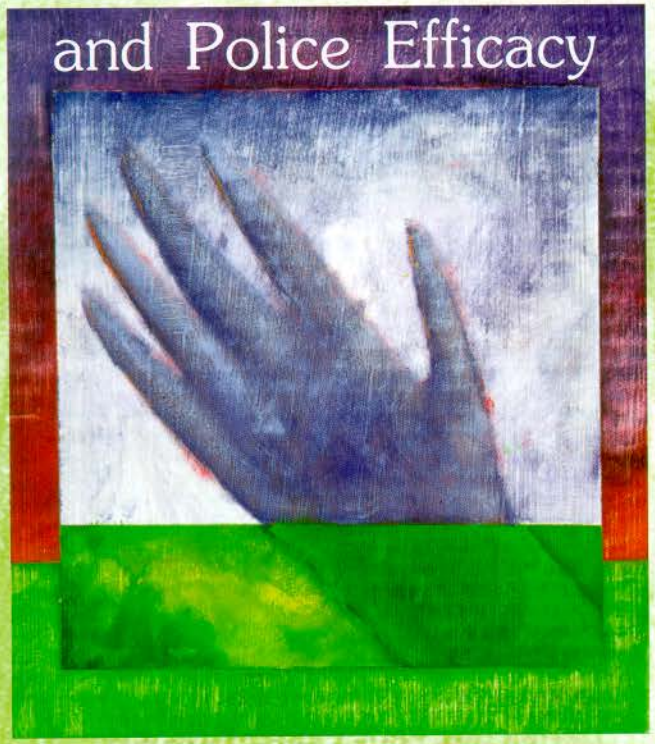
Inspecção-Geral da Administração Interna

COMMUNICATIONS

Human Rights and Police Efficacy



Police Oversight Systems

International Seminar

Lisbon – Portugal

November 1998

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FOREWORD

Starting from zero, Portugal implemented, in February of 1996, the Office of the Inspector General of Internal Affairs (IGAI), with the purpose of exercising an external and efficient control on police activity in view of the defence of the fundamental rights of the citizens, the human rights, and the qualitative improvement in the relationship "policeman / citizen" in the framework of the Portuguese Democratic State based on the rule of law.

After the development of the process, IGAI included in its Plan of Activities for the year of 1998 the realisation of an International Seminar with the theme "Human Rights and Police Efficacy. Systems of Control of Police Activity".

That Seminar was held in Lisbon, on November 5 – 7, 1998, with the active participation of institutional and non institutional, regional and international persons and entities and with experts and thinkers from the European and American Continents.

It counted with a heavy participation of elements coming from the Portuguese security forces and their respective schools.

The high level of the interventions that were the object of debate and the purpose of allowing others to know what was transmitted there, forced upon us the obligation and gave us the great pleasure and pride of publishing, in the Portuguese and English languages, those intervention whose merit derives from the texts themselves.

A synthesis of everything that happened can only be made with a thank you very much to those who have participated and presented their interventions.

Now that we are celebrating the 50th anniversary of the Universal Declaration of Human Rights it is very rewarding to be able to publish this book that deals with the external control of police activity.

The way the police forces behave is in itself a serious token of the maturity of a democracy and, for that same reason, of the respect for the human rights, for man's rights in concrete with an identity and a face.

Of the respect for dignity and freedom.

To all of you, my most sincere gratitude.

One last word to thank those who made possible this enterprise and, if you allow me, to the two pillars of its execution, Mr. Alberto Augusto de Oliveira, then Senior Inspector at the IGAI and now Assistant Attorney General and member of the

Consultative Board of the Office of the Attorney General, and Mr. Augusto José Calado, Inspector at the IGAI.

Lisboa, 30 de Junho de 1999

O Inspector Geral,

António Henrique Rodrigues Maximiano

Jorge Paulo Sacadura Almeida Coelho | Minister of Internal Affairs

The Inspection-General of the Interior has taken the initiative of organising this International Seminar on Human Rights and Police Efficacy. This is an initiative that I wish to greet, in the name of H.E. the Prime Minister and my own, for its undoubtedly opportune and actual theme, in the context of what nowadays are the concerns which emerge from public debate, both in the Portuguese and the European society.

I also wish to take this opportunity to greet the illustrious foreign specialists who kindly accepted the invitation addressed to them for sharing with us their knowledge and experiences on such a relevant matter, thanking them for their availability and interest.

This year is marked by the celebration of the 50th anniversary of the enactment of the Universal Declaration on Human Rights, in the United Nations Organisation. This declaration was born of the dream of the universality of the humanist ideal - a dream that is yet far from becoming a reality- in circumstances perhaps beyond repetition. The truth is that ever since that time the theme of human rights has never lost the central place it has secured within the political discourse, and, more importantly, in the daily life of all organised political societies.

We may say that human rights are much in the order of the day. In the sense that they are permanently present in the discourse of politicians, in the articles of reporters, in the centre of young people’s attention. But above all, we can say that they have seeped profoundly into a new way of being in society.

And, alas, this is fortunately so. It signifies that civil society has taken the theme of human rights as it very own patrimony, unfurling it, as it would a banner,

discussing it, developing it and extrapolating from it those norms that are positive for Life. Enriching it, in other words.

On this occasion, it is my duty to underline the extraordinarily important role that the non-governmental organisations, in Portugal and all over the World, have assumed for the discussion of this theme, through a militant civic attitude and in the name of those rights and of universality.

Nowadays, in the society we make part of, the so-called human rights are no longer restricted to the pious casting they had in the Universal Declaration of the Rights of Man. An extensive panoply of international charters, declarations, international pacts and conventions, on the Rights of Children, on the suppression of discrimination against Women, on Economic, Social, Cultural, Civil and Political Rights, on a world-wide or regional scope- as is the case of our European Convention of the Rights of Man- have given this theme a material breath which was unimaginable 50 years ago.

And yet this is not the last great qualitative alteration that we are able to observe in the process of the rising awareness of the citizens as the claimants of human rights.

Two other alterations are emerging, as important as the one we observed in the 50's and 60's with the broadening of the material scope of the concept of human rights: the conscience of the *erga omnes* nature of human rights and the conscience that to each right corresponds a symmetrical duty.

Firstly, human rights stopped being understood as mere judicial instruments that limited the action of the Government vis-à-vis its citizens, and came to be the foundation for the demand of a positive fulfilment of duties on the part of the public powers. Nowadays they are understood as the judicial revelation of their condition of social actors, both in their quality of subjects and fellow citizens, in a catalogue of minimum rights whose respect is demanded from all the subjects, collective and individual, public and private.

Each citizen is simultaneously an active and a passive subject of human rights, to the extent that, because he is entitled to them, they also oblige him; by demanding their observance, he imposes upon himself the duty of observing them. By demanding the State to guarantee them, he is investing upon the State the power-duty to compel him to respect them.

It is in this new dimension that it is important to measure the perspective of the control systems pertaining the State in general and, in what concerns this

Seminar, of the police in particular. A control that – allow me to put forth a conclusion without pretending to anticipate myself to your travails - can not be exclusively of the States, but, firstly and above all, of the citizens.

What is being talked about nowadays is of the rights – and duties - of the citizens. Of the behaviours that socialised Man must adopt in order to live peacefully with and in his community, and of what he can expect of it and of the public powers that it institutes in a democratic society and whose members of government it chooses and invests with authority. The relationship that thus emerges is, to a large extent, a relation with the State, in what concerns the security and the guarantee of its individual rights but which at the same time pertains, as we saw, to all the other citizens.

In a State of democratic rights such as ours, it is the law and only the law which sets out the measure - meant to be balanced – of the inevitable compression of a total and full fruition of individual rights in the hope of guaranteeing the observance of rules that make coexistence possible and allow society to function such as we have conceived and will it to be.

In other words, the instruments that guarantee freedom and fundamental rights, such as police measures and others, are always amputations – which are absolutely necessary - but are still amputations of the individual freedom of the citizens. The fair balance between these, which materialises in the greater or smaller resources for the research and repression of deviant or damaging behaviours (suffice it to take a look at the most recent debates on the measurement of penalties, the special powers of investigation such as the breaking of secrets, or the electronic measures of surveillance and control of spaces and activities, among others) - this fair balance we were saying, is dictated to us by law. And thus the debate should only occur within these boudoirs.

In terms of our Constitution (as, for that matter, in the dogmatic concept adopted by democratic societies such as the one resulting from Resolution 690 (79) of the Parliamentary Assembly of the Council of Europe), police activity has as its only objective the defence of legality and the safety of the citizens, which is an objective it pursues in the exact terms and limits of the law. The police abide by the law and have it obeyed through the means and in such a way as the law determines. And in a State of democratic rights, based upon popular sovereignty and upon the respect and guarantee of the fulfilment of fundamental rights and guarantees (article 2nd of the Constitution), it cannot but be at the service of the people and their rights.

If this is so, and I understand it is, then human rights or the rights of citizens are not opposed to nor become an obstacle to police efficacy, because to talk of the former is to talk of the latter, and vice-versa. And in terms of practical action, if indeed human rights and police efficacy are not a same reality, it is important to remark that between them there does not exist an inversely proportionate relation, but a direct one.

As a matter of fact, disrespect of the right of a citizen on the part of the police is a violation of the law which is of the police's competence to obey and make obey, and in that measure it constitutes a double inefficacy on the part of police behaviour. *On the contrary*, the greater the efficacy of the police is, the better guaranteed should the rights of those citizens served by the police be.

Ladies and Gentlemen,

The Portuguese Government has not exempted itself from immersing these principles into its Program and translating them into political objectives and measures in the area of Justice and Administration of the Interior that we have striven to accomplish through our work, since October 1995.

To combat crime by eradicating the factors that propitiate insecurity and effectively repressing criminal conduct; to promote citizenship by discouraging the criminal paths taken up by some youngsters, are tasks that are not exhausted within the temporal framework of a legislature, but which we did not wish to postpone. These are tasks that concern each one of us and that demand a multi-sectorial vision.

We all know that delinquency is profoundly related to economic, educational and living conditions as well as to the opportunities offered to the most underprivileged fringes of the population. It is therefore important to act in favour of improving the ordering and the economic conditions and of assistance for all the community, with special concern to the most needy sectors.

The Government, and this must be affirmed, has not forgotten and has made a great effort to act in these areas without, at the same time, disregarding the promotion of safety for all the citizens that live in our Country, with a scrupulous and intransigent respect for the legally guaranteed rights of all.

This can be achieved, and is gradually being achieved, in what concerns the security forces and services, which act in four currents:

The first current refers to the reinforcement of the technological, material and human resources that the police have access to, including here the important component of training, which is meant to be specialised, up to date and permanent, of all police agents. In this domain we have registered many significant advances which allow us to talk about a cycle of modernity without precedent within the Portuguese Security Forces;

A second current which consecrates the reformulation of the organisation, structure and statute of policemen and police agents, adapting the ones and the others to the new social, technological and conceptual realities of modern society. And even making that adaptability flexible to the constant mutations that life experiences in modern times in such a way that policemen are not surpassed by it nor that agents are made to feel like second-class citizens from whom duties are demanded and rights never recognised.

The reinforcement of the institutional control of the legality of the police agent's action constitutes the third current. This has been achieved both through a growth of internal demands and through the permanent action of the Inspection-General of the Interior, that has firmly but also pedagogically and constructively played a vital role in the consolidation of Security Forces that are both modern and increasingly at the service of all citizens

In this domain, I wish to underline and share with you a great satisfaction for the improvement that we have registered in the last few years in terms of a police performance with a continued decrease in the number of cases of reputed abuse of authority, mistreatment and police violence. The years 1997 and 1998 demonstrated clearly that we are headed the right way. We shall be demanding, because we understand that the professional officials of the Security Forces must be professionals in what concerns civics and the respect of rights, freedom and guarantees of the people.

We are, therefore, on the right path, but nevertheless certain that there is much to be done and that much needs to be improved.

Lastly, the fourth current speaks about the implementation of a police policy that allows for the creation of ties of trust and mutual knowledge between the police and the citizens and what is known as the live forces of the communities in which they act. Each police agent must know and be known by the residents, by the economic agents, by the community, by the representatives of the population and even by the marginalised citizens that live in the area he patrols. The policeman

must understand reality in depth, he must know the concerns and hopes of the populations he serves and these must know and trust the actions and efforts the police agents carry out.

The efforts that are being carried out in order to stimulate the above shall take into consideration the existence of the recently created Municipal Security Councils, mainly in relation to the objectives they pursue, and for the development the principle of contract agreements.

This is an innovative concept related to the security of the populations in Portugal. It is demanding at the methodological level and rigorous in what concerns the fulfilment of all parties, particularly the local governments, the security forces, the live forces of the community and the groups of citizens. The results, which have already been obtained in several countries of the European Union, make us feel optimistic. What we are talking about here is of putting into practice a new culture of security which may be shared among all in the name of peace for each and everyone of us, without subverting the responsibility of each one of the partners.

I am personally convinced that the efforts of approximation of the police to the citizens via the adoption of policies of proximity and decentralisation shall translate into - as proximity and decentralisation always translates in the State apparatus -, more democracy and more citizenship conscience. I am addressing you about a new culture of responsibility and civility that must be progressively imposed.

Because, let us have no illusions, police efficacy and the guarantee of the rights of the citizen by the police can only develop and become perfected through the informed vigilance and control of the citizens. Let us not expect from the State more that the State is capable of accomplishing. Let us not demand from it efficacy at any price - translated into statistical numbers - and at the same time demand scrupulous respect for the quality of those results or the irreproachable observance of procedures when, in fact, the ones and the others collide in daily practice.

The key to this apparent conflict of criteria resides in the conscious, responsible and interested participation of an organised and active civil society in the problem of security and of the combat against the devious manifestations of social behaviour, in co-operation with the structures of the Public Administration, through the Municipal Security Councils and other forms of participation which collaborate with the Security Forces.

Ladies and Gentlemen,

In my capacity as Minister of the Internal Affairs I want to make very it clear that I am confident in regards to the performance of the men and women who make up the National Republican Guard and the Security Police, who strictly abide to the principles to which I have already referred to and who work in favour of the security and peace of all citizens.

I also want to extol the fundamental role that is being played by the Inspection-General of Internal Affairs in order to guarantee the control and fulfilment of the law, aimed at protecting the rights and legitimate interests of the citizens and safeguarding public interest and the reintegration of legality that may have been violated. Of the work that has been carried out, there are results that speak for themselves.

Lastly, I wish to tell you that the security policy of the Government I belong to shall not see its investment in the cycle of modernity slow down as is clear from the Budget proposal presented for 1999.

We greet and encourage a culture of closeness of police service, betting on the prevention and firmness of police action.

We defend the respect for the safeguard of the rights, freedom and guarantees of the citizens with intransigence.

We bet on the efficacy of police action, without authoritarism but with determination.

We shall proceed with equal determination on the path we have come to tread in the certainty and with the full conscience of all we have yet to accomplish, but also with the clear notion of the improvements carried out in the last few years.

Lastly, a word of thanks to all the participants, and in particular to our guests from abroad, in the hope that, in spite the intense work of this Seminar, you may have some time to enjoy the beauty of this marvellous city, Lisbon.

Jorge Manuel Moura Loureiro Miranda

Professor of Constitucional Law

- Chairman of the Board of Directors of the Faculty of Law, University of Lisbon

"FONDAMENTAL RIGHTS AND POLICE" *

It was for me a great honour to receive the invitation to speak at this opening session of the seminar on human rights and police efficacy; and also a great responsibility on account of the sensitiveness of the subject and the quality of the audience which I am going to address.

An honour, a responsibility and, at the same time, a great satisfaction to see – I would almost say *at last* – the highest authorities in Security and Police in Portugal worried about the fundamental rights, about the respect for those rights and their safeguard. It is a good sign that the democratic civic culture is also making progresses in this field and it is a happy coincidence that this event is taking place on the eve of the 50th anniversary of the Universal Declaration of Human Rights and the 25th anniversary of the Revolution of 25 April.

1. Although it would be inadequate or impossible to make here an historical digression (or historical-comparative), I can not prevent myself from starting with a reference to some cornerstones that, for the last 200 years, have led to the present situation.

First of all, the transition from the absolute State to the constitutional State, the representative State or the State based on the rule of law; afterwards, the alteration of the principle of legality and the emergence of the principle of

* Translation of the Portuguese original text made by Maria da Conceição Santos, MA, expert translator at the Office of the Inspector General of Internal Affairs.

constitutionality; then, the changing of the relations between Constitution and law and between fundamental rights and law. Only with such a background may we understand the meaning of police, either as a problem or as a solution.

The absolute State, dominant in Europe since the XVI century up to the end of the XVIII century and beginning of the XIX century, is that in which, as we all know, the maximum concentration of power is in the King's hands and consequently the King's will is the law and the legal rules which define power are scanty, vague, incomplete and very seldom in written form. In its final phase, called "Enlightened Despotism", it is also referred to as "Police State" (the State being then considered as an association for the pursuit of public interest and the Monarch, its organ or highest official, entrusted with full liberty of means to achieve that public interest).

(This meaning of *police*, very broad and generic – very much nearer, in a literary sense, to the Greek etymological root *Polis* –, has nothing to do with the meaning nowadays adopted: the "Intendência-Geral de Polícia" in Pina Manique's time, for instance, went far beyond public security. However, such as, sometimes, the police in the present days, it appeared as belligerent in relation to fundamental rights.)

The liberal revolutions opened the way to the constitutional State, the representative State or the State based on the rule of law: constitutional State, or a State based on a Constitution as a systematic arrangement, meant to regulate both its organisation and the relationships with the citizens; representative State, because the rulers' legitimacy derives from the fact that they are elected or considered as representatives of the community; State based on the rule of law, because the principle of legality (whether it is the simple formal legality or the conformity to material values) becomes a basic principle, and the juridical separation of powers is established as a safeguard of freedom.

In the meantime, the principle of legality is progressively broadening. According to a known formula, we are passing from a stadium in which the only aim is the non contradiction of the acts of the Administration with the law, the mere compatibility, into another in which the adequacy to the substance and the purposes of the law, the conformity, is requested. The analysis of the kinds of acts and the vicissitudes which may infect them, the extension of the field of incumbencies of the public entities and the multiplication of the confrontations with rights and interests of the citizens determined the development of the contentious and non contentious means of guarantee of the legality and of those rights and interests.

From the Constitution, as the legal statute of the State, the Fundamental Law, the law of all laws, it ensues, by logical postulate, the necessary subordination of all acts of the public powers to its rules. In Europe, however, people would be aware of the principle of constitutionality much more later (for reasons which would be boring to mention here) than in the United States: if diffuse control appears, in practice, at the end of last century and its consecration is present for the first time in our Constitution of 1911, specific mechanisms were only established by the Austrian Constitution of 1920 and the vogue of constitutional courts would appear in these last decades. And it is a relatively recent phenomenon the consideration that the principle is not only binding on the legislator but also on all organs and agents of the State, including those of the Administration and, consequently, those of the police forces.

For many years, the prevailing conception was that the constitutional rules, specially those concerning the fundamental rights, had as their addressees, or main addressees, the legislative organs and that those rights were in accordance with the law, lacking *interpositio legislatoris* to become effective. With the German Federal Constitution of 1949 and with successive Constitutions, among which is our Constitution of 1976, we are aware of what I have been calling the Copernican revolution of public law: from now on, the constitutional rules are applied, directly and immediately, in the situations of life, independently of the law, outside the law or even against the law. And, as an author says, it is no longer the fundamental rights that move in the framework of the law, but rather the law that must move in the framework of the fundamental rights.

2. I say *fundamental rights* and not *human rights*, if you allow me the emphasis.

The expression *human rights* seems to me to walk away (notwithstanding its wide spread use during the last years, by North American influence): *the rights are, all of them, human rights*, there are no rights (at least in the legal field) which concern others than human beings; but, on the other hand, there were totalitarian regimes in our century which have identified those rights with the human species or humankind and they even went to the point of sacrificing, in the name of that species, of the race considered as the superior one, or the ideological aims of humankind, millions and millions of men and women.

The expression fundamental rights - besides, the one which was adopted by our constitutional text and many others -, on the contrary, withdraws any such

mistake, makes clear their relationship with the Fundamental Law, the Constitution, and allows their distinction from the other rights.

3. Repeating a formula that I have been adopting for a long time, for human rights I understand the rights or subjective juridical positions of persons, either individually or institutionally considered, which are based on the Constitution, whether it is a formal or a material Constitution – thus, *fundamental rights in a formal sense and fundamental rights in a material sense*.

This ambivalent notion – because the two senses may be or ought to be non coincidental – is intended to be susceptible to allow the study of several juridical systems without deviating the correspondence of the conceptions of fundamental rights from the legal ideas, the political regimes and the ideologies. Besides, it covers several categories of rights in what concerns the coverage, in what concerns the object or content and in what concerns the structure and it includes true and proper subjective rights, expectations, aims and, maybe even, legitimate interests.

And it necessarily implies two secure marks. There are no fundamental rights without the acknowledgement of a sphere that is specific to persons, more or less wide, opposite to the political power; there are no fundamental rights in a totalitarian State or, at least, in a complete totalitarian one. On the other hand, there are no true fundamental rights if the persons do not have an immediate relationship with the power, enjoying a common statute, and are not separated by reason of groups or conditions to which they belong; there are no fundamental rights without State or, at least, without an integrated political community.

4. It is not difficult to apprehend and accept the formal concept of fundamental rights. It is not difficult to apprehend it, in the view of the formal sense of the Constitution. And because *a priori* there seems to be no justification to separate any precept of the formal Constitution from the material Constitution – since that precept, even when it apparently has no constitutional relevance, is a part of the whole and is subjected to the interpretation which may be done or ought to have been done in the perspective of the system and, if it receives the influx of other provisions and principles, it also counts to the systematic sense that falls upon other precepts and principles - we must understand as *fundamental* right all the subjective juridical position of persons, as long as foreseen by the *Fundamental Law*.

Participating, by means of the formal Constitution, in the very material Constitution, such a subjective juridical position is subjected, only because it is foreseen by the formal Constitution, to the protection connected to this later, namely in what concerns the guarantee of constitutionality and revision. It is unconstitutional any law which violates it and only through the mechanism of revision (whatever the adopted system of constitutional revision) may it be eliminated or have its content essentially modified.

On the other hand, some doubts may arise in relation to the concept of fundamental rights in a material sense, since its neutrality is supposed to be equivalent to a positivism which is blind to the permanent values of the human being and since the variation of conceptions it takes into account may lead to a relativism without any safe support.

To admit that fundamental rights would be, in each juridical order, those rights that their Constitution, the expression of a certain and determined political regime, would define as such would be the same as to admit the non consecration, the insufficient consecration or the repeated violations of rights such as the right to life, the freedom of convictions or the participation in public life only because they have a minor or despicable importance to a certain political regime; and the experience, both of the Europe of the 30s and 40s of this century as of other continents, would be there to show us the dangers deriving from the way of seeing things.

I think that, for several reasons, the doubts and objections have no grounds.

As a matter of fact, precisely because fundamental rights may be considered *prima facie* as rights which are inherent to the very notion of person, as basic rights of the person, as the rights which constitute the juridical base of human life in its present level of dignity, as the main basis of the juridical situation of each person, they depend on the political, social and economic philosophies and on the circumstances of each time and place.

I do not rule out – on the contrary – the appeal to the natural Law, the appeal to the value and dignity of the human being, to the rights deriving from men's nature or the nature of the Law. But that appeal is not enough to elucidate the constitutional problematic of the fundamental rights since the scope of those rights goes far beyond the grounding inherent to the natural Law. Both in the XIX century as, mainly, in the XX century, the rights considered as fundamental are so broad and numerous that they could not converge (or directly converge), all of them, on the nature and dignity of the human being. Only some of them (or the essential content

of most of them) are imposed by natural Law; not, certainly – no matter how important they are – the right to broadcasting time (article 40 of the Portuguese Constitution) or the right to *actio popularis* (article 52, paragraph 3) or the rights of the workers' committees (article 54, paragraph 5).

Besides, the material concept of fundamental rights does not deal, pure and simply, with rights that are declared, established, attributed by the constitutional legislator; it also deals with the rights ensuing from the prevailing conception of Constitution, the idea of Law, the collective juridical feeling (according to one's understanding, having into consideration that these expressions correspond to different philosophic-juridical currents). Thus, it would be very difficult, if not completely impossible, to judge that such a conception, idea or feeling is not based on a minimum respect for the dignity of man in concrete. Which means that, all things considered, we may find, in most cases and with a greater or lesser degree of authenticity, the proclamation of rights comprised by natural Law – for he who accepts it – and with a vocation that is common to all peoples.

However, when such a conception, idea or feeling is translated into a material Constitution which is not very favourable to a person's rights, which compresses them or even denies the rights which, in other parts of the world or in the view of an universal conscience, should be recognised, what is at stake is the deficiency of that material Constitution when compared to others, the character of the corresponding political regime, the situation of oppression or of alienation in which a certain people live. A notion such as the purposed one, far from being indifferent to reality allows, thus, to submit it to a critical judgement. Placing the fundamental rights into the context of a material Constitution, it allows their apprehension in the light of the principles and factors of legitimacy on which they are depending.

5. The most important distinction of the fundamental rights is that which is translated into the dichotomy "rights, freedoms and safeguards" / "social rights".

It has in view the rights in their structural core but, even further than that, in their function and reflection upon the State (upon the State as power and the State as community). It has in view the rights as a juridical-constitutional expression of relationships between persons and public entities (without excluding, nevertheless, the reflections upon private entities). It considers them, consequently, as long as susceptible of differentiated juridical regimes.

It may be found, in a way or another, in almost every Constitution written after the First World War or, at least, in the ordinary legislation of almost every country; in the international level, it may be found in the two 1966 Pacts – the Pact on Economic, Social and Cultural Rights and the Pact on Civil and Political Rights – or in the European Convention of Human Rights and Fundamental Freedoms and the European Social Charter; and it lies on the basis of the systematisation of rights in our present Constitution.

Rights, freedoms and safeguards are, for instance, nowadays in Portugal, the right to have access to law and the courts (article 20, paragraph 1, of the Constitution), the right to life (article 24), the safeguards in criminal proceedings (article 32), the right to found a family (article 36, paragraph 1), the freedom of the press (article 38), the right to broadcasting time (article 40), the freedom of religion (article 41), the right to enter the civil service (article 47, paragraph 2), the right to vote (article 49), the trade union freedom (article 55), the right to strike (article 57), the right to private economic enterprise (article 61), the right to judicial appeal against administrative acts (article 268, paragraph 4).

Social rights are, among others, the access to law and the courts in spite of insufficient economic resources (article 20, paragraph 1), the right to work (article 58, paragraph 1), the right to rest and recreation (article 59, paragraph 1, subparagraph *d*), the right to health protection (article 64), the right of children to protection (article 69, paragraph 1), the right to education (article 74, paragraph 1) or the right to physical education and sports (article 79).

As far as rights, freedoms and safeguards are concerned, we start at the idea that persons, only because they are persons or because they have certain qualities or because they are in certain conditions or belong to certain groups or social formations, demand respect and protection by the State and other powers. As to the social rights, we start at the verification of the existence of dissimilarities and situations of need – some of them resulting from the physical and mental conditions of the very persons, others resulting from exogenous (economic, social, geographic) conditions – and the will to defeat them in order to establish an effective and solid equality among all members of the same political community.

People's existence is similarly affected by the former and the latter. But in different levels: with the rights, freedoms and safeguards it is their sphere of self-determination and expansion that is secured; with the social rights it is the development of all their potentialities we aim to achieve. With the former, it is the

immediate life that we defend from the discretion of power; with the latter it is the hope in a better life that we assert. With the former it is the present freedom that we assure; with the latter it is a wider and effective freedom that we are beginning to put into practice.

The rights, freedoms and safeguards are rights of *liberation from the power* and, at the same time, *rights to the protection* of the power against other powers (as we can see, at least, in the guarantees of intervention of the judge in the field of threats to the physical liberties by administrative authorities). The social rights are *rights of liberation from the need* and, at the same time, *rights of promotion*. The irreducible content of the former is the juridical limitation of power, that of the latter is the organisation of solidarity.

Thus, freedom and liberation do not separate from each other; they criss-cross and complete each other; one person's unity may not be cut by reason of rights meant to serve him or her and also the unity of the juridical system imposes the constant harmonisation of the rights of the same person and of all persons.

Naturally, the rights, freedoms and safeguards will be the main subject of the present communication although in some areas (even because the distinction between the two categories of rights is not abyssal and there are areas of contact and interconnection) the political activity may not be prevented from leaving a reflection upon the effectiveness or non effectiveness of the rights, freedoms and safeguards.

6. The Constitution of 1976 comprises a long, wide and detailed catalogue of rights, freedoms and safeguards, which may only be exceeded by very few other Constitutions. However, as a close attention has proved, this is not decisive: there are lists of rights in the most different Constitutions of the most different regimes, without assuming the same sense and sometimes without being in the least secured to the citizens.

The essential is not in the catalogue. It is in the regime and it is there that our Constitution turns out to be an unquestionable Constitution of a State based on the rule of law, a Constitution which is a true fundament of power, and not an instrument of power (or, according to the famous meaning of KARL LOEWENSTEIN, a *normative* Constitution and not a *nominal* or *semantic* Constitution as those of the authoritarian and totalitarian political systems).

From the categorical proclamation, which is made by article 1, of the dignity of the human being as the cornerstone of the Republic, that regime comprises rules which are common to all rights and rules which are particular to the rights, freedoms and safeguards (besides rules which are specific to economic, social and cultural rights, that I am not going to mention here).

7. The rules which are common to all fundamental rights are:

1) The principles of universality (article 12) and equality (article 13), with the corollaries of the extension or levelling of rights of Portuguese citizens abroad (article 14) and aliens in Portugal (article 15);

2) The principle of juridical protection, developed into the principles of the access to law and the courts (article 2, paragraph 1, 1st part, and paragraph 2), the juridical tutelage (article 20, paragraph 1, 2nd part, and paragraph 4), the non juridical or non contentious tutelage (article 52, paragraphs 1 and 2, and article 23) and the civil liability of the State and other public entities (article 22);

3) The subordination to the "limitations determined by just requirements of morality, public order and general welfare in a democratic society" (article 29, paragraph 2, of the Universal Declaration, applicable by virtue of the reception made by article 16, paragraph 2, which orders the interpretation and integration of the constitutional principles concerning human rights in accordance with the Universal Declaration).

8. The common rules which are particular to the rights, freedoms and safeguards are:

1) The direct application of the constitutional provisions (article 18, paragraph 1, 1st part);

2) The binding thereon of all public entities (article 18, paragraph 1, 2nd part);

3) The binding thereon of private entities (article 18, paragraph 1, 3rd part);

4) The restrictions of the law (namely, article 18, paragraph 2);

5) The restrictive character of the restrictions (article 18, paragraphs 2 and 3);

6) The exceptional character of the suspension (article 19);

7) Their limitation, suspension or deprivation thereof, in what concerns any person in concrete, only in the cases and with the guarantees foreseen by the

Constitution or the law (article 27, paragraph 2, article 28, article 29, article 32, paragraph 4, article 36, paragraph 6, article 37, paragraph 3, article 46, paragraph 2, and so on);

8) The self-tutelage, by means of the right to resistance (article 21);

9) The reserve of competence concerning the Parliament – absolute legislative reserve (article 164, subparagraphs *a*, *e*, *h*, *i*, *j*, *l*, and *o*) and relative legislative reserve (article 165, paragraph 1, subparagraph *b*) – and reserve of approval of international conventions (article 161, subparagraph *i*);

10) The rise to material limitation of constitutional revision (article 288, subparagraph *d*).

9. Dealing with rights, freedoms and safeguards, no Constitution can fail to have implications in the police field, while activity and while organisation – the police that, in general, will have to provide for the security without which these rights can not be exercised and the police that may play a part in what concerns the behaviours of certain persons in certain circumstances (for instance, in relation to the realisation of a demonstration or the entrance on or exit from the national territory).

Everything resides in the fact that, if the police must be, in a State based on the rule of law, a means of protection of those rights, that same police may sometimes – as it happens, besides, with any expression of power, specially the power endowed with strong means of coercion - turn into a threat or an instrument of damage to those rights. And since *against power only the power* (used to say MONTESQUIEU, and never a sentence was more accurate than this one in our century) everything resides in the creation of forms of conformation and control which may prevent any abuse.

Notwithstanding, few Constitutions consider *ex professo* the police – maybe because they fear less such abuses or because they are satisfied with rules of a general character.

One, which constitutes an exception, is precisely our Constitution of 1976, and it is not difficult to understand why: because of the trauma caused by an authoritarian regime that lasted for 48 years, because of the memory of the attacks against the fundamental rights committed by its political police, because of the concern that similar events will not happen again and also because of the desire to establish a comprising treatment in relation to all subjects with a constitutional relevance.

As a result you may see, besides others, the basic precept of article 272 (which, please excuse my impudence, was the result of a proposition that I presented to the 5th Commission of the Constituent Assembly).

10. When we analyse article 272, it is indispensable to consider 3 points:

1) That it is included in the section dedicated to the Public Administration and that it must be systematically interpreted in accordance with that reality;

2) That the fundamental principles of the Administration, established by article 266, are thus *de pleno* valid for the police – principles of pursuit of public interest, of constitutionality and legality, of equality, of proportionality, of fairness, of impartiality and of good-faith;

3) That other principles included there are, with the corresponding adjustments, also applied – such as the need to bring the Administration closer to the population, the decentralisation and rationalisation of the services (article 267, paragraphs 1, 2 and 5), the tutelage of the legally protected rights of the administered persons (article 268) – administered persons who may be citizens that are in contact with the police or elements of the police organisation that are the object of decisions made by their respective seniors officers – and the exemption from party allegiances and the respect for the disciplinary guarantees of public servants and agents (article 269, paragraphs 1 and 3).

We may ask if the criminal police – the police in charge of criminal investigation, different from the administrative police *stricto sensu* – are included in article 272. In my opinion they are not, which does not prevent them from being subjected, whilst belonging to the Administration and not to the courts of law or the Public Prosecution Service (and, for that reason, there is no justification to put in their direction judges or public prosecutors instead of officials of their ranks), to the same main basic principles (besides some rules of article 32 concerning the guarantees of criminal proceedings).

11. "The police shall have the functions of defending the democratic legality and of ensuring internal security and the rights of citizens" – establishes paragraph 1 (the reference to internal security was introduced in 1982). This is more the reinforcement of the aims and principles to which they are subjected than a simple definition.

For *"democratic legality"* we understand the legality which is inherent to a democratic State based on the rule of law, the conformity of all acts of the State, of the autonomous regions and of local power with the laws, both constitutional and ordinary ones based on democratic legitimacy – I mean, produced by organs based on universal, equal, direct, secret and periodic suffrage (articles 3, 10, 48, 108, and so on, of the Constitution). And for their safeguard are also competent the Government (article 199, subparagraph *f*), the courts of law (article 202, paragraph 2) and the Public Prosecution Service (article 219, paragraph 1).

For *"internal security"*, on its part, we understand the security of persons and properties within the boundaries of the State and it implies, as established by article 1 of Law No. 20/87, as of June 12, 1987, a preventive activity of criminality. It lies opposite to external security, which is identified with national defence (or of which it constitutes one of the main aspects). To this concepts approaches the "public order" to which refers article 29, paragraph 2, of the Universal Declaration of Human Rights.

Public order is the set of external conditions necessary to the regular working of the institutions and the effective exercise of rights – I say *external conditions* not because I am thinking of order in the streets but because what is at stake are factors which are strange to the rights and circumstances which include their exercise. Public order is less thick than internal circumstances but they criss-cross at a double level: practical and normative.

However, there is another concept to which the Constitution appeals (article 19, paragraph 2, and article 273, paragraph 2): that of *democratic constitutional order* or order of rules, institutions and legal values, corresponding to a Constitution based on the democratic principle and which will, thus, penetrate in the whole organisation of the State and the society

In an adequate scale of these concepts and their insertion into the system, we verify that public order, internal security and (even to a certain extent) democratic legality itself converge into the democratic constitutional order; they can only be understood if directed to its guarantee and achievement; they assume an instrumental or accessory character in relation to it.

Public order is a limitation of the rights and, at the same time, a guarantee of the democratic constitutional order: rights may solely be subjected to limitations in the name of *public order* when that is required by the preservation of the *democratic*

constitutional order; in the same way, the rights can not be exercised in liberty and equality without public order.

The Universal Declaration confirms this, establishing in its article 28: "Each person shall have the right to see implemented, in the social and international levels, an *order* capable of rendering completely effective the rights and freedoms ...". And it becomes then clear that the *public order* to which refers article 29 must be understood in connection with the *order* of article 28 and be at its service.

Likewise, although in another sphere, the prevision, in the Criminal Code, of offences against the public authority (article 347 and following), as well as of offences against the realisation of a State based on the rule of law (article 325 and following), is no more than a tutelage, particularly strong, of the democratic constitutional order. Only by means of a deviation may it cease to work without the guidance of that light.

12. From paragraph 2 ensues paragraph 3, perchance somehow repetitive or redundant, although with a heavy historical burden and clear pedagogical purpose: "The prevention of criminal offences, including crimes against the security of the State, can only be made with respect for the general rules governing the police and with respect for the rights, freedoms and safeguards of the citizens:"

It is forbidden any speciality of regime, both here and in the connected field of the information services (insofar as they may involve the performance of police acts).

In what concerns the problem of knowing what are "general rules governing the police", they are precisely those foreseen by the Constitution and the general law (general law is not only the law applicable to all areas of activity of the police but specially – even because it may hit rights, freedoms and safeguards – law which contains general and abstract rules, law in a material sense, such as in article 18, paragraph 3, article 29, article 38, paragraph 3, article 49, article 83 and article 160).

13. "Police measures shall be those as provided for by the law and shall not be used beyond what is strictly necessary" – establishes paragraph 2.

We are dealing, first of all, with a double occurrence of the rules of reserve of law and proportionality. In abstract, it is the law and only the law – not the regulation or the decision and, least of all, that which ensues from the police authority itself – that shapes police measures; and, in concrete, their application depends on how they are needed, on their adequacy and fair measure, without free-will or excesses.

We are dealing, yet, with a principle of characterisation, more than with a simple reserve of law. We can only admit as police measures those specially provided for by the law, with explicit definition of all their presuppositions and of all their elements. It is something that goes on parallel with the principles of characterisation of offences, penalties and security measures or of taxes, because they go against rights, freedoms and safeguards.

The wording of the law of internal security – the already mentioned Law No. 20/87, as of June 12, 1987 – does not seem thus in the least satisfactory when it stipulates, in paragraph 2 of its article 16, that "the statutes and organic rules of the forces and security services characterise the police measures which are applicable according to the terms and conditions foreseen by the Constitution and the law, *namely* ..." since we could say that it appears to comprise a remission and a pure enumeration of examples. However, having into account the paragraph 2 of article 272, that paragraph 2 of article 16 must be read in a limited and restrictive sense.

The police measures which are mentioned, characterised, there are the following: police surveillance of persons, buildings and businesses for a determined period of time; demand of identification of any person who is in a public place or is subjected to personal surveillance; temporary apprehension of guns, ammunitions and explosives; prevention of entrance in Portugal of undesirable aliens or persons who have no identification papers; execution of banishment procedures of aliens from the national territory. And also (article 16, paragraph 3) measures concerning the fabrication and sale of arms and explosives and the interdiction of business of enterprises, organisations or associations which have as their scope of activity actions of highly organised criminality, namely sabotage, espionage or terrorism, or of preparation, training and recruitment of persons for those activities.

When there is a state of siege or a state of emergency there may be, with strict limitations, police measures which may affect certain rights, freedoms and safeguards: confinement to the residence or detention of persons on the ground of violation of security rules; performance of searches of premises; conditioning or interdiction of circulation of persons or cars; suspension of publications, radio and television broadcastings and cinema and theatre shows; apprehension of publications. This is what is established by article 2, paragraph 2, of Law No. 44/86, as of September 30, 1986.

The difference is outstanding when we think in terms of the laws issued by the totalitarian regime, from those restrictive of freedoms of expression, association and

reunion, up to Decree-law No. 37447, as of June 13, 1949, and Decree-law No. 36387, as of July 1, 1947. This last one, in its article 4, even went to the extent of allowing the Council of Ministers to forbid residence in the country or the establishment of residence in any part of the national territory to all persons whose activity could lead to the assumption that they were preparing criminal acts against the security of the State!

Anyway, this field of police measures is one of the most obscure and one that should be the object of a more detailed analysis – which has not yet been done – by the law and the jurisprudence.

14. Finally, paragraph 4 (also introduced in 1982) establishes that "the law shall determine the system governing the security forces, each of which shall have a single organisation for the whole national territory".

Again, a rule of reserve of law appears, together with a rule of national organisation, of the utmost importance in the sight of the transformation of the Portuguese State into a regional unitary State. Security forces are necessarily security forces of the Republic; they can never be attributed to the autonomous regions and their organisation shall be the same for the whole country.

In the previous Constitutions, there was no clear separation or distinction between the fields of security (or internal security) and external security, and the Armed Forces could also intervene in the first one (article 171 of the Constitution of 1822, article 113 of the Constitutional Charter, article 119 of the Constitution of 1838, article 68 of the Constitution of 1911 and article 53 of the Constitution of 1933). But not now: to the Armed Forces are only assigned functions of national defence and connected duties and, at most, they may be employed when there is a state of siege or a state of emergency, declared according to the constitutional forms and the terms of their respective laws (article 275).

On the other hand, the municipal police forces (included, since 1997, in the constitutional text), shall only *give their co-operation* for the maintaining of public order and the protection of local communities (article 237, paragraph 3). Rigorously speaking, they may not be security police forces.

15. The police is also the object of article 270, as well as article 164, subparagraphs *o*, *q* and *u*, and article 165, paragraph 1, subparagraph *aa*.

Article 270 establishes that the law may impose restrictions on the exercise of the rights of expression, reunion, demonstration, association and collective petition and on the electoral capacity of the military staff and the paramilitary agents, belonging to the permanent lists of personnel and on active duty, as well as the agents of the security services and forces, as strictly required by their peculiar functions.

Subparagraphs *o*, *q* and *u* of article 164 include in the absolute reserve of legislative competence of the Assembly of the Republic, those restrictions, the regime of the information system of the Republic and the regime of the security forces; article 165, paragraph 1, subparagraph *aa*, includes in the relative reserve, the regime and the form of creation of municipal police forces. The legal rules governing the restrictions need, according to article 168, paragraph 6, the approval by a majority of two thirds of the Members present, provided that majority is larger than the absolute majority of the Members entitled to vote.

16. This intervention (no longer short) would not be the perfect occasion to establish a connection of all rules concerning the rights, freedoms and safeguards already briefly mentioned with the constitutional rules on the police. I will only call your attention to one aspect or another.

Without prejudice to the criticism I expressed and still do, I can not prevent myself from considering as very positive two rules that the constitutional revision of 1997 included in article 20: the right of all persons to be accompanied by a counsel when they have to go before any authority (paragraph 2, *in fine*) and the implementation, for the effective defence and in due time of the personal rights, freedoms and safeguards (which are those established by articles 24 to 47), of judicial proceedings characterised by priority and celerity (paragraph 5).

The first rule is self-executable and, in my opinion, may be invoked whenever a citizen must appear before any authority or agent of the police forces. The second one is non executable; and, more than one year after its creation, I think that it is deplorable that the Assembly of the Republic has not yet put it into practice, subsisting thus an unconstitutionality by omission.

Only as a sort of remembrance I will now mention article 22, according to which the State and the other public entities are civilly responsible, jointly with the heads of their organs, the officials and agents, for actions or omissions committed in the exercise of their duties, and caused by such exercise, which result in violations of

rights, freedoms and safeguards or in damage to a third party. And the officials and agents are also themselves responsible on civil, criminal and disciplinary grounds, according to article 271.

Without going into details about the problems of juridical construction surrounding article 22 and of its implementation in connection with article 271, it is enough, for now, to point out that they apply, purely and simply, to the police: the disrespect for the rules prescribed by article 272 or for any other right, freedom or safeguard by authorities or agents of the police forces results in responsibility

Finally, I will mention the problem of the limitations and restrictions to the rights.

17. Article 29, paragraph 2, of the Universal Declaration establishes that, in use of their rights and freedoms, "everyone shall be subjected only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society".

This a clause that puts into practice the limitations to the rights (not a clause that puts into practice the rights to the limitations) which must be considered in the following terms:

a) In the reference to "just requirements" is the appeal to a concept of justice or to an ethical consideration which evaluates the precepts of positive Law which, in the name of morality, public order and general welfare, include limitations to the rights;

b) In that reference we may also notice the idea of *proportionality* in its three aspects – solely are admissible the limitations which are necessary, adequate and in proportion with the principles of the Declaration;

c) In the reference to a "democratic society" – the other element granting limitations – we appeal directly to the systematic unity of the Declaration. It is not a requirement whatsoever of morality, public order or general welfare that is admissible: only those characteristic of a democratic society, a society based on the principles of the Declaration, are admissible;

d) Anyway, the limitations must be specified in the law; they may not autonomously result from individual and concrete decisions taken by political, administrative and judicial entities. This is (once again) a very important reserve of the law.

18. Different from the *limitations* to the rights, are the *restrictions* to the rights, freedoms and safeguards – either the restrictions imposed to citizens in general or the restrictions imposed to the agents of the security forces and services in accordance with article 270.

The restriction concerns the right itself, with its objective extension; the *limitation* to the exercise of rights implies the way they are expressed, the way they are exteriorised by the actions of the person entitled to them. The restriction affects a certain right (in general or in relation to a certain category of persons or situations) and involves its compression or, from another angle, the severance of faculties that *a priori* would be comprised in it; the limitation is applied to any right. The restriction is based on specific reasons; the limitation has reasons or conditions of a general character which are valid for any right.

The limitation may be translated into *conditioning*, i.e., in a requirement of a provisional nature on which the exercise of any right depends, such as a time-limit (for the exercise of a right), the previous announcement (in relation to a demonstration, for instance), the registration (for recognition of the legal capacity of an association), the union with other citizens in a group with a minimum number of elements (to form political parties), the delivery of documents (for instance, passports) or the binding obligation (for the establishment of private schools and collective units). The conditioning does not reduce the scope of the right; it simply implies, sometimes, a discipline or a limitation to the framework of liberty of its exercise.

Either explicit or implicit, restrictions lead to two great classes or *raison d'être*: 1) to the combination of rights, freedoms and safeguards among themselves and with other fundamental rights; 2) to the combination with objective principles, institutes, interests or constitutional values. The restrictions admissible by article 270 belong to this second category.

Anyway, the essential content of the rights may never be touched – but what should be considered as essential content is not easy to point out *prima facie*. The law may not, perchance, take away all the usefulness to this or that right and affect, notwithstanding, its essential content because it subverts or inverts its constitutional value. The essential content must be based on the Constitution and not on the law – since the law must be interpreted according to the Constitution and, I insist, the Constitution may not be interpreted according to the law.

19. It is not enough to enumerate, define, explain or assure the fundamental rights: the organisation of the political power and the whole constitutional organisation must be directed so as to assure and promote those rights. Similarly, it is not enough to assert the existence of the democratic principle and look for the coincidence between the political will of the State and the will of the citizens: it is necessary to establish an institutional framework in which that will is freely formed and in which it is assured to each citizen, in a foreseeable way, what is reserved for him in the future.

Briefly: it is necessary that no incompatibility exists between the subjective element and the element that is the object of the Constitution; that the fundamental rights have an institutional framework of development; that (in the line that, after all, ascends to MONTESQUIEU) the guarantee of freedom is made through the division of power. The synthesis of these principles, the model or idea into which they are translated, is the State based on the rule of law.

A State based on the rule of law is not the same as a State subject to the Law, because there is no State without subjection to the Law in the double sense of State that acts according to juridical principles and that brings into effect an idea of Law, whatever that State may be. A State based on the rule of law can only exist when these processes are attributed to different organs, in accordance with a principle of division of power, and when the State accepts its subordination to material criteria that transcend it; it only exists when a material limitation is imposed to the political power; and this limitation signifies the safeguard of the fundamental rights of people.

Quoting again an essential formula of the Universal Declaration (included in its preamble): "It is essential, is man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the *rule of law*".

Reaffirming the decision to assure the supremacy of a democratic State based on the rule of law, the Constitution reiterates, in the same way, the supremacy of the Law – the Law that justifies and organises a democratic State and, at the same time, reflects and gives form to a society that wishes to be free and equal. The State and the society are thus qualified by reason of their integration by the Law and this Law is, on its part, put before the experience of several sorts of factors resulting from that perspective.

It is not a pre-established harmony that we aim to preserve at all costs but rather an imperfect society that we aim to change in accordance with the respect of

some rules and in view of certain goals. We do not deny the contrasts, the conflicts and the antagonisms of classes, groups, generations, sectors and regions; those contrasts are rather inserted into a dynamic perception of the social process in which we hope to surpass them by increasing levels of participation and non alienation – everything within a very strict constitutional framework and in the presence of values that are capable of giving character and *raison d'être* to the political community.

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"The police and the Human Rights" - Is this relationship more akin to "the lamb and the wolf"? At times we are tempted to think so. In fact, if we burrow into the jurisprudence of the Commission and the European Courts on Human Rights, we can but note in particular reference to matters where articles 2 and 3 of the Convention are concerned that it is police service personnel who are implicated in it. At times, it is police "on the beat" who are involved as in the Klaas C. Allemagne or Reibitsch v. Austria; at other times, the implicated police service personnel are from special police branches such as in the McCann, Farrell and Savage v. the United Kingdom and Andronicou and Constantinou v. Cyprus court cases.

On the other hand, this wolfish portrayal of the police seems to be the fundamental conception of the police force that prevails at the Council of Europe. In fact, this organisation has been intensely preoccupied with this debate in the presentations and forums this morning, and it is nearly one year since the programme "The Police and human rights 1997-2000" which seems to principally oriented in this sense. The underlying message concerning this programme is encapsulated as follows:

"The Council of Europe has always insisted on the fundamental role of the police in the protection of fundamental civil liberties and the respect of the rule of law and its primacy in democratic societies.… the training of the police force in the field of human rights constitutes a specific preoccupation of the Organisation".

The programme is centred on current training, diffusion of information and interaction between serving police personnel. The recommendations drawn must concern "the co-ordination and the promotion of the awareness-building on human

rights within the police force". And our demonstration here this morning is entitled: "Human rights and police efficiency. Control systems on police activity." Thus, it seems that the police force constitutes a dangerous instrument in the observation of human rights, and needs to be supervised even if at the expense of its efficiency.

I should like to dispense with altogether or at least attenuate and qualify this projection of the police force. Obviously, it is true that the activity of the police force carries dangers on the citizens' human rights. After all, the police are the iron fist of internal State control and within its jurisdiction. When someone refuses to respect the minimum public order and obey the authorities, it is the police force that is called on. Sometimes the individual will attempt to resist and only physical constraint and force will impose the rule of law.

Indeed, every application of physical force against an individual carries slight against his/her fundamental human rights, and in particular to the right of privacy. It is true that the Court in the Klaas case referred to earlier didn't follow this proposed interpretation by the Commission[1] on ruling 6 against 3 against it. Also, it seems difficult to admit that the CEDH does not protect persons against physical attacks that do not have the particular gravity required under article 3, the banning of torture and inhuman or degrading treatment, and this protection that cannot be any other than foreseen in article 8.

It is not to say that every use of physical force constitutes a violation on fundamental human rights. As a general rule, the intrusion would have a legal base and a legitimate goal. What often causes the problem is the element of proportionality – I will not dwell on this matter for long in this presentation, but not without admitting that this question is of crucial importance. It is, therefore, only natural that the application of physical force by the police is constantly verified with a critical eye by the public and the media-at-large.

Indeed, one should not lose the perspective that the police service personnel are themselves human, that is to say, *beneficiaries* of human rights. It seems to me *maladroit* even dangerous to forget this reality. In certain social circles, namely in extreme far left, it seems fashionable to insult the police-at-large, for example, in the context of wildcat and violent demonstrations. It is often after such occasions that the press refers to the brutality of the police. I will certainly not be the defender of any sort of violence but the human perspective should not be lost sight of, not even in regard to the police force.

All these observations remain nonetheless, close to the “wolf-lamb” *cliché and* stereotype while I attempt here to look at the other side of the coin with the police as the “good shepherd”, and called to defend human rights in an active manner. In fact, as we know, the Convention that not content itself to forbid Member-States from unjustified intrusions into individual rights, but obliges them under given circumstances to actively seek to protect their interests. This obligation which is not far off from the German *Drittwirkung,* and even its equivalent in other languages, is founded on Article 1 of the Convention, whose English text was edited at the last minute from “*undertake to secure*” to “*shall secure*”.

In fact, there is no shortage of examples in Commission and the Court jurisprudence where the violations of fundamental by police inaction have been alleged. Here are but two dramatic examples: In the Platform ‘Ärtze für das Leben’ v. Austria[2], the authorities were reproached for not having protected a demonstration by the plaintiff against a hostile crowd – it concerned abortion issues. Taking up this contentious point, the Commission and the Court note that it is the responsibility of the Member-States to adopt reasonable and appropriate measures in order to ensure the pacific conduct of legitimate demonstrations. Indeed, in regard to choice of police methods to be adopted, the Member-States enjoys a very broad freedom of assessment. In real terms, the police units had been deployed allowing the petitioner to demonstrate – there were neither injured nor significant damages. The police had therefore sufficiently protected the fundamental human rights enunciated in Article 11 of the Convention.

The Osman v. United Kingdom was examined by the Commission and is still pending judgement at the Court. It deals with a real tragedy. A mentally-unstable or at least unbalanced teacher took a shining to a pupil and began to persecute his family by numerous chicaneries. At the same time, the authorities had refused to take protection measures for the evidence provided seemed insufficient. Finally, several people were gunned down by the individual in question. The majority opinion of the Commission came to the conclusion that there was no violation of the Convention; a minority opinion including myself was arrived at, however, in reproaching the government for failing in its duty to protect the family of the plaintiff.

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[1] Decree law of 22nd September 1993, Series A nº 269
[2] Decree law of 21st June 1988, Series A nº 139

These are not isolated cases but exceptional examples. Now, in broad terms, the duty of the police is to maintain law and order and to watch over public safety and security. It is true that the Convention gives no right to law and order (this would be the last straw!) and that the right to safety mentioned in article nº5 has not been granted substance through jurisprudence to date. Nevertheless, it is obvious that a certain measure of order and security constitutes an indispensable element to the enjoyment of civil liberties. Order and security are certainly not the sole property of the police but they contribute to it *par excellence.*

The task is delicate and difficult. There is a tendency to see the police as a repressive instrument of State power. This perception is not false in overall terms, but it is a narrow-minded perception. In a democratic society, the police finds itself ajar between the different freedoms and rights of individual citizens. In reference to an example given above: some want to protest for the right to life, and against legislation that renders abortion relatively easy. Others want to manifest for the protection of personal freedoms, and against legislation that renders abortion relatively difficult to obtain. The police is between the two camps, does it not have cause to complain ?

Without any wish to reduce the importance of the efforts undertaken to inculcate the police with the need to respect the rights of man, it seems essential, to my mind, to also respect rights of police service personnel themselves. In this respect, there are delicate problems that preoccupy the Court, for example, concerning the freedom of expression. Is it justifiable to forbid police service personnel to belong to a political party? I have no intention to probe any further into this contentious issue either, and instead single out several supporting factors, without being exhaustive let alone original, that the police needs to have to meet the challenges laid out for it.

First of all, one such factor seems clear to me: in order that the policeman on the beat respects the citizen-at-large, he needs to feel respected by them. It is therefore very important to raise perceptions on the role and status of the police force. If their salary allows them barely to subsist as we have noticed not so long ago, in Georgia (Russia), it is not astonishing to see corruption rife coupled with abuse of power.

The police need to have an adequate educational level and basic training, and trained up not only so that they know the rights of the citizens but also in order to

develop a sentiment of self-esteem, and natural trust in the exercise of power discerned to them.

Thereafter, it is essential to develop a clear and specific juridical foundation on the role and function of the police work. It is clearly understood that such legislation will not be able to settle each detail of police activity. This legislation should have recourse available to mechanisms with generalist composition, for example, the principle of proportionality. Nevertheless, the legislation could be decisive to determine the goals of police involvement, the conditions and methods to be employed on recourse to physical force with particular reference to side weapons.

It is extremely important that the police force is well equipped, and has the necessary operational material available, and the training of its service personnel must inculcate professional pride in carrying the police uniform.

I have taken a risk in disappoint some of you with these proposals. When a representative “speaks on human rights it is expected he/she talks against the police”. I also think that a number among you consider me an idealist deprived of a sense of reality. In fact, I know very well that in many countries the financial situation is an obstacle in carrying out the ideas developed here. Indeed, these difficulties should not lead to defeatist attitudes. The least that can be done is to take the first steps in the right direction. On the other hand, it is not necessary that every police agent has the same élite status – it is legitimate to check what we call the “boys at rest” – this concerns parking infringements by less qualified auxiliary personnel.

I should not like to end without a final observation on the contacts between the European Commission on Human rights with the police. Article 28(a) of the former Convention tasks the Commission to proceed with an inquiry when the facts need clarification. During such tasking, the police service personnel need to be questioned. I will not go as far as to say that all of them lie or on a regular basis. Nevertheless, the delegates have at times the impression that the care to protect their colleagues has tendency to be given higher priority than the care to participate in the establishment of the truth.

This concerns a very delicate problem. It is a good thing that there is a sound *esprit de corps*. The camaraderie is without doubt an important value. On the other hand, the police work ethic is still more important. It would be highly desirable that the police service personnel recognise and assimilate this scale of values. Their command role should afford them professional pride that brings ethical conduct into clear evidence, and binds it closely with the sense of honour within the collective

identity of the police force. In those cases where misbehaviour has been verified, which can happen in any collective identity, the collective sense of honour must have greater value than solidarity between colleagues. If one or several police service personnel have maltreated an individual held in custody, this is a serious matter. If the wall of silence is formed to protect these wrongdoers, the wrongdoing is greatly aggravated.

In summary, the police must not only abstain from violating human rights, but must also protect them in an active manner. In order that the police force works in the respect of human rights, it needs to be respected in its own right, and to develop individual and collective pride. The ethical values and the code of honour of the collective police identity need to have greater value than camaraderie between police service personnel whenever the latter risks becoming and accomplice to a wrongdoing.

Freedom is a gift related to the nature of man[3]

As Tocqueville once said " what, through the times, allowed the hearts of certain men to be related to the idea of freedom was nature, the charm of freedom, independently from its benefits; that is, the pleasure of being able to talk, to act, to breathe, without constraints, subject only to the empire of God and the laws". "He who seeks in freedom any other thing beyond itself" – says Tocqueville- "was born to serve".

Paradoxically, the concept of freedom does not lend itself much to a definition[4]

Of course, the difference between the understanding of freedom in classical though and at present is abysmal.

In the Greek and Roman civilisations, freedom operated in the orbit of the city.

The intimate connection between the citizen and the city associated freedom to the status of the person.

The way Rousseau speaks of daily life in the ancient democracies is significant: "Among the Greeks, all that the people had to do, it did by itself and it gathered together in the public square all the time. It benefited from a mild weather, it was not ambitious, the slaves took care of his work; his great task was that of his freedom".[5]

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[3] I take up, almost to the text, part of the considerations I produced in my published communication, under the title "Liberdade e Segurança" (Freedom and Safety), in the Portuguese Review of Criminal Science, nº 4/1994,prg. 299 and cont.

[4] Montesquieu had already said: "Il n'y a point de mot qu'ait reçu plus de différentes significations, et qui ait frappé les esprits de tant maniéres, que celui de liberté".

[5] *Contrato Social*, Editorial Presença, pg. 122

This evocation is sufficient to demonstrate that it is a mistake to talk about freedom in the ancient world.

If it is indeed true that it was the stoics that foretold change, it was Christianity that gave freedom a new meaning by dissolving the pagan *ethos* and by developing a concept of *humanitas*.

Medieval and modern histories are characterised, however, by a latent conflict between the two dimensions of man: *subject* and *person*.

The doctrines that subordinate individual freedom rights to the right of the community or to civil society begin with Rousseau, for whom the general will does not coincide with the will of all. They then go on to Hegel, who bets on higher ethical reasons within the State, and then pass on to Marx, who points out civil economic and social objectives in society which are primary in regards to individual activity.

In this century, the problem of freedom acquired a growing space in several international instruments, among which we highlight: the Universal Declaration of the Rights of Man of December 10, 1948, the European Convention of the Rights of Man of November 4, 1950, the European Social Charter of October 18, 1961, the New York Pacts on civil and political rights and economic, social and cultural rights, of December 16, 1966, the American Convention of the Rights of Man, of November 22, 1969, the Helsinki Final Act of August 1st, 1976, the Universal Declaration of the Rights of the People, approved in Algiers on July 4 1976 and the African Charter of the Rights of Man and the People, of June 26, 1981.

As we have seen, the concept of freedom is the result of a long evolution and it carries with it a complex cultural and historic core.

From the constitutional point of view, the idea of freedom becomes rationalised in terms of judicial freedom.

The emergence of the Providential-State and of the social-State gave a positive statute to freedom, multiplying the domains that are of interest for the measurement of its true content. The dialogue between the State and society collectivised the rights of the individual less in the sense of equality than in the sense of the limitation of the individual in favour of the community. The appearance of diffuse powers and the very increase in the social complexity posed the problem of the tutelage of individual freedom in a relation in which, sometimes, it is the institutions, groups or intermediate communities that intervene, rather than the State.

There are various dimensions to freedom.

To simplify we could oppose civil freedom to political freedom. The former translates a limitation of power (freedom of residence, inviolability of domicile and correspondence, and the latter presupposes the participation of power (right of association, right to vote, etc.)

The concrete forms of freedom (political, civil, cultural, religious, social or economic) are a condition and also an instrument of the socio-political structure. The dominant groups identify freedom with their traditional privileges; the groups in search of power reivindicate their projects in the name of freedom[6]

Doctrine agrees with some of the postulates upon which the judicial regimes that guarantee freedom should be based: a) recognition of the dignity of the human person; b) existence of a judicial order of constitutional hierarchy; c) consecration of a set of guarantees (namely a division of powers) and the existence of a certain number of socio-political conditions, in which the level of pluralism translated by constitutional rules and by the functioning of parties and unions, by the regime of public opinion and by the standards regarding the media is enhanced.

The problem of freedom gives rise to harmonisation problems that are especially sensitive in their relationship to security.

Nevertheless, the conciliation of freedom with security is a fundamental objective of democracy, and there exists a vast consensus on what concerns the interdependence of these two concepts.

In the technological societies, the increase in the levels of risk erected security as a condition for the exercise of freedom. On its part, the proliferation of powers and the totalitarian potential of mass phenomena sharpened the weakness of a concept of security where freedom is lacking.

The transformations that have operated on the idea of freedom, which at its origin meant freedom of the individual in face of any kind of state domination, gave rise to the recognition that freedom depends, to a great extent, on the participation of the individual in the power of the State.

In the words of Kelsen, this metamorphosis of the idea of freedom signals the transition from democratic idea to real democracy.[7]

Today, we must enlarge the participation of the individual in the power of the State to the non-interference of the State in the individual autonomy and the way in

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[6] Vd. Carlton Clymer Rodee, *Collier's Encyclopedia*, Vol. 14, pg. 556

[7] *La démocratie sa nature- sa valeur*, transl. Charles Eisemmann, Economica, 1988, pg. 25

which certain economic and social contingencies present themselves before the individual.

Freedom is no longer a mere description of the status of an abstract man which constituted the essence of the liberal Declarations; it corresponds, in Burdeau's expression, to the *situated man*.[8] The problem of real freedom is thus calibrated less by the restrictions imposed on power than by the capacity of affirmation of the individuality and by the effective conditions for the development of a personality in which the right to be different and the space granted to creativity constitute relevant indicators.

And thus, herein the risk.

As Burdeau writes, there is a growing fosse between the theoretical possibilities granted to the choices of man and the resources he has available to concretise them. The progresses of science enrich desire and make satisfaction distant. It is at this interval that the sense of personal autonomy becomes wrecked".[9]

This conceptual relocation has as its main corollary to put freedom into perspective, in modern democracies, as the means for the citizen to defend its individual autonomy, above all else.

In all truth, as Kelsen also points out, history demonstrates that the tendency of democratic power to expand is no less that that of autocratic power.[10]

One of the challenges imposed upon modern societies is, thus, in a certain way, to rationalise the reason of the State.[11]

The compatibility between freedom and security represents, as far as the realisation of this objective goes, one of the most troublesome domains.

In effect, the realities of modern societies have introduced deviations into a field in which the dialectic between the concepts of freedom and security was traditionally projected. The regime of guarantees established in the constitutions and the safeguard clauses brought guarantees - to one of the poles of reference - which were only apparently capable of being consummated: the security of the citizens and

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[8] *Les Libertés Publiques*, Paris, 1972, pag. 18
[9] loc.sit.
[10] loc. sit.
[11] The expression of Mireille Delmas-Marty, *Raissoner la raison d'Etat.* Having jurisprudence as the background of European instances, the author recognises that the possibility for a harmonisation of a Europe which will develop around the rights of man is on the horizon, in a true pluralism of norms with their three dimensions: of a dialogic order, of an heterogeneous space and of an evolutionary time. The only

the security of the State. In the last analysis this evolution is shielded in reasons which, in some cases, are connected to the need to find answers that assure an effective tutelage of the rights of the citizens. In other cases, they correspond to a mere phenomenon of accession in which problems as diverse as those of public order and internal and external security are present.

