Foreword

Terrorism is nothing new. Neither is the fight against it. Liberal democracies have long been preoccupied with the permissibility and limits of anti-terrorist measures, the problem of how to preserve themselves against their enemies without giving up their very ideals.[1] These worries have been reinforced during the past decades, and the inherent tension of liberal democracies became ever more apparent following the series of heinous terrorist suicide attacks upon the United States and the whole democratic world on 11 September 2001. The fine line between self-preserving rules and illiberal practices of rights infringements has been crossed in many jurisdictions proving that terrorism poses a twofold challenge on liberal democracies. Their capacity to preserve themselves is challenged first by direct destruction of lives and (often symbolic) property and second by the tools employed in response to terrorism in the name of a never ending struggle for security.

The quest for absolute security dates back to postmodernism, making societies victims of their own structures generating risk factors of various sorts: health, environmental, criminal, etc. The primary objective became the identification of insecurities and their prevention. Postmodern trends beyond the culture of risks,[2] such as political profits and financial gains of fear creation and punitive populism, expressive justice, the over-emotional tone of and the managerial approach to criminal policy, prevalence of the

[1] See Karl Loewenstein on „militant democracy": Karl Loewenstein, "Militant Democracy and Fundamental Rights," 31 *American Political Science Review* 417-433 and 638-658 (1937). See also András Sajó *infra*, and also András Sajó (ed.), *Militant Democracy*, Utrecht: Eleven International Publishing, 2004. Authors tend to refer to a 1935 quote by then Propaganda Minister Joseph Goebbels explaining the success of the NSDAP at the 1933 federal German elections with the "stupidity of democracies". "Die Dummheit der Demokratie. Das wird immer einer der besten Witze der Demokratie bleiben, daß sie ihren Todfeinden die Mittel selbst stellte, durch die sie vernichtet wurde." Karl Dietrich Bracher, *Zeitgeschichtliche Kontroversen: um Faschismus, Totalitarismus, Demokratie*, München: Piper, 1984, 108.

[2] Mary Douglas and Aaron Wildavsky, *Risk and culture: an essay on the selection of technical and environmental dangers*, Berkeley: University of California Press, 1982; Ulrich Beck, *Risikogesellschaft: auf dem Weg in eine andere Moderne,* Frankfurt am Main: Suhrkamp, 1986, Anthony Giddens, *The consequences of modernity*, Cambridge: Polity Press, 1995.

crime control model,[3] reprivatisation of the conflict by the victim,[4] globalism, knowledge society and modern technology all have something essential in common. They all point in the direction of the establishment of a control society.[5] Risk management in a control society is qualitatively different from just a series of practices employed to overcome, prevent or mitigate insecurities. Rather, it is a complex web of collective strategies through which fear, angst, anxiety, phobia or even hysteria is created and recycled. Liturgies of risks uphold the system through the commercialisation of insecurities. Fulfilling the dreams of any salesman, risks as "bottomless barrel of demands"[6] endlessly call for security created through the production of even more risks. Insecurities are thus self-producible, self-referential and tautological.[7] "With risks, one could say with Luhmann, the economy becomes self-referential independent of its context satisfying human needs."[8]

The fight against terrorism vividly illustrates politics and lawmaking based on the worst case scenario striving at maximum security. The point of departure is that security and human rights are competing aspects that

[3] Herbert L. Packer, *The limits of the criminal sanction*, Stanford: Stanford University Press, 1968, 149-173.

[4] Kent Roach, *Due Process and Victims' Rights: The New Law and Politics of Criminal Justice*, Toronto: University of Toronto Press, 1999; Douglas Evan Beloof, „The Third Model of Criminal Process: The Victim Participation Model," *Utah Law Review*, 289-332 (1999)

[5] David Garland, *The culture of control*, Oxford: Oxford University Press, 2001

[6] For the English terminology see the translation by Mark Ritter: Ulrich Beck, *Risk society: towards a new modernity*, London: Sage Publications, 1992

