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Fear as a Source of Threat with Legal Consequences[1]

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Abstract

This short essay focuses on fear which has its effects on politics, national decisions, and last but not least, on lgislation. Legal philosophers have long been discussing the differences between the legal (sollen) and the physical (sein). Telecommunications and globalization have had an amplifying effect on fear and politics. National politics stayed within the borders until the second half of the 20th century (with the exceptions of minorities living in neighboring countries), but nowadays fear (or dealing with fear at least) has its place in international politics. Terrorism is one of the sources of this fear existing in politics. Besides politics terrorism has great effect on legislation, which can be direct, undefined or hidden. Hopefully this short paper provides some food for thought until the online version, without length restrictions, is available.

Keywords: external and internal dangers, formal legality, transition between the branches of law, purpose and subject of regulations, common good, social legitimacy, legal transplantation, canon

Introduction

The title of this book may lead unsuspecting readers to expect warnings in a military, policing, or national security context, even though there are countless threats that remain mostly unnoticed in common processes and developments. Such hidden threats can have an even more corrosive impact on democracy than one would think at first, as they exert their destructive force continuously and over a long period, becoming natural and integral parts of our daily routines to such an extent that we are more likely to notice their absence than their presence. In contrast to direct threats that are easier both to comprehend and detect in the physical world, forces with an impact on the depth and outcome of political

[1] This work was created in commission of the National University of Public Service under the priority project KÖFOP-2.1.2-VEKOP-15-2016-00001 titled "Public Service Development Establishing Good Governance" and *Pázmány Péter Catholic University.*

decision-making might be more dangerous because they could change the quality and the very nature of a functioning system eventually. Such forces often prevent ex-post revision as well, since the relevant stakeholders are rendered unable to even recognize the issue. The role and tasks of governments have been defined in the course of organic social development, and the opinion of society on the government also provides useful feedback. This organic development and the consistent opinion of society on its government give and define the true identity and immunity of a political system (Pedahzur, 2002).

Special legal order

A democratic institutional framework is capable of effectively resisting external attempts to introduce any change by force, but it has a more difficult time when facing trends and processes that seek to erode democracy from the inside. Thus, the possible political impact of an actual or presumed threat is of great importance, and the primary question is whether or not the threat proposes a political alternative.

A democratic system may respond to physical threats in two fundamental ways: (1) it introduces special rules as parts of the legal system, thereby moving the threat into the realm of the law, making it comprehensible, understandable, and regulable for and by means of the law, or (2) it restricts the rules of democracy for the duration of a threat and seeks to resolve the critical situation by means beyond the realm, but used for the purposes, of the law. In the latter case, such paralegal means and solutions should be selected pursuant to the requirements of the rule of law as much as possible, as the measures taken and not taken will be assessed during the ex-post review of the events with regard to the requirements of the rule of law (Hussain, 2003). An effective means to this end could be a gradual and progressive use of power either guaranteed by normative rules or assured by the temperance of the (almost) omnipotent person in power. Less pragmatic, but deeper considerations may also play an important role in selecting the means to be used under a special legal order, such as the *spirit* of the rule of law. In short, the farther we stray from the rule of law, even if to preserve it[2], the more difficult it is to find our way back.

On the basis of the above considerations, legislatures strive to adopt a normative description of various threats, thereby reinforcing their value-based ties to the rule of law by introducing procedural frameworks as well. It may be hard to tell if the value-based or procedural approach provides greater protection, but it seems clear that the individual valour and integrity of persons maintaining a system following the value-based approach plays a more significant role, than in a procedure-based system, as such systems may be influenced by courts and judges indirectly at best. Another important sign is that the normative rules pertaining to a special legal order are normally adopted at the level of constitutions. This fact (1) indicates the significance of the normative goal, (2) raises such special rules to the highest regulatory level of legal order, meaning that special legal orders are recognized as actual alternative legal orders (apart from the very core of constitutional rules), and (3) sets up a normative framework both for introducing a special legal order and for returning to the normal legal order. The degree of democracy's immunity should also be assessed on the basis of the above considerations (Sajó, 2006).

[2] Cf. the defence function of government (Fleiner-Gerster, 2003).

