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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

INTERNAL SECURITY SERVICES IN EUROPE

Report
adopted by the Venice Commission
at its 34th Plenary meeting
(Venice, 7 March 1998)
on the basis of the opinions of

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Internal security services in Europe

Introduction

The Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe has decided to consult the Venice Commission on the question of constitutional relations between internal security services and other organs of the State.

The work of the Assembly Committee was initiated by two motions concerning internal security services: one by Mr Stoffelen and others (Doc. 7104), and the other by Mr Solonari (Doc. 7424). The Committee circulated a questionnaire among member States, and on the basis of the replies to the questionnaire and other materials, a Working Paper [AS/Jur (1996) 23] was prepared by Ms Monica Macovei. The replies to the questionnaire - from 30 States -and Ms Macovei's paper as well as Barbara Forbes's paper *Under surveillance; Critical citizenship and the internal security services in Western Europe*, prepared for the Quaker Council for European Affairs in 1994, were placed at the disposal of the Rapporteurs of the Venice Commission.

In her working paper, Ms Macovei makes a comparative evaluation of the legal framework governing internal security services in Europe and of their effect on individual rights. She also identifies significant differences between the systems in different member States which may give rise to recommendations for the consolidation of institutional elements consonant with the integration of the new European democracies.

The Office of the Clerk of the Assembly has subsequently, via the Secretariat of the Venice Commission, completed the Committee's request by specifying that the study should be based on constitutions and on general principles which are common to them and that the identification of common European standards might be the main objective of the opinion. The opinion being sought from the Venice Commission should therefore concentrate on questions of a constitutional nature concerning internal security services.

These matters should be addressed not only from the viewpoint of the State that has an interest and a right to protect its territorial integrity and internal security and stability but also from the viewpoint of the individual, who has an interest and a right to continue to enjoy his fundamental rights and freedoms that should only be limited in the interests of the common good of the society of which he forms part and for a valid and just reason. The Constitutional order should therefore find the appropriate legal framework within which the overriding interest of the internal and external security of the State can be reconciled with the fundamental rights of the individual. The studies already carried out to which reference has been made have adequately illustrated how national legislation and regulations in Europe differ greatly on the institutional aspects of the problem.

To address the issue of harmonising the organisational structure of internal security services existing in various European countries would be a mammoth task with obvious political overtones involving delicate issues of national independence and identity. It would go beyond the scope of the present report. As the request must be understood in the context of the definition of a common constitutional heritage of the whole European continent, the scope of the study will be to identify common European standards applicable to the internal security services in order to ensure the conformity of their activity to the three fundamental principles of the Council of Europe: democracy, human rights and the rule of law.

More precisely, in a first part, the opinion of the Venice Commission will focus on the general framework of the internal security services in a State governed by the rule of law, such as the legal (constitutional) basis of the existence of internal security services, budgetary questions or the powers of such services.

A second part will study the relations between the internal security services and other constitutional organs. First, it will focus on the judicial control of the respect of superior rules by these services as well as on the non-judicial control, which may concentrate on the practical or political feasibility of the acts (past or planned) of the services. Then, the emphasis shall shift to the cases in which the internal security services use the services of another organ, or vice versa, and to surveillance activities concerning members or officials of another State organ.

The third part, dedicated to the individual vis-à-vis internal security services, will examine the limited extent to which such services might be allowed to interfere with the fundamental rights of the individual, and in particular with the right of privacy, as defined e.g. by the European Convention on Human Rights.

Before addressing the various aspects of the question in greater detail, it may be useful to mention some peculiarities of the subject of internal security services.

Undoubtedly a variety of internal and external situations may arise in which the executive organ of the State must act quickly and decisively to protect the fundamental interests of the State and society. There must be a consensus that only this need may possibly justify the derogation from normal human rights standards which may sometimes be necessary to ensure the proper and effective functioning of National Security Services. It is this derogation that provokes the need for particular attention to be given to the manner in which these services must be set up, the regulation and control of their activities and their proper place within the constitutional framework of the country. Fewer problems might arise if these services did not sometimes require a peculiar framework within which to operate which might allow them more freedom than that which is accorded to a normal police force within the accepted definition of democratic societies. This freedom allows them to conduct their activities - at least initially and to a limited extent - free from the control of the constituted organs of the State, whose purpose is to ensure full protection of fundamental rights and freedoms.

This report does not address the issue of whether internal security services should exist at all. When carried out correctly, internal security services perform an important function within the constitutional order. Nor is it in dispute that internal security services have inbred in them a potential for the abuse of State power: there have been innumerable incidences of the most serious violations of human rights being committed in the name of internal security. Hence the need for the constitutional order to identify what should be the role of internal security services within a democratic society, what should be their place within the constitutional framework, their functions and limitations and what method of control should be exercised over their activities.

It is still necessary to mention that not all the materials are quite up to date. As this analysis is not intended to be a complete comparative study but rather a survey of problems and possible solutions, no updating of the materials has been attempted. Some of the examples presented may thus no longer be accurate.

The present consolidated opinion is based on the opinions of Messrs. Lundum, Said Pullicino and Suviranta (CDL (97) 30, 34 and 37), which were presented before the Venice Commission's 32nd plenary meeting in October 1997, on the discussion of the first draft consolidated opinion (CDL (97) 58) at the 33rd plenary meeting in December 1997, and, in particular, the comments made by Mrs Err, who represented the Parliamentary Assembly's Committee on Legal Affairs and Human Rights at this meeting.

I. General issues

A. Institutional framework of the internal security services

There seem to be two schools of thought on the question of how security services should be organised. In some European countries, the security services are independent organisations which are not part of the ordinary police force, whereas in other European States the security services are one of many specialised branches of the general police force. From a constitutional point of view, there do not seem to be convincing arguments to give preference to one of these systems over the other. In many cases, the way a country organises its security services is probably as much due to convention as anything else. The main thing is for the organisation of the security services to give the service a clear and precise structure and for the head of the security service to bear the responsibility for all the actions of the service of which he or she is in charge: one could contemplate whether a recommendation should be made to this effect.

The head of the internal security organisation is usually appointed by the head of the State or of the Government. Some other high officials of the system may also be appointed by an executive authority, while other vacancies are filled internally. The appointing authority normally has discretion to dismiss the head of the organisation and other high officials. This power to hire and fire keeps the organisation under the tight control of the Executive.

B. Legal basis of the existence of internal security services

The existence of internal security organs can be based on:

(a) the Constitution;

(b) ordinary legislation;

(c) governmental decrees;

(d) no legislation at all.