In this context, the binary freedom - security translates into a relation in which – many a time - the freedom of the individual is on the one side and the security of the State in the other.[12]

The notion of police is closely related, as can be inferred, to the problem of freedom and security.

Its evolution was a long way coming.

In ancient times, it was incumbent upon the political power to guarantee order and public safety and to repress deviant behaviours. Punishment assumed a purifying and expiatory character and the responses to criminality had an essentially religious basis. In those times, criminal jurisdiction and the powers of the police were intertwined: it was difficult to distinguish the activity of justice meant to reintegrate the violated legal order from the duties of the police that tended to avoid the violation.

For a long time the activity of the police springs forth in clear syncretism with all other functions of the State.

The expansion of the concept of police is related to the development of economic life and to the development of the city.

From the Middle Ages up to the 18th Century the idea of police takes on a double incubation of its meaning: parallel to the development of the city as a place typical of associative life, the police starts to draw up a set of responses prompted by the daily needs.[13]

With the eruption of the ideas brought on by the French Revolution and, in general by the fall of absolute monarchies, the nature and the content of the concept

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answer, Delmas-Marty concludes, to a “very legitimate and very unreasonable reason of State”.

[12] Some examples provided by Anglo-American jurisprudence are illustrative. Ref. Anthony Mathews, *Freedom State Security and the Rule of Law*, London, 1988, S. Bailey, D. Harris and B. Jones, *Civil Liberties*, London, 1991 and the Yale Journal of World Public Order, Symposium *Security of the Person and Security of the State: Human Rights and Claims of National Security*, Vol. 9, nº 1, Fall 1982.

[13] Paolo Napoli, *Notion de police sous l’Ancien Régime, Droits*, 20, Paris, 1994, pgs. 183 and foll.

of police experience a drastic modification, after being wrought by the ample and multi-varied movements of rupture with the *ancien régime.*

Police functions start to gradually translate into administrative activity in a negative sense, that is, a limiting or structured sense, including judicial and security attributions.

As has been generally recognised, the concept of police exerts a nuclear role in the qualification of the State. The remark " of the power techniques utilised against the individuals and meant to correct them in a continuous and permanent manner" – that which Michel Foucault called "the pastoral way of power" - is a conclusive way to identify the type of State.

Contemporary democratic societies are re-orienting the notion of police in several directions. On the one hand, by bringing forth a new way of understanding the relations between State and citizen. On the other, by adding value and widening the intervention of the administration as a result of the change of roles and ends of the State, in its dimensions of social-State or providential-State.

The evolution that has taken place in Portugal provides us with an administrative concept of police, understood as a "way of acting of the administrative authority that consists of intervening in the exercise of those individual activities susceptible of becoming a risk to the general interests, and having as their object to avoid the social damages that law purports to prevent from happening, widening or becoming widespread"[14]. There is yet another more specific notion developed mainly since the 19th Century, in which the police are primordially at the service of the maintenance of order and security.

We shall see to what extent the origins of this notion – and the belated clarification of their double sense (of administrative activity and of security and public order) - are able to inspire the search for a better understanding of reality and a more informed search of solutions.

Nowadays the police organises itself for the purpose of guaranteeing one or more of these four typical functions: the one related to sovereignty and the defence of borders, the one related to administration, the one dealing with security and public order, and the judicial one.

[14] Sérvulo Correia, *Enciclopédia Luso-Brasileira de Cultura*, 15º,pg. 399. See of the same author in Dicionário Juridico da Administração Pública, pgs. 393 and foll.

These functions translate a response to the set of attributions that were at their genesis.

But a response that is applied in substantially different conditions.

In effect, the problem of order has stopped being of the Prince's exclusive concern.

In the complex societies of today, the principle of causality obeys a logic in which multiple dimensions, fluidity and uncertainty are present.

In a way, we could join Paul Valery in saying that the world has come to be threatened by two risks: the risk of order and the risk of disorder.

The tendency for imbalance in the distribution of resources, the creation of "neuralgic tension points", the concentration of technologies, under-urbanism and over-urbanism, the loss of sociability – all of this has revolutionised the way in which we live.

In other eras a hierarchical and homogenous ordering was possible. Nowadays, reality points out to the existence of great principles, where constellations of norms and regulations shine bright, inspired on real or induced needs.

If Montesquieu was able to say, "in the exercise of policing authority punishes more than the law and in the judgement of crimes the law is more than the magistrate". Nowadays this bi-polarity has been substituted by a multi-polarity in which an enlarged number of agents intervene.

In schematic terms I shall offer my appreciation of some of the questions raised by police attributions. For the purpose of economy of analysis I shall consider that the problem about the attribution of legitimacy of order by which the State opposes violence has been overcome.

Preliminarily, I wish to point out that one of the difficulties in dealing with these matters has to do with a lack of a reasonable theoretical support. Doctrine has not duly accompanied the transformations brought on by the changes in the conditions of life in society and therefore tends to provide casuistic answers, albeit condensed and contained in excellent manuals of conduct and procedure. As far as police mission is concerned, a clear definition about the sovereignty, administration, security and judicial functions is non-existent. This lack of definition is compensated by concrete rules of action, but it prevents us from pre-understanding the role that police must perform in democracy. Neither does it clarify to what extent that role must be exclusively theirs or communicated to other organs of the State or even be tutored or verified by them.

The tonic accent has been placed on the objective of “civilising” the police and placing it at the service of the citizens and their fundamental rights which, insofar as being primordial, is also problematic if isolated from answers to related matters such as the kind of society, of mission, and of statute.

It is these questions that I shall summarily address.

The first remark refers to the kind of society and includes the problems of complexity, of the systems of belief and of globalisation.

One of the most acute obstacles faced by the police is, as is well known, that of social complexity.

Being an instrument of the State, the police was able to dedicate itself, up to some decades ago, to rendering effective the few and unclear laws, the judicial decisions that were obeyed a priori, and the regulations that were precise and were consensual for the community.

Nowadays, the laws are many and prolix, litigants rebel against justice and regulations colonise the life of the most anonymous of citizens.

In other eras, the police dealt with cohesive social groups and knew the mechanisms of community identification within a certain group (cultural, family, social or religious).

Nowadays the sense of belonging has disappeared and heterogeneity reigns.

We live in a society in which the weakening of traditional bonds leads to isolation and alienation and creates conditions for a “mass culture” that patronises ideas and behaviours, gives rise to conformity and creates mechanisms of maintenance and reinforcement of order through the propagation of stereotypes and favourable evaluations.

Massification also determines the loss of individuality compelling people to pursue very concrete objectives, to be attained in the shortest, simplest and fastest way.

It is easy to understand that, in this kind of society, the cult of law and equality become empty and one falls into facile indignation because of selfishness or simple mimicry.

But this society is also complex on account of the speed and scope with which powerful technologies entered into the life of people.

It is not only the means of evading law and authority. It is the social stress of the excluded or of those who, impregnated by the myth of “virtual access to all good”

direct their frustrations against all visible signals of power, of which the police, understandably, occupy the closest place.

And, on the other hand, it is a society instilled with the idea that there are abundant rights and justice and which sees the police as the representatives of an order that is easy, and sometimes lucrative, to contest.

In the delicate space in which the police must act, the system of beliefs is one other factor that is modifying the conditions of the exercise of authority.

The question of knowing how beliefs and opinions tend to organise in relation to the police has come to attain remarkable interest.

In effect, because of its proximity and visibility, police activity is exposed to superficial, emotive and volatile reactions.

By having to produce evaluations at the very moment the conflict is occurring, on the one hand, and by having to apply and execute norms or decisions whose sources are not close by, on the other, the police always risk being, paradoxically, either too close or too far from the impulses that define it.

The difference between the use and abuse of power may be only a matter of opinion. But it can have considerable repercussions for the functional self-esteem and self-determination.

In the same way, the police act in a field where the interaction between the facts and the media is probable.

It is useless to ignore this.

As sociology explains, the mere presence of the media can provoke, in a tense situation, a deterioration of the socio-psychological climate that will interfere with the behaviour of the public and of the forces of order.

In the third place, globalisation.

Globalisation corresponds to an ideological-cultural, political and economic transformation of the social systems and, in a way, constitutes the trace that characterises the transition from modern to post-modern. In relation to former movements of internationalisation this one is basically defined by conceiving a functional interaction of disperse cultural and economic activities of goods and services that are generated by a system with many centres, in which “speed to go around the world matters more than the geographic positions from where the action takes place”.

This does not correspond to a concentrated model; it does not even correspond to a more diffuse polycentric one.

Globalisation has modified the conditions in which the security systems used to operate, particularly in what concerns certain types of criminality.

Organised crime has stopped respecting borders. Think only of the Mafia (Sicilian, American or Russian), or the Japanese yakuza, the Colombian cartels of Medellin and Cali or the Chinese triads. According to some observers the crime business, in its multiple forms (traffic of people, drug, arms or vehicles, child pornography and prostitution) increased from 95 billion dollars in 1986 to 500 billion in 1996. It surpasses the combined value of international trade relative to oil, steel, pharmaceutical products, food, fruit, wheat and sugar.

Trans-nationality of crime, however, continues to be in contrast to conceptions of a police that is dispersed and removed from the political and judicial decision-making centres.

The object of the second question is the police mission.

In relation to this problem it is necessary to carry out a re-evaluation that will consider characteristics of risk in modern societies.

Up until recently, countries developed criminal policies based upon a statistical idea of crime rates. It so happens that crime factors have become more and more diffuse while at the same time the answers have not gained efficacy.

Now the bet is on technological resources.

The utilisation of technologies for the prevention and repression of criminality is certainly a road with no return. But it, too, is plagued with risks. Technological exasperation shall lead inexorably to a society of total vigilance, where rights, freedoms and guarantees become eroded.

And thus the need to redouble the importance given to functional differentiation, translated into an idea of mission, spilled over the attributions I mentioned before: of sovereignty, of administration, of security and public order and of the judicial attribution.

Regarding the attributions of sovereignty and administration the solutions appear to be linear.

As for the former, their connection to the defence systems and specific sectors of the administration (namely customs and fiscal) is evident and many of the acquired notions and experiences remain valid.

They will have to be eventually updated due to the emergence of common and the frequency with which new criteria of extra-territoriality are being adopted in regards to treaties and conventions.

Likewise, the attributions of the administrative police do not seem to justify major interrogations. The solution shall be found in assuming that their nature dispenses private means of coercion. The handing over of these functions to officials invested with power of authority but integrated into a purely administrative structure seems to be reasonable and signifies a desirable economy of resources. The experience can be expanded into such diversified areas as that of urban ordering, highway circulation and regulations concerning commercial and market activities.

The matters of crime prevention and repression raise more extensive considerations.

Needless to say, the consideration of crime prevention.

Here and there it is nowadays asserted that no criminal policy is deserving of that name if it does not favour prevention. This is an assertion founded upon the social perspective of crime but that could equally be supported by an economic logic: preventing crime is less costly, by far, than repressing it.

Although criminal prevention is not a function of the police exclusively, it is a function upon which they bear a decisive role.

To this regard it is indispensable to be conscious of the objectives and the method. Prevention is, by nature, trans-disciplinary; it requires structures of communication between the powers, the administration and civil society; it demands a cultural attitude; it imposes rigorous approaches to reality.

As we know, it was the Italian positivists of the 19th Century that for the first time -and on the basis of deterministic thought - defended the need for adopting measures of individual defence in order to stand up to recidivism, and of measures of collective defence in order to reduce the incidence of the social factors of delinquency.

This idea was later taken up by the movement of new social defence. In the expression of Gramatica “social defence is always preventive when it tends either towards the re-socialisation of the individual or towards prevention within the community”.

Other conceptions were born parallel to these, in which criminal prevention is set in the perspective “of the instrument utilised by the State to better control criminality via the elimination or limitation of the criminogenous factors and by the adequate administration of those factors of the physical and social environment which propitiate favourable opportunities for perpetrating offences”. In these conceptions, prevention appears as an instrument of criminal policy that is

differentiated from others, typical of the criminal sciences, in which help to the victims, social re-insertion, de-penalisation, treatment of delinquents or measures of sentence substitution are included.

The need for a notion that would be anchored to experimental theory and knowledge at the same time made the authors formulate an enunciation in which the following elements are highlighted:

a) nature: non coercive

b) objective: collective character (directed towards a set of individuals)

c) purpose: action on the factor of delinquency

The greatest number of currents continues to favour the inductive method, formulating and raising problems about the concept taking the analysis of the appeals and the evaluation of the responses as their point of departure.

In works carried out in the scope of the Council of Europe (*Demostenes Project*) there are references to classifications that sometimes correspond to the traditional categories and sometimes to new perspectives of criminal prevention.

Based on these works it is possible to distinguish three axes:

The first one makes a distinction between *prevention of general criminality* and *prevention of juvenile criminality.* This distinction sets out from the idea that young people are the carriers of a personality that is being shaped, sensitive to the application of re-education measures, whilst the adults merely react to measures of general intimidation concretised in the threat of a sentence.

The second axis opposes *general prevention* and *special prevention*, with the former aimed at the general factors of the delinquency, and the latter to the specific ones.

In the last axis we find the tri-partite distinction between *primary prevention*, *secondary prevention* and *tertiary prevention*. The first one attempts to identify the elements that propitiate the occasion of committing an offence in the physical and social environment. The objective of the second one is to derail potential delinquents to whom educational, recreational or therapeutic measures could be applied; the third one has as its objective situations of well defined concrete risks, namely recidivism.

In this catalogue of classifications we could also include the distinction between *active prevention* and *passive prevention*, according to the pro-active or reactive nature of the measures. The first one purports to anticipate itself to the potential for crime by organising measures that prevent delinquency (like for

example taking advantage of leisure time); the second one elaborates responses according to concrete requests.

Contemporary thought is oriented by a lesser conceptual concern and, in this sense, it has established a smoother dialogue with the currents of judicial realism.

The distinction that in it seems to be the most relevant is the one that opposes *social prevention* to *situational prevention.*

Social prevention encompasses the measures whose purpose it is to eliminate or limit the criminality factors. It is founded, in the last instance, upon the etiological theories of delinquency and encompasses actions related to health, education, housing, employment and leisure. There is a manifest connection between this prevention and the types of response in the domain of social, economic and cultural policies. It is illustrated by hypothesis such as the ones that, in relation to younger people, point out the situations of family disintegration or unemployment rates as the causes of the criminality, and in the case of adults point out to alcoholism, unemployment and drug-addiction.

Several virtualities are to be encountered in each of these domains.

In the case of family policies, the following measures have been made evident with the objective of reinforcing the capability of protecting, watching over, disciplining and sheltering minors: to prevent the pregnancy of adolescents, to guarantee counselling for mothers during pregnancy and infancy, to contribute to the improvement of educational methods, to assure pre-school education, to offer support to educators in periods of tension, to develop strategies to prevent family abuse and the existence of children at risk and to impede young people from becoming homeless.

In what concerns educational policies value is given to the need of maximising pedagogic performance, of guaranteeing assiduity of children and young people to learning, individualising a correct school discipline and favouring organisation and a “school spirit”.

In regards to policies for the young recognition is given to the importance of identifying the networks of “company” and the models of behaviour that induce to deviation and delinquency, to the exploration of the relationship between these models and individual and collective situations and needs, to the encouragement of self-esteem, to access to local services and agencies and to street vigilance.

In the employment policy there is reference to the need for developing formal and informal systems of employment, of studying inside the workplace, the degrees

of satisfaction and positive response, the opportunities of promotion and access, the inter-labour relationships, the professional re-conversion and the deepening of the status of the worker.

The *situational prevention* sets out from the verification that delinquency is distributed in an unequal manner in relation to time and space and favours actions that diminish the occasions of offence, increase the risk of detention and the responsibility of its agents and that eliminate or weaken a “reward” for the crime. What is at stake here is to act on the environment, in a systematic and permanent way, taking some specific forms of criminality into consideration. Among the recommended measures included we have the “hardening of the aims” by means of installation of security devices, access control, separation of potential delinquents (introducing circulation restrictions of the type “access permitted only to residents”) and use of objective procedures of risk elimination, i.e., interdiction of gun carrying in certain sites and spaces.

More recently Mireille Delmas-Marty took up a formula used before to distinguish between *defensive prevention* and *emancipating* or *offensive prevention*. The differentiating element resides, in this last case, in the fact that action is not taken on the basis of “fear of a specific problem”, but in a “trust in the spontaneous possibilities of the populations”.

As can be observed the present notions of criminal prevention obey less to a logic of categories and correspond more to a demand of classification, which results from observation and experience. The frequency with which one resorts to mixed classifications or to a crossing of concepts makes it clear that what is important is to cut out elements that make it possible to widen hypothesis in the field of experimentation and to find open and suggestive formulas in the field of theorisation.

Field work and available studies corroborate the advantage of this methodology. They justify the relativism that is necessary to impress upon the evaluation of preventive actions, the need for rigour in the selection of “target” sectors and the demands for inter-disciplinarity and communication between scientific thought (especially normative thought) and empirical thought.

Particularly in what concerns *social prevention* one cannot overlook the characteristics pertaining research in the field of the social sciences, nor can the variability of the basis for experimentation be forgotten and, consequently, the tendentiously relative character of the results. The formulation of a judgement of

cause and effect is generally inadequate, for which reason criminology utilises the notion of *factor* in favour of the notion of cause of delinquency.

The contiguous zones between prevention and repression of criminality recognise the police as organs of prime importance. However, a methodological cut between their action and that of other participants would compromise all chances of success.

This being the case, co-operation between the different police, the administration (especially, in the field of education, health and employment) and civil society is indispensable.

Besides, criminal prevention is being analysed as an activity in which the very judicial authorities should be involved.

In what concerns criminal investigation, the police act as auxiliary organs of the administration of justice or, in a procedural sense, in the functional dependence of the judicial authorities.

As if in a kind of comeback, these functions once again come close to the policies of justice administration that were prevalent in ancient times.

And the truth is that criminal research acquires it most relevant meaning as an instrument for the realisation of justice. With its enormous potential for coercion, criminal investigation should be carried out according to a demanding framework of judicial powers, techniques and learning.

The majority of international organisations and scientific associations related to the criminal system and to the rights of man have been calling attention to the fact that criminal investigation should be headed by a magistrature or, at any rate, by an accusation organ. This circumstance confirms the axiological scope in which these questions are situated.

The position of the police in criminal investigation means that, by the fact of not possessing of their own judicial powers, they act according to techniques and knowledge given them by the magistrature, although vested on the de facto authority of the very *leges artis*.

In what concerns the statute of police, the answers have to be adapted to the real and symbolic functions they exercise.

To carry out the mediation of the law and to assure social discipline is simultaneously a task of application and recreation of the right which can only be successful if it lets itself be enveloped by a pathos with which the community identifies itself and in which it trusts.

The concept of order developed by the police is the most easily visible and identifiable by the citizen at large.

Whence they comply with the triple objective of reinforcing the sense of respect for the law, defending the trust in the administration of justice and transmitting patterns of civic conduct.

Thus, the demand is for a culturally educated, technically equipped and socially functional police.

I argue, as is understandable, in favour of a dignified functional and social statute, without which the police will not surpass the controversial objective of reproduction of order.

To achieve this will require training that can go beyond the codes of conduct and can absorb principles of social structuring as important as equality and the right to be different.

The distancing of the powers must have in the police its indispensable correction.

In the field of criminal prevention and investigation, for example, it is necessary to entrust the police with duties of proximity susceptible of diversifying and choosing the resource and formal means. I am referring not only to the so-called real discretion but also functions of resolution of conflicts and composition, in crimes where penal action is in the hands of particulars.

The Portuguese police constitutes a model that has evolved autonomously, to a large extent, and it embraces corps specialising in matters that we would call new criminality (Inspection-General of Economic Activities and Department-General of Taxation), a scientific police corps (the Judiciary Police) and two security and public order corps (The National Republican Guard and the of Public Security Police).

In spite of being basically coherent, the solutions can be perfected, particularly in the field of criminal prevention, in which a more effective articulation with other instances is of the essence. A functional separation between the different police, other departments of State and civil society weakens communication and remits the roles that each institution should assume to an unacceptable autism.

In the matter of criminal investigation, the relative position of the various police organs could be clarified. Having to maintain its structure, essentially, (superior police corps for criminal investigation) the Judiciary Police would benefit if the other police could assume - on account of their training and their resources, as they are now doing on account of their will and sense of co-operation - their attributions of

organs of the criminal police. Thus, a better distribution of competencies would become natural, with better contours for the competencies of the scientific police (Judiciary Police) and of the police of proximity (National Republican Guard and Police of Public Security).

This differentiation corresponds to a tuning of the concept of mission and must safeguard aspects of co-ordination and globalisation of information.

What police for the future?

The police of the future must be a police that is loyal to the rights of man and engaged in democracy.

To reach this objective, however, a mere proclamation of principles is not enough.

It is necessary to re-found concepts, organisations and methods.

The police of the future can not be circumscribed to objectives of maintenance and reinforcement of law and order. It must integrate and control the characteristics of risk and of communication in which modern societies portray.

It shall utilise technology in a critical manner, knowing that all progress is ambivalent and that information shall be totalitarian if it interferes illegitimately with freedom and with individual self-determination.

It shall bet on criminal prevention and become available, by means of the creation of consultation organs, to advise citizens and avoid and control risks.

It shall pay tribute to sociology and economy of organisations, by cultivating the idea of functional differentiation and by purifying their sense of mission.

It shall assure the function of dialogue between the law, the State and society, assuming for itself the role of first guarantor of the right to difference, be it among the minorities, in social representations or in conducts not forbidden by law.

It shall assume itself as an instrument of realisation of justice, conscientious of the fact that capturing the truth of the facts is as important as capturing the delinquent.

This is the role for the police in a world in which, paradoxically, all fortunes and calamities seem probable.

This is a role that is not lacking in ambition or in realism. Because, as Morin said, “we are not going to eliminate uncertainty and the alley; let us best learn to work better and play with them. Neither “shall we become suddenly wise. We must

learn to negotiate with our own madness in order to preserve ourselves from its atrocious and massacring forms".[15]

Nicolay Claude Bernard Raymond	On Behalf of the Chairman of the European Communittee for the Prevention of Torture (CPT), Council of Europe • Attorney General at the High Court of Justice of Luxembourg • Ex-chairman of the European Committee for the Prevention of

[15] *Nuit et Brouillard*, La Grande Mutation, enquete sur la fin d'un millénaire, Question de- Albin Michel, Luçon, 1988,pg. 252

Preliminary comments

A. Introduction: the genesis of the convention
B. The main characteristics of the convention and the CPT.
C. The particular importance given to preventive action
D. The powers of the CPT and rights to visit
E. The recommendations of the CPT concerning detention by the police and the prisons

Preliminary remarks

The convention and interior regulation impose very strict confidentiality rules on the members and the former members of the European Committee on the Prevention of Torture, hardship or inhuman or degrading treatment (in short CPT).

All the reports on visits to prisoners, minutes of meetings and working documents of the CPT are, in principle, confidential. The members are under the obligation to keep secret the facts and information they are privy to in the execution of their duties.

The convention foresees two exceptions to the above rule:

- the report that CPT drafts for the interested Party after a visit is made public on the request of this Party.

- If a party does not co-operate or refuses to improve the situation in light of the recommendations by the committee, the latter can make a public statement in regards to the matter in hand.

Moreover, the annual overview on activity report by the CPT to the Ministerial Committee of the Council of Europe is communicated to the Consultative Assembly and made public.

The developments resulting from it can, obviously, be based on the text of the convention, its explanatory report and the internal rules and regulations of the CPT which are in the public domain. Seven annual reports which have been published to date, and the vast majority of Member-States have requested for publication of the reports of prisoner visits involving them – at times with an appropriate response to it from their government. In December 1992, the CPT made a public statement concerning Turkey. A second public statement concerning this country was made in December 1996.[16]

The information supplied herein is included in either report available to the general public, the other data on the work done by CPT, which I hold by mandate, needs to remain confidential.

A. Introduction: the genesis of the convention

After the World War II, a vast number of international instruments formally forbidding torture, hardship, and inhuman or degrading treatment were adopted.

The greater part of these instruments did not create a mechanism able to impose the respect of obligations incorporated in them and, even when such a mechanism exists, the control exercised by them is *a posteriori* control.

As the years went by, some have fervently dreamt to imagine structures that could act in pre-emptive manner, to assess situations at risk of degenerating, and take on the roots of the torture phenomenon and inhuman and degrading treatment. In real terms, the origins of the Convention date back to the proposal made in 1976 by a Swiss banker and philanthropist, Jean-Jacques Gautier. A founding member of the Swiss Committee Against Torture, Gautier suggested the elaboration of a convention installing a system of visits of every place of detention by independent experts. The International Commission of Lawyers and the Swiss Committee Against Torture have elaborated a text in the form of an informal protocol which became the United Nations Convention Against Torture and other hardships or cruel treatments, inhuman or degrading. This project was submitted formally by Costa Rica in 1980 to

[16] These documents can be obtained by simple request to the CPT secretariat, The Council of Europe, F-67075 Strasbourg Cedex

the Commission on Human Rights at the United Nations. Although still prominent within this organisation, this text remains a proposed project only. It is due to this state of affairs that the idea came to realise the Gautier project at European level.

The Convention has been an outstanding success. Fifteen European States ratified it between 1988 and 1989. At the present time, there are 39 countries are bound to the Convention; this concerns all the member-States of the Council of Europe except for Lithuania.

B. The main characteristics of the Convention and the CPT

1. The Convention does not contain any fundamental arrangement on torture, hardship or inhuman and degrading treatment and, above all, does not define these notions. Its purpose is to reinforce the protection of citizens, who are denied their freedom, against torture, hardship or inhuman or degrading treatment by the establishment of a non-judiciary mechanism with essentially preventive character. It also based on visiting rights to any location involving the jurisdiction of Contracting parties, where people are deprived of freedom by the public authority (Article 1 and 2).

2. The Convention sets up a European Committee for the prevention of torture, hardship or inhuman or degrading treatment. The CPT is composed by a number of members equal to that of the Contracting parties. These “hold office as individual members, and are independent and impartial in the exercise of their mandate, and avail themselves to fulfil their roles in an effective manner.” (Article 4).

If the member elected to represent a State cannot have its nationality, the CPT cannot have more than one member from any single State.

The Members are elected by the Committee of Ministers of the Council of Europe from a list of names drawn up by the Bureau of the Consultative Assembly; the national delegation to this assembly has a right of presentation.

Let us note that the Convention framers had the presence of mind and wisdom to limit the roles of the CPT members in time. They are elected for four years and can only be re-elected once.[17]

[17] The second protocol at the Convention, and opened for signature on 4th November 1993, foresees a third mandate. It has yet to be applicable.

3. To describe the main characteristics of the CPT becomes particularly precious to underline the differences between the foundations and objectives of the CPT and those of two other instruments of the Council of Europe in the field of Human Rights, the European Commission and the European Court on Human Rights.

As separate and distinct from the Commission and Court, the CPT is not a juridical body with competence to resolve juridical contentious relating to allegations on violation of obligations by treaty (that is, to draw up statutes from complaints *ex post facto).*

The CPT is above all and mainly a mechanism of prevention on mistreatments even though it can also intervene in a number of cases after the events have taken place.

In the exercise of its functions, the CPT had the right to employ juridical norms contained not only in the European Convention on Human Rights but also in a given number of other pertinent instruments relating to the Rights of Man (as well as the interpretation made by such Human Rights organisations with respective competence). Nevertheless, the committee is not bound by jurisprudence of the juridical or quasi-juridical bodies acting in this same domain. It can, however, employ the means available to the latter as a starting point or as a reference in the evaluation of the treatment of people denied their liberty in the different countries.

4. The notion of co-operation between CPT and the competent national authorities in Europe (Article 3) is at the root of the activity of the Committee.

The role of the CPT is not to publicly criticise the Member-States but instead to assist them in finding ways and means to reinforce the subtle distinction between acceptable treatment or conduct and unacceptable treatment or conduct. In fulfilling this role, the CPT is guided by the following three principles:

i) the prohibition to inflict different maltreatment of private citizens denied his/her liberty is absolute;

ii) the foundations of all civilised behaviour lead to rejection of maltreatment even in the most moderate forms;

iii) maltreatment does not only tarnishes the victim but is also degrading of any representative responsible for its execution or authorisation.

5. The CPT examines above all the factual situation prevailing in the States it visits. In particular, it

i) proceeds to the examination of general conditions inside visited establishments;

ii) observes the attitude of officials in the application of the law and other personnel in relation to citizens who are denied liberty;

iii) to dialogue with detained or imprisoned citizens in order to understand how these perceive i) and ii), and to provide a listening ear to specific complaints these may want to lodge.

Thereafter, the CPT sends a report to the Member-State in question in which it gives its appreciation on all information collected and establishes formally its findings. If necessary, the CPT recommends measures in order to pre-empt an eventual treatment contrary to what it could normally be considered reasonable, and acceptable norms in the treatment of citizens denied their freedom.

Bearing in mind the role of their functions, the Commission and the Court are composed for the most part by lawyers and specialists in Human Rights.

The CPT is composed of not only jurists with different specialisation but also general practitioners, psychiatrists, experts in penitentiary affairs, criminologists and so on.

Besides this composition, the CPT and the Commission and the Court differ on the following points.

i) The Commission and the Court have as first objective to determine whether there has been a violation of European Convention on Human Rights. In contrast, the role of the CPT is to pre-empt mistreatment, physical or mental, on behalf of citizens who are denied their freedom. Its attention is rather focused on the future than to past events;

ii) The Commission and the Court have to apply and interpret the fundamental considerations of a Treaty. The CPT is not bound by these fundamental considerations even though it can draw from a number of treaties and other international instruments such as jurisprudence based on treaty obligations;

iii) The Commission and the Court only intercede after having been solicited to inquire on verbal request by individual citizens or States. The CPT acts by requirement through periodic visits or ad hoc visits;

iv) The activities of the Commission and the Court lead to the verification of a violation by a State or otherwise, and have juridical power to constrain it flowing from its obligations by Treaty. As for the verifications by the CPT, these lead to a report with recommendations if necessary to the attention of a State in question setting out the measures to be taken to rectify detention conditions or unacceptable behaviour. In the event a State neglects to implement the recommendations of the CPT, the latter may choose to make a public statement on the issue in question.

C. The singular importance granted to prevention

1. The CPT is a singular entity by its powers, its composition and, above all, by the essential purpose of action undertaken: to prevent torture and inhuman or degrading treatment.

The examination of individual citizens denied their freedom, and entrusted to CPT is compulsorily centred on the pre-emption of eventual acts of torture or hardship or inhuman and degrading treatment. In other words, the investigations of the Committee do not have the purpose of a judicial or non-judicial procedure to establish in detail and scrupulously whether serious abuses have or have not been committed. The CPT has a much broader mandate: its competence is to establish whether in those places where individual citizens are denied their liberty by public authorities, there are general or specific conditions or circumstances that risk degenerating, and lead to acts of torture or hardship or inhuman or degrading treatment. Its competence includes those conditions and circumstances that could, in any

situation, lead to such acts or unacceptable practices being perpetrated therein.

2. As defined above, the mandate of the CPT does not obviously exclude a role of inquiry or overview of facts which have taken place in a recent past. This applies in particular to its ad hoc visits and motivated by serious allegations and persistent allegations of major abuses committed in a given country. In such cases, one of the roles of the CPT consists obviously to verify on the spot if these allegations are true or untrue. However, even within this hypothesis, the main obligation of the CPT is broader than to limit itself to reporting such abuses: it needs instead to examine the general conditions that surround the reported abuses and, if necessary, to propose the means to bring about their immediate cessation as well as to prevent their repetition in the future.

3. Flowing from the fact that prevention is the cornerstone of the system of visits to the imprisoned and detained alike as enshrined in the Convention, the CPT has deduced four important consequences:[18]

- The CPT must always examine the general conditions of detention in a visited country. It must verify not only if abuses are committed in effect but must also be attentive to the “indices” or “early indicators” of future abuses. For example, it is obliged to examine closely – and thoroughly in doing so – the factual conditions of detention (the space afforded to the detainees; lighting and ventilation; sanitary conditions; meals and bedding afforded; medical treatment provided by the authorities and so on) as well as social conditions (the relations between detainees themselves as well as with the guard and other police personnel; contact with the family, social workers, the outside world in general and the like). The CPT affords specific attention to the existence and the extent of a number of fundamental guarantees against maltreatment, for example: the notification of holding citizens in custody; access to a lawyer, access to a doctor, possibility to lodge a complaint for maltreatment or due to reason of the conditions of detention.

[18] I quote paragraphs 48 to 51 of the 1st report of general activities

- It is not often possible to understand and appreciate the conditions in which citizens were deprived of their freedom in a given country if these conditions are placed in their general context (historical, social and economic). Indeed, human dignity must be effectively respected in all States and signatories to the Convention. However, each of these States has a different context that explains perhaps why these do not respond in similar manner to questions regarding human rights. It follows that the CPT, in order to fulfil its task of prevention of abuses, must frequently latch itself to the core causes of the general or specific conditions leading to maltreatment.

- In certain cases, the CPT – upon examination of the detention conditions in this or that country – may not consider it timely to limit itself to suggest the adoption of immediate or short-term measures, such as, for example, administrative even legislative arrangements. It may consider indispensable to recommend the adoption of measures in the long-term, at least every time unacceptable conditions of detention are noted in a country as a consequence of deep-rooted problems whose impact is impossible to attenuate by straightforward judicial or legislative action, or recourse to other juridical techniques. In such cases, the co-ordinating actions in the field of education and similar strategies in the long-term could become essential.

- Finally, in order for the CPT to fulfil with efficiency in its preventive role, it must tend towards a greater degree of protection afforded to detainees than is incumbent on the European Commission and the European Court of Human Rights. This is applicable whenever it expresses an opinion on cases involving maltreatment inflicted on individual citizens and their conditions of detention.

D. The power of the CPT and its visits to places of detention

1. The European Committee has a right to visit so as to reinforce, in given cases, the protection of individual citizens, who are denied their freedom, against torture and maltreatment, any place where an individual is denied his liberty by decision of the public authority.

The contracting Parties must therefore give CPT free access not only to their prisons but also the youth detention centres, police stations and like establishments. The privation of civil liberties is covered by the convention. The committee has therefore access to psychiatric asylums, establishments for the chronically ill, contagion illnesses or the alcoholic on the condition that under national law, the citizens there are denied freedom to come and go by the national authority.

The procedural detention of foreigners as well as any form of military detention are obviously also included in these arrangements.

2. The committee exercises its responsibilities by organising visits in the different Member-States**.**

Each Party is held do provide the CPT the following facilities:

- access to its territories and the right of passage without hindrance;

- all information on the places where the citizens are being held;

- the possibility to present themselves at will on site where citizens are held in detention including the right of passage without hindrance within these places of detention or imprisonment;

- all other information available to the Party and necessary to the committee in the fulfilment of its task.

The CPT can conduct interviews with individual citizens, who are held without supervision, and can contact freely any person whenever it thinks these can provide useful information.

3. The convention foresees that each contracting Party will receive periodic visits by the CPT, and the Committee can organise any other visit that it deems necessary due to circumstances (Article 7).

In its rules and regulations, the CPT distinguishes between periodic visits, ad hoc visits, and the follow-up visits.

The ad hoc visits are visits motivated by serious and credible allegations that major abuses are being committed in a Member-State.

The follow-up visits are those visits that the CPT decides to effect in any place already visited in the framework of a periodic or ad hoc visit.

The periodic visits are those that the CPT reserves as its main activity: the prevention of torture and maltreatment.

The rhythm of visits is increasing. The increase in number of annual visits is rendered necessary by the increasing number of Parties and signatories to the Convention, but without posing budgetary constraints at human resources level of the CPT secretariat and the level of availability of the committee members.

4. The visits are made by 3 to 5 committee member delegations, and according to the duration and the number of places to be visited. The CPT can be assisted by experts and interpreters and is always accompanied by its secretariat. As a general rule, the visiting delegations are assisted by two experts, two members of its secretariat and a sufficient number of interpreters whose number varies according to linguistic ability of the delegation members**.**

In this respect, it is to be noted that the internal regulation s forbids any CPT committee member and State representative elect (the “national member”) to be a member of the delegation tasked to visit this same country.

5. The notification of the visit to the government of the Party concerned is mandatory. The CPT has decided that the notification of a periodic visit that is defined a one-off visit under the Convention would be instead conceived as a visit in three phases.

To begin with and towards the end of a given year, the CPT provides each of the Parties in its provisional programme of periodic visits for the following year, due notice of intention to organise such a visit. Shortly afterwards, the Committee publishes a short press *communiqué* indicating the names of the countries in which it foresees to undertake a periodic visit.

In its second phase, the Committee officially notifies the States concerned of its intention to carry out the visit (this notification is generally addressed t them about two weeks before the visit). The formal notification indicates the starting date of the visit, the probable duration of the visit and the name of the committee members who will be in the delegation carrying out the visit as well as those of eventual experts

and interpreters. In addition, the notification includes a request for meetings to be organised with such and such ministries and/or high-ranking officials.

In third and final phase, the CPT warns off the States in question a few days before the effective starting date of the visit of the places it has chosen to visit. It is, nevertheless, always specified that during a visit, the delegation of the CPT could decide to visit other places (see Article, paragraph 1 of the Convention and paragraph 58 of its explanatory report).

This process offers several advantages in practice with the foremost perhaps being that, due to the first phase, the interested organisations and individuals know in advance in which countries the periodic visits will take place on a given year, and affords them time to gather their efforts so as to provide pertinent and updated information to the committee. A noteworthy element of surprise is nonetheless retained since the exact time of the visit in the course of the year is not specified.

It is important to note that this three-phase process is only applicable to periodic visits. It is subject to modifications in present trial phase.

6. The setting of a typical visit

The visit in a country starts most often by a meeting of the delegation with national authorities (ministers and/or high-ranking officials of the competent ministries, for example, the equivalent of the Foreign Office, Justice, Home Office and Ministry of Public Health). The delegation also meets the representatives of national non-governmental organisations and specialised in the fields of concern to the CPT:

At the end of the first contacts with national authorities and the non-governmental organisations, and sometimes in parallel with these, the delegations proceeds to the visit of the places of detention often splitting up for this effect. But every time this is possible, these remain in the same region thereby facilitating the general organisation of the activities of the delegation.

The delegation (or its sub-groups) stays on average one-and-half to two days in an average - to large-size establishments (+ 400 detainees). The visit of places such as police commissariats or detention centres of foreign nationals requires obviously considerably less time; the visit of the former establishments is often effected during night time.

In this context, it is to be noted that a prison visit allows the CPT not only to examine how people are being treated under detention there, but also to obtain information on how these were treated before arriving in the prison in question.

At the end of the visit, the head of the delegation, and accompanied if possible by the rest of the delegation, meets once again by the national authorities with whom the initial contact had been made at the beginning. Experience has shown that these final meetings were very welcome by both sides. These offer the possibility to shape observations on the circumstances in which the visits took place, and to communicate first impressions of the places of detention visited.

The total duration of a single visit varies between several days to two weeks.

7. The follow-up visits

The Convention requires the CPT to draft a report after each visit. The report contains the facts observed at the time of the visit and the recommendations that the CPT deems necessary as a consequence. The committee may consult the contracting party with a view to suggest improvements in the protection of detained individuals.

I have drawn attention in my initial comment on the rules of confidentiality that the convention lays down in regards these visits.

The report is addressed to the government involved between six to eight months after the visit. In order to realise the necessary consultations and to institutionalise the co-operation wished for by the Convention, the CPT requests in its report for the government of the visited country to draft its version of the visit within a given time period, and on the measures it will adopt in order to put into practice the recommendations made. The State in question is considered to give account not only on the legislative and administrative measures that will take in this case, but also the effective implementation, in fact, of the recommendations made by the committee.

At present time, the standard practice of the CPT consists in inviting the States involved to provide a provisional report (generally in a period of six months from the date of receipt of the CPT report), and for it to be followed-up by a final report (generally within twelve months of the date of receipt of the initial report by the CPT).

It is important here to underline that the CPT wishes to engage a continuous dialogue with the authorities of each of the contracting Parties. Also, the communication of the report must also be considered as the beginning of a process, and not its conclusion.

8. Public statement

The only “weapon” available to the CPT concerning a State that refuses to bear in mind its observations is a public statement that can be, in given circumstances, a formidable sanction.

“If the Party does not co-operate or refuses to improve the situation in the light of the recommendations of the Committee, the latter can decide to make a public statement following a two-thirds majority of its members.” (article 10.2).

I have explained beforehand that the committee has applied Article 10.2 in December 1992 regarding Turkey. The integral text of the public statement is taken up in annex 4 of the 3rd report of its Annual general activities report (ref. CPT/Inf (93)12). A second public statement was made in December 1996.

E. The recommendations of the CPT concerning detention by police and prisons

In the general activity reports, particularly in the 2nd and 3rd reports, the committee has considered fundamental questions, and taken into account during visits, with care “to indicate clearly and with prior notice to the national authorities, its viewpoints on the different domains flowing from its mandate as well as, in broad terms, induce discussion on the questions concerning the treatment of individuals denied their freedom…” (paragraph 4 of the 2nd report on general activities).

Also, in Part III of its 2nd General report is dedicated to the detention of the police and imprisonment:

a) In regard to **police custody**, the committee has emphasised its specific attachment to three fundamental rights for persons held in custody that should be applicable from the beginning of freedom denied to them (that is, the very moment someone is denied his freedom to come and go by the police). The three rights referred to are:

- The right to inform a third party of his choice of his detention (family member, friend, consulate);

- The right of access to a lawyer;

- The right to request the examination by a doctor besides all doctors called on by the police.

The access to a lawyer for those detained by the police should include the right to contact and to visit him (in both cases, in conditions guaranteeing confidentiality of discussions) as well as, in principle, the right of the detainee to benefit from the presence of a lawyer during questioning.

In regard to the medical examination of police detainees, all these exams need to be conducted outside earshot, and preferably out of sight of police officials. In addition, the results of each exam as well as the pertinent statement by the detainees and the conclusions of the examining doctor should be formally held by the doctor and made available to the detainee and his lawyer.

At later stage, the committee was taken to specify that it is equally fundamental for an individual to be informed in a language he understands the totality of his rights at the outset of his detention.

In regard to questioning and questioning by the police, the committee considered that clear rules and directives should exist specifying the manner in which these need to be conducted. In this regard, the committee has also underlined the importance, on the one hand, of the initial and continuous training of police service personnel, in particular, on the conduct and dialogue with detainees alike, and on the other hand, the training up to modern techniques of investigation.

The CPT considers the fundamental guarantees granted to police detainees would be reinforced (and the work of police officials without doubt facilitated) by holding an integral and sole detention register for each detainee. In this register, all aspects of detention and all dispositions regarding each detainee would be recorded (the time of denial of freedom and justification(s) of this measure; the moment of informing the interested party on his rights, signs of wounds and contusions, signs of psychiatric affliction, and so forth; the moment at which the next of kin/consulate and the lawyer were contacted, and the time/day the detainee was visited by them;

recorded meal times; duration of questioning; the time of transfer or being set free and so on). For several questions (for example, personal belongings of the interested party; the fact that the detainee was informed of his rights and to exercise them or rescinds to do so), the signature of the interested party should be necessary with its absence justified. Finally, the lawyer of the detainee should have access to this type of detention register.

Among the different guarantees the committee deems fundamental with only several of these being expanded herein, it considers essential for detained people to have access to an independent mechanism to examine elaborated complaints concerning treatment detainees were subjected to in custody.

In principle, police detention is relatively short. In consequence, it is should not be expected to find conditions in police detention centres to be of an equivalent standard than those in establishments for long periods of imprisonment.

Nevertheless, the committee holds that a number of material conditions should exist irrespective of the above considerations, namely:

- Police cells need to have reasonable room. The committee has indicated that a desirable dimension for an individual cell should be around $7m^2$.;

- The police cells should benefit from adequate lighting and ventilation and be set up in order to allow detainees to rest (fixed stool or bench). Those constrained to spend a whole day in detention should have one clean mattress each and clean blankets;

- Those detained should be able to carry bodily needs at will in decent and amenable conditions. Adequate provision should be offered to allow them to do their ablutions;

- Finally, the detainees should be provided with food at regular meal times including a whole meal every day.

Please allow me to conclude on the recommendation that I consider particularly important, and which targets the attitude each police service personnel

should adopt. I quote paragraph 28 of the report to the Government of your country relating to the visit effected in May 1995:

«The CPT recommends that the senior police representatives of law and order forces are held to tell their service personnel, clearly and without ambiguity, that any form of maltreatment or mistreatment of detainees is unacceptable and will be severely sanctioned. In this context, it would be convenient to draw the particular attention of police service personnel and their cadre in particular to the new penal dispositions concerning incidents of torture and other cruel treatments considered degrading and inhuman, including the lack of denunciation by the police hierarchy of such behaviour within three days from the moment that it gained knowledge of such incidents.»

Dr. José Vicente Gomes de Almeida | Subinspector General of Internal Affairs
- Public Prossecutor

"It is time to disperse the clouds, break the ice, drive away illusions and fears, dissipate misunderstandings, eliminate suspicion. The fog must rise so the Sun can shine"

The Book of Mutations

EVERY POLICEMAN IS A CITIZEN;
EVERY CITIZEN IS A PERSON.

1 – To know the Police in order to better understand it

To reflect upon the problems posed by the relationship between the citizens and the Police in this era of accelerated changes in our civilisation - characterised by the structural alteration of the economies, by the fear of a financial apocalypse, by the emergence of new technologies and by constant migration fluxes - assumes a particular importance and significance.

Paradoxically, even nowadays the Police are an institution with whom the majority of the citizens are not familiar. In all truth, it is indeed a paradox that in face of the duties of the Police - which are imposed by the Constitution for defending and guaranteeing democratic legality and guaranteeing the internal security of the citizens - these have maintained a negligent attitude of indifference vis-à-vis the nature, the content, the forms and conditions of police activity.

Such distancing generates incomprehension, suspicion and prejudices that affect inexorably the relations between police and citizen. When a victim, the citizen tends to demand from the police official divine qualities of omnipresence and omniscience. But if placed in the position of transgressor he demand the maximum indulgence against the law itself and proves to be, many a time, a partial and pitiless judge of any fault that the former may commit.

2. - Police Work

Police work is work where the risk of irregularities is high, not only because it operates within the scope of a hypertrophied judicial system - made up of norms that are not all that clear, that are ambiguous and unstable - but also because situations occur with an accentuated degree of dynamism and uncertainty. If we were to compare life in society to an active volcano, we could say that the Police work with lava which is still in a state of incandescence, while the remainder of the social operators (judges, Prosecuting Council, Inspectors) can act upon lava which has already cooled-off, or, at least, is already cooling off. Police officials act right at the front line, under the greatest psychological pressure, the greatest risks, where the borderline of fear lies, right there where any error may prove fatal, where the line that separates the hero from the villain depends much on sheer luck.

And therefore, the citizen who is evaluating police behaviour should be concerned about emitting an impartial judgement that is free from prejudice.

We are all aware that if the level of understanding of the citizen decreases, then inevitably the level of acceptable risk also becomes lower. This situation gives way to either mechanisms of self-defence (with an automatic recourse to the precedent case and an attachment to routine, to custom, to hierarchical cover-up) or to attitudes of passivity, with ominous effects upon order and public peace.

Police work can not be seen as a mere obligation to produce results. The obsession for immediate results at all cost can conduce to arbitrariness. Thus an increase in police efficacy can not be made, under any circumstance, at the cost of sacrificing rights, freedom and guarantees of citizens.

We are of the belief that the implementation of the municipal security councils created under Law nº 33/98, of 18 July, shall certainly reinforce police efficacy in a context of ample co-operation with the citizenry.

3. - Safety and Freedom.

The citizen maintains a fictional illusion about safety, of which it has a paradisiacal image. That is why it is necessary to promote a culture of safety, which shows clearly that it itself is inherent to the very essence of life in society (where we are where the risk lies), and therefore is a matter that concerns all citizens and not only the Police.

It is true that the citizen should expect understanding and peace from the police. But it should not transfer upon it the responsibility of finding a solution for the problems that have to do with the private life of each one of us. A police official is not an exorcist of all evil, and neither can he expiate all misfortune. But he must be prepared and be available to listen to the citizen who complains: the police station can and should be a haven from the agitated waters of society.

The citizen also maintains a rather ambiguous and ambivalent relationship with order and freedom. It oscillates between the demands for greater police efficiency and proven results and the exaltation of his rights and guarantees. But when the conflict between the two of them becomes acute, he generally opts for Order, tolerates injustice, seemingly forgetting that this is the mother of all disorder. And this is because the greater the feeling of insecurity, the greater the desire to be protected.

4. - Of the need of a culture of respect for police authority.

We understand, thus, that is it absolutely indispensable to promote a culture of respect for police authority.

The police official must be regarded as the expression of right and justice, more than as the incarnation of law itself. In this way, as Tocqueville pointed out, when the citizen obeys an order from the police, he is not obeying the man – he is obeying justice and law. The police official is not only the symbol of the vitality of the judicial order: he oversees that it functions harmoniously, with respect for the dignity of man, where it is a given that in a free society respect for dignity of man entails, at all times, the self-recognition of the dignity of authority.

The mere legal determination of punishments shall be in vain if it is not accompanied by their effective application. Thomas Hobbes emphasised that *“fear by which you dissuade man to do harm does not come from the fact of having penalties affixed to it, but from the fact that they are effectively applied”* (From Citizen).

Already in Antiquity Aristotle warned of the social implications of the non-execution of judicial decisions, stating that *“Going on trial and begetting a sentence shall be to no avail if afterwards there in no one to make sure they are obeyed. Make the execution disappear and it shall become impossible for society to subsist”.*

Disobedience of authority is accompanied, many times, by a profound contempt for rights and therefore for the conditions that allow freedom, in an exacerbated cult of the most pernicious egotism. It creates a climate of irresponsibility and feelings of impunity, which were always at the basis of deviations of the use of force.

5. - Police credibility.

To this effect, the relationship of the Police with the citizens is crucial for social harmony. Mutual deference and respect, which are associated with a healthy social intercourse, should reign in the relations that prevail between the citizen and the police.

The image that the Police transmit of themselves is crucial for the respect of the legal order. But law abidance on the part of the Police can not be translated into acts of humiliation of any citizen.

In a free society police power cannot be regarded as an end in itself, but as a legal instrument for the safeguard of the full exercise of citizenship. Thus over and beyond his knowledge of law and of the social environment in which he acts, it is fundamental for the police official to be the carrier of multiple virtues, among which good sense, patience, a keen intuition and resistance to frustration are of the essence.

In their relations with the Community, police officials must observe all ethical principles set out in the Public Administration, with special attention to the following principles:

- **the principle of legality**, to act always in accordance to the constitutional principles and according to law and rights;

- **the principle of justice and impartiality**, to treat all citizens in a just and impartial way;

- **the principle of equality**, not benefiting or harming any single citizen;

- **the principle of integrity**, meaning to be governed at all times by principles of personal honesty and character integrity and respecting the

honour and dignity of people, particularly of those which are under custody, treating them in a correct and deferential manner. The duty of probity imposes on them, moreover, to refrain from any act that may eventually put his freedom of movement, the independence of his judgement or the credibility of the Police at risk;

– **the principle of proportionality**, demanding from the citizens not more than what is indispensable for carrying out their action, and utilising opportunely the adequate resources that are strictly necessary.

The credibility of the police rests, therefore, upon its member's competence, upon the transparency of their actions and upon the trust that these inspire on the citizens.

Competence can be assured through an appropriate recruitment and an adequate initial and permanent training.

Transparency shall be understood not only as the impartiality and integrity of its members but also as the acknowledgement and correction of all mistakes.

All police errors must be promptly assumed, corrected and sanctioned considering that:

– they generate in he who commits them a sense of habit and the absence of self-control, making him more and more insensitive and reinforcing the feeling of impunity;

– they transmit to the rest of the colleagues at work a perverse message of "normalcy" which is incompatible with the legal norms and which provokes a connivance that is so many times compulsive;

– they shake the confidence of the citizen in his Police, who by being the cause of discredit affect the image and prestige of the police institution;

– they provoke in he who suffered the consequences a well founded indignation which is so many times the generator of new violence because of the fact that aggression is so much more unbearable and revolting when it stems from the one whose duty it is to avoid it;

– opacity – which should not be mistaken with the safeguarding of professional secret or with the discretion inherent to police activity- originates or amplifies suspicions; it creates the temptation of cover-ups, many times through the practice of acts still graver than the first, which lead inexorably to the personal degradation and the loss of prestige of the institution and its members.

One of the factors that have most contributed for the trust of the citizens in the Police is the existence of a system of control of police activity.

The control of police activity must be considered as something vital to the correct conduct of the Police, since, like any other institution, it must be beyond any suspicion.

In effect, control:

– contributes to the existence of high levels of quality and guarantees that police efficacy is achieved through practices legitimated by law, thereby avoiding the spread of climates of suspicion;

– allows for a permanent evaluation of those conditions of police work organisation which may favour the appearance of problems;

– reinforces the credibility and the prestige of the Police, protecting it from slanderous denunciations, unfounded criticisms and intimidating manoeuvres from those affected by police actions;

– induces positive alterations of behaviour on account of the high probability of having illegal acts detected.

In closing I would merely wish to synthesise my thoughts on this inescapable truth, which should govern the salutary relationship between police officials and the citizens:

Every policeman is a citizen;
Every citizen is a person.

Jesús Caballero Gallego	Inspector of the Inspection of Personnel and Security Services • Senior Commissioner at the National Police Corps

For any human activity to be measured, it needs a system of control. Police activity has been traditionally interpreted as halfway between crime prevention and repression of the offence. Perhaps because of this the systems established to measure efficacy have been questioned many times. The natural resistance of any professional group to be submitted to certain controls that verify their performance has not been alien to the Security Forces, especially since the mechanism for the application of these controls, which have been in place in private enterprise for a long time, have been somewhat late in coming to this field. Nevertheless it is now impossible to do without the systems of control for measuring the correct functioning of police services. Saul G. Gellerman, a specialist in industrial psychology (1) said, in relation to this matter, that “supervisors would not be necessary if everyone knew exactly what to do, in every circumstance, and if they trusted that which they were about to do. The main task of control is to supplant the difference between skill and motivation”.

The Public Administrations of the developed countries consider it absolutely necessary to impose controls in order to measure the quality of their services. The European Union itself has established principles about this matter in particular.

Modern societies demand transparency in the administration of essential public services, in which the services offered by the Police Forces are included and which, in this case, branch out in two directions: the control of efficacy and efficiency and the verification of how the citizen is treated.

As far as the principle of legality is concerned, efficacy and efficiency must be achieved, not at any price but solely within strict abidance to the norms of the State of Law and to the regulations by which those Security Forces are governed; only thus shall they become valid.

Any activity of control requires a strategic planning, which logically implies defining its aims and objectives. Control also supposes the existence of co-ordination from the top or from the command levels and at the same time the acceptance of the members of the Security Forces, starting with their highest

officials, in order to descend gradually to the lower echelons until the bases have been reached. Without this acceptance it shall be very difficult to engrain the stimuli that reward work well done and produce the adequate professional motivations that the leaders themselves should support, in the understanding that these stimuli control the immediate activity of their subordinates.

Thus being, the superior leadership should maintain a planned control over quality, directly and across the successive echelons, delegating on the responsible officials that are subordinated to them. This control might be cracked or broken when certain segments in the chain do not share the conviction about the need for such a mechanism to improve both the efficacy and the quality of police action.

The most appropriate strategies

The matter we have just pointed out simplifies the identification of the diverse strategies destined to resolve the problems of control of police activity. For this purpose it is important to take into consideration the suggestions that all and every single member of the Police Forces may put forth. We shall be thus able to shorten, in a remarkable way, the road for achieving the best results and for perfecting the methods of verification of this activity.

The greatest surprises in this field occur when leadership stimulates their subordinates to present suggestions meant to improve the services in any one of the fields. It is true that at times this will lead us to discover some of the strategies utilised by some of the members to work less. But at the same time, there are many positive surprises to be found in relation to ideas and creative activity that lie hidden in people that have not yet had the opportunity to come forth and speak. These are the ones that interest us most.

The subjective appreciation that the citizens may have in relation to Police action is something else. But what we are talking about here is of evaluation procedures that are serious and objective, and not about subjective feelings.

For example, the “feeling of insecurity” cannot be measured through available statistics.

What we need are elaborate opinion polls containing an elaborate methodology that is not always easy to interpret.

On the other hand, criminality can be the cause for the feeling of insecurity, but it is neither the only one nor the most determinant. Something similar happens

when the very members of the Police Forces evaluate their activity: the feeling of working in an efficient way does not always correspond to reality.

In order to define quality it is necessary to work with objective references, susceptible of being measured by means of a certain method, excluding feelings or impressions. The reason for this is that, once the initial resistance to accept external evaluation controls is overcome, the immediate advantages of the method become clear since many of the guarantees that all professionals demand for themselves come out reinforced. This evaluation enables them to prove they act with objectivity, within the respect of procedural norms and consequent good management.

What guarantees should be established so that the pattern or measures applied to evaluate police activity are also trustworthy for the police? Without any doubt one of these guarantees is the fact that the person who will carry them out is not related to the police unit being evaluated. I believe it is irrelevant whether he belongs or not to the Security Forces. But, doubtless, it is indispensable that he be familiar with the mechanisms by which police activity is regulated. The same happens when any other professional activity is being verified and controlled. A television company or medical service can be evaluated by someone who operates within similar parameters, even if he does not belong to the profession itself, because the results of that activity will have a repercussion upon the citizen and not merely only upon the sector affected.

The control of prevention

Citizen participation and the social role it plays in assisting prevention police duties can be another example of acceptance by the police of certain control mechanisms.

In the last decades, several countries were presented with the opportunity of creating an organism that would fulfil the role of “Council” or “Committee” for the prevention of crime. In his work “Community Prevention of Crime”, edited by the Florida International University, Professor Jose Maria Fico cites that many European countries have institutionalised these Councils for the Prevention of Crime. And he points out the case of Germany (where they exist at the level of some lander).

In Belgium the prevention programs depend on the Ministry of the Interior, of the Regions and the Districts. In France, the National Council for the Prevention of Delinquency was created in 1983, based on the Swedish model. It is presided by the

Prime Minister and composed of 80 members. Sometime later the Common Councils for Delinquency Prevention started being created.

In the United Kingdom several preventive programs have sprung up since 1983 whose objective it is to reduce delinquency and the feeling of insecurity in cities with a high crime rate.

We could thus go on mentioning several examples of what has been taking place in various countries, both in the European Continent as well as in the Americas. We could also mention the case of Spain, where co-ordination programs are being developed between Police Corps of a national, regional, autonomous and local scope. At the same time, specific programs for the prevention of delinquency in the line of the so-called "Proximity Police" have been created, which count on the participation of diverse sectors (neighbours, merchants, municipalities, etc.) in order to make preventive action more and more efficient.

What there is no doubt about is that the Police has to be helped and it has to admit and request the co-operation of other sectors in order to be able to analyse the pre-criminal situation; this is, if it truly wants to develop good preventive planning. And for this it is absolutely necessary to be constantly evaluating the work carried out by the police and of the methods utilised. This evaluation, whatever the name it takes (be it inspection, efficacy audit, legality audit, etc.) shall only be trustworthy if it meets two conditions: that it is carried out by qualified personnel that is familiar with the task to be analysed, and that the personnel is not related to the evaluated Unit. To exemplify this idea and to set it in a very concrete situation with which we are all familiar, we would talk about a cook that wants to evaluate the recipes or dishes he has prepared, without waiting for the reaction of his customers, who will ultimately enjoy the dishes or suffer should an important ingredient be missing.

Quality and its control

In order not to adulterate conclusions, measurement of quality in the Administration - and more concretely in the Security Forces - implies determining the constitutive elements of the latter, some of which are common to other activities of the entrepreneurial world of services, but others are not.

Among the first ones we can state, without intending to be exhaustive:

- The agent's level of training of, which will necessarily have immediate reflection on the good or bad information he is able to transmit to the citizen whenever he requires his services or when he has to go about a certain activity.
- The internal organisation of the assignment, which will certainly have palpable repercussions on the formalities that the citizen must follow in order to have his business or problem resolved.
- The *swiftness of response* which is frequently the target of criticism in any service and which is traditionally used against the State administration, in any of its branches.
- *Productivy*, which can be measured in terms of "group work" or in an individualised manner and which measures the profitability of a community or a person if applied correctly, at least until another formula or parameter is found to do so. In modern enterprise and in the administration it is an objective element for recognising profitability, whenever adequate systems of control are applied.
- In this case, productivity should be compatible with a good and adequate service to the citizen.

It would be worthless to have an agent in the "Denunciation Section" acting with the utmost correctness next to one that does so without the necessary politeness, disrespecting the norms of an adequate and professional treatment.

To these criteria, which we can say are general or common to any activity within these services we can add others that are specific or pertain to the field of security, since they are linked to an activity as exclusive as that of the Security Forces in their missions of delinquency prevention, assistance to justice and working for the protection of citizens. Among other, we must enumerate the following:

- *Relationship between the resources utilised and the results*. It is important to measure this correlation in order not to oversimplify and therefore be able to establish real efficiency. We can either "kill flies with our hands", as

a very classical saying goes, or we can have the appropriate or proportional resources.

- *Transparency of the action*. Not only are quality and specialisation demanded from the Security Forces. The necessary transparency is also required so that quality is not questioned or discussed.

  Precisely because of the sensitiveness of their field of action, which always involves situations that touch at the core of individual and collective freedoms, nothing is forgiven. Therefore, a degree of transparency that is not usually demanded from other communities must be maintained in our case.

These are the required demands for quality within the security services, and we must accept them. In the same way we also have to accept that it be the citizens and other institutions the ones responsible for establishing the levels or qualifications to gauge the degree of efficacy.

Another matter altogether is the question on how to produce a change of attitude or pre-disposition in a concrete community such as the security forces which, as much as any other community of the State administration or of the private world, may feel a natural resistance to certain changes. Among these changes, let us take a look at the resistance to the control systems for measuring the quality of their actions, their adequate operative planning or the productivity of their activities.

It is obvious that at the outset nobody likes to be controlled or have his productivity measured, or have his professional activity submitted to analysis.

When we say “nobody” we are implying the whole organisational chain of any institution or enterprise.

And doubtless, as we go up in the hierarchy, the negative reaction to that control may be greater, if they too are to be evaluated.

The reasons are obvious because sometimes the principle of authority is misinterpreted, and it is believed that it can be diminished or challenged or that it may sometimes result in the questioning of the methods applied.

But this situation is an excuse or a misinterpretation of the systems for activity verification.

Because a good control system is one that will be conducive to the strengthening of the principle of hierarchy, the determination of merit in order to obtain recognition of work well done and the reinforcement of leadership, since it will

have more information on many aspects of its unit - which it didn't have available before. It will also make it possible to learn about new control mechanisms that were ignored up to then.

For all of the above, in a straightforward simplification, but yet not exempt of practical vision about the problem of verification of quality for the services and of the control to observe it, our team classifies the officials responsible for the units which are normally inspected into two groups: those who are grateful (because they believe it is a good opportunity for getting to know their mistakes, problems and aspirations), and those who question the inspections (because they think only about the negative instead of the positive aspects).

As is obvious, I am not here with the pretension of making doctrine and all that I am saying is a result of the analysis of the work that is being developed in the police units, which altogether represent a contingent of about 128 000 men: 73 000 correspond to the Civil Guard, which is an institute of a military nature, and 50 000 belong to the National Police Corps, an armed institute, but with a civil status, both in the scope of the State, as well as 4 500 officials of the "General corps" of the administration, ascribed to this last corps in the administrative areas.

I think that in order to be faithful to the orientation of this seminar, whose conclusion or theme is "Control Systems of Police Activity within the binary Police-Citizen", I should restrict myself to summarising all the considerations presented above, which are the result of problems, questions and planning encountered daily. I will limit myself to explaining solely the experiences carried out in the two areas of inspection that I am responsible for. These are the control systems that the Ministry of the Interior has in Spain through the Secretary of State for Security, for gaining knowledge on the level of activity, the quality of the services, the observance of legality, the degree of productivity, the efficacy and degree of satisfaction on the part of the citizens, in what concerns the activity of the Security Forces to which I referred before: the inspection of units and the control of complaints and suggestions of the citizens about the operation of these services.

1. The Inspection of Units

The inspection is carried out in a non-restrictive scope. As described by the norm by which the framework of competencies is regulated, it encompasses "all the

centres and units of the National Police Corps and the Civil Guard, including the individual or collective action of its elements".

The system is utilised also described in relation to these other norms: "inspections and audits of a functional nature and also related to service, fulfilment of objectives and plans of action, financial or costs, human resources, administration procedures and systems, quality and others".

It is patently notorious that inspection of the Security Forces in Spain has a markedly positive objective. This could not be any other way, and I believe that all inspections that may be created in future must: make an evaluation of the performance, the available resources, and, above all, proposals for the improvement of operation of the different services.

This profile of positive dynamics and the constant search for solutions is, I believe, what has most contributed to give prestige to our task and at the same time, the one that demands the greatest effort. Because proposing solutions requires having the knowledge of the realities of the inspected institutions, knowing the way the police operate, the environment in which it they are rooted, the alternative work methods they possess and a set of variables that is only possible to handle if the personnel in charge is specialised and has been trained to do so.

To develop this task it is evident that a computerised database is indispensable. For this we have access to the databases, statistics, reports and information of the respective forces.

When a visit is made to any one unit to carry out an inspection of any type (general, sectorial or incidental), there has been a previous gathering of data and references which have been analysed and which shall later be submitted for comparison on the field itself.