[7] "Durch die Produktion von Risiken werden die Bedürfnisse endgültig aus ihrer naturhaften Restverankerung herausgelöst und damit aus ihrer Endlichkeit, Erfüllbarkeit. Hunger kann man stillen, Bedürfnisse befriedigen; Risiken sind ein "Bedürfnis-Faß ohne Boden", unabschließbar, unendlich. Anders als Bedürfnisse können Risiken nicht nur […] manipuliert werden. Es können durch wechselnde Risikodefinitionen ganz neuartige Bedürfnisse – und damit Märkte – *geschaffen* werden. […] An die Stelle vorgegebener und manipulierbarer Bedürfnisse als Bezugspunkt der Warenproduktion tritt das *selbstherstellbare* Risiko." "Mit Risiken – könnte man mit Luhmann sagen – werden die Wirtschaft "selbstreferentiell", unabhängig von der Umwelt menschlichen Bedürfnisbefriedigung." Beck, *supra* note 1, 74. The market logics of security expand the forms of control also horizontally. Areas traditionally kept for the relation between the state and the individual are becoming privatized, decentralized and interconnected. For individuals living in the 21st century it becomes increasingly difficult to oversee who controls them, when, on what grounds, in whose interests. When relocating responsibilities for control important segments of state power are shifted to private parties.

[8] „Autopoietic systems produce their own basic elements; self-organising; they create their own boundaries and structures; their elements refer to the system itself." Niklas Luhmann, „The unity of the legal system," in: Günther Teubner, *Autopoietic Law – A New Approach to Law and Society*, Berlin: Walter de Gruyter. 1988, 14-35, 14.

might mutually exclude each other. Those who see the relation as being necessarily antagonistic allege more than the proponents of the crime control model who regard the breakdown of public order as the disappearance of a *conditio sine qua non* of social freedom and therefore value efficiency of the criminal process, placing it even before due process rights.[9] They rather insist that the global threat to security necessitates an entirely new equilibrium. Threat creates emergency, and emergency situations call for a different allocation of liberties than what we are used to in normal times.

Those concerned about the new equilibrium insist that some fundamental rights – most importantly the prohibition of torture, but also a number of other rights – cannot be abandoned; that giving them up is a slippery slope; and that it will be extremely difficult to regain liberties once we have abandoned them. They voice their worries about the curtailing of human rights, privacy, data protection; they criticize the use of wiretapping, the growing tendencies of negative attitudes towards religious organizations, ethnic minorities, foreigners, and asylum seekers. They contend that terrorist threats should not question our belief in the rule of law, however appealing or pressing it might be for political forces to respond to "people's fears."[10] The stressing of the security side of the balance has some further, less direct and more subtle drawbacks from the point of view of the rule of law. Actual rights have to be given up for the sake of a perceived, future danger. Pretrial detention is a typical example. It is extremely difficult to determine the probability of the danger to occur. Present rights are thus given up against an uncertain future scenario. Also, arguments stressing security often imply that the majority of law-abiding citizens, ordinary people like you and me, have nothing to fear from – or at least we should fear not from the security measures, but much rather from potential terrorist attacks. This seems to be a misleading, if not a false argumentation. It is illusory to believe that the stringent measures intruding into liberties affect only the suspects of the gravest crimes. Due to the logics of maximum security these rules are getting increasingly intense and intrusive, covering ever more individuals in

[9] Herbert L. Packer, „Two Models of the Criminal Process," 113 *University of Pennsylvania Law Review* 1, 1-68 (1964)

[10] Cass Sunstein, *Laws of fear: beyond the precautionary principle*, Cambridge: Cambridge University Press, 2005

order to detect and manage potential dangers. Risk society prepares for the worst case, the "what if" scenario, placing everything and everyone under surveillance and control so as not to overlook any type of risk. Legislation driven by an anti-terrorism agenda have good chances of ultimately infiltrating into ordinary criminal law, or even further down to administrative law, and ultimately the exceptional tools are incorporated into the mainstream extralegal terrains of social life. Beside the extraordinarily wide personal and material scopes of the measures, their time-frame is also extensive. The state of emergency, and – irrespective of whether the enemy is an invisible terrorist network, a country, or the axis of evil itself – the quasi war situation has the peculiarity that it is likely to be extended beyond the period of war or emergency; this tendency exists despite attempts to prevent this phenomenon.[11] What is even worse, the public may get used to the elevated level of security measures, initially perceiving emergency provisions first as annoying but tolerable, but eventually coming to accept them as being part of normal life. Gradually the intrusive attitude becomes the norm dominating other areas of life. Illustrative of the irrelevance of jurisdictional differences, this universally valid thought emerged already back in 1928 in Justice Louis Brandeis' dissenting opinion heavily quoted ever since. "Decency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means – to declare that the government may commit crimes in order to secure the conviction of a private criminal – would bring terrible retribution."[12]

