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Public order – public security – legal certainty (2000–2015)

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Abstract

This paper attempts to sum up the major points of the theoretical debates that have taken place in connection with the concepts of public order, public security and legal certainty in Hungary over the past fifteen years. Order and security are values that may be threatened by crime, the ever-expanding terrorism and the wave of migration as well. However, the present author is convinced that the greatest danger lies in surrendering the values of the democratic rule of law, and depart from the path of humanizing criminal law, opened up barely 250 years ago.

Keywords: public order, public security, law enforcement averting danger by law enforcement, monopoly of legitimate physical force, human rights, restriction of fundamental rights, fundamental rights test

Introduction

Our human world is fraught with risk and peril against which one needs to find defence, yet often without having the necessary means at one's disposal and being able to forecast a significant portion of the situations posing a threat. As far as the sources of danger are concerned, however powerful nature's destructive forces may be that are beyond his control, the greatest challenge facing societies is man's ignorance and his irresponsible nature inclined to evil.

Apart from the fact that ancient cultures recognized the importance of individual and community defence, and even the state's responsibility for the security of its subjects, a cooperation between public and private security became possible only with the advent of modernization after the 17th century. In the civic state, it is for the legislation to offer patterns of action that can be utilized for protecting society and prohibiting behaviours that may have adverse effects. The complicated processes outlined above have attracted the interest of social researchers from the outset, and it appears that the concepts of *public order* and *public security* have proved to be the most suitable for linguistic presentation of these processes.

One of the decisions of the Constitutional Court discusses public security: *"The meaning of public security, its relation to public order and internal order, and the definition of the latter two terms, form the subject matter of scientific debates. It is not the Constitutional Court's duty to take a position in these debates. However, a review of the elements of the legal system relevant for this purpose also indicates that public security is a category carrying several meanings, with different types of interests and values and several tasks of a fundamentally different character underlie the expression."* [Constitutional Court decision no. 13/2001.(V. 14.) AB]. Although it is not among the duties of the Constitutional Court to conduct a scientific debate, participation in the scientific discourse is a must for all researchers dealing with the issues of security. The mission of a theory is to assist in recognising the rules regulating the phenomena it investigates with its clear concepts and its definitions that carry confirmed contents. Having clear ideas on the contents of public order and public security improves the chances of defence.

Public order and law enforcement

Walking through the stages of developing the concept of public order produces a rather contradictory picture (Finszter, 2012). The effort to seek the essence of public order as a general moral order outside the world of law "considers public order to be the sum of mostly unwritten rules the observation of which is an indispensable condition for successful coexistence within the community according to the prevailing social and ethical understanding" (Szamel, 1990: 13.). However, this approach sets a task for law enforcement as the defender of public order that is barely possible to resolve. Using administrative force to defend *moral rules* and customs is in itself unsustainable. The problem is even worse if "rather than a violation of law triggering the operation of a law enforcement body, the law enforcement body elevates something into an intangible rule" (Szamel, 1990).

A recognized authority in Hungarian legal literature, among the first to conduct scientific research into police organization, Győző Concha, describes public order as a peculiar conglomerate of legal and other social standards when stating a position that public order is "collaboration between people for a common goal within the boundaries of law and nature" (Concha, 1905: 307–308.). This can lead us to the concept of public order deduced from legal order, which should no longer be in contradiction with the principle of law enforcement proceedings being governed by law, thus eliminating both the risk of making a moral approach exclusive using administrative force and preventing law enforcement authorities from establishing ethical rules.

The legal concept of order relies on the feature that the conditions for the harmonic operation of individuals and their communities can be learned about and followed by man, and such conditions can even be created by way of regulating behaviours by legal rules, and the values created by social cooperation can be protected by prohibitions set in law. However, legal means are not suitable for reaching all social goals, which is why legal order is merely a part of social order that can be regulated by state standards and can be enforced by the state's imperium.

Private law order, forming part of the *legal order,* focuses on the protection of the person and the orderly nature of the civil sector, the economy and market conditions; the

other part is *public law order,* the subject matter of which consists of the regulated relationships between the individual and the community, the state and its citizens. The order established by public law is *public order* (Kántás, 1997a: 50.). Both private law order and public law order are implemented via the voluntary compliance of citizens, but neither of them can do without protection against infringing behaviour. In civil law, the concepts of property being inviolable, the right of the parties to dispose over their things, the freedom to contract, the protection of possession and, ultimately, the enforcement of civil law claims before the court all serve this purpose.

The concept of *law enforcement* differs from this, and means the protection of public order by instruments of public law from human behaviours deemed to be violations under public law (Szamel, 1992: 11.). For law enforcement, public order is the subject matter of protection that the police shall defend, on the one hand, and the form of that protection that the police (each member of the police forces proceeding) shall observe, on the other hand. (Public order cannot be protected by violating the standards that belong to public order.)

Law enforcement tasks may be defined in two fields of public law: administrative tasks may be specified by administrative law; whereas regulating the tasks of the persecution of crime is the competence of procedural and substantial criminal law. In all cases where public security suffers an attack not yet overcome, law enforcement needs to harness the attacker on the grounds of an authorization stemming from law. Such action by authorities is called *material law enforcement activity,*[1] whose procedures cannot be forced into a framework of legislation. So, we have reached the formula of the general authorization granted to law enforcement, a general authorization *(general clause),* according to which the police shall make every effort required for protecting public security. (Note that this is a general power reminiscent of a police state, but while a general authorization is the main rule in a police state, it is an exceptional possibility under the rule of law.)

There is a conflict between the legal order of law enforcement and the freedom to take action. The *rule of law approach* finds a way to resolve this conflict by stating that rather than being simply the protector of public order, law enforcement itself is also subject to the standards set out in public order. The need for law enforcement to act on the grounds of a general authorization arises only in extremely rare situations. Some believe no general authorization is permissible for law enforcement under the rule of law, given that there is no need for such an authorization on the one hand, and that any implementation of it, however narrow, would give way to authoritarianism. We believe that the deployment of legitimate physical force in countering a threat is the manifestation of law enforcement autonomy, which is valid only at a time of averting an extreme danger but is absolutely necessary in such times. However, it cannot be considered to be action beyond law, because its sole source is the authorization granted by law, and there is a measure for its legitimacy: *necessity and proportionality.*

Averting dangers in itself is not sufficient for describing the social purpose of law enforcement. On the one hand, law enforcement has duties that cannot be considered to be the averting of danger; they are administrative services due to citizens and binding on law enforcement. On the other hand, non-law enforcement authorities also hold certain competences that give legal answers to threats arising out of unlawful conduct as well. Think

[1] "Magyary Zoltán" Administration Development Programme: http://magyaryprogram.kormany.hu/.

about the activities of the public prosecutor and the criminal judge (Kántás, 1997b: 54.). In another context, the author just cited, Péter Kántás, identifies the point of law enforcement in "emergency care", and as the most efficient means of providing this "care" is legitimate force, he considers law enforcement to be "negative public administration" the purpose of which is to protect existing values rather than the generation of new values.

In his paper cited above, Lajos Szamel upholds his doubts when he finds that public order also includes public security. Attributing contents beyond legal order to public order gives no guidance as to which pieces of legislation and life situations regulated by legislation may be included under this concept. István Tauber contests the above views. The closing sentence of his paper contains the opinion of the authors: "The subject matter of law enforcement consists of public security and public order" (Tauber, 2002: 146.).

The previous Constitution amended in 1989 did not contain the concept of public order in the definition of police tasks right until 2007, and applied the term domestic order instead. The text in effect after 1 January 2008 was as follows: "The fundamental duty of the police is to protect public safety, public order and the order of the state border" [Article 40/A(2) of the former Constitution]. Reference to domestic order disappeared, in order to be replaced with the traditional concept of public order. In this regard, it is worthwhile to cite a textbook argument from 2004: *"In any case, the following should be taken as the basis for approaching the concept and contents of public order: legislators do not use the category of public order when determining the duties of the constitution or the fundamental legislation of the police, treated as the utmost body of law enforcement. It follows from this that the subject matter of law is public security instead of public order, that is, the law of law enforcement does not operate with public order"* (Ficzere–Forgács, 2004: 402.).

Once the above chain of deduction is accepted, as of 1 January 2008, public order may be said to have become the *legal subject* of enforcement administration. This was confirmed by the Fundamental Law in force today, when it identified the duty of the police as the protection of public order, among others. The jurisprudential concept of public order continues to be the subject of debate in legal literature. From the point of view of rule of law, these debates become significant due to the fact that, provided that the broader concept of public order is accepted (including moral order in addition to legal order), this represents a much broader mandate for law enforcement administration than the approach that public order includes only the order regulated by public law. This latter approach does not contest the significance of moral standards because it requires statutory law to defend moral values as well, and considers it the "gold standard" of the legal norm.

As could be seen above, public order is a key concept of law enforcement, but public order is not deemed to include public security, as the latter has its own meaning. This is what will be scrutinized next.

Public security

Public security as the subject of law is the aggregate of values to be defended, defined as a goal for the state by democratic rule of law states. The state is obliged to operate state institutions with the social purpose of protecting public security. In 1990, the largest Hungarian law enforcement organization, the police, was analyzed by renowned international police

experts. One of their first reports had this to say about public security: public security is the part of the non-tangible type infrastructure required for individuals and their communities to implement their goals valuable for society.

Protecting public security is a task that requires investment, just as road construction is a very costly enterprise, to quote another example. However, the formula cited carries another recognition: public security makes sense only if it supports value-added work that carries risks, demands personal bravery and autonomy, and assumes responsibilities. The creative activity presupposes individual and community rights of freedom. A security that can be achieved by annihilating human rights is worth nothing because this situation destroys the creative force of society. "Observing freedom is the main aspiration for everyone in the future Europe. Security is but a means for maintaining freedom, which has to remain within the framework of rule of law, the European and international human rights obligations. It is this relationship between freedom and security that needs to govern the European Union's policies" (Tóth, 2007: 87.).

Law enforcement's *monopoly of force* is suitable only for defending values already created, and no new values can be generated by repression. This is why a solid public security was unable to prevent the collapse of authoritarian regimes. The essence of law enforcement may be summed up in a single phrase, which is none other than defending *public security.* The concept of public security should correctly be interpreted in a more differentiated manner, which is why the distinction between *normative* and *material* concepts should be made.

