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Global and Hungarian Tendencies in Law Enforcement

Abstract. The author explores current trends in law enforcement and criminal policy. The first part of the essay focuses on the methodological and theoretical difficulties with describing the state of global crime. Special attention is given to the peculiarities of post-9/11 developments in the field of crime prevention and anti-terrorist legal regimes, a situation in which the efforts to combat terrorism have crossed the traditional boundaries of criminal law enforcement and the policy and practice of pre-emptive strikes is difficult to fit even into the recognized conceptual framework of crime prevention. Following this, the author turns to the analysis of decentralizing and privatizing public security and law enforcement and the question of security partnerships.

Prior to the assessment of the concept and paradigm of human security—which is at the heart of the inquiry—Professor Korinek provides an overview of the social effects of crime and security protection, the social perception of crime and law enforcement and the interrelation of politics and criminal law. The author calls for a complex and global approach when approaching the question of liberty and security, since the traditional distinctions between the military and the police as well as domestic and external security are fading. By using a comparative methodology (incorporating a wide range of international examples along with references to Hungarian criminal policy developments and constitutional jurisprudence) the author claims that the new element in the human security approach is that it places the perspective of individuals and their communities before the security interests of the national or even the whole international community, and thus is able to resolve the dichotomy that is generally presumed to exist between human rights and security.

Keywords: criminology, statistics, law enforcement, data protection, terrorism, transition, community policing, crime prevention, privatisation, private security, criminal policy, human security

I believe—and through my work would like to serve—the idea that criminology should be a science that contributes positively to the everyday practice of fighting crime, even on the local level. This does not however relieve the scholar of the responsibility for facing up to those more general consequences that he has contributed to through his work or through his professional neglects.

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Today it is not necessary anymore to argue in great detail that the whole world's security has an increasingly direct impact on our own situation. This is the very practical consideration that induced me—beyond the natural evolution in scientific thinking which tends towards attempting to grasp global issues—to deal with the topic referred to in title of this article. Initially the title was to be “Where does the world progress?”, but the verb “progress” has inevitable positive connotations, while in reality the dissipation of the concerns expressed in this article seems doubtful for now.

1. The state of crime

It should be noted in advance that statistical data concerning the “state of global crime” are even less informative than data collected from individual legal systems. Behind the general numbers there are different, sometimes even downright contradictory behaviours, which are condemnable in some contexts, laudable in other, or at least part of citizens' fundamental rights. As an example for the latter one could refer to the Second Amendment of the United States' constitution, which enshrines the right to bear arms as a fundamental right for citizens, while in other countries the private ownership of firearms is prohibited or very restricted.

So I note with an emphasis on all these advance warning that a survey commissioned by the United Nations for the organisation's 11th congress in Bangkok on crime prevention and administration of criminal justice reported that the number of recorded crimes (based on data from 57 countries) increased by 12% between 1995 and 2002. The vast majority of countries investigated were European and American. The report itself emphasises that criminal statistics in the individual countries are different,¹ comprehensive numbers for the period under investigation were only available from 12 countries, for the rest corrective statistical methods had to be applied. Survey on victimization provided data for the period from 1992–2002, and these indicate decreasing numbers in most categories, but a careful investigation (citizens' willingness to report crimes as well as problems of uncovering them lead to vast differences between popular perception of criminal activity and the number of criminal acts

¹ See Kertész, I.: A bűnügyi statisztika nemzetközi összehasonlításának lehetőségei [Options for a comparative crime statistics-analysis]. *Statisztikai Szemle*, 1996. 1. 16–34.

registered by the authorities) reveals that there is no irreconcilable contradiction between the statistical data concerning criminal acts that become known.²

There is therefore reason for concern—but certainly not panic—on account of the reported data. There is even less cause for demanding exceptional powers or extraordinary licences for combating crime. As the example of dropping US criminal rates shows, crime growth can be stopped with the strengthening of procedural safeguards, the stability of legal unity and the mobilisation of social resources based on democratic co-operation.

Nonetheless, something changed in the area of law enforcement. Barriers were broken, centuries-old constitutional walls were torn down. The reason is not quantitative but qualitative. The exact time of the beginning of the new era in our thinking about security is: 11th September 2001.

It is true that the date and the associated terror attack with its tragic outcome has only symbolic significance for many, as terrorism itself, as well as organised crime and especially drug crimes, which had triggered similar responses earlier, reach back a very long time. September 11th major effect in this regard was to convince a significant portion of Americans that they need to give up their aversion to the state, as only a strong public power, capable of defending the nation from domestic and external threats alike, can be an effective protection from new threats.

One could sense the new direction already in the US president's first speeches following the attack. In his statement to Congress on 20th September 2001 he declared:

We will direct every resource at our command—every means of diplomacy, every tool of intelligence, every instrument of law enforcement, every financial influence, and every necessary weapon of war—to the disruption and to the defeat of the global terror network.

In the same speech George W. Bush also responds to the question what Americans need to do. He asks them to live their lives, hug their children, uphold the American values, to continue to support the victims of the tragedy and to co-operate with the FBI agents investigating the attack. He asks them for patience with the delays and inconveniences that may accompany tighter

² State of Crime Report: The State of Crime and Criminal Justice Worldwide—Report of the Secretary-General, A/Conf.203/3. UN, Bangkok, 2005. points 35–38. 12.

security and for continued participation and confidence in the American economy. Finally: pray.³

It hardly needs complex proof: this is the message of the caring and protecting state. It does not require any individual initiative for fighting terrorism, and it wants activity only insofar as law enforcement officials request.

2. Being protected, observed and exposed

Experience shows that people gladly make sacrifices for the efficiency of law enforcement. If necessary, they contribute financially to combating crime and they are even willing to change their lifestyle. Citizens generally accept surveillance cameras recording events in their private lives. Those who can afford it hire bodyguards or employ difficult technical solutions for the supervision of their residence from a distance. The anxiety resulting from the threat of crime therefore leads to the situation in which being protected simultaneously means being observed.

