István Szikinger

THE POLICE ACT AND THE NATIONAL SECURITY ACT IN SERVICE OF THE FIGHT AGAINST TERRORISM

UNDERLYING PRINCIPLES AND LEGAL FRAMEWORK

INTRODUCTION

Two positions, which in principle mutually exclude each other, can determine the legal framework of counter-terrorism activities. According to one of them, terrorist phenomena are not to be handled within the scheme of a constitutional democracy, and therefore either an exceptional legal regime or a declaration of is needed.[1] Representatives of the other perspective declare the opposite, that is, that terrorism can and should be fought while preserving all the constitutional democratic values.[2] Actually, the debate goes even further: because they do not view a terrorist as having the legal status of a combatant, adherents to the "war" perspective do not want to observe the provisions of international law on war or those of the international humanitarian law.[3] The difference between these two positions, at least in their extreme forms, is that one carries out counter-terrorism activities within a legal framework while the other does so outside of a legal framework. Those who declare the exceptional nature of the fight against terrorism necessarily reach a point where they deny basic legal values even if they make compromises in order to protect the residues of such values. The manifestation of views on the legalization of torture offers a prime example of the negligence of basic legal values.[4]

I believe that Zoltán Miklósi is right in concluding that the war against terrorism leads to unacceptable consequences with regard to the restriction of freedom and the destruction of the norms the Rule of Law.

Before undertaking an overview of the constitutional foundations and ensuing legislation with regard to the fight against terrorism, it is necessary to touch upon the definition of terrorism itself. In so doing, however, our aim is not that of achieving a comprehensive analysis of distinct conceptual issues, but rather it is to determine whether the phenomenon of terrorism contains particularities that create the necessity to expand the traditional framework of the Rule of Law, or at the least to elaborate new legal institutions or schemes of regulation that are different from those that already exist. The Parliamentary Assembly of the Council of Europe classifies an act of terrorism in the following manner: "Any offence committed by individuals or groups resorting to violence or threatening to use violence against a country, its institutions, its population in general or specific individuals which, being motivated by separatist aspirations, extremist ideological conceptions, fanaticism or irrational and subjective factors, is intended to create a climate of terror among official authorities, certain individuals or groups in society, or the general public."

It should be noted that that the central element of most definitions of terrorism is violence and the political-ideological motives and goals that are related to the manifestation of such violence.

In spite of the existing debate over the definition of a terrorist attack, I do not question the ability of the average citizen to interpret the particular phenomenon of terrorism. From the perspective of our subject, the following question emerges: does the threat of terrorist acts offer evidence for the necessity of the introduction of new and previously unknown arrangements of the activities of the police or the national security services. If no such evidence is to be found, we must ask whether, given the context, the pure gravity of the danger would justify constituting competencies and/or procedural provisions otherwise unfit for the normal constitutional regime.

In short, we must address whether or not it is necessary to re-evaluate the theory of the Rule of Law and its historically developed perspectives and whether or not it is necessary to consider limiting the scope of the Rule of Law in suspending it in cases of possible and real manifestations of terrorism. From the perspective of this study the following question can be posed: based on international and national practice and theory, does the legislation covering the activities of police and national security services pro-

vide an adequate framework for acting against terrorism? Examination of these perspectives, of course, leads to an investigation of the justification of the restriction of any rights in order to curb terrorism. As this paper is part of the material of a joint research project investigating the issue in other contexts, I will go beyond analysing the Act on Police No. XXXIV. of 1994 (hereafter: Police Act) and the Act on National Security Services No. CXXV. of 1995 (hereafter: National Security Act) only to the extent that the existing interrelations necessitate.

It hardly needs to be proven that, in addition to the position of the Hungarian Republic in the community of nations and its relation to the universal and regional norms, the nature of terrorism makes it especially necessary that action be based upon the expectations of international law and guiding documents.

INTERNATIONAL FRAMEWORK AND DETERMINING PRINCIPLES OF THE POLICE AND NATIONAL SECURITY ACTIVITIES AGAINST TERRORISM

The Organization of the United Nations, in accordance with the introduction to the Charter, carries out its activities from the very beginning both for sake of security and the protection of human rights. Certainly addressing security concerns means first of all preventing and addressing international conflicts. However, the in elaborating of the concept of Human Security[5] and the implementation of its essential elements, individuals and communities also began to receive the attention of this world organization. Obviously, this new approach makes even clearer the notion that the fullest possible implementation of human rights is not an obstacle to but rather the goal or result of security policy.[6]

The Secretary General of the UNO issued a report in 2005 that reflects both the concept of Human Security and the content of the report of the High Level Panel appointed in 2003. The 2005 report is directly supported rather by the High Level Panel's report (A/59/2005, March 21, 2005). Even the title of the material expresses the priority of the values that the world organization intends to represent: "In Larger Freedom: Towards Development, Security and Human Rights for All" Paragraph 140 of the report points out important correlations: "It would be a mistake to treat human rights as though there were a trade-off to be made between human rights and such goals as security or development. We only weaken our hand in fighting the horrors of extreme poverty or terrorism if, in our efforts to do so, we deny the very human rights that these scourges take away from citizens. Strategies based on the protection of human rights are vital for both our moral standing and the practical effectiveness of our action."