(a) the Constitution

Constitutional norms bearing specifically on the internal security services are rare, and the existence of such specific constitutional norms does not seem necessary in general. What is essential is that legislation or regulations pertaining to internal security organs be in harmony with the Constitution.

In theory, of course, if the existence of internal security services is entrenched in constitutional provisions, built-in constitutional guarantees would increase the protection afforded to interests which are potentially threatened by the actions of internal security services. On the other hand, however, provision in the Constitution might lend undue constitutional legitimacy or status to such an institution.

(b) ordinary legislation

Most of the objectives of a constitutional provision on the internal security services can be attained even if the internal security services are set up through a legislative process that recognises the guiding principles mentioned above. What is essential is that the organic laws and other pieces of legislation pertaining to internal security organs are in conformity with the Constitution. Legislative control over the acts and actions of the internal security services in the exercise of these functions remains an essential means of ensuring that these services operate exclusively in the national interest for the realisation of democracy and the rule of law. This control can, however, only be exercised *a priori* by providing legal instruments ensuring adequate checks and balances that allow these services to operate efficiently, without overstepping their role, particularly where fundamental rights are concerned.

As a matter of fact, in most countries, the existence of internal security organs is based on parliamentary legislation. The same applies to the organisation and functions of these organs, or at least as far as the basic elements are concerned. In some instances (e.g. Spain), "organic laws" are used, i.e. legislation which is hierarchically at a lower level than the Constitution but at a higher level than ordinary legislation.

In several countries (e.g., Denmark, Finland, Ireland, Norway, Sweden and Switzerland) the security services are part of the general police. In these countries the legislation concerning police in general is also applicable to the security services. In Switzerland, however, a Federal Government Bill for specific legislation on internal security services was presented to the Federal Parliament in 1994. In Croatia and the Former Yugoslav Republic of Macedonia, an Internal Affairs Act is in force, covering all activities of the Ministry of Internal Affairs, including internal security services. In most countries the internal security services and the regular police are two (or more) distinct organisations. In Germany it seems even to be a constitutional requirement that the internal security services (the *Verfassungsschutz*) and the police be kept apart. Nevertheless, the German ordinary police has a branch (the *Staatsschutz*) which is said to work in close contact with the *Verfassungsschutz.*

(c) governmental decrees

In France, for example, there is no parliamentary legislation on the internal security services (comprising mainly the *Renseignements généraux* and the *Surveillance du territoire).* The system is regulated in decrees issued by the Executive. This is in line with the constitutional prerogative of the Executive to organise public administration without recourse to parliamentary legislation. Parliamentary legislation on the internal security services is lacking also in Belgium, where the system is based on a Royal Decree (of 1929). The obvious drawback of the French and Belgian systems is that the Parliament has no direct influence over the internal security services. Nevertheless, one can hardly claim the regulation of internal security services by parliamentary legislation to be established as a common European standard, though it is undoubtedly the preferable option. A standard requirement could, however, be that the executive decrees be sufficiently clear and comprehensive.

Naturally, parliamentary legislation – or decrees issued directly under the executive prerogative – cannot be expected to regulate the internal security system in every detail. Subordinate regulations may thus be needed, normally issued by the Executive or by the Head of the security service in question. They must evidently be given within delegated powers, and also be sufficiently clear and comprehensive. In some countries, part of the regulations are secret. This cannot always be avoided. Such secrecy should, however, be kept within a minimum, be within publicly conferred powers, and not violate published norms.

(d) no legislation at all

The United Kingdom used to be farther still from any regulation of the internal security system by parliamentary legislation. Until 1989, the existence of any internal security service was officially denied. The obvious consequence was that the Parliament had no influence over the internal security system, nor were any details of the system publicly known or able to be discussed publicly. In 1989, however, the Security Service Act was passed. Britain is thus now within the mainstream of countries regulating the internal security system by parliamentary legislation.

(e) conclusion

It is true that regulating security services by laws of Parliament will ensure that Parliament has direct influence over them, but there does not seem to be a common basis in the States of the Council of Europe for such a requirement.

It is essential, however, that the regulations concerning the internal security services be as clear and concise as possible so that the tasks they can lawfully engage in are clearly defined and that the regulations should only be allowed to be kept secret to the extent that is absolutely necessary.

C. Budget

One aspect of the question of the regulation of internal security services is the budget of these services. In many countries it is an aspect of the division of powers that Parliament must approve the budget and that no expense can be paid by the Executive without this approval. The

specificity of the budget varies, however, from country to country. The budget may not have particular headings for internal security organs. The functioning of these organs is then financed under more general headings, e.g. for the police or the Executive in general. Such general budgetary items are then divided between different recipients and used by the appropriate executive or administrative authority. This system, of course, diminishes the power of Parliament to direct the internal security system by budgetary means.

For reasons connected with the very nature of the security services, their budgets are often not very specific or might even be totally hidden within the budgets of the branch of the Executive in charge of the security service. Again, the role of Parliament is diminished if the budget of the security services are kept away from them. There does not, however, seem to be a common basis for a recommendation to change this. It might be worth considering whether a recommendation should be made to the effect that at least the member of Government responsible for the internal security services should be responsible for the budget allocated to the security services.

D. Internal Security Services in a State governed by the Rule of Law

As previously stated, what is essential is that the organic and other laws regulating internal security organs are in harmony with the Constitution. This assertion inevitably provokes the question whether there is the need for internal security services to be considered as a separate organ of the State and to be recognised and set up as such.

It is clear that if the internal security services of a country are a part and parcel of the police force entrusted with internal security, that specialised service would be subject to the constitutional controls over the activities of the entire police force. In that event, rather than examining whether and to what extent the relations between internal security services and other organs of the State are regulated in the Constitution, one would have to examine the validity and constitutionality of the exercise of specific powers within the special competence of the internal security service. In such an eventuality (and, as a matter of fact, a great majority of countries have opted for this solution) the internal security service would have no autonomous existence as a constitutional organ.

On the other hand, a few countries have opted to have internal security services with a separate existence independent from other police organisations entrusted with ensuring law and order. It is also true that in these cases the internal security services are rarely, if ever, recognised in the Constitution of a country as a separate constitutional organ. More often than not, they are set up and organised by legislation or regulations. In these cases again the issue would be whether the relevant legislation or regulations could be considered to be in conformity with the accepted democratic Constitution of the country. That would be a matter for that country's Constitutional Court to determine, naturally in the light of widely recognised principles that should govern a democratic society. The actions of the internal security services would be subject to the scrutiny of the Courts or other method of judicial or quasi-judicial control, e.g. the Ombudsman to establish whether or not they were carried out within the proper exercise of their functions and within the provisions of the Law and the Constitution.