In a broader context the storage of personal information about us in various databases also ties into this phenomenon. This cannot all be unequivocally attributed to an overzealous state engaged in keeping an eye on its citizens at all times, since there are many known cases in which citizens—especially in an effort to help uncover cases that elicited widespread public outrage, such as particularly grave and violent crimes—provided information voluntarily. A case in point was an investigation in the German province of Lower-Saxony, where persons within the presumed perpetrator's age range provided DNA samples in massive numbers. These samples then ultimately led to the identification of the murderer of the child who had fallen victim to a violent sexual crime, and the perpetrator confessed another similar crime as well.⁴

It is also true at the same time that data is not always provided voluntarily. Article 3 (2) (b) of our Act LXIII of 1992 on the Protection of Personal Data and Public Access to Data of Public Interest, specifically mentioned—among other things—the interests of crime prevention and criminal investigations as circumstances in which the law could even prescribe the processing of special personal data. It is also a fact that today there are global systems established for the purposes of collecting data without publicly available information on

³ Bush, G. W.: Address to a Joint Session of Congress and the American People, 20. September 2001. <http://www.whitehouse.gov/news/releases/2001/09/20010920-8.html>

⁴ See Hochgartz, P.: Zur Perseveranz bei Sexualmorden—Zugleich ein Bericht über die spektakuläre Ermittlung eines Mehrfachtäters. *Kriminalistik*, 54 (2000) 322–327.

the criteria chosen for their selection; here it is not only the aspect of voluntariness that takes a backseat to crime prevention and law enforcement interests, but in fact even the service of the latter is increasingly dubious.

Rumours on plans for developing general–global–wiretapping and surveillance systems abounded already in the last decade of the previous century. According to the well-respected civil rights organisation Privacy International, the EU and the FBI planned to jointly establish such a system.⁵ There is no reliable information on whether it was realised, but it is safe to assert that given the current regulatory framework it could hardly operate legally. In 1998 a document was drafted to provide information to the European Parliament on this issue, and it stated that such plans exist, but they have not yet been presented to the strategic decision-makers or the relevant control forums. At the same time the report notes as fact that such a system practically exists already (ECHELON), but under the control of the United States.⁶ It is hard to even argue with the notion that information gleaned from such a system could be used, for instance, in the context of economic competition as well.⁷

In reality the issue reaches even further: the efforts to combat terrorism have crossed the traditional boundaries of criminal law enforcement⁸ The policy and practice of pre-emptive strikes is difficult to fit even into the recognized conceptual framework of crime prevention.

Crossing the boundaries of traditional criminal law has an immediate effect on the foundations of constitutionality and the rule of law. The Constitutional Court emphasised the mutual conditionality of criminal law and fundamental law in several decisions. In this vein:

It follows from the constitutionality of the legal system that a fundamental requirement regarding the state's exercise of its penal powers is that it adheres to constitutional principles: the basis for exercising penal power can only and exclusively be constitutional criminal law. ... It is the position of the Constitutional Court that a constitutional state governed by the rule of

⁵ See: http://www.privacy.org/pi/activities/tapping/statewatch_tap_297.html

⁶ See European Parliament: An Appraisal of the Technologies of Political Control. PE 166.499/Int.St./Exec.Sum./en, Luxembourg, 1998.

⁷ See European Parliament: Report on the existence of a global system for the interception of private and commercial communications (ECHELON interception system) (2001/2098(INI)). Final, A5-0264/2001. Strasbourg, 11. July 2001.

⁸ See Sofaer, A. D.: Playing Games with Terrorists. *New England Law Review*, 36 (2002) 903–909.

law can only react to legal violations with adherence to the rule of law. The legal order of a state governed by the rule of law cannot deny anyone rule of law safeguards. The reason is that everyone is entitled to these as a fundamental right. Based on the rule of law even just claims cannot be enforced if rule of law safeguards are disregarded. Though justice and moral cause can serve as motives for establishing culpability, the legal basis for punishability has to be constitutional. ... The Constitution's Article 8 (1) and (2) serve as the guiding rule concerning the constitutional requirements on criminal law. According to these paragraphs the Republic of Hungary recognizes a human's inviolable and inalienable rights, the respect for and protection of these rights is the state's primary obligation. An important demand imposed by the Constitution is that 'the rules concerning fundamental rights and obligations are specified by law, which may not constrain the essential content of the fundamental rights, however'.⁹

It can be stated as a fact that the constitutional safeguards serving to protect fundamental rights were developed precisely with a view to criminal law, starting simply from the generally accepted fact that this is the area where fundamental rights are or can be most severely restricted. Pointing beyond the concrete procedure and decision at hand, this is probably what motivated the Constitutional Court to state—in its decision 23/1990 (X. 31) on the unconstitutionality of the death penalty—that the right to life and dignity as an absolute right imposes a limitation on the state's penal powers.

In spite of the broad array of public power efforts at protecting the essential preconditions of human life (for example environmental protection), it is safe to assert that this absolute value is considerably less protected than the areas falling under the purview of criminal law. If somebody intentionally kills someone else, then he can expect a harsh punishment, but the public power may not take his life, no matter what behaviour he displays in the course of the proceedings against him. The very same person can be legally killed (though not with outright intent) in the case of firearm use by the police, if he refuses arrest.¹⁰ The Israeli security forces' "focused prevention" policy persons—generally used following a rocket attack—in reality denotes the liquidation of persons suspected of engaging in terrorist activities.¹¹ Though one could debate

⁹ 11/1992 (III. 5.) Decision of the Constitutional Court.

¹⁰ 9/2004 (III. 30.) Decision of the Constitutional Court.

¹¹ See Kretzmer, D.: Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence? *The European Journal of International Law*, 16 (2005) 171–212.

the necessity or constitutionality of such a policy, it can hardly be doubted that the frequent killing of bystanders (often children) in the process is absolutely unjustified in terms of criminal policy.

Regrettably the other fundamental value, human dignity, is also increasingly subordinated to the goals of fighting terrorism. Article 54 of our Constitution logically links the protection of human life and dignity with the prohibition of torture, inhumane, cruel and degrading treatment or punishment. There are circumstances under which extinguishing human life is accepted by international human rights conventions, but torture never is.¹² Nevertheless—primarily with reference to the war on terrorism—today the real occurrence of interrogation practices that employ torture is increasingly openly acknowledged, even in the judicial practice of systems that call themselves constitutional.¹³ Moreover, there are even attempts to institutionalise it in constitutional forms.¹⁴ Domestically, too, some have called for placing the members of terrorist organisations and their supports beyond the scope of law in the framework of a new international consensus.¹⁵

It is undeniable that terrorism is really an immense threat to people's security. Consequently, the principle of necessity and proportionality used as a constitutional test could in some cases lead to a different conclusion from the ones we are accustomed to, in terms of the means used to combat this phenomenon. The question is, however—and this is where the issue ties into the subject of this study—is in how far these exceptional authorisations will (or can) remain in the realm of fighting terrorism? The link between money laundering and the financial support for political violence¹⁶ as well as considerations of pre-emption suggest that the special-data processing and other-

¹² See the UN Secretary General's statement: Press Release, SG/SM/9373 OBV 428, 17th June 2004, New York.

