

**The effects of terrorism and their emergence in the democratic
legal system**

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Theses of the Doctoral Dissertation

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Budapest
2019

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I. Antecedents

By the late 20th century, a lot of people felt that the world had become a better, more just and more peaceful place. Those beliefs were clearly refuted by the terrorist attacks on 11 September 2001. In the past 18 years, with the sole exception of the global economic crisis, the news, the interest of the public and international relations have largely been dominated by terrorism. Terrorism has become such a natural part of everyday life that one now tends to quietly acknowledge, albeit with astonishment, another terror attack somewhere in the world. The state attacked and its society, on the other hand, will voluntarily and almost immediately surrender some of the fundamental rights of natural persons and the integrity of some democratic institutions. This is recognised as loss that is temporally necessary and proportionate. The special counter-terrorism laws introduced in France that were in effect for nearly 2 years provided a great deal of examples available for analysis and assessment. Due to the similarities in the legal systems, these findings are also relevant for the Hungarian legal system.

II. Brief Summary of the Research Objectives

The articles discussing the relations of effects of terrorism tend to interpret the subject in a rather one-dimensional way. The political, legal and economic impacts are thus usually approached from two directions. First, the relationship between terrorism and the democratic state is described as a battle between good and evil and a best practice is recommended in order to ensure the expected achievements. On the other hand, the values traditionally associated with western democracies are considered as probably having been lost for good. That pessimism essentially determines their potential findings. At the same time, terrorism exerts a number of latent effects on democratic institutions, which tend to escape the attention of both the practical recommendations serving as 'rallying cries' and the melancholic catchwords. While not from one day to another, over a long period, these latent effects are likely to alter traditional practices

and relationships by fine-tuning our values rooted in security. Democratic conditions are tremendously exposed to change, which is unclear and, most importantly, do not happen overnight.

This study therefore addresses three hypotheses.

(1) Government action against terrorism exerts the impacts of a (traditional) armed conflict on international and domestic legal (public law) relations. The rhetoric of war has been a long-standing practice applied by sovereigns to describe the specific relationship between government bodies and terrorists, particularly where an explanation is required for the deployment of the military.

(2) In counter-terrorism action, the gradual approach normally characteristic of legislation and jurisprudence has disappeared. In addition to the qualitative and quantitative expansion in the abridgment of rights, the boundaries between various fields of law have been qualified, the focus of the jurisprudence of courts has shifted and rules of conduct have appeared that are closer to the social customs of modern times than to normative requirements.

(3) In international relations, the terror threat appears to be one of the widespread political diseases of our age as it may, without any explicit and direct threat, induce political and legislative processes that otherwise normally appear when a direct menace is being faced. The issue is approached on the assumption that the effects of terrorism reach third countries not directly affected by terrorism through a transfer interface. There, they will then exert an influence on political mechanisms, legislation and the interpretation of law. That interface is identified by the study as fear.

The study thus has three objectives: firstly, a terminological question (the war rhetoric), secondly, a dogmatic question (the taxonomic and logical connections of a gradual approach) and, thirdly, a special legal sociology question focusing on the effects of the fear of terrorism.

III. Adopted Research Methodology

While international terrorism has impacted the entire international community, it has essentially determined the recent few decades of certain countries. The sources used for the study fall into two groups: while some address the phenomenon of terrorism in general, others discuss national legal reactions and specific national solutions to terrorism. Apart from studies in English, French, German and Spanish on the subject, the latter include a number of Western European and American pieces of legislation, national and international case-law, statistical data, international agreements and political manifestations determining nationhood policies and international relations.

While the considerations under review are related, their analysis requires a special approach. Therefore, the study attempts to interpret the sources in a complex manner, approaching them from three directions and treating them as being related. Accordingly, the structure of the study is not built up as a classical linear argumentation. Instead, it applies a spiral solution, as it seemed more appropriate to reveal the intricate relations.

On the basis of its structure, the study is based on three main criteria of analysis: (1) the legislative and case-law approach determined by the terror threat, (2) automatic and ad hoc responses in order to protect democratic values and institutions, and (3) the ultima ratio action of the legal system, i.e. special law. While the three analytic criteria are discussed in three separate chapters, the close and sometimes direct causal links between the sources used could not be disregarded, as it is mentioned in the study.

