and manner of conducting the experiment are well-founded in the light of contemporary knowledge'.

⁹ See Irena Fredrich-Michalska, Barbara Stachurska-Marcińczak (eds), *Kodeks karny, Kodeks postępowania karnego, kodeks karny wykonawczy – Nowe kodeksy karne – z 1997 r. z uzasadnieniami* (Wydawnictwo Prawnicze 1998, Warsaw), 130.

¹⁰ For more, see Łukasz Pohl, Konrad Burdziak, *Judicial Interpretation of the 1997 Criminal Code Provisions on Self-Defence* (Peter Lang 2019, Berlin) 136, DOI: 10.3726/b14857; Konrad Burdziak, 'Bezpośredniość zamachu, czyli kilka słów na temat obrony koniecznej w polskim prawie karnym' (2018) 1 Przegląd Sądowy, 55–61.

IV Justifiable Defence in Hungarian Law

In Hungarian law, the source of regulations concerning justifiable defence¹¹ which is the basis for excluding criminal liability for a perpetrator of a criminal offence are two legal acts: the Hungarian Fundamental Law¹² and the Hungarian Penal Code (Act C of 2012). In the context of the Hungarian Fundamental Law, which is the basis of the Hungarian legal system (see Article R of the Fundamental Law), it should be noted that the Hungarian constitutional legislator decided to include it in the indicated legal act, more specifically in its Article 5 (located just after the preamble and regulations concerning the fundamentals of the Hungarian state, and at the same time as part of the chapter entitled 'Freedom and responsibility' just after the regulations on human dignity), the provision according to which everyone shall have the right to repel any unlawful attack against his or her person or property, or one that poses a direct threat to the same, as provided for by the Act. Therefore, the constitutional legislator indicates that: 1) every person (the constitutional legislator does not make any distinction in this respect) has the right to defend his or her interest against an assault; 2) this right only applies to defence against an assault on the defender's own personal interest or property; 3) the assault has to be factual (it has to take place in reality), unlawful and direct (which, of course, is not saying much). At the same time, the constitutional legislator refers to the Act, which seems to be the Hungarian Penal Code, in Section 22 of which the legislator indicates that 'A person's act shall not be punishable if it is necessary to avert an actual or imminent illegal attack against his own person or property or that of another person or persons, or against the interest of the public.'

According to the Explanatory Memorandum of Hungarian Penal Code, in case of this legal institution, a justifiable defence is possible against an unlawful attack. An attack is usually violent behaviour, mostly directed against a person, but can also be directed against property or the public good. The attacked person acts lawfully if his/her act is necessary to avert the attack. The consequences of the unlawful act must be borne by the attacker, i.e. the person who commits the unlawful conduct. This means that if the attacker is harmed, the defender cannot be held responsible for the consequences.

Although, above the before-mentioned 'classical' type of justifiable defence, the Hungarian legislature also regulates two special types of the legal institution. The first of these is the so-called preventive justifiable defence (Section 21 of Hungarian Penal Code): Any person who causes injury to an unlawfully attacking person with a protective device, which was preventively installed and is not capable of taking the life of anybody, shall not be punishable by the law, if he/she takes every expectable measure to avoid injury.

¹¹ For a recent overview of Hungarian legislation and practice see Gellér Balázs, Ambrus István, 'A jogos védelmi helyzetben kifejtett elhárító cselekmény szükségessége, valamint a szituációs jogos védelem a legújabb bírói gyakorlat tükrében' (2018) (2) Magyar Jog, 119–128.

¹² For more, see László Trócsányi, *Wokół prac nad ustawą zasadniczą Węgier. Tożsamość konstytucyjna a integracja europejska* (Paweł Króliczek tr., Wydawnictwo Sejmowe 2017, Warsaw) 122.