¹³ See Crelinsten, R. D.: The World of Torture—A Constructed Reality. *Theoretical Criminology*, 7 (2003) 293–318.

¹⁴ See Filó, M.: Az inkvizítor védelmében – a kínzás jogállami apológiája? [Protecting the inquisitor—a rule of law justification for torture?] *Fundamentum*, 9 (2005) 89–97 as well as Dershowitz, A. M.: *Why Terrorism Works*. New Haven–London, 2002. 131–163.

¹⁵ Kiss Á. P.: A hadviselés szabályai és a nemzetközi terrorizmus [The law of armed conflicts and international terrorism]. *Új Honvédségi Szemle*, 59 (2005) 115.

¹⁶ See Gál I. L.: A pénzmosás és a terrorizmus finanszírozása [Money laundering and financing terrorism]. In: Korinek L.–Kőhalmi L.–Herke Cs. (ed.): *Emlékkönyv Irk Albert egyetemi tanár születésének 120. évfordulójára*. Studia Iuridica Auctoritate Universitatis Pécsi Publicata, Pécs, 2005. 37–41, as well as Sorel, J.-M.: Some Questions about the Definition of Terrorism and the Fight against its Financing. *European Journal of International Law*, 14 (2003) 365–378.

authorisations ought to be extended to apply to background financial/economic operations as well (see for instance Act LIX of 2002, enacted on the basis of the international convention adopted by the United Nations General Assembly in New York in its 54th session on 9th December 1999, on the scaling backing of financing terrorism). You could expand the circle even further: it is undeniable the terrorism and organised crime—primarily but not exclusively in the realm of financing—display numerous common features and points of intersection.¹⁷ Thus it seems hardly justified to draw substantial distinctions regarding the tools that can be employed by the public power in approaching the two issues, and generally this distinction is indeed not made (see for instance the explanation issued in support of the amendment of Articles 1–4 of Act LXXV of 1999 on the Provision of Combating Organised Crime and Certain Phenomena connected thereto). But it does not end here either. Research on the subject has shown that there are numerous criminal acts that, though they are committed in support of political violence or in connection with it, cannot in legal terms be categorised as being connected to terrorism or organised crime.¹⁸

It needs to be emphasised that prevention is an especially key area in terms of the special tools used, and this is also an area in which in the majority of cases one cannot know in advance what will end up becoming really relevant in the course of the investigation or in terms of immediate pre-emption (impeding an act). Thus inevitably data will begin to pile up that is unnecessary in terms of realising the original goal but could be used to scale back other acts that pose a threat to society. This is especially so in the case of countries—such as Hungary, for instance—where the threat of terrorist acts is rather low, but the authorities responsible for security are constantly active.

According to the consistent application of the principle of purpose limitation all information gathered with special authorisations and with special methods should be (and theoretically has to be) excluded from a criminal procedure, if originally their potential disclosure would not have allowed for the use of special authorisations. By contrast the professionals responsible for security reasonably assert that it cannot be in the interest of the legislator to render data

¹⁷ See Bibes, P.: Transnational Organized Crime and Terrorism—Colombia, a Case Study. *Journal of Contemporary Criminal Justice*, 17 (2001) 243–258.

¹⁸ See Hamm, M. S.: Crimes Committed by Terrorist Groups: Theory, Research, and Prevention. Washington D. C., 2005. <http://www.ncjrs.gov/pdffiles1/nij/grants/211203.pdf>

obtained with the most efficient tools and with a serious investment of resources inaccessible to law enforcement.¹⁹

It should be noted that while data collection and prevention in general, as well as criminal investigations, have experienced profound transformations, the study and practice of penalties has displayed a kind of return to classical, conservative principles. The penalty has to be proportional to the gravity of the deed.²⁰ At the same time in many places, Hungary among them, we can observe tendencies that divert the practice of applying sanctions from strict proportionality to promising more severe punishments, either out of utilitarian or political power considerations.²¹ Prison (deprivation of liberty) as a social/political/legal response to criminal behaviour has regained its role and importance which it had somewhat lost in the prior decades of correction-focused trends.²²

Overall it can be stated that the individual's and civil society communities' exposure to the public power has grown to a very significant degree, all the while there have been no observable benefits of limiting fundamental rights in terms of improved public security (though there have been no signs of a marked deterioration either).

3. Decentralisation, socialisation and privatisation in the defence of public security

At the same time it is apparent that in certain respects the state's security monopoly—in contrast to the developments described above—is loosening, and in some specific areas it is completely relinquished. The explanation is that the central power's massively increased control possibilities do not simultaneously indicate an interest in fully exploiting all these resources. The individual's and the community's exposure consists in the authorities' capability to observe who telephone what, when, why and whom. In reality the authorities responsible for security need to take account only of conversations that are important to them—such as those related to international organised crime and terrorism—but the

¹⁹ Hetesy Zs.: A büntetőeljárás szükségtelen eleme: a célhoz kötött bizonyíték elve [An unnecessary part of criminal procedure]. In: Korinek L. (ed.): *Tanulmányok Finszter Géza 60. születésnapjára*. PhD tanulmányok 4. [Essays on Geza Finszter's 60th birthday]. Pécs, 2005. 74.

²⁰ Szabó A.: *A büntetőjog reformja* [Reforming Criminal Law]. Budapest, 1992. 255.

²¹ See Sichor, D.: Penal Policies at the Threshold of the Twenty-First Century. *Criminal Justice Review*, 25 (2000) 1–30.

²² Estrada, F.: The Transformation of the Politics of Crime in High Crime Societies. *European Journal of Criminology*, 1 (2004) 419–443.

caller does not know the criteria for selection or registration, and still less its concrete results. At the same time the interest of central (federal) authorities and bodies of political power is that there be an acceptable level of public security and stability in society. Sooner or later the recognition that the local factors and problems influencing security can—in some cases decisively—be better handled where they arise is going to dawn on the state leadership. Shifting interests will also transform the approach to security issues. The attendance and popularity (and thus profitability) of places that are by their nature public but are privately owned (shopping centres, entertainment facilities, etc.) are obviously improved by police protection. Under such conditions enlisting the owners and operators—or the person and property protection enterprises they employ for safeguarding their assets—hardly requires complex justification.

