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## **Anti-Terrorist Legislation in Criminal Law in Hungary**

**Prof. Dr. Krisztina KARSAI\***

### **1. Introduction**

Hungary is a small central European country with post-soviet heritage, with historical development often comparable to other European countries (kingdoms in medieval times, conflicts with the Osman empire and 150 years of occupation and living-together; eclipse of the Habsburg Empire and monarchical centuries). This means that Hungary – generally – shares the impacts of the developments of European values and institutions, and the major philosophical narratives of the continent (renaissance, enlightenment, etc.) also had their impacts on Hungarian social structures. This also means that the position of criminal law, the structures of criminal justice and the protection of social values follow the same or at least comparable patters to those of other European countries.

Concerning terrorism, we have been witnessing developments that have resulted in very different concepts over the last century. In the monarch period, terrorism as such did not constitute a normal or common crime, but rather, similar activities were covered by rules on

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treason and treachery, and assassination (attempts) against the king or the emperor (or against members of the royal family). The extraordinary character of these types of misconduct was deducted from the symbolic status of the majesty and from the thesis of the depositary of state power, and impersonation of the state authority within the royal monarchy. In Hungary, in 1921 a new legislation was passed on the offence of state subversion and disloyalty as offences against the State. These were not terrorist acts according to the late 20<sup>th</sup> C. or under the current concept of terrorism, but they did attack comparable social values like the protection of civilians, peaceful resolution of conflicts, friendly living together, public safety and public peace (orderly conduct?).

In Hungary, the Criminal Code was amended in 1971 so that the new offence of airplane hijacking could be integrated into the legislation, due to a UN convention; however, genuine terrorist offence was defined by the Criminal Code only from 1978, which was enacted into force in 1979.

Between the period of 1979 to 2001, no specific changes had been introduced, while although some UN and Council of Europe conventions were ratified by the socialist Hungary, neither the social transition nor the redesigning of criminal law had led to radical changes in criminal law provisions.

After 11/9, the criminal code was directly amended by the introduction of the punishability of financing of terrorism<sup>1</sup> (not only as an accessory, but as a genuine criminal offence) in connection with the combat against money laundering. Within two years, the newly codified criminal statute entered into force (2003), in compliance with EU and UN instruments issued in the meantime in this regard.

Hungary re-codified its Criminal Code in 2012, which was entered into force on July 1<sup>st</sup>, 2013 and contains specific provisions regarding terrorist offences, including crimes against public security. Today, the crime of terrorism is rather a “super-offence” – or a complex of crimes, almost an anchored criminal threat, in that nearly all types of misconducts that can be in connection with terrorism may be punishable as such.

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<sup>1</sup> The international instrument was already signed in 1999 (9. 12.) in New York, but the ratification was some of slow process which was clearly accelerated by 11/1.

## 2. Concepts of combating modern terrorism

Maybe *George P. Fletcher*, the internationally well-known and most cited US-American scholar of criminal law and legal philosophy had it right when he said in 2006: ‘As the concept of terrorism fulfils multiple functions, the better way to think of terrorism is not as a crime but as a different dimension of crime, a higher, more dangerous version of crime, a kind of super-crime incorporating some of the characteristics of warfare.’ This definition is useful in understanding the phenomenon itself, but is less effective to be applied in the adaptation of criminal law to fit the evolving challenges of modern terrorist. Nevertheless, many experts and authors have said and say something similar in the sense that modern terrorism cannot be tackled with the tools of modern criminal law, but that our societies must find new ways to prevent and to combat them. One of the new ways is the so-called Enemy Criminal Law (*Feindstrafrecht*; “law of war”), a concept that has been developing during the past 20 years, and which in effect liquefies the boundaries and limitations of modern criminal law, eliminating restrictions in the sense of diverging from fundamental principles (principle of *mens rea*, the principle of legality, rule of law) and moving toward enhancing the perpetrator-centred criminal law concepts. *Sieber* says that acts of terrorism are different from ordinary crime in the sense that they do not only pose a threat to the individual victim, but have far-reaching psychological and political effects on societies that could subject them to political blackmailing, and ultimately to endangering national security; political risks associated with terrorism reach far beyond the dimensions of traditional crimes and may trigger new types of wars.