This form of justifiable defence was introduced into the Hungarian Criminal Law in 2009. However, preventive justifiable defence rarely occurs in practice but, according to scholarly opinion, it could be stated in the case of running electricity, or a black-dog, etc.¹³

Finally, the Hungarian legislator introduced a brand-new type of justifiable defence in the recent Penal Code, which is called situational justifiable defence. As Section 22 (2) states: The unlawful attack shall be considered as an attack against life if committed against a person at night, with a weapon, with an instrument capable of causing death, or by a group. Also if it is committed by way of intrusion into the victim's house: at night, by displaying a deadly weapon, by carrying a deadly weapon, in a gang. Finally, if the unlawful attack is committed by way of illegal and armed intrusion into the fenced area of a home.

As Ádám Mészáros states in literature, in the case of situational justifiable defence, 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, paragraph 2 (b) (c)].¹⁴ Therefore, it follows from the text that 'considering an unlawful attack as an attack on life makes lawful the defence which may cause death even if in the concrete situation the taking of life was not necessary'.¹⁵

In the cited regulation (Section 21 and 22 of the Hungarian Penal Code) the legislator indicates that the act within the limits of justifiable defence (a person defending legal interest against a factual, unlawful, direct attack on the interest) is not punishable as a principle. Therefore, the question arises as to whether we should treat justifiable defence, as in Poland, as a circumstance preventing the commission of a criminal offence and facing criminal liability, or as a circumstance preventing the person from committing a criminal offence. Considering the views that appear in the literature, it should probably be considered that the first of these solutions is appropriate, and thus, that Hungarian solutions are similar to the Polish ones.

If a person acting within the limits of justifiable defence only apparently fulfils the features of the act prohibited under the law or fulfils the features of the act but does not exceed the norm sanctioned in criminal law; these solutions appear to be justified also because justifiable defence results in the same as the permission of law and, in the context of the permission of law, the legislator claims that an act that is authorised by law or that is exempted from punishment by law shall not be criminalised (see Section 24), and the content of Section 15, according to which the perpetrator may be totally or partially exempted from criminal responsibility, or an act may be fully or partly exempted from criminalization on the following grounds: *a*) being under the age of criminal responsibility;

¹³ See Mészáros Ádám, *A jogos védelem elvi és gyakorlati problémái* (OKRI 2015, Budapest) 90–103; Gál Andor, *A jogos védelem teleologikus megközelítésben* (Iurisperitus 2019, Szeged) 131–140.

¹⁴ Mészáros Ádám, 'Constitutional Questions of the Situational Legitimate Defence' (2019) 8 (1) *Acta Univ. Sapientia, Legal Studies*, 67, DOI: 10.47745/AUSLEG.2019.8.1.04.

¹⁵ Belovics Ervin, *Büntetőjog I. Általános Rész* (HVG-ORAC 2017, Budapest) 253.

b) insanity; *c)* coercion and threat; *d)* mistake; *e)* justifiable defence; *f)* means of last resort; *g)* statutory authorization; *h)* other grounds defined by law. This position corresponds in its entirety to the view presented in Poland, *inter alia* by Wolter, according to which,

If [...] for example, based on the provision of the Article 148 of the Polish Penal Code, it is prohibited as a socially harmful act to (intentionally) kill a person, and killing a person in justifiable defence [...] is not a socially harmful act, although it is an (intentional) killing of a person, from a logical point of view in the provision of the Article 148 of the Polish Penal Code it is prohibited to kill a person 'not in justifiable defence'. The case is analogical when it comes to other circumstances, recognised as exceptions to the rule [...]. These negated circumstances constituting exceptions are called 'negative features of a prohibited act', in contrast to features falling within the scope of the rule which (in this sense) constitute positive features of a prohibited act. This is the picture of the logical and theoretical construction.¹⁶