- Direct observation is not only valuable for confronting these first data with the data already available, but also to discover aspects that had not been contemplated before.
- The opinion and suggestions both of the leaders and the subordinates can also be learned through this data information. On many occasions these are totally coincident with reality, but sometimes they may differ from it in aspects that prove to be of great interest.

Without any further delay on my part, I believe that the greatest efforts put forth to improve inspection work is related to the “Procedures Manual”, where the tasks of inspection are mirrored in a systematic way. I believe that with it we have reached several objectives:

- That the inspection personnel direct their work based on a more scientific method and as objectively as possible, which also demands that they be permanently updated.
- That the inspected forces are made aware that a work program exists and that it is the only measure which will be utilised, unless a contingency occurs.
- The recipient of the information has the certainty that the activity is regulated by a method and that it utilises the same measurement system, which offers a double guarantee of objective analysis of the reality which is being scrutinised.
- For the very officials responsible of the police units it is a guarantee to learn that the work carried out can be discussed at a certain point, if they wish, in the knowledge that in order to establish the evaluation of their activity all possible data and references at the national level must be taken into consideration, thus establishing statistical measures which provide us with the real and objective position about the functioning of their services.

2. Control of complaints and suggestions of the citizens

The control of complaints and suggestions of the citizens about the functioning of the services rendered by the State security corps (in this case the National Police Corps, the Civil Guard Corps and the personnel ascribed to the general administration corps) is also incumbent upon our inspection, in accordance to Royal- Decree of 9 February, 1996.

We never suspected that this field of inspection activity would bring us as much information and of such interest for the learning of the functioning of the security forces.

Without a trace of doubt, the Secretariat of State of Security and the police authorities are being well served with a good thermometer to gauge what the citizens

think and perceive about the services rendered by the security forces and by the personnel destined to these units.

Doubtless, I believe that the success of this program is not due that much to the fact of having been actually established, but on account of the program that was developed later for a punctual follow-up of the complaints and suggestions.

Furthermore, procedural norms of internal formalities were established (how a complaint is received, internal operation of verification, notification to the citizen, etc.) on the one hand, and on the other, the computerised processing of the information was also set up, making it possible to have a timely status of the situation.

To conclude, I would like to say that all the units of the Police and Civil Guard are under the obligation of placing a bulletin board, wherever it is most visible to the public, with the information that there is a questionnaire available for it to write its complaints or express its comments.

The superiors of these forces will be aware of these complaints and of the written answer that is remitted the citizen (if it is adequate or not, if it is processed within the established deadline, the time it took, etc).

In sum, with this system periodic studies are carried out whereby it is possible to identify the most frequent types of complaints - by unit or city - the degree of dissatisfaction of the citizens and on account of which services, as well as the measures adopted to correct them and other sets of variables which contain extremely important information for those who bear a certain responsibility within the security forces.

This is in synthesis our vision of the problem and our experiences in this field, of which, in all modesty, we feel quite satisfied. We endeavour to improve them and broaden them at all times, because he who does not see, does not progress.

In ending, I wish to thank you for the attention and time granted during my presentation.

Luís Filipe Cardoso de Sousa Simões	Police Commissioner (Polícia de Segurança Pública - PSP) • Member of several peace missions for the United Nations and the European Union

The topic of this panel, “The Police and the Citizen” has given us the opportunity to consider every aspect of the police force activity, including the organisation and operation of the law enforcement bodies.

I have chosen to introduce, In my intervention, three issues, directly connected to the type of relationship existing between the police force and the community, worthy, in my opinion, of reflection and debate.

The issue of discretionary actions carried out by the law enforcement members;

The emerging new concept of citizenship or, at least, the new attitude in relation to the rights of the citizens;

The new forms of law enforcement (community/proximity).

I

The problem of discretionary actions is normally discussed within the scope of the legal sciences field.

According to our legal tradition, the discretionary power is the target of very few theoretical reflections; the exception lies in the area of Administrative Law whereby the need for Administration to have “freedom of choice or appraisal” which “may be based on the opportunity to act, according to the object or to the form of the act”[19i] is recognised, But this Administrative discretionary actions is, at once, doubly conditioned, only existing when the law confers such power as a means to pursue the law.

“From this results that the administrative bodies discretionary powers, when they exist, are always binding; the powers are tied to the function, have to serve the purposes for which they were established and conferred, and there is no freedom of action allowing them to be shifted from their legal purpose”[20].

[19] Cfr Marcelo Caetano, *Manuel de Direito Administrativo, Lisbon. Coimbra Editora 1965 (7th Edition) (1st ed. 1937), p.31*

[20] Marcelo Caetano, op. cit. p. 185

In terms of the Punitive Law, the matter of discretionary powers is almost unapproachable, although present. for instance, in the determination of the type of sentence.

In relation to the police force actions, the rules defining the behaviour of the officer in terms of the different types of offences, do not confer them discretionary type powers.

#The indictment is compulsory, although the crime agents are unknown".

a) As to the Police Officers, for every crime they have witnessed (Art. 242 of the Punitive Process Code PP)

"Whenever a judiciary authority, a criminal police body or any other law enforcement entity who witnessed a compulsory indictment crime, he shall draw up or requests the drawing up of legal proceedings…" (art. 243 of the Punitive Process Code);

"The law enforcement and supervising forces should consider every event or circumstances susceptible of implying counter-demand responsibilities and take the necessary steps to avoid disappearance of the evidence" (art. 48, nº 1 of Dec. Law 433/82 dd. October 27 "General Counter-demand System)"

When an authority or law enforcement agent, while performing his traffic control function observes a counter-demand, he will draw up, or requests the drawing up of legal proceedings…" (art. 153 of Dec. Law 114/94 dated May 3 - Road Traffic Code).

The binding, even peremptory character of the above mentioned rules appear to discard the existence of discretionary areas when an officer is faced with acts that constitute a punitive offence or a counter-demand.

Does this mean that police officers to not exercise discretionary powers?

A jurist will answer yes to this question, as there will still be a series of activities where the legislator leaves a margin of freedom to the police authority to decide. This is the case of, for example, of decisions taken to toe a motorcar illegally[21] parked or to issue licences to carry fire arms[22].

But, will the law enforcement members only exercise discretionary power when same is foreseen by law?

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[21] The Road Traffic Code stipulates, in art. 166 "*Motor vehicles may be toed from public roads when illegally parked…"*

[22] "*Only for weapons (…) fire arms licences may , for defence purposes, be granted by the General Command of the Public Safety Police…" (*art. 1 of Law 22/97 dated June 27)

We know this is not the case. Law enforcement officers know it, the chief officers, Heads of Police Forces, politicians, every citizen know it.

Everyone knows but only a few are interested in broaching this issue in a clear manner. On the basis of this attitude lie, in my opinion, two types of arguments which are as common as they are false.

The first, states that this is a sensitive matter and the less you speak about it the better; the matter should not be mentioned because in the event of discretionary powers the law enforcement officer will end up finding this out by themselves - a little like the old fashioned morality attitude where certain talks related to sexuality with young people were dismissed because, in the long run, they themselves would discover all about “those things”.

The second type of arguments, more sophisticated, tend to associate discretionary attitudes to “preponderance”, “arbitrariness”, “despotism”, “abuse of authority”, actions and decisions depending from the whims or from the fancy of the officer. In this manner, the word discretionary should only be mentioned to the law enforcement officer to say that it doesn’t exist and that, in their actions, they are only and strictly bound to the rules of the law.

It is not because the codes do not allow it or because it is not debated in the class room or in seminars that the word discretionary no longer exists. I would even go so far as to say that discretionary power is, sometimes, not only necessary but also desirable to the majority of the community. All you need to do is imagine the justifiable uprising if, one night, the police officer had to charge all the vehicles parked against the parking rules in force in a large city; or the inconveniences this would bring to the police forces and security services and even to the safety and tranquillity of the public if each police officer had to draw up a statement for each and every infringement detected. Many of them would find it difficult, during their shift, to go further than a block away from their precinct/post.

The solution to apply the law in every situation, at all times and in relation to every offender - known in the Anglo-Saxon language as “full enforcement”[23], found in most of the juridical city ordinances, and referred to by most of the law enforcement organisations as their main line of action, is indeed not practicable.

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[23] “*A policy of full enforcement implies that the police are required and expected to enforce all criminal statutes and city ordinances at all times against all offenders”,* in Herman Goldstein. “Police Discretion. The Ideal Versus the Real”. Public Administration Review, 23, p. 140.

The impossibility of a "*full enforcement"* leads to an area of *"actual enforcement"*, i.e., deferred to situations where the rules are effectively applied.

There is indeed a difference between the law of the codes and the applicable law, as recognised by many social scientists[24]. However, the juridical speech and the political speech is still based on the "*full enforcement*" which places the law enforcement officer in a difficult situation, since, though not recognised, the discretionary power really exists and has to be exercised[25].

We have to recognise that the application of discretionary power is one of the main sources of conflict between the police forces and the citizen.

Many times due to the fact that the law enforcement organisations do not teach their officers the models and criteria by which they should rule their discretionary power. Others, because the citizen who, not wanting to accept the intervention of the police officer who writes him a ticket, argues with a list of offences, people and problems where the agent should focus his attention instead of wasting his time writing him, "a law abiding citizen", a ticket.

However, there are situations that should be highlighted, where the police officer acts according to the rules established by the law but shows excessive zeal, incomprehensible even to his colleagues. Even the organisations find it difficult to carry out a proper control of such situations when denounced.

I do not intend to say too much about discretionary powers - a matter which, in itself would be worth discussing in a series of seminars and workshops, so I will only refer the following three aspects:

- sources of discretionary powers in police actions;
- types of discretionary powers deserving to be more thoroughly analysed;
- problems arising from discretionary actions;

The origin of discretionary powers may arise from different sources. I will only mention some of the more often practised, and , in the first place, I will mention the law itself.

In fact, a law may be ambiguous, remiss under certain aspects or non regulated in others; it may also, among other reasons, promote injustices -

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[24] Cfr. Robert Reiner, *Policing*, **Brookfield. Dartmouth, 1996, Vol. II, p. iii**

[25] Cfr. Joseph Goldstein. "Police discretion not to invoke the criminal process: low visibility decisions in the administration of justice". *The Yale Law Journal*, vol. 69, nº 4, p. 586.

establishing inadequate sanctions[2627], for instance - or be conflicting with other laws. There are still cases where the same situations may result in different consequences[9].

The limitation of resources is one other source of discretionary actions. In fact, no police department ever has a sufficient number of officers to ensure the enforcement of every rule to all situations; even if, at one particular moment this number was sufficient, it would quickly need to increase this number due to the frequency of new legislation being published which defers new functions and activities to the police forces without the counter-part increase of the necessary means.

There are also limitations of time. An investigation, for example, cannot run for ever, as this will affect the success of other investigations. There are also technical limitations, incurring from the availability of certain devices (radar, alcoholimetres, scales, etc) or from the lack of knowledge on how to handle a certain technique (expert analysis such as dactiloscopy).

Besides these hindrances, it should be stated that the police forces and their officers are subject to different kinds of pressure. Pressure from the direct chief who demands the work to be performed in a certain manner; pressure resulting from the fact the another department is achieving more satisfactory results; pressure from the judiciary authorities who require the processes to be concluded within a specific period of time or those from other authorities who request the police force collaboration for different kinds of activities outside the scope of their normal missions; pressure from responsible police members who demand greater efficiency and better service quality; political pressures who require that certain problems be diminished; pressure from the community who want other problems to be solved; pressure from the media who give greater visibility to certain issues and ignore others, etc..

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[26] To give an example, I consider the high minimum amounts of the fines established by law 38/98 of August 4 - whereby preventive and punitive measures are established to be adopted in sports violence -, may carry an inhibiting effect on the behaviour of some followers but may also inhibit one or more officers from, under certain circumstances, issuing legal procedures due to infringement of the diploma.

[2727] Non compliance of the legitimate orders of transit inspection officer may lead to merely administrative consequences (if the officer draws up a fine according to art. 4 of the Road Traffic Code, being the offender subject to a fine of 15000$00 to 75000$00) or penal (if the agent refers to art. 348 of the Penal Code)

And because the law does not establish priorities, it falls on the police chiefs to decide the way the available human and material resources are to be used[28].

I previously mentioned the “necessary and desirable” discretionary powers and it will be useful to the audience for me to explain some types of discretionary powers.

Firstly, I distinguish a juridical discretionary power, resulting from the legislation in force, from one other - which we may call sociological -, which exists and will continue to exist and is and will go on being practised, whatever is established by the legal texts, or the will, speeches and policies referred to.

I distinguish as well, an “undue” discretionary power, resulting from the free will of the office, not subject to any formal or informal type of control and frequently exercised to the benefit of the officer himself, and which is liminaly rejected by the police force organisations and by the population (here I include every situation of “abuse of authority” and “preponderance”), from a desired discretionary power - which we may designate as “tolerance”), which, in a positive way is reflected upon the community, who values such power and is generally approved within the police force organisations and understood by the other judicial or political institutions. When “common sense” or “coherence” is required from the police forces and their officers they are, actually, defining parameters to delimit the correct use of the discretionary power.

I believe it is important to refer, at this point, that many of the illegal and abuse of authority actions performed - among which some that were widely publicised by the media with an enormous impact in the public opinion - were not aimed at their own benefit but, instead, resulted from an incorrect interpretation of their duties and the purpose of the police action, placing efficiency and efficacy values - so frequently demanded by the populations, the political power and police directors - above the basic rights, freedom and guarantees of the citizens. By this, I do not intend to condone such behaviour but only to call your attention to our share of collective responsibility (police forces, politicians, mass media, citizens) to those facts.

As to the problems emerging from discretionary actions - and I am certain that many will be raised by my panel colleagues and by the assistance - the more frequently highlighted are the following:

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[28] Cfr. Hereman Goldstein, op. cit. p. 143

⇒ when the actions of the police forces are discretionary, they may be putting themselves in the place of other Democratic State bodies;

⇒ the difficult control of the police forces activity - the topic of another panel in this seminar - which is characterised by a feeble direct supervision (special in terms of public safety, inasmuch as the criminal investigation and repression or the maintenance of order reveals lesser dimensions);

⇒ the undue exercise (in the sense of the above mentioned) of discretionary power normally lead to arbitrary or discriminative treatments;

⇒ encourages “mistakes”;

⇒ raises problems of inconsistency, dealing in different manners with individuals who have committed the same acts;

⇒ raises unforeseeable problems; the citizen will find it difficult to govern their behaviour according to rules and criteria they are not aware of.

The whole of these aspects are sufficient motives for the police forces to chose not to recognise the existence of discretionary powers in their actions and to prefer a speech of full respect for the law enforcement. It is less of a problem. But the discretionary powers remain.

It is up to us police professional and to all those who are involved and interested in matters of population safety and tranquillity to search for the more efficient means to fight against a “bad” discretionary power and to disseminate the criteria and parameters of a “good” discretionary power.

And this will be achieved, among other measures, through the:

⇳ improvement of the formal and informal internal control mechanisms (inspections, disciplinary systems, auditing, etc);

⇳ definition of deontological codes - an internal debate will no doubt be more efficient and susceptible of being practised and lived then those imposed by the political will;

⇳ Improvement of the hierarchic framework aspects and the follow up of the police activity;

⇳ inclusion of this matter in every stage of the training (presently only the Police College broaches this topic in a more profound fashion)

The external controls, whether judicial or administrative) will certainly have an important role to play.

A recently introduced measure, which improves the control of the officers activities, is the existence of a Complaints Book in every public service institution.

(I intend, at this point, to refer to some statistical data about the complaints book in the PSP (Portuguese Safety Police)).

The safety forces will belong to the public services where the complaints book is more simplified.

The creation and revitalisation of institutions such as the Purveyor's Office or the Internal Administration General Inspection Office will always be a milestone in the police activity control system in Portugal.

The police professionals and the law enforcement bodies welcome the existence and the action of both entities/authorities, which will allow the removal of biased suspicions or ""collectivism" in the investigation of the situations denounced, allowing for a more trusting atmosphere between the police forces and the community.

It is, however, important for those who exercise inspection activities to be aware of the difficulties and problems encountered by the police forces in their daily activity and that, in concrete cases, they should allow the officers involved the same rights and guarantees provided to the remaining citizens, and not to confront them with the onus of proof of their innocence.

II

It should be recognised however that the resort and the efficacy of these and other forms of control of the police forces activities will be related to the degree of participation of a certain society, i.e., with the concept of citizenship in force and associated practises.

Citizenship represents a group of rights and the existence of powers and means to mobilise the resources that will allow such powers to be exercised, whether according to a passive or active attitude, respectively of citizenship; it also represents a group of duties to which the member of a community is subject.

In the Portuguese society, the citizens will, increasingly adopt more active citizenship attitudes, which is an healthy and desirable attitude in a democracy.

It would be important, even from the point of view of public safety and tranquillity, to have a greater proliferation of collective or group citizenship acts and movements to moderate the different dimensions of social exclusion, revitalising social policy alternatives and achieving a stronger participation from the citizens in the resolution of the existing social problems.

There is, however, the perception that a stronger individualist concept of citizenship is being developed, normally with less solidarity, centred in the claim of the rights and ignoring and even excluding the duties which, just as the rights they claim, are legally and morally associated.

Being present in the regulation of conflicts, the authority officers feel - perhaps more so than any other professional activity - a greater agressivness on the part of many citizens in claiming their rights, real or hypothetical, which they consider as absolute, although ignopring or even violating the rights of the remaining citizens. Many seem to strongly believe in the idea that democracy is synonymous of “absolute individual rights” and that only the others, and specially the authority officers, are subject to the duties.

The dissemination and generalisation of such behaviours will tend, naturally, to increase the conflicts within the Portuguese society in general and in the relationship “police and citizen” in particular.

It is important to state that, sometimes, this type of attitude and behaviours is felt inside the law enforcement organisation itself. There are elements that claim the rights but feel great difficulty in understanding and subjecting themselves to the duties inherent to their quality of public workers and authority officers.

This situation will increase the internal conflicts which will be facilitated by the inefficient or even non existent regulation of some fundamental aspects of the organisational operation, such as working hours, functional contents, the “permanent availability” system, etc.

Some of the officers are, at times, confronted with the perception that they are considered “2nd class citizens”, insofar as they are permanently confronted with the rights of the other citizens and, being, as they are. subject to special duties due to their law enforcement quality, they notice that some of their rights, specially their workers rights, are not regulated.

The above mentioned attitudes, feelings and perceptions, on the part of the citizens and law enforcement officers, contain in themselves a conflict potential, leading to a more sensitive relationship between the police and the citizen which

complicates the actions of leadership and control within the safety forces, demanding a model of authority different from the typical military model; and a model based on action capacity, professional capability exercised through an exchange system aiming at the institution of reciprocal trust and the maintenance of the levels of motivation and involvement required to an efficient performance.

III

The third issue that I intend to cover, directly connected to the relationship between the police and the citizen, relates to the new forms of law enforcement already experimented in other countries and which are now being disseminated in this country through debates - few and not very profound - or through some concrete experiences.

The “Safe School”, “Elders in Safety” and “Support to the Victms of assault” programmes, promoted by the Ministry of Internal administration, are some of the more recent initiatives.

The results will undoubtedly be positive and, disseminated to the safety forces within the scope of the remote training project, will contribute towards a greater sensitivity of the police officers in relation to the human and social problems they encounter in their daily professional activity.

One other embryonic initiative, deserving the best attention in the development of relationships with the community is the recent legal creation of the “Safety Municipal Councils”[29]. We hope that these Councils will become the strongly needed forum where inter-institutional issues related to public safety and tranquillity may be debated - the latter to be considered in its widest sense. It is undoubtedly an initiative that will generate expectations amond the responsible bodies of the police forces but we will have to wait to know whether this law is a corner stone in the process of community adhesion to its policies or if, instead, we are faced with “*yet another example of Portuguese weak implementation*”[30].

It is, therefore, still too soon to assess the real impact of the programmes referred to above in terms of the law enforcement and safety services operation and,

[29] Law nº 33/98 dated July 18 98

[30] Cfr. G. J. Bender cit in Teresa Pizarro Beleza. «Social Re-insertion of criminals». Recovery of utopia or the Utopia of recovery” in João Figueiredo (Coord). Delinquent Citizen: Social Re-insertion? Lisbon, Instituto de Reinserção Social, 1983.

mainly, in relation to the feeling of safety of the target populations[31]. Being some of these programmes still on an experimental basis, others circumscribed to highly specific areas, and all without knowing their future and the later evolution they will go through at medium and long term (being of a political nature it is natural that the political situation at national level will determine the future of some of these projects), great caution should be taken by those who believe that the "egg of Colombo" has been discovered in terms of internal safety.

More symptomatic, although less efficient from the operational and marketing point of view, it will be, in my opinion, the fact that, within the internal scope, PSP tried, in April 1996, to sensitise its personnel to adopt new forms of law enforcement through a directive which highlighted the need for the police forces to "*identify problems and share perspectives with the community by making available departments to help the citizen, the victims, with a specialised attendance in relation to certain crimes, study of problems befalling the younger generation and establishment of training, sensitising, prevention and protection of the citizen and the citizens properties*[32]*".*

It is of interest to analyse some of the reasons why this initiative did not show any visible effects:

⇔ no concrete action was imposed to the sub-units; it was, instead, attempted to sensitise them by recommending the study of the possibility to introduce some of the measured included in the circular letter;

⇔ the adoption of the proposed measures, even the simplest ones, demanded human and material means which were considered by the sub-units as impossible of making available so as not to disrupt the other services;

⇔ the launching and the success of some of these measures demanded the congregation of wills, inside and outside the law enforcement organisation, which were not mobilised;

⇔ the planning of the processes and their performance demanded different

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[31] Not having assessed the previous situation, the results of every action assessed will be compromised.

[32] Circular letter nº OP 3170 dd. Apr.1 96 from the PSP General Command

> knowledge from those who were usually allocated to the remaining operational activities. It is not that such knowledge does not exist inside the police forces organisations (at PSP, at least, it may be assured that they do exist), the problem is to mobilise the personnel, insofar as this is only possible by exclude those who have such knowledge, at least for a certain period of time, from their traditional operational duties.

It is therefore understood that the response given by the PSP sub-units was much more efficient to the new type of law enforcement launched in the previous year in more sensitive areas and which aim is to firstly increase the visibility of the presence of the police forces.[33]

I would like, at this moment, to underline that fact that I do not consider that the models of community law enforcement, or of proximity, should be the replacement of the traditional law enforcement operations, or of the manpower concentration[34]. Each one of these models has potential and advantages, responding to different needs; the difficulty lies in the capacity to integrate and on the correct balance between the different models by creating solutions adapted to the concrete safety problems, to the specificity of the areas of intervention and to the existing operational resources.

In this process it is important not to allow ourselves to be alienated by experiences or by propaganda arriving from abroad. It is paramount that we focus on the reality of our countries and a more careful attention should be paid to the thorough study of the experiences tested and to the models that are adopted but it will be wrong to try and implement imported solutions. Any programme or action will no doubt have to respond to the institutional, political and social realities of our country and to the specificities of the interventional areas and to the particular aspects of the organisation where it is intended to intervene.

The initiatives described show that “seeds” have already been sown in our country for new types of law enforcement and police actions which will improve the relationships between the police forces and the community.

We may not, however, affirm without demagogy that there is already a community law enforcement. Inasmuch as, in my opinion, the conditions which I

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[33] Directive 9/97 dd. 17 Nov. 97 from the PSP General Command

believe to be essential are not yet assembled for the implementation and success of this type of strategies, such as:

- ⇑ the existence, in society, of sufficient organisations and structures to respond to the type and volume of problems identified and channelled by the police forces;
- ⇑ an inter-institutional works driven public administration which demand, besides multi-disciplinary knowledge, the congregation of wills and the availability of means for the resolution of non specific problems;
- ⇑ police organisations able to conceive, implement, develop, follow up and assess specific prevention programmes and inter-institutional projects.

Whereas the exogenous factors have not yet been assembled, it remains - and this is no easy nor immediate task - for the police organisations to promote the necessary endogenous actions for the success of this type of strategy. Some of the actions to be developed should, among other objectives, try to:

Increase the specialisation of their members, specially in what refers to safety prevention and education;

To reformulate the internal processes and actions adapting them to the potentialities of the new technologies;

Develop the communication and inter-personal relationship capacities of every police officer;

Identify the professionals that are able to become “project actors”[35] and elect them to projects aimed at long term objectives.

Create structures for the study and definition of policies to approach the community, and support to the planning and implementation of concrete programmes.

To involve every member in a project that has become of collective interest.

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[34] This latest type of law enforcement - concentration of manpower - will have an ephemeral life not due to lack of intrinsic virtues but due to several deficiencies in the planning and implementation processes.

[35] Understand these as the members who in their professional activity are not limited to the tasks prescribed or included in the normal performance of their duties.

As you probably have already understood, I am referring to the need to trigger a new changing process, not only defined by external elements to the organisation and imposed to the law enforcement forces but without solving the real implications of the organisation and law enforcement activity and also of the life of their officers.

A changing process participated and shared by every police professional and by every one interested in public safety and tranquillity problems, in the sense of being able to have a police force fully integrated in the community to which it belongs, characterised by the transparency of actions and processes and by a permanent inter-action with the environment where they are inserted.

Benedito Dias Mariano

Police "Ouvidor" of the State of São Paulo - Brazil

- Secretary General of the Interamerican Forum of Human Rights

In the first place I would like to thank the Ministry for Portuguese Internal Affairs who, through the General Inspector of Internal Affairs, has honoured us by inviting us to take part in this International Seminar - Human Rights and Police Efficiency - Systems to Control Police Activity.

This panel deals with the subject of “Police and the Common Citizen”. In light of this subject I would like to talk about the novel experience taking place in Brazil and Latin America, which is the creation of a Police Ombudsman.

The São Paulo Police Ombudsman began on 20 November 1995. The State of São Paulo, with 30 million inhabitants, is the most important state in Brazil. The state has two State Police Forces, the Civil Police with 35 thousand men which deals with investigations and forensics, and the Military Police with 82 thousand men which deals with prevention and control.

Unfortunately the Brazilian Police have a racist and authoritarian tradition.

During more than 300 years, Brazil did not consider blacks to be human. We were one of the last countries in the world to abolish slavery. It would not be an exaggeration to say that blacks were victims of the most varied techniques of torture and ill treatment during slavery. With the late-coming abolition of slavery and the arrival of thousands of European immigrants who went to work in agriculture, the freed black could not get a job as a “free man”. Without a job, he became victim of social and racial discrimination and still suffers the violent repression of the State. The “black citizen” is placed on the border of society and is considered a potential criminal. Unfortunately this is rooted in police culture and society. The black Brazilian

population which represent the majority of society, are still trying to obtain their rights as citizens.

Recently Brazil went through a long dark period of exception of almost 40 years of civil and military dictatorship. Possibly due to the very nature of the police action, this area suffered the most influence. How is it possible to change this inheritance and create a new type of Police in which the common citizen can be respected, irrespective of colour, sex or economic condition?

In our understanding the way to do this is by creating structural changes in the police organisation, on the assumption that most policemen are dedicated and idealists and it is the structure which is archaic. Corruption and inefficiency are the main causes. For example:

1 - In less than nine years, the São Paulo Military Police were responsible for the death of 5400 civilians, whilst only 96 policemen were killed over the same period of time.

2 - Three times more policemen were killed on their days-off than on duty.

3 - About 30 thousand prisoners are in the hands of the Civil Police (judiciary and investigation), surviving under sub-human conditions, and this situation has been going on for decades.

4 - Torture and ill-treatment are the *"modus-operandi"* of the police stations, although on a smaller scale.

5 - In most states the highest salary paid on the police force is ten times higher than the lowest.

Only a police force which is democratic and fair can reduce criminality and give value to police work. It is in this context that the experience with the Police Ombudsman has been created.

It appears out of democratic needs. The Ombudsman is the institutional space given to the common citizen, within the public safety sector. In under three years, the Ombudsman has spoken to over 20 thousand citizens and brought over 8 thousand

actions against the forces. These actions were sent to the investigation departments of both police forces.

As a result of the accusations monitored by the Ombudsman, over 1500 policemen were administratively punished or accused of serious crimes, such as abuse of authority, torture, homicide and corruption. Apart from these basic functions of listening and accompanying legal actions, and listening to claims from the population, the Ombudsman can also propose alterations to the system, such as:

1 - Propose ways to strengthen the investigating departments and therefore guaranteeing autonomy and independence to the “Corregedorias”. (judicial circuits)

2 - Create the subject of Human Rights in the Police Academies.

3 - Propose a new philosophy for the force. The policemen must be convinced that avoiding crime is much more efficient than “catching the criminal”.

4 - Priority in fighting drug traffic, organised crime, theft, corruption, intentional homicide, gangs of exterminators, investigating and repressing all types of offences.

5 - Propose the creation of a new career model, reducing steps on the hierarchical ladder, and strengthening discipline. The Police Ombudsman which is the first experience in autonomous and independent surveillance of police activity in São Paulo, has decidedly contributed to the transparency of police activity.

In the words of Mário Covas, the Governor of the State of São Paulo, “ The Police Ombudsman is becoming the paradigm of the relation between the police force and the democratic state”.

However this is not enough. We want one, single, civilian police force in São Paulo and Brazil. We want a civic minded police, which will not look at the poor, the blacks, the minorities and inhabitants of the suburbs as “delinquent stereotypes”. We want a police which will investigate and then arrest, and not arrest and then investigate.

During the process of democratic transition, the police is also invited to be a protagonist in the guarantee of citizenship. The Police Ombudsman wants to play an

important part in searching for this new model of police, which can only be created in democracy.

Michel Sarrazin

Chief of Staff of the Police Service of the Urbain Community of Montreal, Quebec – Canada

Concerning the model for neighbourhood policing

Juridical Framework

A while back, I discovered the casework if Judge Louis Brandeis of the United States Supreme Court, who wrote the following statement: “There is no greater responsibility than the responsibility of the citizen”.

Today, in order to show you to what point the citizen is called to take on a greater importance in several countries and towns including France, Holland, San Diego and Edmonton, I should like to present you the new model of neighbourhood policing that we launched fifteen months ago in the Montreal Urban Community Police.

This model is called the “Neighbourhood Police” and it based on two operational conditions that I deem essential: a commitment by citizens and a democratic dynamic.

Before continuing with my presentation on Neighbourhood policing, please allow me describe very briefly the juridical framework that prevails in Canada. This will enable you to understand better the context in which we are working.

The Big picture of police in Canada

On the competencies of different governmental levels are enshrined in the Constitution of Canada.

1) The competencies are foreseen in the Canadian constitution according the federal level of government (Canada), its provincial counterpart (10 provinces and the North-Western territories), or municipal (1 600 municipalities in the Quebec province) namely to pass legislation on criminality law, penal law, or assorted legislation on the quality of life for citizens.

2) On the jurisdiction of police forces in Canada

In Canada, 54 300 police officers work in some 300 police services, either in a federal police (Royal Canadian Mounted Police – 21 000 police officers), two police services covering the provinces of Quebec and Ontario (8 000 police officers), the remaining serving the municipalities.

3) Police structure in Quebec

The Ministry of Public Safety has the responsibility for the laws relating to the police. There are around 13 000 police officers in Quebec. These are grouped in one provincial police force (Quebec Police – 3 859 police officers), one regional police (SPCUM covering 29 municipalities (1 431 municipalities – 4 772 police officers).

Mechanisms of police control

The police officers and the police service are submitted to a plethora of administrative as much as judiciary controls.

1) Judiciary controls

a) Penal

- The police officer is submitted to the same laws and regulations as any citizen. Only a number of exceptional circumstances protect him whenever he conducts his duties.

- Police work is also sanctioned in conformity to the Charter of Rights and Freedoms**. Police** intervention must be carried out with respect to stated principles of the citizens' freedoms.

b) Civil

- The police officer and the his employer (SPCUM) are subject to the to the same principles of civil responsibility as any private citizen.

2) Administrative control

- The law of police organisation foresees several levels of control of police work notably the power of the minister to require a range of information and reporting, and to carry out inspections and to enquire on the state of any police force.

- The deontology is an applicable regulation to the police in Quebec as a whole, and targets the actions of individual police officers in his relations with the citizen and in the conduct of his duties.

You will have the occasion to hear Maître Denis Racicot, Commissioner of Police Deontology in Quebec, who will speak on this topic tomorrow.

Discipline is a specific regulation to each of the police forces and targets the sanctioning by the employer on the duties and norms of conduct required from police officers with the aim to ensure the efficiency, the quality of service and the respect of the authority of police officers.

The description of the CUM

Created in 1970 by the Council which is composed of 29 mayors and 275 municipal councillors, the Montreal Urban Community is a regional government and exercises the competencies conferred on by the law in the five main domains:

- National territorial management
- Environment
- Evaluation / Finance / economic development
- Transport (with the STCUM)
- Public security

Here are some indicators on the regional government covering the citizens of Montreal island who reside in its 29 municipalities including the Montreal City.

- Territory of 496 km2
  - 85% affected to habitation, commercial activity and industry,
  - public establishments, parks, system of roads and transportation.
- More than 1.8 million citizens with a French-speaking majority.
- The population is composed of citizens from 80 different ethnical origins who speak 143 different languages in total. 90% of immigrants settle in Montreal.
- Between 1971 and 1991, the Urban Community of Montreal has had 10% demographic shift of its population to suburbia.
- More than 1 in 5 families are single-parent families.
- The ageing of the population. 1 in 5 will have more than 65 years in 2001.
- Poverty increases.
- Big quantity of cars: more than 1 million cars a day.

™ Very efficient public transportation system,

™ Metro.

CRIMINALITY IN THE URBAN COMMUNITY OF MONTREAL

	1987	**1997**
Thefts	**6 896**	**4 645**
Burglaries	**34 471**	**30 050**
Car thefts	**13 556**	**19 936**
Car break-ins	**24 314**	**18 273**
Sexual offences	**1 202**	**1 211**
Homicides	**70**	***49**

In 1997, the number of homicides reached its lowest level since 1980.

The police service of the Montreal Urban Community

It was in 1972 that the police forces of the 29 municipalities of the Urban community of Montreal were grouped into one single police service. At the time, the 29 police services had 5 400 serving police personnel.

Today the Police Service of the Montreal Urban Community has 4 157 police officers and 640 civilian employees. In this manner, it is:

™ The 1st municipal police service in police manpower in Quebec.

™ The 2nd most important service in police manpower in Canada after the Toronto Metropolitan Police service.

™ The 8th biggest in manpower levels in North America.

HERE IS SOME DATA OF INTEREST ON THE SPCUM

- Budget: $ 400 million, which represents more than 1/3 of expenses by the Montreal Urban Authority.

- Police manpower levels:

  - 4 157 police officers with 18% female personnel
  - 640 civilian employees
  - 527 tasked with road passages for children
  - a hundred or so police trainees extra complement the total

Number of police cars: 973
Number of police detectives: 458
Number of police constables: 2 066

The Turning point towards Neighbourhood policing.

A NECESSITY

In 1994, the Police service of the CUM undertook an important *démarche* in an organisational switch that resulted as soon as 1997, in the beginning of neighbourhood policing. This radical change appeared to be more than obvious from the moment that it was perceived that the environment in which the police operates in has changed by leaps and bounds over the previous 20 years.

CONSULTATIONS

In 1994, the SPCUM proceeded with different research studies and consultations. The results of these research studies stated clearly:

- The expectation of the elected offices and key partners of the police Service.
- The concerns of citizens.
- The changes requested by the Police personnel .

A RENEWED AND CLEAR MISSION STATEMENT

Following these research studies, the SPCUM deemed necessary to accomplish its tasks in a different manner. In order to achieve this, the SPCUM

undertook the following in conjunction with institutions, socio-economic organisations, the community action groups and private citizens:

"To Promote the quality of life of all citizens within CUM territory and contributing to the reduction of criminality levels, to improve road safety, to engender the sentiment of security, and to develop a peaceful and secure environment in respect to rights and freedoms guaranteed in Quebecois and Canadian charters."

THE DEFINITION OF THE ASSIZE MODELS OR ITS FIVE COMPONENTS

The philosophy which underpins neighbourhood policing is to be found in five interdependent and vital guiding principles:

Problem solving

To eliminate in a long-lasting manner the problem situations by tackling the core causes.

A return to policing basic tenets.
Patrolling.
Inquiry.
Geographical responsibility.

To divide the territories in precincts (23 districts Vs 49 police station). The precincts became "our" neighbourhoods. It is easier to tackle a problem whenever as it is noted.

The police officers have the responsibility over smaller patrolling sectors in order to engender a sentiment of belonging in the neighbourhood
Neighbourhood policing: a part of the social fabric

Partnership

- We cannot solve everything ourselves

- Residents and shopkeepers need to identify the local criminality problems

- To share responsibilities in keeping with competencies and organisations and our partners

- The police cannot be efficient without its citizens

- 84 157 “pairs of eyes” vis-à-vis 1.8 million citizens)

- Partnership with elected offices and social workers

- The formation of advisory committees with above partners

- Citizens have their say on the manner in which the police performs its policing tasks and other services (pro-active citizenship)

- The real possibility for commitment and participation by every protagonists without consideration to the financial resources available to them and their social standing

Customer service

The police officer is the first protagonist after an incident, he is the bearer of the image of the police.

To render human our methods of dealing with crime. Prevention rather than repression.

To render contacts with the citizen humane.

To patrol roads of the CUM and to meet citizens: to understand citizens better for more effective intervention and co-existence.

To provide specific services as opposed to a general formula.

Better trained police officers = more professional.

More accessible to citizens, more respectful of citizens’ rights and freedoms, greater respect and greater efficiency.

Added Value given to Police personnel.

Autonomy. Who understands problems and solutions to them ?

Recognition of experience.

Career path.

Supervision based on feedback from police officers and mutual support.

The leap in police policy is from policing by “roles and functions” to policing by “flexible attitude” approach.

THE REFORM OF THE POLICE SERVICE BEGUN IN 1997

Before this reform, the patrolling police officers, the investigators and the detention units were split between 23 police stations over this territory providing a plethora of services.

The police officers patrolled their respective district with a view to prevention and intervention by motorised individual officers or acting in tandem. These also patrolled on foot, by bike and even by horse. In general, these police officers responded to calls during the course of their patrols. The persons withheld by police officers were taken to the police station to which the officers were posted to, held in its cells and subjected to an inquiry by investigators at the same police station.

Several types of specialised inquiries were tasked to specific departments in the territory. Here is a summary of the deployment of police personnel before the reforms began:

THE MAIN VARIABLES LEADING TOWARDS NEIGHBOURHOOD POLICING

- **The delegation of responsibility of daily operations at local police station level**

  - The closure of 23 police stations and the opening of 49 smaller police stations so-called neighbourhood police stations.
    January 1997: 23 police stations in the Western and Southern region
    February 1998: 26 police stations in the East and North.

  - Essential to respond to local needs
  - Power-sharing
  - Priorities established with local elected offices

- Solutions found with citizens

What is a Neighbourhood ?

- 24 000 to 48 000 citizens
- determined by the natural barriers or geographical landmarks
- respects political and administrative demarcations
- each neighbourhood has its own police station which provides a 24 hour service

WHAT CHARACTERISES NEIGHBOURHOOD POLICE STATIONS ?

- Located near to public buildings
- Easy access
- A small surface area of around 1 525 sq. meters
- Without individual service cells nor investigators
- Conference rooms to meet citizens
- Civilian employees in charge of citizen attendance
- Closed at night

THE ACTIVITIES OF THE NEIGHBOURHOOD POLICE STATION

The fields of activity of the neighbourhood police station are.

- Patrolling
- Response to calls from citizens
- Road safety
- Crime prevention
- Community relations

In this manner, police officers now called “neighbourhood police officers” are called on to patrol their respective neighbourhood **by applying the five components mentioned above.** The means to patrol continue to be by police car by individual police officers or in tandem, on foot, by bike or on horseback, by boot and even by roller-blade.

The concentration of responsibility of administrative and support roles within back-up units.

The police general inquiries, the detention units and the analysis of criminality are grouped in four buildings with each of them serving around 12 neighbourhood police stations.

General Inquiries: 4 operational centres

Why should inquiries be centralised ?

- To increase the rate of successful inquiry
- To reduce administrative costs by 10%
- To improve service quality to the community

To improve work quality

To increase work efficiency

Investigators turned specialists in several fields of activity:

- Physical aggression
- Crimes against property
- Crime in general
- Crimes without plaintiff
- Crime analysis

Specialised inquiries: these are concentrated in a single direction

-	Murders	-	Special Branch
-	Theft Categories	-	Gangland crime
-	Sexual aggression	-	Vice squad
-	Car theft	-	Drugs squad
-	Criminal fire	-	Fraud

What are the reasons for centralising specialised inquiries ?

- To make individual police investigators accountable
- 10% Reduction in costs
- Greater flexibility
- Better service to the client-at- large

Less than a ¼ of the SPCUM manpower works directly in the inquiry sector.

Decentralisation of the decision-making and budgetary authorities

- Ô The local priorities are determined by local problems
- Ô The police units must take decisions by themselves
- Ô The role of management is limited to providing guidelines

Reduction in hierarchy

Levelling out: from 9 to 4 hierarchical levels

- Patrolling
- Supervision
- Command and Control
- Police Authority

The new structure responds well to the operational needs

- Fewer intermediary echelons
- Less centralised control
- Fewer written reports to be provided
- Fewer police directors

The restructuring has allowed the abolition of 250 police officer posts and the re-conversion of 350 staff and administrative posts into front-line police posts.

THE KEYS TO SUCCESS OF THE SPCUM CHANGE

1ST CONDITION FOR SUCCESS
POLITICAL SUPPORT

The SPCUM has received the authorisation of the Community Council to draft plans for the general restructuring of the police organisation. This plan was approved by unanimity by the elected officers. This was unprecedented. The political support was beyond question. The plan needed to be realised within the mandate of four years.

The Commission of public safety has received the mandate to ensure the follow-up in the implementation of neighbourhood policing. This was an example of mutually supportive and amicable partnership between political offices and the police.

2nd CONDITION FOR SUCCESS
MANAGEMENT BY OBJECTIVES (MBO)

THE STEERING COMMITTEE

The mandate to establish a new structure is given to a steering committee bringing together the managers of the Police service, and answerable to the Senior Management Committee composed of the Police Commissioner and his immediate second-in command.

THE SUPPORT AND ADVISORY COMMITTEE

The Support and Advisory Committee consists of mangers and answerable to the Senior Management Committee has been set up. The role of this committee is to ensure that the changes are carried out according to the plan and that the police culture, the attitudes and behaviour of police personnel are modified according to the target objectives.

THE PROJECT MANAGEMENT COMMITTEE

The Project Management Committee is a permanent body whereas the Steering, and the Support and Advisory Committees are periodic committees. The Project Management Committee is composed of members of the Senior Police management committee and their representatives.

Each members of the Project Management Committee is responsible for the project in its overall organisational management.

3RD REASON OF SUCCESS

In order to respect invoicing parameters, the police middle management were replaced by new office holders. The management relieved of their command were given consultant status with police authority.

The new officers commanding neighbourhood police stations have been intensive training in administration, accountancy, social communication and staff management. The courses, which have been adapted to the Neighbourhood policing model have led to the attribution of a university qualification in public safety administration. The commanders of operational and police inquiry centres and its units have also followed training.

4th Condition of success UB

THE RENEWED PROCEDURES IN SORTING CALLS TO THE POLICE

In order to respond more quickly to emergency calls and to make available police units for neighbourhood policing several procedures have been taken in order to sort 786 733 calls to the SPCUM every year, of which 60 % were not urgent.

In fact, the establishment of neighbourhood policing has given us the occasion to review the role of the police officer and to provide him with direction in regard to the tasks directly related to citizen security and the quality of life in neighbourhoods. We want that our police officers dedicate more time to prevention and the problem resolution.

It is well established that uncivil behaviour precede criminal acts and in order to act efficiently on the latter, police officers need more time to tackle with their police colleagues the problems due to uncivil behaviour, and the deep-seated root of criminality.

In order to be able to deploy our patrols in this direction, the SPCUM has fitted out a sorting centre for calls made to the police whose objectives include to eliminate intervention by police officers on patrol following calls to the police where their expertise is not required. For example:

Citizens are requested to present themselves at the neighbourhood police station in order to fill out a relevant police form when there is no perpetrator at the source of the complaint to the police, and where the presence of a police officer would not improve the chances to resolve the crime.

Several years ago, we noted that for more than 150 000 cases every year, the buildings fitted with alarm systems were triggered leading to the assumption of a trespasser inside the building. 95% of these cases were proven to be groundless often due to the bad quality of the alarm system or to human error. In order to reduce significantly these pointless deployments by police officers, fines were imposed on the owners for unjustified alarm calls to the police. It also established that police officers would not deploy after more than four false alarms by each alarm.

5th condition for success

STAFF TRAINING

All neighbourhood police officers have been given a two-day training period based on problem-resolution approaches. The supervisors in regard to them were trained up for two weeks on professional competencies to be held, including problem-resolution and supervisory roles.

In regard to white-collar police officers, a new role of Information Officer – Neighbourhood Policing (PIPDQ) was agreed on with their trade association. These officers have followed a seven-week training period that has allowed them to understand and interpret different information of evolution in police matters.

6th condition for success

SUPPORT OF THE POLICE TRADE ASSOCIATIONS

The achievement of a real partnership between the Montreal Urban Committee was a decisive factor. A joint reorganisation committee on Police Service

and Trade Association has ensured the follow-up of the implementation. Let us note that its President is a committee of the police service Management Committee.

7th condition for success

LEGITIMACY BEFORE THE PUBLIC-AT-LARGE

This legitimacy is only possible on the assurance of transparency and accountability of action s actions and the response to the expectations of the population-at-large as communicated to us. The press and general media is the best means to achieve this transparency. For example, the general public participates in the neighbourhood police stations in drafting action plans by their opinion expressed in permanent advisory committees at these police stations.

Conclusion

- Following the establishment of Neighbourhood Policing concept more than two years ago, our services assemble a greater rate of satisfaction among the general public.

- According to our forecasts, the philosophy of the Neighbourhood Police will not be really incorporated in our daily lives for another 4 or 5 years.

- And even in 2003, there will still be people reticent to a police force with greater community awareness.

- It is therefore understood that even though the concept of Neighbourhood Policing was delivered “turn key” 21 months ago, it needs many years of application, fine tuning and daily gains.

- The concept of Neighbourhood policing is above all a question of changing attitudes and perceptions. We cannot see our new police force coming into fruition in the near term. On the other hand, it will be allowed for us to direct it more rapidly in the desired direction.

José António Pinto Ribeiro

Chairman of the Forum Justice and Liberties – ONG - Portugal

- Lawyer

Allow me, first of all, to salute the organisation of this event by the Office of the Inspector General of Internal Affairs and all persons who contributed to it and, secondly, to salute the persons who sit with me at this table, specially Mr. Luis Silveira whose words were obviously exaggerated, an exaggerate which derives from friendship, a very old friendship and a great consideration in which I hold him.

I am a jurist, a lawyer, an associate professor at the Faculty of Law of the New University of Lisbon and the chairman of the Board of Directors of the "Forum Justice and Liberties". I have no professional activity directly connected with your field of work.

My professional field is a very different one, connected with Financial Law, Banking Law and Commercial Law in general, and not this one, but I will do it as a civic exercise, as an exercise of citizenship and with the purpose of having in the future a better country than that we had and still have.

I believe that having a better country means to have, besides a democratic regime, a State based on the Law; and if people generally thought that, once the democracy was instituted in Portugal as it happened with the revolution of the 25th of April 1974, a State based on the Law would automatically follow, I suppose that all of us have already realised that this is not so.

I mean, we may have a democratic regime at work, a really democratic one, without having simultaneously instituted in Portugal a State truly based on the Law. I think that we all agree that there are a lot of deficiencies in relation to this State based on the Law, which is ours. I intend to do with you an exercise of equality and

which passes by the analysis of some of the rules with occasionally and specially regulate you activity. Yours, because the great majority of the persons here present, in so far as I can tell since they are in uniform or I know them personally, are persons connected with police questions, via the Ministry of Internal Affairs, the exercise of their duties as police authorities and authorities of criminal police, namely in the scope of the Attorney General's Office, of the G.N.R. and of the P.S.P., to mention just a few.

I am a complete stranger to this world, as I have already explained, an "outsider", so to speak, at this table and in this room. I have no proxy to represent the citizens and so my merit on representing them will derive from the rightness of what I will say and nothing else. Similarly, I will not compromise anyone, except myself and, possibly, the Forum to which Board I belong.

The exercise consists in taking some of these laws and tell you what I think is wrong in them, since I believe that every right and every law are meant to induce persons to behave in a certain way. This is the purpose of legal rules, this is the purpose of codes: to make people behave in another way, i.e., to make them have a behaviour which is in accordance with those rules, under penalty of being punished if they do not behave accordingly.

What is expected is that the imposition of penalties will never take place. On the contrary, it is hoped that the persons will spontaneously behave in a certain way, that is, the legal rules are meant to induce certain behaviours in the citizens, the recipients of those same rules, and so I would like to analyse some of them and see what kind of behaviour do they induce in the citizens, namely those citizens who also perform police duties. And I think that some of those rules induce seriously pervert behaviours in a way that they may even be unconstitutional. I come here to speak of a technical subject to persons who are as much citizens as I am myself and who deserve, as anyone else, to hear about a technical subject.

First of all, I would like to call your attention to article 348 of the Criminal Code. Article 348 of the Criminal Code mentions a criminal offence; it foresees a criminal offence entitled "disobedience" and establishes that a criminal offence of disobedience is committed by "whoever will not comply with the corresponding obedience to legitimate order or instruction, duly communicated and issuing from the competent authority or officer", and will be punished with a penalty of imprisonment up to 1 year or a penalty of fine up to 120 days, "if a legal provision imposes, in that specific case, a penalty of simple disobedience or if, in the absence of that legal

provision, the authority or officer will make the corresponding imposition". What does that lead to? It leads the officer, the police agent, to make the imposition when he is not obeyed and, in doing that, to transform the disobedience to the order he is giving into a criminal offence of disobedience. This is nothing new; it is something that really happens with some frequency and I can tell you of cases already tried in Court.

A real case, whose counsel for the defence was a Lisbon lawyer, was the following: a young mother, carrying her few months' old baby, stopped her car at Largo do Rato, in Lisbon, right in front of the headquarters of the Socialist Party; she illegally stopped the car there and took the child in her arms. She was going to the doctor's when a P.S.P. agent intercepted her and said "it is forbidden to park here. Move your car". She replied "officer, do whatever you want. Have the car removed by a pick-up truck. I have been driving around here for half an hour trying to find a place to park my car. My son is ill, I have an appointment at the doctor's and I must hurry. I could not find a spot anywhere else. Call the pick-up truck and have the car removed. Do whatever you want but I can not remove the car from here". He grabbed her by the arm and said: "no madam, you have to remove your car from here. If you do not remove your car you are committing a criminal offence of disobedience. I am expressly imposing that on you. Please, remove your car". She did not; she was arrested, tried and sentenced to a penalty of imprisonment.

This act of disobedience, this criminal offence of disobedience foreseen by subparagraph (b) of article 348, induces the law enforcement officers to behave in a way that, as long as they make the imposition, they automatically transform the citizen who disobeys the order into a citizen who commits a criminal offence.

First of all, I think that this is unconstitutional because it violates the provisions of paragraph 6 of article 112 of the Constitution which expressly establishes that "no law shall create other categories of legislative acts or grant acts of any other nature the power of interpreting, integrating, altering, suspending or revoking any of their precepts with external efficacy" since I believe that what this legal provision does is, through an act of a law enforcement officer, to transform into a criminal offence a behaviour which otherwise would not be a criminal offence. I also believe that, even if it were not unconstitutional, this rule should obviously be modified since it induces an incorrect behaviour in the relationship between the citizen and the law enforcement officer.

What is it that the law enforcement officer must, in my opinion, take into account? He must take into account the objective he is pursuing. If that woman had left her car at Largo do Rato and walked away, what could have happened to her? She would have paid a fine. She may not be punished harder for disobeying an order meant to prevent a fine – i. e., with imprisonment – than she would be for doing what that order seeks to prevent her from doing. What I mean is that such a behaviour is not a strictly proportionate one and so it would always be necessary for the law enforcement officer to take into account what he was preventing, the means he was using to prevent a simple traffic fine for illegal parking and thus in no circumstance should he have had to resort to the treat of a more serious penalty than that which is foreseen by the infraction he is trying to prevent. This article induces this kind of behaviour and, in doing that, you are not to blame: it is the legislator's fault.

Someone ought to call the legislator's attention to this situation. And now the blame should fall on us if we do not call the legislator's attention to that. The legislator should be made aware that this rule induces an incorrect behaviour.

Besides this case, I would like to mention other situations which, in my opinion, are equally serious situations, namely complaints the Forum has being making for a long time.

There are two situations, also in the Criminal Code, which look serious, although I suppose they seldom take place and the rules in question are not imposed. I am talking about the situations which foresee torture and other cruel, degrading or inhuman treatments and I would like you to read with me this rule in order to understand how advantageous it would be if it was also modified.

Article 243 of the Criminal Code reads as follows:

"Whoever, having as his duty the prevention, pursuit, investigation or acknowledgement of criminal offences, infractions to administrative regulations or disciplinary offences, the execution of penalties of the same nature or the protection, safeguard or surveillance of an arrested or detained person, tortures that person or treats him or her in a cruel, inhuman or degrading form in order to:

(a) obtain from him or her or from any other person a confession, deposition, statement or information;

(b) to punish him or her for an act committed or allegedly committed by that person or by any other person;

(c) to intimidate him or her or to intimidate any other person,

shall be punished with a penalty of 1 to 5 years of imprisonment."

But then, if the person who does which is foreseen by that provision is moved by a pure sadistic desire, by a pure sadistic need, without the goal of obtaining from that person a confession, deposition, statement or information, without the goal of punishing him or her for an act committed or allegedly committed, without the goal of intimidating him or her or any other person, does that agent not commit a crime of torture and cruel, inhuman or degrading treatments?

This criminal offence is foreseen in such a way that it is only applicable if the agent is moved by these complementary goals. The agent may torture, may treat badly, may use these inhuman and degrading treatments, but only when he has one of these goals does he commit that crime?

For a long time that Forum Justice and Liberties and Amnesty International have been defending that these subparagraphs must be simply erased and the provision establish that the agent who commits the acts foreseen in the body of article 243 – torture and cruel, inhuman or degrading treatments – shall be punished, regardless of any other purposes. What matters is that he must be punished for that crime should he commit any of those acts.

Similarly, I think that an incorrect behaviour is induce, namely an *esprit de corps* totally wrong, by the provisions of article 245 of the Criminal Code that, referring to the crimes foreseen by articles 243 and 244 of the Criminal Code, crimes that constitute a very serious violation of the fundamental rights of any person, establishes, in what concerns the omission of denunciation, the following: "the senior officer who, having known that any subordinate of his has committed an act foreseen by articles 243 or 244 [i.e., torture or other cruel, degrading or inhuman treatments, or torture or other serious cruel, degrading or inhuman treatments], does not make a denunciation in a maximum delay of 3 days subsequent to the date in which he knew of it, shall be punished with a penalty of 6 months to 3 years of imprisonment".

Does that mean that an officer of the same rank will not act incorrectly if he makes no denunciation and that an officer of inferior rank has no similar duty to denounce his superior officer, even if the officer of the same or superior rank has committed that same crime, a crime of torture?

According to the law, only the senior officer has that duty. So, if the person who tortures commits that act of torture among equals, he is not in peril of being denounced because the others do not have that same duty of denouncing it. It does

not make sense to establish that limitation since it leads to a logic according to which the senior officers do everything right while their hierarchical subordinates may do things wrong; the senior officer has the duty of denouncing the officer of a lower rank but the latter has not the same duty of denouncing his senior officer even when he commits the same serious crime.

This does not allow to separate the wheat from the chaff, i.e., favours a situation in which the righteous man pays for the sinner. One essential condition in the relationship between the citizens and the P.S.P. agents is the understanding that, the same way there are criminals among the citizens, so there are criminal within the police forces.

There are also law enforcement officers who are not an example, who do not have good manners, who do not strictly obey the rules to which they are subjected; the same way the P.S.P., the G.N.R. and the other authorities must separate the wheat from the chaff in what concerns the citizens, that is, to identify those who commit an infraction and denounce them, so it is necessary that within these police bodies that denunciation works.

Not for reasons of vengeance but rather for reasons of internal punishment. This denunciation must work in order to ensure that the same separation we want to be made among citizens is also made among policemen, so that they do not think they are all good persons, which they are not, and so that they are not considered to be all bad persons, which is also not true. Because, in the eyes of the citizens the policeman who watches and does nothing is as bad as the policeman who commits the fault. It is necessary to have a reward and a penalty within all systems, namely within the police system.

This society must be a meritocracy. It must be in accordance with their abilities and the quality of the exercise of their duties that persons are promoted and punished, that persons are rewarded or not rewarded.

Allow me to mention yet another situation which, from the point of view of the citizens, seems also wrong.

Forum Justice and Liberties has been sustaining, for a long time, that certain criminal offences committed by law enforcement officer during the exercise of their duties, specially the offence formerly called bodily harm and now called harm to the moral or physical integrity of persons, foreseen by article 143 of the Criminal Code, should be considered as public criminal offences. This means that when a law enforcement officer sees another law enforcement officer beat a citizen, this criminal

offence should be public; he should present a criminal complaint about that fact and, from there on, a inquest take place and, eventually, an instruction and a criminal proceeding.

That is, it makes no sense that the law enforcement officer who sees a college of his commit a criminal offence of harm to the physical integrity of a citizen, for instance in a police station, as foreseen in article 143, has no duty to denounce the criminal offence.

If the criminal offence is a private one, while there is no denounce by the victim there can be no criminal proceeding.

This makes no sense. We have been defending and demanding for years the inclusion in article 143 of a rule which determines that the criminal offence of simple harm to the physical integrity of persons should be a public criminal offence, i.e., not subject to complaint, when committed by a law enforcement officer in the exercise of his duties.

I would like to say that in 1995, the previous Government and the previous Assembly of the Republic, i.e., the Assembly of the Republic with its former composition, introduce two rules in paragraph 3 of article 143 which do also, in my opinion, introduce wrong behaviours, not only in relation to law enforcement officer but also in relation to the citizens themselves.

One of these rules establishes, in what concerns the criminal offence of simple harm to the integrity that the court may not enforce its judgement if it has not been able to prove which of the two offenders was the first aggressor.

This means that if they aggress each other there is no wrong in that. The Criminal Code somehow thus accepts as non punishable these behaviours in the framework of private justice, non justifiable by the need to use it. Whoever does justice by his own hands, as long as no one can tell who began the aggression, is not punished. I think that this induced behaviour is wrong. People should not retaliate by their own hands. People should give no reply by their own hands. Mind you, we are not talking here about cases of self-defence, which are not foreseen here, but rather of cases in which both aggressors committed a criminal offence of simple bodily harm. Only because there is no proof of who began, none is sentenced.

The same wrong induction of behaviours in what concerns private justice issues from subparagraph (b) of article 143 when it establishes that "the agent who has only made a reply to the aggressor shall not likewise be punished". Notice that we are talking of a reply, i.e., the person who harm the physical or moral integrity of

another when that reply is no longer necessary to prevent the aggression. That person is harming the other after having been harmed and because he was harmed. We can only see here a simple reply. This aggressor may also be exempt from punishment.

I would like to call also your attention to another article which I think may induce wrong behaviours.

The criminal offence of coercion is foreseen by article 154 of the Criminal Code which establishes that the criminal offence of coercion is not punishable when it is committed as a means to prevent suicide, with which I completely agree. No one should be punished for committing coercion upon a person in order to prevent that person from committing suicide.

But that article also establishes that no penalty shall be applied to the agent if the criminal offence of coercion is committed to prevent a characteristic illicit act, without making any kind of balance.

The criminal offence of coercion is a serious offence; it is a criminal offence which absolutely hinders a person's liberty and it consists on, by violent means or threat of serious harm, forcing a person to commit an action or an omission. By violent means or threat of serious harm. And it suffices that it is meant to prevent a characteristic illicit act for the criminal offence not to be punishable. However, a characteristic illicit act has an extremely inclusive range and in that rule there is no balance between the coercion and the characteristic illicit act to be prevented. If it at least said that it was meant to prevent a characteristic illicit act punishable with a more serious penalty that the one foreseen for the criminal offence of coercion, then it would be understandable. But a characteristic illicit act includes any characteristic illicit act even if the penalty foreseen to that act is a very light one and the social value which is at stake is a minor one.

These articles that I mention do, in my opinion, lead to wrong behaviours and should be amended. But, on the other hand, I also understand that there are rules in the Constitution that should be analysed, developed, studied and filled with precise contents, namely by the courts of law but also by other people who are connected with the exercise of police action.

I am referring to the rules that derive, for all public servants, from the provisions of article 266 of the Constitution and also the provisions of article 272. Article 272 refers that the police agents have a duty to defend the democratic legality and ensure internal security and the citizens' rights.

Allow me to remember here article 8 of the 1791 Universal Declaration of Human Rights, which declares "that security consists on the protection given by society to each of its members in order to exercise their rights".

If security consists on the protection given by society to each of its members to exercise their rights, so ...

Security only is security if it is an instrument of freedom. Security is a stadium in which all of us, and each one of us, may fully exercise our rights.

There is no security at the expenses of people's rights. Security is an instrument. If all of us, and each one of us, will be able to exercise all ours rights without being harassed by that fact, there will be complete freedom. Security is that state. Security forces are only the means to promote or defend that freedom, an instrument to ensure the exercise of rights by all and each one.

Every time an act of security is performed we must know if we are not violating anyone's right, as well as which and whose right are we protecting. It is this balance between violated rights and protected rights that must be made at all times.

This is the reason why the security activity, namely the activity of criminal procedure, is a contradictory activity because, on the one hand, it persecutes people whose rights, by reason of that persecution, are put at stake and, on the other hand, it defends all others whose rights, by reason of the persecution of the former, it safeguards and ensures. This is the contradiction in which the performance of police activity is situated, whether it has a preventive or repressive nature.

This is why I would like to tell you that there are some principle which derive from this article 266 that ought to be filled with precise contents. I am specifically referring to the Principle of Justice and the Principle of Good Faith.

It is absolutely necessary to understand that all the agents of Public Administration, and namely the police agents, must obey the Principle of Good Faith and the Principle of Justice. What is the meaning of these two Principles that are established by the Constitution?

Let me put you a question which concerns the P.S.P. agents, namely when they are assigned to traffic duties. Is it normal to force people to drive at a speed limit of 50 Km per hour in the North-South Axis, a fast road in the middle of Lisbon? Is it part of the rules of good faith to have a speed trap to catch the drivers who, in the North-South Axis, are driving faster than the allowed 50 Km per hour?

The North-South Axis goes through the city of Lisbon, it does not go around it. It is located inside the city and there, if I am not mistaken, the speed limit is 50 Km

per hour. If you go now to "Segunda Circular", another fast road that goes through the city, you will see that no one is driving at 50 Km per hour; besides, if any one was driving at that speed, he would be causing many accidents. Is it part of the rules of good faith to put the P.S.P. agents in places where there is no apparent danger, only to "catch" speeding drivers and "deliver" the corresponding tickets?

It is necessary to understand what is this thing called the Principle of Good Faith. Besides the police agents, the law enforcement officers, public servants in general have a duty of urbanity towards the citizens. A legal duty of urbanity that the citizens do not have towards them.

I would say that the ruder the population, the more respectful of legal duties the public servants and the law enforcement officers must be, because they must display urbanity towards rude persons and so, the less the population behaves in a civic way, the more difficult for law enforcement officers to comply with their legal duties of urbanity. A citizens may say, for instance, "I am sorry" or "good morning", or he may not say "I am sorry" or "good morning" without breaking any legal duty. But law enforcement officers must address the citizens with urbanity under penalty of non accomplishment of a legal duty to which corresponds a disciplinary sanction.

Speaking of disciplinary sanctions, I would like to mention the following: One thing that creates a very bad opinion about policemen near the public is the notion that disciplinary proceedings are suspended in a discretionary way whenever a disciplinary offence may also have be a criminal offence.

This is in accordance with the provisions of article 37 of the Disciplinary Statute of the P.S.P. – Decree-law no. 7/90 – whose paragraph 3 establishes that the authority with disciplinary competence to punish may order the suspension of the proceedings until the conclusion of the criminal proceedings in course.

I think this is completely wrong. Some reports have already been made by the Ombudsman in which he mentions this legal possibility and the established common use that resulted from it. In order to understand what I mean, see the 1986 report. I believe that all disciplinary proceedings must be concluded.

Only then, if criminally punishable facts are established, must the facts which have a criminal nature be communicated to the judicial authority. There is a legal duty to report them, according to the provisions of article 242 of the Criminal Code.

What follows? Disciplinary proceedings are suspended and nothing is investigated. And most times, the criminal authority in charge of the investigation runs into a wall of silence and complicity and consequently is not able to ascertain

the facts that really took place; it may also happen that an indictment is never made or else it is not well grounded or based on less serious charges than it should have been and that leads to the scandalous acquittal or to an unaccepted light penalty.

Furthermore, no one even takes preventive measures or places the agent under suspension from his duties towards the population, which hinders even more this relationship. I do not mean, on the contrary, that uses have not been significantly changing over these last years. What I mean is that I think there is still a long way to go before we have law enforcement officers who are so civil citizens that they can afford to have a population that is not yet absolutely civil.