Subjecting lawmaking to the emotional demands that have on the one hand been artificially created and are on the other impossible to fulfill is a dead end from the point of view of the rule of law. An even greater concern is that it is a one-way-street at the same time. Once punitive

[11] E.g. sunset clauses.

[12] *Olmstead v United States*, 277 U.S. 438 (1928)

populism gained strength, rational discourse is close to impossible to be reestablished due to multiple forms of vulnerability of ordinary citizens who are laypersons in the majority. Most threats being im/material and in/visible, knowledge about them is mediated through experts and as such are dependent on interpretation.[13] Both risk perception and their effective regulation are dependent on highly technical forms of scientific information. Technological development however destroyed its own metanarrative;[14] knowledge can only be reflexive and ceased to exist in the original sense[15] including the notion of certainty of ideas. What is left is better or worse ways to interpret contemporary societies.

Assuming now for the sake of the hypothesis that experts manage to agree on scientific truth, the problem of their incomprehension of the average layman voter arises. Even if citizens had access to the scientific knowledge of the day, they did not have the capacity to comprehend it. Instead of introducing scientific, rational, objective elements into the debate, the dangers of a risk society augment. People become incompetent in their own lives and the threat of insecurity is exacerbated by the loss of their cognitive sovereignty. Ignorance turns into angst, "liquid fear"[16] from the yet unknown lurking around ready to swoop any moment as soon as identified. People "no longer pick the experts, but instead the latter choose the victims."[17] People's rational judgment is also distorted by a number of psychological factors, like the emotional nature of certain types of catastrophes, the probability neglect, the availability heuristic, i.e. how easily they can think of examples of the tragedy, or loss aversion, i.e. valuing the status quo more than the gain that would flow from giving up certain already acquired goods/ideals. Risk estimation errors are becoming multiplied as people interact with each other. Even if experts agreed on the mainstream knowledge and it was comprehensible to decision-makers, the lack of understanding on the side of the average voter would have fatal consequences. Risk, which is embedded into the world of scientific experiment, is perceived fundamentally differently in

[13] Barbara Adam, Ulrich Beck and Joost van Loon (eds.), *The risk society and beyond: critical issues for social theory*, London: Sage Publications, 2000, 3.

[14] Jean-Francois Lyotard, *La condition postmoderne: rapport sur le savoir*, Paris: Editions de Minuit, 1979.

[15] See Giddens, *supra* note 1, 38-39.

[16] Zygmunt Bauman, *Liquid Fear*, Cambridge: Polity, 2006.

[17] See Beck, *supra* note 6, 54.

the world of politics. Politicians unlike scientist cannot engage in a risk taking attitude, but need to be prone to public sentiment.

Security concerns are of course very vivid and present in need to be tackled. Democracies certainly need to respond to public fear, where responsiveness needs to be "complemented by a commitment to deliberation, in the form of reflection and reason giving."[18] The tragedy of a risk society is that its above characteristics make the discourse lead to less and less truth. There is no room for a solid evaluation of dangers or the tools employed to ensure security. Distorted risk perceptions cry for policy responses, whereas the state also has an agenda beyond, under the heading of risk management. The debate becomes a tragedy of errors:[19] its internal logics would even allow the employment of an ineffective solution to a non-existing problem, with the price of deconstructing the rule of law. This is even more true, when problems are existing ones. Due to these deficiencies, deliberative democracies do not present a check to governance contrary to their original purpose, but to the contrary: risk panics contribute to the establishment of a control society. Political and economic benefits flowing from oversecuritization found their ally in the popular demands for security reformulated in the rights language.