IV. New Findings of the Dissertation and Possibilities of Their Utilization

According to the first hypothesis of the study, counter-terrorism measures latently produce the effects of an armed conflict on the domestic legal system. This is suggested by the facts that the duties emerging in connection with counter-terrorism action are typically assigned to the military and the police and that, in the language of politics, the action to battle terrorism is described in military terms. While such terminology was used during most of the 20th century in Britain and Israel, war rhetoric has become ubiquitous since the terrorist attack of 11 September 2001.

Diverse national and international efforts have been made to counter terrorism. It would be counter-productive to reduce them to a military approach. At the same time, the means applied by sovereigns lack any warlike nature that would suggest the presence of an international armed conflict. No special law is normally introduced in order to avert the threat and, if so, it can be distinguished from the type of special law implemented in the case of an armed conflict. Similarly, the counter-terrorism action by governments also lacks other characteristics of armed conflicts. There is no general mobilisation order, the central administration is not switched to defensive administration in response to the threat of war and the existing market economy is not limited by war economy in any way. In other words, the rhetoric of war appears to have become widespread due to its political repercussions rather than with regard to its sound legal dogmatics.

According to the second hypothesis of the study, the gradual approach between the legal measures to counter terrorism has disappeared. With regard to terrorism, apart from the measures requiring legislation (within the legal system) and measures not requiring legislation yet having a legal effect, the study looks at criminal law (ultima ratio-type) and non-criminal law (other) solutions, public law and private law instruments and solutions associated with special law and normal (peacetime) law.

It is concluded that the time elapsed since a terrorist attack is inversely proportional to the restrictions manifested in the instruments applied. In other words, the less time has elapsed since the terrorist action, the stronger the limitation of rights, mostly lacking any sound (i.e. properly prepared) legal context. With the passing of time, however, some previously foregone yet necessary changes to the legal system, mostly less restrictive or not restrictive at all, are also implemented. The study also concludes that some of the instruments employed during the counter-terrorism action go beyond the protective function of the government, e.g. relies on multinational corporations, thus essentially transferring part of the political responsibility to those non-governmental actors of limited accountability.

The direct impacts of the terrorist action on politics, the society and the legal system are manifested in the short-term measures, whereas on the medium term, its indirect effects will also appear. Terrorism results in a change in people's values, which can be revealed in particular in terms of the relationships of an ongoing and immediate terror threat. Society will ultimately adapt to the perception of danger, whereas an actual terror attack is always received by the society with zero tolerance. Since terrorism poses an exceptional challenge to governments, the lawmaker will often choose exceptional solutions in response. On the basis of the assessment of French and American examples, it is concluded that, in connection with terrorism, special legal solutions have leaked among the ordinary elements of legislation and thus exert a long-term and virtually unnoticed impact on the legal system.

According to the third hypothesis of the study, terrorism has repercussions on both the entirety and individual members of the international community, setting the legal system off on a special spiral track of defence as a result of the immediate threat. Today, terrorism can solely be interpreted on an international level, with the international community and its members seeking the appropriate responses. For terrorism, the mere existence of a state may give rise to the methods a terrorist organisation selects its targets.

The study arrives at the conclusion that the fear of terrorism acts as a catalyst on a number of political mechanisms which will then affect

legislation or international relations. The effects of the appearance of the fear of terrorism are separately assessed depending on whether they are of internal or external origin. Among the effects of internal origin, a distinction is made between political interpretation and political interests, whether the effects of external origin are divided into four sub-categories: common cultural foundations, empathy, political cooperation and military alliance. International relations are affected by each sub-category, which thus indirectly play a part in adopting the fear of terror threat.