This is the idea I wanted to pass on to you, i. e. that the citizens have reasons to be suspicious of your behaviour, a behaviour that is often induced by factors which have escaped your control; I would thus ask you, as citizens and as members of the Public Administration, to refuse to do things that you consider to be wrong or, at least, to denounce them. Be Citizens, be Public Servants in the full meaning of these words.

State your needs in terms of means of work, say that you are given steel bullets instead of lead bullets and that steel bullets do ricochet, demand the publication of reports – without mentioning names for they do not have nor ought to mention names – on the rate of agents to whom disciplinary sanctions were imposed, on the rate of agents who were deprived of their arms, on the number and rate of agents who used their arms when they were off duty, on a whole set of things which allow the citizens to understand that also inside the police forces the wheat is separated from the chaff.

This is absolutely indispensable for the citizens.

If we have – and many times we do – a feeling that there is a systematic *esprit de corps* which hides serious cases that happen – when they do – in the relationship between citizens and police agents, citizens will not feel confident.

We want to know about the criminal complaints made against police agents and how many were also made by other police agents.

People complain that they suffered ill treatments in a police station. How many cases do we have in which there was also a complaint made by another agent of that police station denouncing the fact? How many?

In which cases is there coincidence between the complaints made by a citizen and a law enforcement officer? Or there is never a complaint made by law

enforcement officer? Is it only the citizens who complain and inside the police station no one takes notice of anything?

We want to know about this. We want these facts made public. Citizens need to establish with you a relationship based on trust. Habits have a tendency to persist. We had 50 years of dictatorship during which everything was all right.

Right now, we live in a democracy. We have to create a State based on legal principles. We have to establish a transparent and confident relationship between us, a relationship in which the citizens look upon the police agents as guarantors of their freedoms and rights, not as a threat to them.

Thank you very much for your attention.

Pedro Bacelar de Vasconcelos

Civil Governor of Braga

- Member of the European Communittee Against Racism and Xenophobia (European Commission Against Racism and Intolerance)

POLICE, SOCIAL EXCLUSION, MINORITIES

The growth of a diffuse feeling of insecurity, which conveys the multiplication of the interactions, the deception of the expectations and the consequent fragility of the relationship bonds, is proper of the existing social systems. The precariousness of the places of work – which is, among us, attributed to the phenomena of the «precariousness» rather than to the less high rates of unemployment that are striking Europe today – the power of the underground economy, the disruption of the rural world, the urban chaos and, finally, the new criminality associated with the traffic in drugs reinforce the isolation and the vulnerability of the individuals in the context of an alleged generalisation of a «crisis in values».

A simple way to react against this situation has become very common: - People are demanding an increase in numbers of the police officers, the building of more prisons or of more police stations and that the penal sanctions applied against the offenders must become more severe. Although being a claiming exercise – book that, luckily, wasn't adopted as a political programme, it led to some well – known results because of its tempting principles of demagogy that one can infer: the overcrowded prisons, the abuse of the preventive arrest , the impunity of the so – called «civil troops», summing up, a non – functional crisis of a system of justice that brought to the police forces, to the judicial magistrates and to the Prosecuting Counsel a wide range of social problems, which can't be solved by these same authorities, because these have nor the means nor the vocation to deal with them, although the social problems are guided to them. This happens because there is the

omission of the civil society and because other public institutions, that share responsibilities in this area, are insufficient and show lack of sensitivity to face them

It is in this context that we have to try to understand today's situation of our security forces. We have to refuse to consider that the police force is an isolated. institutional organ which is free from the tensions and from the dominant prejudices. And, because of this, we have to refuse the idea that the police performance can even reinforce the social segregation and exclusion under which the members of some communities and groups have to live . We have to admit instead, that the police performance can fight against them with the right help of other social agents.

It is not only the constitutional principle of equality that is questioned immediately. Almost the entire third Title of the Portuguese Constitution, where the «economic, social and cultural Rights» are consecrated, may also loose its substantial practical efficiency. The generalisation of the minimum income brought real expectations of a «wide open» access to employment, to health care, to housing, to education to those who are the most excluded from society. It is among this crowd of those who are excluded from the economic, social, and cultural progress – the unemployed, the immigrants, the gypsies, the drug addicts, the prostitutes – that one can distinguish and confuse the many existing ways of being an outsider, ways where the social worrying minorities are vegetating. These populations find themselves in a situation of great social vulnerability, they feel great difficulties in entering into the job market, they show low standards of education and they ignore, to a large extent, their rights or, even, what they could claim from the public institutions. Of course, in these institutions we find those who were elected, the social welfare, the forces of security.

The truth is that areas of frontier and zones were created, where there is no communication whatever, being the poor and other undesirable confined to the suburbs and to the degrading areas. And, in other cases, they were banished by the city itself: to compensate them from having lost their houses, they were paid small amounts of money and were driven into the cheaper lands. Lands where the forests and the fields, that haven't been worked since the great migrating flows of the sixties, have become worthless and where those who stayed have lost their status.

Mainly today, when everybody is complaining about the «crisis in justice », it is important not to forget the non-surmountable fact that those problems only may be solved partially in this sub-system, at the risk of sending a large number of pertinent interventions to the courts, to the police forces and to the prisons. When we were

diagnosing «a non-functional crisis in justice» just a while ago, we meant that risk. The Power is a short resource. The legal proceedings against a psychopathic behaviour, such as the drug dependence, transfer objectively the priorities of the public intervention of the health welfare system to the dependence of the security forces, as well as the crude application of penal sanctions associated with the housing problem – such as the demolition of huts or the prohibition of temporary camping sites – will not only transfer and aggravate problems but will also incentive xenophobic attitudes, if there isn't an effective policy of territorial regulation. If the suspects can't be identified as individuals, which are in certain communities, such as the gypsies, because these have strong family ties, the arrest of all the adult members of the family has to be done. By letting the children alone, one is promoting the multiplication and the aggravation of factors of exclusion and of segregation of that minority ... as well as the overcrowding of the prisons.

In his speech about security, which is today's great social concern, and when he demanded an effective police performance and the aggravation of the penal sanctions, Vicent Verdú referred the growing underground forces as a « criminal fashion », which turns out to be a limit, not only to the pertinence of some questions but also to the real efficiency of the exclusively repressing performances and to the righteousness of the sanctions applied against the wide range of cases. The abuse of the prison sentence, which is the last measure of dissuasion and of punishment of criminal behaviours and of reintegration of those who committed infractions, turns out to have mean effects and turns the prisons into a school of « viciousness ». The growing number of young people who are drug addicts and of offenders of minor infractions that we can find among the population of the prisons questions the hegemony of the confinement sentence. The imprisonment at home, the temporary freedom, the pledge, the service given to the community, the fine are complementary or alternative measures to be thought over and applied more intensively. To do so, not only human resources but also proper materials and a close liaison between the prisons and the surrounding community are required. The prison shouldn't be a place, which is apart from the real life. The positive examples of the link of efforts and of entering into partnerships with the Town Halls and with other public or private institutions must be encouraged and broadcast. Some examples of this can be pointed out. In a campaign to Prevent Aids in prisons, two courses were given under the supervision of the Commission for the Fight Against Aids and they were aimed at the workers of the regional prisons in Braga and in Guimarães. Other formative

seminars, which have taken place, linked different institutions such as, the Ministry of Education, the job centres, the «Project to Life» and they were aimed at different people.

The police activity is trapped between two different realities. On the one hand, there is the inadequacy of the repressive and judicial strategy that we have already deplored: First, because the police performance sometimes only transfers the criminality to other places without succeeding in putting an end to it. Second, because the magistrate doesn't always acknowledge the detentions and even when they are, the criminal is released from the prison once he has completed his punishment. On the other hand, there is not only an indeterminate criminality, which has nor typical actors nor delimited areas and that confuses the beggar with the burglar, the intimidation with the begging in the streets, the strength with the repulsive weakness, the peasant and the suburban, but also the burden of divergent requests that demand results and threaten with disturbances. Sometimes the police act on the spur of the moment between two different events and show the same prejudices and conflicts hidden in the social environment. Equal before the law, the citizens resent how they are treated differently: For some, the presumption of innocence is respected, for others, an inexorable presumption of guilt prevails.

The kinship and the solidarity, which links small communities, tend to change all their members into suspects, situation which is aggravated by the prolonged maintenance of the preventive detention of entire families as we have already referred to. In powerful media contexts, its association with the traffic in drugs makes the violation of their fundamental rights worthless of any social concern. The assimilation of the drug consumer to the dealer induces an equivalent result.

The complex social, economical, urban and cultural web, that is inherent in this criminality and that strikes the daily life of the democratic societies, requires a clear distribution of competence so that this may be the basis of a suitable and strict assumption of the public responsibilities.

The difficulties in communicating are aggravated naturally, when there are conflicts of ethnic and cultural differences. So, it becomes very important to find speakers who may dedicate themselves to these details that have nothing to do with the police activity. In the conflict among some gypsy families of different races, the local governor set up the formation of partnerships in order to create a project inside the range of the social welfare system to fight the conditions of endemic poverty, which were affecting these families in different manners .At once, this enabled to

oppose rational alternatives to xenophobic attitudes and to attract and commit the local elected to the reattachment of the broken neighbourhood relationships, since the summit of the fight was surmounted. This measure was an essential condition to eradicate the social – cultural roots and to create a lasting atmosphere of co-operation and of insertion of the gypsy families. Both the promptness and the efficiency of the police response are essential to isolate the matters of security and to weaken the attempts of direct action.

The «civil troops» are neither a spontaneous nor representative social phenomena. On the contrary, they are actions which are taken by organised, restricted and relatively equipped groups, which have concealed leaderships and a limited capacity of mobilisation and which not only take advantage of, but also manipulate collective feelings of ignorance, or of disbelief in the state institutions to cope with the problems. In the past, the sociological clemency of many magistrates and the opportunistic complicity of certain democratic authorities helped the relative impunity of their actions, which were violent, racist and xenophobic. The political and judicial authorities, as well as the police force, must defend from any kind of violations the demand for civic seriousness, for integrity, for sobriety, the state of justice and the democratic legality.

The social participation, with its available staff, has qualified agents who are able to deal with the complex endogeny of cases and enables the forces of security to act together with it, because these know its agents . So they can send them the cases that they haven't to deal with. On the other hand, the police forces are in touch with other methods of interference and this helps to develop a new concept of civic culture, of solidarity and of responsibility, which is already present in the new programmes of formation of the police force and which is already in progress with the local partnerships. The local government of Braga , the University of Minho, the Civil Police and the National Republican Guard have been celebrating protocols of co-operation in order to establish periods of probation aimed at the students who are concluding their courses in Economy , Social Sciences, Education, Psychology, Engineering and Computer Management. Promoting the access to Information and to developed technologies, we are also developing a modern, intelligent and civilised concept of the forces of security.

The promotion of the support given to the victim is becoming more and more important inside the range of activity of the Civil Police and the National Republican Guard. The way the victim is being welcome, informed and advised in these

institutions is today one of the greatest challenges of the police interference and a decisive step towards approaching the police forces to the citizens and, this meets the guidance of the Council of Europe. The recommendations of the Council of Europe distinguish four fundamental principles of the criminal and of the security policies, which are: the prevention of the crime; the promotion of alternative measures to the prison; the social reintegration of the offender; the support given to the victim.

Barbara Wallace | Chief of the Victims and Witnesses Support Unit, FBI - USA

No where is the, violent crime problem more prevalent than in our major cities. Youth have an indifference to life, to include their own, not to mention the lack of respect for the property of others. If we in law enforcement are to make a difference in the community through the war on crime, drugs gangs, and violence. We must work in partnerships with our school systems, businesses, communities and most importantly with our youth.

First, we must realize that we are a part of the communities, in which we live and work. We spend most of our waking hours on the job. Second, as law enforcement our primary mission is investigative, but we must begin to look at crime prevention as a very significant component of law enforcement. Crime prevention as a very significant of law enforcement. Crime prevention strategies focusing on our youths must include education. Establishment of values, self-esteem, trust, and confidence. Because without values, expectations, hopes, and dreams, there is no success or vision for the future. Thus, there is no fear of death. Further, we need to help our youth to develop an appreciation for the different cultures, people, and diversity among us, because it is these diffences which makes us strong and great within our respective nations. If we do not address the problem of molding our youth into viable citizenry, the war will be most assuredly lost.

One part of the federal bureau investigation's (FBI) community outreach program was designed to instil faith or expectation, hope and dreams into our children. Faith or expectation is how they know where they are going. Hope is what keeps them going, and dreams are the plans by which they get there. The FBI's adopt-a-school program, which includes vile junior special agent, mentoring, and

tutorial programs, was built on these principles in hopes of keeping these principles ever present in children's minds, in their hearts, and yes, even in their subconscious. This presentation will show you through children's smiles, their satisfaction for jobs well done and there confidence in the future because of the accomplishments they have achieved. Re-enforcing good behavior and continuos concern coupled with long-lasting commitment are the keys to success.

Through vile brief video presentation, you will see the hope and desire for success in children. But, best of all, you will see on their little faces satisfaction of a job well done, and a confidence in facing file future because they believe in themselves and are taking ownership of their lives.

A second element of the FBI's community outreach program is formulation of the FBI's community outreach program is formulating partnerships with local, county, state, and federal law enforcement, community, and business organizations/groups. Someone once said, "no man is an island and no one man can walk alone." our existence hinges on the success of our neighbours, brothers, and/or sisters. Thus, we must continue to develop trust, confidence, and true partnerships with one another to win this war on crime, drugs, gangs, and violence. Therein lies the reason for this program. Since we realize we (all of law enforcement) are a part of the community, we must share ownership and responsibility in making our community the best of all communities with the best future leaders equipped to lead, through the following very brief video presentation. You will see law enforcement and community people aligned together in a partnership against crime.

João Manuel Ferreira de Paiva

Captain of the paramilitary police force (Guarda Nacional Republicana - GNR)

- Civil police Observer of the United Nations, in Angola, and monitor of the human rights

"We expect the security forces to act effectively and professionally but their effectiveness is limited by citizens' basic rights" - Dr. António Henriques Maximiano in "Os parâmetros jurídicos do uso da força" ("The Legal Parameters of the Use of Force").

NOTE: Discovering the meaning, contents and scope of the term "minorities"

For purposes of organisation and method, given the scope of this subject, it was decided in this presentation to restrict the concept and provide a framework for ethnic minorities.

1. FRAMEWORK

Racism, xenophobia, social exclusion, ethnic minorities and other terms are various aspects of the same problem.

In the last years and as far as Portugal is concerned we have seen, as Europeans, how this phenomenon has reached very worrying proportions in Europe which in many ways is already reflected here.

It is a fact that, faced with the continuous flow of immigrants and those seeking political asylum, European governments as a rule have responded with legislation which can be considered restrictive, to hinder or prevent entry into their respective countries. It can even be said that much of the legislation approved is the result of pressure by public opinion which, whether confronted with worsening economic conditions or dominated by ancestral fears, makes immigrants or exiles the scapegoat for its problems.

In addition there is another problem. A whole mass of excluded or marginalised people who as a result of rapidly developing technological innovations cannot keep up with this new constantly changing society. Worse: they cannot even join that society, often because their family has broken up, they have not had access to organised schooling or have been affected by a maladjusted teaching system.

Indeed, how many people are aware of the three pillars on which is based the scientific revolution of the 20th century, and the discoveries in the areas of informatics, molecules and quantum physics? How quickly will scientific knowledge increase in the next twenty years and what will be the consequences? Because the people of the societies of the future which the police must serve will have to face this type of problem, and so will the police...

Do we really all understand the signs and speed of this change and how time is running out?

2. LEGAL FRAMEWORK

Listing the entire legal framework on protection of minorities and anti-racist measures would greatly exceed the scope of this presentation. We should mention, however, that article 13 of the Portuguese Constitution establishes the "principle of equality" according to which all citizens have the same social dignity and are equal before the law, and that no person may be privileged, benefited, damaged, deprived of any right or exempt from any duty as a result of their parentage, sex, race, language, country of birth, religion, political or ideological beliefs, education, economic situation or social condition.

In addition, article 8 of the Constitution acknowledges and takes in international law: article 16 paragraph 2 establishes that "constitutional" and legal "precepts" on basic rights must be interpreted and integrated in accordance with the Universal Declaration of Human Rights. Accordingly, under the terms of article 2 of the Declaration "everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status". Article 7 reaffirms the principle of equality before the law, all people being entitled to equal protection against any discrimination in violation of said Declaration and against any incitement to such discrimination.

In addition there is the European Convention on Human Rights, the Convention to Eliminate all forms of Racial Discrimination and the Portugal Penal Code.

This, then, is the legislative framework within which members of the security forces fulfilling their police mission must act in order to solve any problems arising within the scope of this subject.

How, though?

3. A BRIEF REFERENCE

I would like, if you will forgive my boldness, to refer briefly to the way in which the Portuguese (despite any mistakes we may have made) considered human rights in the last century, just by way of example.

In 1839 Vicente Ferrer Neto Paiva, professor of the chair at the Law Faculty of the University of Coimbra, in "Elementos do Direito das Gentes" quoting Burlamaqui and Vatel taught that "Every nation should, for reasons of **humanity** and not only **self-interest**, welcome strangers on their land, protect people and goods, grant them as they do their native citizens the right to enter into agreements, acquire, inherit and bequeath. The same cannot be said of the rights that are exclusively linked to the quality of the citizen, these are the right to take part in electoral and decision-making assemblies, to participate in sovereign power, to be a national guard", op.cit. article v, nº 42.

Note that this author refers to humanity in opposition to self-interest, that is opposing altruistic interests and human beings' solidarity to selfish interests. In nº 43 of this work he stated: "For a foreigner to acquire such rights he must become a citizen at his request and with the nation's consent, joining the social pact and submitting to all its conditions".

It is clear that if in the last century such values were already accepted and taught in Portuguese society, then the police today when going about their duties must inwardly digest and defend these values within the legal framework in force and of humanitarian values.

4. THE REALITY

a. **Ethnic Minorities**

(1) In western Europe in general, with countries suffering greater or lesser degrees of pressure from migration, racist occurrences involving ethnic minorities are usually due to migrations from the so-called third world. Often these involve poor human beings who bring with them standards of behaviour and civilization that contrast

with local culture. From here to the constitution of closed circles, due to the hostility of the host environment, these people sometimes turn to forms of social upheaval.

In Portugal, if we take the migration from Cape Verde in the early sixties as the starting point, we see that other, larger and more ethnically varied migrations occurred as a result of decolonisation. These have remained more or less constant over the years.

To these we must add the migration from eastern Europe and north Africa. Nevertheless, despite the increase and diversification of the ethnic minorities we could say that we have not had a political and social problem of racism and ethnicity at the level of conflicts/ public disturbances of a continued nature or considerable size, as shown by the data collected by the security forces. We believe that facts such as the urban revolts in Central Europe have no parallel in Portugal.

However, we should analyse the phenomenon as it stands today, but from a dynamic perspective so as to plan the future. To do this it is important to note that ethnicity will become more relevant as the contrasts between the minorities and their host society become more marked.

We should now attempt to characterise ethnicity in Portugal without quoting endless data and statistics, bearing in mind the different traditional migrations from the Portuguese-speaking African countries and, more recently, other countries in Africa, eastern Europe and Brazil.

These also include gypsies who are autochthonous communities and do not fit into the typical migratory pattern. Historically these have a centuries-old contact with their host community.

Nevertheless the characterisation of minorities as a result of modern migrations is applicable to this community, as adapted where necessary, they also include the following considerations:

(2) There is no great social and cultural homogeneity between the migrations, races and minorities, rather there is a great diversity.

(3) Socially and culturally there are great contrasts with the Portuguese population.

(4) There are no cases where we could say that there is a large or small number of ethnicity, it is medium to low.

(5) None of them stands out in any significant fashion from their environment due to their social conditions, demographic characteristics, spatial concentration,

language, religion, marriage or way of life, that is globally speaking, as happens for instance in France with the Arab minorities.

(6) It appears that the ethnic minorities do not threaten the condition or way of life of the Portuguese to any real extent.

If we list and identify the social categories that are poor or who suffer social exclusion ethnic minorities are one of the seven categories listed. The other six are:

- low-income farmers;
- low wage earners;
- old age pensioners;
- the unemployed;
- under-educated youth seeking their first job;
- part-time workers.

We could therefore say that most minorities have their place in the job market, a semi-marginal place in the more precarious, unstable segments, and their presence in guaranteed sectors is tiny.

(7) Nevertheless, the study made in the preceding point is neither permanent nor eternal because we cannot exclude the transition to situations of strong ethnicity in future scenarios that are almost upon us, namely with regard to the Guinean and Cape-Verdean communities, for the following reasons:

(a) Depending on whether the growth rate of migration continues, or not;

(b) the continued existence of unfavourable conditions of these migrants in society;

(c) the increase in the social and cultural contrasts between them and the Portuguese population, with a marked re-adaptation of the profile of the minorities and their non-integration, or the creation of their own space for second generation families, which leads us to another problem;

(d) The determination of the route travelled by the ethnic minorities since they settled in Portuguese society, which means studying the modes of reproduction in the older immigrant communities, the profile of second-generation immigrants, and comparing it with their parents'. This aspect is particularly important with regard to the older generations of immigrants because if their low social level is maintained, these communities will be approaching a strongly polarised position. In other words, in addition to social exclusion there will be lack of roots, absence of opportunities which are typical of national socially excluded people, which carries with it ethnic discrimination.

This will certainly be one of the first points on the agenda of the investigation into ethnicity in Portugal - tracing the trajectory of the older immigrants.

(e) Last but not least, it is time to speak of the human race and therefore understand modern migratory phenomena, the legislative framework, modern schools of thought. We should ask:

What are **the dynamics of the global recomposition** of Portuguese society and what place will ethnic minorities occupy within it?

The answer lies undoubtedly in the way these processes will unfold and how political variables and human rights handle questions of ethnicity which is the same as saying the way in which these issues enter and remain within the political sphere.

b. **Social Exclusion**

Everything said above about ethnic minorities can be applied, with the necessary adaptations, to social exclusion, because very often there are cases of inter-penetration. Nevertheless we can say with some margin of safety that all those who are subject to racism or ethnic discrimination could be the targets of social exclusion, but not all those who are socially excluded, obviously, will be the target of racism.

We mentioned above the speed with which man's knowledge is increasing. I think it is safe to say today that of the various powers the only truly autonomous power is economic power. As always this inevitably carries materialistic values governed by the logic of the market. Of the many positive and negative things it carries associated to technology, it also brings new social challenges such as maladjustment, unemployment, the logic of consumerism, the increase of individuality, competition and reduced solidarity.

All these elements alone or together carry new phenomena. together with the media they create a craving for consumption, a craving that for so many cannot be fulfilled. It is but a step from this to the eruption of social problems and crime.

The fact is that the system has not given everyone access to the advantages it has created and promised to so many. Or are not all citizens targeted by publicity?! Excluding, of course, specific advertising.

Who wants to know?

Will it bring violence?

How to establish social pacts without solidarity?

What to do with millions of excluded people?

It seems clear that intolerance has not diminished and we often hear people talk of unfair justice or as one Portuguese author brilliantly puts it: "this is a time of the rule of exclusion, of violence and spectacle, in which we see a form of violence that is injustice in our times" where there is a greater notion of justice but not more justice, separating the idea of the law from the idea of justice, all this perhaps in the century of perverted law, so often at the service of totalitarianism or the mediatisation of law as a show.

As someone said a few days ago at a seminar everyday practice emphasises the weight and meaning of these problems because poverty threatens the safety of peoples and if we do not take care of the poor they will take care of us.

Why?

Probably because delinquency as such and often when linked to drug addiction is becoming increasingly visible. Linked to this problem is the competitive way in which society is organised, with countless cases of poverty. These are made worse by lack of housing, bad access to health care, maladjustment to schooling, uprooting of cultural values, dismemberment of the family unit, on a par with structural alterations to modern society which modify the system of values and enhance forms of violence and social exclusion.

I believe now is the time to quote Ana Martins of the International Medical Assistance who spoke recently at a seminar about poverty, exclusion and family: "All of us at some stage in our lives have felt excluded. Society is extremely aggressive, look at the way we drive. New technologies have given rise to the excluded who will never be able to have access to them and which compromise success in the area of the haves and the have-nots, in which it is clear that the thresholds between poverty and non-poverty are very tenuous."

5. WHAT SOLUTIONS?

Having analysed the situation and listed the problems about this subject, what solutions can be envisaged?

a. **Relationships**

The problems that arise between security forces, ethnic minorities and those who are socially excluded generally reflect intra-community problems in the bosom of society.

Whilst, in scientific terms, the twentieth century was marked by three scientific revolutions: the quantum revolution (physics and chemistry), biogenetics and informatics, and if we believe that the world will change even more in the twenty-first century and the new step will be scientific synergies, the same will happen with interdisciplinarity and intra-community relations in now familiar global society.

This will be the great challenge of the future as it is already of the present.

(1) Sociologically speaking, we can characterise our society into four basic types:

Urban, rural, suburban and rurban.

Whilst the concept behind the first two is clear, the last two show that there is an inter-penetration between them. **They constitute four different types** in terms of behaviour of a model of organised society which we, members of the security forces, must use as a guiding concept in our performance. They determine methods of performance, insertion and analysis that differ depending on the populations and, which in terms of the concept of close patrolling, are decisive in how we communicate with the community.

(2) It is quite clear that in addition to the traditional population the security forces have permanently to deal with minorities and the excluded. Understanding the complexity of social cultures and habits is both relevant and important. From the above it is clear that public bodies must guarantee a balanced and appropriate way to supply services to the various communities and groups, and here the security forces have a particular responsibility. Indeed, they are responsible in day-to-day life for representing the authority of the State and in intra-community relations they are the main target for resentment which the minorities and excluded may feel towards the community or vice-versa.

(3) Generally, problems between the security forces and certain ethnic or social groups reflect intra-community problems. The security forces did not cause those problems, in the same way that deep-rooted problems cannot simply be resolved by better training of its members. Given the outstanding position security forces occupy today in this context, it can reasonably be expected that they should make serious efforts to adapt to the new realities of society, combating xenophobic, racist and exclusivist behaviour.

b. **Training**

Of course it is agreed that one of the best ways for the police to play their part in such a vast, dense problem is to concentrate on training its forces.

Although it may be debatable to talk about **pluri-ethnic societies in Europe and Portugal** and merits reservations, the fact is that communities are going to increase and the number of marginalised and excluded will rise.

Having analysed the problem, bearing in mind the guidelines of the Council of Europe, and considering the assumptions already mentioned, we are of the opinion that the police, within the technical understanding of the term and in this case the security forces, must **always recruit** people to their ranks without discrimination and without discriminatory criteria. To do the opposite would in itself constitute discrimination.

What concrete measures can be adopted? Well, the following, for instance:

(1) Trainers must possess specialised training and experience to allow them to have specific competence to handle ethnic, racial and social exclusion issues.

Trainers employed by the security forces must be carefully selected professionals with the appropriate profile who should deem it an honour to serve through teaching. The police institution should encourage this measure.

(2) Recruitment should be addressed to people who can absorb modern values, solidarity and human rights as intrinsic, unassailable values.

(3) Subjects must be created to **develop the trainees**'s capacity for direct dialogue with the surrounding populations, immigrants, minorities and excluded, to understand the problems of those groups and of the developing micro-societies.

(4) The development of and demand for **coherent, loyal and just conduct** by all the members of the security forces so that a clear frontier between firmness and tolerance is established within its legal framework.

Simultaneously, they must be given to understand that these are essential qualities for the professionalism of the security forces in a modern world and that together with an open mind to enable them to understand and participate in intra-cultural relations, they will mould the modern, pro-active police officer.

c. **The Police Force's Function**

Considering the security forces in the form of the police itself, this is one of the formal instances of social control of crime as are the Public prosecutor, the courts and the penal code.

Accordingly, members of the police forces charged with ensuring that the law is obeyed or with supervising its application must permanently fulfil all the duties imposed on them by the law and must always bear in mind that their mission is one of public service to the community aimed at protecting all persons against illegal acts, and elevated by the high degree of responsibility required by this profession.

All members must act without **mental reservations**, obeying the law and ensuring that it is obeyed so that, as established in the human rights, human dignity is always defended and protected.

Daily practice shows that the protagonism of the security forces no longer places them on the plane of mere organs of execution but that they belong to the State's administrative apparatus with their own competences and attributions.

This point of view leads us to affirm in this respect that police institutions can and should (in accordance with our subject today) consider that all its members must be objective and pay special attention to those with special needs given the extent of the damages suffered or which they may suffer, namely as a result of exclusion, cultural and religious differences, ethnic origin, sex and even age and that this should be considered as a qualitative leap and an increase in the efficiency of its mission.

d. **Recruitment**

This is the core issue in the whole process. There is a popular saying that you cannot make an omelette without breaking eggs.

The young people recruited into the security forces should be enthusiastic and have solid social, moral, cultural and intellectual values.

It is increasingly essential for future members of the security forces to feel the dignity of this public service, giving them a dignified, enticing and sufficiently enhanced career, recognised by the population they serve and by the organs of sovereignty and social communication.

All national citizens must be allowed access to this profession without positive or negative discrimination in accordance with the merits of their capacities attested to in public competition.

6. CONCLUSION

a. We are of the opinion that the problem has two aspects in view of the human elements that make up the security forces:

(1) Current members should continue to be made aware of the values that rule society in this regard, and present levels of training and recycling should be maintained.

(2) Future members should bring with them a solid background in human rights, resulting from the work of the community from which they are recruited, the work carried out at schools and in basic education. There must also be a reciprocal relation between rights and duties, between the community and the minorities.

b. Looking at the Portuguese case we believe, as we have already said, that there are no strong cases of ethnicity although it is possible that in the future this situation will change as a result of policies adopted or the absence thereof.

c. Generally speaking, legislation provides a legal framework for this matter which punishes violators.

In our opinion, therefore, we can say that all the security forces have to do is to respect the legal framework.

This might appear to be a simplistic statement.

It is merely a simple statement which like everything else in life that is simple, encloses a great challenge and is highly complex.

Respect for the legal framework by the security forces necessarily entails that its members must know the ethical and legal rules which must be the beginning and the end, must legitimate their performance: this necessarily entails an in-depth knowledge of the community where they will be working and, finally, adjusting that work in view of the situation which must be resolved or settled.

The security forces need suitable laws and clear instructions. We cannot attribute to them the resolution of political, social and cultural problems for which they are not responsible and which within the legal and institutional framework it is not their place to resolve.

d. Finally, I would like to leave you all with a thought and a question:

To believe in societies with ethnically differentiated intra-community relations is a fact and a principle.

Man has only one place in which to live. This planet. As we have seen last century students in Coimbra were already being taught about foreigners' rights.

The question is:

Is Portuguese society today a society with intra-community and ethnically differentiated relations? Or will it inevitably become one in the future?

The answer to this and other questions will certainly enable us to outline future strategies and study suitable solutions.

Marco Mona

Chairman of the Association for the Prevention of Torture - APT – Switzerland

I should like to begin by thanking the Inspector-General of the Ministry of the Interior for his most kind invitation to participate in this seminar, whose theme is of major interest to us – and you will see why shortly. We are following with great interest the work of IGAI, a project with unprecedented incidence and impact. I was in Lisbon for a sabbatical holiday when, in March 1996 the nomination of Mr. Rodrigues Maximiano was announced. The proposals of the Inspector-General were from the outset ambitious and courageous, and bordered on the utopian (a trademark that is forcefully pleasing to a NGO representative). Their follow-up, as we know it, responded and still responds exactly to our highest expectations that an Inspector-General himself and those who followed its progress closely –filled with hope for some, suspicious for others – in the development of the IGAI. In short, the introduction I intended is that I admire the work by the Inspector-General and his tem, who do not limit themselves to react to situations as good bureaucrats but who act and take initiatives taking on board all interested parties. This seminar is proof of this.

You will admit that an NGO president cannot be address himself to an audience as select without seizing the opportunity to make a short commercial break for his own organisation; indeed, I will go for a double-strike. Firstly, those of you that are not yet aware of APT will learn something useful even if it is only an address or an idea on the organisation for future co-operation, on the other hand, it serves as validation for this speaker. I think to have the honour and the pleasure to have the floor in this international seminar due to presiding at an international NGO on the rights of Man that is concerned with the prevention of torture and maltreatment.

The Association for the Prevention of Torture (APT), is an international NGO with main office in Geneva. It has 11 staff who share 9 full-time jobs at the moment. As President of the organisation, I am an outside member in this light, and perform this role together with my profession as lawyer, public writer, as I prefer to define my profession in an office in Zurich in the German cantons of the Swiss Federation.

The beginnings of the APT (which called itself Swiss Committee Against Torture) were in 1977. Its founding member, the banker and humanist Jean-Jacques Gautier from Geneva decided that expressions of indignation were not sufficient before the appalling scourge of torture and inhuman or degrading treatment. He left the bank and dedicated himself entirely to his idea of preventive action; there is a need for preventive means – beyond and complement to the instruments of torture, denunciation and medical care to victims – and for officially recognised systems to enable visits to places of detention in order to identify from the outset the mechanism that leads to maltreatment and torture even before these can come into operation. Isn't this a idea that stands out as straightforward and brilliant. However, it was not easy for it to be accepted by mainstream society; our predecessors had to apply all their tenacity before the idea began to take shape.

After 10 years of work, its was first presented as "The European Convention for the Prevention of Torture and Inhuman Treatment, cruel and degrading", and signed in 1987 by all the States that were members of the Council of Europe. Many observers were surprised to see these States lining up to sign the Convention for, as you know, the convention foresees the right to intrude in questions of national sovereignty that are jealously guarded at national level, and do not allow the curious interest of outsiders. M. Nicolay, who was a member and president of the Convention structure has spoken to you about this. The Convention counts 39 States and signatories (the 40th State is due to sign shortly) and after 9 years of really working, the Convention warrants our respect and above all our support.

The task of the APT does not cease after this success, it does not limit itself to create instruments of prevention in Europe. We are an organisation with an increasing number of members (sympathising private citizens and organisations) in many countries around the world, all focused on this straightforward idea of prevention that contributes by disseminating the idea, and part of our network of information and action, supporting jointly with us, for example, the political action taken by the CPT. But we work, at the same time, for the creation of a universal prevention instrument tool that will be established through the optional protocol at the

United National Convention Against Torture, and under discussion at the moment in a working group of the United Nations Commission on Human Rights.

In summary, the objectives of the APT are the prevention of torture through the following means.

The promotion of systems to visit places of detention:

- Its role as a catalyst for general appraisal on other preventive tools and mechanisms at national, regional and global levels;
- The identification of categories with real or perceived risks of torture and inhuman treatment (individual citizens, situations and professions), in order to trace the mechanisms that lead to torture; to propose adequate preventive measures;
- Research, reports and publications on the conditions of detention, and standards, legislation and so forth;
- The fight against impunity which is one of the main obstacles in our joint endeavours against torture and for the respect of human rights; and allow me to add: it also deals with the fight against the impunity of dictators.

The prevention of torture is undertaken by employing a wide range of means and methods. It is true that the question on whether a State wilfully applies torture or degrading methods in a systematic manner raises a great of interest. However, in practice, it is equally important for us to establish what is the reaction of the authorities of a State in relation to the phenomenon of culture and inhuman treatment found out on its own soil; Is the solemn and evident legal commitment by the State against all forms of torture and maltreatment truly translated into political will applied everywhere and throughout its jurisdiction ? If you read a little the reports of the European Committee Against Torture, you become aware that the phenomenon is prevalent in differing degrees. There is no single State that is the exception including Switzerland, Sweden and Portugal. And it is normally the social misfits that suffer much more than other social layers – and at this point I will refer to this topic using this table.

The continuation of my presentation will forcibly be a little abstract; I will certainly not dare to speak about police work in your country in the past or in the future, I know only what I read in the CPT reports. I will not talk on the crime of the

Padre Amaro case nor the lost head of father Damanesco Monteiro. I will limit myself to two quotes from it:

- The “detention rate” (the number of detainees for every 100 000 inhabitants) in Portugal was, in 1995, 125 and the highest in Western Europe.
- Following the enquiry by the Council of Europe in 1994 on police training on immigrants and ethnical relations, the official stance of the Portuguese authorities was the following: “These fields of interest are dealt with at the National institute for police studies in the framework of the Rights of Man and international law. The National institute for police studies and forensic sciences includes the questions on immigration, attitudes and perceptions of prejudice in police training programmes. However, in general, it is considered that the circumstances in Portugal do not require for the time being that the themes are integrated in the police training in general”.

I don’t doubt that the attitude of the authorities has changed since for in the meantime it has become clear that everybody in this field escapes the impact of forecast. In the enormous migratory influx which affects and preoccupies every European countries without exception given the ethnical diversification of our societies – accompanied by a nationalist surge, racism and xenophobia, there is no country in Europe nowadays (and there was neither any in 1994) that can allow itself to say that the current circumstances do not require specific attention in regards to problems in migration, ethnical minorities and also (even above all) police training.

Why the police ? In the preventive role of the APT, we seek to identify and distinguish the groups at risk of torture and maltreatment. There is a risk to receive (the prison population, for example, and especially those in society who are considered as intruders and form the lower social strata) and the risk to “give” (staff in prison and detention centres) and among the latter the risk is even greater than the scale of the confrontation. Indeed, there are fewer impacts of importance in civilian life than the moment of being arrested, of the initial questioning session, the first hours in a prison cell. In effect, there are few situations where the alienation of the power-that- be is so obvious, and the risks of abuse of power is so great.

And why would the risk of abuse be greater when the arrested individual belongs to an ethnical minority ? Indeed, this is reality. It is a reality that in my life and travels, I have never been subjected to an identity control whereas I would not

advise my African colleagues to walk in Geneva without identity papers on them. And it verified fact that if I was arrested in Zurich where I work and travel, I would be dealt with firmly but also with respect, and that this treatment would not be guaranteed for the small-time Kosovar drug dealer, who nevertheless has the same civil guarantees and presumption of innocence like myself. It is because the police force reflects more or less society-at-large – there are civil servants who, despite their training, despite their oath to the constitution have also strong prejudices regarding small minority groups.

There is also a certain police “culture” resulting from among other factors, the pressure to which it is exposed (to identify the perpetrators with little inclination to own up) and the constant contact with persons who are excluded from society, withdrawn themselves from our community of the “honest brokers”.

Without a detailed knowledge or active data research on the ethnic minorities and their communities, unfavourable stereotypes are created almost automatically which characterise all the members of a single community without distinction. And the step from there to maltreatment is a very short one. Speakers who are much better qualified than myself, have spoken here on possible measures, in police recruitment policy, in-house training which will be spoken off Saturday, the measures towards professional competencies without prejudice or ill-treatment as integral part of police “culture” which we have spoken about… Please allow me to add a path that has an admirable simplicity. Nevertheless, it is often the most simple ideas which are accomplished with the greatest difficulty.

The role of non-governmental organisations from the police top NGOs are not compatible and are even contradictory. Here is another long-standing stereotype without being correct in as much. It is true that the police and the NGOs (I speak of the NGOs that are concerned with human rights) have very different roles in a democratic society and speak another language; whatsmoreover, there is unfortunately a long history of reciprocal mistrust.

The police in the exercise of its role is often asked to deny people of their liberty and other fundamental human rights. In turn, the NGOs have a role to protect individuals against the limitless usage of powers of their constraint. In order to identify the abuses and set the parameters such as denunciation in providing direct assistance to the denounced individual, through rehabilitation dispositions or creating juridical protection measures, checks and balances in order to foresee possible “mistake”. It is not for me to say to you that NGOs play a key role in the development

and safeguards of human rights for these are the words of the Minister of the Interior who spoke to you this morning. I must state that such acknowledgement is refreshing, and it renders my task easier since it is your Minister who has suggested indirectly to take seriously the proposals by NGOs representatives. The intervention of an NGO following a police incident can create discomfort to a number of protagonists but taken within a broader framework of the police as a democratic instrument of law and order, the police must welcome this kind of control exercised by civilian organisations. It becomes a question of good standing and legitimate democratic continuity. No power without control over it !

In regard to this, it is interesting to note that if the NGOs in Western Europe often had difficulty to be recognised and admitted without too many obstacles (and several such organisations continue to do so) in their control and prevention roles, this is much less so in Eastern Europe where the intervention of civilian structures in the construction of democratic society is much less accepted.

Thereafter, the NGOs play an important role in the dissemination of information even to the point as instruments of awareness-building training. Naturally, the divulging o f information involves formal violations of human rights but also simply information on rights and how to safeguard them. The police can make use of this information but is has also an interest in being the handle with better informed public.

There is also the co-operation between the police and the NGOs even if this is not the classic case of intervention by an NGO; and this for the benefit of all in order to maintain the identity and independence of the protagonists. But it is beyond doubt that the specialised work done by NGO enables them to acquire special competencies – and why not share these with the police in, for example, police training projects or in the definition of the code of doentology of a police corps. For example, the APT has taken on this role in the elaboration of a study of the European Convention for the prevention of torture, in the framework of the Council of Europe “Police – the Rights of Man, 1997-2000.

In these kinds of interventions, there will be those of specialised NGOs who are concerned particularly with ethnical minorities, social misfits but also the “generalist” NGOs such AI, ACAT, APT and many others at every level which in their field of activity can have a significant impact on the protection of minorities, information levels and linking organisation. .

I should like to conclude with a quote from the Portuguese poet “transmontano” that I like very much, Miguel Torga, that needs to be quoted in the Portuguese language of course:

“O que é bonito neste mundo, e anima,
É de ver que na vindima,
de cada sonho
fica a cepa de sonhar outra aventura…”

And here follows one of my dreams in relation to “l’outra ventura”: that we should arrive tomorrow if possible if not the day after (one characteristic of an NGO is tenacious patience), to see us all as one, without mistrust, each in their respective path but in parallel effort in the fight to safeguard the rights of those who are the most disinherited for tomorrow which we can all be proud of.

It is allowed to dream and, Ladies and Gentlemen, it happens at times that these dreams are realised.

José Joaquim Antunes Fernandes

Senior Inspector at the Office of the Inspector General of Internal Affairs

- Police Commissioner (Polícia de Segurança Pública – PSP)

1 - INTRODUCTION -The large urban spaces

The creation of large urban spaces, has caused an enormous disorganisation of space in most cities. The city - which some years ago was considered a harmonious space - has today changed and is now divided into various different areas: commercial areas, dormitory areas, historic areas, degraded estates and luxury estates.

As a consequence of this urban disorganisation however, the most worrying aspect has been the abnormal growth of the suburbs of the cities, which in the case of Portugal has worsened with the arrival, after 25 April 1974, of thousands of people from the ex-colonies and also with the massive influx of people coming to the city from inland looking for better living conditions.

2 - The creation of a new *urban personality*

The building of estates - mostly illegal - with no thought to architecture, with inadequate conditions of hygiene and public health, with no leisure or social areas, has made this *social organisation* enter into rupture right from the beginning, and has also been the cause of the creation of a new “urban personality” and a new urban behaviour.

3 - Space segregation

People of different cultures, different ways of thinking and different ways of being have begun living in the same area, and this has caused great differences in social relations which were not easily absorbed by the people already living in those areas. Amongst other things, these factors led to the appearance of various phenomena, such as delinquency, prostitution, drugs and other deviant behaviours.

In this way the social inequalities and disorders began to concentrate in certain areas of the cities, with the inevitable “stigmatisation” and “ghetto-isation” of these spaces on the one hand, and on the other the withdrawal of other people from these housing estates. Housing is important to the discussion of discrimination. Therefore through a process which we will call space segregation we have encouraged, in a strange way, encouraged the geographical delimitation of the areas of delinquency and disorder.

The existence of these housing estates, some functioning as absolute *ghettos*, has contributed to the increase in violence and insecurity both on those estates and in the surrounding areas.

4 - The State´s (multidisciplinary) response

It is obvious that the answer to violence does not depend exclusively on the measures of repression and confrontation taken by the State.

One should accept that the solution has a multidisciplinary reply, namely in the areas of: education, work, social security, public works and housing, sports and internal affairs.

5 - Frustration/aggression

We all know that during periods of economic recession or when unemployment rises, there can be a tendency for intolerance and the temptation to laying the blame on those belonging to minorities or ethnic groups - especially as these groups are the most vulnerable - when in the end some of them came to us in the hope that we could and would help them.

We see today the great urban spaces inhabited by foreigners, strangers, people we do not know. The new delinquency comes from a problem of

inadaptability, in which crimes are committed for the most part, by people who are not integrated.

6 - An equal treatment of unequal situations

It is obvious that the solutions for insecurity or violence almost always lie in the very reasons for their existence: unemployment; badly controlled influx of immigrants; displacement of people from inland to urban centres; badly adapted or inexistent planning; estates built with no green spaces; lack of sports infrastructures; narrow streets; lack of lighting, schools and creches; cultural differences; social exclusion.

Apart from this, the development of these new inequalities jeopardises the issue of “equal rights” as the best guarantee for the principle of equality. One of the many difficulties in applying this principle comes from the fact that it “implies” the unity of a group of people in a certain context, when in the end, what we face today is situations which are diverse, heterogeneous and different.

7 - The solution of the Police Institution

If is it true that - as already mentioned before - the solution cannot be partial or sectional, it is also true that the police force can play a leading role in those solutions, not only through the measures they can and should take, but also by co-operating with other entities such as “The Commission for the Protection of Minors” or “The Municipal Security Boards”.

7.1 - Recruiting and Training

A rigorous and careful selection together with a new type of training are the support which will help create and implement a new and different philosophy in policing, in order to act differently, particularly on the estates which require a more careful intervention by the police.

Social and institutional control is considered a technical problem (the capacity of the police to deal with situations depends on their working methods and training; their capacity to deter depends on the type of punishments applied by law).

7.2 - A few “adjustments”

Some adjustments in terms of public safety will make everyone feel safe, equally accepted and equally responsible, without making them feel subordinate. This will also create a humanising framework and help people discover a feeling of belonging and bring them to participate actively in the local social life. The traditional model of policing does not seem to be efficient nor does it adjust to present needs - at least on this type of estate. It may be necessary to begin considering another model, or at least a model with different characteristics.

We would like to present some ideas which we feel are fundamental to the “adjustments” which we have referred to:

1 - In the first place it is necessary to study the areas where the police work and carefully plan the forms of policing (study and plan)

2 - Presently the safety of people and goods is only possible if the citizens contribute actively to their own safety (partnership)

3 - On the other hand, it is necessary to focus on proactive measures in which prevention is the most important factor (foresight/prevention)

4 - It is also necessary to involve all those who have any social representation (interdisciplinarity)

5 - Focus on foot policing in order to increase the contact between the police and the citizen (proximity)

6 - Lastly it is necessary to rethink the traditional model of policing and/or present alternative models (imagination/flexibility/adaptability)

In an article entitled “The Future of Law Enforcement”, Alvin Tofler insists on the need for the police to plan long term strategies of action, as only in this way is it possible to prepare for a future which will bring the most profound social, cultural and technological changes. The author adds “…..this *broadening of our imagination* is

crucial to survival, at a time of accelerated and destabilising change…", and ends by saying that this "increases our power of decision".

No one can ignore that "relegating" immigrants to suburban estates, with architectural, environmental and socio-economical deficiencies, immediately symbolises a subordinate condition, which causes victimisation on the one hand, and makes people think that the estate it a real "ghetto" and liable to community problems.

We cannot run the risk of either implementing a *too intense and/or ostentatious policing* on these estates, nor can we fall into the temptation of *under-policing* these areas.

8 - Change

Change - whichever it may be - it always a complex, long and difficult process which takes a while to implement. In order for it to be efficient, it must involve each policeman - an involvement which shares the reasons *of* and *for* change.

One of the great sources of vitality of European civilisation is the diversity of peoples and cultures. Portugal is - for the historic reasons we all know - a multiracial and multicultural society. Fernando Pessoa wrote "we live in a time where, more materially than ever and for the first time intellectually, all countries exist in each other…".

9 - Bringing down barriers (approximation)

Possibly the main reason for most conflicts and problems which we see today, in police terms, is the *breakdown or weakening of trust and communication between the police and the communities in the rundown estates*. This *rupture* is generally caused by racial questions.

On the other hand, it is fair to say that racism as a prejudice does not have too much to do with the policemen´s attitude on an individual basis. It reflects a social culture which in the end affects the member of the police force.

10 - Alteration of the *(essentially technical)* dominant concept

The dominant concept of *"the policeman"* has been that of the agent being *technically efficient, zealous in keeping the law and in controlling crime*. However, nowadays the citizens prefer a "*closer policing*, *turned to the community,* as opposed to the type of policing that applies the law with firmness.

Maybe it is necessary to establish a new paradigm of policing as a form of public service, in which keeping the law does not conflict with the provision of a service.

In this way, side by side, without exclusion and respecting the minorities and the displaced, it is possible to *conciliate crime control and maintain public order*, as well as be *protective, be attentive, be patient, banish fears, and help the community in general.*

RESPECTING DIFFERENCE AND DIVERSITY

What is expected of the police, is respect for differences, diversity, and autonomy of groups as well as a sincere desire for their co-operation. It is suggested, to both, that they learn to enter into dialogue - by putting pluralism into practice - as a way to overcome sectarianism and sterile extremism.

Promoting the idea of participation and responsibility implies that we should re-learn the meaning of risk. This means teaching people and groups the meaning of a society in which not everything *comes from above*. Together they would have to pledge to enter into dialogue and choose between various types of futures, and not simply defend acquired rights.

Lastly

We are facing a world in *perpetual transformation* where little certainties are given apart from the constant changes and the need to adapt to them, which is also true to the subject in discussion.

Let us all join together to build a country of *Portuguese citizens* and *citizens of the world*, because as Jorge de Sena says: “Portugal is made of those who leave and those who stay”.

Mário Gonçalves Amaro

National Director of the Police (Polícia de Segurança Pública – PSP) – Portugal

About a month away from the commemorations of the fiftieth anniversary of the Declaration of Human Rights, I welcome the organisation of this seminar, for the opportunity it gives us to reflect on human rights, and the efficiency of the police: methods of controlling police activity.

A process in constant change

We live in a society which has been marked by change, innovation and difference.

Our political and social system has suffered a process of constant enrichment and modernisation, in a permanent conceptual dialectic for the construction of the future.

It is our daily experience that, in the most varied of ways, it is made clear that we live a moment of growth and expansion in the history of mankind, whose lasting aim is a free and happy society, of which the fundamental rights of each citizen are the corner stone.

As summed up by José María Rico, «the protection of the fundamental rights of each citizen in equal term does not only constitute a limit on the State's performance, but is the foundation of the State, the condition of justice which gives us sufficient legitimacy to the exercise of executive, judicial and legislative power, and definitively, the very existence of the political and democratic organisation».

Our society has developed a sharp critical view that makes us particularly sensitive to these problems and difficulties. This international seminar is actual proof of this constant intellectual uneasiness, which is beneficial and essential.

Having strengthened individual freedoms, today's object, in a society based on total freedom, is to multiply the availability of rights and the conditions in which to exercise them by maintaining a constant and profound drive for equality.

Police and Fundamental Rights

The basic rights and freedoms of each citizen being guaranteed and recognised by the State under democratic rule of law, these corresponds to the natural rights of men which being essential and inherent to their very nature, give them true dignity and let no one doubt this, much less the Police force, whose duty it is to protect that dignity.

In the Portuguese constitution and in various international documents for the protection of the equal rights of men, which are incorporated in Portuguese law, the police has the basis for its guidance and behaviour / conduct.

Our constitution, article 272º nº 1, gives the police the duty to defend legal democracy, and to guarantee internal safety and rights of the citizens.

The basic rights of each citizen does not only limit police activity, but are one of the main aims in the performance of the police force.

As the right to safety and to freedom era at stake, the constitution limits the use of force to the principal of subsidiarity , necessity and proportionality.

In a democracy like ours we all know the value of security and agree that it is a necessity and, more importantly it has increasingly become demanded by society.

It is up to the state to answer this demand, namely through the police force.

One of our guiding principles should be that the main aim of the police force is to serve the community.

Surely this is why the police forces are invested with authority.

But exercise of authority then becomes an instrumental value that is used, under the strict terms of the law, to serve the community.

For Gomes Canotilho and Vital Moreira, the right to security has covered two aspects: «one negative, strictly associated with the right to freedom, turning in it into a subjective right to security (the right to defence in the presence of the law), and a

positive aspect, which is the positive right to be protected by the law against aggression or threats from other people».

And so security becomes a citizen's fundamental right, and is linked to the idea of public safety so that each member of society can preserve their rights and personality.

Public security can only be understood as a social situation that allows a citizen to exercise his rights, individually and collectively. With this in mind the police administration has to be a fundamental element in the social and economic group, which will contribute to a general feeling of order, tolerance and peace.

Public security developed by protecting citizens against certain dangers and ensuring the security of the state, by protecting its very survival.

Nevertheless for a citizen to live in total safety, it means that they themselves and their belongings have to be protected not only from others but also from the State, preventing it from unjustly invading the sphere of its rights, liberty and guarantees.

Liberty Versus Security?

As referred to by Vignola a policeman in his role as «an officer for the people's defence», often faces the dilemma of guaranteeing the difficult balance between the protection of the citizen's fundamental right and collective security.

As nowadays we all want to take advantage of our liberty we know the value of being secure, and because of this we also know that without security there is no freedom.

In certain historical occasions there was the notion that these values would be antagonistic and irreconcilable. In other regimes we witnessed the manipulation of security in order to nullify freedom.

Nowadays, it is indisputable that without a general, and profound feeling of security, in a democratic rule of law the elementary facets of freedom cannot be practised.

We must understand that our safety is a guarantee, a condition with which to achieve total freedom.

And so, clearly in a democratic society, it is an instrumental value and never an absolute value.

Besides liberty and safety are concepts that complement one another: liberty allows for the control of arbitrary actions and security gives us the foundation for freedom.

The Police and the Political System

Over the years, and depending on the extremes, the police and the State have naturally always had a close relationship and have agreed on the organisation of political power and the contents and aims of police activity.

Naturally, depending on the political regimes, the idea of social dangers which the police try to prevent or eliminate once they are materialised, varies as does the idea of the best ways to prevent and eliminate these social dangers.

But also depending on how the political power is organised, reciprocal positions are altered amongst the people, citizens and the police. Naturally, when you go from a dictatorial regime to a regime marked by the rule of law, in his relationship with the police an individual is not judged fundamentally or predominantly as a source of social danger but is rather as a receiver of protection and in some circumstances the holder of a subjective right to public and social protection.

The Police and the Law

In all countries with liberal traditions, the aim of the penal code is to guarantee what appears to be opposing interests. Effectively it exists to protect a society that is constantly exposed to more or less serious threats from transgressors and the individual who risks being considered suspects, or even accused of a crime that he did not commit.

How to assure an adequate and efficient defence of the individual, and to avoid upsetting the tranquillity of the law abiding citizen, is the question facing the legislator.

The difficulty lies in finding a rational system that will in the best possible way reconcile these two equally respectable aspirations.

The ideal demarcation line, the point of equilibrium in this area, are not easy to establish.

These problems appeared on the day that it was decided to preserve not only the general, but the individual interest as well.

Some give priority to the guarantees and freedoms of the individual, on the grounds that it is essential to respect a human being. They propose an a limitation of vigorous restrictions on the coercive measures of State bodies, which in the absence of regulations would run the serious risk of being over zealous, and consequently of abusing their power.

Others on the contrary, without ever having lost interest in defending the right of the individual, have first of all the purpose of defending the social group. They think that society should be forewarned against the behaviour of those who can hurt members of their family or their property, and that an exaggerated concern for the respect of human dignity, will inevitably endanger discovery of the delinquents paralyse repression.

There are others that swear that their deep connection with the guarantees of individual freedom, does not stop them from wishing that an example be made out of the guilty parties. The preoccupation of leaving honest citizens in peace, they say, could not be an obstacle in the fight against the criminals. According to the police, they have means and ways of protecting society without having to interfere in peoples' private lives. This way of trying to understand the activity of justice, is I am sure, very seductive as it reconciles both aspects: a soft hand for the possibly innocent suspect, and a rod of iron for the one who has been found guilty.

This point of view is based on the idea we have of the duties of the police and their possibilities of acting. Its mission is to prevent and suppress all violations, without forgetting respect for the freedom of each person. How will the police force get such a result if, with the excuse of trying to avoid disastrous intrusions, their powers of investigation are strongly limited?

It is true that if the police force had extraordinary detection faculties and could establish an infallible method of deduction it would be able to play its part perfectly. If the police force had the gift of foresight, not only would they catch the delinquents, but they would also be able to stop all criminal behaviour.

But reality is very different because, like all other institutions, the police force only has human resources, which limited and defective in carrying out their difficult day to day task.

The wish to guarantee at all costs the defence of our society can at times encourage people to forget the essential freedom of the individual. An excessive

concern with trying to maintain public order does not always conciliate harmoniously with the scrupulous respect of the human being. So it was necessary to establish the rights and obligations of the law and of the police, in the penal code and the code of penal procedure.

Police officers are often encouraged to be efficient, by generally trying to prevent any disorder and to arrest the criminals. For the police force, “to serve the public is the reason they exist”. I am sure one can claim with good faith that this strive for perfection is inspired not only by the will to defend the general interest of the public but frequently seeking commendable success, which generates personal advantages.

A perfect mode of procedure is not irreconcilable with police efficiency.

Every time we try to significantly strengthen and defend the liberty of the individual by limiting the power of the police, we increase the difficulties of ensuring totally efficient repression, without always being aware of it.

It is obvious that you can try so hard to protect the rights of the individual at the same time knowing that you are in a certain way giving the criminal the advantage.

You can run this risk, which to some is not an important one, the idea being that it is better to let ten or one hundred criminals go than it is to punish an innocent man.

It is said that disorder is better than injustice. Nothing is more serious nor more revolting than punishing an innocent man. Let it be known that disorder leads to injustice the latter affecting not just some but an indeterminate number of people.

If public security is not properly defended, the freedom of each one of us will soon be precarious. What would become of our sacrosanct individual rights if we had to live under the constant threat of the criminals who have no moral or social values?

“If the State is strong it will crush us, but if it is weak we will wither”.

In the difficult harmonisation of liberty and repression, the legislator is often inspired by the current events so as to be able to publish rules adapted to the needs of the situation. He is usually divided between the wish to respect the fundamental human rights and at the same time take into account the demands of current events.

The legislator wavers between periods of low criminal activity and periods of social peace, when he has to guarantee maximum freedom of the individual by restraining the powers of the police. There are also periods of increased delinquency

and of the growing insecurity of the population, where the natural reaction is to reinforce the measures to restore law and order.

Nowadays not only is it better not to weaken the police resources / means, but to make them stronger in certain areas, so that it can face the demands of certain types of crimes and delinquencies.

It is true that criminal activity is not reduced only by giving the police force more power, but its usefulness is unquestionable. A truly obsessive fight for freedom of the individual should not cover up the threats of degradation in our society.

As reported by a Royal Commission in an enquiry concerning the English police:«the public wants the police force to be strong and efficient in maintaining social order and in the prevention of criminal activity, and at the same time it demands that the power given to the police be controlled and limited, so that it does not arbitrarily condition the freedom of the individual. The solution is a compromise. The police must be powerful, but not tyrannical; it should be efficient but never over zealous; it should be an impartial force in our society but at the same time be subjected to some sort of control».

More and more, we have a steadfast conviction that it is not enough to continue formally to evoke fundamental human rights which guides us, the community.

We should continue day after day to try and shorten the distance that still separates the expression of rights and reality in democratic societies.

The police has a duty and a commitment to protagonize with vigour and enthusiasm this daily effort to perfect its principal ideas and procedures, to respect and promote everyone’s fundamental rights, including the police officers themselves.

This undertaking will certainly have to be perfected, both with the internal and external mechanisms of control of police activity reinforcing the practical side of teaching police about human rights; a political relationship with the problems and necessities of the citizens; and improving communications with non governmental human rights organisations.

Peter Moorhouse

Chairman of the Police Complains Authority (PCA) – England

In a fully and genuinely democratic society confidence in the professionalism, integrity and humanity of the police service is an essential factor in the maintenance of that democracy.

Indeed, one of the first signs of the corruption of a democracy is the politicisation of the police force in that democracy. A police service which is not accountable to the community which it polices becomes an arm of the state or a law unto itself rather than a service to the community. It ceases to provide security to the individual member of the community and becomes instead a threat to the community and every individual within that community.

It is also, of course, important in the maintenance of democracy that the community should be able to conduct its life in the knowledge that an efficient and honest police force will protect him or her as a member of the community from the depredations of criminality of whatever sort.

There is therefore a balance to be found between the need for an efficient police force and the maintenance and security of the individual member of the community and the protection of the individual in terms of possible abuse of authority on the part of a police officer and that balance must be found within civilian oversight of the police services.

In addressing this particular balance, I would like first of all to describe very briefly the powers which the organisation, of which I have the honour to be Chairman, exercises in the maintenance of its civilian oversight role.

As many of you will know, in the United Kingdom we do not have a national police force. We have a number of regional police forces, a total in fact of some 50

different police forces, all of which come within the statutory remit of the Police Complaints Authority. These police forces range from the Metropolitan Police Service in London to small forces which have responsibility in the South West of England and Wales and also police forces such as the Ministry of Defence Police, and the British Transport Police which is responsible for policing the railways. We have responsibility for complaints against approximately 130,000 police officers and handle some 10,000 cases of complaint per year .

The structure of the Authority is composed of a Chairman, who is appointed by Her Majesty The Queen, a Deputy Chairman, and 10 appointed members. Members are appointed by the Home Secretary who is, of course, a Minister of Government but these appointments result from national advertising for the recruitment of Members of the Police Complaints Authority and competitive interviewing following that national advertising. The members must reflect the community which the Authority serves in terms of ethnic origin, gender and career background. Approximately half of our 10 members are women, the careers from which our members come - vary from military intelligence through to local government and amongst our membership we have two members who are from minority ethnic communities. Our support staff is drawn from the Civil Service of Government. We have some 50 civil servants who are seconded to the Authority for a period of between 3 and 5 years. Members are appointed, initially, for a period of 3 years and may be reappointed for a further 3 years but are not allowed to serve for longer than a total of 6 years in the same role.

The Authority is divided into two divisions; Supervision and Discipline. The role of the supervisory division is to supervise investigations into the more serious complaints against police such as deaths in police custody; deaths resulting from police pursuit in vehicles; deaths resulting from police use of firearms, corruption and other serious offences. Discipline Division has the responsibility for reviewing <u>all</u> investigations of complaints whether supervised or not and determining the disciplinary outcome resulting from those investigations. We have the power to recommend or ultimately to direct that disciplinary charges be preferred against a police officer provided, of course, that the evidence would justify such a charge. The standard of proof required to support a discipline charge is currently the criminal standard "beyond reasonable doubt" but in April next year will be reduced to the civil standard of proof "the balance of probability".

The actual investigation of complaints is carried out by police officers who are specifically seconded to this role and do nothing else for the period for which they are

posted to the Complaints and Discipline Department of their Force. Of the five thousand cases which are fully and formally investigated, approximately 1,000 of these are supervised by a member of the Authority. The other four thousand cases of complaint will not be supervised during the investigation period but at the conclusion of the investigation when that investigation is being reviewed by a member of our Discipline Division we have the powers, if we are not satisfied with the quality or thoroughness of the investigation, to require additional work to be done to ensure that a thorough and objective investigation has been carried out.

Our budget, which is paid to us from public funds, is approximately £3½ million sterling per annum. This does not include the cost of the police investigating officers. Of course there is criticism of what is referred to as `the police investigating the police'. I personally believe, and it is my Authority's position, that the quality of investigation carried out by police officers is, in the vast majority of cases, extremely high, besides which as I have said, we have the power to require additional investigation should we think it appropriate. I also believe that in the maintenance of proper police standards it is vital that the police service should be involved in the investigation of complaints against its own officers, otherwise how will the police service learn and improve its service as a result of the information which I regard as invaluable that comes from the investigation of complaints.

On looking at civilian oversight and the investigation of police there is often reference to "the public" or "the community". I believe it is important to differentiate between the complainant (the person who is making the complaint) and the public at large. These two groups have different interests and perhaps have different objectives or agendas in their view of the merits or otherwise of the civilian oversight system within the UK. Frequently a complainant will define the independence of civilian oversight on the basis of whether or not his complaint has been substantiated. Frequently, and notwithstanding the evidence, the complainant will not accept any version of events other than his own. The public, the member of the community, will perhaps have a more balanced view of such incidents and will want to be reassured, not only that the complaint has been investigated thoroughly, but that also objectivity has been maintained as between the rights of the complainant and the duty of the police to provide an efficient and effective police service under which he/she can live their lives in peace and security.

Let us look therefore, first of all, at the rights and indeed the responsibilities of a complainant, the person who wishes to make a complaint against the police.

Clearly, the first right of the complainant is to have his complaint recorded, investigated, reviewed and at the conclusion of the investigation, to have a clear explanation of the findings of the investigation and the decisions in relation to discipline. A person making a complaint must also have the right to expect that his or her complaint will be treated with total integrity and that he or she will not be subject to harassment or any other form of prejudicial behaviour as a result of making a complaint against a police officer. The complainant, however, also has a responsibility to co-operate to the best of his or her ability in the pursuit of the investigation of their complaint. On a recent television programme on UK TV it was said that United Kingdom citizens lead Europe in their willingness and ability to make complaints, I speak not solely of complaints against police officers but in general terms of complaining as a whole. I am still trying to work out whether this is an enviable reputation or an unenviable reputation. Certainly within the area of my Authority's responsibilities we too often find that a person at the time of arrest will make a complaint either directly or through their legal representative which can only be described as a tactical complaint which is related to the criminal matter for which they have been arrested and which once the criminal matter has been dealt with in the courts the complainant no longer wishes to pursue his or her complaint. Such malicious or tactical complaints are undoubtedly an abuse of the civilian oversight procedure.

