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VARIATIONS ON A THEME?

Dogmatic problems of the criminal offence of robbery in Hungarian and English law

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– doctoral thesis summary –

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Budapest, 2021

THE OBJECT AND AIM OF THE DISSERTATION

Amongst the legal problems regarding the criminal offence of robbery one cannot find big questions or one great problem which could be solved by proposing one specific solution. Apparently, the case law seems consistent and the dogmatism clear but there are numerous problems and debatable matters only visible for the keen eye.

While a robbery can be committed quite easily and usually it does not need too much of a sophisticated approach, the legal analysis should necessarily be complex. There is always a violent act and an act against property, both of which should be analysed thoroughly, and the fact that for the latter, a deeper understanding of Property Law is a must, complicates matters further.

Because of the fabric of our society and the basic nature of human beings, offences against property have always been amongst the most frequently committed crimes. However, the object of my dissertation is a complex criminal offence which is more serious than other offences against property

because of its violent part. Robbery is the most serious of all violent property offences.

The lawmakers dedicated Chapter XXXV. of the current Hungarian Criminal Code exclusively to the violent property offences, enforcing the principle of protected legal object behind the structure of the Special Part of the Criminal Code better than they did with the former Criminal Code of 1978, which had only one chapter for offences against property and this contained violent and non-violent property-crimes alike.

So robbery is both a violent and a property offence which complexly protects the social interest of maintaining the property structure – the rules of possession and ownership – of the community and all individuals' freedom of will and action. Due to the frequency of this crime, and the fact that is most likely committed by a physical attack against the victim's body, the social priority of the offence of robbery is very high. Its seriousness is only added to by the fact that it is very often committed by multiple perpetrators.

A comprehensive analysis on robbery has not been done since Pál Angyal's famous work from 1934.[1] In the past eight decades society and the world itself has changed considerably, so it is time to look at the dogmatism of this offence and rethink it where necessary.

Our current Criminal Code[2] has three predecessors: the 1878 Criminal Code (also known as the Csemegi Code),[3] the 1961 Criminal Code[4] and the 1978 Criminal Code.[5] The Criminal Code in force has not introduced any significant novelty regarding robbery except for the creation of a separate chapter for violent crimes against property. The text found in Section 365 is almost the same as the text in the 1978 Criminal Code was (Section 321), only a few insignificant textual amendments occurred. The case law of the former Criminal Code is consistent with the current case law and no harmonisation from the Curia

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[1] Pál Angyal, Handbook of Hungarian Criminal Law, 11. Robbery and Extortion, Athenaeum, Budapest, 1934.

[2] Act C of 2012 on the Criminal Code

[3] Act V of 1878

[4] Act V of 1961 on the Criminal Code of the Hungarian People's Republic

[5] Act IV of 1978 on the Criminal Code

has touched the offence of robbery, but with time passing and our society constantly changing there is always a danger that the old, familiar text of the legislation and the consistent case law connected to it becomes outdated and despite the changed social situation the necessary revision might not happen.

From a research point of view, the consistency in the legislation, case law and dogmatism of robbery is fortunate and makes the analysis easier because the case law produced by the courts using the 1978 Criminal Code is still good law, and all secondary sources – articles, manuals, books, etc. – based on this can be used during the research.

One of the aims of this dissertation is the detailed analysis of the offence of robbery, during which, to any revealed and identified problem a possible solution is proposed. To the other aim there is a direct hint in the title of the dissertation. Although the primary goal is dogmatic analysis, secondarily there is an aim to compare the criminal offence of robbery in two entirely different legal systems: in the English common law and the continental legal regime of Hungary.

I was a simple thought-experiment that led to the object of this research and to the research method. The basic proposition was made in the form of a question using words with their ordinary and not their legal meaning. The proposition is as follows: ‘There are robberies committed in Hungary which are dealt with by the law in a certain way. It is common knowledge that robberies are committed everywhere else too, the question is, how local laws deal with these acts. If the actions of the perpetrators are the same, will there be a possibility for the legal interpretation of these similar actions to be substantially different? Another important task was to decide which country’s legal system was most likely to be different enough from ours to come across with such a substantially different interpretation. Looking at our continental legal system, the common law jurisdiction seemed to be the best choice, holding probably the biggest differences. The choice fell on English law because it is the oldest of common law systems, the first of its kind.

So the main question is, that – presuming and accepting the fundamental social rules of the existence and protection of private property and the generally congenial

nature of events when someone commits a robbery in England and in Hungary – how the legal assessment of acts of robbery committed in the two different jurisdictions can differ from each other.