Many outstanding colleagues have made presentations (at this event) on the specific character of terrorism, outlining its true evolution, and on its new genuine types that have been witnessed by our societies in Europe, in the US, and in the Middle-East. Some of them have said that ‘terrorism is the Trojan horse of the democratic political establishment.’ Yes it could be, namely ‘trying to stop the terrorists, who stealthily emerge from this horse to raze the democratic establishment, by methodically curtailing the freedom rights can turn any avid promoter of the war on terror into a dictator.’ (*Köhlmi*) Once criminal law cannot effectively tackle this phenomenon without losing its genuine reactive (ex post facto) and protective character and its guarantying function, then the new ‘security law architecture’ (*Sieber*) under construction shall step in, the main idea of which rests on the prevention of terrorist acts, and as such follows mainly risk assessment and risk management philosophies in connection with large scale surveillance and the control of normal societal life.



The evolution of the Hungarian ‘terrorist law’ shows similar tendencies,<sup>2</sup> I would like to highlight the main characteristics thereto, but focusing primarily on those in connection with criminal justice.

### **3. Hungarian criminal law today and the rule of law**

As I mentioned before, domestic legislation was not influenced by local (Hungarian) experience with true terrorist acts, for Hungarian criminal justice the individual cases are known – perpetrators without any true political agenda<sup>3</sup> – the legal developments are grounded rather in the fulfilment of international requirements and – nowadays – in complying with political movements. The current situation can be characterised by the fact that while the level of terror threat has not changed much in general in Hungary, politics uses and misuses the people’s fear of terror for the public justification of changes within criminal law and also within the architecture of security law.

#### **3.1. Offence of Terrorist Act**

In Hungarian law, the term ‘terrorism’ has not been defined; the Criminal Code (2012) contains the term ‘terrorist act’ as an offence against public security.<sup>4</sup>

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<sup>2</sup> In 2016, the Hungarian parliament amended the constitution and a number of laws concerning the response to terrorist threats. The constitution now contains a regulation on the state of terrorist threat which will be announced by the government and subsequently, within 15 days, approved by the parliament by a two-thirds majority of votes. The announcement of this state allows the army to be used in the country for anti-terrorist operations. Among the measures the government can introduce are: a curfew, restrictions on the movement of vehicles, a ban on mass events, reinforced border protection, and stricter control of Internet and postal communication. The Counter-terrorism Intelligence and Criminal Analysis Centre (TIBEK) has also been established. The new agency will be tasked with collecting and analysing data on public security threats. (Sadecki)

<sup>3</sup> The wording of the HCC (until 2003) had not contained the political agenda of modern terrorism, some common crimes against persons or against property were judged as terrorist acts by courts just due to the fact that the perpetrator demanded advantages from the authorities. In 1999, the court judged as an act of terrorism when a jealous defendant deprived his partner, and his partner’s daughter of their personal liberty, and made their release dependent on the claim given to the police. Also a terrorist act was committed when the perpetrator threatened to murder his child unless the police negotiate with him (1993). When two imprisoned males were attempting to escape a penal institution and a guard who discovered them was taken hostage (with a knife) and was threatened for hours by the two armed (!) offenders. This act was a terrorist act according to the HCC (1995). Another case from 1994 was when two armed men (with firearms) took hostages in a post office robbery and demanded free escape from the police.