The normative concept of public security in the European system of values

Public security as a subject to be regulated by constitutional law is a state goal, realization of which is a responsibility primarily for the government.[2] Article 46 of the Fundamental Law provides as follows:

"(1) The core duties of the police shall be the prevention and investigation of criminal offences, and the protection of public security, public order, and the order of state borders.

(2) The police shall operate under the direction of the Government.

(3) The core duties of the national security services shall be the protection of the independence and lawful order of Hungary, and the promotion of its national security interests.

(4) The national security services shall operate under the direction of the Government."

As the subject of regulations for law enforcement administration, public security is a value to be defended, which may be protected against unlawful conduct by statutory force in the scope of so-called negative public administration. The measures taken within statutory powers are obligations including the limitation of fundamental rights, which the authority taking the measure may enforce by physical force as well in case of opposition. Therefore,

[2] Citing from the reasons of Constitutional Court decision 48/1991. (IX. 26.) AB: "Armed forces need to be organized and kept in a condition that enables them to carry out their duties with direction from the Government."

public security is a value for the protection of which there may be reason to restrict fundamental human rights.

One group of fundamental rights consists of the "parent rights" that serve to protect human life and dignity, which may be restricted only if there is a suspicion of a likely direct threat of unlawful conduct. Section 2 of Act XXXI of 1993 promulgating the Convention for the Protection of Human Rights and Fundamental Freedoms concluded in Rome in 1950 (hereinafter: European Convention) has the following to say about the possibility for restricting the right to life:

"1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:

a) in defence of any person from unlawful violence;

b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

c) in action lawfully taken for the purpose of quelling a riot or insurrection."

For the purposes of the topic, the main morals of the provisions cited is that the abstract threatening of public security does not serve as sufficient grounds for specific coercive measures entailing a deprivation of life. The types of specific threats to public security are listed in paragraphs *a)–c),* which are defined by the criminal and administrative substantial law of countries that are signatories of the European Convention, and the method for eliminating the threat are defined by the rules of criminal and administrative procedure.

Section 3, which defends human dignity, includes the prohibition of torture: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment." In this case, no exception to protection is tolerated, neither an abstract nor a specific and direct threat to public security offers any release from the prohibition.[3] Section 4 on the prohibition of slavery and forced labour also has an absolute force, as it permits merely certain identified forms of public labour but a general defence of public security does not constitute sufficient grounds for obliging someone to work. On the other hand, Section 4 recognizes "service exacted in case of an emergency or calamity threatening the life or well-being of the community". Article 5 of the European Convention on liberty and security contains the following:

"1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

a) the lawful detention of a person after conviction by a competent court;

[3] The Council of Europe's resolution on the fight against terrorism adopted in July 2002 stated that States are under the obligation to take the measures to protect everyone against terrorist acts. However, all measures taken by States to fight terrorism must respect human rights and the principle of the rule of law, while excluding any form of arbitrariness, including an absolute prohibition of forcing admissions by torture. The Council felt it necessary to emphatically remind countries that traditionally consider themselves democratic countries after a long time.

b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
f) the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition."

All of the reasons listed above may be associated with the protection of public security but Article 5 allows freedom to be restricted only in specific danger situations. A separate question of this Article is how to interpret the notion of security in the light of the provisions cited. At first sight, it is the security of person protected against measures of authorities that restrict the person's rights. Trade literature identifies the *vertical* effects of human rights in the relationship between the state and the person, while it investigates the *horizontal* effects of human rights in the private law relations between individuals (Halmai–Tóth, 2003: 98.).

Interpreted vertically, security is a subjective right that binds administrative authorities and the judiciary to refrain from arbitrary measures, so it is added to the category of so-called negative human rights. This notion of security should not be confused with the right to life and property due to everyone, which is threatened primarily by individual unlawful human conduct rather than by arbitrary measures of the state. Being allotted to everyone equally, it may be called the security of the public, and because the state has no means guaranteeing absolute results available to it, public security may only be defined as a goal for the state, as mentioned earlier. (Were this not so, everyone aggrieved by a criminal offence could petition public power, saying it failed to protect them.)

Article 6 of the European Convention explaining the contents of the right to fair trial allows for a number of approaches for the purposes of public security. Let us take paragraph 1 first. "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

So far, we have been seeking and finding the normative notion of public security in public law. Can the violations of law occurring in the field of private law not be deemed to be factors that also degrade public security? In a sociological sense, maybe yes (the great economic crises – that can be described as the collapse of the market economy protected by civil law – had disastrous effects on public security as well), but in the legal sense, the question can only be answered by looking at whether private law and civil law in particular offers any instruments capable of protecting public security in addition to restoring order under private law. How fundamental rights may be enforced in private law relations (in so-called horizontal relations) is a different question (Halmai–Tóth, 2003: 98–102.). Civil law

sanctions are suitable primarily for reparations, but public security that was violated may be restored this way only to a highly limited extent. The substantial differences between liability under civil law and liability under criminal law caution that civil law sanctions that are to warrant the smooth functioning of modern production and the market serve the purpose of protecting public security only in a very roundabout way. It is also worth noting that purely repressive criminal sanctions in themselves are also unable to restore public security, whilst they are suitable for recovering the credibility of the order of public law that was infringed, and this in itself is no small feat.

The great strategic resolutions of community crime prevention launch movements to prevent violations of law seeing the shortcomings of these systems of sanctions, among other reasons. The search for finding the right course has another consequence as well. Certain developments imply a convergence of solutions under public law and those under private law (Vékás, 2008). In civil law, non-material damages ring up the nature of criminal sanctions that restore moral wholesomeness, while mediation and the possibility to penalize legal persons smuggle institutions that belong fundamentally to private law into criminal law. The movement with the greatest effect is the practice of restorative justice (Kerezsi, 2011). The thesis submitted for an academic doctorate on the topic finds the following:

"[...] *restorative justice is indeed different from traditional justice. The difference is indeed dominant in three respects: (1) Restorative justice looks at the perpetration of a crime on a comprehensive basis, and rather than defining it merely as an act against the law, it sees the essence of a crime in the grievance caused by the perpetrators to the aggrieved parties, the community, and possibly even to themselves. (2) In involves several actors in the handling of crime: instead of attributing a role typically only to the state and the perpetrator, it involves victims and the community in the process as well. (3) It measures the success of a procedure differently: rather than measuring success by the gravity of the punishment imposed, what it considers important is the extent to which the damage and grievance caused were restored."* (Kerezsi, 2011: 112.).

It is worthwhile adding that the public law that revived the responsibility of the state and formulated state obligations to remedy the grievance suffered by a person in addition to confiscating the aggrieved party's right to defence could not have been born without this increased role of the state. There is no doubt that this development could have opened up the way to despotism, but the understanding of democratic societies of the relative independence of law resists this. The legal notion of a criminal offence and the normative order of criminal procedures extended the rule of law to the state as well. The movements that put the humanization of the means of criminal law on their banner were able to get a foothold by relying on this legal order. A violation of law by power cannot be the response to the violation of law by a person. The penalising imperium is efficient if it keeps its moral standing. A state that violates the law gambles away this moral gold standard.

Those who talk about the weakness of democratic society ignore even the simplest facts. Criminal law in a rule of law, which in its operation is based on the rule of law, the separation of powers and the respect for human rights, has created greater security than the security achieved by absolutism and cruelty in earlier centuries. Albeit dictatorships were able to thwart formal requirements of the rule of law, the European common values, having created a criminal justice system capable of curbing in the criminalization of politics and

the degrading of law into a means of power by rediscovering human dignity, evolved as the very response to this (Finszter–Korinek, 2015).

Mediation cannot be successful without the lawful and effective operation of traditional criminal justice that relies on establishing liability for a crime in fair proceedings and applies a sanction that respects human dignity. Restoration is generous about the fact that any justice can function only if the exposure of the relevant past in a truthful manner yields results. In this field, traditional justice has the advantage because it relies on investigation as the preparatory stage, the duty of which is to enable justice to learn about the past event that is relevant for assessment under criminal law by way of evidence procedures. A further lesson is that the entire system of the guarantees of fair trial serves the purpose of preventing authorities from committing irreparable errors in exposing the past and from making decisions with a false understanding. Restorative justice can only expect to be successful if it carries out mediation in knowledge of the truth of the past. Apart from the optimistic goals of restorative justice, it can be established that justice is to protect legal certainty rather than public security. Just as civil justice cannot substitute the value-added performance of the economy, criminal justice cannot protect public security that is under attack. It has no duty to do so, either. (This is why the phrase in the Fundamental Law that separates the prevention and investigation of criminal offences from the protection of public order and public security may be considered to be appropriate. This is a wise solution, as this catalogue of tasks is indeed about different qualities.)

In addition to the above, there is one more important factor that restricts the effect of justice on public security. Public security is a *synthetic* notion, which describes the general state of the protected status of persons and communities, whereas justice is an *analytical* concept, as the dispute, the legal case that is to be decided is always a unique one. This is why Thomas Gilly, a researcher of this issue, says that the general state of public security cannot be described using legal categories. (In this paper this is called the material notion of public security, to be elaborated in detail later.) The evolution of criminal statistics is not sufficient for characterizing public security as an actual state of things. Another approach describes the public law qualification of public security with the aggregate of unlawful behaviours (that is, behaviours in violation of criminal law) perpetrated in a defined area during a given period (Gilly, 1998: 154.). This statistical approach ignores the quality requirement set for crime fighting and criminal justice by a democratic rule of law, that is, the requirement of lawfulness.

The whole range of guarantee rules characterizing criminal justice set out in paragraphs 2 and 3 of Article 6 of the Convention (presumption of innocence, right to defence, etc.) serve the purposes of lawfulness and the possibility of establishing the truth in a criminal lawsuit. The validity of guarantees in criminal procedure may not hinge on the extent of the threat to public security. (In the era of proclaiming war on terrorism, this latter statement may not be considered to be evident at all, unfortunately not even in the central states of democratic rule of law.) The point we are trying to make, therefore, is that justice in itself is not capable of protecting public security, and no conclusions on the efficiency of justice can be drawn on the state of public security.

If justice is not capable of defending public security, the statutory function capable of efficiently protecting society against unlawful attacks should be found together with the administrative body allotted to that function; they should do so by preventing attacks by

the presence of public power on the one hand, and by eliminating emergency situations that arise by deploying legitimate force on the other hand. These tasks fall in the powers of law enforcement administration. As law enforcement protects society from unlawful conduct, in addition to the penalizing sanctions, preventive interventions should be based on rules of substantial law.