Simultaneously, the legislator repeats the conditions of defence provided for in the Hungarian Fundamental Law (adding the condition of necessity, and consequently the proportionality of defence), and at the same time extends the scope of application of the necessary institution of self-defence to situations in which the factual, unlawful, direct attack concerns the personal interest or property of other persons, or public interest. In this context, naturally, the question arises as to why justifiable defence was partly regulated in the Hungarian Fundamental Law and partly in the Penal Code? Considering the assumption that the legislator is a rational legislator (and this assumption appears to be necessary; after all, any interpretation of provisions of criminal law would otherwise be impossible), it should be considered that there is a difference between situations in which the defence concerns a factual, unlawful, direct assault against one's own personal interest or property, and situations in which the factual, unlawful, direct attack concerns the personal interest or property of other persons, possibly the public interest, and in principle that there is a difference between, at the very least, the justifications for excluding criminal liability in the indicated situations. Answering the above question, it is worth noting that the Hungarian Fundamental Law defines only the defence of one's own personal interest and property and that such defence is defined as one of human rights. This may suggest that the justification for the existence of justifiable defence provided for in the Hungarian Fundamental Law is somewhat clear and commonly accepted by all members of society, and at the same time not a human creation, but discovered by people by observing themselves and the objective reality, and thus is related to natural law. The justification for the existence of justifiable defence should therefore in the proper not only be for humans but also for animals' primary and natural self-preservation (in natural law). In the face of an assault on our own legally

¹⁶ Władysław Wolter, *Nauka o przestępstwie. Analiza prawnicza na podstawie części ogólnej kodeksu karnego z 1969 r.* (PWN 1973, Warsaw) 106.

protected interest, each of us would do the same. Each of us would try to repel the assault and thus save the endangered interest, even at the expense of the rights of the perpetrator. This is typical behaviour for every member of the human race. Perhaps, thus, by grasping this regularity and acknowledging the correctness of the indicated conduct, each of us, in a natural way, asserts the right to defend our own interest in situations of danger to them, while recognizing the existence of this type of law on the part of other members of society.¹⁷ As Balázs Gellér and István Ambrus state:

There are two points of view in jurisprudence regarding the origin of this legal institution. According to the first, the suppression of private revenge, blood revenge, necessarily brought with it a restriction of self-government. By renouncing these rights, however, subjects of the *ius puniendi* were rightly expected by the citizens to protect them from unlawful attacks. However, the holder of sovereignty, the state, cannot meet this expectation in all life situations, as its representatives cannot be present in all unlawful attacks. A person defending against an unlawful attack is authorised by the state to defend himself. According to the other approach, the institution of legitimate protection evolved from the justifiable defence guaranteed by natural law. The Roman legal principle of the reporter of *vim vi* states that it arises from nature for all living beings, including man, to use force in order to sustain his life in the broadest sense against attack.¹⁸

In the context of solutions in Poland, Cieślak claimed similarly that ‘even if criminal law did not mention justifiable defence, it would be difficult to justify responsibility for an act committed in self-defence against an unlawful attack. There are [...] probably grounds for recognising the individual’s right to justifiable defence as one of the elementary human rights’.¹⁹ In Poland, however, it was not decided to regulate the institution indicated in the Polish Constitution (at most, they can be derived from the principle of a democratic state ruled by law or the principle of respect for human dignity), and thus, it has not been explicitly confirmed that justifiable defence is a fundamental human right.

The justification for defending the legal rights of other persons and public order must be connected (by force of necessity; it is necessary to maintain the postulate of the legislator’s rationality) with another circumstance, meaning 1) with the need to sacrifice one of the conflicting interests; 2) confirmation, by acting in justifiable defence, of the rule that the law cannot give way to unlawfulness; 3) contributing to maintaining legal order by acting in

¹⁷ There is no doubt that the justification of acting in necessary self-defence is also affected by circumstances such as: 1) with the need to sacrifice one of the conflicting interests; 2) confirmation, by acting in necessary self-defence, of the rule that the law cannot give way to unlawfulness; 3) contributing to the maintenance of the legal order by acting in necessary self-defence; 4) to contribute to developing a sense of solidarity in society by acting in necessary self-defence; 5) supplementing the activities of relevant state bodies by acting in necessary self-defence. However, these circumstances are, I believe, only secondary.

¹⁸ Gellér Balázs, Ambrus István, *A magyar büntetőjog általános tanai I.* (ELTE Eötvös Kiadó 2019, Budapest) 262.