I have said that a complainant has the right to have his complaint recorded, investigated, reviewed and at the conclusion to have a clear explanation. Some of you here who have heard me speak at other conferences will know that the question of openness of civilian oversight process is, in my view, crucial to the confidence which a complainant will or will not have in terms of the integrity of the civilian oversight procedure. It is a matter of regret to me that within the UK we do not yet have a Freedom of Information Act under which such matters as complaints investigation can be disclosed openly to the point of transparency to the complainant and if necessary to the community as a whole. Thus it is not always possible for us to give the complainant as full an explanation as we would like. However, we are making progress towards that objective. It is hoped that legislation will be introduced later this year which will give us greater discretion in this area. Also, at a recent conference which my Authority organised on the subject of Deaths in Custody a government minister was sharply critical of police reluctance to disclose evidence to the deceased's legal representatives before inquest.

I would like to turn now to the rights of a police officer and his responsibilities in relation to complaints investigation. First of all a police officer has the right to a fair and objective investigation of the complaint which is made against him. He has the right to a system which will recognise malicious or tactical complaints. He must have the right to assistance, either from a legal representative or a member of his staff association, his trade union, during the investigation of the complaint brought against the officer. The officer must have, within the structure of the police service within which he works a clear discipline code or alternatively clear force orders or guidelines so that he may know precisely what his powers are and he may know the point at which he breaches those powers and is then susceptible to disciplinary action. The police officer has a right to proper training so that he may be clear in his understanding of the role which he has to play within the law and within the community. Ideally, within the procedure of complaints investigation and disciplinary action there must be a recognition of the difference between a failure in performance on the part of an officer as distinct from genuine misconduct. The former, failure in performance, may require only additional training for the officer so that his performance in that particular area can be improved. Misconduct, on the other hand, may well require punishment under the discipline code.

Amongst the responsibilities of a police officer under investigation is the duty to give a clear and open account of his activities at the incident out of which a complaint arose. At present in the UK an officer has the right to remain silent without any inference being drawn from that silence. In April next year that right will be withdrawn and if an officer remains silent when asked to account for his activities an inference may be deduced from his silence at any later disciplinary tribunal.

Civilian oversight is often seen as a matter involving the person who complains, the civilian oversight organisation and the police officer against whom the complaint is brought. I would suggest that a very important right is overlooked if this is the restricted view of civilian oversight. There is a right of the community at large and that right is to know that the system of oversight is independent, objective, thorough, and professional and that the organisation charged with that responsibility will carry out their duties with absolute integrity.

They also have a right to know that oversight does not prevent the proper policing of their communities and allows operational freedom for the police within the law and within the powers that are given to police. This point is often overlooked and if overlooked then civilian oversight may become restrictive rather than constructive. The individual member of the community, the citizen of the Country in which a police service

operates has a right to live his or her life in peace and security, knowing that the police service is capable of doing its job in protecting every member of the community from the depredations of the criminal classes.

I make no apology for repeating again in terms of rights that the community also has a right to openness within the civilian oversight process. The police service is accountable to the community which it serves and the community therefore has a right to understand that complaints are investigated fully. Additionally, the police officer against whom a complaint is made has a right to expect that if the complaint is found to be unproven then that fact will also be made known so that the reputation of the officer concerned is not damaged by the fact that he has been involved within the complaints process.

What I have tried to present within this very brief speech is the balance of responsibilities, which any civilian oversight has to observe in operating the remit which it is given within the legislation of the country in which it operates. It is a balance of the rights and responsibilities of the individual complainant, the police officer and of the community as a whole.

In the increasingly federal atmosphere in which we work as members, most of us, of the European community there is, increasingly, overarching European legislation which must be taken into account - I will not claim expertise within the area of European Human Rights Legislation. Indeed, the United Kingdom has not yet enacted the European Convention on Human Rights although it will shortly do so. I am however concerned lest European legislation becomes so detailed and prescriptive that it dictates the course in which civilian oversight will operate without recognition of differing police structures, differing cultures, and differing communities. If I may take a small example, in a case before the European Court recently, my Authority was judged not to be independent because appointments to the Authority were made by the Secretary of State for Home Affairs and because the funding for my Authority's operations comes through the Ministry of Home Affairs. The judgment appeared to ignore completely the fact that my Authority reports to Parliament through the Home Affairs Select Committee which is a Committee of Members of Parliament and within Parliament is an extremely powerful Committee which has, during the life of my organisation, taken a very detailed interest in the operation of civilian oversight. The judgment also ignores the fact that, for some years now, appointment to the Authority has, as I have described earlier in my speech, been subject to national advertising and competitive interview. Clearly there has to be some person within the country who is

responsible for the formal appointment of members to the Police Complaints Authority. Public appointments such as membership of the Police Complaints Authority are covered in the United Kingdom by a set of rules which are designed to ensure fairness and openness in such appointments and are controlled by a Commissioner for Public Appointments who is similarly responsible to Parliament.

His duties are to ensure that access to public appointments is open to every person suitably qualified within the United Kingdom and he has considerable powers in relation to the way in which Ministerial appointments are governed. I cite this purely by way of example where a decision within the European Court can be reached without detailed study and without having to offer an alternative to the existing system.

It concerns me very greatly that such judicial decisions and possibly European legislation can be reached without reference to or without recognition of the systems which are in place or the structures which have to operate within such communities.

As a committed European, and that is not always a contradiction in terms for an Englishman, I believe that European Law should generally provide a framework rather than be excessively prescriptive. Again with apologies to those who have heard me speak before I have a tendency to quote the sayings of an eighteenth century English politician who seems to have foreseen civilian oversight of police even at that distance of time. He said:

> "It is not what a lawyer tells me I <u>may</u> do; but what humanity, reason and justice, tells me I <u>ought</u> to do".

This, I believe, should be the guiding light for civilian oversigh

José Manuel da Silva Viegas

Commander-in-Chief of the Paramilitary Police (Guarda Nacional Republicana – GNR) – Portugal
- General of the Portuguese Army

My first words are of gratitude for the kind invitation that was addressed to me by the Inspector General of the Interior to take part in this seminar on human rights and police efficacy, which much honours me.

I was requested to address the theme of "**fundamental rights and the rights of citizens to security**", a task which is difficult on two accounts:

- On the one hand, the illustrious audience that is gathered here to listen to me, among which are found distinguished academicians and individualities with much more authority than me for the discussion of these themes;
- On the other, the ever-present difficulty in establishing a point of balance susceptible of guaranteeing the rights of citizens to security and the exercise/guarantee of fundamental rights.

The matter lies precisely on that point of equilibrium, that is, in the assumed and visible co-existence of freedom and authority.

- **the excess of freedom hurts authority, the excess of authority eliminates freedom**.

To this must be added that in a Democratic State of Law, freedom and authority are concepts susceptible to fractures; both the former and the latter can only be considered as such if and when they become fully concretised.

Many illustrious jurists and brilliant academicians have already poured over this theme and, in particular, on what concerns the potential conflict between fundamental rights and the right to security; these are approaches that reveal the legal, social and political dimension of the problem by integrating and projecting the citizen at large into that construction.

Taking into consideration my status as Commander-General of a security force, I chose to make a presentation which, in a certain way, would act as a counterpoint by emphasising concrete matters. These will purport to explore the daily reality of the relations between agents of authority and the citizens in order to, given this context, confront the problem of **fundamental rights** with the imperatives of **security and police actions**.

Fundamental rights, whose modern concept rests on the English tradition of limitation of power (magna carta) and in the jusrationalist conception of the American and French revolutions, are rights inherent to the person itself, as basic elements of their lives. They are thus utilised in common language as synonyms of the rights of man or human rights.

There exists, therefore, a quasi-universal consensus about the set of fundamental norms and limits that should mark the relation State-citizen. These norms are sometimes subject to suffering limitations and derogations, and they may founder only on account of security imperatives or in cases of «state of exception».

There are, nevertheless, norms that are absolutely intangible and can not be derogated or suspended under any circumstance: **fundamental rights**.

According to Professor Jorge Miranda, **fundamental rights** are the rights or subjective legal positions of people as such, considered individually or institutionally, and set down in the Constitution.

The inviolability of human life, freedom and security are, without any doubt, the rights that best identify with the modern state of law and are consequently constitutionally consecrated.

In our Constitution, under the section of "**rights, freedoms and guarantees**" other rights are also included, of a varied content and structure and that have as their foundation the **principle of freedom and dignity of the human being.**

It is in this context, thus, that the **rights to freedom and security** become juxtaposed in the spelling out of the fundamental law (art. 27th, nº 1), as the right of any citizen to exercise his physical freedom, or his freedom of expression, having as guarantee that the State shall ensure that exercise, secure, safe and free from threats of coercion.

It is precisely in this framework that the intimate relation between the right to **security and other fundamental rights** is revealed, as the right to life, to personal integrity and, above all, **to freedom**.

In this sense the search for the exercise of freedom on the part of the citizens, as much as it is a given, necessarily implies its recognition on the part of the State whose duty it is to guarantee it.

In this relation, it is incumbent upon the State to find a point of balance between the responsibility of **guaranteeing the freedom** of the citizens and, at the same time their **security**, without strangling the exercise of their fundamental rights.

This is a task of enormous complexity, especially for the security forces, since it is the duty of its agents to conduct the diligences of authority -precisely those that are the most susceptible of hurting human rights- and concomitantly guaranteeing the inviolability of those rights.

In a simple action (from the point of view of the police) of identification of a suspect, the most relevant matters relating to citizenship and conflict between fundamental rights and security are susceptible of materialising.

Let us take the example of the case in which a military official of the Guard approaches and individual a dozen kilometres from the site of an occurrence of armed robbery, and request his respective identification. Being unable to give satisfaction to

this request, the referred to individual is conducted to the Guard's official vehicle and is taken to the former's workplace –where he claims his documents are – but this fact does not get confirmed.

The reason for identification can only be interpreted as **founded suspicion**;

But how to found this suspicion?

In criminal investigation, beyond the scientific and technical aspects, there exists another factor that is important and which, to simplify the language, we shall define as ***police intuition***.

In our hypothetical case, both identification and suspicion have as their foundation this police intuition; if the suspicions were to be confirmed, all would end well (or not, as we shall see later). In the opposite case, we have a military official of the Guard in trouble.

The reason for this is that the citizen can deem that the right to free movement – a corollary of right to freedom, or even to the right to dignity- was violated when he was coerced to get in the vehicle, if the suspicion were to be not confirmed.

In a Sentence of the Supreme Court, process nº 126/96, a police agent was condemned for kidnapping, in a situation similar to this one (aggravated by the use of handcuffs).

Thus, a truly tenuous, fragile and subjective boundary is established between legality and obligation to act and the crime for having acted, which imposes a previous qualitative appreciation for each concrete case, which is certainly not within the reach of all of our policemen.

Allow me thus to reveal this dysfunction -hardly surmountable and susceptible of being played down- between the dimension of the legal framework, especially in what concerns tutelage of the rights, freedom and guarantees of the citizens and reality at the level of the security forces- and even of the judicial system.

It is to these agents of the authority of the State, upon whom is incumbent- as I referred before- to act in the sense of guaranteeing both fundamental rights and the right to security. It is important to highlight that security, insofar as a primary

responsibility of the police forces, is assumed as an instrument for the concretising of other rights.

It is not possible to talk about freedom if there should be no security to enjoy it; maybe herein lies the all-encompassing meaning of security.

Security,

even as a concept, cannot be translated into an ideal or stable situation; security is a dynamic manifestation of an evolutionary process.

There never was, and certainly shall never be, a society that is wholly secure, because security springs from contradictory collective and individual efforts, ones in the sense of abiding by the norms, the others in the sense of their transgression.

The security of the citizens is a product of the social system. For this reason it reflects, in a continuous way, the structural conditions and the conjuncture of factors present in a rather complex system, where matters as diverse as family education, the level of schooling, mental and physical health or employment, interact with one another.

Since this is one of man's basic needs, it seems natural that it be considered as an exclusive and characteristic purpose for the **ends of the state**. When questioned, it is also natural that it endangers the very political society and that –at the level of man as an individual- it creates feelings and reactions which many times surpass the sense of reality itself.

But the term security assumes diverse meanings and contents according to the framework in which it is being used, for which reason we shall have to establish some criteria that provide us with an unequivocal understanding.

Thus, **security** corresponds more to a psycho-sociological representation of the citizens and the populations, than to a physical state, and this is translated into a feeling that is constructed and sustained in the daily act of living.

When described this way, security must be understood as the result of the balance between the conditions of social normalcy and the free fruition of individual freedoms.

This definition seems to be sufficiently wide to permit the understanding that **security cannot be considered as a problem pertaining exclusively to the police**.

In fact, the understanding of security as a factor for the realisation of citizenship, as opposed to the traditional idea of the defence of the State – insofar as a primary purpose of the security forces- determines that responsibilities in this matter be also shared by civil society.

Another consequence of this new philosophy is the widening of the spectrum of the generic mission of the police; beyond the aspects related to the fulfilment/unfulfilment of the Law, responsibilities of a social order are also now being attributed to the security forces. The programs for “safe schools” and “support to the elderly”, and even the “police of proximity” are manifest examples of this new way of being a police.

This is an answer to the climate of insecurity generated by the conditions to which modern times are subject, where objective and subjective elements of insecurity become confused and where the latter overlap overwhelmingly with the former.

Even with diminishing criminality and conflict, there is no guarantee of being able to combat the feeling of insecurity.

Insecurity is a basically subjective phenomenon because it rests upon the particular perception that each one of us has of seeing and expressing their feelings in regards to concrete social reality. And these will vary according to whether they are more or less known or familiar or, contrarily, appear as obscure and out of shape from the customary parameters of life, principles and perceptions.

The subjective dimension of insecurity refers, therefore, to the imaginary construction that the populace has over the state of the security, which he understands as real, without being concerned about knowing whether it conforms to concrete reality or not.

Thus, in the last few years a collective conscience of insecurity has developed creating an authentic social representation of **diffuse fear** that affirms the existence of a high insecurity index and criminality.

These perceptions have much to do with the sense of development of modern societies, which favours social and spatial asymmetries and propitiates relations of conflict between the instituted powers and the citizens.

Technological development and the manifest limitations of humanity for their handling, the widespread value crisis, the purported “permissiveness” of the judicial-police systems, the immigration phenomena, unemployment, drugs; and particularly, the spread and profusion of news and information about crimes, assaults and violations which enter through television screens and occupy a great share of the newscasts, are catalysts of this feeling of insecurity.

It seems therefore appropriate to affirm that, nowadays, **the phenomenon of security/insecurity can not be faced solely as an issue pertaining exclusively to the police**; in a Democratic State of law, stability and public order cannot be begotten in an authoritarian way. The elimination of its causes, more than the resolution of the conflicts must be the ultimate objective of security.

In this way, the stability that leads to security has to be put in the perspective of a multi-disciplinary optic, involving social, economic, educational and so many other aspects, having the respect for the rights of citizens always present in the balance between **freedom** and **order**.

“Everybody has the right to freedom and security”. This is a constitutional imperative whose materialisation implies the harmonising of two strongly antagonistic vectors.

The essence of police action takes place precisely at the epicentre of these antagonisms – the security forces, by either prevention or repression, always act in a potential or declared climate of conflict.

It is necessary to understand this reality, which many a time is violent, in order to place the problem of fundamental rights in confrontation with the right to security.

To illustrate this climate of conflict and antagonism where police activity is inserted, let me resort to the paradigmatic example of the “cutting of roads”.

How to reconcile the guarantee of right of circulation which is a corollary for the right to freedom, with the right of demonstration, genuine expression of the democratic State of law?

The answer cannot be restricted to police action; whichever the option may be, there are violated rights.

Because of this, the democratically and legitimately constituted powers must assume their responsibilities, constructing a coherent judicial and political model that will grant the security forces the full, confident and responsible exercise of their mission.

Only thus will it be possible, in this as in other aspects of the activity carried out by the Security Forces, to materialise the concept of security that springs from the Law of Internal Security – Law 20/87, of 20 July.

Beyond its objectives and its broad guiding principles, in this diploma, **internal security** is defined as the activity developed by the State in order to:

- **Guarantee public order, security and peace;**

- **Protect people and property;**

- **Prevent criminality;**

- **Contribute to ensuring the normal functioning of the democratic institutions.**

This conception of internal security, which is recent, is all embracing in its character. It goes beyond the traditional vectors of order and peace and preconizes the guarantee of the normal functioning of the democratic institutions as well, which makes it different and not submissive, to the concept of public order, typical of other times and non-democratic regimes, as I referred to before.

This new institutional understanding of security corresponds to a profound philosophical change of the concept of security; the police, who traditionally had the

vocation of prioritarily guaranteeing the security of the State, are now called to act in the sense of the primacy of citizens' rights.

However,

only with order, security and peace will the citizens be able to enjoy the full usufruct of the rights and freedoms that are constitutionally recognised.

In is in this context that the idea of police, *"as the way the authority has of acting by intervening in the exercise of individual activities susceptible of putting at risk the general interest and that has as its objective the avoidance of social harm which law seeks to prevent from occurring, widening or becoming generalised"* as defined by Professor Marcelo Caetano, gains force.

"The declaration of the rights of man and the citizen", voted by the French constitutive assembly on the 26th of August 1789, and included in the constitution of 1791, referred in its art. 12th that public **force is necessary to guarantee the rights of man and the citizens.**

In this way the forces and security services have the complex duty to, in the name of the authority of the state, prevent and investigate crimes, gather information and maintain public order and peace. All of these activities may, under various prisms or circumstances, interfere or collide with the rights and freedoms of the people such as: detentions, inspections, collection of fingerprints, searches or request of identification, controls and registry of vehicles or interrogations.

In sum, all of these are actions marked by a sign of coercion, or that, in themselves, makes police activity delicate and of great responsibility.

The police develop their duty within an ambivalent concept, the binary **freedom – security**, as a consequence of the existence of contradictory freedoms where they find their boundaries, points of confrontation and regulations.

It is in the search of a balance between these two values that democratic power chooses the way that obliges it to the double demand of:

- **watching over the safety of the citizens, without perturbing the exercise of their rights**.

If to this demand we add that, whilst in the exercise of their activity, there are few activities that the police are able to carry out without recurring to a minimum of authority, at a time when all authority is rejected, maybe the degree of the difficulty of the police mission today will become clearer.

In regards to these duties, I take up again the initial example of the problem of identifying a suspect. In the case I referred to, a personal search of the individual did not take place because the legal conditions to so we not present at the time.

In this way, all the diligences carried out by the official of the Guard, in compliance to the Penal Process, were conducted in conditions of extreme risk for its military officials: that is, the individual that they were trying to identify was armed with a war pistol, which he would end up using, killing a military official.

This is a most sensitive situation.

How to guarantee a minimum of police security and efficacy without hurting human rights?

This is precisely what the discussion is about, as becomes apparent in this situation.

In the case of having gone through with the search and having found the referred to weapon, the founded suspicion about gun carrying on the part of the subject would have been demonstrated, and action of the police would have been justified.

In the case of having gone through with the search and not having found any weapon or having found a legal weapon, we would be, most probably, in the presence of an excessive police action and one that violated human rights.

This restrictive framework imposed on police activity corresponds to the humanist ideal of plural societies and has the purpose of securing the plenitude of fundamental rights.

It is not up to the police to contest the legislative framework in which their activity is inserted nor finding forms of going around the law, even on the pretext of the efficacy of their action.

What is incumbent upon the police is for it to utilise the means that society puts at their disposal, in strict observance of their competencies and attributions, in order to make the best of the resources they have available.

It is not society that has to adapt to the police. It is they who, through a permanent effort of technical and human training – allied to the understanding of the social phenomena- must conform to the legitimate will and decision of democratic power.

Nevertheless, such a fact and the consequent subordination of the security forces does not impede, well on the contrary, that in places of their own, as seems to be the case of this seminar, a reflection is cast upon the eventual excessive restrictions to the exercise of authority.

An excess of restrictions imposed upon the exercise of security activities may, in a certain way, put at risk the very enjoyment of freedom on the part of the citizens.

To illustrate this assertion I shall still utilise the example I have been referring to: it is evident that the fact that security searches are not legally espoused makes them prone to a strong conditioning factor of police efficacy and may, perversely, seriously damage the values they mean to protect, that is, human rights.

If it is true that police action cannot surpass legality, it is also unquestionable that it has the obligation to guarantee to the populations that the security forces shall never stop acting on account of the personal constraints of its agents as consequence of the uncertainty of the legitimacy of each action.

This problem I am talking to you about is real. It cannot be forgotten that the police is placed in the middle of a set on inter-dependencies, all of them quite strong: -among others, we mention the dictates of the law, the demands of the public, the resolutions of power, the needs for their operation and the interests of their professionals.

Once we have exposed and conceptualised the influencing elements of the problem –fundamental rights, security and police- we are able to approach, in a more coherent way, one of the most critical aspects in regards to the relation between fundamental rights and the right to security:

- **the violation of fundamental rights of the citizens as a direct consequence of police activity.**

When fundamental rights are questioned by the very action of the police, even on the pretext of police efficacy, we are facing a serious perversion of the Democratic State of law.

Nowadays, happily, and I refer to the force I command, it is becoming rarer and rarer to find cases where, even under the shield of authority, procedures susceptible of threatening the rights, freedoms and guarantees of the citizen are adopted.

But the controlled exercise of authority is not an easy task; it is important to bear in mind that police action is frequently conducted in profoundly violent environments, without any reference to pattern values of social coexistence. This action, moreover, must respond to the specific circumstances of the surrounding environment, or otherwise run the risk of producing a totally unadjusted and inefficient result.

Furthermore, police activity is characterised by the immediacy and individual responsibility of the decisions of authority, where even the most sensitive decisions, those capable of colliding with some of the most important rights and guarantees of the citizenry, are carried out by agent patrols, normally composed of two or three elements of the lowest echelons of the hierarchy.

This limitation can hardly be surpassed. But it can be mitigated by increasing the qualitative training given the police and, especially, by devising a more consistent framework, capable of providing rear-end support to the agents and the military that are in contact with the population.

Nevertheless it is important to bear in mind that in their relation with the citizens, even situations with a low potential of conflict can generate situations of great complexity. I am thinking, for example, about the case of the citizen that refused to be submitted to alcohol testing, in a routine highway operation.

The technical and human training of the agent of authority may not be sufficient to solve the problem without recurring to borderline procedures.

Because the consequence of disobedience can only be detention and, many times, the compulsive escorting to Police headquarters.

Can it be that there are legal alternative solutions to solve this situation?

Can it be that the right to security of the other citizens should not surpass the irresponsibility of someone who, probably under the effect of alcohol, can kill, just as a petty criminal?

In the matter of fundamental rights, it is in the framework of solving these types of cases that the most complicated problems are experienced by the police.

Finally, to conclude, let me repeat the initial formulation of the problem, when we said:

“The matter lies in a balance that allows the assumed and visible co-existence of freedom and authority – the excess of freedom hurt authority, the excess of authority eliminates freedom”.

This balance corresponds, in the last analysis, to the options that the instituted powers adopt at every step of social development. It is the citizens that determine the parcel of individual freedom that they are willing to abdicate in exchange of a greater level of security.

When a society imposes restrictive conditions on the police at the level of procedures of identification of people in the street, for example, it is assuming the primacy of the rights of the citizens relative to the questions of security.

It is a calculated risk, because it is known that the law, in spite of protecting the citizens in general, protects those who violate it or intend to violate it, more.

Because of this legal framework, the populations then tend to question the action of the police, accusing it of being insufficient, inadequate and inoperative and simultaneously of being excessive, of committing abuses and of not providing security.

To counter this feeling, it is demanded of the security forces to be better: it is demanded of the police to be more efficient in all the realms of their mission, but at the same time of exercising a mitigated authority.

It is not an easy task, nevertheless, in spite of the relative growth of the feeling of insecurity on the part of the populations, whose causes were summarily described. It is

undeniable that nowadays the level of rights, freedoms and guarantees attained is much greater than the one that prevailed in the recent past.

In the midst of the Guard forces, and I have no doubt in affirming it, the idea that in a Democratic State of Law the police act according to the patterns of the legal and social order adopted in each period of social evolution, is becoming more and more engrained;

- that it is not society that has to adapt to its desires, attitudes and behaviours;

- it is the police who, by permanently evaluating of their competencies, knowledge and levels of performance, must find mechanisms for acting such that will make it possible to surmount the growing obstacles that democratic and humanistic societies impose on these police actions;

- that the respect of the community for the work of the police is the best instrument for police efficacy.

This is the road that the Guard corps is treading, which will certainly contribute for freedom and security to be able to co-exist fully in Portuguese society.

Júlio Castro Caldas

Ex-Chairman of the Bar Association
Portugal

1. I am privileged to have been given the chance to take part in this seminar which I would like to stress is held at a very opportune moment.

A general belief exists these days that the democratic state confers upon all citizens the exercise of individual rights to safety. In using such rights, demands are made under different, socially-organised forms aimed at actual fulfilment of such rights, either individually or collectively, whereby the State is required to provide adequate laws, governance and policies to guarantee their existence.

Nevertheless, the increasing demands calling for development of State action based on notions of government efficiency and on the mechanisms controlling collective safety - namely in the large metropolitan areas - is in deep contradiction with the increasing demand for guarantees of individual safety with regard to those who are subject to the action of the State agents who in turn are pressured by criteria of efficiency.

This contradictory tension is particularly felt in the fields of action of the police and the courts.

Needless to say the social pressure inflicted upon police activity is also submitted to two forms of pressure:

* the pressure of public opinion: mostly manipulated by the mass media who provide the daily news calling attention to facts that may constitute scandals and which usually demean individual identity rights.
* the determination of criteria of efficiency: measured purely in terms of statistical results.

2. From these contemporary circumstances a number of daily individual situations arise which can be deemed as totalitarian towards the citizen.

Citizens believe that a system of guarantees and safety exists as a result of the constitutional pact of the democratic State. Whenever they feel the effects of any type of measures affecting their liberties or have to endure any perversion of their safety, they promptly believe they are being wrongly treated and unprotected in their individual rights: and all because of the application of certain measures required by criteria of efficiency pressure police activity, ignoring some of the individual guaranties of safety and liberty, or because the measures taken prove to be inefficient.

If to this one adds the consequences of a feeling that people are convicted without appeal or any safeguard of guarantees whenever devastating news is published invading their rights of personality, then one has to conclude that a fermenting culture exists in which citizens will cease to believe in the efficiency of institutions whose task it is to guarantee safety and actual justice.

It no longer takes a prophet to say that we are on the road to ceasing to believe in the institutions of representative democracy which may well mean that a violent crisis of the political system is approaching.

3. Nevertheless, these signs of crisis notwithstanding, it should be said that significant steps were taken in the field of legislation covering individual safety.

Reference should be made to the 1997 amendment to the Constitution whereby article 32 was re-worded to introduce the notion of counsel at the choice of the accused, as a guarantee in criminal proceedings.

Article 32

(Guarantees in Criminal Proceedings)

1. In criminal proceedings, all guarantees of defence, including appeal, are assured.

2. The accused is presumed innocent up to the moment the conviction decision becomes definitive, and should be presented to trial in the shortest time possible consistent with the defence guarantees.

3. The accused are entitled to counsel of their own choice and to counsel assistance in all procedural acts and the law should determine the cases and procedural phases where the presence of counsel is mandatory.

4. Instruction of the proceedings is carried out by a judge who will be entitled in accordance with the law to charge other entities with carrying out instruction acts not directly connected with fundamental rights.

5. Criminal proceedings has an accusatory nature and the verdict hearing and all the instruction acts defined by law obey the contradictory principle.

6. The law will define those cases where, the rights of defence being properly guaranteed, the presence of the accused in procedural acts including the verdict hearing may not be necessary.

7. The offended party is entitled to take part in the proceedings in accordance with the law.

8. Evidence obtained by means of torture, coercion, physical or moral abuse of the person involved, abusive interference in their private life, domicile, correspondence or telecommunications is deemed null and void.

9. No legal case can be removed from a court declared competent in previous laws.

10. In proceedings involving the payment of fines or other forms of sanction the right of the accused to be heard and to present a defence is duly guaranteed."

We should also mention the re-wording of article 208 of the Constitution whereby counsel provided by a lawyer is now an essential part of the administration of justice.

On the other hand, the recent alteration of articles 62, 63 and 66 of the Code of Criminal Procedure, as well as the new forms for the offended parties to intervene in criminal cases, confirm the will of the lawmakers to protect the rights of individual guarantee and safety both of citizens who are accused and of the victims of criminal activity.

It is now recognised that the intervention of counsel fulfils a function of guarantee which for us lawyers represents an added, and binding, functional and social responsibility at the service of justice.

4. In the different steps of criminal procedure, lawyers now have an enhanced duty of more significant intervention in the working of all the mechanisms aimed at individual guarantees both of the accused and of the victims.

This extended functional responsibility calls, however, for improved legislation and, more than that, for new procedural practice so that a new culture of counsel and access to the mechanisms of law may emerge. This should apply to all citizens, mainly the destitute and the victims of social exclusion so that the Portuguese reality may change and one may confidently say that there is no longer one law for the rich and one law for the poor and socially excluded.

Implementation of articles 62 et seq. of the Code of Criminal Procedure calls for proper organisation of the district branches of the Law Association whereby prompt information can be provided to both judges and prosecutors as to the names and listings of lawyers available and willing to act as counsel in criminal cases.

These indications have to be organised and this no doubt is the competence of the Law Association, the sole institution in a position to guarantee the autonomy and independence of all lawyers.

On the other hand this question of appointing lawyers to provide voluntary counsel is closely connected with a new legal framework that can adequately define the policies of access to the law, voluntary counsel and legal aid.

The Law Association has already submitted proposals to the Ministry of Justice on new legislation in this field and as far as we know the Government is endeavouring to have this legislation passed before the end of their present term of office.

This new legislation which will shape in new and modern terms the guarantee of access to the law and to legal information, voluntary counsel and legal aid must also, in our opinion, cover new fields so that actual guarantees of implementation of both objectives do work whenever any type of coercive measures by State agents are exercised upon the citizens.

The reform of the Code of Criminal Procedure calls for this type of interpretation and it is known that for years we have supported the idea that it is necessary to establish a systematic inter-connection between police action and voluntary counsel by lawyers.

Innovative concepts whereby the police are seen as non-militarised forces have grown and consolidated.

Lawyers today can organise themselves in such a way as to be able to set up shifts of lawyers prepared to lend assistance to the police and the National Republican Guard stations whenever either detainees or victims of criminal acts need to have their individual and procedural rights duly guaranteed.

Further logistical and financial means will no doubt be necessary: we do not aim to suggest the simultaneous creation of a system covering the whole country.

We are in favour of Utopia but do not intend to imply that it is immediately at hand.

We do think, however, that we have the legitimacy to propose the establishment of pilot or experimental models in the big metropolitan centres where social differences are becoming more and more marked and the factors of exclusion are so clear and shocking.

If policemen, who are increasingly better trained both technically and civically by the police academies, acquire functional and operational familiarity with a culture where the contradictory principle in court and the guarantee and respect of basic individual rights are the norm, then this will have the double effect of attaining the objectives that motivated this seminar: to guarantee human rights without damaging the efficiency of the police.

I am persuaded that by building the models we suggested an enhanced quality will be obtained when fighting the culture of violence and autocracy, without loss of the

necessary firmness of action from those who have the difficult task of carrying out coercive measures against citizens.

These paths of change call for more imagination and hope in improving the Portuguese institutions.

This is a challenge we will keep alive and in which I think we are not alone.

Mário Gomes Dias

Legal Counsel at the Ministry of the Internal Affairs
- Assistant Attorney General

I

DEMOCRATIC STATE OF LAW

1. What truly characterises the ***Democratic State of Law*** is both the subordination of the State itself, of all its institutions, of all its organs and of all its agents to the Constitution and the Law, as well as the rejection of any power or any authority that may be exercised in an unlimited, irrational, disproportionate or uncontrollable way.

What, in all strictness, identifies ***our model of Democratic State of Law*** are the *basis* or *fundamental principles* expressly stated in Article 1st of the Constitution:

⇒ ***The dignity of the human person***, which founds and confers unity upon the essential rights, freedom and guarantees of the citizens:

⇒ ***The will and freedom of the citizens***, which founds and confers legitimacy to existence, to the organisation and the functioning of the State and its institutions.

These axiomatic basis constitute, therefore, the ***foundations*** and the ***limitations*** of the State, as enacted in the Constitution – ref. articles 1st, 2nd, and 3rd, of the Fundamental Law.

Whereby, as a result, and contrary to what happened in remote eras of our history, when citizens and their organisations were at the ***service of the State***, it is now the State and its institutions that, unquestionably, must be at the ***service of the citizens*** and their organisations.

This new philosophical concept about the raison d'être of the State, made up of principles and values clearly sheltered by the Constitution of the Republic, which is subjacent to the construction, the organisation and the functioning of the State and its two institutions, imposes a radical change - manifestly not yet achieved- in the ***mentality*** of the heads of the organs of political power and of those responsible for the organs of Public Administration:

⇒ In the old days rights were spoken of in terms of politics;

⇒ Nowadays politics must be spoken of in terms of rights.

2. The principles, values and systems consecrated by the Constitution impose upon the State and its institutions - in the concretising of the national project and objective and in the pursuit of the fundamental duties expressly stated in article 9th - to permanently act and feel in a ***binding*** fashion, in what concerns both the ***means*** and the ***ends.***

Thus, in what concerns the principles, no misunderstandings can remain about the hierarchy of values and the prevalence of objectives. And in what concerns the understanding and breadth of the ***relations between the State and the citizens***, no divergences, deviations or hesitations are admissible:

⇒ The ***State*** is merely the maximum system of organisation of free and responsible citizens, which are the holders of fundamental rights and guarantees and who are united by a common life project;

⇒ The ***powers of coercion*** and the ***means of constraint*** that the State is legitimately capable of exerting upon its citizens are justified – exclusively- by the need of securing the pacific coexistence of people and the indispensability of guaranteeing the exercise of their civil rights and their fundamental freedom;

⇒ The adoption by the State and its institutions, namely the security forces and services, of means of coercion and constraint, is limited by the Constitution and by law and it can in no way, offend the ***dignity of the human person***.

II
INTERNAL SECURITY

3. It is unquestionable, nevertheless, that all forms of coexistence among people, no matter how simple and homogeneous the groups, communities and their respective organisations be, always contain limitations on the conduct of each of its members.

Now, if the State constitutes the maximum organisation of the individual, in one specific territory, it is obvious that its first duty shall consist of making pacific coexistence possible among its citizens and guaranteeing the safety of the group against the perils of disturbances to public peace and democratic order; it shall reserve the ***monopoly of the rational employment of force***, under all circumstances, to the organs legitimised by the national community to do so.

For this reason, and for the fact that it becomes a ***condition*** of all the others, the first duty of the State, in the internal order, is to ***foresee, prevent*** and ***neutralise*** all forms of private violence, be it individual or collective, in the hope of guaranteeing public

peace, a normal coexistence in society, the operation of the democratic institutions, the regular exercise of the fundamental rights and freedoms of the citizens and the respect for the law – ref. articles 9th and 272 of the Constitution, article 2l of Law nº 30/84 of 5th September (SIRP9, and article 1st of Law nº 20/87 of June 12th (LIS).

4. The concept of ***internal security*** is relatively recent, be it in legislation, in jurisprudence or in doctrine since it was only brought into the fundamental text after the extremely profound revision that was carried out by means of Constitutional Law no 1/82, of the 30th of September. This Law, as is well known, constitutes the most remarkable reform of the last twenty years in the field of organisation of powers of the State and of the discipline of the essential duties that it is called to perform.

However, referring to article 1st of Law nº 20/87 (Law of Internal Security) which made explicit the fundamental notion of ***internal security*** -incorporated by article 272 nº 1 of the Constitution - it will become clear that it contains traditional concepts such as ***public order***, ***public security, public peace, internal security of the State, crime prevention, protection of people***, etc… and unifies them under a new philosophical, political and functional concept.

It is for this reason that in nº 3 of article 1st of the referred to Law of Internal Security ***the essential and permanent objectives*** to be pursued by the State in the matter of internal security are peremptorily synthesised:

⇒ To protect life and the integrity of the people;

⇒ To guarantee public peace;

⇒ To defend democratic order.

The duty of internal security is integrated, thus, in the essential nucleus of the powers of sovereignty and authority of the unitary State. And although these powers

cannot be delegated and are inalienable and indivisible, they can only be exercised in harmony with the natural, constitutional and legal principles that limit them.

Considering that the **notion of internal security** contained in article 272nd , nº 1 of the Constitution is merely declaratory and that the definition of article 1st of Law nº 20/87 is excessively encompassing, it becomes necessary and urgent for the legislator to clarify that concept, so as to make it more operative, clarifying its nature and the scope of the activities contemplated by that duty of the State.

5. Public order, security and safety constitute thus, the ***essential conditions*** for existing, for the functioning and development of the State and its institutions, as well as for those organisations of civil society which have been freely constitute in the terms of the law.

A society cannot exist without institutions, and there are no institutions without power and without an authority that makes it respect that power, if necessary, by force.

On this matter, a well known Oriental thinker affirmed, 300 years BC that: " ***if your power can no longer be respected it is because another power is on its way***"; and another Western contemporary thinker concluded that "***man is the only animal who cannot live without an authority to restrain it, if necessary, by force***".

However, in a democratic society, organised under the form of Rule of Law, the ***human person is the centre and the purpose of everything***.

Whereby we have that the State can only detain powers that will not be an affront to human dignity and the forces in charge of making these powers be respected – the security forces and services - should only act in such a way so as not to offend that very dignity.

This means that at the level of principles and values no doubts remain about the fact that public order, security and peace do not constitute ***ends*** in themselves; they are merely the ***conditions of*** or the ***means to*** secure the observance of the law and guarantee the freedoms and freedom of the citizens.

The very political institutions of the State are not ends in themselves; they are merely indispensable ***instruments*** or ***means*** for the State to carry out its role in the

pursuit of the permanent interests and the fundamental objectives of the national community.

A State that would not be capable of guaranteeing democratic order, public peace, the rights of citizens, its own security and the normal functioning of the institutions, would have no reason to exist.

For this reason, the Democratic State of Rule has a ***preventive-repressive apparatus*** at its disposal, which is founded on the Constitution and is clearly regulated by law. Through it, it endeavours to reconcile the protection of social order and the safeguard of individual freedoms, always having as its permanent reference –on account of a constitutional imperative- the search for the balance of essential values which are traditionally expressed in the binary ***security- freedom***.

6. The most visible and active faces of that apparatus -and the ones that interfere more directly with the people, with their freedoms and fundamental rights- are the faces of the system of internal security, which is integrated essentially by security forces and services, and those of the system of penal justice, which is fundamentally characterised by the Organs of the Public Prosecutor and the courts.

The organisation and operation of these two systems, with their many intersections and permanent interactions – many times misunderstood and frequently disorderly, both at the level of political decisions and at the level of execution in spite of their respective functional and organic statutory autonomy- permanent and necessarily reflect the natural vicissitudes of the political regime. They assume, moreover, a crucial importance for judging whether, and to what extent, the State continues to be ***bound to the ends*** that justify its own existence:

⇒ Respect for the human person’s dignity;

⇒ Personal fulfilment of the citizens;

⇒ Global development of the national community.

The judicial institutions as well as the police institutions are, thus, means or indispensable instruments for the realisation of the State of Law. They are responsible for the preservation of its foundations and for guaranteeing its normal operation.

In what specifically concerns the raison d' être and the behaviour of the police institutions, the Constitution is very clear in the definition of the means, the objectives, the ends and the limits, when it establishes:

⇒ In article 9th, paragraph b), to guarantee the rights and freedoms of the citizens as ***fundamental duties of the State***;

⇒ In article 18th , nº 1 and 2, the ***bond*** with the fundamental principles of ***need, adaptation and proportionality***, whenever it becomes necessary to limit or restrict the rights, freedoms and guarantees of the citizens;

⇒ In article 266th , nº 2, the ***subordination*** of all the organs and agents of the State, in the exercise of their duties, to the principles of equality, ***proportionality, justice***, ***impartiality***; and

⇒ In article 272nd , nº 1, as ***duties of the police*** to ***defend the democratic legality and guarantee internal security and the rights of citizens.***

By developing the constitutional directives on this the matter, the referred to Law nº 20/87 (LSI) was able to clarify the responsibilities of the State in this sphere and to characterise the function of internal security as a national, permanent, interdisciplinary and multi-sectorial activity by instituting the ***national system*** of security forces and services and by typifying the general and special police measures, as well as the ***a posteriori*** control of their application.

The activity of internal security which is of the special incumbency of the security forces and services which integrate the system assumes various facets and develops in the following fundamental fields:

⇒ Information about Internal Security;

⇒ Crime prevention;

⇒ Crime investigation;

⇒ Maintenance of order and public peace.

7. Precisely because this is an activity that interferes, or may interfere, directly with the lives of people in any of the fields described above, and because this interference expresses itself frequently through coercion and constraint of fundamental rights and freedoms, the question of police power and of police measures assumes aspects which are sensitive and delicate to an extreme, especially in what concerns the action of the police in matters of security and public order.

In effect, in what concerns the activity of ***internal security information***, the judicial framework is quite clear, since it is set down irreversibly, and in a practically pacific way, that the specific objectives to pursue in that field must be reached by its very own methods, with a rigorous respect for the individual rights of people and without any possibility of recourse to the means, to the powers or to police type measures - ref. articles 3rd and 4th of Law nº 30/84 (SIRP), complemented by Decree- Law nº 225/85 (SIS).

In what concerns ***criminal investigation*** which is developed by the police forces and services acting as criminal police, the situation is even clearer since all forms of action are minutely disciplined by penal procedural legislation and they are exhaustively studied and clarified by jurisprudence and doctrine. It is true, moreover, that all pleadings carried out in the scope of enquiries consubstantiate the exercise of

functional powers-duties with a bonded character and are subject to the verification of the judicial authorities, which diminishes the risks of abuses or practicable illegalities in this domain, or, at least, makes their impunity difficult- ref.- article 1st, nº 2, of Law nº 20/87 (LSI) and articles 1st, nº 1, paragraph c), 55th and 56th of the Code of Penal Process.

And thus, it is in the specific domains of ***police prevention of crime*** and of ***maintenance or restitution of security and public order*** that the greatest difficulties for a rigorous definition of the judicial framework of the activity of security forces and services occur. This can be easily understood if we consider the following factors:

⇒ In the first place, because certain manifestations of ***disorder***, in the literal sense of the term occur, and since they are natural to the very way of living of a free and democratic society, it becomes difficult to determine, abstractly, the margins of tolerance for this type of behaviour.

⇒ In the second place, it is practically impossible to foresee, in the great majority of cases, the situations, the forms, the ways, the places and the times that behaviours contrary to public order and legality will be expressed.

⇒ Thirdly, it is also practically impossible to typify the forms and ways of reaction on the part of the agents of the police force that are on the field. It is even harder to abstractly define any rules about the moment in which the reaction to disorder should commence.

III
POLICE POWERS/ POLICE MEASURES

8. It is quite true that the Constitution and the Law establish expressly that the activities on internal security are subordinated to the principle of legality and to ***exercise***

them in terms of the law, namely of penal law and of the organic laws of the security forces and services - ref. article 272, nº 1 to 3, of CRP and articles 1st, nº 2 and 2nd, nº 3 of Law nº 20/87 (LSI).

It is also true that the Constitution and the Law consecrate - as has been referred- the fundamental principles and the imperative limits to be respected during the exercise of the activity of internal security, by the police powers that are inherent to it and by the applicable police measures – ref.- article 18th, nº 2 and 272º, nºs 2 and 3 of the CRP and articles 2nd, nºs 1 to 3 of Law nº 20/87 (LSI):

⇒ Subordination to the principles of the Democratic State of Law;

⇒ Respect for the rights, freedoms and guarantees of the citizens;

⇒ Observance of the general rules of the police;

⇒ Legality and typification of police measures;

⇒ Need, adaptation and proportionality;

⇒ Prohibition of excess.

It is true, furthermore, that in all organic laws of the police forces and services we find rules about the exercise of the respective functional attributions and procedural norms on how to react to certain situations which, as a result of many years' experience, it is possible to foresee and typify.

Beyond that, it is obvious that all ***police powers*** are ***functional powers-duties*** that integrate public competencies, conferred by law for the materialisation of certain ends **(finalistic bond)** where it becomes apparent that any deviation in relation to those ends consubstantiates an abusive, illegitimate and infringing use of those same powers.

However, it cannot be ignored that in the domain of police action regarding general crime prevention and maintenance of order and public security - more than in any other domain of action by the State, for the reasons that have been stated above-, in the majority of situations the exercise of police powers is ***discretionary, in what concerns the way and the manner in which to act.***

The ***bond*** is only maintained -always and under all circumstances- in relation to the ***end*** for which such powers were conferred, to the ***function*** that results from the institutional purposes of the force or service to which the agent belongs, to the ***natural limits*** implicit in the prevision of those powers and to the ***fundamental principles*** of ***impartiality and proportionality*** on which the exercise of any of the powers of authority shall be concretely based.

In sum, in the Democratic State of Law the security forces and services are institutions that serve the defence of the democratic legality and protection of the citizens. They are exclusively at the service of the State and the national community and exert power-duties corresponding to their functional attributions, with ends and within the limits set by the Constitution and by Law. They cannot adopt coercive means beyond that which is strictly necessary and, furthermore, they must have due respect for the principles of appropriateness and proportionality.

When duly interiorised by the organs of command or management and by the agents of the security forces and services, the principles of ***prohibition of excess*** and ***safeguard of dignity*** constitute the only safe references and guarantees regarding the perils that arise from the vast discretionary areas that exist in the diverse domains of police action, especially in the field of general prevention and of public order and security.

The respect for those principles and the effective materialisation of the limits that they impose upon the exercise of power and the application of police measures depend, to a great extent, upon the human qualities, the basic and complementary training, the framework and permanent hierarchical control of the action, on the self-discipline and the ethical and deontological sense of the staff that make up the security forces and services.

Maria José Raminhos Leitão Nogueira	Senior Inspector at the Office of the Inspector General of Internal Affairs. • Judge

The organisers of this Seminar requested me to deal with the theme *"Police: security; criminal investigation; limitations".*

In the limited available time, and in view of the multiple aspects that could be fitted into the theme, I opted on focussing on the procedures and practices of police organisations in the scope of criminal investigation. Beyond the general interest the theme may eventually generate, it is a matter that poses, not infrequently, difficulties to the security forces involved when it comes to its application. Thus, within this framework I shall go into the problem of *trusted man/undercover agent/agent provocateur*, in the scope of combat to drug trafficking and bearing special attention on the Portuguese penal system.[36]

[36] On aspects related to foreign penal systems see, i.e. Ferreira Ramos, Comentário, in *Droga- Decisões tribunais da 1º instância*, G.P.C.C., Ministério da Justiça, Lisboa, 1997, p.155 to 168; Juan Muñoz Sánchez, *El agente provocador*, Tirant Monografias; Carlos Garcia Valdés, *El agente provocador en el tráfico de drogas (Introducción y selección)* Tecnos, Madrid, 1996; M. da Costa Andrade, *Sobre as proibições de prova em processo penal,* Coimbra, 1992, p. 219 and foll.; Sybil Sharpe, *Covert police operations and the discretionary exclusion of evidence*, in The Criminal Law Revue, (Sweet & Maxwell), November 1994, p. 793 and foll.

THE TRUSTED MAN
UNDERCOVER AGENT – AGENT PROVOCATEUR

Because of the fact that combat to traffic of narcotics presently involves different forces of security with diverse competencies in the field.

In the Portuguese penal judicial system, the investigation of illicit trafficking of drugs or psychotropic substances was of the exclusive competence of the Judiciary Police up to 1995. This regime was based on DL 15/93 of 23 January. With the alteration introduced by DL 81/95 of 22 April to the content of article 57th of the former diploma – that continued in force- competence in this area was attributed to the National Republican Guard and the Public Security Police, although in a limited way[37]

Understandably, the legislator continued reserving the investigation of the crimes of ***Traffic***[38]*, outside the situations of direct distribution,* ***Precursors, Conversion, transference or dissimulation of goods and products, Abuse of the exercise of profession and Criminal association*** to the Judiciary Police. It thus allowed this entity – which for a long time was the exclusive bearer of the powers to combat this phenomenon- to become partly liberated from a "slice" for which it did not possess, the most favourable standing. This, in turn, made it possible for it to concentrate on big traffic, on organised traffic and also on the "precursors" and " recyclers of capitals" who are, for all intents and purposes, to ones who carry out the acts that make possible and nourish the main activity.

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[37] Limited competence, of course, in what regards criminal investigation, crimes contemplated under article 26 (Trafficker-consumer), 29th (Incitement to the use of narcotics of psychotropic substances), 30th (Traffic and consumption in public or meeting places), 32nd (Discarding of syringes), 33rd (Qualified disobedience), 40th (Consumption) of Decree-Law 15/93 and, also, in article 2lst (Traffic and other illicit activities). In this last case only when situations of *direct distribution to the consumers* occur under any circumstance, of the substances or preparations in it referred to, as long as they are carried out in the respective areas of jurisdiction, when they become participated or when they take notice of them.

[38] Contemplated in article 21st

Having presented this brief summary, it would seem pertinent to clarify, from the start, the notion of *trusted man/ undercover agent/ provocateur.*

Keeping to doctrine, within the plain concept of trusted man we deem that an agent should be considered as *infiltrated* or undercover when, by concealing his status or identity he insinuates himself to the authors and accomplices of the crime, winning over their trust in order to obtain information and evidences against them *without, however, pushing them towards new infractions*. He shall thus be differentiated from the *agent provocateur* who, on the contrary, directs his activity in such a way as *to induce* the suspect to the *practice of illicit acts* for which he may be incriminated, becoming himself the true instigator or co-author of the crime, with the sole objective of being able to gather evidences against him[39] .

Let us successively see what the law establishes, what the opinion of doctrine is and what national jurisprudence has decided on this matter.

THE LAW

Besides the alteration of 1995 we referred to, the DL 15/93 went through new modifications by means of Law 45/96 of 3 September – a diploma that was then justly understood as creating a new specific penal process for drug cases[40]. In it relevance is given, precisely, to the modifications operated in its article 59, which declared as non-punishable the conduct of the criminal investigation official who, for the purpose of the investigation, and without revealing his status or identity, would accept receiving narcotics or psychotropic substances[41] directly or through the mediation of a third party.

This Law, which obviously altered the epigraph in art. 59 of the *"Non-punishable conduct"* to *"Non-punishable conducts"*, removed all possibility of punishment from the

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[39] See J. Ramos de Sousa, *Léxico: Provas e sinais, in Sub Judice*, 1992 (Sep/Dec), nº 4, p. 138

[40] See Eduardo Maia Costa, *Direito penal da droga: breve história de um fracasso*, in Rev. Ministério Público, nº 74, p. 103

[41] Similarly to what was contained in article 52nd of DL 430/83 of 13 December, that preceded it and is today totally revoked.

conduct, both of the *criminal investigation official*, and of the *third party*, acting under the control of the Judiciary Police who would, for the purpose of prevention or criminal repression and by concealing his status or identity, would *accept, detain, keep, transport* or, in the sequence or the request of those dedicated to these activities, would *deliver* narcotics or psychotropic substances, precursors and other chemical products susceptible of being utilised for the illegal manufacture of drugs or their precursors.

A special procedural mechanism was developed in this precept whose objective it was to confer greater efficacy to the repression of this type of criminality. This development was translated into, not only the "openness" of the type of agent involved, did not have to necessarily be an official related to criminal investigation anymore but could now be any individual; it also widened the number of possible activities. That is, beyond the material action of accepting – already considered in the primitive wording- it contemplates the activities of *detaining, keeping, transporting and delivering* of narcotics or psychotropic substances, precursors and other chemical products indicated therein, and in the latter case *(delivering)*, in the sequence or the request of those dedicated to these activities.

At any rate, in regards to the third party, the legislator imposed the obligation of having his action be under control of the Judiciary Police, and, as opposed to the previous regime, it came to demand that for all kinds of action referred to in article 59th - as is the case in the Italian and French legislation – there be previous authorisation from the competent judicial authority[42]. This requisite could be only dispensed on account of reasons related to urgency, but even in this case would be dependent on the subsequent validation on the part of the said authority[43].

In any case, the legislator imposed, furthermore, that the Judiciary Police carry out *(in all cases)*, the report about the official's or the third party's participation to the competent *judicial authority*[44]. This requirement was already contemplated in the

[42] See nº 2, of art. 59th
[43] Idem, nº 3. In the first immediate working day.
[44] Idem, nº 4. In a maximum forty-eight hour term after the participation.

primitive wording of DL 15/93, although with a shorter term[45], whereby the report was meant to be attached to the process, which presently is not necessarily the case, since the *judicial authority* shall only order its inclusion if it deems it absolutely necessary in probative terms[46]

DOCTRINE

Portuguese doctrine has generally defended the exclusion of provocation to crime as a method for criminal investigation, and, consequently, the exclusion of the agent provocateur.

This is the understanding of Germano Marques da Silva when he argues that provocation not only creates it very own crime and criminal, but that it is in itself unlawful, with the consequent exclusion of the evidences obtained[47]. He does admit,

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[45] In nº 2 of art. 59th . The term was twenty-four hours.

[46] See art. 59th of Law 45/96. The appreciation of indispensability can be remitted for the term of the enquiry or the instruction in which case the file remains temporarily in the hands of the Judicial Police. The official or third party shall appear in court for the hearing trial if he is considered indispensable for the evidence. The hearing can take place without any public present and even with the exclusion of publicity about it. See, to this purpose, the decision of the European Tribunal of the Rights of man, in the case Ludi against Switzerland (Sentence made on 1992-06-15, Series A, nº 238, pub. in *Sub-judice* nº 3- 1992, p. 163) thus summarised. "The infiltration of a sworn police agent in a supposed network of cocaine trafficking does not violate the sphere of the suspect's private life. (…) Nevertheless, in order for the reports of the undercover agent and the transcriptions of the telephone conversations to be valid as evidences, the offender must have the possibility, of securing later on the appearance of that undercover agent in the trial, in order to be able to question him as a witness and eventuality question the credibility of the probative elements he has produced and presented. Without this, the rights of the offender to a fair trial, shall be violated. Furthermore, this appearance may be processed in such a way so as not to impair the legitimate interest of the police authorities in preserving the anonymity of the said agent, thus protecting him and making it possible for him to be used again in the future". See also Irineu Cabral Barreto, *A convenção europeia dos direitos do homem*. Editorial Notícias, Aequitas, p. 122.

[47] See *Bufos, infiltrados, provocadores e arrependidos*, in Direito e Justiça, t. VIII, t. 2, 1994, p. 27 and foll., "(…) provocation is not merely informative, it is, above all,

however, the recourse to informers and undercover agents, insofar as their activity is not constitutive of the crime, but merely informative. He does emphasise, however, that the use of this method of investigation is only admissible as a last resource, because it translates into a disloyal action, whereas he defends that loyalty constitutes a principle that is inherent to the structure of the penal process[48].

After pronouncing himself against the use of the agent provocateur as a means of criminal investigation for considering it contrary to the mission of authority, and for deeming that it pushes the third party into the practise of acts which he would not carry out otherwise, Lourenço Martins tells us, still referring to DL 430/83, that in art. 52 of this diploma there seems to be the anticipation of an offer of drugs to the undercover agent taken for a buyer[49]. The safeguard of this type of investigation would have nothing to do with the conduct of the official that prepares, offers, puts on sale, distributes or hands out drugs, for the purpose of identifying the consumers, suppliers or traffickers, which is always punishable, even if his action had as its only purpose that of identifying the criminals.

As regards article 59th of DL 15/93, which he recognises is a controversial order but which must be accepted as a necessary evil, this author alludes to the need of

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formative; it does not reveal the crime or the criminal but it creates it very own crime and the very criminal and is, consequently, contrary to the very purpose of criminal investigation, since it generates it very own objective. On the other hand, the activity of the agent provocateur is in itself unlawful, to say the least, and therefore, evidences obtained through this method are inadmissible, they are excluded evidences".

[48] *Idem, idem* "(…) pretends to impress, a priori, a whole attitude of respect for the dignity of the people an of Justice and it is the foundation of the evidence exclusions (…)"

[49] *Droga. Prevenção e tratamento. Combate ao tráfico*, Coimbra, p.154 "(…) the probability that an agent or official undercover in the "milieu of drugs be offered any of the substances foreseen in the tables, having been taken as a consumer or, at least, for a buyer. The acceptance of payment without understanding that it was an apprehension (which would be conducive to its immediate identification and procedural measures) if it were punishable, and in principle it would be, would imply both the impossibility of going on with the pursuit of the traffic network and, on the other hand, the "denunciation of the quality of the police with the consequent inefficacy of future actions in the same area, at least."

distinguishing between agent provocateur and undercover agent[50]. After duly expressing the doctrinaire postulates that advocate impunity both of the provocateur as well as of the provoked, based in the figures of putative crime or of impossible or unsuitable attempt, or which based on the criminal co-participation defended the punishment of both, with the argument that the intention of the revelation of the crime *"was presented as extraneous to the process of a judicially relevant determination"*, and that unsuitability of the attempt should be appreciated "ex ante" through recourse to likely circumstances for the average man, and not "ex-post", concretely about drug trafficking, he pronounces himself decisively against the action of the agent that sells drug in order to identify the buyers, taken for unequivocally unlawful.

In what concerns the undercover agents that makes himself pass as a buyer, he deems it is decisive to previously apprehend the drug which the trafficker held for the purpose of drug trafficking [51].

Costa Andrade[52] sets out with an ample concept of trusted men so as to embrace all witnesses, be they private individuals or police agents who collaborate with the formal instances of penal prosecution with the promise of confidentiality of their identity or activity as a counterpart, and who submerge surreptitiously into the crime underworld

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[50] *Nova lei anti-droga- Um equilíbrio instável*, in Droga e Sociedade – O Novo Enquadramento legal, GPCCD, Lisboa, 1994, p. 58-59. "The other controversial ordinance is that of the "undercover agent", inscribed in article 59th as " non-punishable conduct " (…) In our view, one must distinguish, of course, between agent provocateur and undercover agent. The former is "that which induces the other to transgress for the purpose of having him condemned", be it for a reward or for his "moral satisfaction". (…) The latter, designated as "undercover agent" in the Anglo-Saxon terminology, appears in the areas of the so-called crimes without a victim, that is, corruption, closed organisations or in crimes of "successive treatment", as the Spanish say".

[51] *Idem,idem* "The action of the police who sells drug in order to identify the buyers, considered generally unlawful, is out of the question. He would really be an "agent provocateur". The discussion centres around the policeman that, by himself, with recourse to the other, infiltrates within the "milieu" passing himself as a drug buyer. What happens then is that, in general, the apprehension of drug for the purpose of trafficking it already exists; the agent is not acting "to bring the crime to life", but merely to uncover the traffic channels".

[52] *Sobre as proibições de prova em processo penal*, Coimbra, 1982, p.220,231 and 232.

whether they limit themselves to the gathering of information or as provokers of the very crime. He defends that recourse to them will create, as a rule, to a tricky setting and, as such is prone to fall into the category of methods forbidden by article 126th . nº 2, al) of the Code of Penal Process. He admits, however, that recourse to the trusted man may not always be covered by evidence exclusion, as used to be among us in article 52nd of DL 430/83 (today revoked) which, according to the author, consecrates him under the description of clandestine agent.

He distinguishes the behaviour of a trusted man who acts with purposes and ends of a strictly repressive nature, which would be inadmissible, and would thus be covered immediately of a strict evidence exclusion, from the cases in which he is seeking exclusive or predominantly preventive purposes. In these *"(…) the treatment could be different (…) It will always be this way as long as the persecution of probable agents, attained through the trusted man is integrated in programs of repression and dismantling of terrorism, of violent or highly organised criminality. In other words, society would be left unarmed vis-à-vis such drastic and intolerable expressions of criminality".*

Rui Pereira[53] defends the need to distinguish between repressive and preventive purposes considering that, in general, the recourse to the trusted man affects the right to moral integrity consecrated in article 25th of the Constitution and implying nullity of obtained evidence.

As long as the trusted man has as his sole purpose to prove already consummated crimes we shall be falling within the scope of nullity of evidence exclusion. But when, through his action, he purports to impede their consummation or the relapse of the agent, the matter would be transferred from the procedural level of the evidence exclusion to the level of material law, in which the legality of the conduct would be defined, based on the judgements to be pondered.

Moreover, he considers it indispensable to distinguish between the undercover agent and the agent provocateur, being the latter the true crime instigator. The recourse

[53] *O consumo e o tráfico de droga na lei penal portuguesa*, in Revista do Ministério Público nº 65, p. 59

to him would be admissible “when talking about serious crimes, in situations with a high potential of being consummated and as long as the crime does not bring about the actual injury of judicial property”. It would be in this context, according to the author, that article 59th of the DL 15/93 would allow for the acceptance of drug on the side of the trusted man.

JURISPRUDENCE

It has been on the basis of the norm appearing in article 59th of DL 15/93 in its present writing and in the one that preceded it right before that the Supreme Court has considered the conduct of some agents as justified, especially in the case of the security forces, who, in the framework of drug trafficking and with the concealment of their status and identity, obtain drugs from traffickers with the purpose of revealing their activity and of, consequently, having them punished for it.

Several decisions of the SC have focussed upon the conduct of the undercover/infiltrated agents in the framework of drug traffic investigation. Let us take a look at some of them.

The sentence of 21-3-96[54] deals with the conduct of agents of the NRG that, passing as drug consumers travelled to one of the offender’s home in order to buy narcotics, together with other people whom they knew had already purchased drug from him[55]. The offender who was convicted in the first instance lodged and appeal in which he maintained that the way in which the agents acted was illegal and thus he argued for the nullity of evidence they had brought into the process as well as about the unconstitutionality of article 59th of Decree-Law 15/93 for offending article 32nd of the Fundamental law.

The Supreme Court, after emphasising the existing differences between the infiltrated agent and the agent provocateur, considered that the accused was already

[54] STC, *Coletânea de jurisprudência, Acordãos* do STJ, ano IV, t. I, p.236

determined to proceed with the sale, and that therefore the way in which the agents proceeded was susceptible of being accommodated within the framework of art. 59 and the Constitution[56] .

The sentence of 15-5-97[57] focuses on a case in which the PSP agent is led to an individual whom the police authorities have classified as trafficker, and who had sold a consumer a package containing heroine that very day. He made the trafficker an offer to purchase the product from him, without the former being aware of his real identity. Contrarily to what decided in the first instance, in which it was considered that such means of evidence was null because it went against the contents of articles 126 of the C.P.P. and 32nd nº 6 of the Constitution, the SC determined that the police agent did not lead the offender into the practise of any crime, since it could be inferred from the produced evidence that the said offender, before being addressed to, already possessed drug illegally in his house which he later went to fetch. For this reason the invoked nullity was removed and it was considered that the conduct of the agent of authority was not subject to any of the hypothesis contemplated in the aforementioned article of the C.P.P.. Whence it did not constitute the use of deceitful means and, consequently, had not violated the contents of article 32nd, nº 6 of the Constitution.

The sentence of 8-1-98[58], which focussed on a case in which the PSP agents, concealing their identity as policemen, detained an individual when he was about to supply them with the heroine they had ordered, having utilised the mediation of a third

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[55] Faced with the supposedly purchasing agents, the offender enquired about the quantity they desired, having determined his price per gram. The moment he was about to weigh the product, the buyers identified themselves and detained him.

[56] *Idem* " (…) the evidence that was produced was in the sense of the accused being pre-disposed to proceed with the sale of narcotics to whomever showed up and appeared to be (either apparently or in reality) as a drug-addict, and, therefore, the way in which the NRG agents proceeded when they presented themselves as drug-addicts, in the company of addicts, recognised as such by the accused, is only susceptible of being set within the framework of the contents of the above mentioned article 59, whose dictates are in perfect agreement with the actions that are legally safeguarded by the wording of article 32nd noº 6 of the Constitution."

[57] STJ, *Colectânea de jurisprudência, Acordãos do STJ,* ano V, T. 11, p.203

[58] STJ, *Colectânea de jurisprudência, Acordãos do STJ,* ano VI, T. 1, p.155

party that had put them in contact, decided that the agents did not either unchain or provoke the crime, but simply caused it to emerge.[59]

In his motivations, the appealed had alleged that the matter given as fact in the appealed sentence had as its basis a stratagem set up by the PSP in co-ordination with a collaborator and well as the illegitimacy of the investigative operation of the PSP. In other words, that this was a case of forbidden conduct and that the evidence produced was therefore invalid.

Reporting directly to article 126th of the C.P.P. the Supreme Court considered that no perturbation had occurred to either the will of freedom or decision of the accused, but merely the revelation, by means of the shrewdness of the agents, of his already operative criminal activity .[60]

A different argumentation had been set forth by the appealed tribunal which, in spite of also denying the existence of excluded evidence in the case, considered that a

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[59] *Idem.* "By pretending to be interested in purchasing half a kilo of cocaine, the PSP undercover agents,
and thus by bringing close to them he who carried out clandestinely the continual practice of that crime and by further unmasking he who surreptitiously gave himself into the traffic of drugs, did not unchain or provoke crime…they simply made it to emerge and precipitated the end, with the total abandonment on site of an abundant batch of drugs, which the offenders kept for sale and was destined to be sold that very day or later, as a whole or in fractions, if in the meantime their underground activity would have not been unmasked. This activity, what is more, has been already consummated and was dragging on a series of purchases, detention, offer and transportation of substances included in Table I A, of dec-law nº 15/93, of 22.1".