The description of threats in a normative manner does not seem to pose a threat to, but seeks to reinforce, the rule of law. However, it is just natural that any rule adopted in the constitution may bring along various new rules that eventually become parts of the legal order in the wake of foreseen legislation. There is an apparent gap between normal and special legal orders, and the separation is usually also quite clear from the wording of a constitution. Pieces of legislation constituting a normal legal order are enforced during special times subject to, and together with, the rules introduced under the special legal order (with the exception discussed later), while the rules adopted under a special legal order are generally repealed when the normal legal order is reinstated. While some exceptional examples to the contrary were seen between WWI and WWII[3], returning to a normal legal order usually means both that the normal organization of government will be capable of handling conflicts that may arise later on, and that it is supported by a solid consensus in society. Under such circumstances, it seems unusual that a piece of legislation introduced under a special legal order is preserved due to a regulatory necessity or its political legitimacy. Thus, the legislative approach to actual or presumed threats that do not justify the introduction of a special legal order pose far larger challenges to the cohesion of a legal system, than any rules introduced under a special legal order does.

Legislation

The purpose of legislation is to adopt a formal and normative description of (regulatory framework for) reality for the future (Szabó, 2001). Having a formal framework means both that legal provisions are adopted by a body duly vested with legislative powers[4], which also has due political legitimacy, and that the proceeding of that body is in line with statutory provisions on legislation, i.e. laws are passed and promulgated by the authorized body pursuant to the required procedure (this is the legally defined aspect of a formal framework). In other words, laws have *formal validity*, if they meet the above requirements both politically and legally.

Adopted pieces of legislation also have *sociological validity*, a term essentially referring to the binding nature of formally valid laws having regard to the degree a piece of legislation is actually followed by members of society. While this dimension of a law could depend on the regulated subject matter theoretically, the sociological validity of a law society does not generally support (e.g. mandatory provisions on public contributions) is ensured by law enforcement. From another perspective, if a law hardly has any impact on the daily life of people, even indirectly (e.g. internal rules concerning the operations of public administration), indifference poses a far more significant threat to its sociological validity than, for example, active resistance.

In a normal legal order, the primary objective of the law is to maintain and preserve the existing social and economic order. The objective and primary task of norms adopted under a special legal order is to facilitate the return to a social and economic order that character-

[3] E.g. Act VI of 1920 on extending the period of exceptional powers granted during the period of war; Act VII of 1945 on re-enacting government decrees issued on popular jurisdiction as acts of parliament; Act XI of 1945 on the temporary consolidation of the exercise of state powers.

[4] The national assembly or cabinet, typically.

izes the normal legal order (cf. Jakab–Till, 2014). This is a substantial difference because, *a contrario*, it also means that the purpose and subject-matter of legislation is not necessarily the same under a special legal order. This last sentence needs some further explanations.

It seems clear that both the norms adopted under a normal legal order and the norms adopted under a special legal order become law. Pursuant to Article T (2) of the Fundamental Law of Hungary, decrees of the National Defence Council adopted during a state of national crisis and decrees of the President of the Republic adopted during a state of emergency shall also be laws. This means that both kinds of decrees become norms of general binding force, which may even suspend or restrict the exercise of certain fundamental rights (pursuant to Article 54).[5] The adoption of pieces of legislation is thus subject to both form and content related requirements, even under a special legal order. A duly authorized legislative organ may adopt a norm, but the grammatical, systemic, logical etc. requirements and the guarantees of access, which are normally applicable to all pieces of legislation, remain applicable. Nonetheless, the objective and subject-matter of the regulations is different, due to the very reason because the validity of laws passed under a special legal order is limited to the duration of the special legal order. In comparison to the temporal scope of laws adopted under the normal legal order, it seems clear that the limitation of the temporal scope of *ordinary* laws adopted under the normal legal order depends on a condition that is already known even when a given law is passed. This remains true even if a given piece of legislation is amended or even repealed subsequently. On the contrary, the temporal scope of *extraordinary* laws is subject to the same condition that necessitated the adoption of the legislative act.