On the whole, the following basic conclusions are made:

- Terrorism has transformed the system of international relations as staying out of international counter-terrorism cooperations may result in isolation or may have even more serious consequences. This has ultimately rendered impossible any attempt at an isolation policies, at least as far as terrorism is concerned.
- The practice of choosing, scheduling and maintaining the instruments of counter-terrorism in effect has radically altered the legal system, particularly during the past decade. Its most serious consequence has been that special legal solutions have been implemented and later adopted within the framework of the ordinary legal system. The lawmaker has thus normalised the exception and sustained what used to be transitional. In order that the elements alien to the ordinary legal system can be applied, the direct regulatory environment needs to be adapted, which in turn results in further unforeseeable regulatory pressures. Ultimately, during any future legislation, the exceptional elements will represent a minimum of security, serving as a point of reference on codifying any subsequent security-related provision.
- The emergence of democratic values and institutions has been a consequence of centuries of continuous legal and social development. The terror threat directly prejudices people's need for physical safety. The integrity of fundamental rights is treated more flexibly by the society if their restriction is related to their sense of security. The exceptional solutions of special law represent an answer in cases where the legal system is unable to rise up to the challenge without

prejudicing its integrity. Once the special law has been terminated, the former conditions of public law are restored. However, the changes implemented due to terrorism are perpetuated, i.e. the rule of law will never return to its original condition. Value relativism may emerge, while the rule of law drifts away from the fundamental values that define its very essence.

V. List of Publications

SABJANICS István: *Fear as a Source of Threat with Legal Consequences*. In: FINSZTER, G., SABJANICS I. (szerk.) *Security challenges in the 21st century*. Dialog Campus Kiadó, Budapest 2018., pp. 737-745.

BÉKÉSI Nikolett, SABJANICS István: *A terrorizmus elleni fellépés magánszférát érintő kérdései*. In: CSINK Lóránt (szerk.) *A nemzetbiztonság kihívásainak hatása a magánszférára*. Pázmány Press, Budapest 2017., pp. 227-260. [*Privacy-related issues of counter-terrorism action.*]

CSINK Lóránt, SABJANICS István: *A különleges jogrend alkotmányjogi és igazgatási értékelése*. In: CSINK Lóránt (szerk.) *A nemzetbiztonság kihívásainak hatása a magánszférára*. Pázmány Press, Budapest 2017., pp. 261-285. [*The constitutional and administrative assessment of special law.*]

SABJANICS István: *Az Alkotmánybíróság határozata a bírák nemzetbiztonsági ellenőrzéséről: A jogállamiság gyakorlati értelmezésének két konkuráló oldala.* In: *Jogesetek Magyarázata* 2017/4., pp. 19-24. [*Decision of the Constitutional Court on the national security clearance of judges: Two competitive sides of the practical interpretation of the rule of law.*]

SABJANICS István: *A nemzetbiztonság jogi koncepciója.* In: CSINK Lóránt (szerk.) *A nemzetbiztonság kihívásainak hatása a magánszférára.* Pázmány Press, Budapest 2017., pp. 103-123. [*The legal concept of national security.* In: *Effects of the challenges of national security on privacy.*]

SABJANICS István: *The Legality of National Security.* In: Agnieszka BIEŃ-KACAŁA, CSINK Lóránt, Tomasz MILEJ, Maciej SEROWANIEC (szerk.) *Liberal constitutionalism – between individual and collective interests.* Uniwersytet Mikołaja Kopernika w Toruniu, Torun 2017., pp. 221-236.

SABJANICS István: *Ágazati-szakmai érdekek alakulása a különleges jogrendben: Különös tekintettel a nemzetbiztonsági szolgálatokra.* In: *Iustum Aequum Salutare* 2017/4., pp. 91-103. [*The evolution of industry and specific interests in special legal order: With particular regard to national security services.*]

SABJANICS István: *A rendészeti hatáskörök exportálása: A katonai és a rendvédelmi feladatok, avagy a tyúk és a tojás esete*. In: CHRISTIÁN László (szerk.) *Rendészettudományi kutatások: Az NKE Rendészetelméleti Kutatóműhely tanulmánykötete*. Dialóg Campus Kiadó, Budapest 2017., pp. 121-128. [*Conferring police powers: Military and police duties or the chicken or the egg dilemma.*]

SABJANICS István: *A félelem mint jogi következményekkel járó veszélyforrás*. In: FINSZTER G., SABJANICS I. (szerk.) *Biztonsági kihívások a 21. században*. Dialóg Campus Kiadó, Budapest 2017., pp. 745-753. [*Fear as a Source of Threat with Legal Consequences*. In: *Security challenges in the 21st century*]