Relinquishing the state's monopoly naturally only applies to the immediate security protection activities. Threat prevention and the administration of justice still belong to the state's realm of responsibilities. It no longer fulfils this task alone, however, but rather serves as a coordinating director in a stage play that features multiple roles. In the context of this new co-operation between the police, security companies, local governments and other bodies, civil organisations, as well as individual citizens a—and in some areas more than one—*security partnership* emerges. In the long term operation of this joint effort the state creates the legal framework with a view towards ensuring that no area with security relevance remains uncovered. The state plans and creates the conditions that stimulate the participants' activities. Thus it “governs remotely”: it accepts that it cannot provide for everyone's security at the desired level. Nonetheless, there still remain areas of activity that cannot be privatised.

The process can therefore most aptly be described as follows: a state with limited capabilities confers part of the protection tasks on enterprises and citizens, who by assuming these tasks enter into a risk community, security partnership relationship with the state.

There can be few doubts as to the necessity of these security partnerships. The mode of realisation, however, requires immense circumspection and the very careful weighing of interests and constitutional values. This is necessary because within the framework of the new forms of close co-operation, the private security companies serving private interests—and of course the clients behind them—will inevitably gain some influence over the operations of the public power, while the state for its part will also undoubtedly extend its intervention and control possibilities to relations that constitutionally belong within the realm of the private sphere. If the framework of co-operation is not very clearly specified and realised with a close view to constitutional principles, then there is the danger of the emergence of a law enforcement

complex that is disquieting in terms of both, the state's legal functioning and the protection of fundamental rights. Hoogenboom refers as "grey policing" to the system in which the security organisations belonging to various different sectors are engaged in informal relationships in which the boundaries of responsibility become blurred.²³ Research has shown the validity of Hoogenboom's conclusions and the dangers of inscrutable security co-operations.²⁴ Citizens' voluntary engagement is not unproblematic either. On the one hand they depend on power interests, and on the other hand there is the problem that the civil guard and similar units are also subject to the control of persons or groups with their own respective interests and values, which in no way guarantees an operation that is compatible with constitutional principles.²⁵

All the above does not cast doubt on the *raison d'être* of security partnerships, since in spite of the differences the basic values (personal or property security) are common, and the protection from dangers is a necessary element of all human activity and behaviour. One of the advantages of harmonised public and private security co-operation is diversity, that is the ability to flexibly adapt to the given requirements. There are many different models of partnership and their study could significantly enrich our knowledge of threat and crime prevention, and even law enforcement.²⁶

The Hungarian national strategy for crime prevention [Annex to resolution 115/2003 (X. 28.) of Parliament] has given a substantial impetus to local and regional planning and coordination. Both, the local government documents on the objectives, principles and methods for protecting public security, as well as the institutionalising security partnerships are important elements of this tendency.

²³ See Hoogenboom, B.: Grey Policing: A Theoretical Framework. *Policing and Society*, 2 (1991) 17–30.

²⁴ See Fairchild, P.: The Emerging Police Complex: Hoogenboom and Australian Inter Agency Cooperation. *The Australian and New Zealand Journal of Criminology*, 27 (1994) 2–59.

²⁵ See Funk, A.: Die Fragmentierung öffentlicher Sicherheit—Das Verhältnis von staatlicher und privater Sozialkontrolle in der politikwissenschaftlichen Diskussion. In: Sack, F.—Voß, M.—Frehsee, D.—Funk, A.—Reinke, H. (Hrsg.): *Privatisierung staatlicher Kontrolle: Befunde, Konzepte, Tendenzen*. Baden-Baden, 1995. 49–53, as well as Bólyai J.: *Társadalmi részvétel a rendfenntartásban—közösségi rendőrség* [Social involvement in law enforcement—community policing]. Kandidátusi értekezés, Budapest, 1994. 122–154.

²⁶ See Pitschas, R.—Stober, R.: *Kriminalprävention durch Sicherheitspartnerschaften*. Köln 2000, as well as Terpstra, J.: Models of Local Security Networks: On the Diversity of Local Security Networks in the Netherlands. *Crime Prevention and Community Safety*, 7 (2005) 37–46.

4. The social effects of crime and security protection

It is a commonplace that crime is a social mass phenomenon whose causes—according to a significant portion of the scientific community—are rooted in coexistence, more specifically the disorders of coexistence. Another obvious fact: crime does not merely threaten the legal order and the specific objects of the criminal acts, but in its own way it also shapes the people's and communities' behaviour and life. It is also evident that the access to tools of protection, having those at one's disposal is an important factor of subjective and objective security, ultimately of life quality overall.

The population of a society can be grouped in relation to two extreme poles. Around the one pole are those whose victimisation is rather unlikely, as their situations allows them to install supplementary security equipment and to buy security services.²⁷ Nonetheless it must be noted that security cannot be listed among the easily maximised goods, as every institution, system, or equipment also produces new security hazards, whilst it increases protection against other threats. Many criminal acts are known in which it was the security personnel who provided the robbers with the necessary tip-off, in fact sometimes the robbers hailed from their ranks. Indira Gandhi was murdered by her own bodyguards.

Still, the most exposed are those who are located near the second pole. Their lifestyle, their destitution significantly correlates with a high risk of victimisation. Supplementary security is unavailable or less available for them, and the criminals select potential victims whose vulnerability is greatest. By virtue of the “rights of the poor” this group must make do with the level of security that the state guarantees to all.

This phenomenon is pernicious, because for one it marks the failure of the 20th century's aspiration to achieve social (welfare) homogeneity, and also because it wreaks havoc on society's community consciousness, its sense of self-identity. A fragmented society cannot feel, live and act according to common criteria of order. Disintegration is a negative process for the progress of society as a whole, and its effect on public security further widens and deepens the gap between the different strata of the population.²⁸

In reality this is about even more than that. Even with the best regulation and strictest control the abovementioned security partnerships cannot resolve

²⁷ Salgó L.: *Az új típusú biztonság* [New Security]. Budapest, 1994. 59.

