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A COMPARATIVE ANALYSIS OF THE ISSUE OF NECESSARY DEFENSE IN TERMS OF TORT LAW

Abstract

This paper addresses a comparative analysis of the issue of necessary defense in terms of tort law. The concept of indispensable defense is most often associated with criminal law. However, it is not the only branch of law in which it occurs. It is also possible to find it on the grounds of the Civil Code. A necessary defense is one of the main counter-narratives which exclude the unlawfulness of an act. As a matter of fact, acting within the framework of necessary defense, we act according to the rules of law. Nevertheless, it is important to act only within the limits of such defense, because exceeding them excludes the unlawfulness of the act.

The subject of this dissertation is to show, compare, and analyze legal regulations defining the right to indispensable defense in Poland and other contemporary countries.

KEYWORDS

tort law, necessity, necessary defense, comparative analysis, assassination

SŁOWA KLUCZOWE

prawo deliktowe, konieczność, obrona konieczna, analiza porównawcza, zabójstwo

VIM VI REPELLERE LICET – THE ORIGIN OF THE ROMAN RULE

*Vim vi repellere licere Cassius scribit idque ius natura comparatur: apparet autem, inquit, ex eo arma armis repellere licere.*¹
Ulpian D. 43.16.1.27

The principle *vim vi repellere licet*, according to which “force can be repelled by force”, originated in Roman law and is the foundation of the doctrine of necessary defense (*inculcata tutela*). According to Ulpian’s account (placed in *libro sexagensimo nono ad edictum* in D.43,16,1,27), the principle *vim vi repellere licet* in its exact wording was formulated only by Cassius, who lived in the first century AD. This principle referred to the protection of possessions (which in turn means that it was originally an institution of private law, not criminal law). On the other hand, the oldest written basis for the right of defense is the Law of the Twelve Tables (*Leges Duodecim Tabularum*) from the turn of 451/450 BC, which allowed for necessary defense in the case of night-time theft. This way, self-help in its broader sense was to become, first, a permissible, though often drastic, alternative to ending a conflict in the face of a troublesome private lawsuit for the return of a stolen object.²

Following the chronology of the history of Roman law, the *lex Aquilia* also provided examples of the permissibility of self-help, which the law guaranteed impunity. The considerable scholarly activity of jurists on this law, confirmed by the extensive title of the *Digesta Justinianum*, includes both casuistic solutions and contains the generalization formulated by Paulus: *vim vi defendere omnes leges omniaque iura permittunt*.

As far as self-help is concerned, there are various divisions of it. The most interesting one with regard to the topic of this paper and also inspiring for scientific deliberations is on the level of activity or inactivity. Self-help can be divided into offensive actions, initiating a change of the factual state (active self-help),

¹ Cassius says that one can repel force with force; for this right is conferred by the law of nature. Hence he holds that it is clear that armed aggression can be repelled by arms.

² D. R. Yerenatovna, N. E. Talantuly, B. A. Abaevna and K. Bakhyt *Stages of Formation and Historical Development of the Institute of Necessary Defense*, Middle-East Journal of Scientific Research 14, pp. 33-40, 2013.

and defensive actions (passive self-help), consisting of counteracting attempts to change the factual state by another person. Precisely in the case of passive self-help, we can speak about the birth of the construction of necessary defense, called so today both in the language of private and criminal law.

FUNCTIONS OF NECESSITY

The social function of necessary defense requires special discussion. Referring to the justification of indispensable defense it should be noticed, that it was once sought in the law of nature. Referring to Cicero, it was claimed that this right resulted from the right of every man to defend himself against attacks on his property, so it did not require any additional justification as *lex nata*. T. Bojarski seems to endorse this view, classifying the institution of indispensable defense among inherent rights, which are connected with the sphere of subjective rights of an individual.

In this view, however, one cannot find any reference to the social justification of the legality of such an action, i.e. the social function of necessary defense, which seems to be particularly important. The beginnings of perceiving the social function of this institution can be noticed only in the epoch of Enlightenment. J.J. Rousseau, the creator of the theory of social contract, in the limits of his theory, claimed that every person, who in any way commits an attack on life, health, or other good protected by law, violates the conditions of the contract, which from this moment ceases to protect and bind him. In such a case, the assailed person is, as it were, automatically exempted from respecting any property of the assailant. Grotius and S. von Pufendorf, on the other hand, unanimously argued that in a social contract, the citizens of a state renounce to the state the right to apply self-help against attacks on their goods. However, if the state authority fails to protect them in a particular situation, they regain the right to act against the aggressor in defense of their property and are not liable for damages thus caused. The person acting in necessary defense 'relieves', as it were, the state authorities of the use of means necessary for the defense of the right. This theory of exculpation has also found many supporters in modern times. One of them was A. Gubiński, who stated that necessary defense is justified by the fact that "state authorities cannot always ensure the security of legal goods. Therefore, in the case when there is no officer in place (...) it is necessary to grant an individual the right to assist the state in its tasks".