In this respect the complexity of the issues involved and the diversity of the solutions proposed by the legislators of different countries, as evidenced by the Macovei report, suggest the need to

establish guiding principles to which basic laws setting up internal security services should conform. These principles should be set out in an international instrument - a Convention or a protocol - which would allow each individual country to provide efficiently for its own internal security requirements while ensuring proper avenues of control in conformity with a uniform democratic standard: a standard that would ensure that the internal security service would act only in the national interest and not in favour of the party in Government, or for that matter any other party or institution, that it would not be used as a means of oppression or undue pressure and that it would operate in full respect of fundamental freedoms.

If such a solution were to be pursued - and one considers this to be a more possible and plausible alternative to expecting States to amend their *Constitution* to conform to expected declared standards - then the constitutional relations of the internal security service with other constitutional organs would also be governed by this international instrument, thereby ensuring national and/or international judicial control.

This issue of control deserves emphasis here because it should be clear that the protection of the State by the internal security services, apart from ensuring public order and the proper functioning of authorities and institutions, and apart from ensuring territorial integrity against outside aggression, should also aim at ensuring the constitutional order of the country, the proper functioning of democratic institutions of the State, the rule of law and the protection of fundamental rights. Any control exercised by appropriate constitutional organs of the State on the activities of the internal security services must necessarily be aimed at ensuring that these services properly and correctly carry out these duties.

The following conclusion of the Parliamentary Commission of the Swiss Federal Parliament graphically underlines this principle: *"Le Conseil fédéral a confirmé 'la nécessité de déployer une activité préventive ayant pour but de protéger le citoyen et les institutions contre le terrorisme, l'extrémisme violent et le crime organisé'. Cette remarque est également valable pour le service de renseignements prohibé. La protection de l'Etat doit s'effectuer dans le plein respect des droits fondamentaux: les atteintes à ces droits ne sont tolérées que dans le cadre des dispositions légales et pour un intérêt général majeur (principe de proportionnalité)"*.

E. Powers and restrictions

On this point, there appear to be two different schools of thought. In some countries (e.g., Germany, Luxembourg, the Netherlands and Spain), the role of internal security services is limited to the gathering of intelligence and to the subsequent analysis and interpretation of the material. Any preventive or enforcement functions lie then with the ordinary police or other organs. In other countries internal security organs may have preventive and enforcement functions as well, especially with regard to actions directed against the security of the State. Particularly in the countries where the security services are part of the ordinary police, the security service police officers are allowed to perform the same acts as other police officers, *inter alia* performing arrests, tapping telephones etc. Again there seems to be no consensus in European countries on which to base a recommendation. Furthermore, there do not seem to be convincing constitutional arguments in favour of one of these systems over the other.

In either case, it is of the utmost importance that the regulations on the powers of the security services are clear and precise and that they are in conformity with the rights of the individual as

protected under the Constitution of the State in question and/or with the international obligations to which the State in question has undertaken to adhere, such as the European Convention on Human Rights.

The mere reading of newspapers, periodicals and books, listening to public broadcasting and the observation of television programmes would probably be free from any regulation by other organs, as is the case for ordinary individuals. The filing and processing of the information so gathered may, however, already be subject to such regulations aimed at the protection of the privacy of individuals.

Publications, radio and television are evidently not the only source of information employed by security organs. Clandestine, forcible or intrusive methods may be used, such as the interception of telephone calls, house searches, surveillance from a distance with optic or auditory devices (concealed microphones, etc.), and infiltration into groups and organisations. The use of such methods is to some extent regulated in constitutions, international agreements and legislation. These regulations make the use of certain methods, e.g. interception and searches, subject to permission being granted, upon certain conditions only, by a court of law or another authority, e.g. a Government Minister in Croatia and the United Kingdom, three or four Ministers in the Netherlands, or a special prosecutor in Romania. These restrictions normally apply to internal security organs in the same manner as to the police in general. On the other hand, it seems almost inevitable that the use of some clandestine methods can neither be regulated nor denied to the security organs.

Preventive and enforcement functions often involve forcible means, especially the detention of people. Such means are in many cases unavailable to internal security organs. In any case, their use is most often strictly regulated in constitutions, international agreements (especially in the European Convention on Human Rights) and legislation. The regulations generally include the requirement of permits from other State organs, e.g. from a court of law, for police detention for more than two or three days. As a rule, there should be no discrepancy between the internal security service and the ordinary law enforcement practice, with respect to the form and duration of initial detention before a suspect is brought before a judge. Exceptions may be made in the strict interests of national security in accordance with prescribed norms. However, once a judge issues a remand order pending trial, the person charged must be detained in a normal remand centre, free of the control of the internal security services. There is no legitimate justification for a separate remand centre for internal security services, as any necessary precautions, such as solitary confinement, could effectively be taken in an ordinary remand centre.

It is not necessarily enough for the keeping and processing of information that legislation and regulations are abided by. Permits from, reports to, and supervision by, outside administrative agencies – data protection authorities – are often involved as well. Internal security organisations, or the police in general, are, however, in many cases free from such outside administrative interference. Compliance with legislation and regulations is then the responsibility of the organisation itself. Freedom from outside administrative supervision may also keep the activities in question rather effectively free from surveillance by the media, the general public, or interested – or affected – individuals. Secrecy may, indeed, to a certain extent be necessary for the success of security operations. It may, however, also harm important general or individual interests, which makes the regulation of these questions a delicate matter.

Internal security services may have a duty to perform tasks given to them by superior authorities (within the Executive power), e.g. to procure information concerning a certain person, or to follow his movements (in Finland, the internal security services used to be called "the President's police"). Such assignments should not in principle increase the powers of the security organs. This principle may, however, be difficult to apply, e.g. to the use of information from the files of security organs. The information is there for the protection of vital national interests, and superior authorities may indeed require such information for this very purpose. The leaders of the party in power should, on the other hand, not have access for party political ends to information which is denied to their political opponents. Detailed regulation is required for this delicate issue.

The problem should be simpler in regard to assignments which go beyond the use of existing information (or such information which security organs can procure by ordinary means). The assignment should not give any additional right to, e.g., telephone interception or house searches. Complications may ensue if the authority which assigns a task is also empowered to grant permits which are needed for the fulfilment of the task: e.g. a Government Minister may require information for which telephone interception is needed, and the same Minister may be competent to grant interception permits.

The question of the conformity of internal security service activities with human rights guarantees, and especially with the right of privacy, shall be developed later (section III).

II. Relations with other State organs

A. Control of the internal security services

It appears to be common ground in European States that the control of the security services cannot be merely internal, i.e. carried out by the leaders of the service in question or by the ministries or agencies to which they belong. On the contrary it seems that an external control exists in all Member States from the Executive, from Parliament and/or from the judiciary in some form.