The question mark in the title represents the ultimate goal of the dissertation: to answer the question with a 'yes' or a 'no'.

RESEARCH METHOD

The research consists of two parts. The first is a comprehensive analysis of the Hungarian law concerning robbery, while the second part is a shorter presentation of the criminal offence of robbery in English law. The second part also contains the necessary parallels drawn and distinctions made between the two legal system's approach to robbery. This is followed by my observations and conclusions at the end of the research.

It is important to point out that despite the comparative structure of the dissertation is not about Comparative Law. The same method is used here as in the case of any other scientific endeavour to analyse Criminal Law: dogmatism. Since the Hungarian and the English legal system and

jurisprudence is based on a different dogmatic basis, the points of analysis should be somewhat different in Criminal Law as well.

The Hungarian criminal dogmatism makes distinctions between different categories of legal concepts in an abstract, generalising way, making ladder-like conceptual structures and it always searches for and makes type solutions.

The first step of the analysis is the legal object (which cannot be found expressly in the text of the Criminal Code), then the different elements of the crime are to be looked at in detail: the objective side of the elements first, then the subject (perpetrator) of the crime with the conditions of becoming the subject of a crime, and then the subjective side of the elements. The aggravated or privileged form of the crime – if such exists in case of the offence in question –, the phases of the crime are also parts of the analysis, just as the questions of unity, plurality or the necessary distinctions between different offences. The first part of the dissertation follows this Hungarian method.

English lawyers use dogmatism too for the analysis of criminal offences, but the principles and the order of analysis is different, as they employ a less ladder-like system based on abstract type-solutions. In the English system there is no Criminal Code, but there are separate Acts of Parliament for certain offences (or groups of offences) like theft, robbery[6] or fraud,[7] while other offences are still governed by common law without a background in parliamentary legislation, such as murder. The lack of a Criminal Code naturally means that there are no Ordinary and Special Parts to speak of, although the authors usually discuss the general concepts of Criminal Law applicable to all offences separately from the offences themselves. At the same time, it is worth noting that certain concepts belonging to the Ordinary Part in our system are considered separately, as if they were separate offences (i.a. the phases – attempt and preparation – of the crime and the forms of perpetration like aiding and abetting). General defences might be considered after the offences and it is worth keeping in mind that certain

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[6] Theft Act 1968, Theft (Amendment) Act 1996
[7] Fraud Act 2006

offences might have special defences attached to them, which are always analysed together with the offence itself. General defences are different from special ones in the respect that their application almost always results in acquittal irrespective of the offence they are applied to.

English dogmatism usually divides the analysis into two, abstract parts: actus reus and mens rea.

Although actus reus contains the conduct of the perpetrator, but it is a much more complex concept than the 'criminal conduct' in Hungarian terminology. Actus reus contains everything belonging to the 'objective side' in our system.

English authors differentiate between three types of elements within actus reus: conducts, circumstances and consequences. There is always a conduct in every offence but circumstances and consequences are not necessarily present. The other main category is mens rea which translates to 'guilty mind' in English, so the Hungarian term of 'culpability' seems appropriate for the continental lawyer, but in line with the translation of actus reus as the 'objective side' of the offence, the proper translation for mens rea to Hungarian terminology is the 'subjective

side'. Additionally, there is also a division into objective and subjective mens rea within mens rea itself.

The English technique of analysis deals with the question of sentencing and possibly other problems. In case of robbery such a problem is the completion of the offence. The second part of the dissertation operates with the English method analysing the English offences, to the extent of the limits of a doctoral dissertation as necessary to the successful comparison between the English and Hungarian version of robbery. The differences between the two legal systems (resulting from conceptual and linguistic disparities) are indicated partially in the second part, partially amongst the conclusions and observations at the end of the dissertation. For the purpose of making the comparison as thorough as possible, the Hungarian and the English method of analysis used in Criminal law are compared to each other in the dissertation, just as the main dogmatic concepts. The dissertation aims to draw parallels between similar legal concepts and make distinctions between different ones. Moreover, the most important English cases are analysed not only according to English law, but also as if they were Hungarian cases under

Hungarian jurisdiction. This method aims to show whether cases with similar facts can end up being decided differently in the two legal systems.

OBSERVATIONS

Evaluation of the problem-proposal

The first question asked in the introduction of the dissertation was whether it was possible to reach a substantially different legal conclusion based on similar events (criminal conducts) happened in England and in Hungary. As the result of the research it can be ascertained that the right answer to the question asked using non-legal terminology would most probably be ‘no’.