²⁸ Ferge Zs.: Szegénység és bűnözés, azaz: van-e dezintegrációs és decivilizációs veszély? [Poverty and crime: is there a danger of disintegration and de-civilisation?] *Belügyi Szemle*, 37 (1999) 3–27.

the differences between the various actors participating in protecting public safety in some form. This is complemented by the privatisation of communal spaces, which can in part be understood absolutely literally, while in another sense it means that significant manifestations of social life (for instance shopping, spending one's leisure time) increasingly take place in private places. As a consequence the poor, as well as members of groups marginalised on the basis of social prejudices, are more exposed to harassment, occasionally even expulsion by security personnel. *Nota bene*, the public power itself uses solutions that restrict people's freedom of movement (bans, house arrests, etc).

Another consideration that ought not to be neglected is that today the number of private police exceeds the personnel of the official bodies entrusted with ensuring public security.

According to official statistics there were 43 000 private investigator positions in the US in 2004—employees and entrepreneurs²⁹—while the number of security guards somewhat exceeded one million.³⁰ At this time there were 842 000 police positions,³¹ including investigators.

In Hungary the numbers are vastly different. According to the Chamber of Bodyguards, Property Protection and Private Detectives there are 112 066 persons with a licence that authorises them to conduct private security activities, and even those qualified as actively engaged are 69 951 as of 1st September 2005,³² which is more than double the number of active police personnel. The total number of the latter, according to the January 1st 2005 statistic of the National Police Department (ORFK) was 29 449.³³

The situation wherein the burghers live securely in cities surrounded by walls, while those stuck outside endure in hazardous living conditions, is reminiscent of medieval conditions. Just as back then, today, too, many people aspire to become members of the exclusive club, which naturally implies the exclusion of many people.

Poverty and exclusion do not merely impede access to security services; prejudices, as well as efforts resulting from misinterpreted and impatient notions of political efficacy result in deprivation itself being considered some sort of

²⁹ See <http://www.bls.gov/oco/ocos157.htm#empty>

³⁰ See <http://www.bls.gov/oco/ocos159.htm#empty>

³¹ See <http://www.bls.gov/oco/ocos160.htm>

³² See <http://www.szvmszk.hu/node/6>

³³ See (http://www.orfk.hu/magyar_rendorseg/tortenet/jelen_szamokban.html)

deviance, even straight-out criminal behaviour.³⁴ Just as it was expressed by the outspoken monographer of the domestic police between the two world wars:

*...it is a psychologically known fact that the destitute, needy popular stratum, or just group, is extraordinarily dangerous to public security, wholly unreliable from a national standpoint, and thus not only useless for the national society, but rather a burden.*³⁵

Today the public power's turning on the poor and disadvantaged groups manifests itself most strikingly in framework of the still fashionable "zero tolerance" principle, which intensifies the policy of exclusion³⁶ even if the state may achieve some measure of success in terms of liquidating or alleviating some (social) differences, or at least the most flagrant manifestations of marginalisation (for instance Roma settlements). It has an especially demoralising effect when the penal power is spectacularly lenient towards a suspect that hails from the "upper ten thousand" (the prime suspect of the criminal act that caused billions in damages was interrogated by the prosecutors in a markedly friendly atmosphere, and the popular folk singer sentenced to incarceration was often allowed to leave the prison for a few days, etc.)

It also has to be said that the helplessness resulting from destitution and social exclusion can really veer those towards the world of crime who see not other possibility for improving their lot. Though of course the vast majority of them remain exploited and disgraced pariahs in that environment, too.³⁷

5. Petty crime and major crime

Opposition parties aspiring to a ruling role generally like to refer to the incumbent administration's suspected corruption or other shady deals, at the same time promising that if elected they will mercilessly expose all abuses regardless of who the perpetrators may be. As far as they are successful, however, the

³⁴ See Crowther, Ch.: Thinking about the "Underclass"—Towards a Political Economy of Policing. *Theoretical Criminology*, 4 (2000) 149–167 as well as Gönczöl K.: *Bűnös szegények* [Guilty poor]. Budapest, 1990. 1990.

³⁵ Nagy J.: *A község rendészete* [Community law enforcement]. Szombathely, 1938. 171.

³⁶ See Ferge Zs.: A szétszakadó társadalom [Disintegrating society]. *Belügyi Szemle*, 38 (2000) 14.

³⁷ See Forrai J.: Szegénység és bűnözés különös formája a budapesti utcákon: a férfi- és női prostitúció [A special form of poverty and crime on the streets of Budapest: male and female prostitution]. *Belügyi Szemle*, 37 (1999) 91–101.

results are usually pretty slim, mostly straight-out disillusioning (witness for instance the activities of the short-lived State Secretariat for Public Funds). In the criminal proceedings concerning the astonishingly high commission paid from public coffers the successive court verdicts were diametrically opposed, and in terms of the key charges the case ended in the acquittal of the accused. The investigation concerning the oil affairs—that is their taking on the characteristics of organised crime—began in 1996 but has failed to produce even a first instance ruling.

In the last decade of the previous century there was such an underworld war in Hungary, in the course of which the attacks—typically bombing—of the criminals against each other created an almost unbearable situation. The interior department and police leadership at the time employed methods reminiscent of efforts aimed at total control, such as comprehensive identity checks, and as a result they apprehended 1.574 persons, 153 of whom were caught as a result of arrest warrants. 252 persons, mainly of Ukrainian, Romanian and Asian nationality, were expelled from the country due to lacking residence permits, employment without permit and other miscellaneous violations. Charges were brought against 268 persons on the basis of strong suspicion of criminal acts. In a parliamentary session the minister of the interior reported all this as a success. He also added that even though these measures do not offer a solution to the problems, there are nonetheless encouraging signs in the investigations concerning the bombings as well. We must note at this point that a significant portion of the bombings and their perpetrators remains unexposed even today.

The differing efficiency of law enforcement in fighting petty crime and major crime is a result of several factors.

Above all there is a difference in visibility and the closely related willingness to report crimes. In the case of major crimes the perpetrators' education, technical skills and levels of information increase the chance of failing to uncover, and finding evidence is also difficult. In the case of minor crimes this is usually not the case.