The basic and undisputed function of the law is to protect the goods considered valuable by the legislator, whether from the perspective of the interests of citizens or social groups, or society as a whole, or from the perspective of the

state. The protective function of the law consists in the fact that the law, by means of establishing prohibitions of certain behaviors that violate or threaten certain social values, or by means of prohibitions of certain behaviors, provides legal protection to these values. This function is realized through the protection of social relations and a certain system of values adopted by the state against attacks on them. From this formulation of the role of law, the protective function of necessary defense can be derived. The legislator, introducing the exclusion of criminal responsibility in the case of violation of the assailant's legal good, when the perpetrator acted in order to repel an unlawful, direct and real attack on a certain legal good – in a special and real way, protects this good in practice. At the same time, by setting the boundaries of acting within the framework of indispensable defense and by penalizing their violation, it also grants certain protection to the assailant and his legal goods.

Another function of necessary defense is the pursuit of justice. An expression of this understanding of the justice function is the state's acceptance of the action of necessary defense. The justice function of indispensable defense satisfies the social sense of justice. At the same time, it should be clearly emphasized that one should not associate a necessary defense with a reaction of revenge or personal serving of justice by the attacked person, but with fulfilling the social sense of justice and fairness by allowing everyone to take an appropriate reaction to an attack on a specific legal good. Indeed, everyone has the right to defend his own goods or the goods of another person against an unlawful, direct and actual attack without having to obtain prior individual permission from a state authority, even if this involves harming the good of the attacker. The legislator's introduction of impunity for indispensable defense, as well as the possibility of mitigating criminal responsibility or renouncing the imposition of punishment in the case of exceeding its limits (and in certain cases even not being subject to punishment) constitute the realisation of the justice function of indispensable defense.

REGULATIONS OF NECESSITY IN DIFFERENT LEGAL SYSTEMS (GERMANY, SWITZERLAND, ESTONIA)

GERMANY, BGB³

In Germany, it is the BGB code that is the main source of civil law, so there we find §228, which provides for necessary defense. According to it:

³ German Civil Code, Bürgerliches Gesetzbuch (BGB).

A person who damages or destroys a thing belonging to another in order to ward off from himself or from another a danger threatened by the thing does not act unlawfully if the damage or destruction is necessary to ward off the danger and the damage is not out of proportion to the danger. If the person acting in this manner caused the danger, he is obliged to pay damages.

It may be inferred from the above-quoted provision that the most important issue allowing one to consider the repulsion of a danger as an act of necessary defense is its proportionality to this danger. As long as the means used to avert the danger from oneself or another person are adequate to the threatened harm, their use does not constitute a violation of the law. The situation will be different when the measures taken significantly exceed the threshold of proportionality. As an example, we can mention here a situation sometimes encountered in housing estates. When children play with a ball, every now and then the ball hits a neighbor's window. The neighbor, after the ball hits his windows a number of times, wants to protect them from being smashed, so he takes out his air rifle and shoots the children. In such a case, one can no longer talk about necessary defense, because at first glance, the neighbor's behavior is disproportionate to the damage that the ball may have caused.

SWISS, CODE CIVILE⁴

In Switzerland, the issue of necessary defense is contained in Article 52 subsection 3 of the Civil Code and reads as follows:

A person who uses force to protect his rights is not liable in damages if in the circumstances the assistance of the authorities could not have been obtained in good time and such use of force was the only means of preventing the loss of his rights or a significant impairment of his ability to exercise them.

Thus, as can be seen, it draws attention to the availability and immediacy of the response of the authorities to the danger. When there is no opportunity for the intervention of the relevant state authorities in due time – a person may use force to repel an attack on a legally protected good. It is also important that the use of force by the injured person is the only means to avert an action threatening the loss of the person's rights or their significant limitation. There are no adjectives in the provision describing an action directed against a person who may use necessary defense.

⁴ Swiss Civil Code, Schweizerisches Zivilgesetzbuch (ZGB).

ESTONIA, LAW ON OBLIGATION⁵

In the legal system of the northern Baltic state of Estonia, the issue of self-defense is explicitly mentioned as one of the four possible options for depriving an act of its unlawfulness. As stated in Article 1045 of the Estonian Contract Law, causing damage is not unlawful if the tortfeasor acted in self-defense or in necessity. The entire article reads as follows:

§ 1045 Estonian Law on Obligations of 2001

[...] (2) The causing of damage is not unlawful if:

- 1) the right to cause damage arises from law;
- 2) the victim consents to the damage being caused, except in the case where the grant of such consent is contrary to law or good morals;
- 3) the tortfeasor acted in self-defense or in necessity;
- 4) the tortfeasor legitimately used self-help to perform or protect the tortfeasor's rights.