On the basis of the above considerations, it appears on the one hand that, in a normal legal order, the relationship between the objective of a norm (i.e. to preserve and maintain the existing social and economic order) and the subject-matter of a norm (i.e. the normative description of a specific segment of the existing social and economic order) is the same as that between the whole and its parts; the objective is closely related to the subject matter of the norm. On the other hand, the objective (i.e. to eliminate the reasons for introducing the special legal order and return to the normal legal order as soon as possible) and subject-matter (again, the normative description of a specific segment of the existing social and economic order) of laws adopted under a special legal order, even if they might point to the same direction, are clearly separated from each other.

Legislation may be fundamentally characterized by that (1) it seeks to adopt normative rules deliberately, (2) it focuses on the future, just like public administration, and seeks to shape the future by regulating the present, (3) it introduces general provisions instead of dealing with individual and unique situations, (4) it creates a solid set of rules, and (5) it is also characterized by a certain degree of static existence (Szabó, 2001). In the context of

[5] Article 54 of the Fundamental Law of Hungary
"(1) Under a special legal order, the exercise of fundamental rights – with the exception of the fundamental rights provided for in Articles II and III, and Article XXVIII (2) to (6) – may be suspended or may be restricted beyond the extent specified in Article I (3).
(2) Under a special legal order, the application of the Fundamental Law may not be suspended, and the operation of the Constitutional Court may not be restricted.
(3) A special legal order shall be terminated by the organ entitled to introduce the special legal order if the conditions for its declaration no longer exist.
(4) The detailed rules to be applied under a special legal order shall be laid down in a cardinal Act."

special legal orders, legislation, similarly to public administration, also gains an operative dimension, meaning that the relative significance of tactical, specific, and sometimes almost individualized and unique legislative approaches increases in comparison to other strategic, comprehensive, and concept-focused approaches. At the same time, the somewhat static existence of previous times is replaced by a certain legislative dynamism, which in turn may not jeopardize the stability of the legal order. Such differences are clearly evidenced by the fundamental differences between the legislative processes (in terms of deadlines, drafting, debate, adoption) followed by entities playing a significant role under a special legal order (National Defence Council, President of the Republic) and other entities with a legislative role under the normal legal order (National Assembly, cabinet).

The ex-post assessment of presumed or actual threats that do not justify the introduction of a special legal order, as well as of the emergence and handling of the threats that resulted in the introduction of a special legal order is usually carried out by way of *targeted retrospective legislation*, which may bring about fundamental changes in the legal system. The revision of threat-related legislation is also likely to result in a systemic modification of the legal system, meaning that the laws passed with regard to a threat are seldom ad hoc in nature. A (legislative) event fits into a patter and, as such, may be foreseen, even if certain special rules are tabled as independent legislative motions, or if a regulatory need (or need for an amendment) is raised by a local government instead of the cabinet. As a matter of fact, the legitimacy of an adopted special rule is not affected by the identity of the person or entity launching or initiating the legislative process. However, it is important that there must be a direct causal relationship between the danger that passed and the purpose of legislation. The *sense of danger* remains capable of influencing the behaviour of persons and bodies involved in the legislative process and the legislative process itself, even when the actual danger has already passed. If there is pressure from society and politics, the persons involved in the legislative process are unlikely to take all the time allowed to them in the legislative process; they are more likely to limit the number of persons and entities consulted to the legal minimum, thereby limiting the number of persons involved in the process both vertically and horizontally. Naturally, such behaviour increases the likelihood of errors, opening the gate both to accidental typos and to other substantial (content-related, systemic etc.) mistakes that could jeopardize legal certainty.

It seems both to be a requirement and a basic principle that the legal order should reflect reality under normal circumstances. In other words, if there is a significant difference between the normative realm and reality, the former must be adjusted. Conversely, it seems possible that a legislature may attempt to use normative means to adjust (influence) reality if necessary. References to the common good (meaning in this context a goal that is useful for the community, i.e. society) may make otherwise unpopular laws appear more appealing during the social debate leading up to their adoption (Arkes, 1998). The goal of laws and the essence of the common good implies that they seek to increase the common good of the people. The human condition seems to mean, among others, that people achieve the purpose of their existence in full through the functioning of society; for this reason, a system that attacks the individual existence of a person and enslaves him by melting him into a collective social existence, i.e. any collectivist totalitarian system, is based on false foundations (for the purposes of philosophical anthropology, among others). Consequently, the common good must be aligned with the good of individuals, thereby serving as ground