The other connection is that the administration of criminal justice needs measurable results which—just as commercial companies—it can best achieve with “mass production”. It is a different matter that the possibilities open to the administration of justice (for instance the difference between misdemeanour and criminal proceedings) allow for fewer simplifications, and as a result the handling of petty offences does not reduce the strain on judicial administration of justice proportionally to their minor importance. Thus it can happen that courts become “clogged up” with cases that pose minor threats to society while as a result the capacities originally set aside for trials on major crimes are increasingly difficult to mobilise. This goes some way towards explaining

how in criminal law—and as a part of this phenomenon also in the context of court trials—fundamental requirements are formulated that seek to counter the difficulties in finding sufficient evidence by either renouncing or at least relaxing rule of law values (introduction of witnesses that the defence may not encounter, admitting into evidence materials from clandestine information gathering without revealing the sources or the methods for obtaining them, etc).

Increasing efficiency by abandoning rule of law principles is dubious to say the least. In my opinion we rather ought to start from the notion that minor crimes—though they affect a much larger group of victims—are altogether not as dangerous to society as terrorism, extremely well-funded organised crime structures that threaten the creation of alternative social structures, or environmental pollution that threatens the health of millions.

In the case of petty crimes it is more effective therefore to expand alternative sanctions that also contain civil rights elements. Simultaneously the capacity for combating major crimes ought to be improved and increased both in qualitative and quantitative terms.

6. The social perception of crime and law enforcement

It is hardly debatable that in democratic societies public perceptions, the citizens' opinions, sentiments and especially their fear of crime cannot be disregarded when it comes to the public power's approach to crime, nor in criminological research.

Generally it can be asserted that two kinds of approaches exist in terms of social reaction to crime. The first suggests that the self-restraint of criminal law is appropriate, since the decriminalisation experiences tend to be rather good overall. If society does not wish to receive back savage evil-doers back from prison, then the humanisation of penal law is imperative.

The other approach, referring to law and order, proclaims exactly the opposite. According to this thinking permissive criminal policy is a fiasco. Criminals do not deserve society's good faith or patience. Prisons are either completely incapable or extremely inefficient at conveying proper values to people, but it does not follow that one should try to humanise prisons, but that criminals ought to be locked up for as long as possible, for life if need be.

People generally tend to hold the latter belief. They perceive severe punishments as the best method for preventing criminal acts. Nonetheless, it is an indisputable fact that the punitive approach is not exclusive in reality but—though sometimes in a somewhat contradictory manner—is mixed with more tolerant views. The majority of people calling for strict punishments simulta-

neously accept the need for both, punishments and correctional-type measures.³⁸ We can also observe a subtle shift in the assessment of the role of retributive types of punishment, while there is an increased acceptance of complex state/public power responses to crime.³⁹ Proper information on crime and the administration of justice plays a very important role in this process, in persuading people—for instance in the course of all proceedings that pertain to them in any form, or in the media—, furthermore in increasing social participation in prevention and the administration of criminal justice.⁴⁰

A special problem for societies that experienced regime transition is that dictatorships generally—including the former socialist systems as well—managed to keep crime rates at a low level, at least according to official statistics. Undeniably the paternalistic state provided people with some sense of security.⁴¹ In contrast, the countries in transition were hit by massive waves of crime that struck simultaneously with political democratisation. It was easy for the perception to emerge—as it indeed did—that it was really the constitutional fundamental rights safeguards—suddenly taken more seriously—which lead to the “police’s hands being tied” and thus caused increasing crime.⁴² Consequently, the solution can be nothing but the curtailment of individual liberties, renouncing some principles in exchange for increasing the efficiency of law enforcement.⁴³ It can really be observed that in the transitional states free-market based

³⁸ Boers, K.: *Kriminalitätsfurcht*. Pfaffenweiler, 1991. 324 and 325, as well as Kerner, H.-J.: *Kriminalitätseinschätzung und Innere Sicherheit. Eine Untersuchung über die Beurteilung der Sicherheitslage und über das Sicherheitsgefühl in der Bundesrepublik Deutschland, mit vergleichenden Betrachtungen zur Situation im Ausland*. Wiesbaden, 1980. 225 and Korinek L.: *Rejtett bűnözés* [Latent crime]. Budapest, 1988. 151.

³⁹ Korinek L.: *Félelem a bűnözéstől* [Fear of Crime]. Budapest, 1995. 116–117, and Hart Research Associates: *Changing Public Attitudes toward the Criminal Justice System for the Open Society Institute*. 2002. <http://www.prisonsucks.com/scans/CJI-Poll.pdf>

⁴⁰ Allen, R.: *What Works in Changing Public Attitudes—Lessons from Rethinking Crime and Punishment*. *Journal for Crime Conflict and the Media*, 1 (2004) 55–67.

⁴¹ Irk F.: *Rendszerváltás Közép-Európában: a bűnözés-megelőzés és a kriminálpolitika kérdőjelei* [Political transition in Central-Europe: the questionmarks of crime prevention and criminal policy]. In: Vigh J.–Katona G. (eds.): *Társadalmi változások, bűnözés és rendőrség* [Social changes, crime and police]. Budapest, 1993. 267–275.

⁴² See, Mawby, R.: *A változó rendőrség–bevezető elmélkedés Kelet-Európa nyugat felé fordulásának ürügyén* [Police in transition—introductory thoughts on Eastern-Europe turning westwards]. In: Vigh–Katona: (eds.): *op. cit.* 248–253.

⁴³ See Boross P.: *Megnyitó beszéd a Társadalmi változások, bűnözés és rendőrség című konferencián* [Opening speech at the Social change, crime, police conference]. In: Vigh–Katona (eds.): *op. cit.* 10.

governance is mixed with such police-state methods, indeed with such conceptual approaches.⁴⁴

7. Politics and Criminal Law

Significant changes in criminal policy usually result from long, arduous processes in public thinking. The birth of a new policy is generally preceded by the exhaustion of reserves offered by old solutions, by the recognition that the previously used methods mark a dead-end.