DRINÓCZI Tímea, CSINK Lóránt, SABJANICS István: *A biztonság alkotmányjogi szabályozása Magyarországon*. In: Agnieszka BIEŃ-KACAŁA, Jiří JIRÁSEK, Lubor CIBULKA, Tímea DRINÓCZI (szerk.) *Kategorija bezpieczeństwa w regulacjach konsytycyjnych i praktyce ustrojowej państw Grupy Wyszehradzkiej*. Wydawnictwo Naukowe Uniwersytetu Mikołaja Kopernika, Torun 2016., pp. 309-356. [*Hungarian constitutional law and interpretations of security*. In: *Security in V4 constitutions and political practice*]

Tímea DRINÓCZI, Lóránt CSINK, István SABJANICS: *Chapter VI. Hungarian constitutional law and interpretations of security*. In: Agnieszka BIEŃ-KACAŁA, Jiří JIRÁSEK, Lubor CIBULKA, Tímea DRINÓCZI (szerk.) *Security in V4 constitutions and political practices*.

Wydawnictwo Naukowe Uniwersytetu Mikołaja Kopernika, Torun
2016., pp. 177-199.

SABJANICS István: *A párizsi terrortámadással kapcsolatos jogi következtetések.* In: Szakmai Szemle 2015/4., pp. 156-167. [*Legal conclusions concerning the Paris terror attack.*]

SABJANICS István: *Szerepváltozások a jogállamiság horizontján: A bíró szerepének felértékelődése.* In: Szakmai Szemle 2015/2., pp. 163-174. [*Changes in roles on the horizon of the rule of law: The rising importance of the judge's role.*]

SABJANICS István: *Minősített időszakok az Alaptörvényen innen és azon túl.* In: KOVÁCS Péter (szerk.) *Religio et Constitutio.* Pázmány Press, Budapest 2014., pp. 221-232. [*Special legal periods prior and beyond the Fundamental Law of Hungary.*]

SABJANICS István: *Összehasonlító elemzés a vallásszabályozás kérdéskörében európai kitekintéssel, különösen a vallásgyakorlás színhelyére vonatkozó kötelező állami előírásokra.* In: KOVÁCS Péter (szerk.) *Religio et Constitutio.* Pázmány Press, Budapest 2014., pp. 99-103. [*Comparative analysis on the regulation of religion with a European outlook, with particular regard to the compulsory government requirements concerning the place of the practice of religion.*]

SABJANICS István: *Adatvédelem és terrorellenes intézkedések az Egyesült Államokban: A MATRIX modellkísérlet története és visszhangjai.* In: GERENCSÉR Balázs Szabolcs (szerk.) *Modellkísérletek a közigazgatás fejlesztésében: Az ún. „pilot projektek” határai elméletben és gyakorlatban.* Pázmány Press, Budapest 2013., pp. 79-88. [*Data protection and counter-terrorism measures in the United States: The story of and reactions to the MATRIX model experiment.* In: *Model experiments in the development of administration: The theoretical and practical limits to ‘pilot projects’.*]

SABJANICS István: *Az ügyészek büntetőjogon kívüli feladatai a Brit-szigeteken.* In: VARGA Zs. András, PINTÉR Zsuzsanna (szerk.) *Az ügyészek büntetőjogon kívüli tevékenysége.* Pázmány Press, Budapest 2013., pp. 137-142. [*Non-criminal-law functions of public prosecutors on the British Isles.*]

SABJANICS István: *Elméleti alapvetések a különleges jogrend vonatkozásában.* In: *Magyar Rendészet* 2013/2., pp. 69-80. [*Theoretical baseline concerning special legal order.*]

SABJANICS István: *A terrorizmussal összefüggő jogalkotás kihívásairól.* *Magyar Rendészet* 2012/ Különszám, pp. 136-142. [*On the challenges of terrorism-related legislation.*]

SABJANICS István: *Review on some actual legal issues regarding anti-terrorism legislation.* In: Tradecraft Review 2012/1., pp. 212-218.

SABJANICS István: *A terrorizmus jelentette jogállami kihívásokról.* In: Új Magyar Közigazgatás 2011/6-7., pp. 67-71. [*On the challenges of terrorism to the rule of law.*]