[60] The following was written about the referred to judicial decision: "In spite of the article prohibiting various methods of evidence procurement, in this case the only issue being questioned is that of the deceitful methods utilised by the Police. And should they, in fact, be considered as forbidden, therefore giving way to the consequent nullity? We do not believe so (…) Essentially, it should be pointed out that in the very paragraph a) of nº 2 of the referred to article 126th of the procedural diploma it is stated that deceitful methods shall only be considered as such when the cause a perturbation of the freedom of will or of decision. In this case, what happened was that, in spite the police authorities having presented themselves under disguise or undercover before the suspect, they merely caught him or cleverly conducted him to the time and place where his criminal activity could be revealed. Therefore, there was not a case here of perturbation of the freedom of will or of decision proper on the part of the agent, but

restrictive interpretation of the norm contained in article 126th of the C.P.P. was justified, at the point where it sets down that it is forbidden to utilise deceitful methods of excluded evidence. This would allow for situations in which the police agents present themselves without revealing their identity before the suspect and therefore catching him or shrewdly leading him to places or times in which his criminal activity may be revealed.

An identical decision was taken in the sentence of 15-1-98[61], which reflected upon a case in which an element of the NRG had previous knowledge, through the accused, that a drug transaction was about to take place at a given spot and time. The defence alleged that the former instigated the latter to contact the supplier in order to have a supply of hashish delivered[62].

From the readings of the referred to judicial decisions, it is possible to observe that, in all of them, the defence alleges violation of the norm contained in article 126th nº 2, a) of the C.P.P., and, in some cases, also of the role of agent as instigator/provocateur which caused the accused to be led to the practice of crime. The instigated thus acted with no freedom, by means of the former's deceit, without which no crime would have been committed.

In spite of this argumentation being present so many times in the appealed instance, we are only aware of one sentence of the SC, which utilising recourse to the

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merely the revelation by means of cunning of a criminal activity that, as a matter of fact, was already underway".

[61] STJ, *Colectânea de jurisprudência, Acordãos do STJ,* ano VI, T.1, p.160

[62] It reads as follows "There are no doubts about the fact that the accused had been involved in the purchasing and selling of hashish, (…), and that the trafficking came to an end only after his detention. Even the day before the accused, Mario, had sold 152,520 gr. of hashish , and when he was detained he was about to sell another 250 gr. of the same product. (..) In this way, the conduct of the 1st sergeant (…), in co-operation with the (intermediary), was not pre-ordained to the shaping of the will of the (accused) to traffic with the referred to narcotic substance, putting his action in a context of a mere "criminal situation in course" and for the evident "preventive purposes of combating traffic and drug dissemination", that was an already decided intention on the part of the accused even before being contacted by the (intermediary) (…) Whence we deem the action to be licit, which signifies that the means of evidence resulting from it cannot be contemplated as forbidden.".

Public Prosecutor, confirmed the absolution in first instance that considered the police action was illegal, and considered the nullity contemplated in article 126th, nº 1 a) of the CPP as concluded, making reference to article 32nd, nº 6 of the CRP, based on the fact that the agent's conduct had not limited itself to revealing a criminal conduct already underway, but rather that it instigated or determined the accused to the practice of crime, which in other circumstances he would not have committed[63]. In the rest of the decisions to which we had access[64], the conduct of the agent was never qualified as instigating the crime, but as that of an infiltrated agent who uses anonymity to collect revelations of a criminal activity whose author is already previously determined to practice.

SOME CONSIDERATIONS

In the framework of the law and in view of the synthesised stand of doctrine and jurisprudence, some aspects seem to us to deserve special attention. Among these, to rigorously determine, in light of article 59th of DL 15/93, which conducts of the criminal investigation official or of a third party acting under control of the Judiciary Police are punishable, since their non-punishable nature shall result in making these actions be placed within the strict legal terms that permit them.

We already referred to the fact that the cast of conducts capable of determining the conduct of the agents as non-punishable was broadened through the legislative alteration of article 59th introduced by Law 45/96.

Apart from the material action of accepting, already contemplated in the former wording, the actions of *detaining, keeping, transporting and delivering* narcotics, psychotropic substances, precursors and other chemical products indicated therein (and

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[63] STJ,(Ac. of 15/1/97) *Colectânea de jurisprudência, Acordãos do STJ,* ano V, T., p.185

[64] Namely the decision of the SC of 12-6-90, 22-6-95, 6-7-95 and 2-11-95, published, respectively in BMJ nº 398, p.282 and in *Colectânea de jurisprudência, Acordãos do STJ,* ano II, T.II, p.215, ano III, T. II, p. 238, e 261, ano IV, T. III, p.218

in this last case, *as the sequence and by request of who is dedicated to those activities*) are now also contemplated.

Leaving aside the actions of *detaining, keeping, transporting,* which I do not consider as being problematic, we have the ones of ***accepting*** and ***delivering*** which, according to us are the ones that can raise the greatest doubts, at least in what concerns evidence exclusion, since they in themselves pre-suppose a relation of direct otherness with a potential criminal.

In regards to the last action –*deliver*- the legislator was clear when demanding that in can only occur as the *sequence and upon the request* of whoever is dedicated to such activities. In view of this limitation, the official or third party cannot take the initiative of supplying drug, in any way whatsoever, to potential traffickers or consumers with the objective of prosecuting them criminally, even if he knows that they have their own suppliers and that they resort to them in a regular basis[65].

The same clarity, however, was not expressed by the legislator in regards to the action of *accepting*, whence a greater number of doubts arise.

As we saw in the referred to sentences, the courts have been confronted, in great many cases, or even maybe in all of them, with situations in which the very criminal investigation officials, or the private individuals they recur to, present themselves before individuals that are purported traffickers, concealing their status and identity and stating they are interested in purchasing drugs. There is an almost unanimous treatment of these situations, in the sense of removing any instigation or provocation of crime, in the understanding that crime was already existent at some previous time, and that the activity of the agents merely constitutes the means of uncovering it, which would find support in article 59th of DL 15/93.

This reasoning takes into account that the crime of drug trafficking constitutes a crime of abstract danger, insofar as that does not presuppose neither the damage, nor the risk of to any of the concrete judicial goods protected by the incrimination. It suffices,

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[65] Regardless of it being a delivery to the trafficker or to the consumer. In the latter case it can be upon the consumer's own request or the trafficker who intends to supply it.

for example, that the drug be merely detained, outside the cases contemplated in article 40 (consumption), for it to be considered as consummated.

Nevertheless, it seems to us that the nature of the crime and the time of its consummation have been taken as a point of departure for the solution of concrete cases where a distinction has been traditionally made both at the national level and within other judicial systems, between undercover agent and agent provocateur, in detriment of the fact that the non-punishable conduct of the official or the third party depends, in the first place, on the circumstance of inscribing the respective action in the precise legal terms that allow it.

As far as we are concerned, the action of *accepting* contemplated by the norm does not consent that the official (and the same goes for the third party) take the initiative of requesting the alleged trafficker to sell him the drug. In order for him to act in accordance to the said legal ruling, he shall have to wait until it is, in any way, offered to him, since the ratio of the condition imposed by the legislator in what concerns the *delivery* of drug (only in the *sequence and at the request* of whoever is dedicated to such activities) is equally valid for the action of *accepting*.

In all truth, we ask ourselves if this condition were not expressly contemplated by law for the action of *delivering*, would it be defensible not to punish a situation where a drug delivery, instead of having been expressly requested, was made on the criminal official's initiative, even if it be for the purpose of prosecuting a potential criminal? We do not think so! And this in spite of the fact that, in this case also, the recourse to distinction between undercover agent and agent provocateur, associated to the knowledge that that potential trafficker was being supplied by several individuals and that, as such, he held the drug with the intention of trafficking, removes the instigation to crime, according to the orientation followed by jurisprudence, in the measure that due to the nature of the crime, was already existent.

It does not seem to us, therefore, that it can be argued against this by means of the non-existence of the legal determination of a similar condition, in what concerns the action of *accepting*.

In all truth, while *delivering* necessarily implies an active conduct on the part of the criminal investigation agent (or of the third party) and the terms in which it can take place must be therefore defined, the action of accepting induces a passive conduct on his part, and it renders useless, on our point of view, to stipulate any condition, without this signifying that the same requisite shall not be applicable.

In this sense, we understand that in the resolution of concrete cases, national jurisprudence has generally made its decisions based on extremely pertinent criteria (namely, utilising the distinction between undercover agent and agent provocateur, the determination or not of practice of crime and the nature of the crime of trafficking); we believe, however, that it has apparently left in the shadow, or perhaps not given sufficient value, to the fact that the concrete action of the investigation agent is contained or not, in the precise legal terms that allow it.

Admitting, without granting, that this point of view may be considered too restrictive, what seems to me needs to be removed is the recourse to the trusted man as a method of criminal investigation, without the previous gathering of elements capable of revealing strong indications that we are before a potential trafficker.

The sentence of the SC of 15-1-97 referred to before, which proceeded with the decision of considering the police action illicit and determining the integration of nullity contemplated in article 126th, nº 1, a) of the CPP, with reference to article 32nd , nº 6 of the Constitution, sets out to analyse this matter. In effect, the admissibility of the agent of authority taking the initiative of requesting the drug is not questioned. What is questioned is the fact of his action having an incidence upon an individual about whom there wad no indication he may have been involved in trafficking or related to the activity in any way. For the agents this individual was a perfect stranger. But nevertheless, they approached him expressing their interest in acquiring drug, with a merely repressive purpose. In this situation, contrary to the other cases, it was not possible to assert that the intention was to uncover an activity already underway.

The sentence of the SC of 5-5-94[66] pronounced itself on a situation identical to this one.

In this case the appealed was also a stranger to the agents, who intended to act as undercover agents and sought an individual whom they knew was a consumer, expressing their interest in buying heroine for the purpose of finding the supplier of the trafficked narcotics, that were also trafficked by the individual in order to sustain his consumption.

The Supreme Court considered that there had been a very pronounced insistence, bordering on persistence, on the part of the agents of authority, but deemed it justified because the individual that put them in contact with the vendor was a consumer who trafficked himself in order to sustain his consumption. They had acted with the purpose of identifying who the supplier was, and were successful in doing so.

Called upon to pronounce himself[67], on 9-6-98 the European Court for the Rights of Man considered that the agents acted as instigators. It was deemed that there were no reasons for the police to suspect that the appealed was a trafficker; on the contrary, this individual was a stranger to them and they had not undertaken any preliminary diligences in order to find out about his activity. The was no existence, therefore, in the sense of proving the appealed was already determined to practice crime. Based on this fact, it was determined that article 6th, paragraph 1 of the Convention had been violated.

A different matter is knowing whether in the provision of the norm contained of nº 1 of article 59th of DL 15/93, apart from the criminal investigation official of the Judiciary Police, officials of the same branch, but belonging to the NRG or the PSP can also be included.

As we referred above, DL 81/95 came to also grant competencies to these security forces in the area of criminal investigation.

Before the application of this Diploma came into force the matter was not an issue, since the previous writing of article 57th of Law 15/93 attributed the Judiciary

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[66] *Colectânea de jurisprudência, Acordãos do STJ,* ano II, T. II, p.215

[67] Teixeira de Castro v. Portugal case, number 44/1997/828/1034 (we obtained the text of the decision through the Internet).

Police with the exclusive competence for investigating traffic– a prime area for the action of trusted men in a broad sense- which, in practice did not prevent officials from the NRG and PSP to act as such (see the mentioned sentences, which in great part relate to facts that occurred on dates previous to the enforcement of the diploma).

The recourse to a third party for carrying out the actions described in article 59th is only possible trough the Judiciary Police. In effect, the legislator expressly refers to the fact that the third party shall act under the control of that Police force, who is responsible for writing a report of their intervention for the judiciary authority. This authority will keep the file to which the report corresponds when the appreciation of its indispensability in probative terms of its attachment to the process is remitted to the term of the inquest or the instruction.

Relative to the possibility of the undercover agent being a criminal investigation official not belonging to the Judiciary Police, we understand that in view of the nature of the norms set down in articles 59th and 59th-A, it is banned.[68] Against this understanding we could argument that it did not make much sense for the legislator to continue to reserve the conducts declared as non-punishable for the Judiciary Police, after having conferred competencies in the areas of combat to drug trafficking upon the NRG and the PSP.

Withal, it is necessary to keep in mind that the competency combat to trafficking in what concerns the above referred to security forces is limited to the cases of direct distribution to consumers. On its part, the technique of criminal investigation with recourse to trusted men, considering how sensitive an issue it is at the procedural level, (evidence exclusion) and also in the scope of material law is especially geared to dealing with organised crime, traffic networks and others. In these cases it is necessary to climb intermediate and high levels of the pyramid structure that characterises the organisation that are dedicated to these activities in order to dismantle them.

[68] There would still be another possibility, over which we have not gone over, of the criminal investigation official not belonging to the Judiciary Police being able to intervene as the third party, in legal terms.

What can be questioned is whether the concrete actions of these security forces in what concerns combat to traffic has been restricted only to cases of direct distribution to consumers. Experience tells us that sometimes there has been on their part a tendency to go beyond, although from the point of departure of direct distribution, in order to reach the higher levels.

Gerald Lapkin

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- Founder of the Canadian Association for the Civilian Oversight of Law Enforcement – CACOLE

INTRODUCTION:

To live free: free of threat; free of oppression; free of crime; is a fundamental tenet of democratic societies whose principles embrace the desire to maximize individual liberty and to encourage the growth of community and civil society. Where conflicts arise, we rely on the rule of law to regulate disputes and to deal with conduct which violates our safety or security.

To those ends, most democratic societies have developed professional law enforcement agencies to deal with behaviour that infringes on individual and societal rights. We demand that our police protect us, but to do so in a manner consistent with respect for human rights. Were the police to illegally enter enough homes, eventually they would find some evidence of crimes; were they to arbitrarily confine and search enough people, eventually they would find some criminals; however, such a society would be inconsistent with our democratic values. Accordingly, although we expect police to ensure our personal and state security, to prevent crime, to apprehend criminals, and even to protect us from state and political excesses, we demand that they do so in a manner that respects human dignity and civil rights, and in accordance with the rule of law. These constraints on the powers of the police to investigate and to take

other actions to apprehend suspected criminals are the price we pay for a democratic society in which human rights are respected. This attempt to balance measures to achieve crime control against limitations on police and state actions in order to protect fundamental human rights, can be seen as an enigma similar to the unsolved mathematical quandary of "squaring a circle". Since the year 200BC, mathematicians have tried unsuccessfully to construct a square with the same area as a circle using only a compass and a straight edge. Although they have not yet succeeded, they have not lost sight of the goal. Similarly, efforts to achieve an acceptable balance between crime control and human rights are ongoing throughout the world. However the scale is far from even. This year of 1998, on the 50th anniversary of the Universal Declaration of Human Rights, a report was issued by Amnesty International[69] documenting abuses in 141 countries. Included in these abuses, they found torture or ill-treatment by police or other state authorities in 117 countries; extra-judicial executions in 55 countries, "disappearances" of people in 31 countries, and persons arbitrarily arrested or detained without charge or trial in 53 countries. Regrettably, no continent is exempt from these allegations.[70]

It is the intent of this paper to examine democratic policing in light of the dual responsibilities of crime control and human rights which are placed upon it, and I will emphasize the Canadian situation which I have had an opportunity to observe in many capacities, including being the Police Complaints Commissioner of Ontario until 1998.

The concept of limitations on police conduct is not a recent one. The view that police actions, even though undertaken in an effort to protect, may nevertheless be excessive and therefore need to be restricted, was first stated for modern democracies

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69 WWW.amnesty.org.ailib/aipub/1998/POL/P1000398.htm, and WWW.amnesty.org/ailib/aireport/ar98/index.html

70 Other organizations have made similar world-wide findings. For example, see Human Rights Watch :*World Report 1998* (WWW.hrw.org/hrw/worldreport/Table.htm). This organization is one of the largest human rights group in the United States.
Also, in a separate report called *Shielded from Justice: Police Brutality and Accountability in the United States of America*, they found police brutality persistent in 14 major American cities (WWW.hrw.org/reports98/police/index.htm).

in the Declaration of the Rights of Man and of the Citizen, approved by the National Assembly of France on August 26, 1789, which provides in Articles 7, 8 and 9 as follows:

> *7. No person shall be accused, arrested, or imprisoned except in the cases and according to the forms prescribed by law. Anyone soliciting, transmitting, executing or causing to be executed, any arbitrary order, shall be punished....*
>
> *8. The law shall provide for punishments only as are strictly and obviously necessary, and no-one shall suffer punishment except it be legally inflicted in virtue of a law passed and promulgated before the commission of the offense.*
>
> *9. As all persons are held innocent until they shall have been declared guilty, if arrest shall be deemed indispensable, all harshness not essential to the securing of the prisoner's person shall be severely repressed by law.*

These concepts prohibiting arbitrary police actions and excessive force later received global recognition in the United Nations Universal Declaration of Human Rights on December 10, 1948, when The General Assembly adopted it.

On that date, the General Assembly proclaimed:

> *" this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance .....".*

Encompassed in the Declaration are the following limits on actions by state agents including the police:

Article 5 No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

Article 9 No one shall be subject to arbitrary arrest, detention or exile.

Article 11 Everyone charged with a penal offense has the right to be presumed innocent until proved guilty according to law in a public trial at which he had all the guarantees necessary for his defense.

Article 12 No one shall be subject to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

In the police forces in Canada, we find these principles reflected in a formal Code of Conduct which sets out both the goals of the police, generally seen as crime control, and the limitations on their conduct within the context of fundamental freedoms and human rights. The goals set out in law[71] for the various police forces throughout the province of Ontario include:

1. Crime Prevention
2. Law Enforcement
3. Assistance to victims of crime
4. Public order maintenance
5. Emergency response.

These crime control goals are reflected in laws governing all police services in Canada, including the federal Royal Canadian Mounted Police who are assigned to

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71 *Police Services Act*, Statutes of Ontario, 1997, s 3.

"...the preservation of the peace, the prevention of crime... and the apprehension of criminals...".[72]

However, these objectives must be carried out in a manner consistent with the democratic values previously mentioned. Accordingly, a Code of Conduct is established under law for all police forces which requires police to perform their duties subject to disciplinary measures if they abuse their powers. These disciplinary charges may be in addition to any criminal charges or any other legal proceedings which arise out of the same matter.

Pursuant to the Code of Conduct, the police must " respect the rights of every person" and punishment is provided for "any disgraceful or disorderly act or conduct". Specifically, officers performing their duties may not improperly exercise their authority, and deceitful or corrupt practices are not permitted. Accordingly, unlawful or unnecessary arrest, unnecessary violence, incivility and other improper conduct is spelled out in the Code of Conduct as being prohibited. The Codes of Conduct for all Ontario police officers, as well as for the Royal Canadian Mounted Police, are Appendices "A" and "B" to this paper.

These Codes are reflected in the United Nations Code of Conduct for Law Enforcement Officials which was adopted by the General Assembly on December 17, 1979, and which provides in Article 2 that:

2. In the performance of their duty, law enforcement officials shall respect and protect human dignity and maintain and uphold the human rights of all persons.

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72 *Royal Canadian Mounted Police Act*, Revised Statutes of Canada, 1985, s.18.

This general principle is followed by specific restrictions on anyone exercising police powers and which limit the use of force, including firearms, to exceptional and strictly necessary situations. In addition, torture, and other cruel, inhuman or degrading treatment or punishment may not be inflicted, instigated or tolerated. Similarly, corruption and other dishonest acts are prohibited. This United Nations Code of Conduct is Appendix "C" to this paper.

These principles have formed the basis for significant changes to policing in Ontario, and I will now turn to an examination of the events which led to the founding of civilian oversight organizations as a result of allegations of police excesses. I will then note some cases of individual misconduct during the course of police activities where intervention occurred; and I will highlight some of the significant changes to police investigative policy which were brought about by external civilian review of police actions. Finally, I will discuss what I perceive to be new trends affecting police methods.

THE BEGINNINGS OF CIVILIAN OVERSIGHT:

In discussing how the current system of independent civilian oversight evolved, it is important that its historical roots as it began in Ontario be understood. That history reflects in many ways the development of oversight of police which subsequently took place in other jurisdictions.

In the system that existed prior to the development of the complaint system in Ontario, members of the public had to make their complaint to a police officer, and they had no knowledge of the extent of the police investigation, and no explanation of how the decision on a complaint was reached. Complaints from the public were dealt with at the local level by the police alone, with no civilian oversight provisions to ensure that the alleged misconduct was properly investigated. There was no recourse from unsatisfactory decisions.[73]

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[73] The disciplinary scheme which applied to all police officers in Ontario at that time was set out in the former *Police Act*, Revised Statutes Of Ontario, 1980 - Queen's Printer, Ontario.

The complaints process then in place was perceived by some as a closed, secretive, biased system. Parts of the public felt the police culture was resistant to civilian oversight; and that the "thin blue line" and the police "brotherhood" in which police feel that their primary allegiance is to each other rather than to the public they have sworn to serve and protect, acted as a roadblock to unbiased police investigations.

As well, there were concerns publicly expressed about the integrity of a system that lacked independence, about poor investigations, and about a process in which some misconduct was allegedly ignored and coverups allegedly existed.

Complaints were numerous, serious human rights violations were alleged, and there was extensive media coverage. This culminated with a complaint by a group of 73 criminal lawyers to Amnesty International. That agency in turn wrote the Ontario Attorney General urging that a public inquiry, independent of police, be instituted to examine the complaints. In the space of five years, from 1975 to 1979, five public inquiries[74] examined different aspects of the interaction between the police and the public, all of which called for some form of civilian oversight, and the need for greater accountability by police.

As a result, in 1981, the government responded to growing pressure and concerns about the accountability of police officers, by creating the predecessor of my agency, the Office of the Public Complaints Commissioner, in one large urban city: Metropolitan Toronto.

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[74] Carter, G.E., Cardinal (1979) *Report to the Civic Authorities of Metropolitan Toronto and its Citizens (*Toronto: Office of the Cardinal).
Maloney, A. (1975) *The Metropolitan Toronto Review of Citizen-Police Complaint Procedure* (Toronto: unpublished).
Morand, J. (1976) *Royal Commission Inquiry into Metropolitan Toronto Police Practices* (Ontario: Queen's Printer).
Marin, R. (1976) Canada, *Commission of Inquiry Relating toPublic Complaints, Internal Discipline and Grievance* Report Ottawa: Information Canada).
Pitman,W. (Chair) (1977) Metropolitan Toronto Task Force on Human Relations *Now is Not Too Late* (City of Metropolitan Toronto).

During this period the police challenged the legislation in a variety of ways. The nature of these attacks by police, were strong indicators that police lacked commitment to the complaint process.

For example, in 1985, the Chief of Police dismissed allegations of excessive use of force, which had caused permanent injury to a complainant. My Office reviewed the decision and ordered a hearing before the civilian tribunal, which found misconduct by the police officer. The tribunal ordered that the officer be dismissed. The Courts of Appeal upheld the decision, and as a result, the Police Association announced it intended to devote itself to the destruction of the civilian complaints system and called for strike action. This action included refusing to enforce traffic violations, thereby denying the government of revenue. Many officers also replaced their uniform hats with baseball caps depicting the destruction of my Office.

However, the police position was not supported by the public nor by the media, and the police abandoned their approach. This demonstrated the importance of the media, and the force of public pressure, in the creation and the sustaining of civilian oversight.

Subsequently, in 1990, the jurisdiction of the Police Complaints Commissioner was extended throughout the province of Ontario and it had jurisdiction over more than 101 police forces and approximately 25,000 officers until it was disbanded on January 1, 1998.

In 1995, I was given the opportunity to head this organization which had as its objective the establishment of police accountability. In 1974, I had made submissions to create one of the first systems for civilian oversight of the police, and some of the ideas I suggested were ultimately reflected in the Ontario system. Its purpose was to deal with police violence and misconduct, as well as the public review of police actions. It was the first system to have brought such a vast number of police officers and territory under its jurisdiction, and the worldwide prominence and respect it has received has resulted in its being adapted for use in many countries.

What are the hallmarks of this system of independent civilian oversight? It is a way of dealing with police conduct that allows anyone in society to have access, without

fear, to a fully independent system in which civilians who are not part of police or government can receive, monitor, investigate, review and judge police actions. Through this system, civilians can also have involvement in changing police policies and procedures, and accordingly, it brings the community into policing.

Under the civilian oversight system in Ontario, my Office - the Police Complaints Commissioner, recorded all complaints about police, monitored all investigations arising from the complaints, received monthly reports, and had the power to take over investigations at any time. We also had the power to compel testimony, to enter police premises, and to examine documents and other evidence. All of these functions were performed by non-police civilians under the direction of the Commissioner. Finally, we also had the power to review all decisions made with respect to complaints.

A special tribunal, composed of three civilians, was also created to hear and adjudicate cases of police misconduct. It could impose penalties up to dismissal from the police. Jail sentences can also be imposed by the courts in cases of criminal conduct.

The legislation also provided the authority for my Office to make recommendations on police practices and procedures. The Police Complaints Commissioner was in a unique position to identify systemic issues and suggest changes to police practices or procedures that give rise to complaints. This allows for civilian input into police policies, and focuses on preventing police errors or abuses. Many such recommendations, about 160, have been made, with the vast majority being adopted.

I would like to elaborate on this very important aspect of a process whereby the public is able to have an impact on the way in which police carry out their duties, and in ensuring that the police are accountable. For example, due to a recommendation made by my Office, every time an Ontario police officer draws a firearm, he or she must subsequently complete a report indicating the details of the incident, including the nature of the investigation that led to the incident. The failure to do so is a disciplinary offence. This helps to ensure that police resort to firearms only when absolutely necessary and that they are accountable for having done so. This demonstrates the importance and the impact that recommendations made by civilians can have on police policies and procedures.

When two black men were killed by police in Toronto, my predecessor as Police Complaints Commissioner (The Hon. Clare Lewis) was asked to head a task force to examine such matters. He recommended changes to the police use of force, and he also recommended the creation of a special investigative organization to independently investigate police shootings in Ontario.[75] The Special Investigative Unit was subsequently established as another external non-police agency. It has its own non-police investigators who can review "the circumstances of serious injuries and deaths that may have resulted from criminal offences committed by police officers"[76], with a view to laying criminal charges against police officers in appropriate cases.If the investigation results in criminal charges, they are prosecuted by a specialized team of Crown Prosecutor.

This legislation marked a significant change as police shootings had previously been investigated by police, and this new limit on police investigation specifically provided for external investigation and special prosecution. These new processes of surveillance and control by independent civilian agencies brought the public into policing in a formalized way for the first time.

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75 *Report on the Race Relations and Policing Task Force - 1989 (Clare Lewis- Chair)* Queen's Printer, Ontario.

76 *Police Services Act*, Revised Statutes Of Ontario, 1990 - Queen's Printer, Ontario.

This civilian presence in policing had a number of significant effects. Police opposition to this system during the above-mentioned public inquiries focused on the police belief that they alone were capable of assessing the appropriateness of police actions.

With the rejection of this argument and the advent of a civilian-run system, the mandate of the Police Complaint Commissioner became focussed on three primary objectives: making accountability a reality by effective and comprehensive review of police actions; ensuring that civilian and citizen involvement was incorporated in every layer of the oversight system; and promoting professionalism in the police (through appropriate education, selection, training, salaries and pensions.)

Inserting citizens into the policing structure has resulted in the ability to bring about meaningful change in the way police function, thereby protecting citizens' rights. When citizens are brought into the power structure in an effective and independent way, they not only can watch the watchmen, but they can also participate in setting the rules by which the watchmen operate. It is this aspect that has had a demonstrative effect on defining the democratic limits of law enforcement.

INTERVENTION INTO POLICE ACTIONS:

Soon after the creation of the Police Complaints Commissioner, these concepts were put to the test in two cases that attracted public and media attention involving allegations of assault and excessive force on the part of the Toronto police.

In 1983 the police had been called to a house party estimated at 300-500 people. When the officers arrived, and saw the large number of people on the street, they called for re-inforcements and 53 officers attended, as well as the media who filmed the events. The videotape showed some of the officers using their batons to strike party-goers who were leaving the area. The officers were not defending themselves at the time, nor were they attempting to make an arrest. For example, one officer is seen kicking out at several individuals while another is seen dragging someone who was on

his hands and knees and striking him with his baton and kicking him. It was also apparent that some police had removed all identifying badges before the confrontation. The incident led to allegations against the police of excessive force, assault, and property damage.

A former Police Complaint Commissioner (The Hon. Sidney Linden) held an open public inquiry into these matters. However due to the poor quality of the videotape, compounded by the fact that the officers involved in the incidents had removed their identifying badges, it was impossible to identify with certainty those officers who had misconducted themselves.

Although the charges against individual officers could not be successfully pursued, nevertheless, the Police Complaint Commissioner made a number of recommendations. As a result, the Chief of Police held a press conference apologizing for the conduct of the officers, and five civil suits brought by complainants were settled by the police. as well as providing compensation to complainants for property damage. In addition, a number of the Commissioner's recommendations to change police procedures were implemented, such as new policies and procedures that would ensure police would be required to wear cap and uniform identification at all times. Furthermore, these recommendations ensured that senior officers would be held responsible for actions of the field officers during a large scale incident, and that an officer be designated to make contemporaneous notes of the events.

Shortly after in 1984, the same police force was the subject of a series of complaints brought by 7 criminal lawyers that a number of their clients had been tortured by officers of the Robbery Squad during the course of police interrogation during their investigations. The Police Complaint Commissioner was asked by the Attorney General to conduct a special investigation into these allegations. The Commissioner undertook a detailed investigation into allegations of individual misconduct and the investigative practices of the Robbery Squad. However, having regard to the passage of time, there was insufficient evidence for criminal or disciplinary charges against individual officers.

However, once again, these allegations of individual misconduct led to recommendations from the Commissioner that brought about significant changes to police policies and procedures, many of which have impacted on procedures used during police investigations, such as: prevention of officers copying from their fellow officer's note books; police officers must fully account in their note books for the entire period during which a suspect in custody is being investigated; note books must contain numbered pages, and be signed daily by the officer in charge of the station or immediately following the interview of a suspect in custody; institution of video taping in police stations; records be maintained of all movements of prisoners while in custody; officers in charge of the station should be required to make frequent checks on the condition of prisoners in their care and report any injuries, complaints of mistreatment, and all contacts with police officers; and such complaints should be immediately investigated and brought to the attention of senior officers. These recommendations lead to a series of changes and there were subsequently no repeat of the egregious complaints that had plagued the Robbery Squad for a number of years.

This approach of using a pattern of individual complaints as a basis for making recommendations was emphasized during my tenure as Commissioner, and it is my view that this civilian power to influence police policies and procedures has proven to be one of the most important aspects of the civilian oversight system.

I will return to this aspect, but it is important to note that the need to intervene with respect to individual misconduct was not de-emphasized either. Taking 1996 as an example, I will outline some cases where my Office intervened in matters involving individual officer misconduct. [77]

Recalling our earlier recommendation in 1984 requiring note books to be kept of contact with suspects, we sought in 1996 to have two officers note books entered into evidence in a disciplinary hearing against them in order to prove that they were the

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[77] *Annual Report, 1996,* Office of the Police Complaints Commissioner, Toronto

officers involved in the incident (the complainant was unable to identify them). The Ontario Court of Appeal upheld this use of the officers' note books.

In two other cases in which we intervened, officers were found guilty of discreditable conduct for assaulting their wives and children. These cases are significant in that the misconduct was not in the ususal policing context. In one of the cases, the officer was ordered dismissed from the force.

In another case in which we intervened, an undercover police officer, while driving home from a bar where he had been drinking, struck and killed a young bicyclist. He claimed he had thought he had hit a deer with his car, but he did not go to investigate and left the scene. After a full public hearing into his conduct, he was ordered dismissed from the police.

Other cases involving allegations of excessive force were also initiated by my Office and were the subject of subsequent public hearings.

Individual complaints were always dealt with, but we never lost sight of the potential for making changes where systemic problems became apparent.

AFFECTING POLICE POLICIES AND PROCEDURES:

As I have indicated, my Office made full use of the legislative authority to make recommendations on police practices and procedures. For example, we have been responsible for changes in areas such as hiring practices, appropriate use of force, use of pepper spray, and procedures for searching a person. Other initiatives included changing the way in which aboriginal communities should be policed, and setting up programmes whereby police interaction emphasised means other than force, whenever possible, and stressed concepts such as community policing, informal resolutions, and race relations training.

We have made 163 recommendations for changes in policing, and the vast majority have been implemented. A list of Police Complaint Commissioner Recommendations is attached as Appendix "D" to this paper.

Some of the recommendations have had a direct impact on the way in which police investigations are carried out, so as to ensure that human rights are respected. For example, in 1997, we addressed the issue of Video Recordings in police stations. It was our view that the quality and retention of video recordings can be extremely important in determining the circumstances surrounding deaths, injuries or other serious incidents that have occurred while an individual is in police custody. I subsequently recommended that all police in Ontario maintain real time video recording of all common areas in the police station, such as the booking area where a suspect or prisoner is first brought; and that the recordings be retained for at least 90 days. This would provide an accurate record of the condition of detainees from the moment they are brought into the station. Although costly, some police services have begun this process.

As another example, with respect to drug raids, concerns were brought to the attention of the Commissioner about the procedures and conduct of police officers when conducting raids on premises suspected of being used to sell drugs. These concerns alleged that the police used racial slurs, demonstrated negatives attitudes and rough treatment including the display of large numbers of firearms, and the harassment of other occupants who were not involved in drug activities. As a result of examining the police procedures involved, recommendations were made to reduce the conflicts between police and community members during this kind of police investigation. The recommendations which were accepted included the requirement to give the owner or occupant a copy of the search warrant before the search begins, and if this is not feasible, then the reasons why it could not be done should be recorded; that the owner or occupant shall be present when a room-by-room search is conducted, and if this cannot be done, then reasons shall be recorded.

Another set of recommendations impacting on police investigative techniques involved searches of the person, which arose from complaints that such searches, including strip searches, were being improperly carried out. The complaints alleged that they were done in full view of people, and sometimes without any lawful authority. I made a number of recommendations which established a framework as to when, where and how searches of a person's body should be conducted. As these recommendations

are extensive and are indicative of a set of formal recommendations, I have attached a copy as Appendix "E" to this paper. The 13 recommendations include: that such searches be conducted by persons of the same sex; that they be conducted in privacy; that intimate searches only be conducted when authorized by a senior officer: that they be performed by qualified medical practitioners; and that the officers make a full written record of the reasons for and the circumstances of the search. As these searches are conducted often as part of the investigative process, the object of these recommendations was to balance the investigative and security needs of the police officer with the human and privacy rights of the suspect.

Finally some of the recommendations we have made directly impact on issues of national and international security. These recommendations were made in response to complaints concerning the manner in which the police handled demonstrations by church groups and social activist organizations during the Economic Summit (G7) Conference held in Toronto in June, 1988. The recommendations dealt with the appropriate limits on the use of force in arresting non-violent demonstrators (including the avoidance of certain kinds of pressure-point holds), the discretionary use of handcuffs, the need to avoid unnecessary delay in processing demonstrators, and permitting them to contact family and legal counsel. These guidelines were intended to assist the police in properly exercising their powers during mass arrest situations, while attempting to ensure that individual rights were still protected.

The net effect of this kind of recommendation process has been to allow the public through the civilian oversight organization to watch and mould the policing institutions that affect them, and to attempt to ensure that a balance is achieved between police policies and procedures, and the fundamental rights and freedoms of all citizens.

EMERGING TRENDS AFFECTING POLICE METHODS:

To this point, I have examined the development and implementation of review mechanisms of police methods in Ontario.. These mechanisms, although relatively new,

have received much international attention, and have been adapted or are being considered for use in many other countries.

At the same time, policing issues are moving to a new level of awareness in Canada. This has resulted in some recent cases which I believe may indicate new directions for the way in which police must carry out their duties so as to recognize the special obligations of the police to the public, even at the expense of some previously established rules of law which appeared to shield the police from liability.

In the case of *Gauthier v Town of Brome Lake*[78], the victim was suspected of theft of a safe, and he was beaten, tortured and threatened with death by two police officers - one of whom was the Chief of Police- while detained for investigation at the police station. Six years later, he brought a civil action for damages against the police officers (who had been in the interim convicted criminally of aggravated assault and sentenced to prison) and against the Town that employed them. However, the victim lost at trial on the basis that the law provided that such actions must be brought within six months of the event. This decision was upheld by the Court of Appeal.

On July 9, 1998, the Supreme Court of Canada considered this matter. In order to appreciate their decision, it may be important to note some of the facts of the case reported in their judgement :

At about midnight on March 1, 1982, while Gauthier was sleeping at his brother-in-law's residence in Lac Brôme, he was suddenly awakened by police officers from that municipality.

He was arrested for questioning about the theft of a safe. No formal charges had yet been laid against him. He was taken to the police station, to a room where the officers wanted to question him. He was punched and kicked in the head several

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78 [1998] 2 S.C.R. 3

times. He made no statement. At no time was he told why he had been arrested, and the only justification for detaining him was to make him confess to participating in the theft of the safe. He was not told of his right to contact his next of kin, nor of his right to retain and instruct counsel.

At one point, one officer punched him so hard to the head that his uniform was spattered with blood, and the officer screamed: "I'm going to kill you fucking pig." They continued to hit him. Then, they took him to a washroom, where they plunged his head into the toilet. He was taken to another room, where they removed his clothes and started throwing burning matches at his genitals, which caused him unspeakable pain. The contents of an aerosol can were sprayed in his face. He was then taken to another room, where they removed his clothes. The defendants hung him upside down in a stairwell and clubbed him. They threatened to drop him unless he talked.

He was then taken to a basement cell, where he was given a 40-ounce bottle of liquor. They suggested he drink it to get his strength back. He refused, as he knew that it could be used against him if he smelled of alcohol.

Although he was now dressed only lightly and covered with scratches and bruises, he was driven to an isolated place, where he was tied to a metal post near a little-travelled gravel road. It was close to -25º Celsius. They returned for him one or one and a half hours later.

He was taken back to the station, where he was told to confess or one of them would break all his fingers, and one did in fact hit Gauthier's right hand with the club. He then hit the floor near Gauthier's frozen feet and forced him to dance. Finally, since he would not confess, they returned him to his cell.

A little later, he was taken to the ground floor where another officer who arrived for his shift was more conciliatory. Gauthier wanted to call his brother-in-law. The officers agreed, but he was warned that after his release, he would have to stay at his house and if the officer saw him anywhere else, he would kill him. However, they kept him in a basement cell until 7:00 pm, when one officer drove him to a side road in a patrol car and told him: "If I see you again, I'll kill you." Gauthier walked to his brother-in-law's house.

He walked barefoot or in stocking feet, but without shoes, which he found painful to wear. He knocked on the door with his knees, as he was unable to use his hands owing to his injuries. Gauthier refused to be taken to the hospital because he was afraid the defendants would kill him.

Gauthier finally agreed to go to the hospital, where he stayed for a few days. Still afraid to initiate an investigation of the defendants because he feared for his life, he did not give the real cause of his injuries but said that he had suffered frostbite while hitchhiking. He eventually left for Vancouver, where he was unable to work for at least six months and lived on welfare benefits.

The majority of the Court found that the victim was in a state of extreme fear for the six years that followed this brutal assault, and that this fear prevented him from taking legal action against the defendants during that period. As a result, the Court held that the six year delay did not prevent the action from proceeding, and awarded the victim $300,000 with interest and all costs.

Thus it would seem that such claims against the police may not have to be filed within statutory time limits where the facts demonstrate that the techniques used by the police create a psychological state of fear that prevents the victim from pursuing the action within the time limits.This case no doubt will have a significant impact on the manner in which police interrogation is carried out.

It is also important to note that the Supreme Court judgement specifically acknowledged the magnitude of the role played by the Quebec oversight agency in bringing this matter to light: "It took a Police Commission inquiry to bring an end to the silence that reigned with respect to the violence in the respondent's police force".

For the most part, cases involving the police focus on acts that may be seen as excessive. However, in a recent landmark case in Ontario, the police force was found liable for their lack of action. In *Jane Doe v. Toronto (Metropolitan) Commissioners of Police et al*[79], Jane Doe was raped and otherwise sexually assaulted at knife point in her own bed in the early morning hours of August 24, 1986 by a stranger. Ms. Doe lived

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[79] 39 O.R. (3d) 487

in a second floor apartment in the City of Toronto. Her apartment had a balcony which was used by the rapist to gain access to her premises. At the time, Ms. Doe was the fifth known victim of a man who committed these rapes, all in one neighbourhood, and he became known as "the balcony rapist".

Ms. Doe brought a civil action against the Metropolitan Toronto Police Force for failing to warn women, who they knew to be potential targets of the rapist, that they were at risk. Through their investigations, the police had developed certain information as to the physical description of the rapist, the area in which he committed the rapes, the type of victims, and the means by which he gained access to second and third floor apartments having balconies.

The Trial Judge upheld the victim's claim and found that the police failed utterly in their duty to protect these women from the serial rapist that the police knew to be in their midst by failing to warn them, so that they may have had the opportunity to take steps to protect themselves. Such warning should have alerted the particular women at risk, and advised them of suggested precautions they might take to protect themselves. The Judge noted the evidence that a warning could have been given without compromising the investigation on the facts of the case.

The Judge held that:

Here police were aware of a specific threat or risk to a specific group of women and they did nothing to warn those women of the danger they were in, nor did they take any measures to protect them. ... In my view the conduct of this investigation and the failure to warn in particular, was motivated and informed by the adherence to rape myths as well as sexist stereotypical reasoning about rape, about women and about women who are raped. ...I am satisfied on the evidence and the plaintiff has established that the defendants had a legal duty to warn her of the danger she faced; that they adopted a policy not to warn her because of a stereotypical discriminatory belief that as a woman she and others like her would become hysterical and panic and scare off an attacker, among others.

The result was that on July 3 ,1998, the Judge awarded the victim $220,000. The decision was not appealed. This decision would appear to support the view that it is not only excessive police investigative actions that will be penalized, but also the inaction by police that results in harm to citizens or that infringes upon their rights. This would seem to again set new guidelines for police investigation which focus not simply on crime control and the apprehension of criminals, but also on the need to ensure that the rights and liberties of citizens are protected; and that the public are made aware in appropriate cases of the facts of an ongoing police investigation where it would assist the public in defending themselves against attack.

Another matter which may lead to guidelines on police powers to pursue fleeing suspects, results from two deaths of innocent bystanders in Toronto during high-speed police chases. In both 1998 cases, the police were pursing a stolen car through city streets. The fleeing drivers struck two innocent persons who were killed. The Mayor, members of the public and even the police have called for clear guidelines on when the police should abandon such chases, even though it may mean that the criminal escapes. These matters are presently before the Courts (in one of the cases, two police officers are also charged criminally with dangerous driving, as well as the person fleeing); and the issue of limitations on police pursuit is continuing to receive media and public attention.

Similarly with respect to matters of international security, the Royal Canadian Mounted Police Complaints Commission is presently embarking on a public inquiry into RCMP actions during the APEC (Asia Pacific Economic Co-operation) summit held in November 1997 in Vancouver, and hosted by the Prime Minister of Canada. The police use of force and pepper spray against protesters led to a number of complaints, and the inquiry will be examining these actions in the context of security issues. The Prime Minister has been asked in Parliament and elsewhere to comment on these events. The appropriate level of government and political involvement in police and security operations may form part of the inquiry, as well as examining the line between the need to ensure the safety and protection of visiting heads of state, and the right to freedom of speech and expression. Some of the emerging trends I have mentioned do demonstrate

that the Courts are becoming more involved in police accountability. Traditional legal processes can be extremely important in examining police conduct with a view to civil and criminal liability. However, court involvement is often limited because it depends on either an aggrieved party in civil matters, or the State in criminal matters, to initiate and pursue the matter as plaintiff or prosecutor. This presumes that the private parties have the financial and legal resources to maintain court proceedings, or that the investigators and state prosecutors are prepared to pursue criminal charges. In addition, the courts are generally limited to the conduct in the case before them and to traditional legal remedies, and they rarely become involved in specific recommendations regarding police policy or procedural change.

By contrast, the oversight process may establish independent agencies who act as a watchdog, with sufficient resources to review policing matters on behalf of the public, and without the necessity of depending on the individual complainant or prosecutor to determine whether the matter will be pursued. They may also be granted the power to issue public reports and to make recommendations to change police policy and procedures regardless of the outcome of the individual complaint.

The challenge for the future will be to coordinate these civilian oversight and judicial mechanisms. Neither system provides the total solution; but together, they may move us closer to the answer.

It is my view that the civilian oversight institutions that have been created to deal with police actions and procedures, together with new judicial trends redefining legal concepts to ensure the protection of fundamental human right in the context of police conduct, have moved us further along the road to solving that ancient dilemma of "squaring the circle". The perfect balance between crime control and democratic rights has still not been fully achieved, but the possibility of a solution seems to have moved closer to reality.

I want to express my appreciation to Susan James of the Canadian and International Associations for the Civilian Oversight of Law Enforcement, and to Jeffrey Clark formerly of the University of Ottawa - Human Rights Research and Education Centre, for their helpful comments after reading my initial draft of this Paper

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When I was invited to participate in the panel related to the theme "**Police; Security; Criminal Investigation – Limits**", I was immediately taken over by two antagonistic feelings:

On the one hand, the great honour and pleasure of being able to share some thoughts and experiences with such an illustrious audience, and on the other, the concern of not being able to meet with the expectations, in view of the depth and level of interest of the communications that have already taken place.

Nevertheless, I shall try to present my address free from any technical-legal pretensions. I shall rather favour presenting a non-theoretical vision of matters that are complex and many times difficult to grasp for those who have to respond, on site, to the appeals of the victims and of the population at large who aspires to More and Better Security. But who are also conscious **that in a State of Law, one has to scrupulously respect the Limits that the Constitution and the law impose.**

"Public good requires the police to be strong and efficient in maintaining social order and in preventing crime, but, at the same time, demands that police power be controlled and limited so as not to arbitrarily impede individual freedom.

The solution calls for a compromise.

The police must be strong and yet not tyrannical; it must be efficient and yet not too zealous: it must be an impartial force in society and must be subjected to a certain control”

The above can be read in a report drawn up by an enquiry commission and presented to the British police.

The reading of this text should suffice to foretell of the difficulties encountered by the security forces in their daily action, for they must simultaneously respect two fundamental values of society that on first sight appear to be antagonistic: **Security and Freedom.**

Herein lies, precisely, the core of the matter.

Up to what point is it possible for the police to correspond to this desideratum in a society that has become more and more demanding and jealous of its rights and freedoms, but also more insecure and uneasy.

The feeling of insecurity which periodically devastates the population and public opinion in general -which is not always explicable from an objective point of view- demands from the State and the security forces efficient and immediate answers that, as we know, are not easy. And, furthermore, many times they do not correspond to what the victims and populations- threatened by the phenomenon of delinquency and drug- would like.

Because of this the police are many times accused of being inoperative and insufficient.

But, on the other hand, it is undeniable that today’s **society** is founded on a logic of absolute freedom that rejects all forms of authority and that, as a rule, **accuses the police of being excessive and of committing abuses.**

It is thus in this context that I shall attempt approaching the theme I was invited to address. For the sake of synthesis I shall restrict myself to aspects dealing with the **limits imposed to police action**, relating them, especially to the so-called **police measures.**

I shall thus start by a definition, widely known by all of us: the definition of Police, who according to Prof. Marcello Caetano is:

> "*the way authority has of acting by intervening upon the exercise of the individual activities susceptible of putting at risk the general interest, that has as its objective the avoidance of the social harm which law seeks to prevent from occurring, widening or becoming generalised".*

From the above can be inferred that the intervention upon the exercise of individual activities is one of the duties of the Police. This in itself represents a reality that deserves the best attention from public opinion and the media and the special concern of everyone involved.

In the state of law, the precautions that purport to limit the risk of the political-functional arbitration of the Police in its mission to secure the maintenance of security and order remit us to a very specific aspect of police activity: **its subordination to the law and the principle of the typification of police measures** – founded upon the way in which law and norms in general interfere in its scope and orientation, and, above all, in the behaviour of the police forces.

One of the characteristics of the police is, in fact, to constitute a force at the service of order, which in the fulfilment of its duty must scrupulously respect legal norms and procedures. This assertion acquires even more relevance when referring to the use of force.

The security forces have as their duty -consecrated by the Constitution- to defend democratic legality, to guarantee internal security and the rights of the citizens. Thus, in agreement with the hierarchy values of the modern states, in their intervention they must guarantee the exercise of freedom and strictly comply with the rules of the game, without committing any arbitrariness or abuse. In this way it obliges them to the principles of proportionality and the prohibition of excess.

Thus, the security forces have the difficult and complex mission of preventing and investigating crimes, gathering information and maintaining public peace and order. Now, all of these activities may, under diverse circumstances and points of view, interfere and collide with the rights and freedoms of people.

It is in the fulfilment of these duties that **limits and obstacles are imposed by law and public opinion** – in a more and more acute crescendo associated to modern society and democratic regimes.

If, as I have tried to demonstrate, **it is unquestionable that the police must act according to rules and limitations, it doesn't seem to me out of place to pose the question of whether we might not be headed towards a total exaggeration of limitations and constraints which in one way or the other may become inhibiting factors to police efficacy – with the inherent perils therewith for the security and freedom that is purportedly to be preserved.**

In other words, **the limits to police action** that society imposes nowadays are varied, and for the sake of the approach I am presenting hereby, I have divided them into two spheres, one internal and the other external.

The true **limitation to police behaviour** and abuse or arrogance **in the internal sphere** is given by the **statutes and codes of conduct** or deontological codes inherent to all police forces in the world possess and which, for the police corps of a military nature such as the National Republican Guard, are even more restrictive, precisely because of their military nature.

In the external plan, and in a more informal but no less perceivable manner, the mediatisation of events and occurrences in which Police intervene also constitute limitations to police behaviour and abuse.

However, many a time the media weave their comments and spread out not too rigorous and sensationalistic news, in ways that are neither the most correct nor desirable. Thus, instead of forming and informing, they create in the public the idea that it is the police agents who are the real disturbers of order and the main threat to life in society.

Still on the external plan, **it is the Constitution and the law that, without a trace of doubt, constitute the foundation, the limit and the criteria of all police action, namely of the actions which may in any way collide with rights, freedoms and guarantees**.

In this way, to concretise further, let us take a look at some of the aspects of police activity where **compromise between the efficacy** of the police system **and the respect for the limits** come closest to each other.

The entry into private locations for the purpose **of search and apprehension of the means of proof** constitutes an indispensable element of criminal investigation. The search for proofs of crimes and the recovery of stolen or illegally obtained objects, the examination of documents, the surveillance of correspondence and telephone bugging are some of the more relevant aspects of the functions of the police.

Other aspects that are also fundamental to police activity are the need to control people and vehicles and to carry out their **identification and search** for reasons of security and prevention of criminality.

When the law permits, these activities are generally accompanied by a set of restrictions and limitations, whose ultimate end purports to avoid arbitration and collision with the fundamental rights of citizens. They represent an area important enough to bring about a compromise of the relations between the Police and the public.

It is in this framework that the "**police measures**" come into play. These are acts typical of administrative law, meant to prevent or eliminate social perils, without which the security forces loose all their capacity of intervention. This is especially true in situations where constraining people constitutes one of the most visible faces of their power of coercion.

In the terms of art. 16th of the Law of Internal Security, "police measures" are the following:

- ***Police surveillance of people, buildings, and establishments for specific periods of time;***

- ***Demand of identification of any person that is found or circulating in a public place or subject to police surveillance;***
- ***Temporary apprehension of arms, ammunition and explosives;***
- ***Forbidding entry into Portugal of undesirable or undocumented foreigners;***
- ***Activation of the expulsion of foreigners from the national territory.***

The following are considered as special police measures, to be applied in the terms of the law:

- ***Temporary shutting down of store-rooms, deposits or armament ox explosives factories and their respective components;***
- ***Revocation or suspension of authorisations for the owners of the establishments referred to in the paragraph above;***
- ***Temporary shutting down of establishments destined to the sale of arms or explosives;***

  Cessation of the activity of enterprises, groups, organisations or associations that are dedicated to actions of highly organised criminality, namely sabotage, espionage or terrorism, or to the preparation, training or recruitment of people for these ends".

The so-called "**precautionary police measures**" inscribed in the Code of Penal Process constitute yet another set of actions of an essentially precautionary nature, to assist judicial action in the persecution of criminals, indispensable for the discovery and preservation of the proof. In sum, to assist criminal investigation.

The following constitute the "precautionary police measures":

- **The practice, on the part of the OPCs of the precautionary and urgent acts required to secure the means of proof, even before receiving the order from the judicial authority to proceed to investigations (examinations, gathering of information, apprehensions);**
- **The identification of suspects;**
- **The inspection of suspects in case of imminent escape and searches at the site where the said suspects are, except when dealing with house searches.**

Beyond these measures, there exists a wide set of instrumental acts that are indispensable for the material execution of police measures and police activity. Because of the diversity and unpredictability of the situations that occur in the sphere of police intervention, they are not, not could they be typified. But in the last analysis they are founded on the power of coercion that the Police have available to fully exercise their mission - its paradigm is the possibility of the recourse to the use of force, in obeisance, at the same time however, of the principles of proportionality and the progressive utilisation of the means.

The following are examples of these acts:

- **recourse to the use of handcuffs in the detentions and the escorting of dangerous detainees;**
- **stop orders given whilst verifying traffic;**
- **interdiction of a street or area for security reasons or at the site of preservation of crime vestiges;**
- **the control of people and vehicles, through the carrying out of Stop, Round-up, etc., operations.**

Because all of these measures and acts are essential to police efficacy it is necessary that, for the benefit of additional demands or excessive limitations, they not be devoid of content.

To illustrate these concerns, let us make reference to two examples of our judicial ordering, where the difficult police efficacy- limits relation is clearly illustrated.

The first one deals with **controls of identity**.

Let us recall the famous Law 5/95 of 21 FEB (law of the obligation to carry identification documents) which caused such a great uproar when it was discussed in Parliament and whose "ratio" seemed to be the fact of making mandatory the carrying of the identity card as a means of identification of people by the police.

Meanwhile, and contrary to what appeared to be, this was not the case. A more careful reading of the diploma would have sufficed to conclude that this law, by the fact of not being comminatory of any sanction to its non- abidance, turned it into a measure devoid of any real content- as a police measure- added to the fact that the law itself restricted drastically those situations where identification could be required.

It is true that the recent alteration of the Code of Penal Processing surmounted some of the reticence noted before, but it nevertheless did not go as far as would be required for the sake of police efficacy.

To this effect it is appropriate to refer that the French judicial ordering, by distinguishing between the "**identity controls of judiciary police**" and that of the "**administrative police**", seems to have found a more effective solution, making this measure more efficient.

The control of administrative identity operates "*on any person that is within the national territory*" and has as its purpose "*the prevention of attempts against public order and security of people and property".*

The recourse to such an administrative measure is always possible, as long as the police agent identifies it as a situation of potential risk to security and public order, namely when people or property are threatened.

It is common to proceed to identity control (administrative) in areas that are especially insecure, as for example, certain neighbourhoods, underground corridors, train stations, etc. This action, as is apparent, lies on a different foundation and is more widely embracing than what is recognised in our law.

Also Greece, Spain, the Netherlands and Germany seem to allow the control of identity, with less restrictive presuppositions than ours.

A second example is the one related to **Personal Searches**.

In diverse police actions, for reasons of security and of eventual gathering of proof it becomes necessary to search people.

Under the technical-police point of view, we may consider that, essentially, there exist two types of searches: the one destined to guarantee the security and physical integrity of the police agents and of third parties, designated as **Security Personal Search**, or put more simply, **Security Search**, and those which are meant to obtain means of proof in the scope of criminal investigations, which are designated simply as Personal Search.

Thus it is important to refer here solely to **the so-called Security Searches which, as is known, constitute typical instrumental police measures, essential to prevention and security.**

In the course of criminal prevention actions and administrative police actions executed by the police, the officials are confronted with people whom they may suspect of carrying arms or hiding other objects with which they may eventually practice acts of violence- and who, therefore, constitute a threat.

The following are examples of the characterisation of these types of people:

- Found during the verification of places and sites or establishments subject to special police surveillance (discos, bars, etc.):
- Transported in police vehicles, to be submitted to alcohol tests:
- Conducted to the Police Station, in the terms of the law of identification, etc.,

As we know, in terms of arts. 174 and 251 of the Code of Penal Process -before its last review- the organs of criminal police could proceed to a personal search without previous authorisation from the judicial authority in the following cases:

" *Terrorism, violent or highly organised criminality, when there are founded indications of the imminent practice of crime which may constitute a serious risk to the life or integrity of any person;*

Those in which the suspects pointed out consent, as long as their consent is somehow documented; or

At the time of detention "in flagrante" for crimes that deserve imprisonment".

These organs could also proceed to searches without previous judicial authorisation in the cases of:

*"**suspects in a situation of imminent escape** and to searches of places where they would be found, -excepting home searches**- at any time where there existed a founded reason to believe that in it were hidden objects related to the crime, susceptible of aiding the proof and without which proof could be lost**".*

As is evident these situations constitute cases and presuppositions that we do not find among the ones described above nor in many others that were not referred to herewith. But this does not mean that they constitute less of a threat to security, which **could only be minimised by carrying out the so-called security searches.**

It is nevertheless interesting to note that -in spite of the legislator's reluctance in consecrating these kinds of searches in situations as the ones described above, which aim at security in general and of the police in particular- he has finally done so in the latest review of the code for "***those people that must participate, or have the***

intention of being present, in any pleading, at any time that reasons exist to believe they are hiding arms or other objects with which they may practice acts of violence". (*art. 251/1 –b. of the Code of Penal Process, last version)*

To conclude, I would like to refer to two observations that deserve some attention when speaking about the question of police limits and efficacy.

The first one concerns the fact that in the last thirty years all of Europe is experiencing a growing increase in the number of police (the percentile relation Police/Citizen has become greater) without this increase corresponding, as a rule, to a decrease of criminality or of the feeling of insecurity. What is more, in some cases it has even become higher.

The second, and the most recent one, regards the growth of the number of aggressions that police agents (the NRG and the PSP) have been subjected to.

This reality, apart from other diverse inferences, allows us to pose the question of to what extent can the exaggerated imposition of limits to the police be crucially influencing police efficacy.

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To speak about the police under an action control and efficacy perspective arises the legitimate suspicion that it walks hand in hand with the police ethical and integrity issue.

When dealing with police and criminal investigation, the problem of the analysis of their limitations is not solely and exclusively a police matter, inasmuch as before, during and after the respective activities other actors and actions are outlined. Furthermore, it is unavoidable for my perspective to be intimately disabled by some conflicts and by a feeling of intrusion, insofar as my original professional quality is that of a magistrate. However, if it is true that it is the police ethics and integrity that are being analysed, than we have entered the field of relevant vital issues for the success and democratic acceptance of the police organisations.

Being thus, I may be able to rip some legitimacy to reflect about the topic proposed.

Having said this and before I go any further, it is important to affirm that,in this matter elements from the concept *integrity* seem to be implied. At the same time, it is important to know whether *integrity* may be taught or whether integrity is measurable within a police profession context.

As Plato said in his *Republica*, the issue is to know what is the sense of acting in a morally responsible manner when it places in Glauco's mind the idea that we do good only because we risk being punished if we practise evil. That is: if it is true that we accept certain limitations to the freedom of action it is because we are afraid of being caught infringing, or else, justice is not intrinsically good nor a value in itself but is adopted only to avoid damages. In this context, I allow myself to mention the story of the "Giges Ring" because it is significant: The ring that turned its owner invisible, allowed shepherd Giges to kill the King of Lydia and kidnap the queen. And the gist of the story is that the ring allowed its holder to practise evil without punishment. Although Glauco insisted in the idea that justice is only a set of control and prevention instruments, Socrates counter-posed that the citizens of a fair society will act correctly because they know and validate moral good and not only because they are afraid of being caught if they practised evil.

When looked at under this perspective, the bottom line is, that of knowing if the police acts, sometimes, as if holding the Giges ring and whether the police departments frequently assume Glauco's understanding of justice

What I have just said could, as a last resort, lead us to an incurable contradiction which may be thus seen if there is no supervision and control with sufficient frequency and intensity, the bad policemen will not be afraid of being caught. And, as someone has already stated, if the bad policemen are always charged with the training new ones, this means that the recipe for catastrophe would, in this manner, be complete. We are, in this manner, bordering the threshold of the public trust in the police forces.

Although it may not be easy, there is, still, another matter to be considered which is to know whether the public believes there is a problem of integrity in the police forces, even if the police forces themselves believe there isn't.

The nuclear issue now equated, is also to know the nature and the core of motivation for the police force to act, professionally in such an integral and ethically correct manner.

If these considerations are fair, how do we analyse the problem from a criminal investigation point of view?

In this reference framework it appears useful to consider, successively, among others, the following plans:

1. the existing criminal investigation system,

2. the characterisation of the police force actions,

3. the characterisation of the police officers actions,

4. the level of control of the police force actions

1 The existing criminal investigation system

What is the framework of police action in terms of criminal investigation? It does not seem possible to reflect about the problem without taking into account the legal framework from which emerges the criminal investigation performed by the police. About this matter there is no way to ignore the essential issue of intelligibility of the laws and of the "system" built by such laws. For a long time now, increasing concerns arise in this field both from the point of view of the citizens - a particularly important aspect when their acceptance of the Police Forces is the vital condition for their collaboration - as well as from the point of view of the democratic organisation of the State and within the scope of the indispensable "external control" of the formal control authorities, namely of the *police forces*, but not only them.

As already referred to in other latitudes, it is not acceptable that aims/objectives, the structure, the organisation and the "*law enforcement*"• operations are exclusively defined by the Administration clerks, by the police force alone or even by the magistrates, investigators, analysts or commentators and professional organisations. Being a controversial and contravening problem by the political elements which it

encloses, it will always have to be decided, as a last resort, through the democratic process. Furthermore, there is no way to overcome the information collecting process for a public debate, instead of, by any means, deferring it.

What, in terms of criminal police or criminal investigation, the «*law enforcement*» should be and under which organisational or legal articulate model is the truly nuclear problem which reveals its amplitude and the demand for democratic scrutiny. Furthermore, the understanding seems to be pacific that the preservation and maintenance of public order and tranquillity constitutes the subordinating aim of criminal prevention while a police objective, insofar as the repressive side of the criminal investigation is only a specific aspect of the former.

However, being these definitions important and necessary, the importance of the *allocation of personnel* must be taken into consideration (whether in uniform or in private cloths) in «the criminal police system» created and the certification of the results obtained in different foreign studies, according to which the «allocation of personnel» hold a limited impact over the police forces and over the evolution of the criminality rates. This seems to be moe linked to the nature of the actual criminality than with the insufficient or inadequate police actions. In fact, a large portion of the modern criminality is revealed in crimes against the legacy of an “opportunistic” character and oriented towards the long lasting consumption goods (i.e., motor vehicles). Generally, in such cases, there are no successful investigation prospects insofar as these are crimes that do not imply any contact between the offender and the victim and do not require any particular skills or time and they are carried quickly, anonymously and furtively. Under these circumstances, the traditional police tactics such as, for instance, the «saturation patrolling», do not offer great preventive expectations. For this reason, the police actions should, necessarily, be set on innovating action tactics.

• L*aw enforcement,* underestood as *actions performed by the police force to avoid producing, spreading ou generalising social damages which the law tries to prevent.*

On the other hand, prevention will be considered from the classic binomial «situations prevention- -social situations, not only through their combination but in the sense of implying a concerted action of the so called prevention actors.

To broach a national structuring perspective of criminal prevention and chose to follow an essentially police logic means, in general, to the so called «technical» prevention or “police” prevention, i.e., to convince the public to take a certain number of precautions against the daily delinquency. In other words, trying to make the access to eventual displacement of criminal activities towards other (new) social groups, other neighbourhoods or less protected local authorities.

What are we dealing with?

It seems that we are undoubtedly facing the urgency of resolving the need to react, in time, to the daily problems of the populations - problems that become more acute within the urban and suburban areas. It is therefore understandable to keep in mind the need to maintain or to restore the normal life to the urban centres through the continuation or the reinforcement of prevention actions against the so called “petty criminality”, For this reason it should also be understood the emerging correlation between the police response, the internal co-operation and the effective co-ordination between the different services, in agreement with their main and secondary competencies.

It is undeniable and recognised that the police function, even though only within the *criminal police* sector, is pluri-faceted and revealed in categories such as the «police witness», the «mediator police» or of «conciliation», the «police first/last aid», the «emergency police» and the ‘police-your-servant?. These are, so to speak, areas of social or family intervention or of legal assistance but which, one way or the other, may end up by being connected to criminal investigation.

The core problem is that of knowing what type of treatment is given to requests for help, complaints, participations, information, etc., meaning, if they trigger an immediate action and, if so, it’s of interest to know what type or types of repercussion

have those different solicitations within the services and within the operational structure of the police force and in relation to the police officers actions.

