Parliamentary Assembly
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COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

Recommendation 1402 (1999)[1]

Control of internal security services in council of Europe member states

Parliamentary Assembly

1. The Assembly recognises that internal security services perform a valuable service to democratic societies in protecting national security and the free order of the democratic state.

2. However, the Assembly is concerned that member countries' internal security services often put the interests of what they perceive as those of national security and their country above respect for the rights of the individual. Since, in addition, internal security services are often inadequately controlled, there is a high risk of abuse of power and violations of human rights, unless legislative and constitutional safeguards are provided.

3. The Assembly finds this situation potentially dangerous. While internal security services should be empowered to fulfil their legitimate objective of protecting national security and the free order of a democratic state against clear and present dangers, they should not be given a free hand to violate fundamental rights and freedoms.

4. Instead, a careful balance should be struck between the right of a democratic society to national security and individual human rights. Some human rights (such as the right to be protected from torture or inhuman treatment) are absolute, and should never be interfered with by state authorities, including internal security services. In other cases, however, which right should have priority – the individual human right or the right of a democratic society to national security – will have to be established using the principles of proportionality and legality, as laid down in the European Convention on Human Rights.

5. The risk of abuse of powers by internal security services, and thus the risk of serious human rights violations, rises when internal security services are organised in a specific fashion, when they wield certain powers such as preventive and enforcement methods which involve forcible means (for example the power to search private property, run criminal investigations, arrest and detain), when they are inadequately controlled (by the executive, legislative and the judiciary), and also when there are too many of them.

6. The Assembly thus proposes that internal security services should not be allowed to run criminal investigations, arrest or detain people, nor should they be involved in the fight against organised crime, except in very specific cases, when organised crime poses a clear danger to the free order of a democratic state. Any interference of operational activities of internal security services with the exercise of human rights and fundamental freedoms as protected in the European Convention on Human Rights should be authorised by law, and preferably by a judge, before the activity is carried out. Effective democratic control of the internal security services, both a priori and ex post facto, by all three branches of power, is especially vital in this regard.

7. The Assembly considers it necessary that each individual country provide efficiently for its own internal security requirements while ensuring proper avenues of control in conformity with a uniform democratic standard. This common standard should ensure that internal security services act only in the national interest, fully respecting fundamental freedoms, and cannot be used as a means of oppression or undue pressure.

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1. Assembly debate on 26 April 1999 (9th Sitting) (see Doc. 8301, report of the Committee on Legal Affairs and Human Rights, rapporteur: Mr Frunda). Text adopted by the Assembly on 26 April 1999 (9th Sitting).

8. Thus, the Assembly recommends that the Committee of Ministers draw up a framework convention on internal security services incorporating the guidelines below which form an integral part of this recommendation.

Guidelines

A. As regards the organisation of internal security services

1. All internal security services must be organised and must operate on a statutory basis, that is on the basis of national laws which have gone through the normal law-making process in parliament, and which are completely public.

2. The sole task of the internal security services must be to protect national security. Protecting national security is defined as combating clear and present dangers to the democratic order of the state and its society. Economic objectives, or the fight against organised crime per se, should not be extended to the internal security services. They should only deal with economic objectives or organised crime when they present a clear and present danger to national security.

3. The executive must not be allowed to extend objectives to the internal security services. These objectives should instead be laid down by law, to be interpreted by the judiciary in case of conflicting interpretations (and not by successive governments). Internal security services should not be used as a political tool to oppress political parties, national minorities, religious groups or other particular groups of the population.

4. Internal security services should preferably not be organised within a military structure. Nor should civilian security services be organised in a military or semi-military way.

5. Member states should not resort to non-governmental financing sources to support their internal security services, but finance them exclusively from the state budget. The budgets submitted to parliament for approval should be detailed and explicit.

B. As regards the operational activities of internal security services

1. Internal security services must respect the European Convention on Human Rights.

2. Any interference by operational activities of internal security services with the European Convention on Human Rights must be authorised by law. Telephone tapping, mechanical or technical, aural and visual surveillance, and other operational measures carrying a high risk of interference with the rights of the individual should be subject to special a priori authorisations by the judiciary. Legislation should normally establish parameters which are to be taken into consideration by judges or magistrates, who should be available for prior authorisations twenty-four hours a day so that the demand for authorisation can be processed within a few hours (maximum), before they authorise operational activities such as house searches. These parameters should include as minimum requirements for authorisation that:

   a. there is probable cause for belief that an individual is committing, has committed, or is about to commit an offence;

   b. there is probable cause for belief that particular communications or specific proof concerning that offence will be obtained through the proposed interception or house searches, or that (in the case of arrest) a crime can thus be prevented;

   c. normal investigative procedures have been attempted but have failed or appear unlikely to succeed or be too dangerous. The authorisation to undertake this kind of operative activity should be time-limited (to a maximum of three months). Once observation or wire-tapping has ended, the person concerned should be informed of the measure taken.

3. Internal security services should not be authorised to carry out law-enforcement tasks such as criminal investigations, arrests, or detention. Due to the high risk of abuse of these powers, and to avoid duplication of traditional police activities, such powers should be exclusive to other law-enforcement agencies.

C. As regards effective democratic control of the internal security services

1. The executive should exercise ex post facto control of the activities of the internal security services, for example by obliging the internal security services to draw up and submit annual detailed reports on their activities. One minister should be assigned the political responsibility for controlling and

supervising internal security services, and his office should have full access in order to make possible effective day-to-day control. The minister should address an annual report to parliament on the activities of internal security services.

2. The legislature should pass clear and adequate laws putting the internal security services on a statutory basis, regulating which kind of operational activities carrying a high risk of violation of individual rights may be used in which circumstances, and providing for adequate safeguards against abuse. It should also strictly control the services' budget, inter alia by obliging these services to submit to it annual detailed reports on how their budget is used, and should set up special select control committees.

3. The judiciary should be authorised to exercise extensive a priori and ex post facto control, including prior authorisation to carry out certain activities with a high potential to infringe upon human rights. The overriding principle for ex post facto control should be that persons who feel that their rights have been violated by acts (or omissions) of security organs should in general be able to seek redress before courts of law or other judicial bodies. These 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. Thus, the court should have the right to determine whether there was undue harassment of the individual or abuse of discretionary administrative powers in his or her regard.

4. Other bodies (for example ombudsmen and data protection commissioners) should be allowed to exercise ex post facto control of the security services on a case-by-case basis.

5. Individuals should be given a general right of access to information gathered and stored by the internal security service(s), with exceptions to this right in the interest of national security clearly defined by law. It would also be desirable that all disputes concerning an internal security service's power to bar disclosure of information be subject to judicial review.