for the sanctity of the freedom of conscience and religion, as well as private and family life (Frivaldszky, 2013). However, the fundamental interest of individuals and communities in their existence and survival frequently clashes with the desirable harmony, and fear is capable of tipping the balance in favour of systems that systematically and fundamentally violate the personal dignity of individuals. Legislatures may not unsure the validity of their laws under natural law simply by invoking the common good. For non-lawyers, disregarding an apparently unfair law is not that big of a challenge, as it lacks a natural and inherent component that would be required to make a piece of legislation morally valid. However, the problem lawyers need to face is more complex, as a piece of legislation becomes binding automatically once it is adopted (debated and promulgated) in a valid manner, since the binding force of laws is rooted in their validity (Szigeti–Takács, 2004). The acceptance or recognition of the theoretical option of individual review would jeopardize legal certainty, even if it appears in the form of the avoidance or circumvention of a law or civil disobedience. Grossly unjust and unfair events can take place when fear appears under such circumstances (for example, in an actual crisis situation), considering that private justice and excessive use of force by the armed forces seem to commonly appear in such situations.

Fear

Fear is a term that is hard to define for legal purposes, but the *lack of security*, as a component of fear, might offer a useful alternative. Attempts at defining "security" and the "lack of security" commonly focus on the correlation between the two terms (Ádám, 2005), and the same approach may be used to consider the meaning of "fear" and the "lack of fear", i.e. the sense of security. The statistically confirmed deterioration of public security inevitably results in more stringent criminal legislation (a good example is the social debate prior to the introduction of the "three strikes" rules), which tends to become a political factor in and of itself. This is a normal process, considering that, in a community, decisions on social coexistence and the preliminary social debates (common thinking) always has been part of the realm of politics. Thus, the political initiatives with the strongest social legitimacy are the ones that can rely on and represent the widest social need (demand) with a message or agenda. According to Karl Renner, legislation is the primary and most suitable means of solving social problems and tasks, and controlling society.

The purpose of legislation is to preserve and maintain the governmental, social, and economic order by normative means (i.e. by prescribing rules and regulations). A new law changes the legal system whether or not it operates as a code to encompasses all distinctive features or a given legal field, or it merely introduces minor changes to fine-tune some technical rules. The behaviours prescribed in a normative manner become reality through enforcement sooner or later. This means that laws that take into account factors other than their normative goal (think of laws adopted under a special legal order or under considerable social pressure) will also have a more complex impact on the legal system. Such additional factors may remain hidden and may go unnoticed, but they do become parts of the legal system; even if they work in more subtle ways than the written law, their spirit does have an impact on the future interpretation of the law.

In terms of their origin, presumed or actual threats can be internal or external threats. A threat is real, when it is rooted in an actual and existing phenomenon; it does not matter in this context, if the threat is generally known in the political community. A presumed threat may be either a fictitious threat or a non-professional assumption (in contrast to expert assumptions that can reliably suggest the presence of a threat), where the threat either does not exist or does not reach the degree it is thought to reach. *Scaremongering* (the spreading of frightening rumours as defined by the Criminal Code) is a means typically used by persons seeking to achieve a result (e.g. shaping the public opinion) by influencing the general public (as a means).

The *internal sources* of presumed or actual threats include, among others, conflicts between nationalities and religious groups, social tensions, constitutional crises, xenophobia, and terror attacks. Similarly, *external sources* of such threats might include religious wars, ethnic cleansing, historical demands, taking action at international level, economic interests, and other interventions by the government. Apart from the countless specific sources of threat, three general groups of sources of threat can be identified: (1) domestic political interests (internal, political), (2) common cultural traditions (external, traditional), and (3) relations between allied countries (external, political). Domestic political interests have already been discussed. Common cultural traditions (such as nationality, language, legal tradition, and religion) connect countries and societies in a way that may serve as ground for beneficial cooperation and useful novelties, but they may also cause danger and threats. For example, English and French speaking countries that take the hardest action against international terrorism are facing the very same threats, regardless to the actual extent of the involvement of individual countries. Such cultural traditions are supplemented or, in the absence of cultural relations, even replaced by the international legal relations of allied nations, as they formalize the roles of countries taking actions against terrorism under international law, and also make such countries targets for terrorists once and for all.