How the control of the security services is best carried out, differs from one area of their work to another. It is important, however, that the control is not limited to more general aspects - human resources, areas of interest, priorities etc - as a closer control of the working of the security services is necessary. It might be feasible to recommend that the task of controlling the security services be divided between the Executive, Parliament and the judiciary. The Executive could, for instance, be responsible for the legality of the work of the security services and for their efficiency. Parliament (or an independent body appointed by and accountable to Parliament) could be responsible for monitoring whether the internal security services confine themselves to operations that fall within their mandate and confine themselves to using the methods they are allowed to use. The judiciary could be given the role of deciding whether actions on the part of the security services that involve intrusions into the fundamental rights and freedoms of individuals should be allowed.

1. Judicial control

The Rule of Law requires that government be able to show legal justification for its actions. The ordinary courts, the traditional redressors of grievances, are seen to stand between the citizen and the State, concerned to protect individual rights and freedoms when scrutinising administrative activity, keen to ensure that legal powers are not exceeded in terms of substance and procedure, and to apply principles of natural justice.

An independent judiciary is an indispensable requisite of a free society under the Rule of Law. This implies freedom from interference by the Executive or the Legislature in the exercise of the judicial function. It does not mean that the judge is entitled to act in an arbitrary fashion. In the concept of independence, provision should be made for the adequate remuneration of the judiciary, so that, e.g. a judge's salary should not, during his or her term of office, be altered to the disadvantage of the judge. Furthermore, rules as to the appointment and dismissal of judges, and their transfer to other judicial duties are of the essence.

As previously noted the role of the courts in respect to secret surveillance is the inherent, supervisory one of ensuring that all officials act within their powers and according to the law.

Persons who feel that their rights have been violated by acts (or omissions) of security organs may in general seek redress before courts of law or other judicial bodies. The right to a judicial remedy may be secured in the Constitution (e.g. in Sec. 16, as amended in 1995, of the Finnish Constitution: "Everyone shall have... the right to have a decision concerning his rights and obligations reviewed by a court of justice or other independent judicial organ."). To a considerable extent, guarantees can also be found in international agreements, notably in Art. 13 of the European Convention on Human Rights ("Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.").

In addition to constitutional and international guarantees, judicial remedies are usually regulated in ordinary legislation, which may well go beyond the constitutional and international requirements.

Legislation can provide that the internal security organs be open to scrutiny by established specialised organs (appeal authorities for complaints against internal security organs, e.g. in Ireland, and in the United Kingdom as provided for in the Interception of Communications Act, 1985 and the Security Service Act, 1989). Such specialised organs should be guaranteed the right to deliver enforceable decisions and not merely furnish recommendations to the Executive. They should be kept separate and autonomous from the Executive acting on their individual judgment and not subject to the direction or control of any other person or authority, thereby ensuring effective redress to the aggrieved party. Thus, an office headed by a judge/magistrate enjoying the above-mentioned guarantees would certainly serve to provide adequate redress to the aggrieved party.

In the absence of such specialised organs, the general rules for challenging administrative actions (and omissions) should apply. Grievances must be referred to the courts of law since the protection of human rights is unanimously considered as essential to the very existence and survival of a democratic State. In many countries a citizen's fundamental rights and freedoms are nowadays enshrined in a bill of rights, which is enforceable by national courts; where the

country is a State Party to the European Convention on Human Rights and has recognised the compulsory jurisdiction of the European Court, the citizen also has the added ultimate protection of the control organs of the Convention, the Commission and the Court of Human Rights.

One must accept that there may be limitations regarding the extent of judicial control over the activities of internal security services. However, it is noted that these controls are twofold. On the one hand, there are those controls that are proper to judicial review of the acts or actions of these services that have already been completed and which therefore invite an investigation into their legitimacy or constitutionality. In this respect a proper balance must be struck between the interests of the individual and the interests of society at large. The principle of proportionality must be applied to assess whether a particular act that could impinge on the right of the individual citizen could be justified as acceptable in a democratic society as a necessary measure to ensure the rule of law. The overriding principle should also be that the Courts should have jurisdiction to determine whether the actions complained of were within the powers and functions of the internal security services as established by law. Within the limitations laid down by law, the Court should have the right to determine whether there was undue harassment of the individual or abuse of administrative discretion in his or her regard. Judicial review of the executive acts, even with proper safeguards essential in the circumstances to ensure the integrity of the State, should not be unduly withheld.

Another form of control refers to the requirement imposed on internal security services to seek authorisation from a Court or other specialised organ before proceeding with actions which might be construed as infringements or a threat to the fundamental rights and freedoms of individuals. The term 'individual' is meant to include private individuals and legal persons such as political parties and commercial companies. In this case the same principles of proportionality apply.

A special aspect of the work of the security services is, however, that many of the actions that they undertake are carried out clandestinely so that the person who is the target of their operation will often not be aware of their actions. This makes it impractical to rely on judicial control at the initiative of the person who has been the target of an operation of the security services. As such a judicial control could be seen as a vital safeguard of the rights of the individual, it might be advisable to make a recommendation that operations of the security services that involve intrusions into rights and freedoms protected by the Constitution or the European Convention on Human Rights can only be carried out under judicial control.

It should be clarified that what is being discussed is not a situation of existing, imminent or potential public emergency. In such a situation other considerations might apply [see, eg. the European Commission for Democracy through Law's publications in this area in its series *Science and Technique of Democracy* Nos. 12 and 17]. What is being considered here are the operations of internal security services in a normal situation in which the circumstances might indeed be very serious and constitute a threat to the Rule of Law and democratic institutions, but fall short of a public emergency.

Officials of the security services who violate their official duties are, as a rule, liable to a punishment (or to a disciplinary sanction). The State may also be ordered to pay compensation to persons whose rights have been infringed.

2. Control by non-judiciary organs

The internal security organs are normally supervised by their hierarchical superiors, at the top level by the appropriate Government Minister or even by the Prime Minister or the Head of State. The supervision often includes regular reports from the security services. It may even include the need for a supervising person or body to authorise the commencement of investigations in individual cases.

This hierarchical control is often supplemented by parliamentary supervision. In many countries parliamentary committees have been created specifically for the supervision of internal security organs. Regular reports shall be made to the committee, which is also entitled to be provided with any additional information it requires and to issue its opinions on the activities of the security organs (in Italy the Committee may not, however, be furnished with any information on pending operations; but in Germany, the Parliamentary Control Committee shall be informed about any interception of postal and telephone communications and other instances of covert gathering of information). The committee is not, however, a hierarchical superior to the security organs. Hence, it cannot give them any orders.