According to Article 7 of the European Convention: "No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed." Can it be said that the rules of *nullum crimen sine lege* and of *nulla poena sine lege* may be set as a requirement already for the deployment of legitimate force by law enforcement? This requirement is often possible to fulfil, because the vast majority of behaviours that threaten public security show objective characteristics that allow for a direct and causal conclusion that a violation of law has taken place. In other cases, however, the legal facts need to be proven in order to establish a violation of law, which may be expected only in proceedings before a court decision. On the other hand, law enforcement interventions often cannot hesitate in taking measures until the evidence procedure is concluded successfully. Dangers must be averted even if the author of the attack is doli incapax. Finally, there may be situations of threat the unlawful contents of which cannot be clarified even by evidence proceedings.

Wishing to answer the question about what types of behaviour are suitable for threatening public security, substantial law on misdemeanours and criminal offences should be mentioned first, as they can be considered to be the substantial law on law enforcement. These laws are unable to encompass all the legal facts that represent threats and need to be responded to by law enforcement measures. Therefore, the sources of specialist administrative law that protect the given field by setting out prohibitions giving rise to administrative liability by setting them out in a set of legal facts subject to sanctions also belong to the domain of substantial law on law enforcement. (Such sources of law comprise areas ranging from health care through nature conservation up to consumer protection.)

Administrative and criminal standards only provide for prohibitions threatening with administrative or criminal sanctions. Once the violation of law has occurred and the authorities become aware of it, law enforcement, which safeguards public security, plays a role in preparing for holding the perpetrator accountable. (The police may also proceed as the authority in charge of misdemeanours, in which case it is also an administrative forum that enforces accountability.) However, law enforcement also has the task of preventing violations of law, which may be fulfilled by the classic watchdog function. From this point on, this function will be referred to as *law enforcement presence.* In all cases endangering public security that cannot be set out in a hypothesis, law enforcement needs to protect community values the procedures of which cannot be squeezed into the framework offered by legislation, either.

In respect of restricting the fundamental rights to life and human dignity, it can be seen that the European Convention will not be satisfied with an abstract situation of danger, it makes the application of statutory force conditional upon the occurrence of specific legal facts identified in law. Having said that, it requires less to make statutory force lawful when restricting the right to privacy and to family life, the freedom of thought, conscience and

religion, the freedom of expressing an opinion and the freedom of assembly and association. Authorities may order a restriction of the fundamental rights listed in Articles 8 to 11 of the European Convention when "necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others." Although this phrasing indeed opens the gates wide to statutory action restricting fundamental rights, one cannot think this is about a general authorization. The limits of the freedom of expression in public law are set by the definition of libel and incitement in criminal law. The methods for exercising the freedom of assembly and of association are identified in law (the Acts on the freedom of assembly and on the freedom of association). Moreover, the Constitutional Court has specified the requirement of legal certainty for all acts in a number of its decisions. For instance, it stated that the Police Act failed to meet this constitutional requirement in a number of respects as regards the collection of information in secret that restricts respect for privacy and family life.[4]

In other cases, however, the Constitutional Court found regulations to comply with the requirement of constitutionality. There have been constitutional concerns about the collection of intelligence in Hungary earlier as well. In an earlier decision [decision 32/2013 (XI. 22.) AB], the Constitutional Court has scrutinized Section 7/E(3) of the Police Act, in connection with which the European Court of Human Rights (ECHR) has now established a violation of the Convention. The investigation focused on the question whether the fact that a certain domain for collecting information is authorized by a minister of the government, a member of the executive power that can be considered the political branch of power is compatible with Article VI of the Fundamental Law that guarantees respect for privacy and for family life as well as the right to informational self-determination.

The Constitutional Court found no conflict with the Fundamental Law. In its opinion, "the assessment of national security risks requires a political decision, and is therefore in the domain of exercising executive powers." The European Court for Human Rights did not share this view when it pointed out that the most serious concern was the lack of court control over the authorization procedure. In the opinion of the Strasbourg judges, an authorization by a minister who belongs to the executive branch of power that may be considered to be the political branch is not sufficient security against possible abuse. The

[4] *"A further requirement for ordering checks to prevent crimes is that the court shall have established one of the circumstances specified in Section 69(3) paragraphs a) through h) of the Police Act to exist in the underlying case. However, the legislator has not defined the contents of the legal notions and procedural technical terms shown as categories of crimes listed in that section of the Police Act in the interpreting provisions, and they cannot be identified with the provisions of either the Criminal Code or Act XIX of 1998 (hereinafter: Code on Criminal Procedure). Consequently, save for a few exceptions, the judiciary has no set of fixed notions defined (at least) in other legislation available to it that provides sufficiently unambiguous guidance for investigating this requirement for ordering action. The Constitutional Court summed up its findings related to the requirement of clear legal standards in its decision 10/2003 (IV. 3.) AB. According to the essence of this decision that is relevant for this case, legal standards should have clear contents that can be interpreted in a recognisable manner in the course of applying the law, and this forms part of legal certainty. If the wording of a legal standard cannot be interpreted or allows for different interpretation, this results in creating an unpredictable situation for those to whom the legal standard is addressed. In addition, wording that is too generic offers a possibility for subjective and arbitrary judiciary action."* (Constitutional Court decision 47/2003).

most certain guarantee for independence, impartial and fair procedure is external control of secret surveillance by a court.[5]

In summary, the normative concept of public security includes the state goal specified under public law the implementation of which is a task for the state, as well as the social value recognized by law, whose protection may justify certain restrictions on fundamental human rights as defined by law.

The material concept of public security

Presenting public security as a conglomerate of social relations leads us to the material concept, the public security that actually exists and can be experienced in everyday life, or the absence of which may be suffered. By its primary meaning, security is a static state free of risks and dangers. Immobility without dangers can by no means be a feature of social processes. Communities do not lead a static life anywhere; it is a dynamic activity in constant motion, which is why no value-added collective action can be envisaged that does not carry any risks.

As there is no absolute security, it is more fitting to describe security as a favourable situation that is unlikely to be changed. This approach already takes into account the threats to security, and therefore strives to keep the possibility of an adverse effect at the lowest level by imposing a whole range of statutory measures. As regards the performance of business organizations, security surfaces as a requirement in addition to quality and reliability. The security of goods and services is determined by three factors: confidentiality, inviolability and availability (Vasvári, 1997: 26–28.). As public security also means security of property, these aspects govern the measurement of public security as well.

There is another approach to security, which may be considered a dynamic notion. Everyday experience is unable to come up with a single social activity that does not carry a risk of some extent. Understanding security as a state of equilibrium, a favourable life situation when some individual or community activity is able to be implemented smoothly because the effects that support the activity are in balance with those that threaten it, is a much more realistic approach. This understanding of security can be utilized well in defining public security, as it counts with inevitable risk factors while consciously striving to obtain the greatest degree of support in order to avert threats.

A further explanation of public security is close to business activities, and is typical for all kinds of social activities based on community action, in a broader sense. The interpretation of security as a non-material type of infrastructure can be attributed to the achievements of the science of organization. Having investigated the efficient operation of organizations, the various management theories called attention to the fact that security was an indispensable requirement for implementing both individual and group goals. A set of material conditions that grows increasingly complicated – encompassing a whole range of factors from buildings through road networks to communications connections – is absolutely necessary for human activities to be successful. Similarly, security is also needed, but is often not manifested in objects (which is why trade literature calls it the non-material part

[5] www.jogiforum.hu/hirek/35308

of infrastructure), nevertheless is just as indispensable as buildings, telephones or means of transport. The infrastructure approach makes it obvious that creating public security is a costly task that requires investment. (The paper will provide information on what to invest and what is worth investing in, and how the efficiency of investing for security purposes can be measured later on.)

An additional approach to security is close to entrepreneurial conduct; in this interpretation, security is the outcome of target-oriented activities, saying that the creation of security in itself is a service, where the outcome is the continuous creation of the most favourable internal and external conditions for operation. When this service is provided by public administration, its determination by administration is emphasized: it is linked to the rules of public law, there are requirements concerning format, and there is a relationship between an authority and its client, representing a peculiar form of subordination and superiority. When the service is provided by the private sector, a security company, its contents are provided by the contract drafted within the broad framework regulated by private law, and is characterized by the freedom of form and the equal standing of equal-right partners. This form under civil law is a necessity in a market economy based on private property, when private spaces are growing at the expense of public area. Private security appears as a helper of public security (Stenning, 1999). Others, however, worry that the conversion of public security into private security may result in the proliferation of social injustice and arbitrariness (Szigeti, 2001: 153.). These fears are well-founded if public law fails to firmly set out the limits beyond which protection may only be granted by the state monopoly on force. Developed European public law resolves this task successfully. (This is why it was considered to be so important to present the legal guarantees for protecting public security in such detail.) The other source of errors is when private security fails to perform its duties with sufficient proficiency and responsibility. This is a serious problem in all transitional societies where private property and the market has barely existed or operated under considerable restrictions for a long time. Fewer people think about how understanding an office as a commercial operation and the dissemination of marketing methods in public administration can also lead to a drop in quality. A cost-sensitive public administration may lose its sensitivity to law, and chasing effectiveness may undermine lawfulness. The new type of security builds on a harmony of public and private security by virtue of which it is capable of avoiding the misleading paths listed above (Salgó, 1994).

Creating security cannot be the production of one single person or an organization dedicated to this purpose. It takes collective effort to efficiently eliminate threats, so therefore, security is also a product of cooperation. The crime prevention strategy adopted by Government resolution 1744/2013 puts it like this: "Public security is part of society's quality of life, a collective product with a value the development and preservation of which is a common cause." In the modern European understanding, public security is a collective product of society that is created as a combination of the activities of individuals and their communities, the statutory measures of government agencies, the self-defence capacities of citizens and the services offered by the business market.[6]

[6] See Parliament decision 115/2003 OGY on the national strategy for crime prevention, which is not in force any more.

The following actors are especially significant in developing the urban models for public security: municipalities, the police, security businesses and civil self-defence associations. The duty of the public security and crime prevention committees described in the Hungarian Police Act is to coordinate these roles. Typically enough, the inefficiency of coordination committees in the development of the local public security system may be blamed for the lack of community cooperation even in England and Wales, where the police operates on a municipality basis. A methodology publication of the Home Office dating back to 2003 calls for local law enforcement committees to beef up their expertise on applying public opinion polls, to continuously inquire about the population's opinion using the techniques of in-depth interviews and focus group talks, thereby accelerating local cooperation (Dalgleish et al., 2003). Interestingly enough, the inhabitants of English and Welsh towns are at least as pessimistic about cooperation with the police as the people asked in the Budapest districts in a model experiment conducted by OKRI (National Criminology Institute) (Kerezsi et al., 2003).