It also became clear that the question itself could not be considered entirely precise because of the lack of legal terminology. According to the non-legal terminology, robbery means taking away a thing from someone violently, using force. In this sense, there is no significant difference between the English and the Hungarian system. The real difference can only be seen after a systematic analysis and the clarification of the legal concepts. From a

common language point of view, robberies in Hungary and in England are committed in the same way, and the legal interpretation of these actions are also roughly identical. Nevertheless, this is only the surface under which fundamental differences lie, even on the level of basic legal concepts. This is mostly the result of the differences between the two legal systems, but this is well known. The aim of the research was never really about the reasons behind the differences, but the analysis one by one then making a comparison.

Based on the problem-proposal, a comprehensive analysis was possible and the questions asked were appropriate be answered. The fact that the problem proved to be much more complex than it had been anticipated at the beginning of the research, does not make the questions flawed. It is safe to state that the question asked at the beginning of the dissertation can be answered adequately based on the research. The results can be summarised as follows.

General differences

Both English and Hungarian regimes were analysed with their own proper method because applying a foreign way of analysis to a regime would not have been fortunate. This resulted in obvious differences between the two parts of the dissertation, mostly from a systematic point of view. This however did not make the comparison more difficult, but only helped in understanding.

The first point of comparison is the method of analysis. This is not specific to robbery; it can be applied to all offences. The method was criminal dogmatism in both parts of the dissertation, although the concepts and the points of analysis showed significant difference. Looking at the different approach of English dogmatism one might even think that the principles of analysis of common law does not even form a dogmatic system. Though this thought came up during the research, but in light of the whole and finished research it can be said with certainty that English Criminal Law also utilizes criminal dogmatism, but there are significant differences in the definition of legal concepts.

In the Hungarian system, the basis of research is the text of the Criminal Code which is analysed using the method of criminal dogmatism, through the points of analysis set out in the commentaries of the Criminal Code. There are other sources helping with the interpretation: other pieces of legislation, documents came into existence in the process of legislation (like a written justification of a bill), decisions of various courts of law, the products of the harmonisation activity of the highest court and writings of various authors. The commentaries of the Criminal Code are definitely the products of jurisprudence just as other writings of legal authors, but commentaries are more important than the rest of the secondary sources. In the English system, the text of the legislation also dominates, because robbery is not governed by common law anymore, but by an Act of Parliament. Nevertheless, there is no official commentary for the Theft Act 1968, only the famous works of famous lawyers constantly used by the courts throughout the decades. These are usually comprehensive legal handbooks made many editions; they are trusted and regularly quoted by the courts. It is important to note that in Hungary there is no official

commentary either, there is only a written justification to the Bill on the Criminal Code,[8] and after the entering into force of the Act on the Criminal Code several commentaries are written. Not one, but several of these handbooks exist, written by different authors and published by different publishers. The two systems are similar in this respect. The role of jurisprudence in English law is subsidiary as well, because the legal system is based on the Doctrine of Precedent which is a chain-like structure of court decisions where legal decisions made by judges in higher courts are compulsory to be followed by lower or equal courts in the future. Thus, the interpretation of the legislation can be learned best from the decisions of the courts. These judgments use the same terminology as the great handbooks and they often contain references to these books and their authors' legal opinions. The dissertation shows the same phenomenon existing in Hungary by presenting numerous decisions of the Curia of Hungary where the court cited great authors like Pál Angyal. After reading all the English and Hungarian court

[8] The Hungarian Government's No. T/6958. Bill on the Criminal Code. Justification for the Act C of 2012 on the Criminal Code.

decisions, reference to great authors might be a little more common in the practice of the English court, the similarity in this regard is beyond any doubt nonetheless, so both the English and the Hungarian judge likes citing expert jurists with unquestionable authority.

In the English system, the highest court takes part in the harmonisation of the case law by rendering judgements, so there is no specific type of decision for this purpose, thus the English system lacks the Hungarian legal system's uniformity decisions the specific aim of which is the harmonisation of the case law. The highest court is the Supreme Court (formerly called the House of Lords) but in some cases the Judicial Committee of the Privy Council serves as the final forum for appeal. Regarding the offence of theft and robbery the Privy Council has no jurisdiction in in England and Wales, nevertheless, there are cases where the English courts refer to the case law of the Privy Council because this forum also tends to conceive important legal principles. However, most of the case law comes from lower courts like the High Court or the Court of Appeal. It is also worth mentioning that English courts sometimes refer to judgements from abroad – even in the

case law of the Privy Council –, from the United States of America for example. Naturally, this only happens when the judge can use those decisions for the corroboration of his or her reasoning. These foreign court decisions are not binding; they only form a part of the law as the works of authors. Hungarian criminal courts hardly ever (or almost never) refer to foreign law or a decision of a foreign court in their judgements.