The Council can be proud of significant success both in the field of promoting security with respect to the implementation of human rights. Similarly to the UNO, this regional organization prefers the values of Human Security in the shaping the framework of activities undertaken to counter terrorism.[7] The Council's guidelines on human rights and the fight against terrorism of July 11, 2002 [H(2002) 4], in recalling that it is not only possible but also absolutely necessary, to fight terrorism while respecting human rights and the rule of law, offers an example of such success.

The Charter for European Security, adopted within the framework of OSCE in 1999, manifests a similar spirit. This document declares that the most adequate guarantee for the security of the region is the capacity of the participating states to maintain democracy and the Rule of Law and the respect of human rights. The title of the chapter on the platform addressing the human dimension of cooperative security, in particular, emphasizes that the party-states confirm human rights — including the rights of national minorities — as part of the foundation of the comprehensive, indivisible concept of Security of the OSCE.[8]

Heads of states and governments of the European Council in December of 2003 adopted the strategic guidelines for the European Union under the title "A Secure Europe in a Better World". This document focuses, first of all, on issues of international security, emphasizing the role of economic factors in addition to other factors, and the necessity of maintaining coherence between activities aimed at international security and cooperation in the legal and judicial field. The strategy points out the importance of collaboration with the United States, NATO, the OSCE, and other organizations. Key threats, according to the document, consist of the proliferation of weapons of mass destruction, regional conflicts, state failure and organized crime. The strategy confirms, among other things, the following: "The quality of international society depends on the quality of the governments that are its foundation. The best protection for our security is a world of well-governed democratic states. Spreading good governance, supporting social and political reform, dealing with corruption and abuse of power, establishing the rule of law and protecting human rights are the best means of strengthening the international order." In my opin-

ion, it was Mr. Javier Solana, the spiritual father of the European Security Strategy, who pronounced in a conference held in Helsinki in 2004 the sentence expressing the essence of the document's capacity to serve as a good compass in acting against terrorism. The sentence was: "...A world more fair is a world more secure."[9]

The determining document and framework in the field of activities for the promotion of freedom, security and justice, is the Hague Programme, which was adopted in 2004. The agenda of the programme seeks to better respond to the expectations of the European citizens and to protect both the external and internal dimensions of security within an integrated perspective and in a coordinated way. Respect for human rights has remained a decisive element of this Union policy. An important message is delivered by the fact that, similar to the OSCE strategy, among its principles the first priority — referred to — is given to the requiring the respect of human rights and citizenship. It is true, however, that the urge to strengthen the foundations of counter-terrorism activities immediately follows.

The process of adopting the Constitutional Treaty for the European Union has been checked by the referendum defeats in France and in the Netherlands. Independent of further developments, however, it remains a fact that the document has, with regard to the topic of this paper, basically confirmed the results already achieved in maintaining the separation of a common foreign and security policy from cooperation in the field of justice and home affairs. The principles, institutions, and the division of competencies related to the party states are not identical in these two areas. At the same time, of course, the basic law of integration places the provisions of these two functional directions into a framework based on uniform principles. Among those principles, paramount importance must be attributed to the norms of the Charter of Fundamental Rights obliging both the organs of the cooperation — according to Article II/111 of the Constitutional Treaty — and the member states — through their participation in the Union — to respect the human rights and the rights of citizens and to promote their implementation.

In summary, one can conclude that international law and their guiding documents take the firm position of preserving the original values of constitutionalism both on universal and regional levels. This does not exclude, of course, restrictions on rights adapted to the particular features of the fight against terrorism. However, a consequence of this perspective is that such restrictions may only be applied in full respect of the formal and substantial requirements accepted in international law, which begins with the observation of the principles of necessity and proportionality. Legislation and practice that violations of the guarantees that protect rights are rejected by both international and competent national courts.[10]

The policies and legislation of the United States have without a doubt proceeded in a direction opposite to the one discussed here. However, partly because of judicial control and partly because of strong internal criticism, a certain return to the traditional values of constitutionalism can be perceived.[11]

SECURITY POLICY AND HUMAN RIGHTS IN HUNGARY SINCE THE CHANGE OF THE POLITICAL SYSTEM

The Resolution of the Parliament No. 11/1993. (III. 12.), which determines the basic principles of the security policy of the Hungarian Republic, declares that the starting point should be the indivisibility of security. A risk that concerns our country must be addressed within the framework of a system of institutions dealing in a complex manner with the economic, political, military, human rights, environmental and other dimensions of security while also cooperating with all of the states that could potentially be affected by that risk. In this respect there is continuity with the Resolution of the Parliament No. 94/1998. (XII. 29.), which currently prescribes the basic principles of security and defence policies. The goals of the security policy include: "— The creation of appropriate circumstances to ensure implementation of the principles laid down in the Constitution, promotion of the fulfilment of the Rule of Law, support for the undisturbed functioning of democratic institutions and the market economy, contribution to ensuring internal stability of the country; — Promotion of full materialization of the human and citizens' rights, the rights of national and ethnic minorities."