The local, regional, national, integrated and global dimensions of public security represent the aspect of the material concept that should be mentioned finally, while this aspect is particularly meaningful nowadays. In general, the primacy of local public security may be said to have been undisputable, because individual closed communities could be "self-sufficient" in crime, particularly in an urban setting, while successfully resisting external impacts. The strict order of medieval towns required high security. This security disappeared for good with the advent of bourgeoisie and capitalist production. However, it took a balancing of the economic and cultural differences between areas and a significant development of transport to be able to demonstrate the combined effect of regional and nationwide security factors in all settlements. Once this balancing takes place in a contiguous geographic area, it is worth regarding the area to be a single public security region. The international aspect of public security may evolve in places where the values of economy, law and morals rest on a common foundation. According to Article 61(1) of the Treaty of Lisbon: "The Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States" (text promulgated by Act CLXVIII of 2007).

It would be very nice to have security as a subjective right, protected by a state guarantee. However, this is impossible, mostly because in addition to generating value, society regularly destroys values as well. Values are destroyed in unjust distribution situations, by bad political decisions, in the absence of tolerance and solidarity, while they are also annihilated by individual emotions. The state is fallible, makes many mistakes and is not omnipotent. Administration cannot control all human intentions. Michel Foucault called the experiment of the 19th century, attempted to set up institutions that also tried to correct the behaviours deemed to be dangerous instead of merely punishing violations of law to be *social orthopedics* (Foucault, 1998: 72.). The horrible consequences of the *"disciplinary society"* were demonstrated by the 20th century dictatorships, but such attempts may occur in the future as well in spite of the lessons.

In constitutional democracies, public security can be no more and no less than a state goal that needs to be continuously worked on, but without security becoming an enforceable subjective right that could be achieved by anyone on an absolute basis. Public security as a state goal is closely related to the protection of societal values under criminal law.

The most serious threat to the security of persons and property lies in unlawful conduct. It has been experienced for over two hundred years that criminal law under a rule of law and criminal procedures surrounded by guarantees are the most efficient weapons against the crimes committed. Criminal investigation and criminal justice may take action once public security was breached, but criminal liability can restore only the legal order but not public security. It is an important achievement of the national strategy for crime prevention that it has recognized this relationship and therefore, it does not regard criminal justice as part of the crime prevention system, although it plays an important role in maintaining legal integrity, and obviously, a legal order that is restored has a beneficial impact on public security as well.

It may also be said that the security of persons and property is a reduced category of public security, which simplifies the complicated societal relationships indicated above. There are several reasons to justify this simplification. First, because prohibitions of criminal law build on this ease of understanding (don't kill, don't steal), with great efficacy. Second, because this enables public security to be measured. Even the loosest criminal statistics are capable of this. (It can hardly be denied that the history of breaking and entering coupled with theft in Hungary over the past twenty years shows a fair picture of the restructuring of property conditions in society, just as the sudden increase in car thefts provides information on the renewal in the quality of vehicles.) However, statistics are utterly incapable of controlling the performance of criminal investigation and justice bodies. Yet politicians use these statistics exactly for that purpose, similarly to the heads of the law enforcement organization. It is the statistical evaluation of police work that poses the greatest problem. "It has long been suggested that efforts should be made to unbundle the assessment of police work from the statistical registration system. Assessment of police work still relies on the statistical indicators on the success of investigations appearing in ENYÜBS[7] today. The problem with this is that the work of individual units of the investigation authorities is assessed on the basis of data in a system generated by those units themselves... If police officers know their work is assessed on the basis of the data forms they complete, they might, wittingly or unwittingly, end up distorting the statistical figures." (Kó, 2016: 47.).

Politicians recognize they are able to gain votes by promising public security, explaining why a particular technique of argumentation has evolved which might be called the interpretation of criminal statistics for purposes of party politics. It is essentially about the powers in government interpreting the then current figures to suggest that public security has improved, while the opposition concludes, from the same set of figures, that public security has deteriorated. This does not pay off for either side in the long run. Once this becomes obvious, the desirable situation will emerge in which public security becomes the field of political consensus.

It is much easier to banish the statistical approach from professional assessments. Here, the only thing that needs to be realized is that rather than being an operation that produces security, the police is an authority watching over legal order, which is why its performance is determined by the triple requirement of lawfulness, proficiency and service, and the extent to which these requirements are met cannot be estimated by statistics. This is about quality, the quality of the rule of law, and not quantities. In constitutional democracies, the

[7] Single Criminal Statistics of the Investigation Authorities and the Prosecution Organization (ENYÜBS).

persecution of crimes has to strike a balance between lawfulness and effectiveness. The values of the rule of law cannot be protected by infringing rights.

However, there is another approach, focusing on the mass of risks which have never been encountered and which cannot be managed using traditional means.

The security policy approach

"At national, European and international level, security policy is exposed to changes that have dissolved the once strict distinction of internal and external security, state and private security, prevention and repression, and the institutions allotted to and separated from these. The distinctions to disappear first are between internal and external security, and police and military security, giving rise to an international concept of security that confirms humanitarian interventions as well. Humanitarian intervention is aimed at combating crime and securing law: it sees serious violations of human rights and crimes against humanity as factors threatening international security, and departs from the interpretation according to which the only threat to international security lies in military aggression between states" (Albrecht, 2006).

The analysis of global dangers for societies from a legal perspective is performed by Ferenc Irk (2012). The title of the introductory chapter of his monography *(The notion of globalization, cosmopolitism and risk subject to socio-economic changes, from the beginning of history to date)* implies that something has changed fundamentally in the world. Though in the course of the historical review, the author himself emphasizes that globalization and its aftermaths – risk, danger, the dissolution or surrendering of security – are natural products of human life from the advent of man to date, nevertheless, dangers started to escalate in the 20th century, resulting in redrafting the conditions of the existence of human communities, cultures, civilizations by the coming of the 21st century. The age of "world risk society" has come.

According to the author, "Globalization may be best approached along economic criteria, which is why [...] the phenomenon can be discussed and interpreted from this perspective in its purest form." The path from this idea to the interpretation of the "incredible capacity" of multinational companies "to exert pressure" on states (Irk, 2012: 24.) and the "realization of extra profits" by the finance sector in a way that perceives these formations of economy to be the causes of the crises that occur rather than the results of development is quite straight. Globalization should be discussed as "the setting of particular functional, political and value phenomena" rather than in geographic or physical terms.

At the end of this chain of deduction, Ferenc Irk quotes Ulrich Beck: *"Many believe that the changes taking place in the world are driven by the battle of civilizations.* Beck thinks this is wrong. The reality is that the boundaries of nation states are being dissolved, and this world is characterized by a competition between the different cultures for seizing and retaining power. The fact that this process is nothing but the suicide of cultures is a different kettle of fish, which is corroborated by the fact that so far, the only guarantee of retaining reign – and in our current world, of survival – is democracy" (Irk, 2012: 25–26.). Irk's next idea is of key importance: "Had prehistoric man not been sufficiently willing to assume risks and shown a sound resolve (as we understand this today), his descendants to-

day would not exist, and he would have shared the fate of species that have become extinct earlier" (Irk, 2012: 25-26.). However, this statement raises questions.

If globalization is a manifestation of the essence of humanity, and can, therefore, potentially be interpreted as the only possible alternative of the future – for humanity – the question arises when and why the turn that changed globalization – as the promise of preserving and developing the human quality – into a source of risk threatening with the destruction of human existence occurred in this organic development. If the capitalist way of production is not identified with the hunger of multinational companies and banks for profit but with the sanctity of property, the freedom of contracting and equality before the law (which are the pillars of bourgeois society), the following conclusions can be drawn. The adequate political regime for this production method (the bourgeois state) is the democratic rule of law (rule of law, principle of the division of powers, respect for human rights, parliamentarism based on political freedoms). In this case, another question arises: if capitalist production was doomed to failure, should we have to say goodbye to its political setup, democracy?

There is no doubt that the bourgeois rule of law came into existence in the framework of nation states. There is a view according to which the democratic system is inoperable below a certain magnitude and/or over a defined size of society (Dahl, 1996). Other approaches fail to confirm this completely. For instance, István Bibó talked about small circles of liberty when he referred to the fact that a few persons already can carry democratic values, even if under highly adverse conditions. On the other hand, although the institutions of the Union – which have actually grown beyond the limits of individual nation states – cannot be considered to be without fault by far (and in any case, it is only totalitarian regimes that set the demand of being without fault because the appearance of being in possession of the absolute truth needs to be maintained at all times in order to exercise unlimited power), nevertheless it is true that this community was created to conserve the values of democracy, and its performance has not been bad by far in this respect so far. The questions that arise in connection with the above are as follows (and this is where the last phrase of Beck's analysis quoted above is addressed): if a democratic structure of society requires the framework of a nation state, all changes leading to the dissolution of this structure threatens democracy itself. Can the assumption that globalization brings down the nation state framework be confirmed? Also, is the observation correct that the institutions of civil democracy, of the democratic rule of law can only be operated effectively in the framework of nation states?

The trends seen nowadays indicate the contrary: on the one hand, successful globalization is the path to the survival of the nation state; on the other hand, politics pursuing a nation state that opposes global processes is often coupled with strong restrictions on the operation of democratic institutions. That is, on the one hand, the efforts to protect the nation state framework out of concern for its existence do not guarantee the conservation of democratic values; and on the other hand, successful globalization in fact defends democracy. (Both Nazism and Communism relied on national chauvinism in creating the totalitarian regime, whereas the Allied Powers acting against Hitler's Third Reich were able to defend freedom with a solidarity pointing beyond their own respective national interests, by way of what one might call global action.)

Putting the community values that determine the nation before the values inherent in persons in itself is a democratic deficit. The fundament of civil parliamentarianism is the dignity of the individual person. There is no human dignity without liberty. If, however,

the economic setup leads to the impoverishment of a part of the people (asymmetry in consumption), liberty loses its attraction and a situation occurs when democracy offers a possibility for the majority to vote for dictatorship because they believe it is the sole guarantee of security. Irk finds: "All these freedoms are important, to be esteemed and appreciated, it is just that a significant part of people are not interested in them because they have no way of exercising them, which is why they are nothing but stupid demagogy if used as an argument" (Irk, 2012: 34.).