<sup>4</sup> Hungarian Criminal Code (HCC) Acts of Terrorism, Section 314: (1) Any person who commits a violent crime against the persons referred to in Subsection (4) or commits a criminal offense that endangers the public or involves the use of arms in order to: a) coerce a government agency, another State or an international body into doing, not doing or countenancing something; b) intimidate the general public; c) conspire to change or disrupt the constitutional, economic or social order of another State, or to disrupt the operation of an international organization; is guilty of a felony punishable by imprisonment between ten to twenty years or life imprisonment. (2) Any person who for the purpose defined in Section (1) Paragraph a) – a) seizes considerable assets or property and makes demands to government agencies or international organizations in exchange for refraining from harming or injuring said assets and property or for returning them; b) organises terrorist group – shall be punishable according to Subsection (1). (3) The punishment of any person who: a) abandons the commission of the terrorist act defined under Subsection (1) or (2) before any grave consequences have resulted therefrom; and b) confesses

The HCC essentially incorporates the relevant elements of the crime of terrorism with the view to make the regulation more transparent. For the sake of this effort, the HCC divides the relevant stages of criminal law concerning the phenomenon terrorism into three parts, whereby it introduces the crime of ‘Terrorism’ (Section 314), ‘Failing to Report Plans for a Terrorist Act’ (Section 317) and the ‘Financing of Terrorism’ (Section 318).

The act of terrorism is a complex, aggregated offence, because it consists of a common violent offence such as homicide, robbery or a gun crime and also of a very specific terrorist purpose: the offence shall be perpetrated in order to: a) coerce a government agency, another State or an international body into doing, not doing or countenancing something; b) to intimidate the general public; c) to conspire to change or disrupt the constitutional, economic or social order of another State, or d) to disrupt the operation of an international organization.

### **3.2.Extension of the Criminal Responsibility**

In Hungary, the person who had not turned fourteen at the time of committing the offence shall not be punishable for the commission of an offence, unless the perpetrated offence is homicide, homicide committed under the influence of sudden or extreme passion, causing bodily harm with life-endangering or fatal consequences, *terrorist act*, robbery or qualified plundering (objective criterion), and provided that the perpetrator of these listed offences has turned twelve at the time that these offences were committed and is capable of recognizing the consequences of his/her conduct (subjective criterion: ‘mental-moral maturity’) (Section 12 HCC). The examination of this capacity requires special expertise; the investigating authorities shall order a special expert to investigate whether a child could be regarded as a liable person in relation

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his conduct to the authorities; in such a manner as to cooperate with the authorities to prevent or mitigate the consequences of such criminal act, apprehend other co-actors, and prevent other criminal acts may be reduced without limitation.(4) For the purposes of this Section, violent crime against the person, or criminal offense that endangers the public or involves the use of arms shall include: homicide, battery (...) kidnapping, violation of personal freedom (...) misappropriation of radioactive materials, assault on a public official (...) public endangerment (...) criminal offenses with firearms and ammunition (...) robbery (...) breach of information system or data. Section 315: (1) Any person who instigates, suggests, offers, joins or collaborates in the commission of any of the criminal acts defined in Subsection (1) or (2) of Section 314 or any person who is involved in aiding and abetting such criminal conduct by providing any of the means intended for use in such activities is guilty of a felony punishable by imprisonment between two to eight years.(2) Any person who is engaged in the conduct referred to in Subsection (1) or in the commission of any of the criminal acts defined in Subsection (1) or (2) of Section 314 in a terrorist group, is punishable by imprisonment between five to ten years.(3) The perpetrator of a criminal act defined in Subsection (1) or (2) shall not be prosecuted if he confesses the act to the authorities first hand and unveils the circumstances of the criminal act.

Section 316: Any person, a) who threatens to commit a terrorist act; or b) who travels from or through the territory of Hungary is guilty of a felony punishable by imprisonment between two to eight years.

Failure to Report a Terrorist Act, Section 317: Any person who has positive knowledge concerning plans for a terrorist act and fails to promptly report that to the authorities is guilty of a felony punishable by imprisonment not exceeding three years.

to the listed offences. However, this rule has been in force only since July 2013; to date, no remarkable such cases have occurred that would provide us a descriptive basis as to how this rule could be applied in every day practice. In itself, the evaluation of mental-moral maturity is an innovative element of establishing criminal responsibility, but, as mentioned above, reducing the age limit has faced general rejection in both academic debates and among practitioners.