The first reference in the National Security Strategy to the above principles was published in the Annex of the Government Decree No. 2144/2002. (V. 6.). This document elaborates upon the desire of the citizens of the Hungarian Republic to live in peace, security, under the Rule of Law, and democracy. The Government Decree No. 2073/2004. (IV. 15.) repealed the National Security Strategy that was adopted two years earlier and, while emphasizing continuity, it was also enriched by the elaboration of a number of new elements from the list of values and interests to be defended and promoted respectively. For example, the new document references the pro-

motion of democratic values outside the Euro-Atlantic area (I/6). With regard to the subject of this paper, it should be pointed out that the task imposed on national security services of gathering information is extended to global, regional and internal sources of danger in order to pursue preventative and intelligence activities. All of these activities also relate, of course, to the counter-terrorism activities initially mentioned as one of the global challenges (II.1.1.). The strategy declares that terrorist activities are directed at disrupting democratic social and political institutions and at undermining the trust of societies in their governments.

Hungary's police cooperation with relevant European institutions and the EU Member States is very well developed. Since 2002, a special organization, the Centre for International Cooperation in Criminal Matters has been assisting with police cooperation at an international level and with the implementation of the Europol cooperation agreement. With regard to the fight against terrorism, Hungary has signed all terrorism-related UN conventions. Hungary also joined the common positions of the EU with regard to the fight against terrorism.

Within a legal approach, the norm included in the Article 8 of the Constitution should be the first to be mentioned. This provision provides for the principles of solving possible conflict between institutions of public power, including contentious issues related to terrorism. Article 8 postulates that the respect for and protection of human rights is the primary duty of the state. Regulations pertaining to fundamental rights and duties are determined by law without restricting their essential content.

The Hungarian Constitutional Court has not addressed directly the relationship between terrorism and the respect for and protection of human rights. However, it has, in a number of decisions, dealt with problems of constitutional order and basic rights as they relate to the legal framework of the activities to be carried out against threats. Some of the rulings declare that some of the terms connected to terrorism (e.g. "of terrorist character") may not serve as bases for the application of serious legal consequences because of a lack of the necessary concreteness and well defined content [47/2003. (X. 27.) AB; 44/2004. (XI. 23.) AB]. On the other hand, the Constitutional Court also emphasizes that protecting the internal order and public security of the country and the police necessitates serving these in an efficient manner [65/2003. (XII. 18.) AB; 9/2004. (III. 30.) AB].

Even according to the opinion of the Constitutional Court, such efficiency is apparently to be supported by legal provisions which otherwise would be unacceptable in the civil sphere. An example of such a provision is the duty to comply with unlawful orders or instructions. The Court ruled in one case that exemptions from the general duty of obedience to law deriving from the essence of the democratic sate and Rule of Law may only be constituted by making possible the issuing and the executing of unlawful orders in the interest of constitutional values [8/2004. (III. 25.) AB]. For example, only the defence of the country is referred by to the decision. On the other hand, another decision of the same Constitutional Court came to the following conclusion: "Protection of public order or public security as constitutionally acknowledged purposes of the state may justify the implementation of law enforcement means and procedures. This necessity is to be determined by the legislation. However, in the course of regulating institutions established for these purposes, positive provisions of the Constitution must be complied with to their full extent. A fundamental expectation of legislation is the observance of the requirements of legal security, clarity and calculability of norms, further keeping in mind the application of the principle of necessity and proportionality related to restricting basic rights, elaborating procedural guarantees, and ensuring the coherence of the norms related to the given institution within the whole system of current legislation."[12]

The duty of the Police is to protect public security. The term "internal order" used in Paragraph (2) of Article 40/A of the Constitution and in Paragraph (1) of Article 1 of the Police Act is a reference to previous state security activities,[13] as, at the time of the comprehensive modification of the Constitution in 1989, the national security services were not separate from police. The fact that there would have been the possibility to make this provision more precise because there were a number of modifications affecting the regulations of the "armed" VIII Chapter of the Constitution is yet another problem. Due to the fact that the police protect public security on the one hand and, on the other hand, they detect and prevent of terrorist acts, one can logically conclude that the Constitution and the Constitutional Court do not recognize the possibility to stray from constitutional requirement, and thus from the primary duty to respect and protect human rights in the area of acting against terrorism. Regardless, it is unthinkable that in the course of performing such activities (detection of terrorist acts) national security services would be entitled to use substantially different means.

It can be concluded that the domestic legal system remains unchanged with regard to the underlying values and basic norms that have existed since the

change of the political regime. The Hungarian system thus, in congruence with international expectations, does not regard the fight against terrorism as an activity in which it is possible to deviate from the constitutional requirements.

ON THE HUNGARIAN POLICE ACT AND NATIONAL SECURITY ACT IN FORCE

Division of competencies

In Hungary, counter-terrorism duties are basically those of the police. The Police organization exercises substantial powers in all three phases (prevention, obstructing and averting, detection and investigation of acts committed). Police may, according to Paragraph (1) of Article 63 of the Police Act in addition to Articles 64 and 69, carry out secret information gathering in order to prevent, detect, and stop terrorist acts and other crimes, and in order to identify and apprehend the offender, to search and determine the whereabouts of a wanted person, to collect evidence and to protect the authorities conducting an investigation and those collaborating with justice. This can be done either with or without a judicial warrant, depending on the character of the intervention.