In fact, stupid demagogy is not the use of freedoms as an argument but the political manipulation wanting people to believe that freedoms are the cause of problems and security may be guaranteed only by withdrawing freedoms. It is true, however, that the greater social inequalities are, the more efficient this kind of propaganda is; so much so that the latest formations of state authoritarianism can be created even with society's support by relying on this propaganda. Therefore, a power striving to become the sole power is interested in increasing rather than reducing inequalities.

Have we set out on the right path by replacing Socialism with Capitalism? János Kornai warns that answering this question is an inevitable obligation. He convincingly confirms that dynamism and innovation are specific features of the Capitalist economy and are virtues to be recognized (Kornai, 2011: 29.). I note that once this is understood, we will not consider the problems of world economy, Europe and Hungary as the consequences of a conspiracy by international large capital, but will look at where the requirements of the market economy and the civil rule of law were harmed.

Is it possible to resolve the contradictions inherent in the Capitalist method of production in the framework of civil society, or can results be expected only from setting up new power mechanisms? Historical experience shows that so far, all attempts at bringing down the civil rule of law have failed miserably, and to the contrary: all attempts relying on the forces of democratic society yielded considerable results, although the fundamental contradiction has not been completely eradicated. (As Irk points out, China's example shows that it operates its Communist state subordinated to the rules of the market economy, which is ultimately a concession to liberty, compared to the earlier situation in which it considered the system of absolute authoritarianism to be applicable to economic life as well, which nearly led to the total destruction of the economy.)

The enumeration of danger sources brings us to crime and its extreme forms, most of all terrorism, by necessity. The author makes a definitive statement: "Many consider the novel phenomena in the crime of the second half of the 20th century, namely acts of terrorism and hostage-taking to be a new form of appearance of the advocacy of interests. This view appears to be mistaken because – at least as far as the essence of their contents is concerned – these acts of violence stem from much earlier times" (Irk, 2012: 36.).

This statement has consequences. If crime essentially shows no features different from what it was like centuries ago, this has at least two consequences: one is that the processes that have been taking place for nearly two and a half centuries and may be referred to as the humanization of the persecution of crime and criminal justice can be explained by a shift in the values of the penalising power, rather than by the taming of crime. Cruelty by power can be no response to cruelty; the unscrupulous nature of the criminal gives no licence to the unlimited exercising of power; fear from power cannot be the remedy to the fear from crime; the key to the efficiency of justice is finding out the truth and not the extent of fear

its procedures and sanctions can provoke. The principle of the rule of law (the rules of *nullum crimen sine lege* and *nulla poena sine lege*), the system of procedural guarantees (the requirement of fair trial), the independence of justice and the humane nature of the penitentiary system could be built on these ideas.

The other conclusion is that the emergence of new forms of crime indeed calls for new criminal law solutions, but this renewal cannot mean surrendering the cardinal ideas of humanity. The criminal law of the democratic rule of law is characterized by failure to adopt the logics and methodology of crime. No level of dangers of threats can be envisaged that would justify surrendering the values of the rule of law, because in that case, the authoritarian state itself would represent the greatest danger and threat. The criminal law of the rule of law has not become obsolete, yet it is no doubt extremely unfavourable for ambitions that will not tolerate restriction on powers and claim to possess knowledge which no other political alternative has access to.

The picture of a risk society is frightening. For the purposes of the topic, the doubt arises whether public security can be sustained at all as a category suitable for describing the existing processes of society. This doubt can be detected in some of the Government documents of the past years. Even though the theorists and practitioners of law enforcement have been calling for the drafting of a strategy on public security, the central administration was more willing to accept a general vision of threats. Its result was the Government decision 2073/2004 (IV. 15.) Korm. on the national security strategy of the Republic of Hungary, replaced by Government decision 1035/2012 (II. 21.) Korm. on the Hungary National Security Strategy. Government decision 1009/2009 (I. 30.) Korm. on the National Military Strategy of the Republic of Hungary is associated with this.

Complex security

The dangers that threaten complex security, yet which are of different qualities – international terrorism, the dissemination of weapons of mass destruction and their carriers, instability within states, the challenges of the crises rooted in civilization appearing in various regions, illegal and mass migration – are effects reinforcing each other, so that disaster management services need to be on the alert constantly to manage them. Centralized civic defence and the integrated nationwide direction of fire brigades allotted to local autonomous units are not typical in the Union's regions, but several European countries have shown examples for the most efficient use of these forces in a coordinated manner in the course of preparing for emergency situations can be implemented by combining standby duty services and via single systems of operation control.

The complex approach to security and the need to immediately intervene in unexpected situations have brought traditional law enforcement administration closer to disaster management. If, however, problems that are essentially of different qualities are linked to security, "there is a firm danger that these issues take a turn towards security, that is, we will adopt the terminology and way of thinking of traditional security institutions, thereby strengthening the approach of hostility rather than of cooperation" (Renner, 2005). This warning argues against opening up the scope of law enforcement administration too wide.

The new dangers require changed techniques for managing them, which may be built on the integration of law enforcement, military and civil counterstrike capacities.

It is reasonable to separate the fields of averting dangers that can be regulated by law from the fields that cannot be regulated by law, and those that should be managed by other types of standards (scientific and technological development requirements, technological requirements, professional criteria) and not legal norms (Irk, 2004a). Another possibility is to distinguish between danger sources based on the type of threat to and vulnerability of the value-adding process. Under this approach, the extent of risk can be expressed as a ratio of threat and vulnerability (Vasvári, 1997). The other approach called "reflexive modernization" monitors the process of how activities that initially carry a high risk grow increasingly safe as technology evolves. Finally, the third approach analyzes the social reception of dangers, where one progresses from community solidarity to the completely vulnerable individual forced to face threats he is unable to control (Bukovics–Kiss, 2004).

Modern times achieve their most significant successes by developing entire systems of technical defence mechanisms. This way, the factors that initially enhanced risks may contribute to creating the means of defence. Political advertising plays a great role in facing dangers. Governments present activities within their own sphere of responsibility as low-risk, while attributing high risks to certain external factors for which they cannot be held accountable (Peretti-Watel,1999). Security is a need of society as well as of the individual. The danger can only be a threat challenging the values of society. However, the source of the danger can be purely natural, which initiates causal processes leading to losses without human intervention. The natural environment free of human intervention may be rendered safer only by learning more about it and forecasting natural processes.

The other large group of natural dangers is generated in the interaction between nature and society, which is why these risks may be substantially reduced by conserving the natural environment, an environmentally conscious behaviour, and based on the principle that the condition of nature bears no further deterioration. All states, institutions and people are obliged to observe this. Conserving nature in its current condition is a human right, an important condition for a viable life. Constitutional Court decision 28/1994 (V. 20.) finds: "The right to the environment elevates the guarantees for performing the state's obligations concerning environmental protection to the level of fundamental rights, including the conditions for no restrictions on the level of protection achieved in conserving the environment" (Bándi, 2005). The dangers flowing from metabolic processes between nature and society require the activities of natural sciences and engineering forces, as well as the development of the statutory restriction and sanction institutions of environmental administration available under public law.

The introduction of the notion of security is a sensible abstraction for government strategy purposes, but is too broad a generalization for identifying the day-to-day actions of public administration. This is an effort that strives to list all risk factors but fails to clarify that these risks show fundamentally different qualities that include positive and negative, social and natural phenomena, and phenomena that can be influenced by public law and those that cannot be managed by law. The decisions on national security are vague about the fact that in constitutional democracies, law enforcement fulfills statutory administrative and criminal investigation functions, where the rule of law should be enforced in full. This approach also contributes to the *inflation of strategies*. This phenomenon is understood to

mean that while high-standard scientific discourses appear in the form of various documents of the Parliament and the Government – which are, however, less suitable for state governance purposes – (such as security and defence policy, drugs policy, crime prevention strategy, national security strategy), the specialist branches of administration receive a decreasing amount of help for elaborating the practical actions that correspond to their particular requirements.

A similarly homogenising approach considers the distinction between public and private law to be obsolete. Although the dividing line between the two fields is indeed mobile, this in itself calls for emphasising the differences, rather than minimising them. (The importance of this can be understood when comparing the means of defence available to public security and private security.) Public security is no obsolete notion. It clearly distinguishes between venues of private and public life. It maintains the differences between the regulatory solutions of public and private law, assumes responsibility for individuals while not removing the possibility for individual self-defence, takes into account the dangers threatening public security, and identifies the unlawful behaviours against which public power may use repressive means. Developed economy, environmental protection, social security, health care, culture and education cannot be developed by way of law enforcement. Public security starts to make sense because its protection by statutory means helps the smooth running of the systems capable of generating these values.

Public security fits into the measurable domain of social phenomena. The objective state of the security of persons and property is reflected by criminal statistics, particularly when the evaluation of data takes into account the legal solutions that influence the development of statistics.

"The number of registered criminal offences showed a great drop of 20% compared to the figures of 2012 already in respect of the year 2013, and was the lowest in the past two decades. This could be explained primarily by changes in legislation, which influenced statistical enumeration and through that, the number of criminal offences that were registered. The impact of legal factors on statistics can be perceived mostly in the significant decline in the number of abuses of official documents. The reason underlying this is the amendment to Section 277(1) of the old Criminal Code effective as of 1 February 2013 (adopted also by the new Criminal Code) the essence of which is that under the earlier system, the number of instances a crime was committed was based on the number of documents stolen in the course of the offence (real formal aggregation), but from that point on, one act is to be evaluated as one instance of the offence (composite crime, delictum compositum). This change is clearly reflected by statistical figures: in 2013, the number of abuses of official documents in itself dropped by 69,000 year on year. It should be noted that the impact of the change in legislation is magnified and made more conspicuous by the fact that the figure for this type of crime in 2012 was oustandingly high, so much so that nearly every fifth criminal offence registered (18 out of 100) was about this offence. In addition to the changes to the Criminal Code, the dramatic decline in the number of criminal offences registered could be attributed to the role played by the changes made to Act II of 2012 on misdemeanours concerning value limits. The number of crimes registered in 2014 was 329,575. This shows a decline of 15% compared to last year's figure, or, in absolute terms, of cca. 48,000."(Prosecutor General's Office, 2015: 5.).

The opinion on public security reports on subjective security. The latter may be measured by regular public opinion polls. Public security is a cooperative product in which the statutory services of the state are added up with the individual and collective performance of self-defence. A well-formulated public security strategy is an efficient tool for wise governance. As public security is extremely suitable for becoming a common cause shared by the most diverse political forces, the public security strategy may be one of the first products of responsible politics in which the consensus between parliamentary forces appears as an absolutely necessary condition for law enforcement modernization in the long run, encompassing several parliamentary terms.