¹⁹ Marian Cieślak, *Polskie prawo karne. Zarys systemowego ujęcia* (PWN 1990, Warsaw) 241.

justifiable defence; 4) contributing to developing a sense of solidarity in society by acting in justifiable defence; 5) supplementing the activities of relevant state bodies by acting in justifiable defence; 6) the social benefit of the perpetrator's behaviour. However, this issue is not explicit.

V The COVID-19 Pandemic and Justifiable Defence

It can be stated without exaggeration that the COVID-19 pandemic completely turned the whole world upside down in 2020. Of course, the extraordinary situation required extraordinary legislation, which has not left the Hungarian Penal Code untouched. For instance, Act XII of 2020 on the containment of coronavirus introduced, with effect from 31 March 2020, the criminal offence of obstructing epidemic containment into section 322/A of the Penal Code, which, as a *sui generis* criminal offence, can be understood as a quasi-qualified case of violation of epidemic control regulations (which criminal offence will be discussed later in this article). According to the related Explanatory Memorandum,²⁰

the new statutory definition of obstructing epidemic containment shall punish the active obstruction of the measures initiated in the event of the legally and officially identified danger of the epidemic from being implemented. The reason for the increased dangerousness and, therefore, the more severe punishment (in contrast to the mere violation of epidemic control regulations) is that, in this case, the commission manifests itself not only in a formal violation of regulations but also in the obstruction of the concrete official control. The statutory definition does not evaluate the result, hence, to establish the crime, the failure or any disruption of control is not required. Neither using violence nor threatening it are statutory elements, which leads to the consequence that a real concurrence with the offence of violence against a public official occurs due to any violent or threatening action against public officers involved in civil defence. The social dangerousness of the act is significantly enhanced when committed by a group, which significantly increases the likely effectiveness of obstruction. Death, as a result, contained in the statutory definition as a qualifying circumstance essentially means unity between obstructive conduct of any type and homicide by negligence; the dogmatic distinguishing criteria in this regard are settled in case law. The legislator can achieve the earliest possible protection against such a crime by penalising preparation for it, and it intends to make use of this means in the present situation as well.

The Explanatory Memorandum added to the new statutory definition is particularly reassuring from the viewpoint that it underlines that criminal proceedings for this criminal offence may only take place due to active, positive conduct. According to Article 28 of the

²⁰ Or in other words: Explanatory Notes to the Bill.

Fundamental Law, interpretation of a statutory definition shall take place in legal practice subject to an Explanatory Memorandum. It would be worth emphasising this circumstance in the statutory definition itself in which, conceptually, it is also possible to obstruct by an act of omission. For instance, if an apparently asymptomatic person in quarantine refuses to assist the procedure upon the call of the authority (to go with them voluntarily for testing).

Several questions also arose related to 'old' criminal law during the first three waves of the pandemic. For example, we can mention criminal offences against life and human health. In a case of allegedly causing bodily harm, it is quite a hard task to prove causation, since the coronavirus mostly spreads by droplets. However, the situation is different in relation to an attempted criminal offence, when criminal liability can be established; if for example, an infected perpetrator coughs on the victim with an intent to cause illness.

In the context of both causing bodily harm and homicide, the question of whether there is a place for justifiable defence against the commission of these crimes through the transfer of disease. As far as if an infected person coughs on the victim with an intent to infect him/her, this movement should be considered as an unlawful attack based on Hungarian criminal law, thus the victim has the right to protect himself/herself as it is necessary (e.g. pushing the perpetrator away or even hitting him/her with slight force).