This rule on the punishability of children (under 14) for terrorist offences requires not only general intent and the specific terrorist purpose, but additionally, the court must assess whether the child had not only willingly committed the act (takes the gun, kills somebody etc.), but also that s/he understands the nature of his/her acts and its consequences. The test of assessing this ability ('mental-moral maturity') is clearly different from the judicial test of purpose and intent, and psychological expertise is required to establish it.

### **3.3.Predating Criminal Responsibility**

Thus in general, it can be evaluated that criminal law provisions on terrorist acts are broadly defined, which means that even acts in loose temporal or factual connection with a planned or executed terrorist act are punishable according to HCC.

*In the temporal horizon* – the HCC makes the preparation for committing a terrorist act generally punishable. The HCC sets forth that a person who, for the purpose of committing a criminal offence, provides the conditions that are necessary for the perpetration or for facilitating the perpetration, who undertakes or offers the perpetration, invites for it, or agrees on joint perpetration, shall be punishable for preparation if this Act specifically prescribes. Of the five preparatory actions listed in this Article, four can be regarded as 'verbal forms': undertaking or offering a criminal offence, inviting for the perpetration of a criminal offence or agreeing on joint perpetration. The remaining preparatory act can be regarded as a catch-all clause that applies to each and every action that, must first be carried out in order to be able to commit a certain criminal offence or, second, that facilitates the perpetration. Examples include providing a gun or producing the poison for homicide, waiting in a car on the street for the victim to come in the case of kidnapping, or for example, installing photo printing and editing software in case of counterfeiting money. Each of these actions must be carried out in order to commit a concrete criminal offence; the perpetrator must have this special purpose and act with direct intent. (*Karsai-Szomora*)

Furthermore, it is similarly punishable if someone threatens to commit a terrorist act, and the conduct or behaviour is such that it generates serious fear in the threatened.

*In the factual horizon* – the *failure to report a terrorist act* means that anyone who has information about a planned terrorist act is obligated to report it; failure to do so shall result in punishability. The vague – only subjective – connection is similarly present in case of travelling to or through (the country) with the purpose of joining a terrorist group. In the latter case, the purpose of the perpetrator is not more than the accession to a terrorist group, which can happen – some naively – without the purpose of committing severe offences, but even in such case, the same punishment may be given, up to eight years imprisonment.

The *offence of organising a terrorist group* is a new modality of the terrorist offence (it came into force in 2016) and means that the basis of the criminalisation is the abstract danger connected to the terrorist group (which consists of three or more persons), and that this group intends to commit a terrorist offence. In order to establish criminal responsibility, it is not required for the terrorist offence to be attempted.

Finally I can report about another amendment which predates criminal responsibility and has strong symbolic character supporting the war concept of tackling terrorism. The offence of ‘*incitement to war*’ was extended and a new modality has been introduced with regard to terrorist offences: any person who before the public at large engages in incitement to supporting terrorism or otherwise displays terrorist propaganda is guilty of a felony punishable by imprisonment between one to five years.

### **3.4.Criminal Sanctions**

According to the HCC, the most severe punishment that can be imposed for persons convicted of committing a terrorist act is life imprisonment. Moreover, the exclusion of the parole is also possible for this offence, which means that if the court decides so, the convicted person shall remain imprisoned until his death, and with this decision, the conviction is turned into real lifelong incarceration.<sup>5</sup>

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<sup>5</sup>After real life imprisonment had been introduced in the system of sanctions (1998), complaints were filed to the Constitutional Court in order to contest the constitutionality of this penalty, but the court did not decide for a decade. Then in 2014, the ECtHR unanimously held that Hungary violated Art. 3 of ECHR by having imposed whole life sentence on the applicant László Magyar (László Magyar v. Hungary, no. 73593/10, 20 May 2014). Following this decision, the Constitutional Court also brought a decision and new law was issued in order to comply with the constitutional and human rights requirements. The so-called “compulsory procedure for pardon” was introduced, which provides that for the whole life prisoners who have served forty years of imprisonment, the Minister of Justice shall launch the procedure of granting a pardon, provided that the prisoner consents to it. The possibility of a conditional release will then be examined by a clemency board composed of five judges of criminal matters. The reasoned opinion of the clemency board has to be transferred to the President of the Republic who is not bound to the opinion of the clemency board and makes a discretionary decision about the release without any reasoning. Despite the introduction of this compulsory procedure for pardon, concerns under international law still remain, since this procedure can take place only after serving forty years of imprisonment, which period