An interesting difference – which is obviously the result of the Doctrine of Precedent – is, that while in the Hungarian system the courts prefer to refer to and cite the case law of the Curia, in the English system the Supreme Court speaks much less, and the majority of the cited judgements are important decisions from lower courts.

The structure of English judgements is different from the decisions of the Hungarian courts as well. English judgements resemble the decisions of the Hungarian Constitutional Court the most. The judge presenting the case makes his arguments to which the agreeing colleagues join, sometimes emphasizing certain thoughts of their own, then the opinions of the dissenting minority of the judges are recorded. The wording of a decision of a

Hungarian criminal court is always unified, the opinions of every single member of the judicial council is not recorded separately.

There is a considerable difference in the style of language used in the court decisions of the two jurisdictions. The reasoning and the whole text of a Hungarian court decision aims to be impersonal and highly technical, while an English judgement can be compared best in style to a legal handbook, where the judge writes down his or her legal opinion which is binding. A Hungarian court always refers to other judgements when necessary, while an English judge uses other judges' reasonings found in different judgments.

Apart from the forums discussed above, there are various advisory bodies as well (like the Law Commission), which take part in the shaping of the law by giving opinions on various legal matters. With regard to the fact that the members of these bodies are mostly renowned lawyers and the problems they deal with are always important, their opinions have considerable value, they are not binding however.

Key dogmatic differences

As it was emphasized by Pál Angyal, robbery is a clearly separate offence which is not an aggravated form of theft (or any other offence) under Hungarian law; this is a major difference between the two legal systems. In our Criminal Code, robbery unifies the offence of theft and duress into one offence by law; this is true for both forms of robbery: *delictum complexum* and *delictum compositum* as well.

In the English system, the perfectly separated nature of robbery is not obvious, because this legal system recognises neither the concepts of *delictum complexum* and *delictum compositum*, nor the concept of unification by law. According to the common view in English law, robbery is in fact aggravated theft. Additionally, the offence of robbery is governed by the Theft Act 1968, but the offence has its own name and it is separately dealt with in the Act.

The legal object of an offence does not exist in English dogmatism; English lawyers does not pay particular attention to the interest protected by law as a category of analysis.

With regard to the real object of the offence, it has to be put down that in both systems property is the real object of the crime, but the concept of property is considerably different in each jurisdiction. Under English law, property is not the thing itself, but the rights and obligations attached to the thing. It is without question, that physical objects can become real objects of the crime in both systems, but under English law real estate (land) can become the real object of the crime in exceptional cases, whereas in Hungarian law this is not so.

The question of wildlife is interesting because wild animals cannot be the real object of theft or robbery, but they can become the real objects of the crime of poaching. In the Hungarian system theft and poaching can even be cumulated.[9]

As for the human body and the parts of it as real objects of the crime, the two systems follow mostly the same principles, as these things can very scarcely become real

[9] English law deals with theft and poaching so separately that the two offences are governed by entirely different pieces of legislations.

objects of a crime, and as a general rule, they cannot be stolen or robbed.

Regarding things in action, it has to be emphasized that these are actually claims, so it is impossible for them to become real objects of robbery in Hungary. Amongst other incorporeal things, electricity is the one worth mentioning because it can become the real object of theft – and in my opinion robbery as well[10] – in Hungary, but in England there is a separate offence criminalising the dishonest consumption of electricity, called 'abstracting of electricity'.

Some English authors contemplate that even information may become the real object of theft.[11]

The two legal systems follow the same patterns regarding the passive subjects (victims) of robbery. According to both the Hungarian and English rules, the person whose

[10] Cf.: András Vaskúti, The violent crimes against the property (Chapter XXXV.), In: Commentary of the new Criminal Code, Vol 7, Special Part (editor in chief: Péter Polt), National Publisher of Civil Service and Textbook Co. Ltd., Budapest, 2013, p. 10.

[11] Anna Louise Christie, Should the law of theft extend to information? Journal of Criminal Law, Vol. 69, Issue 4, 2005, pp. 349–360.

property rights and personal rights are violated by the offence is often the same, but in certain cases these can be separate persons.