In the absence of such a specialised committee, the Parliament or its appropriate committees may discuss internal security matters on the basis of the Government's regular reports or of questions presented by Members of Parliament as well as in the context of the annual budget debate. In Sweden, the Board of Directors of the National Police Board, heading the whole civilian police organisation, including security services, is partly composed of lay members, who are usually Members of Parliament and its Committee on Justice. A corresponding system exists for military intelligence, with the qualification that the lay members are usually elected among the members of the Parliament's Committee on Defence.

Various other more or less independent organs may also have a right or even a duty to keep an eye on the security organs. This applies especially to the now common Parliamentary Ombudsmen with a general competence to supervise legality in administration. The Ombudsperson may act on his or her own initiative or on the basis of complaints of individuals (or of legal persons, etc.). The Ombudsperson may make inspections, demand explanations, admonish or prosecute officials, make reports to the Parliament, etc.; but he or she can neither give orders to official organs nor rectify their actions.

In addition to Parliamentary Ombudsmen with general competence, a specialised ombudsperson may have competence with regard to internal security organs, e.g. privacy ombudsmen or data protection ombudsmen. In addition to the Ombudsperson elected by the Parliament, in some countries (Sweden, Finland) there is a high Government official (the Chancellor of Justice) whose competence more or less overlaps with that of the Ombudsperson. A Government official or body with similar tasks may also exist in countries without Parliamentary Ombudsmen (the Office of the Republic's Prosecutor in Belarus, the Chancellor of Justice in Estonia, the General Prosecutor of the Swiss Confederation).

The main rules on the organisation, functioning, competence and tasks of the highest State organs are normally included in the Constitution. This applies, as a rule, also to the Parliamentary Ombudsperson (and to the Chancellor of Justice). The supervision of internal

security organs by the highest State organs is accordingly covered by these main constitutional rules, even though the internal security organs are not specifically mentioned in those rules. More detailed rules as well as provisions on specialised ombudsmen (on privacy, etc.) are principally a matter for ordinary legislation (despite the fact that in Belgium there is no parliamentary legislation on the internal security services themselves, there is an "organic law" containing provisions on the Permanent Parliamentary Committee on Intelligence Services).

B. Other relations

1. Services to other State organs

Internal security organs may provide other State organs with services which are similar to the services the security organs perform for private firms or individuals. In such a case, services performed for State organs do not appear to involve special problems.

State organs may, however, also have access to such services which are not performed for private individuals or entities. Here we encounter problems which are similar to those related to services performed pursuant to superior orders (see section I.E, *supra).* However, the responsibility for discriminating between services rendered for the protection of vital national interests and services for which State organs should not receive any privilege could be more easily attributed to the internal security organs themselves.

2. Services from other State organs

Here, too, the problems that arise concern services which may not be performed for private individuals or entities. As already mentioned above, in some countries the internal security organs do not have any preventive or enforcement functions. Furthermore, where the security organs themselves may act, they may have the alternative possibility of requesting the ordinary police to, e.g., arrest and detain a suspect or search a dwelling. The request from the security organ should neither enlarge nor restrict the powers or the responsibility of the ordinary police. In Germany, the security services may not request cooperation from the ordinary police in taking measures to which they are themselves not authorised. Upon information provided by the German security services, the police may only take action if they consider that the information provided justifies it. In countries without such express provisions it might, however, be unreasonable to require, especially in urgent cases, that the well-foundedness of the request be verified in detail by the ordinary police.

The security organs may require information not only from the ordinary police but from many other public organs as well. Information may be requested by a security organ, but the other organ may also provide information on its own initiative. In principle, the restrictions which are included in the data protection or privacy legislation are also applicable to the transfer of information to internal security organs. In order to fulfil their duties in the protection of vital national interests, security organs may require privileged access to protected information. Such privileges must obviously have a legal basis and, as far as the restrictions of access are included in the Constitution or an international agreement, they must also have a basis in the Constitution or agreement ("necessary in a democratic society in the interests of, e.g., State security," in the words of the European Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data). In drafting the privileges, the possibility of misusing information for party political or other non-privileged ends must be kept in mind.

3. Other State organs as targets

Internal security organs, or their individual officials, may consider it their duty or right to procure, keep and process information on the opinions, activities and whereabouts of other State organs and their members and officials. An extreme example is mentioned in Barbara Forbes's study: a Swedish ambassador (and former Government Minister), who was chairing a Government commission investigating the activities of the Swedish security police, found reason to believe that he was himself at the same time under the covert surveillance of the security police. Surveillance of persons belonging to State organs is a more sensitive matter than the surveillance of individuals in general. Security organs, or persons or instances acting through them, may try – or seem to try – to influence the actions of other State organs either by a direct use of the information gathered or by using the surveillance operations to intimidate or harass the persons in question.

However, even high Government officials can act as spies for foreign powers, and Members of Parliament or official boards can plan and carry out violent and even revolutionary acts. Security organs should be able to discover and combat such tendencies without, however, taking steps which hamper – or even seem to hamper – the interplay between different democratic political forces or the normal functioning of State organs. Detailed legal rules may be needed for a proper balance to be achieved. It is probably more important that the security organs themselves respect democratic society and serve it impartially as a whole; but appropriate legal rules may help in creating and preserving this democratic spirit within the internal security service.

III. The individual vis-à-vis Internal Security Services

A. Introduction

It is pertinent to investigate from the outset what limitations should in principle be made on the activities of internal security services - irrespective of their particular organisational setup in different countries - to ensure the minimum of respect for fundamental human rights. It is accepted that by definition an internal security service is expected, in the course of its legitimate activities, to exercise a measure of control within the territorial limits of the country ('internal' interest) with the aim of ensuring the safety of its citizens in various aspects e.g. political and economic stability, and rule of law ('security' interest). It is also recognised that these activities, even when legitimate, may sometimes have to be carried out outside the accepted controls of

other constitutional organs (legislative or judicial) and that, therefore, the individual might not have an absolutely guaranteed opportunity to object to or oppose such activities and ask for protection. There should be absolutely no question of allowing a person or authority to be above the law or of giving a person or authority any licence to violate fundamental rights and freedoms. Exceptions and limitations in the interest of the common good of society can only be tolerated within the limitations accepted in democratic societies as expressed in international conventions and subject to close scrutiny and control by the appropriate organs.