Ill-advised decision-making might raise constitutional concerns other than human rights objections. Sacrificing them will be seen as the price to be paid for a safer future in the vicious and circular logic of the risk society. Rather, expert knowledge, cost-benefit analysis, impact assessment need to be reinserted as rational elements into the system. Even if a measure has been found to be necessary and proportionate to the aim to be achieved, redistribution aspects shall also be considered. Placing emphasis on one policy or another is a government power and burden, but the procedure culminating in making that decision shall be transparent. Experts might differ on the definition of risks, their probability or the tools to be employed to deal with them. More often than not, however, they will agree on what does not work from among the currently employed tools. In a rule of law as understood today superficial and

[18] Sunstein, *supra* note 7, 1.

[19] David A. Green, "Public Opinion Versus Public Judgment About Crime: Correcting the 'Comedy of Errors'," 46 *British Journal of Criminology* 1, 131-154 (2006)

remote precautionary principle type of justifications for grave curtailment of liberties shall not suffice for a law to survive.[20]

How far the boundaries of a system based on the rule of law can be pushed by the novel techniques of risk management, crime prevention and persecution, especially the fight against the gravest mischief such as terrorism, is a grave concern. Demands of a new social consensus might dictate more then just a few modifications and call for something qualitatively different both in terms of institutions, procedures and values. The present book has been written with a stubborn insistence and sincere hope that rationality might penetrate the self-referential system of risks hysteria and is devoted to identifying and evaluating benefits and drawbacks before off the track of the rule of law a one-way path towards a maximum security[21] society is taken.

The introductory chapters by Ulrich Sieber and András Sajó are setting the scene. As *Ulrich Sieber* shows 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 might subject them to political blackmailing, ultimately endangering national security. Political risks associated with terrorism go beyond the dimensions of traditional crimes and might trigger new types of wars. These novel types of wars are asymmetrical in the sense that they do not take place between states, but between states on the one hand and networks on the other. If the latter are – as so often is the case – internationally organized, associated risks can only be prevented abroad. Terrorism therefore pushes traditional criminal law to its functional limits both in terms of safeguarding security and also in guaranteeing liberty. States tend to respond to these kinds of risks by employing two strategies. First, the "law of war" penetrates criminal law, the reach of which is extended and traditional human rights and procedural guarantees are reduced; and second, criminal law is supplemented or indeed replaced by the "law of war", i.e. legal instruments regarded as more suitable for the achievement of security in specific areas. Examples underpinning the first approach include the attachment of criminal liability at an earlier point in the unfolding of a criminal offense in the field of substantive

[20] "Because risks are on all sides [of social situations,] the Precautionary Principle forbids action, inaction, and everything in-between." Sunstein, *supra* note, 4.

[21] Gary T. Marx, "La Société de Sécurité Maximale," 12 *Déviance et Société* 2 147-166 (1988)

law; the expansion of preventive surveillance measures; the reduction of legal guarantees; the creation of special competencies in the context of criminal procedure; multiplication of obligations of private persons to cooperate in the fight against terrorism; the creation of inter-institutional and international task forces as part of a new "architecture of security"; and the introduction of new measures in criminal and administrative law that limit the liberty of persons presumed dangerous. A new "security law" seems to emerge in the penumbras of criminal law, the law on intelligence agencies and administrative law, such as immigration law, foreign trade law, telecommunications law. The second phenomenon, the application and expansion of the law of war materialses in the justification of the law of war in specific areas of crime; in the use of special war powers; the diminishing of procedural guarantees; deprivation of liberty in special facilities and extraordinary and irregular renditions and abductions. Ulrich Sieber does not dismiss modifications and blurring of legal categories, or shifts and transfers in various aspects, but rather calls for a critical analysis of the present architecture of security law, and an examination of the limiting principals and mechanisms for the protection of human rights. *András Sajó* seems to agree that at least "in principle, there exist techniques for the protection of the state's constitutional (democratic, liberal) order that, again in principle, do not eliminate the values to be protected." States will necessarily be forced to depart from "constitutionalism as usual" in the fight against international terrorism and András Sajó opts for constitutional authorization of such departures setting their exact level well in advance, when there is still time for reason-guided deliberation, instead of being exposed to the pressure of hardship which might dictate hasty and over-intrusive actions. Even in a state of dystopia where mass-scale terrorist attacks or their repeated attempts call for a regime of severe rights restrictions, a constitutional state's self-defense can remain within the boundaries of the constitutional paradigm, but only if it is capable of excluding opportunities for abusing rights restrictions, or can at least keep such abuses within rational bounds. In order to realize this, people have to understand the reasonability of such restrictions, and give their "informed consent" to them. They also have to comprehend that changes will affect the entire community, potentially considering everyone as risk factors. Public debate will have to address fundamental issues of discrimination within and beyond the citizenry.