On legal certainty

The Ministry of Justice produced a working paper entitled *The strategy for legal certainty (2007–2013)* in January 2006. One of its foundations is the Constitutional Court's understanding of legal certainty. (Pursuant to the Constitutional Court's decisions, the elements of legal certainty are in particular: the prohibition of retroactive legislation, the freedom of legislation from conflicts, the prohibition of legislation adopted for individual cases, and respect for acquired rights.)

The Constitutional Court has found already in its decision 9/1992 (I. 30.) AB that legal certainty requires not only individual norms to be unambiguous but also the predictability of the operation of legal concepts. (ABH 1992: 59, 65.). "Legal certainty requires the legislator to avoid the use of terms that are too broad or too undefined, while the wording of the law should be understandable and clear, and carry contents that make the standard possible to interpret adequately." [Constitutional Court decision 13/2001 (V. 14.) AB, ABH, 2001: 177., 201.].

In its decision 26/1992 (IV. 30.) AB, the Constitutional Court made it a theoretical point that "clear, understandable contents for legal standards that are possible to interpret adequately are a constitutional requirement for the wording of legal norms. Legal certainty – an important element of the rule of law declared in Article 2(1) of the Constitution – requires the wording of the legislation to carry sensible and clear contents that can be recognized in the course of judiciary action" (ABH, 1992: 135., 142.). "If the legal facts in a piece of legislation are too abstract and/or too generic, the provision of law can be extended or narrowed at the judiciary's discretion. Such rules offer a possibility for making subjective judiciary decisions, diverging judiciary practices and the absence of a unity of law. This prejudices legal certainty." (ABH, 1993: 607–608.). According to Constitutional Court decision 42/1997 (VII. 1.) AB, "a rule that creates legal uncertainty due to it being impossible to interpret because its effect cannot be predicted and cannot be foreseen by those to whom it is addressed may be declared to be unconstitutional" (ABH, 1997: 299., 301.).

"In earlier decisions, the Constitutional Court recognized the interest in crime prevention as a constitutional goal the securing of which does not preclude the restriction of even certain fundamental rights. However, in all instances, it emphasized that the rule of law and the system of requirements of legal certainty cannot be surrendered even in order to implement this constitutional goal, and state bodies cannot be given too broad authorizations with uncertain contents in the interest of crime prevention taken in the general and

abstract sense" [Constitutional Court decisions 20/1997 (III. 19.) AB, ABH, 1997: 85., 92: 24/1998 (VI. 9.) AB, ABH, 1998: 191., 195; 13/2001 (V. 14.) AB, ABH, 2001: 177., 199–200.; 47/2003 (X. 27.) AB, ABH, 2003: 525., 533.].

"Legal certainty expresses the situation in which individual rights are protected from others and from state authoritarianism" (Ministry of Justice, 2006: 5.).

The main fields of the strategy on legal certainty are:

- legal regulation,
- guaranteeing the enforcement of the law, the judiciary (public administration and justice).

Though it may be considered to be a commendable initiative, the legal certainty strategy of 2006 failed to live up to the hopes it attracted, as it did not improve the quality of Hungarian legislation and made no contribution to strengthening legal certainty. Yet it was correct in defining itself as a functional strategy, and its advantage was that it relied on a thorough analysis of the situation, and dared to look its own faults made in the course of legislation in the eye. Still, it failed, and the reasons for this can be summarized in three points:

1. Lack of the culture of strategic planning

It is a general statement that the methodology and practice of strategic planning has not evolved in any of the government terms from 1990 to date. Thanks to management studies and the most diverse theories of organization, there is an abundance of recommendations, but as they were formulated with focus on the features of the business sector, even the most original ideas can be adapted to the fields of legislation, justice and public administration only with great restrictions.

The legal certainty strategy is functional in the sense that fair and predictable legal regulations are needed in all sectors of state governance (business life, finances, health care, education, social security, law enforcement, etc.). Yet, however carefully a functional strategy has been prepared, it remains ineffective if sectoral strategies are missing. And these have not been born to date.

The lack of a planning culture can be explained by rejecting the operation of power in a self-restricting manner and not the lack of preparation on the part of government actors. Public and responsible planning of government work is in itself self-restriction. The basis of the strategy is a thorough assessment of the current situation, which cannot take place without assessing one's own activities with self-criticism. The absolutization of power cannot afford such a "weakness". People can be held accountable for plans from time to time, and often need adjustment. However, power without limits rejects accountability, whoever possesses the absolute truth cannot get into a situation where he needs to modify his plans.

2. Unclarified nature of the political and public power contents of governance

Legal theory, administrative law studies and politology – which is supposed to research government work as well – have barely done anything to produce clear answers on at least three questions:

- What relationships between party politics and governance are desirable in order not to create a conflict between the will of political forces on government and the principles of operation of a constitutional rule of law?

- What are the conditions that create harmony between political direction and the sectoral requirements of specialist public administration?
- How is it possible to avoid the "abuse of legislative powers", which leads to excessive production of laws, personalized legislation, the fast obsoletion of the law drafted, and the degradation of law into a tactical means (of propaganda)?

There are no clear answers to these questions, but the fact that the questions themselves are justified is proven by several scientific works (Samu, 2003). Perhaps it is a new emerging social study, the study of governance that may bring us closer to solving the problems. Tamás Sárközi writes about the transformation of the contents of governance, in the course of which "[…] state functions change, a requirement that the rule of law should also be efficient appears, which has been unknown beforehand. Today, the practice of public power is inseparably intertwined with the provision of public services, and *par excellence* political governance was supplemented to include the functions of managing public administration and the management of public institutions" (Sárközi, 2012: 13.).

What happens, however, if a successful political force takes the position that the rule of law (at least its liberal version) is not suitable for efficient operation and should therefore be replaced? Sárközi responds to this possibility in a new monography: "The rule of law is not simply a legal technique but a democratic political value. The basic criteria of the rule of law (such as legal certainty) have evolved in Europe over the past two hundred years, regardless of the fact that certain elements allow several interpretations, and that the rule of law itself is not unchanged"(Sárközi, 2014: 19.). He goes on to continue with the idea that "pursuing the rule of law to the extremes" may be a limit to efficiency, but "the limits of the rule of law must not be exceeded in the interest of efficiency and the enforcement of power" (Sárközi, 2014: 20.). As far as that is concerned, there is not even the faintest danger of the latter.

Constitutional law aspects are also worth noting. László Sólyom thinks that there has been a process of "constitutionalization of politics" in Europe. "It was in this period that constitutional courts spread throughout Europe and the legislative activities of constitutional courts have unfolded. The ghost of »court governance« that was outlined earlier turned into the reality of court legislation for the period in which the Hungarian Constitutional Court was set up. This brought about the transformation of the entire political system" (Sólyom, 2004: 10.). These ideas reflect that the settlement of the relationship between politics and law is guaranteed through the judiciary practice of constitutional courts – at least in the western part of Europe – as constitutional court decisions are capable of curbing political will in all cases where this will takes shape in the form of legislation. However, the author also pointed out that, while it carried out an outstanding "constitutional development" mission, the Hungarian Constitutional Court made very little contribution to developing a coexistence of law and politics that complies with the requirements of the rule of law.

"The Constitutional Court failed to take into account the mediating powers that are very real parts of the political system with sufficient weight. The Constitutional Court interpreted even the inevitable mediating powers, the political parties, locked into legislation. It found that what makes a party a party is the effort to get into Parliament, it recognized a separate legal status for parliamentary parties, etc. However, it failed to adopt judgments on a really theoretical basis that would have explained what the phrase set out in

the Constitution means according to which parties cannot exercise public power, although they are obviously masters of public power in Parliament and when they get into government. That is, the interpretation of »direct« exercising of power is missing, which would be the filter to transform party power into state power" (Sólyom, 2004: 17.). We note that the problem exposed here still survives, although the Fundamental Law added a clarification by stating "political parties may not exercise public power directly" [Article VIII(3) of the Fundamental Law].

Sólyom's paper is revealing because it warns about the delay characterizing the change of the political regime. We had ideals of the rule of law and the division of branches of power standing before of us that have in the meantime become tarnished even in the leading civil states that were providing the examples:

"The multitude of state goals indicates the capitulation of legislation before the tasks of the modern state, the organizational and risk evasion needs of which they have to satisfy. These needs may be resolved with specific administrative measures, more and more by involving non-government partners and less and less legal means. This way, however, processes become lost to the democratic control over legislation. In the absence of legal grounds and forms, court control cannot be exercised. Increasing portions of the political regime become impossible to interpret for the purposes of constitutions, which were not familiar with any other system than the system of clearly distinguished social and state sectors" (Sólyom, 2004: 20.).

We think the situation is even worse in Hungary because legislation was unable to defend itself against efforts that

- put social problems that cannot be managed by legal means into a legal form (see for instance the failure of the legislative package against prostitution);
- forced ideological concepts into law, which were then put back on the agenda government after government, contradicting each other (the legal policy of strictness vs. the primacy of crime prevention, etc.);
- wished to narrow the autonomy of justice by legislation (the median value when imposing penalties, the formulation of the mandatory case for preliminary arrest, crime prevention control in the Police Act, category of priority cases, etc.);
- intended to remedy organizational and operational disturbances such as shortfalls of cooperation or the loosening of office discipline by law (law on the Coordination Centre to Counter Organized Crime, reliability check, etc.);
- turn Parliament into an "office" of the executive power by adopting "omnibus legislation", a task of which should be the control of government work (Constitutional Court decision 76/B/2005. AB).[8]

[8] The Constitutional Court's decision referred to finds the following about having fixed the budget act (Budget Act) to purpose:*"The Budget Act presents the revenue and expenditure of the state, and mainly what the state intends to spend revenues on. The Budget Act addresses state agencies that the law authorizes to spend the appropriations provided to them in the budget in order to perform legal obligations or other goals permitted by law, by taking into account other (non-budgetary) legislation. This fixing to goal means that appropriations are linked to the Budget Act. Considering its purpose, nature and character, the Budget Act differs from other legislation. Legal literature often describes this difference with the notion of law taken in the material and formal sense, showing that the Budget Act is an act only in respect of the way it is adopted, while it is rather a series of individual financial decisions by its contents. This particular, special nature of the Budget*

In contrary to the above, legislative tasks for subjects that were under the rule of law were not taken into account in strategic planning. (It is difficult to carry out a police reform without reviewing the necessary legislative tasks, and the modernization of public administration is doomed to fail if the need to legislate fails to appear or is minimized.) Instead of improvisation, planning legislation might be a solution, which would enable responsible governance to carry out the preliminary impact analyses, and to wisely consider the achievements of the scientific disciplines involved and the professional experience of the sectors to be regulated. This obligation does not limit the responsibility of politics to formulate long-term goals, but then again, there would be no danger that the executive power would get immersed in technical details. Péter Szigeti warns of another kind of danger when he writes: " – under the auspices of a kind of technical proficiency – it is exactly the quality of political theories aimed at the overall process, the whole, the actions of government that go to waste" (Szigeti, 2003: 137.). The judiciary should be obliged to professionally oppose political ideas that take to flight. (An intimidated public service is hardly able to fulfill such a controlling role against aggressive political forces, although wise governance expects this support from the administrative staff.)