In view of the above provision, one may notice an enumeration of reasons defining an act as not unlawful. However, there are no specific forms of self-defense in the provision, and there are no criteria that the behavior should meet in order to be included in the category of acts under the disposition of subsection 3 of Article 1045 of the Estonian Code.

PREREQUISITES FOR THE APPLICATION OF THE COUNTER-OPTION OF NECESSITY IN POLISH CIVIL LAW (ARTICLE 423 CC)

In Poland, the provision describing the use of necessary defense is relatively extensive. Each of its elements has a significant value, and all prerequisites indicated in it must be fulfilled in order to release a person from the responsibility for repulsing an attack. Only after meeting the requirements specified in Article 423 of the Civil Code, we can talk about necessary defense as a counterpractice excluding the unlawfulness of the act.

ARTICLE 423 POLISH CIVIL CODE

A person who acts in self-defense to resist a direct and unlawful attack on any of his interests or those of another person shall not be liable for damage caused to the assailant.

⁵ Law on Obligations, Võlaõigusseadus.

The necessary defense in Polish civil law differs slightly from its counterpart under criminal law. It should be pointed out that, in principle, self-help is not allowed as a tool of protection in Polish civil law, because as J. Kozińska notes, the legislator prefers court protection, but the Civil Code in this respect introduces exceptions in the form of necessary defense and allowed self-help.

In fact, it should be pointed out that in Poland necessary defense is defined *expressis verbis* in as many as two provisions of the Civil Code – in Article 423 and Article 343 § 1, so in the part concerning obligations and the part concerning property law.⁶

According to the content of the above-mentioned provisions, the behavior of the perpetrator of the damage, in which exceeding the prohibitions or orders resulting from universally binding norms or rules of social coexistence allows invoking the reason abolishing the unlawfulness, does not constitute a tort. Generally speaking, the provisions of civil law do not contain a strict list of exclusions of unlawfulness, although they mention the most typical ones. One of them is acting in the course of necessary defense, regulated in Article 423. Due to the formula used in the commented regulation, “is not responsible for the damage caused to the assailant”, it should be assumed that the exclusion of liability covers the liability for damages based on any basis (principle) provided by civil law.

Actually, all prerequisites quoted in the text of Article 423 of the Civil Code, conditioning the possibility of accepting indispensable defense as the basis for exclusion of civil responsibility, are identical with the prerequisites functioning on the grounds of Polish criminal law. Thus, the following prerequisites must be fulfilled altogether: 1) the occurrence of an attack, 2) the orientation of the attack towards any good of one’s own or of another person 3) the direct character of the attack, 4) the unlawfulness of the attack, 5) the necessity of defense.⁷

It is, therefore, an attack contrary to the broadly understood legal order, and therefore also contrary to the principles of social co-existence. The unlawfulness of the assault is repealed by the consent of the person concerned provided, however, that it is legally binding and admissible (e.g. one cannot consent to euthanasia – then the necessary defense could consist in the fact that a doctor seeing another doctor or nurse giving drugs to the patient that are to lead to his death may invoke the necessary defense and e.g. push the person away). If he causes damage (e.g. to the person – bruising, scratching, or damage to property – damage to clothing), he will not be responsible for it. The attack must also be direct, so there must be a temporal connection between the unlawful behavior and the action within the framework of the necessary defense. Defense

⁶ R. Sosik, *Self-defense in Polish and American criminal law. A comparative study*, UMCS, 2019.

⁷ G. Karaszewski, *Civil Code. Commentary updated*, J. Ciszewski, P. Nazaruk (eds.), LEX/el. 2023, Article 423.

cannot be invoked after a certain time or before the attack. The object of threat can be either non-material goods (e.g. life, health, honor, freedom) or material goods (property), both one's own or someone else's. The value of these goods is irrelevant. Necessity, in turn, is understood as the use of necessary means, adequate to repel the threat to one's own or another person's property. In the circumstances of a particular case, we should, therefore, assess whether there was an excess of necessary defense. It is a matter of assessment of means available in a given situation and their effectiveness. It is even necessary to conclude that without the act causing harm the attack could not have been repelled. Such a standpoint – in contrast to the criminal law – suggests subsidiarity of the necessary defense in the civil law.

DEFINITION OF ASSASSINATION IN POLISH LAW

Continuing the discussion, it follows directly from this wording of provision 423 of the Civil Code that for a counter-narrative situation to exist at all, an attack must occur first. However, it does not always authorize to act in necessary defense. It should be noted that the law allows for defensive action only when three conditions are met: the attack must be direct, unlawful and directed at any good protected by law.