Once the boundaries are set in advance for a potential attack and the need for a special constitutional regime of the counter-terror state actually emerges, it shall be up to the state to prove that the necessity for rights restriction indeed exists. Most importantly the judiciary shall be entrusted to remind us that rights restrictions are not part of normalcy, even if legitimate under certain circumstances, and more practically it shall be the courts that make sure that the technique chosen remains within agreed safeguards and is least restrictive of rights. The greater the departure from normalcy, the stronger judicial and other external bodies' overview shall be.

European human rights norms and predominantly the European Convention on Human Rights (hereinafter referred to as: "ECHR" or "Convention") together with the Strasbourg court's case-law constitute such safeguards by transcending the national sovereignty of contracting states including those that might wish to depart from the path taken by liberal democracies. The interpretation of three Convention rights will be singled out in three consecutive critical chapters. Elspeth Guild contrasts the European understandings of freedom and liberty, while Samantha Joy Cheesman and Michael Hamilton address the right to a fair trial and distortions of free speech respectively in light of the fight against terrorism. When exploring the European understanding of freedom and liberty, *Elspeth Guild* invokes the most recent case law attached to Article 5 of the Convention. After a convincing analysis she comes to the conclusion that the myriad of well elaborated and defined fair trial rights are merely the consequence of the right to liberty that is virtually the right of freedom of movement, which cannot be subjected to interference neither horizontally, nor vertically, unless very specific strict requirements are met. Accordingly the state has twofold obligations: it must not detain the individual as a main rule and has to ensure that private persons don't do the same to fellow human beings. The important and eyeopening conclusion proven through the selected judgments is that there is a fundamental difference between citizens and foreigners in terms of both these state obligations. *Samantha Joy Cheesman* engages in an Article 6 ECHR analysis exploring European standards for the right to fair trial through the example of control orders in the United Kingdom. At a more abstract level she urges Member States to reform criminal procedures and judicial practices beyond ECHR standards instead of pushing and testing

the boundaries of the right to a fair trial in the face of a threat of terrorism. In a remarkably elegant chapter *Michael Hamilton* proves that criminal laws adopted in the name of the fight against terrorism for the purpose of prohibiting terrorist speech – i.e. speech that glorifies, eulogizes, or fails to condemn terrorism, but that falls far short of advocacy of imminent violent action –, are undermining the rule of law, if they are constructed as a notion retaining as a central element an ideal of democratic participation and self-governance. The author overviews the various proclamations that have urged states to introduce criminal law prohibitions on the glorification of terrorism, and analyses three illustrative ECtHR decisions. He locates these developments within a broader trend of anticipatory and risk-averse policing of violent crime and suggests that preventive legal interventions fundamentally reorient criminal law. Ronald Dworkin's view in relation to the illegitimacy of laws restricting hate speech is extended to laws prohibiting indirect incitement, glorification, apology, etc. of terrorism: excluding particular critical voices from the public sphere, and thus from the process of collective judgment, and attaching criminal liability to "terrorist speech" is in Michael Hamilton's view too often an example of legislative overreach.

Further chapters narrow the European focus to the European Union. The EU is a perfect example for a jurisdiction where anti-terrorism legislation infiltrated into ordinary law, i.e. into the body of the *acquis communautaire*. Seen from an other perspective, the window of opportunity that 9/11 created has been used by the Union legislator to push through pieces of legislation in relation to which previously there was no consensus – which was then needed in the third pillar that used to function along the lines of inter-governmentalism before the Lisbon Treaty erased the pillar system. The chapters by Stefan Schumann and Judit Tóth are setting the legal framework for anti-terrorism measures within the European Union. *Stefan Schumann* addresses the structural shift from intergovernmental cooperation to supranational integration in the criminal field introduced by the Union's novel constitutional document, the Lisbon Treaty. Changes lead to a stricter enforcement of EU legislation in police and judicial cooperation criminal matters; the Court of Justice of the European Union plays a stronger role in defining fundamental rights and general principles in criminal matters; the suggested establishment of a European Public Prosecutors' Office signals