The impact of fear on legislation

There are three consequences of *codifying fear*[6], i.e. to pass laws led by fear from presumed or actual threats:

1. Need to set a standard. Extraordinary regulations (the introduction of new or more stringent rules), even if used in a targeted manner to solve a specific problem, tend to gain a general dimension and become part of the legal system due to their normative nature. If successful (i.e. if the desired effect is reached and the threat is eliminated), the rule becomes the minimum standard for security, and subsequent pieces of legislation (passed on the same subject-matter) will be compared to it.

[6] The author used this term for the first time in his speech *"A tömeges bevándorlás okozta válsághelyzet, valamint a különleges jogrend és a határokon átívelő jogalkotás gyakorlata"* (The mass immigration crisis, special legal order, and the practice of cross-border legislation) delivered at the *"Globális migrációs folyamatok és Magyarország – Kihívások és válaszok"* (Global migration trends and Hungary – Challenges and responses) conference (Budapest, 16 to 17 November 2015) held at the Hungarian Academy of Sciences, where he also spoke about external and internal threats.

2. Overlaps between legal branches. Pieces of legislation adopted with regard to security, threats, and fear may appear in any branch of the law, but they typically use different wording and legal solutions in line with the distinctive characteristics of the legal branch concerned. In this context, solutions that may be somewhat alien to a given branch and tensions that may arise between a specific wording and the broader legal environment are usually regarded as codification errors made by the competent bodies. Such criticism is justified in part, since laws and regulations should not be amended (deformed) with regard to certain aspects of a given legal branch only, but they should be adopted in a manner that both takes into account such aspects and fits into the legal system smoothly.

3. The phenomenon of transplantation (Donohue, 2012), taking place through the following phases.[7] (a) By way of adopting a piece of legislation, the *direct intent* of a legislature is to have the adopted norm become part of the legal system and exert its legal effect pursuant to the criteria presented to the public during a social debate. (b) Through the adoption of the norm, the legislature influences the existing legal order directly, as new pieces of legislation are usually more than one more *copper plate* in addition to the existing ones, and they also have an impact on already existing pieces of legislation (modify or repeal such norms). (c) However, legislatures tend to ignore the indirect effects of passing laws, even though such laws, like pebbles thrown in a lake, have a legislative "ripple" effect and may cause more and more waves of legislative effort. (d) Finally, legislation becomes more and more extensive and eventually covers fields that are not even indirectly related to the original (current) social debate, but the passing of such laws goes unnoticed in the queue of new legislation, satisfying a social need for the (statistical) success of legislative efforts.[8] This seems particularly relevant where legislation is based on fear from a presumed or actual threat and the legislature simply rides the waves of such fear (even though seemingly acting with regard to that very fear). Under such circumstances, the political validity of the adopted norms seems questionable even though they have a strong legitimacy and a formal legal validity. A "vacuum effect" (Donohue, 2012) is quite likely to appear in the two latter cases, where, in order to facilitate the application and enforcement of the new norms, the amendment of existing rules becomes necessary, even if such a need is not clear in advance. This means that thematic legislation (i.e. legislation directly related to a given subject-matter), even if it is planned to have a one-time impact on the legal system, might force the legislature to follow a path determined by a continuous need for re-calibration for years.

During its existence of over a thousand years, the Hungarian legislature tackled countless challenges successfully, either by passing formal norms or through the domain of legal traditions and practices. The right approach appears to be to keep an eye on trends and act in a sensible and flexible manner, so that ex-post revision remains a possibility, instead of insisting on following the old ways. The possibility of ex-post revision is of utmost importance, as a closed democratic institutional setting may cause its own demise by excluding the possibility of such revision.

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[7] The term *"transplantation"* was coined by Donohue in legal literature in the context of latent aspects pertaining to legislation, which may not form parts of the ordinary legislative process but have a considerable impact on the outcome of the proces through their sensible presence. The referenced essay examines criteria that influence security-related legislation.

[8] A kind of sneaking legal harmonization.

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