It goes without saying that all countries that are signatories to the European Convention on Human Rights and who recognise the jurisdiction of the European Court are bound to be guided by the principles of the Convention and the decisions of its organs. It is also clear that these countries' legislations and regulations governing internal security services are subject to the scrutiny of the Court, which has full jurisdiction to determine whether, in particular cases brought before it, the state of the law was such as to ensure that the minimum degree of legal protection to which citizens are entitled under the rule of law in a democratic society was present and not found to be lacking. This in itself can be considered to be an available judicial safeguard against inadequate national legislation or arbitrary interference.

The matter of the conformity of legislation setting up internal security services in individual countries with the European Convention on Human Rights has on occasion been investigated by the European Court and Commission. Reference is made to the case *Klaus and others vs West Germany*, in which it was held that the Government's "interference" was in accordance with the law *"in that the Act not only defined precisely the purposes for which the State could impose any restrictive measures but required that any individual measure of surveillance had to comply with the strict conditions and procedures laid down in the Act itself*'. Other decisions dwelt on the principle that State action through its internal security services should be proportionate to the legitimate aim, to the right of the State to undertake the secret surveillance of subversive elements, to the need for adequate and effective guarantees against abuse, to the duty to give citizens an adequate indication as to the circumstances in which, and the conditions on which, public authorities are authorised and empowered to resort to secret and potentially dangerous interference with the right to respect for life and correspondence and to the need to give the individual adequate protection against arbitrary interference.

B. The Right to Privacy

An area that is obviously exposed to the particular activities of internal security services is the "privacy" of the individual. "Privacy" is intended here in the widest meaning of the word, extending to the full enjoyment of life in its various aspects. It is useful to consider this aspect in some detail since this would help us in the identification of recommendations that could be made concerning the relations between internal security services and other organs within the constitutional order.

More precisely, many types of police work, such as home searches and wire-tapping, involve fundamental rules on the protection of privacy included even in the Constitution or in international agreements, e.g. in the European Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, 1981. Such constitutional and international rules shall evidently be respected when legislative or other rules of lower degree are issued; and the constitutional, international or inferior rules shall normally also be applied to the operations

of internal security organs. The rules may also include derogations in favour of internal security operations. It is, however, rare for such derogations which are included in constitutional or international rules to give privileges directly to internal security organs. Instead, exceptions may, as granted in constitutional or international norms, be included in ordinary legislation (or executive decrees, etc., as the case may be), to be then applied by internal security organs. Furthermore, such authorisations may be narrowly circumscribed. The European Convention just mentioned above thus requires not only that any derogation must be provided for by law but also that the derogation is a necessary measure in a democratic society in the interests of, *inter alia*, protecting State security, public safety, the monetary interests of the State or the suppression of criminal offences.

The principle of a right to privacy emerged from a famous article published by Warren and Brandeis (*The Right to Privacy*, 4 Harv. Law Rev. 192) in 1890. Drawing primarily on the law of intellectual property the authors argued that:

> *"in very early times the law gave a remedy only for physical interference with life and property, for trespass vi et armis. Thus the 'right to live' served only to protect the subject from battery in its various forms; liberty meant freedom from actual restraint; and the right to property secured to the individual his lands and his cattle. Later there came a recognition of man's spiritual nature, of his feelings and his intellect. Gradually the scope of these legal rights broadened; now the right to life has come to mean the right to enjoy life - the right to be let alone, the right to liberty securing the exercise of extensive civil privileges; and the term 'property' has grown to comprise every form of possession - intangible, as well as tangible."*

According to Article 8(1) of the European Convention:

> ***"Everyone has the right to respect for his private and family life, his home and his correspondence."***

This Article evolved from Article 12 of the Universal Declaration of Human Rights (adopted by the General Assembly of the United Nations on 10th December, 1948) which reads as follows:

> ***"No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honor and reputation. Everyone has the right to the protection of the law against such interference or attacks."***

This same right is reiterated in Article 17 of the International Covenant on Civil and Political Rights (1966) of the United Nations, though here the *unlawfulness* of the interference also comes into play:

Article 17

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
2. Everyone has the right to the protection of the law against such interference or attacks.

Throughout the years various attempts have been made in order to find an all-encompassing legal definition of this right. Thus, for example, the Nordic Conference of Jurists on the Right to Privacy (May, 1967) defined the 'right to privacy' as *"the right to be let alone to live one's own life with the minimum degree of interference"*. It elaborated this definition and held that the right to privacy means:

"The right of the individual to lead his own life protected against:

(a) interference with his private, family and home life;

(b) interference with his physical or mental integrity or his moral or intellectual freedom;

(c) attacks on his honour and reputation;

(d) being placed in a false light;

(e) the disclosure of irrelevant embarrassing facts relating to his private life;

(f) the use of his name, identity or likeness;

(g) spying, prying, watching and besetting;

(h) interference with his correspondence;

(i) misuse of his private communications, written or oral;

(j) disclosure of information given or received by him in circumstances of professional confidence."

A more recent definition was given in the Declaration concerning the Mass Media and Human Rights (Resolution 428 [1970] of the Consultative (Parliamentary) Assembly of the Council of Europe), in which the right to privacy was defined as consisting:

> *"essentially in the right to live one's own Life with a minimum of interference. It concerns private, family and home life, physical and moral integrity, honour and reputation, avoidance of being placed in a false light, non-revelation of irrelevant and embarrassing facts, unauthorised publication of private photographs, protection from disclosure of information given or received by the individual confidentially"*.

Notwithstanding the above, the State, as a result of the extensive field of regulation entrusted to

it, is constantly in need of acquiring, monitoring and evaluating information. In fact, the work of internal security services is a guarantee for the continued existence of the State itself and for the democratically regulated life of society. Such services also have the task of safeguarding the economic well-being of the country against threats posed by the actions and intentions of individuals.

The aim of such services should also be to provide protection from possible espionage, terrorism and sabotage from foreign powers, to investigate actions which aim at undermining democracy and to undertake the secret surveillance of subversive elements operating within a country's jurisdiction.

However, the above-mentioned freedoms can never be properly guaranteed if domestic security surveillances may be conducted within the absolute discretion of the Executive. It is an established fact that where there is unreviewed executive discretion this may very well lead to imposing pressure in order to obtain incriminating evidence and thereby overlook potential invasions of privacy. Thus, the services cannot operate uncontrolled. There have been various instances where security services have attempted to influence the political scene in the countries in which they operate.

It must be emphasised that the fundamental freedoms and rights of individuals cannot be adequately protected if the acts of such institutions are not made susceptible to judicial review. Furthermore, the regulation of internal security services can only be made effective by having specific legislation. If the position is regulated by administrative practice, however well adhered to, it will never provide the guarantees required by law. Being an administrative practice, it can be changed at any time and thereby clarity as to the scope or the manner in which the discretion of the authorities is exercised would undoubtedly be lacking.