a remarkable shift towards even stronger integration. Yet, certain legal solutions tellingly demonstrate that elements of supranationalism have been retained. These include basic principles of police and judicial cooperation: the principle of mutual recognition of judicial decisions as well as the principle of availability of information. Consequently, integrated cooperation is still of a transnational nature. The principles of enumerative competences for the Union, subsidiarity and proportionality, as well as certain requirements for unanimous Council decisions, have remained applicable. Furthermore, the Member States' responsibilities with regard to the maintenance of law and order and the safeguarding of internal security have not been affected. It is in this Janus-faced setting that post-Lisbon anti-terrorism measures are adopted and applied. *Judit Tóth* critically evaluates the most recent anti-terrorism efforts of the Union contending that aims of the legal instruments have not been defined in a coherent way and that guarantees in fundamental rights are fragmented, in particular in the area of personal data exchange with respect to dignity and privacy. The author focuses on the dangerous aspect of securitization threatening fragile democracies, which ever more easily accept increasingly restrictive counter-terror measures even when they do not consider themselves either targets of or contributors to international terrorism. In post-communist Member States legislation on border management, migration and passenger control has been passed without impact or cost and benefit assessments; moreover, the self-defence mechanisms of these countries' rule of law and democracy are weak due to a less developed civil society, and a diminished autonomy of judges and the media. Critical reports of international bodies on the implementation of human rights remain without public debate. Judit Tóth highlights the dangers through the Hungarian case, where society is moving from liberty to more and more security extending the powers of law enforcement, security and intelligence agencies.

The success of counter-terrorism measures depends to a large extent on whether there is a general public trust in the government, lack of which can be remedied by generating trust also in other powers, such as an impartial judiciary evaluating state action through the prism of the rule of law. This is where democratic checks get down to business "to ensure that the political necessities of today do not become the legal realities of tomorrow. Their responsibility is to guarantee that what may be politically expedient at a

particular moment also complies with the rule of law without which, in the long run, no democratic society can truly prosper." Illustrating the global validity of the dangers of a risk society Miguel Maduro then Advocate General at the European Court of Justice continued with the words of Aharon Barak, former President on the Supreme Court of Israel: "It is when the cannons roar that we especially need the laws … Every struggle of the state – against terrorism or any other enemy – is conducted according to rules and law. There is always law which the state must comply with. There are no 'black holes'. … The reason at the foundation of this approach is not only the pragmatic consequence of the political and normative reality. Its roots lie much deeper. It is an expression of the difference between a democratic state fighting for its life and the fighting of terrorists rising up against it. The state fights in the name of the law and in the name of upholding the law. The terrorists fight against the law, while violating it. The war against terrorism is also law's war against those who rise up against it."[22] It is in this spirit that Konrad Lachmayer and Márton Varjú explore the EU judiciary's role in the Union's counter-terrorism activities. Whereas the former author gives an overview of the Court's activities in developing access to constitutional justice, the latter scholar dwells on the famous ECJ case *Y.A. Kadi versus Council*. In his paper *Konrad Lachmayer* provides a thorough analysis of the legal framework for constitutionalizing European justice. With the coming into force of the Treaty of Lisbon on 1 December 2009, among other crucial changes, the so-called fundamental rights culture gained black-letter-law backup and at the same time the Court of Justice of the EU gained more powers in framing the counter-terrorism activities of the Union. The judgments of the Court of Justice of the European Union (hereinafter also referred to as: "CJEU") in the field of counter-terrorism up until the adoption of the Lisbon Treaty and the future challenges in the post-Lisbon era as described in the chapter are part of a broader process regarding the role of the EU's judiciary: namely the constitutionalization of the CJEU. Different developments are already establishing the CJEU as a Constitutional Court of the European Union, with the decisions in the field of counter-terrorism activities making an