It should be mentioned that a terrorist act, as it is defined by the Criminal Code, which refers to the activities of all crime prosecuting organs and those performing similar or connected functions, does not only include attacks that are actually committed, nor does the scope of the law cover only the perpetrators of such deeds. Paragraph (4) of Article 261 of the Criminal Code also threatens with punishment those who make preparations for the execution of terrorist acts. A special definition with more serious sanctions relates to any preparatory behaviour contributing to the activities of a terrorist group [Paragraph (5)]. According to Paragraph 6, it is important, from both the perspective prevention and that of detection, that a person who reports an act unknown to the authorities be offered immunity from punishment. The provision that follows [Paragraph (7)] determines the punishment for threatening to commit terrorist acts while Paragraph 8 imposes a duty to report such offences and makes non compliance punishable by the deprivation of liberty.

Criminal procedure legislation has also to be mentioned in this context. The 1973 Code of Criminal Procedure No. I in force until July of 2003 declared, similarly to the present law, the official principles of legality, according to which, once the occurrence of certain legally established conditions is proven, the competent organs had the duty to begin conducting a procedure. However, there is an essential difference between the conditions of the previous legislation and those of the current legislation. Article 12 of the previous piece of legislation made possible commencing the procedure only in case of reasonable suspicion of commission of a criminal offence. On the other hand, Act No. XIX. of 1989, which is in force at present, requires only the establishment of a plain suspicion in order to begin an investigation that is not in reference to particular persons. A reasonable suspicion that is supported by more facts than in the case of plain suspicion is, however, needed, in order to establish a suspect in a case.

As has been previously explained, preparations for a terrorist act or a failure to report knowledge of such preparations can already commence a criminal procedure. In other words, the prevention of terrorism, as it is understood in everyday life, is done to a large extent within criminal procedures and more precisely during the investigation. Hence it is necessary to refer to the role of the Prosecution as this service, according to the Code on Criminal Procedure in force, dominates the investigation by both investigating and ordering investigation.

All these factors make the delineation of the scope of activities of national security services very problematic. One of the few points of orientation is the provision in Paragraph (1) of Article 31 of the National Security Act, according to which national security services do not exercise investigative powers. However, all investigation up to the beginning of a criminal procedure, that is until establishment of suspicion, is also their task. The Office of Intelligence, dealing basically with foreign information gathering, collects information on terrorist organizations outside Hungary, while the National Security Office, which performs constitutional protection functions, detects and averts the terrorist efforts of foreign powers, organisations, or persons corresponding to Paragraph c of Article 5 of the National Security Act. Paragraph i of the same article provides that the National Security Office investigate terrorist acts if the report of the crime has been sent to its office or if their office discovers the perpetration of such an offence. The activities of the military's secret service exist in parallel to those of the National Security Office. The Military Intelligence Office collects data about terrorist organizations that endanger the armed forces (today: the Homeland Defence Force). The Military Security Office, as a military equivalent of the National Security Office, must detect and prevent the terrorist efforts of foreign powers, organisations, or persons in

the area of the Ministry of Defence and the Homeland Defence Force. In addition to this, the Military Security Office also detects terrorist acts within the scope of its activities independent whether they are committed by foreigners or by Hungarian nationals.

The problem is that, based on this explanation, according to the present substantial and procedural provisions, an investigation must be started even in the case of the emergence of a plain suspicion (less than 50% probability) of somebody inviting another person to commit an offence, somebody offering his own participation or somebody undertaking plans to execute such an offence in the future. In such cases there is no longer any basis for national security investigation. The question remains, what kinds of behaviour can be detected beyond these relationships, which are far from the actual execution of a terrorist act? Practically none, as the manifestation of the intention to commit such a crime, which is not punishable with regard to "normal" offences, is hardly imaginable without the presence of a threat as defined in Paragraph (7) of Article 261 of the Criminal Code. Pure thought does not exist in a realm that is accessible to the power of a constitutional democracy.

There is cause for some concern with regard to the hardly conceivable situation, in which there remains a possibility to detect the relationship of the police and secret service tasks prior to an investigation. First of all, we must ask whether it is reasonable at all to designate terrorist investigation as a national security competence within the narrow framework outlined.

In the course of the Parliamentary debates on the National Security Bill the keynote speaker of the ruling government party (the Hungarian Socialist Party), Mr. Lajos Kórozs, reasoned that one of the characteristic features of the fight against terrorism that belongs to the National Security Services' area of competencies is its undercover appearance. Therefore, it is necessary to carry out its detection and prevention through the use of a particular set of means of the services (Session on 24. 10. 1995 of the Parliament).

If this is the case, the provision of the competence police investigation can be questioned. How is it possible to refer this task of paramount importance with regard to the security of the nation and that of individuals to the competence of a police force that is not entitled to use national security means, thus, making the investigation dependent upon on the circumstances of the arrival of a report and which organisation happens to first learn of a terrorist act that is under preparation or that has been committed?

The answer can seem reassuring. As a matter of fact, the particular "set of means of the services" is also accessible to the police. There are no substantial secret means that cannot be applied by the police. At the same time, the organs of the police can start the investigation without delay and they also can use the full scope of the necessary coercive measures. It should also be noted that members of national security services may resort to typical police means and methods except those that pertain to conducting investigations. The law provides, in a rather unusual way, these organizations with the power to arrest, detain, handcuff and even use firearms. What is more, members of national security services, as opposed to police officers, may, for the purpose of prevention, also use these forms of coercion in a manner that eventually leads to the loss of human life.