The enactment of legislation would give citizens an adequate indication of the instances and conditions in which such surveillance is admissible. It should also provide for an indication of the scope of any executive discretion and the manner of its exercise so as to afford protection against arbitrary interference. In the United Kingdom, prior to the Security Service Act, 1989, which legitimised for the first time the activities of the Security Services, the position was regulated by common law. During this period it was firmly believed that the most effective remedy was an application under the European Convention on Human Rights.

The appointment of judges or magistrates, whose independence and impartiality would be guaranteed by the Constitution, to investigate and monitor the activities of security services could ensure that such services do not abuse the powers with which they are entrusted (having a judiciary independent of the Executive is a vital component of the rule of law). Thus, for example, in the *United States vs United States District Court* [1972], the Supreme Court held certain wiretapping to be improper which had been approved only by the Attorney-General. The view was expressed that the freedoms guaranteed by the Constitution cannot be properly guaranteed if domestic security surveillances are conducted merely on the discretion of the Executive. Furthermore, the official is to draw up an annual report of the activities undertaken by the service, a copy of which is to be presented to Parliament.

However, when investigations to be carried out concern foreign relations, different considerations of the Executive come into play.

In cases concerning telephone tapping, listening and visual surveillance including e.g. the planting of electronic devices and the use of video cameras to observe the activities of persons in private places, the introduction of specific legislation would ensure that, whilst the security services are provided with the necessary tools they do not exceed their powers. Although the State requires powers of interception in order to gather information about serious crime and terrorism, these powers should not be unlimited. By establishing such an institution which is distinct and separate from the executive branch it would be ensured that:

a) An individual who believes his communications have been intercepted can apply to such office for redress and request an investigation on unauthorised interceptions;

b) The judge/magistrate who carries out the investigation should be guaranteed full access to information and thereby be in a position to assess whether the order for interception was justified or vexatious.

c) The judge/magistrate could give orders on how the intercepted material is handled such that he could make arrangements as to the extent to which the material is disclosed, the number of people to whom it is disclosed, the extent to which it is copied and the number of copies made.

d) Copies of the material are destroyed as soon as the storing of the material is no longer necessary for the purpose for which it was issued.

e) The service is kept under review and a provision could be introduced stipulating that an annual report is to be drawn up and presented in Parliament.

An interesting proposal made in the United Kingdom was that of the Royal Commission on Criminal Procedure, which recommended in 1981 that no warrant for telephone tapping should be issued until an Official Solicitor who acts on behalf of the unsuspecting suspect, has had an opportunity to consider and question in court the grounds for a request to intercept communications.

An advantage in having interception warrants issued by courts would also serve to dismiss any objection to introducing the transcripts as admissible evidence in a prosecution case. In countries such as the United States, experience has suggested that this type of evidence can be crucial to the conviction of so called *"inside dealers"*.

Another recommendation is that a phone tap be installed where the judge/magistrate is satisfied that there is imminent danger of *serious crime* and that more routine methods of investigation would be unlikely to succeed. Provision should also be made for the transcripts to be handed first to the judge/magistrate, who then releases to the Services such portions as he or she deems relevant to the investigations being carried out. When investigations are concluded the destruction of the transcripts could be ordered.

Certainly, it would not be sufficient to satisfy the above-mentioned principles merely by writing unlimited administrative powers into formal law. Thus, for example, the British response to the judgment in *Malone vs United Kingdom* (1984) was the enactment of the Interception of

Communications Act 1985, which provides a statutory basis for telephone-tapping, with the warrant of the Home Secretary. Furthermore, it sets mechanisms for control over this power but unfortunately excludes the courts from this process. An individual may complain to an independent tribunal from which there is no appeal, and a Commissioner, a senior judge, is charged with overall supervision of telephone-tapping. It is interesting to note that in the case of *Christie vs United Kingdom* [No. 21482/93] the European Commission of Human Rights confirmed that the scheme of the Interception of Communications Act satisfied the substantive as well as the formal requirements of law.

As was stated in the *Malone* case:

> ***"it would be contrary to the rule of law for the legal discretion granted to the executive to be expressed in terms of an unfettered power. Consequently, the law must indicate the scope of any such discretion conferred on the competent authorities and the manner of its exercise with sufficient clarity, having regard to the legitimate aim of the measure in question, to give the individual adequate protection against arbitrary interference."***

It must be emphasised that any enactment should provide guarantees against the arbitrary use of the power it confers. Adequate protection is to be afforded as such cases involve an intrusion into private life. The relevant legislation must provide answers to such questions as: Whose telephones might be tapped? For what offences? For how long? How are the results to be used? What are the rights of the defence of access to such recordings? What happens to the tapes and records on conclusion of the proceedings?

Furthermore, such legislation could provide for certain offences which would act as a deterrent and aim at protecting the citizen's right to privacy. This would include a provision that it is an offence for a person to:

I. Intentionally intercept or interfere with a communication in the course of its transmission;

II. Disclose the contents of any communication which has been intercepted in the course of transmission, where the perpetrator knows that such contents have been unlawfully obtained;

The law should also provide for the prosecution of security services officials in the case of abuse of their powers.

Another area which requires regulation refers to the collection and dissemination of secret information concerning individuals and effected by secret services. The invasion of an individual's privacy by the secret collection of information about him or her by organisations which have no legal powers or for that matter legal existence, and against whose behaviour there may be no remedy, is a problem that necessarily must be dealt with. There have been recorded cases where such information has been collected with the aim of damaging careers. A case in point is the *Spycatcher case*, in which Peter Wright confessed to *"burgling and bugging his way around London"* in the service of MI5. It was shown that Wright had collected private information about a large number of left-wing politicians, trade-union leaders and friends of

Harold Wilson with this scope (vide, *Freedom, the Individual and the Law* by Geoffrey Robertson pg. 109).

The gathering of such information should be effectively monitored by an independent institution and thereby ensure that effective investigations are carried out where members of the public are believed to have been black-listed. The decision whether an individual requires investigation should certainly not be made exclusively within the service.

The law should further provide for the prohibition of any security service from taking any action to further the interests of a political party.

Certainly, security measures should be taken against unauthorised access or alteration, disclosure or destruction of such personal data. Other proposals include:

I. Where information concerning an individual has been collected and stored without his knowledge, he should be informed, where practicable, that information is held about him as soon as the activities of the security services are no longer likely to be prejudiced.

II. The collection of information on individuals solely on the basis of their particular racial origin, religious convictions, sexual behaviour or political opinions or association with particular movements or organisations should be prohibited, unless their behaviour is proscribed by law.

III. Communication of data to private parties should only be permissible where a legal obligation requires it or with the authorisation of a supervisory authority.