3. Unclarified relationship between law and the state

While we miss the scientific and professional foundations of legislation, it should also be mentioned that the enforcement of "professor's" criteria in departure from practice is at least as great a fault as that shortfall, of which there have been several examples in the course of reforming the criminal procedure. Forcing a normative reform without organizational and operational reforms is a phenomenon that is related to this. The creation of substantial and procedural law codes comprising the objectives of modernization may be considered to be the normative reform, whereas organizational and operational reform means the harmonization of the structure and operation of government agencies with codified law, the duty of which is to enforce effective law. The new spirit of legislation is doomed to fail without organizational reforms, a consequence of which is the "counter-revolution of the rule of law". The situation in which the judiciary proves it is capable of preventing the enforcement of certain new legislation might be called the counter-revolution of the rule of law. (According to a view often voiced in connection with the code on criminal procedure, "whatever the new code says, we will just do as we have been doing so far".) There is hardly any more serious symptom to indicate a waver of legal certainty. Its consequence will be – as seen in the case of the code on criminal procedure – that codified law will slowly give up on its modernization ideas and adapt to the expectations of the conservative organization. This mutation will then lead to the extremely fast depreciation of the law. (All signs indicate that Act XIX of 1998 on the code for criminal procedure effective from 2003 is not expected to remain in force for fifteen years.)

On the other hand, examples cited from the range of instruments for regulating public law organizations are examples where implementation is impeded by disturbances of the "genre" rather than the lack of strategic thinking. For instance, the Parliament resolution containing the national strategy for crime prevention mentioned earlier was an excellent

Act excludes the possibility of the Budget Act to amend other legislation, but it is also excluded for other legislation (not on budgetary subjects) to amend the Budget Act."

scientific dissertation, whereas the resolution – given its genre – should have specified tasks for the Parliament. If crime prevention addresses the entire society, the appropriate form should be a law and not a resolution. A similar objection can be raised against setting out the drug strategy into a Parliament resolution. The latter is also an example for a case where the Parliament follows a legislative practice that is absolutely contrary to the spirit of its own resolution.

There are a number of draft strategies for modernising law enforcement, but none of them provided answers to the questions raised above, until all of them went into oblivion. In this context, the question may arise as to what legal forms the sectoral and functional strategies formulated in just working papers might take in order to ensure their implementation. For example, the strategic ideas on legal certainty could have been formulated in the new law on legislation if they could take a normative form. (See Act CXXX of 2010 on legislation.)

It would be reasonable to build the future of law enforcement on a public security strategy, but we are not aware of such work. In line with the practice of other countries, there is an urgent need for drafting a law on public security, because most of the improvisations that pose a severe threat to legal certainty have taken place in this field. Such a piece of legislation could formulate the investment needs of public security, which might put an end to shortage economy. (It might also put an end to wastefulness as well, because a public security strategy elevated to the level of an act could eliminate several parallelities and the proliferation of organizations.) At this moment, the only thing that can be known is that the strategic planning efforts of earlier years were not followed by government action, and at this moment, it seems that it is the time of action without planning. At least, this is what can be deduced from the fierce legislation activities that we have been witnessing but were not part of since 2010.

It could be a nice example of responsible governance if the public security strategy – in addition to taking the form of an act – could rely on

- the true and fair presentation of the current situation,
- a vision of the more distant future based on consensus,
- the comprehending acceptance of professional criteria,
- responsibility for the entire society,
- the minimization of narrow criteria of party politics as regards its contents.

The act on the procedure for legislation and the act on public security could be a fundamental factor of wise governance in the future in general legal policy and criminal policy, which is a prerequisite for a durable law enforcement strategy that promises safety, and could open up new horizons for those who find a lifetime career in public service in law enforcement.

Law Enforcement and Changing Substantive Law

The law enforcement governed by the law stems from the processes of law humanization in the 19th century (Finszter, 2011). Changes occurred in social movements that urged for a theoretical basis of law enforcement administration and persecution of crime (criminalistics). In this process especially three factors deserve attention.

1. The first turn occurred in the *hierarchy of values,* when the dignity of individuals reached the highest position in it. In his famous book Cesare Beccaria, the founder of modern criminal theory warned, that a suspect not deprived from their human nature, can no longer be an object, only a subject of a procedure and are entitled to the right of defence (Beccaria, 1967). A criminal procedure is not a tool of vengeance, but a road to the disclosure of truth, the sanction restores the infringed judicial system, for which the inhuman nature of crime cannot be an example. "The defendant cannot be charged with more than necessary; so freedom may be lost, but not humanity" (Vuchetich, 2007: 92.).

Has protection of society weakened when the state waived raw cruelty? On the contrary. "humanity" has brought a more liveable and secure world. The characterization of the public security of the current days is full of superfluous commonplaces, which have nothing to do with reality even if many believe in them. Those who constantly talk about the increasing risks of crimes forget that, just to take an example, security in the largest cities of Europe is clearly much better these days than it was centuries ago when executions were public events and torture during interrogation was obligatory. What has society won with the humanization of the criminal law? It has won a criminal justice system, which may enforce its power on those who deserve deprivation of honesty, and in doing this it can rely on its high moral authority. It is a common achievement of civilian merits and the criminal sciences that during the period of the European democratic transformation it was possible to build such a justice system in just over two hundred years even if the progress involved diversions and painful mistakes. This moral rise forced the modernization of law enforcement and the extension of the rule of law even on statutory compulsion.

2. The second turn took place *in the world of law.* A new study of norms, dogmatism, appeared, which successfully translated the idea of "humanity" into the language of law without giving up the objectives to protect society in the meantime. The merger of justice and usefulness was the main driving force of codification in the 19th century, which functioned as the "main principle of the educated world, approved by science and legislation" (Csemegi Code, 1880: 29.). This *credo* expressed in the Hungarian Parliament more than a hundred years ago also turned out to be the source of the constitutional criminal law. By developing the concepts of unlawfulness, actual facts and guilt, the criminal substantive law provided a tool to legislators to define just criminal prohibitions serving legal certainty.

There are classic merits of legislation, one of the most impressive Hungarian examples of which was the Csemegi Code. Law must be created when a social need can only be satisfied in that manner and when the selected legal tool seems suitable for its purpose. Punishment is an *ultima ratio*, and therefore it can only be used where more lenient tools of accountability cannot be applied. Law should be created by using the rules and patterns identified by the legal science. Legislation is an art and a craft, the possession of the techniques of writing law, in the form of an understandable, clear, enforceable text that describes the consequences of any infringement. The procedural rules satisfy similar requirements and are completed with a few specificities identified by the criminal procedural law. "Recognition has limits in a criminal procedure, which follow partly from the criminal law and the procedural law but are partly independent from them" (Király, 1972: 107.).

The main impediments of recognition in a criminal procedure are as follows:

- in most cases the single, individual and trivial criminal act cannot be reconstructed from the criminal justices *(epistemological impediment);*

- the hiding nature of crime (averting responsibility is a *moral impediment,* which is an insuperable impediment especially when the overwhelming majority of society do not accept the moral approach constituting the basis of the illegal prohibition either;
- different nature of the law and epistemological truth – this means that the legal tools are not always suitable for recognising the substantive truth *(impediments stemming from legal tools).*

This latter problem is rather complex. It raises the issue of the justice of the norm and also the issue of the match between the statements about the facts of the past with reality. It is also a problem in the application of the criminal law that the statements about the past (facts) and the legal assessment (qualifications) both appear together. Tibor Király has the following warning in relation to wrong judgments: "Legal truth can contain both truth and falsity. It is a dangerous position that any mistake or falsity covered by the state or another authority is portrayed as truth, or even legal truth" (Király, 1972: 221.). The difficulties in recognition may drive criminal power into mistakes. The procedural guarantees are there to mitigate that risk.

"According to the position of the Constitutional Court, a constitutional state can only respond to any infringement of the law in a constitutional manner […] *In the interpretation of the Constitutional Court, legal certainty imposes an obligation on the state and, primarily, the legislator, to make the law and its individual fields and rules clear, unambiguous, predictable in effect and also foreseeable in the criminal law for the addressees of the norm. The prohibition of retroactive effect can also be derived directly in the criminal law from the principle of predictability and projectability, and it especially applies to the prohibition of ex post facto legal settlement and the application of analogy* […] *The procedural guarantees stem from the principles of the constitutional state and legal certainty. These are of fundamental importance in terms of the predictability of the operation of the individual institutions of law. An effective legal act can only be the result of following the rules of a formalized procedure and legal services function constitutionally only when the procedural norms are complied with* […] *Any default of the authorities designated to exercising the criminal powers or the failure of catching criminals as a risk may be charged to the state"* [11/1992. (III. 5.) CC Resolution].

3. The third turn was *the unprecedented development* of natural sciences in the 19th century, which also created the criminal sciences. Criminalistics is the criminal science that tries to provide technical and tactical tools to an investigation with which the failures of the persecution of crime may be reduced to minimum without turning a legal service into a miscarriage of justice.

When it seemed that the law built an impossible course of barriers to justice, it turned out that such mistakes were ideal to avert judicial mistakes but they did not limit the power of the state at all in using all options offered by the natural sciences in the enforcement of criminalistic needs. It is a nice example of the harmony of history that when the punitive power applied some self-restriction and gave up its tools that deemed human beings as objects, it received unexpected assistance from the workshops where our scientific knowledge about nature and human beings expanded to such an extent in quality and quantity that was unprecedented before.