[22] Opinion of the Advocate General Poiares Maduro, 16 January 2008, Case C-402/05 P, *Yassin Abdullah Kadi v Council and Commission*, in paragraph 45 citing Supreme Court of Israel, HCJ 769/02 [2006] *The Public Committee Against Torture in Israel et al. v The Government of Israel et al.*, paragraphs 61 and 62.

important contribution. The Court as "guardian" of the European constitution in the broad sense is pushed by EU's security policy to develop further elements of a European rule of law and to decide important and actual problems of human rights in European societies. Although the CJEU does not (always) mention the rule of law explicitly, it is developing a European rule of law within the concept of general principles. The *Y.A. Kadi v Council* judgment analyzed by *Márton Varju* can be seen as the first substantive decision regarding human rights protection by the CJEU in counter-terrorism activities. Overview of the seminal Luxembourg case addresses a range of weighty legal issues implicated by European Union anti-terrorism governance, such as the relationship between international public law and European Union law, the relationship between the former pillars of the European Union, or the application of the constitutional requirements of basic procedural rights and the right to judicial protection. These issues have been settled by the CJEU with authority, but the main question posed by the author on a more abstract level is whether multi-level systems of governance can rely on innovative concepts and solutions in order to ensure the legality of measures adopted on different levels within the system. Márton Varju argues that a multi-level system is capable of ensuring compliance with the rule of law and of correcting the constitutional shortcomings of the other levels by creating and fostering open, intra-systemic communication among the various levels of governance.

In the concluding chapter, a special case study by *Péter Hack* introduces fundamental institutional changes in Hungary through the establishment of the Counter-Terrorism Center in 2010 that was granted all possible political, legal and financial support from the then newly elected government. While Hungary not being the main target of terrorist attacks in the past can be praised for ex ante legislation as suggested by András Sajó in his introductory chapter, the sweeping powers, overbroad competences of the Center, along with the constitutionally questionable, vague language on measures it can take at the same time, illustrate another point made in the previous chapters: that intrusive measures in the name of the fight against terrorism will not only be directed against the source of terror, but against the whole community turning us into a suspect society.

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Gestation of this book took considerable time. The idea of compiling papers on "The Rule of Law and Terrorism" emerged back in 2006 when a workshop with the same title has been convened by the Hungarian Europe Society, a prominent civil society organization representing and promoting the idea of a unifying Europe and common European values. Engagement in the discussion on the fight against terrorism and its limits in a rule of law correspond to the Society's objective to be involved in the ongoing international dialogue on the future of liberal democracies.

In the years following the conference we came across valuable presentations at various academic events and persuaded scholars to offer their thoughts in written form for the benefit of our audience: political scientists, legal scholars, international relations and EU experts, or any concerned citizen who wishes to gain thoughtful insight into the generic framework of antiterrorism and the rule of law and its reflections in real life cases. Submissions of manuscripts dispersed over time between 2009-2011, therefore certain additional relevant events might have occurred in the meantime, but these do not alter the overall value and validity of any of the arguments represented. Purposefully we included papers from authoritative authors and promising scholars of the new generation without any jurisdictional limitations. All chapters but the introductory ones are original publications.[23]

Beside the authors of the volume, special thanks are due to the participants of the 2006 conference who triggered further debates on the fight against terrorism under the rule of law: first and foremost keynote speaker András Sajó, whose earlier piece which continues to gain relevance has been republished in the present book; Detmar Doering, Director of the Liberal Institute, Friedrich Naumann Foundation; Péter Molnár, Hungarian Europe Society member and researcher at the CEU Center for Media and Communication Studies, Tamás Lattmann from ELTE School of Law, Department of Public International Law; Wiktor Osiatyński, visiting professor at CEU Legal Studies Department; Hajnalka Vincze, security policy researcher; Edwin Rekosh from the Public Interest Law

[23] We owe thanks to editors Stefano Manacorda and Adán Nieto liberally agreeing to republish Ulrich Sieber's chapter originally published in the volume they edited on Criminal Law between War and Peace, *Justice and Cooperation in Criminal Matters in International Military Interventions*, Cuenca: Universidad de Castilla-La Mancha, 2009 and for the kind permission of the Cardozo Law Review to republish András Sajó's article that first appeared in the renown journal in 2006.

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Petra Bárd