We also have to deal with those offenders who fail to wear their masks where it is mandatory, for example on public transportation. According to Government Decree 484/2020. (XI. 10.), in Hungary, the operator of a public transport vehicle is entitled and obliged to order those passengers not wearing a mask (or not covering their nose and mouth) to put it on. There is a question over whether an individual is entitled to do the same. Section 22 paragraph 1 of Hungarian Penal Code, as we already saw, states, that 'The act he act which is necessary to prevent an unlawful attack on [...] the public interest [...] shall not be punished'. Thus, justifiable defence may also have a place to protect the public interest. And for example, on a crowded bus, it is undeniable that a person not wearing a mask is a potential danger to all other passengers. Consequently, the conduct necessary to prevent it – forcing them to wear a mask, verbally, possibly committing defamation – may be permissible against such a person.

In the Polish Criminal Law, this situation is similar. All cases of intentional direct exposure of another person to be infected with COVID-19 fulfill features of one of the prohibited acts punishable under the law specified in Article 161 of the Polish Criminal Code. It relates to types of the prohibited acts punishable under the law where: 1) anyone who, knowing that he or she is afflicted with a venereal or contagious disease, a serious incurable disease or a potentially fatal disease, directly exposes another person to infection from that disease (and thus, is liable to imprisonment for a period from 3 months to 5 years); 2) anyone who, knowing that he or she is afflicted with a venereal or contagious disease, a serious incurable disease or a potentially fatal disease, directly exposes a large number of people to infection from that disease (and thus, is liable to imprisonment for a period from one to 10 years). Of course, criminal liability for intentional or unintentional damage to

health or even death of another person is not excluded. The Polish legislator simply uses the wording ‘anyone who causes, is liable to’ in the legal regulations concerning these effects, which may suggest that the features of the types of prohibited acts punishable under the law and characterised by these effects can be caused with any behaviour that remains in such cause-and-effect relationship. Naturally – in this context, there may be evidence problems, as well as problems with the objective attribution of the effect, but this does not exclude the possibility of the perpetrator (a person who exposes other people to COVID-19 infection) exceeding the relevant sanctioned criminal law norms.

The perpetrator commits the prohibited act even if they try to infect a person already infected with the COVID-19 virus. In that case, it would be a matter of the qualification of his behaviour as an ineffective attempt to expose another person to infection, and thus, the qualification under Article 13 section 2 of the Polish Criminal Code, in relation to Article 161 section 2/3 of the Polish Criminal Code.

A prohibited act could also be malicious coughing on another person after removing a face mask. This is because it seems that this kind of behaviour could be treated analogously to spitting on another person, and thus, as a behaviour fulfilling not only the features of the prohibited act punishable under the law specified in Article 216 section 1 of the Polish Criminal Code, i.e. an insult, but also the features of the prohibited act punishable under the law specified in Article 217 section 1 of the Polish Criminal Code, i.e. a violation of personal inviolability.

Not wearing a face mask despite the order to do so is also considered a prohibited act punishable under the law which, in Poland, was specified in section 25 point 1 of May 6 2021 of the Regulation of the Council of Ministers on establishing certain restrictions, orders and prohibitions in the occurrence of an epidemic (Journal of Laws of 2021, item 861), according to which, until June 5 2021, covering the mouth and nose with a face mask is ordered: 1) in means of public collective transport, on passenger ships in domestic maritime transport intended or used for transporting passengers; 2) in generally accessible places; 3) while performing religious practices. It is true that the violation of this order is a minor offence, yet it remains a prohibited act, and therefore also an unlawful act.

Considering the above, in the situations related to the issue of this text, it is possible to violate the legal interest of the perpetrator in order to establish a lawful status (a state in which the legal interest is not threatened), with reference to acting within the limits of justifiable defence. In each of these cases, there is an attack by the perpetrator on a specific legally protected interest (individual or group), and above all, on an interest in the form of human or public health, and in each of these cases the attack is illegal and direct. Thus, if the remaining of the mentioned conditions of defence are met, including in particular the condition of its proportionality to the danger of an attack, there is no reason not to exclude the criminal liability of the behaviour of a man defending a given interest. Using the examples mentioned earlier, it can be said that, in Poland, is also possible to force a person obliged to wear a face mask (because they are, for example, in a crowded bus) to

put it on by using physical coercion, for example, and referring to acting within the limits of justifiable defence. Similarly, in Poland, it is possible to counter an attack in the form of coughing on a victim with the intention of infecting them, referring to acting within the limits of justifiable defence. This type of behaviour should be considered an unlawful act, and thus the victim has the right to protect themselves and others if necessary (for example, by pushing the perpetrator or even hitting them using slight force).