The Coordination Centre Against Organized Crime (hereafter: Centre) established by the Act No. CXXVI of 2000 is devoted to the harmonisation of the activities of the police with those of the national security services in addition to the coordination of the national security services in relation to each other. According to Paragraph (1), Article 5 of this Act, the cooperating organizations, the police and the national security services, are obliged to immediately forward all of the relevant data that they gather, including that which relates to terrorist acts, to the Centre before taking the decision to start a criminal procedure. Both the sender and the addressee must document forwarding and receiving of data.

In the practice, this means that the fight against terrorism necessitates ensuring that the Centre is informed while detection is simultaneously undertaken. In response to the information that the Centre receives, it examines whether parallel detective work is already happening, and it makes proposals to stop such overlap. As a consequence, it is possible that the analysis and evaluation of data is carried out simultaneously in three or more institutions (the organs conducting detection and the Centre), while, according to the above mentioned provision, an investigation has to be ordered even in case of plain suspicion of preparations.

Based on the decision of the Cabinet for National Security of the Government, another new organ, the Coordinating Committee Against Terrorism, was established in November of 2003 with the task of enhancing the collaboration among national security services and the police.

In my opinion, this kind of division of competence is far from justified. Indeed the overlapping complexity of the coordination is rather dangerous to the efficiency of preventing terrorism. It should be added

that during past decades, there have been no terrorist attacks that could be termed significant, and even the danger of such an offence has yet to be identified.[14] Of course, one cannot, even given these circumstances, justify a failure to prepare for the worst. It can be concluded, though, that one organization would be sufficient in undertaking this task. It would also be preferable to provide this organisation with all of the data in order that it act exclusively in the fields of prevention and detection and in order to bring an end to the currently existing superfluous coordination. A division of competencies between police and national security services, while feasible, is not reasonable in the absence of a general separation of the activities of the police with those of the national security activities. At present such separation exists to such a limited extent that in reality no clear-cut difference separates either the tasks or the methods to be applied.

Undertaking activities to prevent criminal terrorist attacks from being committed or attempted is basically the duty of specially trained units that are maintained by the police. In exceptionally justified cases it is possible to have recourse to the Forces of the Homeland Defence [Paragraph (2) of Article 40/B of the Constitution, Subparagraphs c. and f. of Paragraph (1) of the Article 70 of the Act on National Defence and the Homeland Defence Forces]. As the armed actions against terrorism require special training and preparations, the power to use firearms, which is given to the members of national security services in Subparagraph b of Paragraph (1) of the Article 36 of the National Security Act, may cause concern. In my opinion, it is rather hazardous to encourage the members of national security services, who have not had the slightest training to take such action. In actual fact, members of the national security services could perform that which is expected of them by the law even in absence of this legislation. It should be recalled that the members of the services may carry arms and that the justified (self-) defence clause in Hungarian legislation may be invoked in order to prevent an attack or a danger that directly threatens public interest.

Special powers

Of all the substantial or procedural institutions that can be found in the international practice of regulation, the existence of a large number of them is attributed to, at least in large part, the necessities of the fight against terrorism. These institutions exist, first of all, within the framework of the "war" approach, which puts aside legal guarantees. Legislative provisions emphasizing the principles of necessity and proportionality, however, also institutionalise arrangements in order to ensure that the norms of constitutionality and accepted international rules are not exceeded. The following are specific examples of legal guarantees that are put in check by the "war" approach: indefinite detainment, proscribing certain organisations,[15] expanding powers to use secret means[16] and even the legalization of torture, depending on specific conditions.[17]

First of all, it should be remarked that there is no power or procedural arrangement in the legislation on police and national security services in Hungary that could be used exclusively or predominantly in counter-terrorism activities. This situation reflects the previously mentioned, fact that, while there have been a number of "common" offences that may reasonably be compared to terrorism in their resulting consequences and destruction, no terrorist act of outstanding seriousness has occurred in Hungary. There was a bank robbery resulting in eight deaths and downtown Budapest has also experienced a devastating explosion that killed several people.

These facts, in my opinion, clearly support the conclusion that protection planning has to be approached not with regard to the character of the attack or with regard to its political-ideological determination. Protection planning must rather be approached exclusively with regard to the values that such activities are intended to defend, with special attention paid to the protection of human life, which corresponds to the concept of human security.

As previously mentioned, no provisions expressly adapted to the need of counter-terrorism activities are to be found in the Acts on Police and National Security Services, although the special norms elaborated for fighting organized crime can also be applied to terrorism investigation. For example, one can mention Paragraph (2) of Article 68 of the Police Act which allows information gathering to be undertaken using a simplified process that is different from the general procedure if a delay would cause danger and if the case is related to drug-trafficking, terrorism, unlawful trade in arms, money laundering or organized crime. This kind of arrangement may, of course, be justified. The only question is why the legislature has not provided for these exceptional possibilities of prevention, arrest or detection in case of a "pure" mass murder or the creation of a public danger. The only explanation is that the legislature has not paid due attention to constitutional values and especially to the protection of human life and has instead of focused on other interests.