With regard to both theft and robbery it has to be pointed out, that the central action in Hungarian law is the taking (away) of the real object of the offence, while in English law the central momentum is the appropriation. The 'taking' as an action is undeniably object-centered, so the main momentum is the interaction with the thing itself, while the concept of appropriation in English law – which is in fact exercising an ownership-right – is right-centered, where the emphasis is not on the object (the thing) itself, but on exercising the rights attached to it. This approach to the concept of appropriation is understandable in respect of the fact that 'property' is not the object (thing) itself in English law, but all the rights attached to it. Appropriation is present in the Hungarian system as well, but it is always the next step after the taking of the object. There is always targeted intent in case of a theft or a robbery pointing to the appropriation which is the intended result of the action. In my opinion however, the Hungarian term for appropriation (*eltulajdonítás*) is an unfortunate choice of

word because it can easily be mistaken for the acquisition of property in Hungarian (*tulajdonszerzés*), but nobody can acquire property by theft or robbery.

During the analysis of the term 'appropriation' in English law, the vastness of the concept's interpretability became clear. This problem is known both amongst authors and legal practitioners; there is a need for a more precise definition, to such an extent that the idea of making a comparison with continental laws emerged in hope of a better solution..[12]

Another main difference between the offence of robbery in the two legal systems is the sufficient degree of force used by the perpetrator. Hungarian law requires irresistible force (*vis absoluta*), while in English law a considerably low degree of physical action is enough for a conviction for robbery. Similarly however, when the force applied is only against an object, there is no robbery committed, only in case of force applied on a person or force applied on an

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[12] Nils Weinrich, German cures for English ailments? Appropriation versus taking away: significance and consequences of conceptual differences between the English and the German law of theft, *Journal of Criminal Law,* Vol. 69, Issue 5, 2005, pp. 427–441.

object in such a manner that the force spreads onto a person. Cases where the perpetrator tears a bag or a sack from the victim's hand a common in both Hungarian and in English case law; these actions usually amount to robbery in both countries. Otherwise, the English concept of force is much harsher, so a much lower degree of force is enough for a robbery conviction.

Regarding the threat, it is worth noting that the two regimes bear a resemblance to each other, although the wording of the legislations are different. The threat in English law is immediate regarding both time and place (*then and there*), and means threatening with the use of force, so it is quite similar to the Hungarian concept of 'threat against life or bodily integrity'. There is no explicit equivalent however to the English concept of 'seeking to put a person in fear of being subjected to force', although there is no real need for that, because when someone seeks to put someone in fear, it is an unsuccessful threat, but a threat nonetheless.

The English concept of 'dishonesty' does not exist in Hungarian law, because the doctrine of culpability in the

General Pert of the Criminal Code is applicable to robbery which committed by targeted intention.
In my opinion, the possible parallel of the ’intention of permanent deprival’ could be the ’targeted intent of appropriation’ in Hungarian law.

Answer to ‘the Question’

‘Is it possible to reach a substantially different legal conclusion based on similar events (criminal conducts) happened in England and in Hungary?’
At the end of the research, it is safe to say that the acts defined as robberies under Hungarian law would be robberies under English law as well. The inverse of this statement is not necessarily true however. Robbery always includes theft. In English law, theft has a much broader scope than in Hungarian law, so it seems only logical that robbery has an equally broader scope. It is questionable however, that any act of theft can be accompanied by the application of force, thus evolving into robbery. If it is so, then the offence in English law has a broader spectrum.
The other factor beside theft is the question of force applied or the threat of force. Obviously, the degree of

force necessary for the offence of robbery to be committed is much lower in English law than in Hungarian law: not only acts using irresistible force or a threat against life or bodily integrity can amount to robbery, but also acts with much milder circumstances.

In my opinion, any act of theft can be accompanied by the use of force or the threat of using force, so any theft has the ability to evolve into robbery. Both theft and robbery have a broader spectrum in English law than in Hungarian law. As a consequence, the criminal offence of robbery according to the Hungarian Criminal Code would be considered as robbery in English law as well, but the offence of robbery under the Theft Act 1968 has a much broader spectrum.

List of publications

Commentaries on the counts of robbery with a brief detour to the court practice of continuous unity, *Büntetőjogi Szemle*, 2014/3, 14-18.

The impact of court practice on the interpretation of the actus reus of robbery according to section 365 (1) of the Criminal Code, *Magyar Jog*, 2016/11, 628-637.

Co-perpetration, complicity and group perpetration in the court practice of robbery, *Ügyészek Lapja*, 2017/2, 27-42.

When the thief caught in the act becomes a robber, *Iustum Aequum Salutare*, 2018/2, 281-299.