Considering the above, it is also worth noting that, under Article 231b section 1 of the Polish Criminal Code, anyone who, in justifiable defence, prevents an attack on another person's well-being, protected by law, or to maintain safety or public order, benefits from the legal protection provided to public officials (but the provision does not apply if the offender's attack against the person driving back the attack is directed exclusively at this person's honour or dignity). It should be stressed that the above regulation is not a characterisation of a justifiable defence. It only strengthens the protection of persons indicated in this regulation.

Simultaneously, it should be emphasised that, even in a situation where the person defending a given interest against an attack on it is wrong about the fact that the attack actually takes place or that the attack is illegal, it is not necessary to prosecute them. In this case, it is possible for such a person to refer to the regulation of Article 29 of the Polish Criminal Code, i.e. a mistake over the exclusion of unlawfulness. Then, 'only' the guilt, and not unlawfulness of their behaviour, is excluded. The effect, however, is the same – no crime and no criminal liability.

VI Summary

To conclude the above considerations, it must be stated that there are many similarities between justifiable defence solutions in Polish and Hungarian law. In both cases it is necessary 1) that the defence is related to a factual, direct and unlawful assault; 2) that the defence was necessary and proportional. Also, in both legal systems, there is a solution according to which any person who exceeds the reasonable force of self-defence due to shock or justifiable aggravation shall not be prosecuted.

Naturally, there is some variance, namely 1) in Hungarian criminal law (as opposed to Polish law) it is assumed that the unlawful attack shall be construed as posing an imminent danger of death if committed: *a)* against a person, *aa)* at night, *ab)* by displaying a deadly weapon, *ac)* by carrying something that could be used as 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 something that could be used as a deadly weapon, or *bd)* in a gang; or *c)* by way of illegal and armed intrusion into the fenced area of a home; 2) in Polish law (as opposed to Hungarian law), it is indicated that anyone who exceeds the limits of justifiable defence by repelling an assault consisting of entering a flat, apartment, house

or adjacent fenced area or repelling an assault preceded by trespassing on these places is not subject to punishment, unless exceeding the limits of self-defence was blatant;²¹ 3) in Polish law (as opposed to Hungarian law), it is indicated that, in the event of exceeding the limits of justifiable defence, in particular when the perpetrator used a method of defence disproportionate to the danger of an assault, the court may apply extraordinary mitigation of punishment, and even issue an absolute discharge; 4) in Hungarian criminal law (as opposed to Polish law), it is clearly stated that justifiable defence is independent (it is specifically indicated that the person assaulted shall not be liable to take evasive action so as to avoid the unlawful attack).

The fundamental difference between the Polish and Hungarian legal orders is the distinct emphasis of the Hungarian Constitution that justifiable defence (at least to some extent) is one of the basic human rights, a right which, it must be emphasised, was not created by people, but discovered by them and results from natural law. The present authors accept this in its entirety and suggests considering the possibility of amending the Polish Constitution by introducing the following regulation: 'Everyone has the right to resist a direct, unlawful attack directed against his or her personal interest or property'. In this way, the justification for distinguishing the institution of justifiable defence in the Polish legal order would be emphasised and, as a consequence, current doubts in this respect would be removed.

Additionally, it should be proposed to introduce to the Polish legal order a regulation worded as follows: 'A person under attack shall not be required to escape from the illegal attack'.

²¹ After all, Section 21 indicates that 'Any person who uses such means of defence, which are not recognized as a deadly weapon, installed for his own protection and/or for the protection of others against the peril with which he is threatened in the event of an unlawful attack shall not be prosecuted for the injury the aggressor sustained in consequence, provided that the person on the defensive has done everything within his power to avoid the injury.'