It should be noted that, according to Paragraph 8 of the Article 137 of the Criminal Code, a criminal organization is a group consisting of at least three persons, organized over a long period of time, acting in coordination with the intentional aim of committing criminal offences that are punishable by five years or more of deprivation of liberty. As a consequence, a terrorist group that is defined as such by a particular provision [Subparagraph b. of Paragraph (9) of Article 261 of the Criminal Code] can, at the same time, be qualified as a criminal organization: Thus, the same means that target organized crime can be used, without further reference, in the course of activities against terrorism. Terrorists who undertake their actions alone or in pairs are an exemption, as they no longer constitute an organisation. However, this is rather rare as detection and prevention necessarily aim at relationships and communication. Thus, the collective preparation for or execution of an offence generally cannot be excluded from this provision.

THE APPROVAL BY THE CONSTITUTIONAL COURT OF THIS PROVISION IS WORRISOME BECAUSE IT LEGITIMATES CAUSE FOR ARREST AND DETENTION THAT LACK THE GUARANTEES OF CRIMINAL PROCEDURE IN ORDER TO SERVE THE GOALS OF CRIME PROSECUTION.

It should also be noted that substantial legal barriers do not obstruct the preventing, detecting and defeating of terrorism as legislators proved to be very generous when shaping competencies of the armed agencies.

In other words, the institutionalisation of specified authorizations for the activities against terrorism were not needed in the Police Act and the National Security Act because these pieces of legislation provide so much power in the entire domain of the protection of public or national security that some of the authorisations appear only as exceptional means to counter terrorism, and in some cases they aren't even permitted under those conditions. For example, we can examine regulations for deprivation of liberty. Article 5 of the European Convention on Human Rights gives an exhaustive list of the conditions, which can serve as bases for the public power to restrict the basic right to personal liberty. The European Court of Human Rights, in implementing the Convention, consequently emphasizes that Subparagraph c of Paragraph 1 of Article 5 may only be invoked as a reason for bringing people to the authorities in the case of a reasonable suspicion but non in the case a plain.[18] On the other hand, Subparagraph b of Paragraph (2) in Article 33 of the Police Act makes it possible for the police to bring people before the authority based only on plain suspicion and to deprive them of their personal liberty for up to 12 hours.

A further problem is the aim of the employment of this kind of arrest and detention. It is obvious that Article 5 of the Convention relates to criminal procedure. However, no criminal procedure against an individual can be initiated in Hungary based on plain suspicion. Indeed, bringing persons before the authority based on plain suspicion serves the efficiency of justice without providing the individuals concerned with their fundamental rights that are guaranteed by the provisions of criminal procedure. Actually, in a number of cases a kind of "calling to account" occurs. "Calling to account" means an interrogation without applying any of the procedural guarantees. This usually occurs when an alibi is verified, but it is also frequent that a person is "called to account" in order to explain the origin of the objects found on him. The specific reason for questioning and the criminal offence being investigated are usually not communicated precisely because the goal, or sometimes the result, of "calling to account" is exploring previously unknown criminal offences. It does not require profound thought to understand that this practice violates the presumption of innocence.[19] Nevertheless, the Supreme Court did not express any criticism when it concluded concerning the evidence taken in a case related to a very serious crime: "In the course of calling to account and data collection defendant I first denied and then acknowledged that he had killed his father, and he also has shown the site where he buried him."[20]

The approval by the Constitutional Court of this provision is worrisome because it legitimates cause for arrest and detention that lack the guarantees of criminal procedure in order to serve the goals of crime prosecution. Among the reasons given for the decision to accept the constitutionality of this procedure, the Constitutional Court even referred to the necessity of establishing the notion of reasonable suspicion for future investigations [65/2003. (XII. 18.) AB].

Article 54 of the 1994 Police Act empowers law enforcement officers to use firearms in a number of situations. A police officer may resort to the use of firearms in the following situations: in order to avert a direct threat to or an attack against a life; in order to avert a direct attack endangering bodily integrity; in order to prevent or to stop the execution of offences that cause public danger such as a terrorist acts or an airplane hijackings; in order to prevent the criminal use of firearms, explosives, or other deadly means; in order to prevent an act aiming at the unlawful seizure of firearms or explosives; in order to avert an armed

attack directed against a facility of outstanding importance for the functioning of the state or for supplying the population with goods; in order to apprehend a perpetrator who intentionally killed someone or to prevent his escape; in order to enforce a police request to put down weapons if the behaviour of the person concerned leads to the suspicion of their using them directly against others; in order to prevent a detainee being freed by violence; in order to avert an attack directed against the police officer's life, bodily integrity or personal freedom.

The Constitutional Court has repealed some of the provisions, which it deemed unconstitutional. The provision that permits the use of deadly force for the apprehension and prevention of escape of a person who has committed an offence against the state or humanity has been repeals, as has been the provision that enables the use of firearms in order to prevent the escape of a detainee or in order to capture him [9/2004. (III. 30.) AB]. However, the goal of apprehending a perpetrator who has intentionally killed someone remains even in the absence of a court decision that would provide a ruling on the guilt of the person targeted. Needless to say, substituting a legal sentence with the knowledge of a shooting police officer is far from respecting the presumption of innocence. It should be pointed out that, in addition to some substantial constitutional concerns, that the provisions largely overlap and a careful analysis can only result in identifying the legal condition to be invoked. This hardly contributes to the efficient and timely police action that is required in terrorist prevention activity.