This is how it was already in the 17th century, when as a result of continuously harsher penalties almost all legal violations resulted in the gallows, and in England, for instance, over two hundred offences were punishable by death. In spite of the increasing severity of punishments crime kept rising. The irony of the situation was that one of the best opportunities for committing crime was offered by public executions, which drew pickpockets and other criminals whose acts were also subject to the death penalty.⁴⁵

It was Cesare Beccaria who recognized the need for a new perspective by emphasising that it was not the severity of the punishment, nor its cruelty, but its inevitability that exerted the best deterrent effect.⁴⁶ He also formulated other important, still valid considerations concerning police work and crime prevention. Regarding the former, for example, his opinion was that it should only be allowed to operate based on clear laws, lest it paves the way for tyranny, which always “lurks on the fringes” of political liberty.⁴⁷ Beccaria’s ideas on the connection between criminal law regulation and prevention are also instructive and relevant today:

Just as nature’s permanent and extremely simple laws cannot prevent turmoil in the movement of heavenly bodies, human laws, too, between the infinite and contradictory powers of attraction of pleasure and pain, cannot prevent all disruptions and disorder. Still, this is the illusion harboured by narrow-minded people once they attain power. If we forbid people to engage in various indifferent activities, then this will not unequivocally mean that

⁴⁴ Łoś, M.: Post-communist Fear of Crime and the Commercialization of Security. *Theoretical Criminology*, 6 (2002) 180.

⁴⁵ See, King, P.: *Crime, Justice and Discretion in England 1740–1820*. New York, 2000. 343.

⁴⁶ See Beccaria, C.: *Büntett és büntetés* [Crime and punishment]. Budapest, 1967. 99.

⁴⁷ See: *ibid.* 120.

*we pre-empt the crimes resulting from such activities, but rather that we create new crimes, that we arbitrarily specify the concepts of virtue and crime, which are proclaimed as eternal and immutable. Where would we end up if we banned everything that might induce us to commit crimes? One would even have to deprive humans of the use of their sensory organs!*⁴⁸

The world has not changed much since, and neither has the temptations to solve its problems through criminal law regulations. It is time to recognise that criminal law alone is not capable of solving the problems it addresses.

As pointed out before, it is beyond dispute that the prevention and the reconnaissance preceding criminal investigations, furthermore the war on terror, as well as its expansion to include other criminal categories, increasingly takes place beyond the framework imposed by criminal law, in fact partly beyond any legal frameworks whatsoever. This raises fundamental human rights concerns. At the same time one also has to see that politics seeks to “channel back” the really great results into the administration of criminal justice—albeit with mixed success. International criminal courts are established one after the other, and failed dictators are brought to justice. It appears therefore that it is “only” the fundamental rights safeguard aspects of applying criminal law that are relegated to the background, the expectations from deterrent effects are still prominent.

In developing the future role of criminal law we ought to keep in mind that it is aimed at individual, externally manifested acts and behaviour, and is thus incapable of liquidating or substantially influencing the causes of crime. The exception here is the regulation itself, as far as the cause and objective of criminalisation is not the protection of general social values, but the interest of helping the public power’s operation, in some instance the interest of furthering the enforcement of other legal statutes (*mala prohibita*).

Article 218 of our criminal code, for instance, ordains a punishment for anyone who helps another person to cross the national border without permission or in an impermissible method. The state undoubtedly has a right to regulate the conditions and modes of border-crossing. Still, it needs to be kept in mind that in this case (I would like to emphasise that the current regulation does not require the motivation of financial benefits nor other circumstances necessary to fulfil the criteria of a criminal act, that is a purely benignly motivated co-operation in helping somebody get into the country this way could prove sufficient to bring somebody into prison) the subject of the criminal act is in essence the furthering of a generally recognised human value (free movement).

⁴⁸ See: *ibid.* 134–135.

Moreover, the border crossing to leave the country, which is also subject to the prohibition, is the immediate assertion of an internationally recognised fundamental right, in as far as the International Covenant on Civil and Political Rights—implemented by Act 8 of 1976—, in its Article 12 (2) explicitly states that anybody may freely leave any country, including his own. It is true, of course, that the exercise of this right can be subject to legal limitations, but the restrictions do not change the hierarchy of values. We generally classify as *mala prohibita* those kinds of behaviour in the case of which the applicability of penalties depends on whether they were undertaken with authorisation or without. Here again I emphasise that the system of authorisations may have—and indeed usually does have—a reasonable justification, but the fact is that the action without permission is subject to punishment even if it does not violate anyone's interests. In other words: the basis for official action is not the concrete social damage caused by the legal violation, or any threat thereof, but the public power's loss of prestige.

The politicians who wish to use the seemingly simple tool of criminal law regulation for dealing with social problems fail to take into account—though as pointed out above Beccaria already called attention to this fact—that bad regulation and unjust application of the law not only fail to achieve a deterrent effect, but can outright lead to the opposite result: they can increase the number or severity of criminal acts.⁴⁹

While emphasising the dangers lurking over lawmaking we also need to state—precisely because of the clandestine operations that are based on a war-like conception and are devoid of fundamental rights safeguards in their efforts to combat crime—that criminal law regulations are also repositories of social and constitutional values that need to be enforced in the future as well.

Above all we need to emphasise the values and most important norms based on these values, which provide some kind of security both in an objective and a subjective sense as well. The key issue here is that criminal law clearly and predictably establishes the expectations whose violation will allow for the application of—also previously established—legal consequences (*nullum crimen, nulla poena sine lege*). Thereby the rules' moral reinforcement is also achieved.⁵⁰ The creation of long term regulations based on generally accepted values also

⁴⁹ See Kury, H.—Ferdinand, Th. N.—Oberfell-Fuchs, J: Does Severe Punishment Mean Less Criminality? *International Criminal Justice Review*, 13 (2003) 110–148 and Sherman, L. W.: Defiance, Deterrence, and Irrelevance: A Theory of the Criminal Sanction. *Journal of Research in Crime and Delinquency*, 30 (1993) 445–473.

⁵⁰ See Robinson, P.—Darley, J. M.—Carlsmith, K. M.: Ex Ante Function of the Criminal Law. *Law and Society Review*, 35 (2001) 165–187.

presumes that ideological perceptions concerning crime and punishment are relegated to the background, both in justice policy, as well as in research.⁵¹

Beccaria was right. Prospective punishments have no deterrent effect.⁵² Of course it does not follow that all prisons should immediately be torn down. Deterrence is not the only function of punishments and criminal law. It can undoubtedly be necessary, for example, to temporarily—or according to the reigning official view today even permanently—seclude some perpetrators from society. Though the severity of the prospective punishment in itself does not deter from committing a crime, the enforcement, as well as the authorities' treatment of suspects in general does have an effect on the individual and his future action. The most important "message" that the administration of criminal justice and the public power in general can send the people is: fair treatment. It is not surprising that studies have verified: the authorities' fair behaviour and the accepted legitimacy of their intervention has a demonstrable impact on law-abiding behaviour.⁵³

A special problem is that in tough political battles criminal law may become dysfunctional. When financial resources are scarce, legislators—in the thrall of impatient omnipotence—may wish to try to heal society's general ills with a criminal law that is not supposed serve this purpose. If a phenomenon that they believe deeply worries society (in reality their presumed voters) spreads, they immediately revert to using the tool of criminal law. A typical example is the law adopted by the Orbán government to impose more severe punishments on drug consumption. It appeared that they lashed out at drug consumers, while in reality they sought to demonstrate their deep commitment to their own voters. In light of such practices the criminal code begins to resemble a book of political messages rather than a codex created by moderate politicians.