Criminalistic recognition is the reconstruction of an event of the past that involves the suspicion of a crime in order to enable the justice system to decide whether the state needs to apply any punishment. There are three levels of that recognition: everyday, professional and scientific information.

In *everyday life* the evidence procedure takes place spontaneously, in an amorphous and autonomous manner because there are no pre-planned recipes, its form is not defined and there are no obligations applicable to individuals either. We also are free in what we accept on trust basis and what we have doubts about even despite obvious evidence or facts. Although the truth contained in information can be verified in practice, but not all accurate recognitions can be justified immediately, occasionally a very long period is required for it. Sometimes successful practice is based on false information and at other times the right action is the result of the lack of information and not our knowledge. However, in everyday life recognition as communication with the environment cannot be stopped; we must act even if we know very little or nothing at all about our object. (Defence against legal infringements follows a similar natural command and therefore, as the study of the historic forms of criminal procedures proves it, some justice already functioned when there were very few options to establish historic facts.)

The following level can be deemed *professional recognition,* i.e., recognition that is in line with the rules of a profession and follows a technological order. Exercising an art and craft also assumes a special responsibility. Its evolution stems from the needs of society. It is not any generally disseminated knowledge but is the privilege of a certain part of the community, i.e., those who opt for that way of studying and thereby distinguish themselves from the majority, yet also undertake to serve the community. (The investigator's knowledge as a profession began to develop late, in the 17th century, when the first law enforcement offices were established, but became a profession that could be studied only at the end of the 19th century, when criminalistics was also born.)

Scientific recognition cannot be a spontaneous activity but must be a deliberate and planned act at least in the selection of the object and the methods that match it. The detected information is justified with a carefully developed methodology. The methodology of the theory focuses not only on the external features of the researched object, but also relies a great deal of any recognized patterns, and important and durable characteristics.

The first forms of scientific police *(la police scientifique),* the police laboratories appeared at the beginning of the 20th century. They became successful because they constantly followed scientific development and tried to match it with the needs of the fight against the changing crimes. New disciplines were created, such as voice and scent identification or the assessment of narcotic drugs. Personal identification based on DNA (genetic) samples was another revolutionary development. In recent times, computer technology provided challenges for the criminal technology: the computer systems brought progress especially in criminal records and search for data. Nonetheless, the investigation of criminal cases involving computer technology also led to the birth of a new expert field, known as IT expertise.

"During the turn of the millennium, Hungary also made progress in the application of modern scientific, IT and information transmission methods (DNA database, automatic fingerprint records) […] *Some new criminal science institutes, active in a number of developed countries of the world for a number of decades (including e.g., the German Bundes Kriminalamt, the British Forensic Science Service, the US FBI Laboratory etc.) maintain*

regular contact with research and development institutions, professionally informing them of their specific requirements for basic research, performing the adaptation research required for the utilization of new results of various natural sciences and technical fields in investigation as well as the expert examinations requested by investigation agencies" (Katona, 2004: 525.).

Naturally, the question is whether the natural science tools will make procedural guarantees superfluous. On the contrary: these exact methods made the threat of mistakes obvious and that criminal justice is not omnipotent either or that it could verify the accuracy of obtained information with legal tools. Our current knowledge makes only one option feasible for enforcing the criminal needs of the state: the fair procedure. "Consequently, the right to fair procedure is absolute inasmuch as there is no situation in which anyone could be deprived of that right" (Bárd, 2007: 61.).

As seen, three social, legal and scientific events played a dominant role in rendering law enforcement administration within the powers of the law:

- the appreciation of human rights, with the non-restrictability of human dignity at the forefront;
- emergence of the criminal substantive and procedural law based on the foundation of criminal sciences;
- development of natural sciences exceeding any previous level.

The history of emergence should be looked through the interconnection between criminalistics and the specific punitive forms. This relationship suggests a large number of conflicts for any superficial observer. Documentation of the individual elements of statutory facts entails significant evidentiary issues. Certifying criminality and especially the projective, instigation as an emotional preparation of an attack against people, infringement, causing any harm, the cause and effect relationship between a conduct and the outcome, are all difficult challenges in investigation. We must not forget either that the criminal code defines the object of evidence with such care that makes the persecution of crime plannable and facilitates the application of a wide range of detection tools and methods.

Predictable substantive law granting legal certainty is a guideline for the criminal investigation apparatuses. The more it applies to a criminal act that it is permanent in space and in time, and it challenges universal basic values, the more ancient is the prohibition command, the stability of which may not be questioned even by the accelerated social changes. If legislation in fact deems criminal liability a guard stone with the necessary wisdom, even the latest criminalization needs can loosen up the solid foundation of the criminal law.

A democratic constitutional state must possess all law enforcement and criminal tools with which the constitutional fundamental values, such as freedom, order and security, can be protected against legal infringements. Determining the borderline between freedom and criminal liability is an especially difficult issue. Often these borders could not be defined by maintaining the intactness of legal certainty and justice by legislation, or law enforcement administration or the persecution of crime or justice. If we examine the degree of responsibility of the various functions of the state listed above for this gap, then the deficiencies of legislation should not be mentioned first. Regardless of how intensively the criminal law is formed, in itself it cannot produce any solution. The abstract prohibitions of the written law can only be enforced in the specificities of the judicial practice. Persecution of crime

is a preparation for justice, which may not lack the guidance of judgments. Investigations often run into uncertainties due to the frequent modifications of the criminal code, yet a consistent and high professional quality of justice could make it confident and more effective.

A detective expert is well aware that the purpose of the criminal norm is not to make evidence easier, but to prohibit the gravest conducts that impose a threat on the community. Such experts are not afraid of any legal facts that comply with the strict requirements of legal dogmatism because they recognize that their own fight against crime can be turned into a meaningful mission only through justice and legal certainty. However, such experts are very much afraid of the sudden modifications made by the government, the individual MP motions prepared in secret workshops either based on the mistake that public order could be restored with legislation or build on the concept that low legal culture encourages the public to support those who advertise rigorosity, and that is why criminal legislation should serve political propaganda.

For criminalistics, the substantive law is an indispensable and single authentic source to define the object of evidence. However, the procedural law defines the of evidence. There is a widely accepted concept according to which the procedural laws impede persecution of crime in numerous ways to protect the criminals and therefore fair and honest legislations must end that situation. The modifications of the Act on the Criminal Procedure aimed at accelerating judgments and increasing its efficiency reflect that ideology. Restriction of the right to defence, the extension of the application of coercive measures restricting freedom, the re-interpretation of the functions of the investigation judge (serving the interests of the persecution of crime rather than protecting the fundamental rights), the establishment of special procedural rules for outstanding cases and the right of the prosecutor general to appoint a court were all adopted in that spirit.

It could also be interesting to learn about the opinion of the criminalists. Do criminal experts also look at the procedural law as a circumstance impeding their work? Can persecution of crime be made more effective by loosening the guarantees? The review of the organizational laws granting an authorization for the persecution of crimes and of the procedural code can convince all citizens worrying for public security that the criminal authorities do not lack tools and instruments in the fight against crime. The power-type nature of the legal relationships in criminal proceedings means that an arsenal of coercive measures is available for the investigators. Especially the coercive measures that restrict freedom represent a restriction of rights of which it can only be stated with slight cynicism that they are not brought forward punishments and may be executed without infringing human dignity. (The arrests shown by the media, the rules of applying handcuffs established in Hungary and the use of leashes only increase our doubts.) If we also consider the options of secret information collection and secret collection of data, we can truly see that there is almost no human right which could not be restricted in order to enable the state to enforce its criminal demand against the perpetrators. In addition, the latter tools are applied in secret and therefore the exercise of the right to defence cannot even occur in that phase but the right to legal remedy can be exercised by those whose rights were infringed to any extent by the procedures indicated above only subsequently and only to a very restricted degree.

It is a feature of investigation and it applies especially to the phase prior to the order of the investigation that the relevant past is not recognised through evidence, where we intend to convince other subjects of the procedure of the accuracy of the obtained informa-

tion but by detection, when the authority persecuting the crime intends to increase its own knowledge. It is another feature of investigation that, contrary to the reconstructing nature of investigation, the available detection methods are suitable for observing the events of the present. Seemingly, it facilitates direct recognition of reality but this directness and the incomplete nature of the observed conduct may distort the legal assessment of the recognized reality. Other tools are also available in the persecution of crimes with which it is possible to intervene into processes deemed to be criminal processes without the knowledge of the perpetrators and without any clear legal guidance as to where the limits of that intervention (the trap) are or the type of criminal assessment that can be given to the actual conduct that was triggered by the secret action of the authority.

The arsenal presented above is an effective tool in defending society but it may also become the source of an erroneous practice in the persecution of crimes. Its application may also infringe fundamental human rights, which does not comply with the requirement of proportionate and necessary restriction of rights and may cause legal disadvantage that risks the moral basis of justice and could also become a tool of political arbitrariness. We know of no dictatorship that would not have downgraded criminal law into a servant of its own power objectives.

Károly Bárd, quoted above, also points out in his book that the fair procedure does not only determine the framework of the detection of truth with which erroneous judicial judgments can be avoided. "Substantive values are not legitimized by the fact that respect for them enhances the possibility of the establishment of accurate facts or that with them it may be avoided that innocent people are punished by criminal law" (Bárd, 2007: 56.). A fair procedure also contains absolute prohibitions which in a narrow sense are called as recognized procedural guarantees and are available for everyone. They are independent from their role in learning about the truth because their single mission is to warrant the intactness of the set of values of democratic societies that serve humanity. Criminalistics provides professional skills that confirms the belief in a fair procedure. It does not consider procedural guarantees as barriers but as support which prevent members of the criminal authorities from destroying values while they look for the truth, thus risking the moral basis of the punitive needs of democratic societies and their own professional credibility.

Intelligence is the main tool in the persecution of crime. Collection of data is not unlimited because the timing, the tools and the persons involved in detection and investigation are defined according to strict statutory conditions. The criminal approach is not aimed at interrupting or preventing criminal acts taking place at present and projected in the future but is aimed at detecting unlawful acts of the past, at reconstructing historic facts and at collecting evidence. All that can have only one legitimate goal: to prepare for justice. An investigation cannot be considered a fight because it is not aimed at beating the perpetrator but at enforcing the criminal law demand of the state. This fight can only be successful when it ends in victory and all means are permitted to achieve victory. The judicial service of a constitutional state cannot use any tool and no unconditional effectiveness can be demanded from it. However, history still teaches us that such fallible justice is much more suitable for creating security for free people than any arbitrariness under the disguise of security provider.

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