In fact, it is particularly relevant to know what type of «immediate response» is assumed by the police. It is not enough to observe, for example, the displacement to «the site» occur and within an adequate period of time, notwithstanding the nature of the facts that have triggered the *action* or the *activities*: it is because the mere displacement has a useful effect in itself which should be the re-establishing of the order, avoiding motorcar accidents and the eventual subsequent emergency of facts punitively relevant. The issue resides in knowing whether to go beyond that; if the same type of solicitations will not occur repeatedly, if the action was far from being what was demanded from the point of view of *globally requested police tasks* or if only the police *placebo* «therapy» was applied.

To question these different aspects leads, on the one hand, to the need of defining and establishing operational articulations with other Public Administration services and, eventually also with Private Institutions of Social Solidarity (IPSS) - which, unfortunately, is not a minor relevant problem. On the other hand, such aspects will also lead to the need of analysing *juxtaposition* between the different law enforcement *branches* and services - which will force us, perhaps, to revert to the need to forewarn the co-ordination, the co-operation, the collaboration and the consistency of the police action.

The problem of efficiency and efficacy is always being questioned. To focus only on some considerations strictly within the police sector, it would be important to, from the start, analyse the *degree* and the *quality* of the articulation «from the inside» and the implications over the actions of their different officers with such different types of qualifications and qualification degrees.

From a police action control point of view, the defficient or bad articulation of the “police criminal system”, let us say, from the *inside* (at least from the citisen’s perspective whose requests are frustrated), it is adamant, before anything else, to return to the institutional issue of the police forces role in the areas of identified and

necessary reciprocal complementary without forgetting that prevention is indissoluble from the repressive activity. This is an essential issue, under penalty of *police intervention* being inadequate and (or) inefficient in many situations and by the suggested inefficiencies.

A presupposition generally recognised within the scope of the question under analysis is, obviously, the contact with the community or with the public - which assumes different and specific shapes in a rural environment. As known, the complex social structure of the modern cities has been the cause of typical responses which are not always able to facilitate proximity or the referred to contact with the citizens. The known solution of concentration of effective members, in the sense of allowing the organisation of devices based on the American methods which highlight the «fast intervention» but do not favour such proximity. Whatever the answer to this solicitation, the organisation will have to set the allocation of said effective members to the same urban «sector», for certain established periods, so as to ensure their daily presence there and allow the establishment of frequent contacts with the resident members (in the widest sense).

The adequate and efficient treatment of the public solicitations (specially those of a criminal nature) will depend, to a large extent, on the «function-co-ordination? on both levels to be considered: the internal co-ordination and the external co-ordination - the latter in the double sense of co-ordination with any “other law enforcement branch” and with other services, entities, or organisations according to the nature of the occurrence. At this level, the working base is necessarily made up by the daily analysis of the information and reports related to the “external interventions”, without questioning the different co-ordination levels and structures, of a necessarily variable complexity but always in the sense of allowing the assessment of response possibilities, nature, extension and implications (also aiming at the different «branches»), which should be timely, within a useful and flexible period.

The multitude of complex issues which an architecture of this type may arise is not ignored. But one cannot see which other way could generate synergy addressed at

efficiency and, preferably, at efficacy. The education and training would play, in this sense, an essential role, namely in the promotion of performance patterns and ‘common working practises».

It is not possible to hide that the whole of this framework, only sketched, is a pathway to diminish the «feeling of urban insecurity?, i.e., to reduce or to stabilise the criminality rate and to diminish the isolation felt by the city inhabitants.

For what is now of interest, it is fundamental to circumscribe what is already a “police patrol”, how is a concrete area defined where the patrol works during their shift period, what are their responsibilities (particularly in the field of the criminal police tasks) and which areas are the object of motor or on foot patrolling. Define what each officer should do, being important to know whether he is able to do it, so that what follows downstream may be established. The police forces need to be endowed with the necessary knowledge, competence and skills that will help them exercise an observation capacity supported on the capacity to evaluate the meaning of what they are observing. The fundamental knowledge of the police officer have to radica permanently and conscientiously within a clear framework of their functions and nuclear tasks, be it the protection of life or property, the criminal prevention, maintenance of public order, the “criminal chasing” or any other task. That fact is that the best methods to prevent crime are related to the knowledge of the criminals, of the patrolling area of of those that are related with these and also of the more vulnerable sites to the criminal activity. The patrolling efficacy depends, greatly, of the knowledge of the circumstances favouring the criminal action within specific sites and different periods, during the year.

These and other aspects of the knowledge which the officers are expected to have of the respective sector of patrol should necessarily be supported by efficient criminal information records systems. This efficacy depends, not from the record, but from what the *system* «produces» and makes available.

The development of a detailed analysis, from the law enforcement as well as from the particular aspect of «patrolling» would require that special attention be paid to the methods such as those referring to the collection and recording of the criminal data

observed (what structure, details or items, how to deal with omissions and errors and the action taken when In a «out-of-duty» situation»).

However, in the sense of favouring a better understanding of the hindrances related to the «criminal police system» *performance* and under the action perspective previously referred to, it should be considered, though in summary, three particularly relevant aspects: the so called «*modus operandi* system» (MO) and those relating to the complaint and to the reports.

The first renders conspicuous the existence of a "general actions pattern" followed by the delinquents which will allow the establishment of identifiable characteristics: the MO. This is why its importance is relevant if, after committing a crime, the MO is correctly reported, because this will be the only way to compare the systematic MO's entered into the «criminal data system», with the advantage of allowing for a better identification of the suspects and limit the «extension» of the investigation.

The «data collection» is, therefore, an essential moment in the sense that only an adequate and complete "record" of every element of the crime will enable the drawing up a correct situation and the respective MO. This data, which is demanded, may only be obtained through the "site of the crime/occurrence inspection» carried out in a most competent manner. In this situation, the record of the elements of the participated crime should also consider an «index» which, in general, should ensure the so called «10 MO features».

The second point relates to the complaint (whichever the manner in which it is participated t the "criminal investigation system") which is, so to speak, the first «record» of the crime. The standardisation of the record processing (in paper or computer, desirably available *on-line* and real time) containing every necessary legal and police «informers» represents an efficiency and efficacy requirement, as already mentioned.

Thirdly, the subsequent follow up is the "crime site legal inspection" from which will result the reports of the «preliminary actions» of local inquiry, the expert(s) report(s) (from the technical or scientific police forces) but also a detailed report from the officer

present which should contain, at least, the whole range of standardised data related to the crime in question: he consistency of any investigation lies in the extension of the data collected and on the number of people interviewed to supply information.

In this manner, he specific parameters of the «criminal police investigation» are summarised from which it should be possible to analyse the problem of modernisation, of the change and of the methods of the whole «system» of criminal investigation.

Is the aim is to, first of all, respond efficiently and within useful time, to the news of the crimes around each 24 hour period (or other more adequate periods for the purpose), it is important to have the elements of the analysis at the disposal relating to the different items referred to previously.

Afterwards, the real knowledge, capacities and skills should be established in relation to all intervening personnel according to the sectorial means to achieve the final purpose. This is a complex level of discussion and analysis but one which may, eventually, be fruitful. Only to touch on the essential issue and at the level of the criminal police training and professional qualification, it should be clearly stated that the legislator, when recognising the criminal police competence according to mere formal criteria and generality he followed, did not ensure the process, the manner and the contents required to safeguard the necessary coherent professional qualification (or simply: the know how to do) for the whole «crimial police system» and for the different levels of police intervention. And this when degrees of qualification should have been foreseen, conditioning the different levels, types and nature of the intervention, by way of ensuring the control of the different types of qualifications - which is, necessarily, an inefficiency factor, not to mention aspects related to the problematic police actions arriving there from.

Still following this line of thoughts and for the presumed effects, besides other aspects already equated, the co-ordination and articulation of the «criminal police system» and criminal investigation presume organisational definitions at the level of the general co-ordination, of responsibility in the field and of the technical police articulation and of the scientific police which, at the level of «legal inspection», whose autonomous

and random intervention cannot be conceived without the back up of a technical and methodological functional organisation.

Finally, being it on the repressive side, or on the repressive-preventive side, as already mentioned, and particularly in what concerns the collection of evidence, the necessary and adequate means of intervention by the Department of Justice should be weighted and the corresponding articulation within the strict sphere of its competence as legal authority.

It seems therefore clear that, if the need arises to analyse the whole set of questions raised in terms of police efficacy, police efficacy control systems or by the criminal investigation limitations, a weighted analysis of the «criminal investigation system» should not be ignored, or of the criminal investigation within the fields already equated and of their competence and responsibilities in terms of the different levels of actions. And very specifically if we consider the flexibility and the latitude with which the police powers are exercised, due to the different motives and grounds.

2. *Characterisation of the police force activities*

The modern democratic societies demand the performance of the police mission under a stable balanced situation between order and safety and the guarantees and fundamental Freedom and, furthermore, within a setting where a social and cultural "*diversity phenomenon*» emerges. It is not only to recognise the increased cultural and social complexity but also to establish the way the police force should deal with this new reality in a controlled manner.

One other, but no less important starting point to analyse part of the problem under discussion could be to identify the legal control mechanisms of each identifiable form of activity. Though essential, this is not however an easy reflection, so much so that it involves a set of mechanisms ranging from the process of presenting the public complaints, from the different disciplinary procedures and from the penal law, or, still, from the inquest system resulting from the present legal framework.

The justification to carry out a systematic study of the adopted behaviour or actions of the police force is the following:

- the police behaviour or actions shape the perception of the citizens in relation to the system;
- the police interventions generate a strong impact at individual level in terms of the subsequent consequences in relation to other elements of the *system*;
- the *law enforcement* method which allows the identification and study of the legal apparatus aimed at controlling and structuring the decision taking process at police level.

At this level, the importance of the discussion has to do with the evidence that, within the law enforcement sphere, the police force *officers* assume a large range of decisions and activities which are specially sensitive within the scope of the criminal investigation. It is not only a matter of considering the aspects of the activities related to identification, personal search for safety or the use of force in relation to the suspects but also those relating to the type of follow up of the complaints or notifications received from the citizens. At the same time it would be important to identify and understand the respective causes, not only at the individual level of the *officers* but also the systemic causes, such as those that emerge from the type and composition of the respective human resources, from the type of law enforcement, according to its *reactive* nature or based on the notification of the citizens and in the proximity of the local communities or, still, from failures in the field of education and training of the police personnel. It is here that the analysis and study of the police forces activities patterns - if defined - would allow to identify certain or some of the already mentioned aspects.

But, in face of the emergence of this social *diversity phenomenon* what may be questioned is how shall the law enforcement respond.

In countries where the police force has wide experience in dealing with *diversity*, the law enforcement concept has evolved towards the local communities. Moreover, the

street patrolling has progressively been returned to practise, creating and maintaining contact with the members of the local community, becoming aware of their concerns and being deeply involved in the solution of the problems found in each of the communities. It is thus understood that the police forces structure has to reflect upon this evolution, giving a consistent expression to the need for innovation and flexibility.

The law enforcement philosophy allows the safeguarding of the ultimate aim, that is, it ensures the resolution of the local problems at local level and, at the same time, reinforces public safety. It is clear that the incurring concrete strategies depend on the specific nature of the identified problems and available resources in each specific local community.

This understanding of reality, wherein the law enforcement moves within the new emerging conditions, is addressed at a wide range of criminal problems.

The question is whether to adopt or not a certain orientation for law enforcement within the present social and economic framework. But, having assumed this philosophy which safeguards the resolution of the problems at local level, what is important is to be able to keep it for a long time, as every is reflects upon the communities quality of life and upon their feeling of safety.

The social reality over which befalls the law enforcement is dynamic. As in crime emerging therein, law enforcement should react and adapt to the changes within the environment. In thins manner, law enforcement should also be revitalised to become efficient.

The need to educate and train the police forces personnel in order to ensure the understanding of the back ground and the status of the problems within the areas falling under their responsibility is, in this way, a mere evidence. *Diversity* referred to herein demands a vocational training to guarantee understanding and responses by an increasingly multi-cultural society.

It is now better understood the need to reflect on the evolution of the police forces structure and activities giving consistent expression to the need for innovation, flexibility and external control.

3. Characterisation of the Law Enforcement activities

From everything that has been explained, results that the police forces act within a complex social intervention framework where a set of decisions are taken based on a peressonal judgement and not strictly regulated by law. The doctrine clarifies this power by establishing that such power is granted by law to intervene under certain situations and certain conditions according to their «own judgement and their own conscious »*

When the police force margin of action is understood from this point of view same should be balanced between legal admissibility and the restrictive use of this power, that is, dealing with some discretion applied to prudent criteria.

The law enforcement activities based on this law enforcement power imposes the non-negligent dealing of the postulated problems by their extension and, specially, by the abuses that this may lead to. It means that the solutions and prevention are based on *professionalism* and on the efficient control of the police forces activities.

We are now able to better understand the previously mentioned need to establish police forces performance patterns.

4. Levels of control of the police forces activities

There is an impossible triangle to bypass in matters of police forces activities control:

- **One strict selection and training of the police officers, according to each level of intervention;**
- **a framework of activities directives, discussed and accepted by the different hierarchic levels and by the public;**

- **a proper *law enforcement* management and supervision system.**

However, reality is what it is and, therefore, there is no way to overcome the need to create or improve the formal control, internal and external, under the police forces jurisdiction which, in fact, are well known, both as to their nature as well as in relation to the efficacy guarantee they offer.

From an internal control point of view, we are analysing two levels:

∇ **one, the repressive internal control which aims at:**

- **clearly illegal behaviour**
- **violation of regulations and service instructions**
- **violation of courtesy duties**
- **abusive behaviour in the performance of certain police forces powers**

∇ **one, the preventive internal control aiming at:**

- **Verification that the police forces tasks are being performed with the highest efficacy to attain the established objectives**
- **verification of the reasons for eventual failures in the efficacy of the tasks performed.**

If the first level is clearly a control exercised by a formal jurisdiction, the second however is a fundamentally hierarchic control which supervises and controls the fulfilment of the law, regulations and internal rules, safeguarding the fulfilment of the deontological code and the correlation of the *resources* with the *activity efficacy.* It is at

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* According to Roscoe Pound, the nature of such power arises within the "intermediary zone between the law and morality".

this level that, so to speak, control is established of the police forces discretionary power.

Moreover, it would be useful to define which are the greater categories of acts or omissions that endanger the trust and the validation that the police forces function demands. It is also important not to loose sight that the police activities control is linked to the need to have a deontological system served by its own mechanisms and autonomous functioning. Without forgetting that police deontology has to do with the relationships between citizens and the police and that the internal discipline relates to the relationships between employee and employer.

The trust placed by the public on the police forces cannot be based on the assumption that the motivation of the latter to act correctly has only to do with the fear of being punished. If, in the core of the problem under discussion lies the question of integrity, this cannot be understood as a mere capacity to refrain certain types of actions.

To think of the police forces as a profession means to assume the level of responsibility that a professional career normally carries, from the time of recruitment and selection. This is the posture of the citizen-police officer in whom the "Giges ring" does not fit.

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Subinspector General of Internal Affairs

- Public Prossecutor

THE EXERCISE OF DISCIPLINARY ACTION

I - Foreword

I will analyse the subject of this panel - the exercise of disciplinary action - from the point of view of the intervention and scope of activity of the IGAI*.

Considering however that we are in an international seminary, with the presence and participation of entities which have come from different countries, I will first give you a brief outlook of the fundamental principles which regulate, in Portugal, the disciplinary proceedings. Those principles are based on the fundamental rights and, for that reason, I think they shall apply to all kinds of proceedings, all law enforcement agents, whether or not they are police agents and, within this last category, regardless of the unit to which they belong.

To this general outlook I will add some aspects which specifically ensue from the requirements of discipline among agents entrusted with authority and coercion powers in relation to the other citizens. The exercise of those powers will inevitably entail increased requirements and responsibilities, as well as a greater strictness in the evaluation of the respective behaviours, specially when they affect fundamental rights of citizens, when they constitute serious abuse of authority or still when they correspond to illicit acts which those agents must fight.

Afterwards, I will mention some specific aspects of the exercise of that disciplinary action within the Portuguese security forces, in accordance with the conclusions drawn by the IGAI after the performance of an operation on this subject.

Finally, I will characterise the IGAI's intervention in the disciplinary field, both from the point of view of the reception and handling of the complaints and from the point of view of the preliminary investigation of proceedings which assume greater seriousness or social relevance.

II - General aspects of the Portuguese disciplinary procedure

As general aspects of the Portuguese disciplinary procedure, I may summarise the following:

- the mandatory obligation to institute written disciplinary proceedings in case of an offence to which corresponds a penalty other than a mere reproof or reprimand;

- the capacity of any senior officer to order disciplinary proceedings to be started;

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[*] "Inspecção-Geral da Administração Interna": Inspection General of the Ministry of the

- the capacity to punish, restrained to certain ranks, in accordance with the seriousness of the penalty to be imposed; the capacity to impose a penalty of expulsion is only ascribed to the competent member of the Government;

- the implementation of the principles of establishment of the material truth and non-solemnity of the investigation, but with full respect of the defendant's guarantees of defence;

- the right to be heard, consolidated by the service of the notice of culpability to the defendant;

- the possibility of application of provisional remedies as proceedings go on, namely transfer and provisional suspension, and, in the case of elements of the security forces, also the disarmament;

- the right to hierarchical and litigious appeal, this without a deferred effect;

- the autonomy of the disciplinary procedure in relation to the criminal procedure, in case of an offence both disciplinary and criminal, with the only exception of an offence of military nature (for which there is only one procedure and only one punishment).

Being these the general features of the Portuguese disciplinary procedure, I will however take the liberty of saying that, in which concerns the principles in which it is based, we stand nowadays before a phase of obvious evolution, characterised by the increased influence of the constitutional principles and the principles of criminal procedure in the disciplinary procedure.

Interior.

Thus, the traditional Portuguese jurisprudence, based mainly on the understanding and work of Prof. Marcelo Caetano, according to whom the disciplinary procedure was characterised as “simple” and “ductile”, ruled by the principles of opportunity, atypical nature of the offences and free choice of the applicable penalties within the corresponding legal frame, is now being outdated in view of the values and principles of a State based on the Law.

The Administration’s bond to the principles of legality, impartiality, equality and proportionality are necessarily expressed in the disciplinary justice and they somehow soften, by their purity, those traditional principles of the disciplinary procedure.

As an example, in what concerns the principle of opportunity of the procedure, there are today signs that point out that it must give way to the rule of compulsiveness.

In this sense, I will mention the provisions of article 27 of the Disciplinary Statute of the Employees and Agents of the Central, Regional and Local Administration, which foresees the imposition of the penalty of termination of employment to the chief administrative officials who *“do not take disciplinary action against the employees and agents under their command”*. And the Decision of the Administrative High Court, dated 30/03/1993, which considers that *“as a rule, if there are facts which characterise an offence, with a minimum or at least a reasonable basis, criminal proceedings must be started. Such a principle may only be put aside if it is considered that starting the proceedings will not be convenient for the services and if this is the mainly decisive ground not to start the proceedings”*.

And there are, today, some people who consider that this possibility of not starting proceedings in certain cases, must be confined to the area of “disciplinary trifles”.

On the other hand, the choice and imposition of the penalty can not be made at random, but rather obey the principles of justice and proportionality, in their aspects of adequacy, exigency and prohibition of excessive punishment. The respect for the equality in what concerns the treatment of the situations must always constitute the

presupposition of the exercise of the disciplinary action, preventing excess and arbitrariness.

The rule of the atypical nature of the offences is also somehow restrained in the cases which may lead to the penalty of expulsion; with regard to this aspect, I will quote the Decision of the Constitutional Court, dated 14/12/1994[80], which concludes that *"although the rule of the atypical nature of the offences is only in force, gua tale, in the field of criminal law, when the question is the choice of disciplinary penalties of expulsion - the imposition of which will affect the right to exercise a profession or a public job or the security of employment - the legal rules must contain a minimum of firmness, a degree of predictability which may allow the identification of the kind of behaviours susceptible of inducing the choice of that kind of penalties"*.

On the other hand, as a sign of the evolution of the disciplinary procedure, I can not help mentioning its increasing technical character. It really seems to me that the idea of lack of solemnity, informality, so significantly summarised in the above expression "simple and ductile procedure", is somehow in opposition to the present demands of law and jurisprudence, as to the observance of essential formalities, mainly in what concerns the elaboration of the notice of culpability and the direction of the defence's phase.

As a matter of fact, the respect for the guarantees of defence of the accused, which constitute today, both in the disciplinary procedure as in the criminal procedure, a real "statute of the defendant", require special judicial precautions during the procedural phase and the notice of culpability complies, more and more, with the principles which regulate the indictment in criminal procedure, and it must be articulated, concretised, itemised, pointing out the circumstances of time, place and manner, the mitigating and aggravating circumstances, identifying the offences and the corresponding penalties, and forming a whole which sets the boundaries for the punishment to be imposed. It

[80] In BMJ, no. 446, suppl., page 94.

must be added that the non fulfilment of the corresponding essential formalities often leads to the nullity of the proceedings.

This degree of exigency does no longer harmonise, in my opinion, with the system of appointment of any agent as an inspector, but rather requires the establishment or consolidation of nucleus of discipline and disciplinary justice, provided with specialised elements, apt to lead the preliminary investigation of the proceedings, helped by experts in law.

III - Discipline in the Security Forces

Speaking now of discipline within the security forces, it is almost a redundancy to say that such discipline is essential in a group empowered of a public mission. And, reproducing the words of Professor Cheyron de Pavillon[81], *"in what concerns police matters, strict obedience is vital since the minor mistake or omission may lead to dramatic consequences and irremediable national or local repercussions"*.

We must not forget that we are talking about persons to whom the legislator gave authority powers and who may and must, in justified circumstances, make use of their force and weapons, restrain a person's liberty or deprive he or she of it, identify or conduct searches on persons and make use of grievous measures to keep public order and to ensure the operation of the institutions, the safety and security of the population.

Accordingly, it is no wonder that the concept of disciplinary offence, in what concerns police and military agents, has a larger factual content that in relation to other employees. And if, as Professor Eduardo Correia said, the ethical and social grounds of the disciplinary offence are based on the protection of *"values of obedience and discipline, from certain persons who are bound by a special duty in relation to others, in the scope of a public service"*, that duty is even more intense when we talk about

persons who have been entrusted with authority powers - such as police officers - or powers of criminal prosecution and punishment - such as judges and public prosecutors.

So, besides being subjected - perchance in a more severe way - to the general duties of obedience, responsibility, loyalty, rectitude, secrecy, exemption, punctuality and assiduity, these agents are also subjected to particular duties that derive from their respective statutes and regulations, such as special requirements of moral integrity, availability, dedication, politeness and courtesy in their relations with the public. Those requirements sometimes reflect on acts of their private lives which affect the institution's prestige and, ultimately, the public interest.

Now that I have stated these considerations about the grounds for disciplinary power in the security forces, I will refer to the exercise, in concrete, of the disciplinary action, beginning with the internal exercise, i.e., that which is taken through the senior officers of the PSP[**] and GNR[***] , both in what concerns the preliminary investigation of the proceedings and in what concerns the decisions of punishment or acquittal.

Without going into details, specially in relation to the PSP (because at this table sits a representative of that security force who will speak in this panel and will certainly explain it better than I would), I will nevertheless say that at the very beginning of its activity in 1996, the IGAI carried out an operation aimed at the study and analysis of the exercise of disciplinary action in the security forces, having performed a statistic survey of the proceedings and their verification by random samples, and visited some nucleus of discipline and justice, promoting meeting with the persons in charge for a better knowledge of the problems and possible needs.

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[81] "La police des polices", in *Revue de Science Criminelle et de Droit Pénal Comparé*, 1985.

[**] "Polícia de Segurança Pública": Security force whose purpose is, among others, to execute a set of acts aimed at ensuring the safety and the well-being of the citizens and whose activity takes place in the urban areas.

The result of that operation - which took place for the approximate period of one year and a half prior to its establishment, i. e., from 01/01/1995 to 30/05/1996 - is mentioned in two reports, one for each security force, in due time submitted for appreciation to the Minister and now inserted in the book that the IGAI presented at this Seminary.

Briefly, and in what concerns the PSP, the responsible team esteemed that, although with some particular imperfections concerning the structures, the organisation and the lack of legal advice, the disciplinary action was perfectly exercised. It verified that, contrary to some external idea of “concealment” of conducts, there was a great number of proceedings started and subjected to a preliminary investigation - in 1995, for a total number of 18,000 to 20,000 agents, 2,062 disciplinary proceedings had been subjected to a preliminary investigation. From these, 65.3% concerned breaches of the internal rules or non accomplishment of professional duties and 16.4% were the result of complaints presented by private persons. The number of punishments which were imposed corresponded to 19.2% of all proceedings started; the penalty of fine was the most recurrent (71.6%); the penalties of expulsion corresponded to 10.46%.

Besides the recommendations about the organisational and structural aspects, the responsible team expressed some considerations about possible legislative changes (it must be said that the PSP has its own Disciplinary Regulations to which is applied, in addition, the Disciplinary Statute of the Employees and Agents of the Central, Regional and Local Administration).

It specially remarked the practice that was followed, according to which the results of the proceedings started on the basis of complaints were not communicated to the private persons, giving thus that idea of “concealment” of the situations.

*** “Guarda Nacional Republicana”: Security force having the same purposes as the “PSP”, but still subjected to a military statute and whose activity takes place outside the urban areas.

This recommendation was accepted and today the communications to the complainants is a common practice, which largely contributes to the transparency of the operation of the institution in what concerns its relationship with the citizens.

The approach of this subject, as to the GNR, is somehow more complex. I will develop this part in more detail since no representative of this force sits at this table (in accordance with the criterium adopted by the organising commission that only one representative of the security forces would be present in each panel, that place was attributed to the PSP) and also because I was directly involved in the exercise of the disciplinary action in the GNR; furthermore, I was part of the working group that recently presented a draft of the Disciplinary Regulations for this security force.

As already largely explained, the GNR is a security force of a military nature and, for that reason, the Regulations of Military Discipline are applied to it. However, regardless of the debate that may ensue about the politic option of the maintenance of its military nature or about the coexistence of two security forces, one of a military nature and the other of a civil nature - a dual solution, peculiar to the Latin countries (Portugal, Spain, France and Italy) - the truth is that the GNR's mission is largely composed of police and internal security duties.

Thus, the Regulations of Military Discipline, obviously established having in mind scenarios of war and crisis or the external security, are necessarily more grievous and offer less guarantees to their addressees.

The question is to know if it is fit to apply such Regulations in situations of normal performance of the GNR's duties, in which is in evidence their nature of police work. Without following further this path I will say, nevertheless, that this debate is not a characteristic attribute of the Portuguese reality, but that it has also been discussed in the countries where there are similar entities and that in Spain, since 1991, the "Guardia Civil" has a disciplinary regimen of its own which, and I quote, *"without prejudice to the*

specificities ensuing from its military nature, corresponds mainly to the police function which, as a security unit of the State, is imposed by the Constitution"[82].

Making a little history about the last couple of years, and reporting to 1996, in the sequence of the thematic operation undertook in relation to the exercise of the disciplinary action in the GNR, the IGAI reached the following main conclusions:

> - as to the number of disciplinary proceedings started during the analysed period, that number was not excessive - 174 in the year of 1995, to which were added 124 proceedings of inquiry, in a total of 298 proceedings for a total number of about 25,000 men;
>
> - as to the offences, it was verified that they related mainly to questions of an internal nature: non execution of orders, duty breaches, impoliteness, disrespect of senior officers, and also a great number of cases relating to abuse of alcohol and a remarkable number of proceedings based on charges made by private persons for aggression, as well as cases of involvement of agents in criminal offences;
>
> - as to the results, it was verified that the proceedings of inquiry, usually relating to aggressions and other illegal acts, were often dismissed by lack of evidence; on the other hand, the disciplinary proceedings, largely based on internal questions, would often lead to the punishment (mostly with the imposition of penalties of detention and disciplinary imprisonment).

In what concerns the organisation and structures, apart from other insufficiencies of resources, it was specially evident the lack of juridical support in the preliminary investigation of the proceedings.

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[82] António Millan Garrido, *Regimen Disciplinario de la Guardia Civil*.

Some dissimilitude of criteria was also verified, adopted as a result of the great decentralisation of the exercise of the disciplinary action, according to the principle that, since discipline is the “command’s arm”, where there is a commander the disciplinary action must be exercised.

However, the principal problems that were registered concerned certain practices which resulted from, or were based on, precepts of the Regulations of Military Discipline, of dubious constitutionality or even expressed unconstitutionality, and contrary to the defendant’s principles of defence. Among those practices, the following stand out:

- the non existence of a defendant’s true right of defence, the representation by counsel having little weight;

- the small value given to the notice of culpability, as an essential piece of the proceedings on which is based the defendant’s defence, as well as the little weight given to the phase of defence, often non existent;

- the predominance of the penalties restraining the liberty and the recurrent lack of obvious proportionality between the offences and those penalties, having in mind that the Regulations of Military Discipline leave no alternatives since they do not foresee the usual intermediate penalties of fine or suspension and go directly from the penalties of simple reprimand to the penalties of detention and disciplinary imprisonment, considering also the imposition of fatigue duties;

- the legal impossibility of applying to privates and corporals the penalties of expulsion, even in cases of extremely grave offences which clearly prevented the maintenance of the defendant in the “Guarda”; that impossibility is being often replaced by the imposition of the statutory

measure of leave of service whose applicability in such cases is not absolutely clear;

- the successive aggravation of the penalties as the proceedings, already closed and with a punitive decision, go *ex officio* through the hierarchic ranks, producing a feeling of insecurity in relation to the situation of those concerned and disturbances on the channels of appeal;

- the immediate service of the penalties, even of those restraining the liberty, regardless of the exercise of the right of appeal, which, besides rendering unrecoverable the damage endured, seems to contradict the requirements of article 27, paragraph 3-(c) of the Constitution which foresees as an exception to the principle of freedom, among others, the cases of disciplinary imprisonment, imposed to military personnel, but with the “guarantee to appeal to the competent court”;

- the doubts arising from the conjunction between the disciplinary procedure and the criminal procedure, in face of the duality of legal criteria depending on the offence being also a common law crime - in which case the rule of independence is applied - or a military crime - in which case the unit’s rule is applied.

Considering this set of conclusions, mentioned in the operation’s report which was submitted to the Minister, the IGAI prompted the need to begin a process of legislative amendments, namely by the approval of specific Disciplinary Regulations for the GNR.

By that time, a Decision of the High Administrative Court was made public, considering that the exception of the said article 27 of the Constitution should not be applied to the GNR, i.e., deeming unconstitutional the imposition of penalties which

restricted the freedom of the elements of that security force, judged by that Court as militarised and not military. Other Decisions of that High Court ruled in that same sense and the question is now being studied - but, as far as I know, not yet decided - by the Constitutional Court.

Anyway, the idea of specific Disciplinary Regulations for the GNR was about to take form and, on 29/10/1997, by ministerial decision, a group of work was formed to prepare a draft project for the revision of the disciplinary regimen applied to the GNR which, although respecting its military nature, would update it in accordance with the constitutional principles.

This draft project is now concluded, according to a logic of possible equilibrium and consensus, and was already submitted for evaluation.

IV - The IGAI's intervention

I will now talk about the exercise of the disciplinary action by an external entity to the security forces, which is the case in Portugal since 1996, year in which the IGAI began its activity.

And in fact, the preamble of the bill which established the IGAI - Decree-Law No. 227/95, as of 11/09/1995, afterwards amended by Decree-Law No. 154/96, as of 31/08/1996 - states that it is a "service of inspection and supervision, specially directed towards the control of the legality and the defence of the citizens' rights, and a better and faster application of the disciplinary justice in the situations of great social importance". Several precepts of those bills state, among the scopes of the IGAI, the scope to start disciplinary, investigation and inquiry proceedings.

On the other hand, it evidently ensues from that same preamble and all the historic conditionality which lead to the establishment of this Inspection General, that its intervention must be selective and qualified, thus reserved for the cases of special seriousness and social importance, concerning above all the violation of fundamental rights.

Besides, this is the meaning of the recent ministerial decision dated 29/07/1998 which materialised the cases that specifically determine the priority intervention of the IGAI: “whenever the action or the lack of action of security agents and other similar services ... results in the violation, to someone, of personal property, namely death or serious body harm, or there is evidence of serious abuse of authority, or damage to high patrimonial values”.

These principles, subjacent to the IGAI’s intervention, are then the determining criterium of study and treatment of the complaints which are presented to us.

As a matter of fact, written complaints are daily received in the IGAI, coming from private persons, governmental or private entities, as well as associations working in the field of human rights and courts of law. In what concerns the latter, it must be said that since 12/05/1998, in accordance with the circular letter no. 4/98 of the Attorney General’s Office, the public prosecutors must send to the IGAI a copy of all criminal complaints made against agents of the security forces. Apart from these sources, the IGAI also gets a direct and *ex officio* knowledge of all relevant cases, mainly through the media.

I must add that, although the IGAI exercises its activity in relation to services that depend on the Ministry of the Interior, an approximate of 80% of the total number of complaints and communications received concerned the security forces, surely because this area of its intervention is more publicly known.

Through several channels, the IGAI receives thus a lot of denunciations (true and false) that must be analysed and handled. By this process, in a first analysis, all anonymous denunciations are automatically dismissed, in accordance with the provisions of article 76, paragraph 3, of the Code of Administrative Procedure, without prejudice to the transmission of a copy to the Attorney General’s Office when they contain matter of criminal relevance, since stronger reasons of criminal policy allow this entity, even having as a basis an anonymous denunciation, to make the corresponding investigation. On the other hand, we send to other entities the complaints that, in whole or in part, do not fit into our sphere of competence.

In a second analysis, the complaints, reports and communications are studied according to criteria of their seriousness and consistency, social echo and individual damage caused, temporal proximity, circumstance and if the facts took place in the exercise of duties or otherwise.

And, according to these criteria, three options are possible:

- in cases of small importance or questions of clear internal nature, the complaints are sent to the Commands General of the security forces, because it is considered that they are who better deal with the exercise of internal discipline;

- in cases of some importance but not yet within the scope of the IGAI's qualified intervention, or in more serious cases but which took place off duty or before the establishment of the IGAI, the complaints are also sent to the Commands General but, in these cases, the IGAI organises a file and follows the evolution and results of the internal discipline;

- finally, in the more serious and relevant cases, verified on duty and in fairly recent dates, the IGAI takes on itself to make the investigation and start the corresponding proceedings.

The cases which require the direct intervention of the IGAI correspond to approximately 20% of all communications received; as a matter of fact, most of them concerned incorrect attitudes or disagreement with procedures adopted by the agents, mainly in traffic matters, and they are send to the two Commands General.

Among the most relevant cases which have justified our direct intervention, I must point out:

- the aggressions and abuses of authority, mainly in the act of arrest and during detention; these cases have been subjected to a remarkable decrease, specially from 1996 to 1997, and it is only fair to mention here that, in a great number of cases publicly denounced, we verified, after the corresponding investigation, that they had no grounds;

- the deaths, as a result of police action, fortunately very few and, in recent times, always due to the use of the firearm during police operations and pursuits. However, these proceedings have showed the need for a better legal clarification of the situations in which agents are allowed to use their arms, as well as the necessity to train and select the agents that use those arms, update the armament and establish ranks of command in situations and areas of greater danger;

- also the cases of suicide in the precincts are always the target of investigation proceedings by the IGAI and, although in these cases there was neither deception nor neglect of the agents, there is a need to continue the policy of humanisation in relation to the detentions, either by the implementation of better physical conditions on those places by the elimination of the points of risk, or by a better assistance to specially needed persons (drug addicts, alcoholics or other groups that show needs or weaknesses and deserve thus a particular human consideration);

- finally, a specially serious area is that of the involvement of police agents in criminal actions. Besides serious involvements limited to the private life of the agents, some cases however are susceptible of social echo and great discredit to the institutions. I mean the cases of extortion, corruption and implication in the traffic of narcotics.

Although they are rare, these cases assume a particular gravity and their investigation must be made in concert with the corresponding criminal investigation.

As I have already said, Portugal applies the principle of independence between the disciplinary procedure and the criminal procedure, the evolution and outcome of each of those procedures being independent. However, in these cases of a more complex investigation and in which sometimes the disciplinary justice lacks elements of proof which can only be obtained in the criminal area, there is a justification, in my opinion, to defer the disciplinary proceedings in order to wait for those elements; similarly, the co-operation between the entities in charge of the disciplinary investigation and those in charge of the criminal investigation is absolutely essential. In this respect, the new concept of the Portuguese Code of Criminal Procedure about the secrecy of justice (article 86, paragraph 7) explicitly allows a certificate or a document in secrecy of justice, necessary for the preliminary investigation of disciplinary proceedings of a public nature, to be issued.

In what concerns the formal aspects, the IGAI's intervention in the disciplinary area requires some specificities. As a matter of fact, the IGAI, as a service belonging to the Ministry of the Interior and charged with the of inspection, control and technical support, with an area of intervention comprising all services that belong to or depend on that Ministry, does not have, however, in relation to those services and respective staff, the powers of direction, control and discipline which characterise the hierarchical relation.

Thus, the IGAI has no competence to start, on its own initiative, disciplinary or inquiry proceedings and, for pragmatic reasons based on urgency, it may only start, on its own initiative, inquiry proceedings. Furthermore, it has no powers to impose any penalty or have it executed. In all these cases, the IGAI must submit its respective proposals to the Ministry of the Interior.

On the other hand, this organic schema leads to the fact that, in parallel with the inquiry competence of the IGAI, there is always the competence of the senior officers of the respective agents. It may thus happen that proceedings are simultaneously

instituted by the IGAI and the senior officers in relation to the same matters and against the same defendant. If this happens, it is not possible to give continuance to both proceedings.

How to solve this situation?

According to a ministerial decision dated 31/12/1996 which foresaw this possibility, whenever the IGAI is given inquiry competence, the services of origin must not start the proceedings and, if they have already done so, they must send the files to the IGAI, where they will be given continuance.

The restriction of the IGAI's powers of decision requires, with particular vehemence, the Minister's intervention in the proceedings.

So, the Minister is the person who orders that inquiry and disciplinary proceedings be started, who designates the inspector, who establishes the time-limits and, mainly, it is the Minister who renders the final decision, imposing a penalty or dismissing the proceedings.

According to the provisions of the law, following a logic of intervention external to the security forces and of selection of the cases of particular seriousness and relevance, it is fundamental that the final decision be the responsibility of the Minister, whatever the result of the investigation and the penalty proposed.

In fact, only the Minister's intervention in the final decision will ensure the system's coherence and only by this process may we talk about an action external to the security forces, in accordance with the legislator's intentions.

V - Conclusion

I will finish with an assertion which I think important to transmit here:

The intervention, in the disciplinary field, of an entity external to the hierarchy is a very complex matter.

Only a great degree of exemption, impartiality and objectiveness, together with the broadcasting of the results, whichever they are, and without losing sight of feelings of justice and humanity in analysing the individual behaviours, will give support and prestige to this intervention.

And it is with great pleasure that I may say that it is common for requests to be addressed to the IGAI, asking it to intervene and directly investigate certain cases, not only by private persons but also by agents and senior officers of the security forces.

As long as that happens, the goal which the legislator had in mind with the establishment of this service will be reached *"... to investigate, with complete exemption, events which may assume a great degree of susceptibility, in consequent of which it is, more and more repeatedly, in a State based on the Law, to ascertain the truth, the only way to administer justice and assume or refuse responsibilities"*.

Denis Racicot

Commissioner for Police Ethics, Quebec – Canada

1.0 Introduction

The first part of the present seminar “The Rights of Man and police efficiency” starts off with the forces at play when we approach the problem area concerning the control on police activity.

No-one can question the vital role of the essential role that is the competence of the police in the different countries either regarding the protection of people and goods, the respect of human rights or in the maintenance of democracy. In short, we cannot discuss on police forces without associating themselves to public order. Our different societies are strongly aware of this importance Not only do these grant the police significant budgets but these cede them exceptional powers in order to allow them to fulfil their mandate which is done necessarily at the expense of citizens’ individual rights. It is sufficient to allude to the powers to intercept, to search and requisition, to arrest and hold in custody. It is fortunate that these powers are their means of application are spelt out in different laws.

When the significant number of interventions that the police perform as a whole, it is reassuring to note that the majority of these are carried out in the respect of established modalities. Nevertheless, it is for us to note that as in other fields of activity, policy activity has its array of mistakes, misinterpretation, wilful evasion, abuse and even crimes.

We are therefore of the opinion that a society careful of its rights and its citizens cannot grant such exceptional powers to the police without at the same time placing control mechanisms that are in addition to those already exercised by the tribunals of common law. The respect of those human rights and the maintenance of democracy mentioned beforehand that lead to the ceding of exceptional powers to the police call for as much attention and the control of activity by the these very police forces.

One of the surveillance mechanisms is disciplinary action that targets to control the individual conduct of policemen. In Quebec, the legislator has deemed it pertinent to dissociate deontology from disciplinary action. We can define this discipline as a set of rules of conduct in common for all members in a police corps in order to ensure good order; with deontology being a set of rules calling on the relationship between the citizen and the police.

If we can have as many disciplinary systems as there are police corps around one hundred and fifty (150) police officers in Quebec, there is nevertheless only one doentology system for those officers who belong to those one hundred and fifty (150)police corps.

Therefore, the discipline comes from each police director whereas the law foresees that the doentology comes from two autonomous organisations: the Commissioner to Police Doentology and the Committee of Police doentology.

2.0. The Doentology Commissioner: The Organisation

Let us specify at the very outset that the jurisdiction of the Commissioner is total, and entails to receive all written complaints relating to the conduct of individual police

members in the exercise of his responsibilities and constituting a derogatory act to the Code of Deontology for police officers in Quebec. We will have the opportunity to discuss at length on the mandate of the Committee. Let us dedicate some time on the organisation itself, and under the authority of the Commissioner of Police Deontology.

The Commissioner of Police Deontology is an autonomous organisation dependent on the Minister of Public Safety which in Quebec is a distinct post from the Minister of Justice and the Attorney General. His budget as we shall discuss later on is determined by the latter. It is obvious that the Minister must ensure that the Commissioner has sufficient budgets available to fulfil this mandate.

What is meant by “autonomous” ? If the Minister responds to the Commissioner before the National assembly, it is allowed and recognised that he cannot interfere in the individual treatment of complaints received by his Commissariat. He can neither be informed on the decision process and the general management of the organisation. It is therefore with moderation that the Minister oversees this organisation which is presided over by a … Commissioner.

THE COMMISSIONER FOR POLICE DEONTOLOGY: THE INDIVIDUAL

The law foresees that the commissioner is nominated by the Council of Ministers for a period of 5 years. The law establishes one single requisite, that he is a Member of the Law Bar, that is, he has been a lawyer for at least 10 years. Even though this requirement is identical to that established to for judges, it seems useful to us to note that the Commissioner does not belong to this body of the judiciary. This requirement has the equal effect to exclude the nomination of a senior police officer as Commissioner since in Quebec, a lawyer cannot be a Bar member and a police officer at the same time.

It seems therefore timely to establish at this moment the main characteristic of the Quebec police deontology system: the complaints are sorted by civilians only. The police service members are wholly excluded from this sorting process. The Quebec

system is a CIVILIAN system in the control of professional activity by police officers. We could discuss for at length this sound premise for the exclusion of police officers from this process but it is to be noted that this emphasises the independence, impartiality, the transparency, in fact, the credibility that must be embodied in the any control system of police activity.

4.0 COMPLAINTS SORTING

4.1. The reception of complaints

As we have already specified, the mandate of the Commissioner is to receive every complaint relating to the conduct of a police officer under the following conditions:

- The complaint must be in writing;
- It must concern the conduct by a police officer;
- The police officer must be on duty;
- The complaint must cite an allegation of prima facie derogatory act regarding the Deontology Code adopted by the government.

It is important to stress that the Commissioner cannot take control of a given situation, he needs to have a written complaint in his possession to exercise his role. A complaints form is made available to citizens but its application remains optional. The only requirement: the complaint must be written. We should further underline that anonymous complaints are unacceptable for the system requires a real participation of the plaintiff in dealing with his complaint.

All the police forces have different complaint procedures, and the law foresees that police service members have the duty to inform citizens who wish to complain on

the conduct of a police officer on the rights provided under police deontology, to receive the complaint by citizens and communicate them without delay to the Commissioner.

In regard to the Commissioner, he has the additional duty to lend assistance to every person who requires it in the shaping of the complaint.

What does the Commissioner do with the complaint he receives ?

He registers each complaint, and acknowledges their reception with the plaintiff while informing him in written form of the process dealing with complaints particularly in regard to conciliation; he transmits one copy of the complaint to the police commissioner in charge of the police force whose service members are to in the complaint. It is to be noted that the police officer concerned is not informed of the complaint lodged against him at this stage. Besides, in general, he will never receive the copy of the complaint.

- As a follow up, the Commissioner verifies the complaint, and requires if necessary additional information from the plaintiff , and obtains a copy of operational reports established by the police officers to decide on which of three paths will be acted on:
- To refuse to take the complaint ant further;
- To refer the complaint to the Conciliation service;
- To initiate an inquiry at several levels or otherwise for a formal criminal inquiry.

4.2. Refusal

Even though the Commissioner can invoke multiple motives to refuse to deal with complaints any further, he does it generally for the following reasons:

- Verified cut-off of 1 year from the initial event;
- The police officer was not on duty;
- The conduct of the police officer is at first sight in accordance with different laws,

- The reproached conduct does not constitute a derogation foreseen in the Code of Deontology;
- The refusal of the plaintiff to co-operate with handling his complaint, in particular in omitting to give follow-up to the additional information that the Commissioner requests from him;
- The complaint is in all likelihood groundless.

The Commissioner has the obligation to forward his decision in writing to the plaintiff , to the police officer and his senior officer-in-charge of the police force in question, and, in addition, he must invoke the motivation to justify his decision. The plaintiff has the right to appeal to the Commissioner to review his decision.

4.3. Conciliation

Having deemed the complaint as valid, the Commissioner has the obligation to communicate the complaint to the Conciliation Department unless there are motives to hold an official inquiry. Before the Commissioner takes the latter decision, the plaintiff has the right to communicate his comments to the Commissioner in this respect. It is important to specify that if the plaintiff has the right to oppose conciliation, he does not have the right to veto inasmuch: the decision is the Commissioner's alone. It can be deduced that the most serious matters will lead the Commissioner to decree the need to hold an inquiry.

Conciliation is a very informal process that brings together the plaintiff and the police in order to allow them to comment on their contentious in order to arrive at an understanding or compromise that is satisfactory to both parties.

The conciliation is under the sponsorship of the Commissioner that entrust this task to conciliators who belong to the staff under his charge. The conciliation session takes place behind close doors. The plaintiff and the police may be accompanied by one person of their choice besides the conciliator, and these are the only people

authorised to assist or participate in the above session. There is no recording and it is foreseen that the exchanges cannot be employed or accepted as proof in any court of law. It is necessary to also specify that the policeman cannot be in uniform during the session.

When an agreement is arrived at, it is confirmed in summary manner by the simple signature of the conciliator and the two parties and ratified by the Commissioner.

The law foresees that a complaint sorted by conciliation has the faculty to be withdrawn and due to which the obvious interest of the police officer to submit to it willingly even though his participation is mandatory. The participation of the plaintiff is equally compulsory; his refusal to do so will lead to the rejection of his complaint which extremely rare for the plaintiff also present themselves willingly.

This other particularity in conciliation of the Quebec system of police deontology affords, as you know, numerous advantages. It allows:

- The plaintiff can deal with the police officer face-to-face as an equal party without fear of reprisal;
- The police officer has the power to express his perception of the events in question;
- To avoid an enquiry and probably for the complaint to be brought to a court of law,
- In fact, it allows to handle a complaint efficiently, rapidly and at least cost, and this to the satisfaction of both parties

As an example, a complained by conciliation will be sorted in general within 90 days following its reception when an enquiry and court case alike require several months. It can be added that other inconvenient connected with juridical process it is difficult to imagine all the advantages that are entailed in a process of conciliation.

But the most important advantage remains the satisfaction of the plaintiff s and police officers alike. This is verifiable for the successful resolution on conciliation is between eighty-five (85%) to (90%).

4.4. Inquiry

The other means of handling complaints is the inquiry. The law foresees that this method is reserved for the most serious complaints either due to the character of the complaint or the reoccurrence of the complaint on police officers, and due to failure in the conciliation process.

The inquiry is also held under the authority of the Commissioner who entrusts this role to the investigators and members of his staff. In practice, all the investigators are former police officers unless exception is made. Nevertheless, the law foresees that an investigator cannot be entrusted with an inquiry when the police officers in question are members of the same police corps the inquirer had been previously served in.

The Commissioner and his investigators have important powers available to them to carry out and conclude official inquiries among others:

To enter at moment’s notice in a police precinct to examine any document to be found therein;

To constrain any person, civilian, police and police directors to appear in the inquiry in order to answer questions and present documents. The only exception to this power is the police officer subjected to the inquiry, who cannot be constrained in this manner at least at this stage.

Nevertheless, it is important to emphasise that the Commissioner hardly ever exercises these powers for he can easily solicit the co-operation of the collaboration required from the different protagonists in particular the director of the police force concerned.

In addition to these powers is another important immunity with the effect that neither the Commissioner nor the employees can be constrained to divulge what was revealed to several authorities concerning the complaint lodged including in a court of law.

When the inquiry is completed, its content is transmitted to a lawyer of the Commissioner, who prepares for him the scope for decision with the effect of either rejecting the complaint or to refer the police officer to the Committee of police deontology.

Let us consider the rejection of the complaint which, in general, is set in when the Commissioner considers that the complaint has no legal basis, and that it is frivolous or vexing or further still that there is insufficient proof.

The Commissioner has the obligation to communicate his decision in writing to the plaintiff, to the police and the director of the police force in question, and by setting down the premises that his decision invoked after a brief summary of the results of his inquiry.

The plaintiff who does not agree with his decision can ask for it to be reviewed not by the Commissioner in question but by the Committee of police deontology which I identified as the second organisation that is responsible for dealing with complaints. Even though I will have the opportunity to refer this aspect again, let me make clear right now that this entails an administrative court whose function among others is to review the decision of the Commissioner on request of the plaintiff following his decision to reject the complaint as groundless after an official inquiry.

The Committee can confirm the decision of the Commissioner or cancel it in which case it can order him to proceed with new verifications or order him to notify the police officer of prosecution charges. The decision of the Committee is final.

Therefore, the decision to charge the policeman is above all the responsibility of the Commissioner, and at times of the Committee when the decision is reviewed.

4.4. Notification

The notification seeks to refer to the competent tribunal namely the Committee of Police deontology, of one or several alleged infringements of the Code of police deontology, and at the origin of the complaint to the Commissioner. It is important to

underline that only the Commissioner can refer complaints to the Committee. The plaintiff or any other citizen has no juridical means to do so. Meanwhile, the Commissioner takes into account the cause and effect on behalf of the plaintiff without being subject to his wish. In fact, the Commissioner has an institutional role and is under the duty to act in this manner.

The Committee on police deontology is composed of only lawyers nominated by the Government. Its members are a collegiate body. The committee acts like any other tribunal in sorting proof and legal argumentation by the contending parties in respect to the rule of law in order to determine the sound premise of the notifications provided by the Commissioner. On the grounds that the notifications are well-founded, the Committee imposes one of the following sanctions.

- Warning;
- Reprimand;
- Blame;
- Professional Suspension without payment;
- Demotion;
- Removal from the police force;
- The inability to exercise the police functions for a given period.

It seems to me very important to emphasise that contrary to the inquiry of the Commissioner, the police officer in question and referred to the Committee of Police deontology can be constrained at this stage.

4.6 Appeal

The law foresees that it is legal for the Commissioner and the police officer in question to appeal against the decision of the Committee in invalidating or confirming

the sound basis of the notification. The plaintiff has no right of appeal; he can nevertheless impress his viewpoint to the Commissioner and be given consideration in doing so.

The appeal is lodged with common law circuit judges. The appeal is submitted by file without proof being judged on in part or as whole.

On closer inspection of the inquiry process and its jurisdiction, the advantages linked with conciliation of the contentious seem to us even more obvious. It would be nevertheless utopian to think that conciliation allows to deal adequately with every complaint. Despite its inconvenient, the inquiry and its jurisdiction have their justification.

4.7. Request for criminal inquiry

As we already mentioned, upon the decision to decree an inquiry, the Commissioner can also combine with a formal criminal inquiry.

In Quebec, the Commissioner has no power to conduct a criminal inquiry; its conduct is the competence solely of the police. Nonetheless, the law foresees that the Commissioner has the duty, and not only the power to communicate requests of criminal inquiry to the commander of the police force in question whenever the preliminary analysis of the complaint, it seems to him that a criminal offence has been committed.

In such cases, there will be two inquiries: one regarding criminal matters held by the police itself and the other by the Commissioner regarding deontological aspects. In practice, these two inquiries are not held simultaneously for the Commissioner allows firstly the criminal inquiry to be held, and in due course to take and complete its findings, if it is held, whenever it seems useful for doentological purposes for him to do so.

This new arrangement seeks to ensure that the plaintiff will see his complaint dealt with adequately and in every respect; the doentological system must not be a process that leads to decriminalisation of actions for the benefit of the police officers,

when these same actions would lead the ordinary citizen to be taken before a criminal court in normal circumstances.

5.0. COST REIMBURSEMENT

At the beginning of this presentation, I have mentioned that a number of budgetary considerations would need to be specifically dealt with. For some time now, the Quebec system of police doentology has another particularity that, in our opinion, warrants to be presented: the financing of the conciliation and official inquiry activities. The law foresees that costs connected to the conciliation process or to the official inquiry must be reimbursed to the Commissioner by the employer of the police officers who are the subject of the inquiry, and following a pre-defined hourly fee for work performed by the conciliator or the inquirer.

It is not necessary to insist to understand that the managers of the police force are themselves affected by the conduct unbecoming their serving police officers risks to seriously reduce their budget available to them.

The Commissioner is also requested to put in place a rigorous management process that allows for the justifiable costs to be retained while remembering that this concern cannot at any time be given higher priority than the right of the citizen to have his complaint dealt with in fair manner and according to the law.

6.0. Conclusion

The Quebec system of police deontology as we know today is the fruit of a long-standing thinking processes, trials and legal changes the last of which date back to 1st October 1997. It has been elaborated bearing in mind the general context of Quebec society that evolves in its own political, social, economic and juridical environment.

A great deal has been achieved bit a lot remains to be done. For a number, this system should even more demanding in regard to police officers whereas for others it is already excessively so.

One thing is for sure, the thinking process needs to be pursued and receptive to what is done elsewhere in this respect as well as the evolution of our society.

I thank the organisers of this seminar. Their kind invitation is an excellent opportunity for me to think further, and above all to draw from the experience of different participants and contributors.

Anita Hezenberg

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- Working as manager of the Programme “Police and Human Rights 1997 – 2000”

"A voiding Disciplinary Proceedings by
creating Human Rights Awareness
in Police Services"

Introduction

I was very honored to be asked by the organisers of this important conference to discuss with you the item 'human rights and policing'. I was challenged, however, when I saw that my presentation was to be delivered under the heading of 'disciplinary procedures'. The traditional notion of a 'disciplinary procedure' is that constituted by a system for the identification and punishment of offenders within the police I have always viewed the existence of such a system as only one of a variety of measures which I believe are required to prevent and deal with commission of human rights violations by the police.

1) Anita Hazenberg (1964) was born In The Netherlands where she went to the Police school at the age of seventeen for several years she worked as an operational

police officer in different pants of the country. She studied at the Social Academy for her bachelor degree in Equality issues and obtained a Masters degree in Politics and Pubic Administration from the Free University in Amsterdam She worked as an adviser to, the management on diversity and personnel issues and as staff member of the Dutch Foundation of Policewomen's network During the reorganisation of' the Dutch police, she participated in the project "organisation culture" and "designing new personnel policies", In 1991 she was appointed director of the European Network of Policewomen From April 1997 she has been working within the Council of Europe in Strasbourg as Programme manager "Police and Human Rights 1997-2000".

I hope you allow me to focus therefore in this presentation on a broader notion of 'disciplinary procedures'. I would like to view the development of 'disciplinary procedures from a wider perspective as the development of a culture and system of accountability and transparency within the police service. I want to focus not just on disciplinary procedures but also on other elements, which together form a pivotal multifaceted approach to safeguarding human rights by the police.

I want, in particular, to make use of this opportunity to challenge you to action. The problem with securing human rights is that it is too often seen as 8 matter of discussion and debate but not translated into concrete measures.

I would like to ask you what are you going to do with the information you receive during this conference? You could easily go back to your own organisation next Monday, give all the papers to your superiors and tell your colleagues that the seminar was interesting, the food and drink sufficient - that you had a great time in beautiful Lisboa. If that is your intention, may I ask you lust one question? Can you, as an individual, justify to yourself the fact that so many people here present are spending their time and energy to contribute to human rights and police efficiency, without any concrete results? If you are not sure how to answer this question can I invite you to consider what your personal involvement can be in concrete activities as a follow-up to this conference either here in Portugal or in your own country.

I hope that in this presentation I am able to give you some food for thought.

What can you expect from me today? After a brief personal introduction I will address the issue of the commission of human rights violations by police officers. I will suggest as to what might be the elements of a multi-faceted programme to tackle human rights violations by police officers. I will offer you a tool in the form of a pan-European Programme "Police and Human Rights 1991-2000" which can help you to create 'triggers' for change. Since time is limited, I'd better start...

I am honoured to speak to you as staff member of the Directorate of Human Rights at the Council of Europe where I was appointed in April last year as Programme Manager in charge of the Programme Police and Human Rights 1997-2000". The Council of Europe. Founded in 1949, the Council of Europe is the oldest Intergovernmental European organisation consisting at the moment of 40 members States. The organisation stands for a Europe of individual freedom, political liberty and the rule of law - principles, which form the basis of all democracies.

The Council of Europe should not be confused with the European Union, which has its headquarters in Brussels; my organisation is based in Strasbourg in France.

I am myself a Dutch police officer on secondment from my government to the Council of Europe. In the sixteen years of my police career I have worked as an operational police officer on the beat, as an advisor to the management of my police force on personnel issues and in the past six years as director of the European Network of Policewomen. As regards my academic background, I studied Equality issues and Politics and Public Administration.

Human Rights and Policing

If we consider that the protection of human rights is one of the main aims of the Council of Europe the link with policing is quite natural to make. I do not want to spend much time explaining the paramount importance of the role and responsibility of the police in relation to human rights. I think this was sufficiently underlined in the valuable contributions of the other speakers during this conference.

I would like, however, too particularly underline one aspect of the relationship between police and human rights. If a police service does not respect and protect human rights it is impossible to discuss co-operation between the public and that police service. Respect for human rights is a fundamental condition for whatever you want to develop in partnership.

One thing is clear - In every society there is crime. This results in feelings of insecurity within the community. We need to be realistic and not expect the police to be able to prevent and solve crime and to provide security without the support and active participation of the society itself. A partnership is needed in order to tackle crime and insecurity. In order to build partnerships with individuals and organisations in a society the police needs to be trusted. How can the police be trusted, consulted and work efficient if the community feels that its police does not respect and protect the basic human rights of the people it is there to serve? It is a little bit like a chicken and egg story.

Causes of Ill-treatment

I would like to take a closer look at human rights violations and ill treatment by the police. There are different ways of looking at the causes of this problem. Uildriks (1997), a Dutch academic, Identifies three different points of view:

1) Individual

This approach incorporates the view that if human rights abuses are taking place in a police service, the problem is the existence of "individual" officers violating human rights This means that the misbehaving police officer is seen as an exception, a so-called "selection mistake" or "rotten apple". The basic belief behind this approach is that in general the police acts within the law. If there is a problem however, the solution is easy - you simply remove the rotten apple, you make use of a disciplinary procedure

and the situation is resolved. This is, in my opinion, a very simplistic way of looking at the problem.

2) Contextual

The second perspective takes into account the specific circumstances in which the abuse by police officers takes place. With this contextual approach the causes of bad behavior by the police are explained by the situation in which the police officer finds himself or herself in. The way the officers experience and interpret a particular situation, and how they interact with an offender, determines whether they will use violence for example. Police officers may feel justified in committing human rights abuses in certain contexts. They explain their actions by saying, for example, that they were dealing with "a serious criminal"; that they misjudged the degree of violence that they expected the offender to use; that events happened too quickly for them to interpret the situation correctly; that fear for their own safety, the need to obtain information or a confession; or simple desire for retribution, made the violence inevitable.

3) Environmental

This last perspective takes into account the whole environment within which police officers work. Firstly, it is recognised that there are guiding influences within the police force itself, the "internal environment'. Some elements of the policing process, and the police organisation itself may, for example, foster a culture of violence. Uijdriks (1997) remarks that the strong emphasis on discipline and hierarchy prevents police officers from developing social skills. Also, the action-orientated bias of policing with its main focus on combating crime can encourage violence. Likewise, the fact that the police is a so-called "front-line" organisation is relevant here. Policing on the streets is generally carried out by the lower ranking officers; these officers report back to senior officers according to their interpretation of events. Police management does not

participate in street action, and therefore does not influence directly what happens on the street. In addition the so-called "code of silence" is a part of this internal working environment. Strong loyalty and a sense of duty to back up your colleagues are concrete examples of this code.

There are also external environmental elements which influence how the police may behave. The fact that the police are in an isolated social position within society encourages strong group identity amongst police officers and can legitimise the use of violence towards certain other groups in society. Westley (1970) describes how young recruits learn to assimilate the accepted rules of behavior within the organisation in order to become part of the inside world of policing. If a newcomer refuses to accept the internal codes, he or she may be punished or excluded by fellow officers as a result.

A Complex Matter

It makes no difference whether we look at human rights violations and ill treatment by the police from an individual, contextual or environmental point of view. All three approaches are complex enough in themselves. It is clear that we must develop measures to deal with the breadth of aspects of this problem. I am quite sure that you will think about adequate disciplinary procedures and that many of you will also immediately say that 'training' is the solution: "The police officers in my town have to fallow a course". I only partly agree with this.

Training, even when it is perfectly organised, will not be effective enough on its own. Will training help avoid a "selection mistake", will it prevent a recruit from becoming a "rotten apple"? Can aspects of the organisation itself, such as its social isolation, the strong emphasis on discipline, the action-orientated approach and the front-line character of the job be changed by training? My answer is no. I do not believe that such a strong, internally orientated police culture will be changed by training only.

That there is an urgent need for other measures to be taken. It requires a change of attitude and role from the people in charge of police organisation. The people at the

top have to stand up and make clear that in their organisation there is no place for rotten apples, no justification for ill-treatment, that the "code of silence" must be broken by changing the internal structure of the organisation.

A multi-faceted plan of action aimed at preventing human rights violations in European police services must be developed. The police in each country should take responsibility for implementing such a plan of action targeting different areas. For them to say that they have developed special training modules is no longer sufficient!

In my opinion we should examine making changes to the internal structure of police forces, into developing internal and external control mechanisms and, of course, into improving training.

With regard to changing the internal structure of police forces, I have in mind the following: police forces are, currently, strongly hierarchical organisations. Granting of greater responsibility to officers of lower rank should be considered. By doing so, officers would be less able to blame the system when abuses of human rights occur. They would become more personally accountable. Personal accountability and self-control are the key concepts here.

Closely connected with the need for personal accountability is the need for development of internal and external control mechanisms. Only by encouraging internal discussion and professional feedback amongst colleagues, fostering example setting behavior of middle managers, by introducing a system of rewards and sanctions and by establishing an internal code of conduct, will the "code of silence" disappear. Clear performance indicators should be developed. These are all measures are preconditions for the traditional notion of a disciplinary procedure

As Programme Manager of the Programme "Police and Human Rights 1997-2000", I call for the development of a basic plan of action inside every police service as a form of quality control in which basic standards are laid down in order to prevent, identify and punish ill-treatment.

External controls are also necessary in order to enable victims of alleged human rights abuses by police to have their allegations investigated. Lay visiting schemes can

be set up. Allegations of ill treatment could be made to an independent "Complaints Committee" or to an Ombudsman, for example. The crucial factor is that investigations into the complaint should be carried out by independent outsiders, not by members of the police service.

Police services should realise that every such investigation constitutes an opportunity to better their performance If they take criticism positively and act on it constructively they will be able to use the complaints system as part of their strategy to improve their record on human rights and by doing so earn respect as a trustworthy partner In society.

If co-operation between the police and the public is seen as an important tool to tackle crime and insecurity, I am quite sure that you also agree that it is fundamental that police should respect and protect human rights. If you recognise the need to maximise human rights awareness in your own police service you probably agree with the need for a multi-faceted approach. What can help you in creating this awareness in the police in your own environment?

Role of the Programme "Police and Human Rights 1997-2000"

Maybe the Council of Europe's programme 'Police and Human Rights 1997-2000" can act as a trigger for human rights activities in your own police service.

Bringing human rights awareness to Europe's police forces is the aim of this three-year programme launched by the Council of Europe on International Human Rights day, 10 December 1997. The programme follows on from previous work with senior police officers during a seminar organised by the Council of Europe in December 1995. The conclusion then was clear: a structural and co-ordinated approach is needed. The Programme provides a framework within which national, bilateral and multilateral projects in the field of police and human rights can be conducted in a coherent, co-ordinated and structured manner.

Responsibility for devising and implementing projects lies with the national police authorities in the member States, invited in March 1998 by the Secretary General of the Council of Europe, to actively participate in the Programme. Counties were asked to appoint a 'Police and Human Rights' Co-ordinator and to establish a national project group. On its part, the Council of Europe offered support and assistance to member States wishing to undertake their own projects. In practice this means the development of police and human rights training material in the form of a workbook, videofilm brochures and publications, Initiatives for research and specific seminars, the establishment of a network of police officers who are closely involved in human rights work. They will co-operate with other police services: working together using specially constructed databases, information and material exchanges and seminars. They will also help to devise human rights educational support programme including the development of training material and develop internal quality controls to prevent bad behavior.