IV. A supervisory authority or other independent body should ensure that only specifically authorised personnel have access to terminals containing information and that the communication of data is duly authorised.

V. Periodic reviews of all files should be undertaken to ensure that they are kept up to date and free of superfluous and inaccurate data.

VI. The transfer of data to other bodies should be regulated by specific provisions, for example where the communication is necessary so as to prevent a serious and imminent danger.

The above examples of restrictions on the activities of internal security services obviously necessitate a measure of control through other constitutional organs. It is therefore advisable to set up a committee which would perform supervisory control with ultimate judicial review where an individual complaint arises over the data retained by the security services.

Legislation should ensure, with certain reservations, public access to such information. This:

I. Avoids a direct attack on the good faith of the administration;

II. Serves as a redress to the imbalance between the State and the private organisation;

III. Is of the essence of democratic government: the public should have the right to be aware of the holding of such data.

Where, due to such access, it is shown that data collected is inaccurate, irrelevant or excessive, then it should be ensured (even via the supervisory authority) that the relevant file is put in order. This can be done by erasing inaccurate data, or rectifying the information so as to make it correspond to the correct situation.

Another proposal is that such data should not be accessible to the public in general but the person requesting to have access must prove a specific interest in the said information.

Conclusion

The opinion of the Venice Commission was requested on the *constitutional* relationship between internal security services and other organs of the State. There are very few constitutional rules specifically regulating the relations between internal security services and other organs of the State. These relations are, however, affected by constitutional rules on the organisation and functioning of the highest State organs, determining how and by whom the organisation, functioning and powers of Government organs, including security organs, are set, and on fundamental and human rights, limiting the competence of the highest State organs to grant powers to other Government organs, again including security organs. Especially in the latter respect, constitutional rules are to a large extent supplemented and reinforced by international agreements and by the international organs monitoring the application of these agreements.

Despite the influence of the (mainly general) constitutional and international rules, the more detailed rules of ordinary (and "organic") legislation and executive and administrative regulations on the organisation, functioning and powers of internal security services are of fundamental importance in enabling the services to perform their tasks effectively but at the same time under the rule of law and respecting the democratic integrity of all people.

The following more detailed conclusions can be drawn from the above considerations:

(a) It is recognised that an internal security service exists for the protection of a State, and that this service, by its very nature and scope, sometimes has to act outside the accepted standards of an ordinary police force.

(b) Such a service can be conceived as an autonomous body and a separate organ or as part of the Executive directly responsible to a Minister or appropriate committee. In any case, however, the internal security services must be made accountable for their actions within the provisions of the law that regulates them.

(c) While the Internal Security Service must be given the right space within which to operate effectively and the necessary means to obtain results, there should be consensus that these services should be legitimated in so far as their role, functions, powers and duties should be clearly defined and delimited by the legislation that sets them up or by the Constitution.

(d) It would be preferable that the rules concerning security services be enshrined in the laws of Parliament or possibly even in the Constitution. It is absolutely essential, however,

- that norms concerning the internal security services be as clear and concise as possible so that the tasks they can lawfully engage in are clearly defined;

- and that the legislation pertaining to internal security services be in harmony with the Constitution and the international obligations of the State, and in particular with the rules protecting human rights.

(e) Norms applicable to internal security services should only be allowed to be kept secret to the extent that is absolutely necessary.

(f) There must be an appropriate control of the budget of the internal security services. As their budget, as approved by the Parliament, is often not very specific or might even be totally hidden within the budget of the branch of the Executive in charge of the security service, it would be suitable, at least for the member of Government responsible for the internal security services to be responsible for the budget allocated to the security services.

(g) Internal security services must act only in the national interest and not in favour of the party in Government, or any other party or institution. They must not be used as a means of oppression or undue pressure.

(h) There is common ground in Europe that the control of the security services cannot be merely internal; on the contrary, it seems that an external control exists from the Executive, from Parliament and/or from the judiciary in some form in all member States. A close, and not only a general, control of the activity of the security services is necessary.

(i) It is imperative that these services operate within an administrative/legal structure that provides for adequate control of their activities. Whereas it would be unrealistic to require their activities - if they are to be effective - to be fully transparent at all times, it is, however, expected that internal security services be accountable for their acts and activities within the legal framework in which they operate. To that extent they must be transparent in the sense that their actions should be verifiable and subject to control to establish whether they had correctly exercised their functions and powers intra vires. This control must be a judicial one either by an *ad hoc* judicial authority, or by the ordinary courts. This is especially so where fundamental rights are involved.

(j) In the exercise of this judicial control, great care should be taken to protect the

overriding interest of the State and therefore appropriate legislative provision must be made to ensure confidentiality, secrecy, lack of publicity, protection of preserved information and data, protection of witnesses, etc.

(k) In order to avoid any abuse, detailed regulation is needed on the power of other authorities to ask the internal security services for information or other services not available to private firms or individuals.

(l) Internal security services must not interfere with the activity of other State organs. However, the surveillance of persons belonging to such organs may be necessary (e.g. if they are suspected of espionage). Detailed legal rules may then be required for a proper balance to be achieved.

(m) It is recognised that internal security services should be accorded the opportunity to operate swiftly, effectively and preventively with the least possible interference as to the method and the means at their disposal, but their actions must be such as to ensure that derogations of fundamental rights and freedoms of individuals subjected to their activities and investigations be kept at a minimum. It is to be expected that the actions of internal security services may sometimes have to be unconventional. However, they must always be accountable for their actions when these unduly infringe on fundamental human rights or when they wrongfully and unwarrantedly have a destabilizing effect on democratic institutions and the rule of law.

(n) Having established that the unorthodox means by which internal security services must be allowed to operate can have this negative effect, it is imperative that these extraordinary measures and restrictions of fundamental rights and liberties should be proportionate to the danger involved. The same principle applies when the internal security services intervene out of necessity in the defence of the State in the political/democratic process. These services are only authorised to intervene in this manner as long as the danger their action is meant to prevent persists and with the minimum involvement for a definite and determinate purpose.

No one can deny that certain restrictions of fundamental rights can take place, especially in relation to information concerning international relations and national security where the very well-being of the nation is at issue. Without doubt such measures must be proportionate to the prevailing situation in the country concerned. This concept of proportionality is to be found in the constitutional law of countries such as Germany, the USA and Canada as well as in French administrative law. A restriction on a fundamental right cannot be regarded as necessary in a democratic society unless, amongst other things, it is proportionate to the legitimate aim pursued. Thus, if for example there is a need for action to limit freedom of expression, the interference with such a fundamental right must be necessary and proportionate to the damage which such a restriction is designed to prevent.