One can conclude that the police have extraordinary authorizations. While it is true that that the police do not have the possibility to impose indefinite detention, they can nevertheless resort repeatedly to arrests and to detentions that have a maximum time of 8 hours and, in case of prolongation, 12 hours. A lack of regulation with regard to activities that can be undertaken during detention leads to arbitrariness.

The situation with regard to the provisions of the National Security Act is of a similar nature. Paragraph (3) of Article 31 of this piece of legislation gives an itemized list of the rights that may be restricted in the course of performing the duties by the activities of the services. The national security services may accordingly, in compliance with the provisions of the law, restrict the right to personal freedom, to an inviolable of private home, to private secrets and secrets of correspondence, to the protection of personal data and the freedom of information and to the protection of possessions. As the right to assembly and religious freedom are not on the list, the undisturbed practice of these rights is guaranteed by Article 1 of the Law No. II of 1989 and Article 1 of the Law No. IV of 1990 respectively.

Nonetheless, the government has formulated expectations that are incompatible with the guaranteed right to assembly and religious freedom. The home page of the Office of the Prime Minister, for example, lists the obstruction of the gaining of ground by groups and individuals belonging to or sympathising with organizations functioning on the basis of Islamic Fundamentalism as one of the tasks of the National Security Office.[21] It should be known, however, that Fundamentalism is far from being identical with terrorism[22] and the obstruction of gaining ground can hardly be imagined without disturbing of the right to assembly and to the free practice of religion (the former protects informal as well as institutionalised relationships). A portion of the population of Islamic Fundamentalists do not even deal with politics,[23] and thus, the observation of such organizations without further criteria is possible only in violating guarantees to religious freedom. The Yearbook of the National Security Office gives a detailed account of the activities of Muslim communities and organizations in Hungary (not published in the English version of the Yearbook) followed by a statement that these groups, according to the data acquired by the time of publication, have not carried out activities supporting terrorism. Such reference to the previously collected data logically indicates an intention of continue observation. The conclusion itself quite obviously presupposes permanent monitoring of the given groups and individuals by national security services.

National security activities that violate the freedom of religion can, of course, be qualified as an infringement of one of the provisions that can possibly be restricted by national security operations. Thus this practice is not necessarily a failure of regulation. However, two additional norms of the National Security Act must be mentioned here which, when considered in the above discussion, can justify the charges that the legislation is unconstitutional.

One of them, Article 10, stipulates that the Government must control as well as supervise the activities of the services. Within that framework, the Minister in charge is responsible for, among other things, dictating in written form [Subparagraph b. of Paragraph (2) of Article 11.], the tasks of the services for the Directors General in written form and instructing them to satisfy the data needs of the Members of Government. How, then, does the Minister know what kind of danger deserves outstanding attention in

a given period? Indeed, in a constitutional democracy any secret service can at most operate a service that reports, in a very general manner, perceived threats to national security. However, the Commentary on the National Security Act unquestionably declares that in coordinating the network of organizations the predominant role is performed by the Government.[24]

The situation is made even worse by Paragraph (3) of Article 27 of the National Security Act, which requires members of the services to conduct unlawful activities. "If a professional member of the national security agencies is given an instruction to carry out unlawful activities he will be obliged to call the attention of his superior to this fact but he will not be entitled to refuse its execution [except for obviously criminal actions]."

Undertaking unlawful conduct can thus even be the duty of members of the services. Returning to the previous example, while an instruction based on a mistaken confusion between Fundamentalism and terrorism is in itself no criminal offence, the execution of such an instruction has already resulted in the activities of the National Security Office violating the Constitution and the freedom of religion.

CONCLUSIONS

In Paragraph 2 of Chapter I of this study, I quoted the thoughts of the Secretary General of the UNO, according to whom strategies built upon protection of human rights are essential not only in order to confirm our moral standing but also to promote the effectiveness of action. I am strongly convinced that this statement is also supported by the present overview of the Hungarian legislation on police and national security from the perspective of the possibilities of counter-terrorism actions.

At the same time, competencies described together with a high degree of complex of coordination result in violations of basic rights because of the confusion between police and national security powers. In addition, a profound understanding is not necessary to demonstrate that simultaneous analysis and evaluation of data flow by different organs impedes efficient activity despite (and even partly because of) the duplicated coordination.

The legal framework designed for the police force, which is also to be used in the fight against terrorism, does not fit with the values of the Constitution and those of international expectations. Because of this, the real protection of public security that the people need, one that would reflect the constitutional may be endangered (e.g. by giving priority to less important cases related to organized crime rather than data collection with the aim of saving human lives). Such practice also undermines efficiency in purely professional terms.

National security services are in a similar situation. An arbitrary extension of the ability to restrict rights, combined with the Government's power to issue instructions, has yielded the devotion of large amounts of energy to the observation of individuals and communities who do not support terrorism even according to the Yearbook of the National Security Office.

The Constitution enshrines the most important values of public power. In addition to that, it also serves as a compass in the course of the interpretation and the implementation of a very complex system of law. Precisely because of this, the deviation from the logic and provisions of basic law cannot yield professional success. On the contrary, after examining the quantitative or qualitative signs of terrorism in combination with the logic of public power functions, one would not find cause for the institutionalisation of "exceptionalism" (in which case, according to experience, the "exceptional" becomes a general rule).