The application of confiscation in the case of terrorist offences is also rather controversial. The general rule is that the all financial gain or advantage obtained by the offender that had resulted from or was honoured from the terrorist activities shall be subject to confiscation. It must be emphasized that confiscation can apply only if the connection between the property and the terrorist activity can be proven by the investigating authorities – but this link is often hard to prove. Therefore, there is a special rule (in the case of organised crimes, human trafficking, drug crimes and also terrorist offences), that all assets obtained by the perpetrator at the time the offence was committed shall be confiscated in the absence of proof to the contrary. This means that the burden of proof has been changed for cases regarding the above mentioned severe offences, and the offender has to prove the legal source of the financial gain or advantages. Moreover, all assets obtained by an offender of terrorist offence or of financing terrorism *within the last five years before the criminal procedure was instigated* shall be confiscated if the property or the living standards of the offender is especially disproportional in the light of his incomes and other personal circumstances. In such cases, the burden of proof lies on the offender, and if he cannot provide evidence to justify the legal source of the property in question, all incomes and property shall be subject to confiscation. This essentially means that if the accused fails to provide supporting evidence on the source of his income/property gained during the period in question, it shall in full be confiscated upon the ‘presumption of guilt’.

### **Latest developments**

1. A Syrian builder has been jailed for 10 years on terrorism charges in Hungary in a case that has become a cornerstone of the country’s crackdown on refugees, and which Amnesty International has called “an affront to justice”. The 42-year-old Syrian, named in court as “Ahmed H”, was arrested on the Hungarian-Serbian border in September 2015 and accused of orchestrating clashes between refugees and police. By the time he was arrested, H was already a legal EU resident living in Cyprus with his wife and children. He says he only joined the thousands of refugees making their way from Turkey to Germany last year when his elderly parents and other family members fled Syria and asked him to accompany them for their safety. They reached the Hungarian border just as it closed, which sparked clashes between police and migrants. In the melee H and his parents were arrested. As H had been carrying a loudspeaker

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significantly exceeds the 25-year period given in the Vinter (Vinter and Others v. the United Kingdom (Grand Chamber), nos 66069/09, 130/10 and 3896/10 , 9 July 2013) and Magyar judgements of the ECtHR. Furthermore, the discretionary decision of the President of the Republic eventually annuls the guarantees, which are characteristic for the functioning of the clemency board.

as well as his family's passports, he was accused of being the ringleader. He admitted that he threw something during the fracas, but said that he had initially tried to calm the situation and mediate between the police and protesters, which was why he used a loudspeaker.

In summer 2017 the regional high court in Szeged nullified the first instance judgement and ordered a new procedure due to mistakes in evidence procedures and due to missing elements of crime ('what was the demand to the authorities').

The case has been central to the right-wing Hungarian government's two-year campaign to stoke xenophobia and portray refugees as terrorists. It has also become a cause celebre for rights campaigners seeking to highlight the draconian character of Europe's refugee policies. We will see how the new first instance procedure will end – the judgement is still pending.

2. I would like to say a few words about current topics of Hungarian public discourse. The government is consistently claiming that refugees and migrants are criminals and threats to Hungary's security. State actors up to the highest level continually refer to unsubstantiated links between refugees and the spread of terrorism in Europe. The government has spent millions of euros of taxpayer money on billboards, national consultations, and a referendum to push its xenophobic agenda. The money spent did not bring any benefits and did not result in greater rights protections for anyone. Quite the opposite has happened: the climate contributes to legitimizing the appalling treatment of refugees and migrants and has been resulting in a society increasingly hostile to foreigners. In the EU built on equality and diversity, this is a worrisome prospect. We can only hope that the misleading and really damaging rhetoric will be terminated and also that my country will participate in the fair and solidarity-based cooperation in handling the migration influx.

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