The notion of an attack itself does not cause major problems in interpretation. The term is unanimously defined by Polish doctrine as “human conduct directed against a legally protected good”.

An attack must be directed at any good protected by law. The existence of such a good, and also directing the attack at it, is therefore another feature of necessary defense in Poland. However, in this context, it is worth discussing the issue of the scope of goods protected by this institution of law.

A separate feature of an attack, being its characteristic, is unlawfulness, i.e. infringement of some sanctioned norm, and what is important – it does not have to be an action realizing the elements of a prohibited act.

As far as the aspect of directness is concerned – it should be recognized that the legality of defensive actions depends on the time (or rather its lapse in relation to the attack) when they were taken. Defensive actions may be taken only at the time when one is dealing with a direct attack. In deciding the issue of the directness of the attack it is, therefore, a question of establishing the time relationship between the attack and the defensive actions intended to repel it.

SOURCES OF NECESSARY DEFENSE IN COMMON LAW WITH AN EXAMPLE FROM AMERICAN LAW

Transferring the above considerations to the American law, it should first be noted that in the United States, and in fact in the whole common law system, there is no uniform civil law in the shape of that known from the continental legal systems. Americans place the issues of contractual obligations (Contract Law) and the issues of civil liability for committed torts (Tort Law) in separate branches of law. It seems that it results from the Roman tradition, according to which the sources of obligations were symmetrically divided into obligations arising from contracts (*obligationes ex contractu*) and obligations arising from torts (*obligationes ex delicto*).

In American law, the defense of necessity in *inter partes* relations is called tort law. The term “tort” itself is taken from the French language and means ‘wrongfulness’. Tort, therefore, means a violation of law, but on the one hand, it is not a violation of contract law, on the other hand, it contains features of a violation of criminal law. In many cases, the offender’s act violates both the norms of tort law and the norms of criminal law at the same time, but the liability of the offender is completely different in both cases. The basic difference is the question of the right to bring an action or initiate proceedings. The plaintiff in tort law proceedings is the injured party who sues for damages. In the case of criminal cases, it is a state authority appointed to prosecute criminal offenses.

It should be noted that in the entire culture of common law and, therefore, also in the United States, usually the rules of legal relations *inter partes*, both contract and tort, are determined by the law of precedent and this form operates in most states of the U.S. (with the exception of states such as Texas, where the general rules are codified in the Texas Civil Practice and Remedies Code, which in free translation means “the code of civil practice and remedies of the state of Texas”; or New York and the New York Civil Practice Law and Rules (CPLR)).

SUMMARY

Necessary defense is an important element not only of Polish legislation. As it has been proved in this work, the provisions defining it can be found both in the legal systems of European countries operating on the principles of civil law, as well as in the United States – the common law country. The discussed counter-rule is defined and described in various ways in national legislation. In some codes, for example in Poland, in order to qualify an action as a necessary defense

it must satisfy a number of rules already included in the discussed provision. In others, the regulations about necessary defense are more enigmatic.

This does not change the fact, however, that if they have been included in sets of regulations, they are an important part of the legal system of many different countries.

REFERENCES

- Amielańczyk K., *Vim vi repellere licet. Kilka uwag na temat genezy prawa do obrony koniecznej w prawie rzymskim*, Palestra 11-12/2008
- Ankony R.C., *Sociological and Criminological Theory: Brief of Theorists, Theories, and Terms*, CFM Research, 2012
- Baum F.S., Baum, J., *Law of Self-Defense*, Nowy Jork 1970
- Black H.C., *Black's Law Dictionary. Definitions of the Terms and Phrases of American and English Jurisprudence, Ancient and Modern*, 4th ed., 1968
- Czechowska M., *History of the principle vim vi repellere licet in Polish criminal law – evolution of the counter-rule of necessary defense*
- Diosdi G., *Vim vi repellere licet (A contribution to the study of the question of self-defense in Roman Law)*, Acta Universitatis Wratislaviensis. Antiquitas, Vol. I, 1963
- Ginszt K., Ginszt J., *The concept of self-defense in American and Polish legal systems*
- Karaszewski G., *Civil Code. Commentary updated*, Ciszewski J., Nazaruk P. (eds.), LEX/el. 2023, Art. 423.
- Jędrzejewski Z., *Necessary defense, an aggressive and defensive state of ... higher necessity in civil and criminal law – justification (legalization) of a criminal act between freedom and utilitarianism (proportionality, solidarity)*
- Poola M., *Evidence of civil law – Estonia*
- Sosik R., *Self-defense in Polish and American criminal law. A comparative study*, UMCS, 2019
- Yerenatovna D.R., Talantuly N. E., Abaevna B. A. and Bakhyt K., *Stages of Formation and Historical Development of the Institute of Necessary Defense*, Middle-East Journal of Scientific Research 14, pp. 33-40, 2013