As a result, the arsenal of the fight against terrorism must be derived from the concept of human security. The respectful protection and promotion of constitutional rights is not an obstacle but a goal of security policy including measures taken to protect against the threat of terrorism.

NOTES

1. Cindy C. COMBS, *Terrorism in the Twenty-First Century.* Upper Saddle River: Prentice Hall, 2003, pp. 236–237; HADNAGY Imre, "A háború és a terrorizmus. Változnake a háborúval kapcsolatos elméletek – korunk egyik legnagyobb kihívása, a terrorizmus tükrében?" [War and Terrorism: Do the Theories Related to War Change in the Mirror of one of the Biggest Contemporary Challenges — Terrorism?] *Hadtudomány,* Vol. XV. No. 1., March 2005, pp. 16–28.
2. Tonay BUNYAN, *The War on Freedom and Democracy tatewatch.* http://www.statewatch.org/new/2002/sep /analysis13.htm; Conor A. GEARTY, "Terrorism and Human Rights." *European Human Rights Law Review,* 1/2005, pp. 1–6; MIKLÓSI Zoltán, "A terrorizmus elleni 'háború' és az emberi jogok" [The "War" Against Terrorism and Human Rights]. *Fundamentum,* 3/2004, pp. 43–49; Carl TOBIAS, "Punishment and the War on Terrorism." *University of Pennsylvania Journal of Constitutional Law,* May 2004, pp. 1116–1158.
3. HADNAGY, *Op. cit.*, p. 26.

4. Alan M. DERSHOWITZ, *Why Terrorism Works*. New Haven – London: Yale University Press, pp. 131–163.
5. *Commission on Human Security*, 2003, Human Security Now, New York: UN.
6. Gerd OBERLEITNER, "Human Security and Human Rights." *European Training Centre for Human Rights and Democracy, Occasional Papers*, No. 8. 2002.
7. Conor A. GEARTY, "Terrorism and Human Rights." *European Human Rights Law Review*, 1/2005, p. 4.
8. MÉSZÁROS Margit, "Az Európai Biztonsági Charta" [The European Charter on Security]. *Hadtudomány*, Vol. X. No. 3., July,1999, pp. 114–120.
9. http://www.upi-fiia.fi/tilaisuudet/2004/Solana_puhe.htm.
10. See, e.g., Ireland v. United Kingdom, ECHR (1978), Series A, No. 25.; A (FC) and others (FC) v. Secretary of State for the Home Department, X (FC) and another (FC) v. Secretary of State for the Home Department, 2004 December 16, House of Lords, United Kingdom; Colin WARBRICK, "The European Response to Terrorism in an Age of Human Rights." *The European Journal of International Law*, November 2004, pp. 989–1018.
11. See, e.g., Jose Padilla v. George Bush, Donald Rumsfeld, et al. (U.S. Dist. Court, Southern Dist. Of New York – Case No. 02-4445); Bethke ELSHTAIN, *Just War Against Terror*. New York: Basic Books, 2003.
12. 47/2003 (X.27.) AB.
13. *A rendszerváltás forgatókönyve. Kerekasztal-tárgyalások 1989-ben* [Scenario of the Change of Political System – Roundtable Talks in 1989] (eds. KALMÁR Melinda, RÉVÉSZ Béla). Budapest: Új Mandátum, pp. 425–426; BALLA Zoltán, "A belső rend és a közrend fogalma a jogszabályokban" [Concept of Internal Order and Public Order in Legislation]. *Belügyi Szemle*, 2/2000, pp. 99–103.
14. See, *National Security Yearbook 2004*, http://www.nbh.hu/evk2004/04-0041.htm#2.
15. Brice DICKSON, "Law Versus Terrorism. Can Law Win?" *European Human Rights Law Review*, 1/2005, pp. 11–28.
16. Peter CHALK, William ROSENAU, *Confronting The "Enemy Within": Security Intelligence, the Police, and Counterterrorism in Four Democracies*. Santa Monica: RAND Corporation, 2004.
17. DERSHOWITZ, *Op. cit.*, pp. 131–163.
18. See, e.g. Fox, Campbell and Hartley v. United Kingdom, Series A. No. 182.
19. John PARRY, "Constitutional Interpretation and Coercive Interrogation after Chavez v. Martinez." *University of Pittsburgh School of Law Working Paper Series*, 2/2004.
20. BH 2000. 7.
21. http://www.nemzetbiztonsag.hu/visszatekintes.php.
22. ROSTOVÁNYI Zsolt, *Az iszlám a 21. század küszöbén* [Islam on the Threshold of the 21. Century]. Budapest: Aula Kiadó, 1998.
23. Angel M. RABASA, "Overview." In Angel M. RABASA, Cheryl BENARD, Peter CHALK, Christine C. FAIR, Theodore KARASIK, Rollie LAL, Ian LESSER, David THALER, *The Muslim World After 9/11*. Santa Monica: RAND Corporation, p. 5.
24. Dr. DEZSŐ Lajos, Dr. HAJAS Gábor, *A nemzetbiztonsági tevékenységre vonatkozó jogszabályok – kommentár a gyakorlat számára* [Legislation on National Security Activities — A Commentary for Practice]. Budapest: Budapest, HVG–ORAC, pp. 138–139.