⁵¹ Braswell, M. C.–Whitehead, J. T.: Seeking the Truth: An Alternative to Conservative and Liberal Thinking in Criminology. *Criminal Justice Review*, 24 (1999) 50–63.

⁵² See Gendreau, P.–Goggin, C.–Cullen, F. T.: *The Effects of Prison*. Sentences on Recidivism. Ottawa, 1999.; Kury, H.–Ferdinand, Th. N.–Oberfell-Fuchs, J.: Does Severe Punishment Mean Less Criminality? *International Criminal Justice Review*, 13 (2003) 110–148. and Paternoster, R.–Iovanni, L.: The Deterrent Effect of Perceived Severity: A Reexamination. *Social Forces*, 64 (1986) 751–777.

⁵³ Sherman, L. W.: Defiance, Deterrence, and Irrelevance: A Theory of the Criminal Sanction. *Journal of Research in Crime and Delinquency*, 30 (1993) 452.

8. What is to be done?

So far I have dealt with—not without critical remarks—criminal law and its social and legal environment: I described some tendencies that can be observed in security protection today. A representative of science cannot limit himself to explaining the world, as best as his powers and talent allow he must also contribute to changing and improving it.⁵⁴

Of course we already achieved something if we show politics and legislature the dead-ends, the paths they ought to avoid at all costs. Such is for example the removal of law enforcement from the rule of law, or the plan to scale back crime by increasing the severity of punishments.

There is more we have to offer, though. There is a continuously evolving approach that provides a modern response to the majority of the problems raised in this article, at least on a theoretical level. Its further extrapolation and application could help to end, or at least reduce, in many areas the dilemmas and problems presented in this study. This approach is nothing else than *human security*. Let me note that the English term “human security” is usually translated as humane security,⁵⁵ but the notion of “human security” is better in terms of expressing the close connection to human rights.

The concept of human security and the associated criteria were developed by the United Nations Development Programme (UNDP). The programme, in its 1994 Human Development Report, designates the freedom from fear and deprivation as a basic component of human security (Human Development Report, 1994). As regards to our topic the issue here is that the success of countering crime depends on the success of preventing social problems, resolving social tensions, and head off disintegration—in essence on pre-empting the need for criminal law intervention in the first place.

To further develop the concept of human security and to create a plan for its realisation, at the UN’s Millennium session in 2000 a decision was made to establish a Commission on Human Security. The best theoretical and professional experts were delegated to this commission, which was co-chaired by Sadako Ogata, former UN High Commissioner for refugees, and Amartya Sen, Nobel Prize winner in economics. Former Polish foreign minister Bronislaw Geremek also participated in the Commission’s work.

⁵⁴ See Fichte, J. G.: Einige Vorlesungen über die Bestimmung des Gelehrten. In: Fichte, I. H. (Hrsg.): *Johann Gottlieb Fichtes Sämtliche Werke*. Berlin, 1845–1846. 1794.

⁵⁵ See for example Axworthy, L.: A NATO új biztonsági küldetése [NATO’s new security mission]. *Nato Tükör*, (1999) 8.

The body finished its report by 2003 and noted that the international community needs a new security paradigm. The state will continue to remain an important factor in ensuring security, but often it can or does not want to live up to its security obligations, and sometimes it even becomes a source of threat to its citizens itself. Thus instead of the state's security one has to make human security the centrepiece of attention.⁵⁶

The Commission defines the concept of human security as follows:

*to protect the vital core of all human lives in ways that enhance human freedoms and human fulfilment.*⁵⁷

The protection of fundamental rights and liberties is absolutely inseparable from the concept of human security. But it also extends to the defence against severe wide-ranging threats and hazardous situations.

The need for complex⁵⁸ and global approaches⁵⁹ in the thinking on security was already recognised earlier. It has also become apparent that previous distinctions (military/police, domestic/external, etc.) are fading, or at least losing their pertinence. The new element in the human security approach is that it places the perspective of individuals and their communities before the security interests of the national or even the whole international community.

The assessment of migration exemplifies the difference in the traditional state or national security and the novel human security conception. The latter sees human migration as something positive, for it increases countries' mutual dependence and reinforces the acceptance of differences. It enhances the exchange of knowledge, as well as the spread and conveyance of skills. It helps economic development and simultaneously the success of the people involved in migration. Admittedly, there are also dangers and adverse consequences, but the negative consequences of migration should also be primarily assessed with regards to their effect on the people who are immediately affected.

The concept of human security resolves the dichotomy that is generally presumed to exist between human rights and security. This approach holds that

⁵⁶ See Commission: Human Security Now. Commission on Human Security, UN, New York, 2. 2003.

⁵⁷ See Commission: Human Security Now. Commission on Human Security, UN, New York, 4. 2003.

⁵⁸ See for example Rubin, H.: *Security in Society: Protecting an Increasingly Connected World*. Washington D. C., 2003.

⁵⁹ See for instance Steinbruner, J. D.: *Principles of Global Security*. Washington D. C., 2000.

providing for the most extensive enjoyment of human rights possible is not obstacle, but rather an objective—and in a successful case an achievement—of security and defence policy.⁶⁰

If I need to sum up the desired strategy as succinctly as possible, I turn to a phrase by Javier Solana: “[A] world more fair is a world more secure”.⁶¹

⁶⁰ See Oberleitner, G.: Human Security and Human Rights, European Training Centre for Human Rights and Democracy. *Occasional Papers*, 2002. No. 8.

⁶¹ See Solana, J.: *Beszéd az Európai Nemzeti Fórumon* [Speech on the European National Forum]. S0005/4, Dublin, 2004.