The results of the programme will be brought together in the organisation at national level of a Police and Human Rights Week' from 28 October - 4 November 2000. During this week - commemorating the 50th anniversary of the signing of the European Convention on Human Rights - the police services in every member State will be encouraged to show to their community the efforts they are making to ensure that law enforcement officials respect and protect human rights. This special initiative should provide both a fitting conclusions to the three-year programme as well as a suitable jumping-off point for future action.

The programme is a facility offered to police authorities and is in no way thrust upon them. It is there to be used if so wished. For its part, the Council of Europe will act as a facilitator, providing assistance, contacts, expertise, information and ideas. Above all, it can give high-profile visibility to projects initiated within individual police authorities by placing those projects under the umbrella of a co-ordinated Pan-European Programme with clearly articulated objectives for police services throughout Europe.

By launching this programme, the Council of Europe hopes to trigger off imaginative thinking by police professionals, police authorities and non-governmental organisations about human rights in policing and to encourage them to initiate projects and 'good practice'.

Closing remarks

I am coming to the end of my presentation. The fact that we are here together during these days is already a clear indication that you have a specific interest in the subject human rights and police efficiency. I hope that this conference can be seen as the starting point for many new initiatives within the scope of policing and human rights. If you not want to go back to your office empty handed tomorrow take these challenges with you:

What can your role be In future initiatives to improve human rights awareness amongst the police officers in your home area? Why not?

- initiate activities that will prevent the need to use disciplinary procedures;
- start a project about the protection of misuse of personal data;
- organise a special training seminars on human rights issues;
- develop a code of ethics for your police service and the start of a fundamental discussion about basic values;
- initiate specific programmes for vulnerable groups in your local community like victims of crime, refugees, minority groups and women;
- set concrete targets how your police service can decrease the use of violence during operations;
- look again at internal control mechanisms for safeguarding persons in police detention; organise for, or in cooperation with the police a "police and human rights week" in your own community?

This year is a particularly appropriate year for the launching of new 'police and human rights' initiatives. 1998 was launched as "Human Rights Year" as the 10th December this, (which has been designated as "Human Rights Day") will be the 50th anniversary of the proclamation of the Universal Declaration of Human Rights. In 1999, the European Union will launch a campaign for zero tolerance of violence against women and the year 2000 will mark the 50th anniversary of the first concrete steps taken to enforce these values in the form of the European Convention on Human Rights. Why not use one or more of these landmarks as an incentive to launch new initiatives? There are many reasons to act and few excuses not to.

The Council of Europe has developed an international framework to put your activities into the right perspective and is there to give you the information, ideas and support you need. Only in this way can we together ensure that in every police service in Europe there is no place for rotten apples and that the way is cleared for constructive and successful co-operation! And I always remember the following saying: "At the end of the road you will smile over. The pebble stones, that once lacked like mountains".

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It was decided to include a panel on “Exercise of Disciplinary Action” within the scope of this Seminar, whose theme is “Human Rights and Police Efficacy – Control Systems of Police Activity”.

From the point of view of the Public Security Police, this panel bears a significant importance in face of the existing interaction between the exercise of disciplinary action within the Security Forces and the respective police efficacy. It can be even asserted that, to a certain extent, the exercise of disciplinary action constitutes one of the systems for controlling police activity, insofar as it allows for the development of internal control of the operation of the Services and their different levels of command, while at the same time exercising a punitive action –but **also of a pedagogic nature**- at the level of the officials of the Corporation.

In this way, similarly to what happens with most institution, the PSP also boasts norms of conduct indispensable for the cohesion and efficiency of the personnel that makes up its respective corps. Such norms of conduct are made up of disciplinary regulations or statutes, whose non compliance originates lack of discipline and the consequent application of legally contemplated sentences, having as their ultimate

objective the realisation of the very ends of the Institution- that is, the fulfilment of their obligation.

In the definition given by Law nº 20/87 of 12 June, **internal security** is the activity developed by the State in order to guarantee public order, security and peace, to protect people and property, to prevent criminality and to contribute to ensure the normal operation of the democratic institutions, the normal functioning of the fundamental rights and freedoms of the citizens and the respect for democratic legality.

The PSP is, precisely, one of the institutions responsible for carrying out this activity, which justifies its nature as an armed and uniformed police force, dependent on the Ministry of the Interior which obeys a command hierarchy at all levels of its organisation structure.

In order to carry out its mission, the PSP has available two personnel groups, basically: the personnel with **police functions** and the personnel with **non-police functions**.[83]

The “non-police” personnel correspond to about 3% of the total officials belonging to the PSP and carries out duties whose functional content is practically identical to that of similar or other departments or public dependencies. For this reason, the Disciplinary Statute of Officials and Agents of the Central, Regional or Local Administrations is applicable to them, which means they are the same disciplinary norms that are applicable to the majority of officials and agents of the Public Administration.

Thus, we justify the option of focussing this participation about “exercise of disciplinary action” in relation to the personnel with police functions by the fact that this “police” personnel represents the majority of the officials that constitute the PSP (close to 97%) - and because they play a fundamental role in pursuing the specific mission of this security force.

Now, both due to the PSP’s nature as well as to the interests this Institution has pursued –situated as it is within the scope of internal security- there was always

justification, and there continues to be, for the police personnel to be subordinated to **special disciplinary norms**, in view of the increased need to ensure a spirit of intimate cohesion, of obedience and of great efficiency at all levels of the organisation structure.

These norms presently embody the Disciplinary Regulation approved by Law nº 7/90, of 20 February, which is generically characterised by the demand for the exact observance of the Country's general laws, as well as of the norms and resolutions applied in special occasions. This demand is further founded upon the duties imposed to these personnel at the level of their professional conduct, as well as their conduct in private life, insofar as it is capable of affecting the dignity of the police function and the prestige of the Institution.

Thus, according to article 7th of the referred Regulation, it is a **general duty** of the PSP personnel to act in ways that will reinforce the trust in the actions carried out by the PSP action in the community, especially on what concerns its impartiality. Beyond this, the general duties of impartiality, zeal, obedience, loyalty, secrecy, correctness, assiduity, punctuality and righteousness are also considered essential.

Because of the relevance they assume within the scope of this Seminar in regards to the general theme proposed, we highlight the following duties:

- **The duty of impartiality**, which consists on not drawing direct or indirect advantages, monetarily or otherwise, from the functions carried out and to act with independence in relation to interest and pressures of any kind, in the perspective of the respect for the equality of the citizen;
- **The duty of correctness**, which consists on treating the public at large as well as the higher hierarchies and all other officials of the PSP with respect and due consideration;
- **The duty of righteousness**, which consist on assuming, during hours of duty and beyond, the principles, norms, attitudes and behaviours that express,

[83] Officials of the Army subject to the Regulation of Military Discipline also lend their

reflect and reinforce the dignity of the police function and the prestige of the corporation.

Because of the fact that the exercise of police functions constitutes a fundamental duty of the Administration, as set out in article 272nd of the Constitution of the Republic, the common legislator has also imposed several **restrictions regarding the exercise of fundamental rights** upon the personnel entrusted with police functions. These deal mainly with the rights to express, to demonstrate, to meet and to petition, whose violation equally constitutes a basis for the exercise of disciplinary action.

Thus, in the terms of article 6th of Law nº 6/90, of 20 February, among other restrictions, the police personnel are forbidden to:

- Make declarations which may affect subordination of the Police to democratic legality, to political and partisan impartiality, to cohesion and prestige of the institution, or to the dependency of the institution vis-à-vis the organs of government.
- Make declarations about matters that constitute a secret of State or of justice;
- To convene meetings or demonstrations of a political, partisan or syndical nature;
- To be affiliated to any national associations related to trade-unions;
- To exercise the right to strike or any other substitutive options susceptible of damaging the normal and efficient exercise of the police missions.

The PSP personnel with police functions respond to their hierarchical superiors for the infractions they may commit, that is, for the violations of the general or special duties that spring from the functions it carries out. All the hierarchical superiors that

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services to the PSP.

exercise command, administration or leadership duties have the competence of bringing action, or order for a disciplinary action to be brought upon the respective subordinates.

Nevertheless, **disciplinary competence** to judge infractions and the imposition of sentences pertains only the entities that carry out command or management functions, from the level of section commander to the level of commander-general, culminating with the Minister of the Interior, who is vested with full competence.

Whenever maintaining the police personnel posted represent an inconvenience for the service or for the clarification of truth, a **preventive suspension** may be applied. Furthermore, the precautionary measure of **disarmament** may also be applied by any hierarchical superior with a command or leadership status, when this measure proves to be necessary or convenient.

The sentences applicable to the personnel with police functions are:

- Verbal reprimand;
- Written reprimand;
- Fine of up to 30 days;
- Suspension of 20 to 120 days;
- Suspension of 121 to 240 days;
- Compulsive retirement;
- Dismissal.

The sentences of **verbal and written reprimand** are applicable to faults from which no prejudice derives to the service or the public.

The fine of **penalty** is applicable in case of negligence or misunderstanding of the functional duties from which manifest prejudice derives for the service, for discipline or for the public.

The penalty of **suspension**, on its turn, is applicable in case of serious negligence, an accentuated lack of interest in the fulfilment of professional duties or for facts that seriously affect the dignity and the personal prestige or the prestige of the

function. In the cases in which the infraction corresponds to the penalty of suspension the transfer of the offender can be additionally determined whenever it is deemed that - attending to the nature or gravity of the offence- the offender can not remain where he is maintaining the rank corresponding his function, or whenever he proves to be in collision with the milieu.

Lastly, the sentences of **compulsive retirement** and **dismissal** are applicable, in general, to disciplinary infractions that make it impracticable to maintain the functional relationship. Their application is of the competence of the Minister of the Interior.

These sentences are applicable to the official or agent who, namely:

- Commits any fraudulent crime punishable with a prison sentence of more than three years, with flagrant and serious abuse of the function he holds;
- Commits, albeit outside the exercise of his functions, any fraudulent crime punishable with a prison sentence of more than three years, that makes clear the official is incapable or undeserving of the trust necessary for carrying out his functions;
- Use of powers of authority not granted by law or abuse of powers inherent to his functions;
- Practice or attempt of the practice of an act that is classified by crime against the State by the penal legislation;
- Aggression, injury or serious disrespect for a hierarchical superior, colleague, subordinate or third party, at the workplace or in public;
- Concealing criminals or assisting them in any way that may contribute to frustrate or complicate the action of justice;
- Practice or attempt to practice an act that demonstrates the danger of his permanence at the institution;
- Practice of the crime of stealing, robbery, fraud, abuse of confidence, embezzlement, bribery, coercion or extortion, in an attempted or consummated way.

- Violation of professional secrecy or committing indiscretions from which prejudice may fall upon the State or third parties;
- Accept, directly or indirectly, gifts, gratifications or participation in profits as a result of the place he occupies;
- Habitual abuse of alcoholic drinks, consumption or traffic of narcotics or psychothropic substances.
- For being an accomplice of any crime contemplated in the points above, be it tentative or consummate.

In the **application of the sentences**, attention is given to the criteria mentioned before, to the nature of the seriousness of the infraction, to the category of the transgressor, to the degree of fault, to his personality, to his cultural level, to the length of service and to all circumstances that count in favour or against the accused.

The adoption of these criteria have been subject to an attentive consideration on the part of the hierarchical superiors to whom disciplinary competence pertains for the judgement of infractions and the imposing of sentences. This careful consideration is justified by the heterogeneity of the personnel that makes up the corps of the Corporation and which is basically the result of their different economic, social and cultural levels.

In fact it is this reality, as well as problems of a psychic nature sometimes derived from it, that are at the origin of the disciplinary infractions committed by the police personnel.

To lessen this reality a **service of occupational health** is in the phase of implementation at the PSP, which contemplates the adoption of adequate measures for improving the rendering of services and of preventive health and work accident conditions, as well as prevention of drug-addiction and alcoholism.

The **Superior Council of Justice and Discipline** operates in direct dependency of the Commander-General and is integrated by officials of the PSP in different

positions and levels of command. It is an organ of a consultative nature in matters related to justice and discipline, and it is charged with judging and pronouncing itself on:

- Disciplinary effects of the condemning sentences pronounced by the tribunals against the PSP official or agent;
- Processes for promotion by choice and distinction;
- Proposals for the granting of decorations;
- Proposals for the application of sentences of compulsive retirement and dismissal;
- Any other matters in the realm of justice and discipline.

Although these opinions are not of a binding nature, they have proved to be of inestimable value for the exercise of disciplinary action, especially in what concerns the appreciation of the punishable infractions with the sentences of compulsive retirement and dismissal, since they give way to a deeper reflection about the facts as well as of the adoption of unifying criteria in situations of an identical nature.

In order to be able to have an idea about the effective exercise of disciplinary action within the PSP we shall present the **statistical data** we deem the most relevant to this effect, regarding the last two years and more precisely to the period between January 1997 and October 1998.

We have here that 3 515 disciplinary processes were brought into action (corresponding to a monthly average of 167 processes) of which 1 193 were filed without a disciplinary procedure on account of lack of proof that the accused had carried out the infractions they were charged with.

In regards to the remainder of the processes concluded, 463 disciplinary sentences were applied and distributed as follows:

- 131 sentences of verbal and written reprimand;
- 276 fine sentences;

- 32 sentences of suspension;
- 16 sentences of compulsive retirement;
- 8 sentences of dismissal.

To finalise my participation, it is important to underline, moreover, that the exercise of disciplinary action is not restricted to a merely punitive action.

In all truth, in order for disciplinary action to be effectively exercised it is indispensable that -hand in hand to punitive action- there be rewards for all of those who reveal an exemplary understanding of their duties- meaning that they carry them out conscientiously and by making their best effort towards the achievement and progression of the objectives of cohesion of the Institution, as well as of the fulfilment of their mission.

In accordance to this principle, the Disciplinary Regulation of the PSP contemplates, additionally, that the personnel with police functions may be granted the following **rewards** to honour their exemplary behaviour and exceptional zeal, as well as to mark actions of social and professional relevance:

- Praise;
- Commendation;
- Promotion on account of distinction.

Praise is destined to reward those who, on account of their exemplary conduct, composure and righteousness, become deserving of a distinction on the part of their superiors or other entities.

Commendation is destined to reward important and relevant acts that are worthy of distinction and it is granted to elements that have proven exceptional zeal in the fulfilment of their duties.

On its turn, **promotion on account of distinction**, - a competence of the Minister of the Interior - is destined to reward elements of exceptional competence and

high professional bravery, or who have carried out acts of extreme valour or exceptional abnegation in the defence of people and property, at the risk of their own lives.

During the period comprised between January 1997 and October 1998, 554 commendations were granted through the various levels of the chain of command. To this type of reward we must add the praise also given by the same hierarchical superiors.

The personnel of the PSP that have rendered services all through their professional career and have shown a proven spirit of loyalty are further granted a **medal of exemplary behaviour**, which comprises the following degrees:

- Gold medal;
- Silver medal;
- Bronze medal.

The **gold medal** is granted to elements of the PSP who have had 25 years' effective service with an exemplary behaviour and who have revealed noteworthy capacity of zeal for the service and a high sense of virtue, obedience and the rules of discipline.

The **silver medal** is granted to elements of the PSP that have had 15 years' effective service with an exemplary behaviour.

The **bronze medal** is granted to elements of the PSP that have had 8 years' effective service with an exemplary behaviour.

During the same time period (January 1997 to October 1998) the following medals of exemplary behaviour were granted:

- 1 362 bronze medals
- 1 157 silver medals
- 579 gold medals.

We thus come to the end of our presentation, in the hope that it has contributed to the debate and considerations to follow.

António Pestana Garcia Pereira

Secretary General of the Portuguese Association of the Citizens' Rights

- Lawyer

I have here some words to say, which I do not know if meant to give or take headaches, but first of all I would like to thank, naturally, the invitation made by the IGAI, through his Inspector General. As a matter of fact, I have come to speak in this Seminar answering a request in that sense made to me by my good friend Mr. Alberto Augusto, when the person initially schedule to speak could not make it. If it were the gods or the demons that caused this replacement, it is up to you to judge!

Two previous questions, or rather three. First, for that same reason and also by reasons which are directly connected with my professional activity as a lawyer – and to say this is to talk about the first headaches I usually cause in the Courts of Law! – since lawyers are the only ones who must comply with deadlines in Court proceedings, as it is public and obvious, I had no chance to write down my text and only after this oral intervention will I do it.

For this same reason (second previous question), I was asked another sacrifice, almost unbearable, which consisted in speaking slowly and allow for some pauses. Let's see if I can do it. I hope so, out of respect for our foreign guests and also the translators who would have a hard job if I spoke with my usual rhythm.

Finally (third previous question), I am here in a triple quality and I do not reject any of those aspects. As a matter of fact, I am here as President of the Board of the Portuguese Association of the Citizens' Rights.

I also stand here as a lawyer, a profession in which I take great proud and in relation to which I always say that the first and main defect that a lawyer can ever have is that of being afraid because, when the day comes in which lawyers are afraid to say aloud what they think and what they esteem to be necessary, Justice will be over as will be over the Democratic Regime in Portugal!

The last but not the least, I am here as a citizen.

And it is exactly in these three qualities that I will keep myself faithful to my style, that is, to defend the ideas which I deem correct, doing that in a frontal and straightforward way, eyes in the eyes, no offence meant but saying everything I believe in.

Entering now the subject purposed, I must confess that I questioned myself very hard on which I should say on a subject about the disciplinary regime, the disciplinary power, the disciplinary question on an International Seminar whose general subject is the Human Rights and Police Efficiency. A Seminar furthermore illustrated by a slightly blue hand with some bloody traces on the tips of its fingers and sliding on something that looks like a glass case, which in vain I regarded for a long time trying to get some inspiration out of it. It seemed to me then – observing the quality of the other co-speakers – that it would make no sense to come here, surely repeating things previously said by others and in a better form, to make a pure description of the legal regime now in force. I rather thought that perhaps it would be more useful to make a few reflections on what must be the disciplinary regime and procedure concerning the Polices.

And this is what I will try to do, but not without at first warning you that I am going to be polemic about it!

The first point which I think is indispensable to bear in mind is that there are a lot of issues which are located upstream the disciplinary questions and precisely because

they are not solve at that point they end up on top of this aspect which is, at least at first sight, a final question so to speak, a question which is put on the final part of a given process.

What I mean is that it seems undeniable that near the end of the millennium the Politic Powers, not only in our country but also in our country, as they refuse to face with determination a set of problems which are in fact of a very serious nature, they are in truth, and with a greater or smaller amount of politic hypocrisy, unloading on the Courts and Polices the consequences, occurred downstream, of problems which should have been solved long ago.

I will not elaborate on this point but I would say that it is not through the Courts and the Polices that problems like unemployment are solved, that is, problems of a strategy of (non) development of our country which, in my opinion, aims at transforming it into a kind of golf courses, holiday resorts for the wealthy European, a strategy in which the margin of creation of employment in Portugal is smaller and smaller and by reason of which we all seem condemned – it seems in fact that this is the strategy of the "active policy of creation of employment" ... – to end up in certain fringes of the services or in rural tourism, that is, to end up, all of us, as babysitters or bartenders for the German or British tourists, working in rural hotels or in the golf courses in Alentejo.

So, considering the unemployment, the seasonal work, the lack of perspectives for the young people and the increase of such a serious problem as the drug problem, without a strong will to really attack those problems at their origin, the Politic Power evidently does nothing and then says to the person who was fired and lost his or her livelihood to "start an action in the Labour Court"; says to the young man who, totally in despair because, notwithstanding having done his studies and wishing to work, he can not find a job, may not get married, may not start a family of his own, has no perspectives and ends up as a drug addict (and everybody knows that becoming a drug addict automatically means, as things are, to enter the world of criminality), "you have become a criminal, let the Police arrest you, let the Court sentence you, you are going

to the universities of crime which are our prisons to complete your studies in that subject"!

Therefore, in my opinion there is here a first aspect which must be considered and which is that when we talk about Police questions and Polices we must bear in mind:

- first aspect, the Police is not suit nor may be suited to attack and combat the "visible face" of a certain number of economic, political and social phenomena which should be attacked further upstream and with economic, political and social measures;

- on the other hand, and this is the second aspect, I myself, notwithstanding the fact that I am a jurist (for my sins, I suppose), have been thinking for a long time that we must not have illusions about what may be the part played by the Law.

In fact, everybody knows that in a certain moment there was a legalised prostitution business in Portugal and the Government of that time, in the 60s, "solved" that problem: it enacted a decree-law and forbade prostitution; from that day on, as everybody knows, there was no more prostitution ... If, on the other hand, we wish the days to be longer, tomorrow we can have a decree-law published in the Official Gazette ordering the sun to set at 10 p.m. We can already see what will happen the next day, that is, the sun, complying with the "democratic legality", will only set at 10 p.m. ...

But, having no illusions about what the Law cam make, I think that, notwithstanding the fact that problems – some of them already briefly mentioned here - take their time to be solved, the truth is that we must be brave; I mean, it is always more difficult to fight the inertia and the state things are in than go with the tide. And obviously, if nobody has the courage to go against the tide, things will never change;

secondly, the Law can have the effect of inducing new conducts which may even be, at a certain time, minority ones but which will afterwards, little by little, begin to take form.

Mentalities are not changed by decree. But mentalities may be changed!

And, also in this field, there is a lot to be changed in terms of mentalities!

So, disciplinary regime and Police, let's now talk about this subject.

It is well known that during the regime that preceded the revolution of the 25th of April 1974, the security problems were abusively identified as necessarily representing Police problems. Security meant Police. And the police forces were mainly conceived as repressive forces, that is, suitable for pursuing the so-called enemies of the State, i. e., for pursuing, beating and arresting mainly workers and students. And, believe me, I have a great experience and practice also in this field, I am not only a law practitioner!...

In this concept, in which the so-called "Public Order" was defined as an end in itself and not even as a means, the policeman was regarded as an element of repression in relation to whom everything that might limit or impair his efficacy should be removed. This signified that it was absolutely unthinkable, within this logic of Police, the concept of a policeman as a citizen, with his own ideas and opinions, with his own associations and unions and even with his own rights.

I would even say that, to this concept of Police, the more stupid and brutal the police agent, the better from the point of view of the regime. Besides, all this was based on the concept of Police Forces instilled with a military attitude. To defend my arguments I will resort – see how curious these things are – to a text written by a General, the General Rangel de Lima, who called the attention to this military way of thinking, saying that:

"The more outstanding aspects of this military way of thinking could be thus typified [...] by a penchant for the heroic, the mystic and the fabulous, with credibility to

accept mystic explanations for phenomena and an attraction to metaphysical interpretations which escape scientific knowledge (...):

- a tendency to a vertical concentration of the decisions in charismatic Chiefs, (...);

- the incorporation, ever present, of the pragmatic concept of the enemy sublimated into the category of prejudice (...);

- a penchant for non rational and uncommon ways of action (...).

“This ideal characteristic picture leads frequently to the despise for the practical wisdom of the social intelligence of peoples."

So, I would say that in this kind of conception the Police – almost exclusively under a principle of command in which obedience was a fundamental value – would be so much "better" as fewer rights it would respect, first of all in relation to third persons, the citizens, but also in relation to the very rights of policemen.

Discipline was thus meant to maintain this "continuous compression" of the rights, considered as an indispensable condition of efficacy.

In my opinion, from here also derives, straightaway, the concept of the Polices as forces with Military or Militarised Statutes. However, I think that in a Democratic State such as the one we live in, at least supposedly, this kind of concepts must be completely modified.

The Police must be considered as a State Department like any other although, naturally, with its own characteristics, deriving from the particular functions it performs.

For their part, policemen must be considered as public servants like any other public servant, although with specific rights and duties, with particular characteristics of formation and preparation and even with a set of specific rights deriving from the functions they perform.

I think that it is precisely from this kind of democratic and modern concepts that result, in my opinion, a whole set of points on which should be based the question of Discipline in the Police Forces, but not only.

In the first place there is, in my opinion, a total lack of justification – I apologise to those who think differently for I do not wish to hurt susceptibilities but this is what I think – for the existence, at the end of the 20th Century, of a Police Force with the nature, statute, disciplinary regime and Military or Militarised Organisation such as the G.N.R., whose extinction I have already asked for and still do.

This is not about grasping the elements which form the G.N.R. Force, put them all aboard a Cruiser and send them anywhere, to a more or less unknown destination. This is not want I think!

The fact is that, in truth, it makes no sense to have two Police Forces: one meant for urban areas and the other meant for the rural areas and roads, one police force with a statute developing towards the civil kind and the other with an eminently military nature!

A Police Force is not, nor should it be, a Military or Militarised Force!

The conception and defence, in all aspects, of the Police or the Polices as a civilised Public Department in the two senses (a Civil State Department, instead of Military or Militarised, and respectful of civil rights) leads – and this is the second point – to the conception of the Police as an organisation formed by public servants who are correct and respect the citizens' rights, with a special emphasis on the criteria which preside the selection, preparation and training of the Police Agents.

A third point, directly ensuing from what I have just said: unequivocal acknowledgement of the right to union association and even of the right to go on strike, for all Police agents and not only, as it happens nowadays, for some of them.

The explanation I hear (besides some other explanations totally, pardon me the expression, absurd) for not acknowledge to Police Agents the right to go on strike is

thus based on deeply wrong presuppositions. The argument is that if the policemen will all go on strike we will see the criminals climbing prison walls, raping old ladies and mugging old men and, therefore, putting peace and public order seriously at stake.

And what about the warders? Do they not go on strike? They may, and nobody sees a problem there. And the Criminal Police Agents, do they not have the right to go on strike? They have, and no objections were raised against it. And I could go on and on. What I mean is that the question we are dealing with is not that of the right to go on strike but rather that of ensuing the performance of minimum services, a question for which the union associations are responsible. All this allows us to say that, the same way as when doctors go on strike we do not see thousands of sick people dying in every street corner, also if the policemen would go on strike, with the guarantee of the performance of minimum services, there would not be thousands of criminals at large.

So, it is not this kind of argument that may exclude the acknowledgement of the right to go on strike; the exclusion of that right simply results from the militarist concept of Police Forces.

Fourth point which I consider essential – and here begin the most polemic ones – is that of the disarmament of the Polices during their routine functions having as counterpart the punishment with more severe penalties of those who attack, assault, cause serious bodily harm or, even worse, commit murder upon(?) an unarmed agent.

Restriction on the use of firearms, only during certain services and for operations that justify their use, which otherwise should be kept in the armoury store of the police station.

Besides, I would like to call your attention to that circumstance of the authorisation given to a police agent to carry a gun at all times, supposedly because he is on duty for 24 hours; the truth is that he is not on duty for 24 hours, or rather, he only is for some matters.

There is a case which has always impressed me and that some persons in this room may know, specially those connected with the G.N.R.

I was the lawyer who represented the widow and the daughter of a G.N.R. agent who was run over by a van out of control at the door of his Unit at Calçada do Combro. He lived in Cartaxo or Azambuja. He had, like always, travelled all those kilometres using the public means of transport, in which he did not have to pay a ticket precisely because he was considered to be on duty. He was two steps away from the Unit's door at the time of the accident, accompanied by a fellow agent, who marched a little ahead of him, and was also run over by fortunately was not killed. Because he had not yet set a foot inside his Unit, the accident was not considered to have occurred during service according to an order rendered by the Minister of Internal Affairs, Mr. Dias Loureiro. That signifies that, even today, the "permanently on duty" is applied in some circumstances and is not applied in others; so, the restriction on the use of weapons for police agents when they are really on duty and only for certain duties is totally justified.

Another point: An end to the unacceptable and unbelievable (in my opinion) precept which establishes that, to assure the defence of the police agent who is accused of having committed an offence, during the exercise of his duties, the corresponding Commandment chooses and **pays**, or at least may choose and pay, for the services of his lawyer. This is a legal and constitutional barbarity; first of all, because it is a privilege since no other public servant has the right to have the services of his lawyer paid; secondly, because it is the Commandment that chooses the lawyer and this is against an essential principle, and against it in two senses, it prevents and violates the agent's right of choice, but specially because it determines another very serious kind of relation since, as the final decision belong to the Commandment, this situation creates an objective contradiction between that agent's interests and those of the Corporation to which he belongs.

Further, and according to my reasoning, the procedure and the disciplinary regime of the policemen must be those provided for by the Statutes of Public Servants which, besides, also needs some improvement because a lot of the previous spirit of the Disciplinary Regime of Public Servants, with sixty years old, is still there.

We must also put en end, in my opinion, to the deplorable mechanism, presently systematically used, of the suspension "ad aeternum" of the disciplinary procedure. I know that now it has decreased a little but continues, to a large extent, to be used notwithstanding the legal and constitutional principle of the independence of the disciplinary procedure in relation to the criminal procedure. That mechanism is, as we all know, that of suspending the disciplinary procedure until the criminal procedure is concluded. The argument usually invoked is that without it there could be contradictory decisions. But the truth is that they are not contradictory because they could only be contradictory if the facts established on each one of them would necessarily and strictly be the same.

Well, the fact is that there is no justification for this except for one thing: the use of this mechanism (which, if I am not mistaken, is foreseen by article 37, paragraph 3 of the Disciplinary Regulation of the PSP) allows, as everybody knows, the proceedings in Court to last for as long as they do and so this person never sees his disciplinary procedure reach its end and, in the meantime, is entirely in the exercise of his duties!

At this point, the criteria of disturbance of the tranquillity and public order no longer matter because when, in a certain urban centre, a given agent is, for instance, accused of the murder of a citizen he is quietly kept in the exercise of his duties because the disciplinary procedure is in course but is suspended and the criminal procedure is waiting for its development, or rather "lies", in some department (whether that is the Department of Investigation and Criminal Action or a Court of Law); this evidently causes a tremendous disturbance in the tranquillity, in public security, which now is no longer relevant. However, this is completely overlooked, as if nothing had happened, and unfortunately there are, as we all know, several examples of this kind. There are cases in which it was necessary that the victim was also an Agent of the Corporation to put, at last, an end to a series of irregularities and you know, specially those among you connected with the P.S.P. of Lisbon, what I am talking about: only when, after tens of citizens were the victims of a notorious "stolen cars' brigade", that same brigade began to insult and threaten your colleges of one of the police stations

near Cascais was the main responsible for those irregularities finally arrested. And, however, the cases had been increasing over the years!

Afterwards, the urgent and immediate implementation – in accordance with the ample terms mentioned by Professor Jorge Miranda in his initial intervention – of the principle ensuing from paragraph 2 of article 20 of the Constitution, i. e., the right of every citizen to be assisted by a lawyer when he has to appear before any authority.

This is also applicable to other entities, it is applicable to Public Prosecutors, but is similarly applicable to the Polices and in relation to all their acts, which means that even in the so-called detention for identification the citizen has the right to be assisted by a lawyer. I also think that in all disciplinary procedures in which there is a complaint about, or is involved, the violation of someone's human rights, it should be made possible the intervention in the procedure of the private defendant's lawyer, somehow similarly to what happens in the criminal procedure in which there is a public and a private accusation. And in what concerns the criminal procedure, the nature of public criminal offence must be consecrated in relation to all illicit acts which include the violation of Rights, Freedoms and Safeguards.

You know perfectly well that nowadays, with or without reason, persons who are the victims of acts of violation of rights are afraid to complain.

I also would like to say that this solution would not be exclusive of these matters since I sustain, for instance, that acts of negligence or even more serious ones committed in hospitals should have the same nature because the patients are manifestly in a condition of actual inferiority and are afraid to complain for fear of reprisals.

As far as I am concerned, in the same kind of cases, i. e., in the trial of disciplinary procedures for facts implying a direct violation of citizens' Rights, Freedoms and Safeguards, that trial should take place before a Council composed of (if not wholly, and that is a possible system, at least in part) common citizens of recognised aptitude and not entirely of elements that same corporation. All this combined with the obligation, at least for the same kind of proceedings and in which are at stake the same kind of

violations, to send the disciplinary procedure or the established elements to the Public Prosecution Department.

One of the thing which astonished me the most was the circumstance that it was considered a great achievement the fact that the Public Prosecution Department no longer refuses (as it did up to now, and wrongly in my opinion) to issue certificates relating to criminal proceedings in course in order to allow the disciplinary procedure to be initiated!

Even more serious is the fact that the elements established in the framework of the disciplinary procedure are not communicated to the criminal procedure. This gives way to, pardon my bluntness, scandals like that of the Ponta Delgada's affair, and you know very well what I am talking about!

I think that it is absolutely inconceivable that, at the end of the 20th century, a judgement like that can be passed. And the truth is that such a judgement could be passed because the Police Corporation did not provide the Judicial Entities with the necessary co-operation to establish which one of the two agents had fired the fatal shot. We know for sure, because the Court had to conclude that in its judgement, that the man who caused the youth's death was one of those two but, due to the absence of evidences given by the Police itself, it was not possible to establish which one of them did it!

But mainly and above all – and I am going to finish my speech – I think it is fundamental to assume, once and for all, that the respect for the Human Rights and the conformity of Police behaviour to the principles of equality, proportionality, justice, impartiality and good faith are not obstacles to Police efficacy but rather a condition to reach that efficacy. They should not be only, which they also are, essential duties of behaviour of all organs and Public Agents, namely police agents; they must also, and specially, be a natural and common conduct of a Democratic State, based on the dignity of the human being.

To conclude, I would dare to make a challenge.

If you tend to excuse abuses of power, violations of rights, demonstrations of intolerance and racism and even brutality itself, evoking your deficient conditions of work (which for sure frequently exist) or starting always by seeing in the denunciation of such situations the work of someone allegedly ill-intentioned, who made his purpose to unjustly attack the Police and the policemen, society, i.e., the common citizens will never acknowledge you citizen's rights; however, if you assume the scrupulous respect for the Rights, Freedoms and Safeguards of those citizens, as a high priority of your work towards society, surely that same society will pay you back, ensuring also the respect for your Rights, Freedoms and Safeguards!

Mark Gissiner

President of the Internacional Association for Civilian Oversight of Law Enforcement – IACOLE

Who Controls the Police?

I would first like to acknowledge and thank the Inspector General of Portugal, the Honourable Antonio Rodriques Maximiano, for inviting me to this prestigious conference and providing the opportunity to speak. As some of you may know, Mr. Maximiano spoke at the 14th World Conference of the International Association for Civilian Oversight of Law Enforcement (IACOLE) in the United States last month in Seattle, Washington, USA. I look forward to developing a solid relationship with his office and IACOLE, and I hope that he will once again be available to speak at our 15th Annual Conference next September in Sydney, Australia.

Let me first begin by indicating that through my relationship with the International Association for Civilian Oversight of Law Enforcement (IACOLE), I have gained considerable knowledge of police accountability issues and those models created by legislative or executive authority to address the issues of police accountability, external versus internal methods to handle complaints, and public accountability.

This session, titled *Who controls the Police?*, could be titled: *Who Watches the Watchmen?* It provides a subject that has been openly debated in societies during

man's civilized existence. It is also a topic that generates significant public opinion. It is accepted that the most visible public servants are police and security officers. (I must note that depending on the country, police are seen as agents of local government, state or provincial governments, and federal governments. In some countries, such as Belgium, there is a movement to nationalize police officers. In other countries, there is a movement to decentralize the police function from national security forces to local government police forces.)

So, who controls the police? Some would argue that no one controls the police. In fact, there are people in every country of the world, including the United States, that would make that statement, including those who have had tragic experiences with police would make this statement, and we would all recognize that there may be validity to what they say.

In many countries, some would argue that the police (or security forces) control themselves, for better or worse. (When I refer to police or security forces, I refer to a military or paramilitary police organization that has internal security responsibilities, as opposed to security forces that defend borders from external threats.) Many times when we see revolution in countries, the primary provocateur of a government's overthrow is the national security force. The police, who act similarity to an occupation force, take control of a country through force and install a government that is controlled by the leadership of the occupying force. We see this in Africa, Indonesia and other third world areas. For example, in a paper delivered at the International Conference on Civilian Oversight of Law Enforcement, October 18-19, 1997, in Belgrade, Yugoslavia, Dr. Stanko Pihler, Professor of Law at Novi Sad University, stated:

"Both experts and the general public have a mainly negative opinion of the legal, and in particular, de facto status and work of [the Yugoslavian] police, and not without grounds. In the past several years, our police force has lost what little good reputation it had though it must be noted that... police have never been held in high regard in these parts. People have never really trusted the police and, in the

present situation, perceive it as a power to be feared, a power that has often been turned against them, does not protect their interests and is unresponsive to the needs of the individuals and society. The police force is increasingly identified with the current, illegitimate regime and with unidentified forms of para- government.... People are especially skeptical about the work and efficiency of the police in crime prevention.

"Another phenomenon, connected with the first, is also evident: the police seem to be aware of the situation it is in and the position it has in the exercise of power. No healthy feeling of self-confidence and self-respect has been built up in the police force, only an illusion of self-sustainment and self-sufficiency. This creates unwholesome tensions in relations between police and citizens and within the police structure itself, and is one of the reasons why it is so bureaucratized. The basic function of policing, the prevention of crime, is sidelined in favor of the repressive function. Our police force, subjected to the pragmatism of day-to-day politics, is increasingly doing jobs it is not supposed to do and not doing those for which it exists. It does not seem capable of establishing a correct relationship with either the citizenry or the state as an institution and the agencies with which it must cooperate, whose legally constituted and supervised organ it should be, and therefore cannot have the right attitude toward itself. In a way, the police has unraveled as an organ and important agency of the state."

Some may wonder why I have included such a lengthy quotation about the state of police affairs in Yugoslavia. Well, sometimes, control of the police seems impossible without bloodshed, an extraordinary degree of public outrage, and essentially an overthrow of a totalitarian regime. Prospects for democratic policing that first and foremost respects the rights of its citizens, seems far away in some nations.

In other countries, effective systems of checks and balances minimize the threat of police to the citizens and allow for the sharing of power and control among many different government bodies. In addition, degree of control is dependent on the

personal characteristics of the police leadership, executive branch top official, and other bureaucrats who have been given the power to oversee the operations of the force.

On the other hand, many police, particularly those in a democratic society, contend they have little or no control, that their actions are controlled by bureaucrats, judges and legislators who have no real concept of modern day policing or the dangers that officers must face every day. They argue that political self-interest takes precedence over crime fighting and the safety of citizens.

The Hon. Sidney Linden, Chief Judge, Ontario Court of Justice, Ontario, Canada, at his speech at the 1997 World Conference of the International Association for Civilian Oversight of Law Enforcement (IACOLE) in Ottawa, Ontario, Canada, stated:

> "[Police feel] that civilians have no real appreciation of the unique difficulties and stresses of police work and hence, no right to judge them, or to be their watchdog."

In a speech by Dr. Martin Oosting, President of the International Ombudsman Institute and Ombudsman for The Netherlands (*Contributions on Ombudsmanship, International Ombudsman Conference, Taiwan, 1994)* he stated:

"Governments occupy a monopoly position in every society. They have, for example, a monopoly on the lawful use of violence - by the police in particular - in the enforcement of order and safety.... Governments are very significant sources of power in every society...."

Each point of view has some validity based on many factors. My view is that this paper should address *who should control the police.*

Analyzing how police should be governed (or controlled) requires us to consider some fundamental questions about ourselves and our relationship to government. How

we control police and security forces determines in large part the kind of society we choose to live in.

Police must recognize and honour fundamental constitutional and social values. Two fundamental issues must be addressed: the rule of law and responsible government

Rule of Law

In the 1800s, Professor A.V. Dicey, in the *Introduction to the Study of the Law of the Constitution, 10th Edition* discussed the rule of law as follows:

> "It means, in the first place, the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of government. Englishmen are ruled by the law, and by the law alone; a man may with us be punished for a breach of the law, but he can be punished for nothing else. It means, again, equality before the law, or the equal subjection of all classes to the ordinary law of the land administered by the ordinary law courts; the "rule of law" in this sense excludes the idea of any exemption of officials or others from the duty of obedience to the law which governs other citizens or from the jurisdiction of the ordinary tribunals.... The "rule of law," lastly, may be used as a formula for expressing the fact that with us is the law of the constitution, the rules in which foreign countries naturally form part of a constitutional code, are not the source but the consequence of the rights of individuals, as defined and enforced by the courts; that in short, the principles of private law have with us been by the action of the courts and Parliament so extended as to determine the position of the Crown and its servants; thus the Constitution is the result of the ordinary law of the land."

Responsible Government

Responsible government includes the principle that the executive branch of the government must be responsible to the legislative branch of government. The legislative branch exercises sovereignty in the creation of laws, and the executive branch is responsible to the legislature for the manner in which those laws are implemented and enforced. If the executive branch delegates enforcement to a subordinate body such as the police, then in turn the police are accountable to the legislative branch for the manner in which they conduct their duties. In a responsible government, the police are ultimately accountable to civilian authority and oversight. This concept distinguishes democratic institutions from dictatorial or totalitarian countries in which the police are either accountable only to the executive branch (such as in the Federal Republic of Yugoslavia) or in some cases, to no authority at all.

Responsible government also means that executive Cabinet members and legislative members are familiar with the policies and practices of police and security agencies. Police and security forces must not be permitted to withhold information from those within the executive who have ultimate responsibility over their operations.

Mechanisms of Accountability

There are schools of thought that promote police as having a sphere of independence which allows broad discretionary powers of arrest, confinement and control. Police in democratic societies can have tremendous impact on an individual's life. This emphasizes the requirement that there must be mechanisms of accountability that extend well beyond the internal structures of the police agencies and in fact, the executive branch itself. These mechanisms include an active and independent judiciary and accountability mechanisms that report directly to the legislature, bypassing the executive branch.

Dr. Oosting: *Bulletin of the Netherlands Jurists' Committee on Human Rights,* International Commission of Jurists, March 1994.

"The need for governments to respect the fundamental rights and freedoms of individuals is indisputable and overriding. In countries where these are threatened, ...the judiciary has to work hard to ensure that the respect for these rights and freedoms is observed by the authorities.... Only when respect for fundamental human rights, particularly the traditional freedoms is sufficiently guaranteed will there be an opportunity to consider other requirements of proper administration as well. These requirements may also be considered as an expression of society's expectations of the authorities. Therefore, the extent to which also these requirements are met determines, in part at least, the legitimacy of the authorities. In the meantime, respect for fundamental human rights should continue to be fully guaranteed...."

Dr. Budimir Bavovic, in a paper delivered at the *International Conference on Civilian Oversight of Law Enforcement,* October 18-19, 1997, in Belgrade, Yugoslavia, stated:

"The chances of establishing [control of police] depends to a major extent on the priorities given to the police. If the job of a police force is primarily to defend a regime, the process of establishing control will be much more difficult and slower than when the police are required above all to combat crime, and enforce the law protecting the people and state."

Separation of Powers

Fundamental to the control of police, and for that matter, government power holders, is the democratic principle of separation of powers. It is a fundamental element for stopping arbitrary actions by governmental agencies, particularly those agencies that have the power of arrest, search and seizure and the use of force, including deadly force to effect arrest and defend the lives of others. By the same token, politicians must

not over-legislate the police to the extent that the police are not able to operate efficiently, and instead spend most of their time wrestling with bureaucratic issues.

It falls upon the legislative branch to conceptualize, design and enact legislation (or laws) that state in detail, the powers with which the police may exercise. It is their responsibility to enact laws that protect individual and group constitutional rights, but also to protect citizens from criminal activity, including criminal activity of the police. The legislature must also create and have report to it, an independent body of oversight that acts in an executive capacity but reports to the legislative body. In most instances, it is complaint driven. This oversight body must be given the power to investigate and audit activities of the police beyond the boundaries of the executive branch. It must be free of political interference from all parties and cannot make decisions for political reasons otherwise it will fail to gain the credibility of the policing body as well. It must be transparent and have access to all employees of the police and their records.

The Police are not perfect. Sometimes they make mistakes in upholding the law, and sometimes they even undermine and violate that which they are sworn to protect. Like other branches of government, they must be subjected to outside oversight, particularly because they hold a monopoly on the use of force. The police cannot police themselves - not because they are by nature any more suspect than the rest of us, but simply because they are no less human.

The legislative body must also exercise control of the police by the use of the budget process. Control of police finances will have a significant impact on the strategies employed by police, particularly illegal ones. Financial power over the police can be an important tool of control that the legislative body must not overlook.

In the separation of powers, the executive branch will hold tremendous control over the police.

They will present the budgetary needs of the police to the legislature. This branch will exercise day to day control of the operational aspects of the policing function. It will appoint and control the police leadership, hopefully in a very firm manner. Foremost, is the leadership exercised over the police. As Dr. Bavovic stated:

"...If the job of a police force is primarily to defend a regime, the process of establishing control will be much more difficult and slower...."

For the goal of establishing independent and effective control of police services while at the same time allowing them the ability to function as an effective crime fighting organization, the role of the judiciary cannot be underestimated or understated. On the one hand, the judiciary must be the final arbitrator of a citizen's guilt or innocence whether trial by judge or jury. While it is often alleged, with degrees of truth, that the relationship between the police and judiciary is a close one, and even arguably the relationship between the police and the prosecutorial functions is extremely cozy, it ultimately falls upon the judiciary branch to make final determinations on the status of many issues involving police, particularly constitutional ones. The judiciary must be free of one party political control and must have safeguards in place to allow its total independence from political interference in the final decision-making process. This is one critical area missing in emerging democracies. There is a fundamental failure to realize that a one party system within a judicial branch under control of an executive (such as in Yugoslavia) destroys any opportunity to truly establish a democratic state and the protect to human and constitutional rights of its citizens.

Lucie Edwards, former High Commissioner to Kenya with responsibility for Rwanda, Burundi and Somalia, stated in a speech at the 1995 IACOLE World Conference held in Vancouver, British Columbia:

"The connection between law enforcement and the development of emerging democracies is one which is often overlooked. There is a natural tendency when speaking about democracy to focus on free and fair elections, but democracy is more than the casting of votes on election day. While the act of voting is often the only point at which most citizens come in direct and active contact with democracy, a society which is not governed by the rule of law, does not maintain an

independent judiciary or a free press and which does not respect fundamental human rights cannot be truly termed democratic.

"A key component in the process of establishing civil society in these [emerging] democracies is effective law enforcement. Anarchy and banditry had inevitably accompanied civil war, and there was a great longing among ordinary citizens for the restoration of law and order. Societies emerging from conflict or generations of dictatorship are often incapable of establishing an effective law enforcement regime.

Poorly trained or disciplined rebel soldiers or politically tainted police cadres from displaced regimes do not readily become guardians of the rule of law."

Police Control and Daily Interaction With the Public

My view is that the central issue involving the police control and the interaction with the public deals with complaints and the conduct, or misconduct of officers. In addition, concerns about systemic issues both in democratic and non-democratic countries tends to be the focus of people when concerns about conduct and control are raised. One example of systemic issues is the use of plastic bullets by forces in Northern Ireland, Korea and other countries, including the United States.

Concerns about police behavior and the ultimate issue of control including the methods for handling complaints against police have continued to expand for decades. These concerns were heightened by a series of commissions and government initiated reports into police practices, even in the most liberal democratic societies throughout the world. Among other things, these inquiries revealed the failure of police internal processes to hold police officers and managers accountable for their actions and to impose disciplinary sanctions commensurate with community standards. It was found that police were less than impartial in their internal accountability and management mechanisms. With regard to individual complaints, on many occasions complainants were interrogated and treated as though they were offenders; the police version of

events was overwhelmingly accepted at face value; there was often no record of interviews and in some instances there was rampant opportunity for police under suspicion of misconduct to collaborate.

People in the general community lost confidence in the internal, police controlled system. They objected to police being the investigator, judge, jury and sentencer in matters relating to the conduct of other officers and have started movements for more impartial and independent systems. A clear message was sent to governments: the police-controlled system was grossly inadequate as an accountability mechanism, and more important, citizens were no longer willing to accept such an unfair and unjust situation. In many instances, that solution was the establishment of independent, external civilian oversight bodies to oversee police misconduct. Evidence suggests that previous attempts by governments to deny problems relating to police misconduct have made communities cynical and distrustful of governments and the police, and under particular circumstances have had adverse electoral consequences.

In the establishment of the Police Complaints Authority for New Zealand, the then Minister of Justice (and later Prime Minister) the Right Honourable Geoffrey Palmer said of the bill (information provided in a paper titled *Political Interference in the Oversight Process* presented by Judge Neville Jaine, Police Complaints Authority for New Zealand at the 1998 IACOLE World Conference, Seattle, Washington, USA, October 20, 1998):

"The present system, whereby the police investigate complaints against police members, is fundamentally flawed. However conscientiously the police carry out their investigative function-and I am sure that they do so very conscientiously indeed - the suspicion of partiality must remain in the minds of complainants. it is fundamental to our system of justice that people should not be judges in their own fields. There cannot be public confidence in investigations that are basically in-house. In a healthy society, grievances need to be examined, and if people are

to air their concerns they must have confidence in the system. They must believe that their complaint is worth pursuing."

My other general observation is one beyond the control of the local authorities. Many internal and prosecutorial models lack the primary element necessary for a credible oversight system: **transparency.** It is very troubling to me that in a democratic country and a democratic state where citizens who are taxed to pay the salaries of public officials, including police officers, citizens do not have access to disciplinary records of public employees, or for that matter, the fruits of those disciplinary records. Citizens should have a constitutional right to inquire into the activities of the State. It makes a strong case for keeping our officials accountable and provides a strong deterrent to misconduct by public officials. Until the public has access to records of their own government, police forces will fail to achieve a reasonable level of public trust and credibility on issues of discipline, accountability and oversight.

Community Input Into Policing

All communities should have an effective say in how policing is carried out by being involved in recruitment, training, promotions, and community-specific enforcement priorities. Whether a local community is policed by a local, provincial, state or national police force, it must have a substantial voice in how it is policed. With this role, the community must have the ability to effectuate change when conditions exist in policing that the community finds to be unacceptable. Public approval resulting from civilian input and participation would in the long run raise, not sink, police morale. It is important to move away from an `us versus them' mentality and move toward a vision of a common enterprise for achieving social order.

Situation in the United States

In the United States, civilian oversight and external police accountability is not a profession at the national or state level. It does exist at the local level with local police forces which have arrest powers and powers to use force to effect arrest. However, civilian oversight and external police accountability at the local level in the United States in most instances was created and exists to placate minority communities which have the most contact with police. This does not in any way suggest that many of these local systems do not work well. As they evolve, and people begin to accept them, many end up functioning very well. However, often civilian oversight in the U.S. is marginalized, under funded and directed by those with little or no experience conducting investigations, particularly of police officers. There are no judges or other officials with outstanding credentials at the helm of these agencies.

The United States must rely on the United States Justice Department to prosecute local police officers. Despite millions of police contacts with citizens every year, and 28,000 police agencies in the U.S., less than 50 officers are prosecuted per year for civil rights violations in the entire country; and less than ½ result in convictions.

Conclusion

The challenge for the control of police lies in creating a system of governance for policing that will result in a fluid, transparent and cohesive structure responsible to the needs of society. The “rule of law” must be followed and responsible government must not only be a goal, but a reality as well. Governments must have systems of external accountability that are free of political interference and must be fair and impartial when evaluating actions of police. The legislative branch must be vigorous in their drafting of legislation that not only protects individuals from criminal activities, but also protects citizens from constitutional and human rights violations. The need for an active and independent judiciary cannot be understated. Their role is often that of final arbitrator of

issues involving public and police interaction. They must be free of political interference, especially from the executive branch and must adhere to the highest ethical standards. Their sanctioning body must be a legislature with impeachment powers to remove judicial officials who fail to follow the “rule of law.”

I have the great honor of speaking at the last session of this conference and this offers me the opportunity to leave you with something interesting, so I will try.

Control of the police is fragile because if police use their ability to militarily oppose judicial or legislative authorities, anarchy is possible. No matter what controls exist, at the end of the day, the citizens must depend on the integrity of police and military leadership of its members to respect human rights. And the government, citizens and police must always remember that the people who need the police the most, the poor, elderly, homeless, mentally ill; the people who need the police the most **fear** the police the most and it is your responsibility to lessen those fears.

Claes Eklundh

Chief Parliamentary Ombudsman – Sweden

The police organisation plays a key role in any country. The police have virtually a monopoly of exercising the power of the state to use physical force against persons, and an intervention by the police often involves a far-reaching encroachment on the integrity of the individual. Also many measures taken by the police are of such a nature that it is not possible - or anyway not very useful - to appeal against them to a court of law in Sweden this is true about e.g such actions as the searching of a person's body or house or the taking into custody of an intoxicated person

In a democracy based on the principle of the rule of law the legislation concerning the duties and powers of the police must strike a balance between the general interest of maintaining public order, on the one hand, and the legitimate interest of the individuals of enjoying fundamental rights and freedoms in relation to the state, on the other. The basis of this legislation is the general philosophy of democracy, which means i.a. that the state is regarded as having no interests of its own different from those of its members, There are consequently no special "police interests" as opposed to the interests of the citizens The task of the police can be expressed as protecting the citizens without harassing them.

This balance between opposing interests, which is typical of democracy, is expressed already in the first chapter of the Swedish Instrument of Government, which is part of the Swedish Constitution. It is stated there that the fundamental aim of the activities of the community is the personal, economic and cultural welfare of the individual. It is obvious that this wide welfare concept includes the protection of the members of the society against crime and public disorder. This aspect is elaborated in (he Swedish Police Act, which states that, "as part of the activities of the community in order to further justice and security, the work of the police shall have as it aim to preserve public order and safety and to offer the public protection and assistance".

On the other hand, however, is prescribed in the same chapter of the Instrument of Government that public power shall be exercised with "respect for the equality of all human beings and for the freedom and dignity of the individual" This obviously means that there are some limits as to the methods that can be used by the state in order to attain the aims of the public activities

The most important limitations in this respect are to be found in the second chapter of the Instrument of Government, which contains provisions concerning the fundamental rights and freedoms of the individuals In addition to this the European Convention on Human Rights has recently been incorporated into Swedish domestic law.

That the role and activities of the police have a constitutional aspect is made quite clear when one studies the following provisions in the Instrument of Government.

"Every citizen shall in relation to the community be protected against any forced encroachment on his body - - -. Furthermore, he shall be protected against any bodily search, search of his home or similar encroachment as well as against secret surveillance or Secret recording of telephone conversations or other confidential communication."

"In relation to the community every Citizen shall be protected against being deprived of his liberty. He shall also in other respects be guaranteed the freedom to move within the Realm and to leave the Realm."

These rights and freedoms can not remain unlimited of course It is stated in the Instrument of Government, however, that they can be limited only by statutory law decided by the Swedish parliament, the Riksdag. Every

intervention by the police against an individual must thus be founded on an express provision in an act of law. Such provisions are to be found i.a. in the Police Act and the Code of Judicial Procedure.

It is in the nature of things that legal piles protecting the integrity of the individuals set limits to the methods that can be used by the police. As a result individual policemen might sometimes regard such rules as unnecessary hindrances in the work of the police. In fact the risk of misuse of the powers of the police for a good cause must never be neglected. There is always a risk in police work that the end is considered to justify the means.

In a democracy based on the principle of the rule of law it is thus not sufficient to make sure that the powers of the police are carefully circumscribed by the law In order to maintain public confidence in the police it is also necessary to see to it that the police do not exceed these powers. For this purpose it is necessary to supplement the legislation concerning the police with an efficient system of supervision. The most important purpose of such a system is to maintain public confidence in the police.

Systems for supervising the police can of course have many different shapes. I intend to describe the Swedish system with special emphasis on the role of the Parliamentary Ombudsman.

The Regular Supervisory Organs

The Swedish system of supervision of the public authorities is based on the principle of personal accountability of every official for his actions in his official capacity. Serious transgressions of the legal provisions regulating the duties of an official are punishable under criminal law. In the Swedish Penal Code there are provisions concerning misuse and negligent use of public power, which are applicable in such cases. In the first place it is the task of the public prosecutors to take the initiative in the application of these provisions.

Offences by a public official can also result in disciplinary punishment or dismissal. These sanctions are primarily used within the police organisation itself. It is the duty of the head of any police authority or unit to see to it that the rules regulating the work of the police are applied in a correct way and to initiate e.g. disciplinary proceedings where this is called for. For the investigation of

such cases every commissioner of police has at his disposal a special unit, which is quite independent in relation to the main body of the police authority. Cases concerning disciplinary punishment or the dismissal of a police officer are decided by a special disciplinary board within the National Police Board. If the case concerns a senior police officer it is dealt with by the National Disciplinary Board, which also handles eases concerning judges and public prosecutors.

In addition to this there is a system of hierarchical monitoring within the police organisation. The National Police Board has a special unit for the supervising of the local police authorities The activities of this unit mainly consist of inspections on the spot. Also the County Administrative Boards, which have some important functions concerning the police organisation, have a duty laid down in the Police Act to supervise the police authorities in the county. With the exception of the County of Stockholm this duty has been largely neglected, however, and a governmental commission has recently proposed that the duties of the County Administrative Boards as regards the police shall be abolished.

Public confidence in the police cannot be maintained if allegations of a more serious nature are dealt with by the police itself as I have already mentioned matters concerning the accountability under criminal law of the public officials are dealt with by the public prosecutors. It is laid down in the Governmental Ordinance on the Police that every allegation that a police officer has committed a crime in his job shall be handed over to the prosecutor even though it may appear to be quite unfounded. This applies also to suspicions that have arisen within the police itself. If the prosecutor decides to investigate the case he is assisted by the special police unit that I have just mentioned.

A prerequisite of this system obviously is that the prosecutors are not part of the police organisation in any way. Even so one cannot quite avoid the problem of the "police investigating itself".

One way to meet the demand for an impartial supervisory institution outside the ordinary administrative and judicial system is the Ombudsman.

The Swedish Ombudsman system

The first Swedish Parliamentary Ombudsman was elected in 1810. The new institution was pant of a constitutional system based on the principle of balance of power between the King and the Riksdag. The duty of the ombudsman was to supervise, in his capacity as a representative of the Riksdag, the observance of laws and other statutes by all judges and other officials. The weapon of the ombudsman was the right and duty to prosecute those officials who had violated the law in their official capacity.

Today the basic provisions concerning the Parliamentary Ombudsmen are to be found in the Instrument of Government of 1974. The activities of the ombudsmen are part of the parliamentary control of government. This control is divided between the Riksdag itself and the ombudsmen in such a way that the Riksdag, represented by its Constitutional Committee, supervises the Cabinet ministers and that the Ombudsmen supervise the Courts of law and the administrative authorities of the state and the municipalities.

In order to understand the position of the Parliamentary Ombudsmen in the Swedish system of government it is necessary to have some knowledge of the Swedish public administration. Unlike most other countries Sweden does not have a ministerial system. This means that the ministers are not heads of the different branches of administration. Their duties are instead concentrated on policymaking activities. The administrative work is carried out by autonomous administrative authorities which have the same constitutionally guaranteed independence as the courts when they apply acts of law decided by the Riksdag or otherwise make decisions concerning the rights and duties of individuals or juridical persons. Every authority and every official has an independent responsibility for ensuring that the treatment afforded a case as well as the decisions in the cases are lawful and correct also in other respects.

In addition to the constitutional provisions more detailed provisions about the ombudsman institution are to be found in an act of law decided by the Riksdag. Within the bounds laid down in this act the ombudsmen have complete freedom of action also with regard to the Riksdag. They decide themselves about their procedure and they select on their own discretion the authorities that

should be inspected. The issues that should require their attention and the complaints that should be investigated.

The ombudsmen are nominated by the Constitutional Committee of the Riksdag and elected by the Riksdag at a plenary sitting. There are no provisions concern mg the qualifications of the ombudsmen but in practice only persons qualified to sit on the bench of the Supreme Court or the Supreme Administrative Court are elected.

The term of office is four years. Re-elections are possible and frequent. An ombudsman can be elected by a single majority. The tradition is however that every ombudsman shall be elected unanimously. This is a way of proving to the public that party politics play no role in the work of the ombudsmen.

The ombudsmen are accountable only to the Riksdag. An ombudsman who has lost the confidence of the Riksdag can be dismissed immediately by a single majority vote on the proposal of the Constitutional Committee. Neither the committee nor the Riksdag is allowed, however, to review the individual decisions of the ombudsmen or to give instructions to an ombudsman how he should deal with a specific case.

There are at present four Parliamentary Ombudsmen. Each of them investigates and decides his or her own cases quite independently. The total area of supervision is divided between the ombudsmen according to subject. Only an ombudsman is entitled to sign a final decision in a case.

The ombudsmen are assisted by a staff of 50 persons. Some 30 of those are legally trained. They are usually recruited from the authorities and most of them are junior judges in the judicial career. There is no regional or local organisation.

The work of the ombudsmen is financed by an annual allocation, voted by the Riksdag without any interference of the Ministry of Finance on the basis of estimates made by the ombudsmen themselves

The main object of the Ombudsmen's activities is the safe-guarding of the principle of the rule of law and the protection of the rights of the individual as laid down in the Constitution and Swedish 14w. It is said in the Ombudsman Act that it is the particular duty of the ombudsmen to ensure that the courts of law and the administrative authorities observe the provision in the constitution concerning objectivity and impartiality and that the fundamental rights and

freedoms of the citizens are not encroached upon in the process of public administration. This provision refers i.a. to the fact that there is a Bill of Rights in the Swedish constitution. Even though the ombudsman institution basically is not a human rights institution it can be described as a part of the constitutional system protecting the fundamental rights and freedoms of the citizens.

The work of the ombudsmen is of a pronouncedly judicial character. It is based on the law, and the ombudsmen use the same methods as the courts when they interpret the law. The investigations and the decisions are strictly impartial. The ombudsmen do not side with either the complainants or the authorities. Today the main purpose of their activities is not; however, to have negligent officials punished but to improve the legal quality of the public administration and the administration of justice. One of the most important functions of the ombudsman institution is in fact to take part in the developing of Swedish administrative and procedural law. The ideal is that the ombudsmen shall prevent mistakes from happening.

All state arid local government authorities come under the Ombudsmen's jurisdiction including the courts of law, the administrative courts, the armed forces, the regular police force and the security police. The Ombudsmen's jurisdiction also comprises individuals and economic enterprises - state, local government or private ones - to the extent that they have been given the right 10 exercise public power.

The ombudsmen do not enter into the areas of competence of the courts and the administrative authorities. The ombudsman institution thus does not function as a surrogate court or an all-embracing administrative agency. The ombudsmen have an overlapping competence; however, in relation 10 the Chancellor of Justice, who is the Government's Ombudsman, and the regular control mechanisms within the administration. The same is true about the public prosecutors as far as crimes committed by public officials in their official capacity are concerned.

The ombudsmen have the right to refer a case to another complaint-handling agency. e.g. a public prosecutor or a state authority with supervisory powers, if that agency is better suited for dealing with the matter. When a police officer is accused e.g. of having used unjustified force against somebody the ombudsman usually refers the case to a public prosecutor.

The ombudsmen have extensive powers of investigation. They have access to all official documents whether they are classified or open to the public. Furthermore the authorities and officials are obliged to provide an ombudsman with such information and reports as he may request. Failure to give an Ombudsman full and truthful information is considered to be a disciplinary matter. This does not apply, however, if an official is suspected of having committed a crime in his job. In such cases the investigation is carried out according to the provisions in the Code of Judicial Procedure. In such cases the ombudsmen often avail themselves of the right laid down in the constitution to ask for the assistance of any public prosecutor.

The role of the ombudsmen is based on the principle of personal accountability of every official for his action. As I have already mentioned the character of the Ombudsman office originally was that of a prosecutor The ombudsmen still have the right to prosecute any official under their supervision for a crime committed in his official capacity, and they also have the right to initiate disciplinary proceedings. Today prosecutions by the ombudsmen are not very frequent, however, due to the fact that most of the errors discovered by the ombudsmen are not serious enough to deserve punishment under criminal law, and the same can be said about disciplinary cases.

The most important tool of the ombudsmen today is the power to make critical pronouncements about the activities of the authorities and individual officials and statements intended to promote uniform and appropriate application of the law. This power is directly derived from the power to prosecute. The ombudsmen soon realised that their work on the improving of the quality of the Swedish administration could be made much more effective if they intervened also against errors that were not of such a serious nature as to give cause to legal action. In order to be able to inform the officials about the contents and the correct application of the law also in such cases they introduced a practice of stating their reasons for not prosecuting.

These pronouncements are legally non-binding. The ombudsmen cannot change a decision made by a court or an administrative agency, nor can they order an authority to act in a certain way. In practice, however, the authorities

consider themselves bound by the ombudsmen's pronouncements in their future activities.

The ombudsmen also have the power to propose amendments of the legislation. They use this power especially in such cases where they find deficiencies in the protection of the individuals.

The majority of the cases dealt with by the ombudsmen are based on complaints. At present the annual number of complaints is close to 5,000. The largest numbers of complaints concern the social welfare system, the prison and probation organisation, the police, the courts of law and the social insurance system. The annual number of complaints against the police is approximately 500.

The majority of the complaint cases are not very dramatic or spectacular. The ombudsmen deal mainly with the everyday grievances of the average citizen. Some cases however, concern important matters of principle or attract great public attention for some other reason.

Everyone - also Citizens of other countries or persons not living in Sweden - can complain to the ombudsmen. There is no rule saying that the complainant must be personally concerned in the matter. There is no absolute time limit, but it is prescribed in the Ombudsman Act that an ombudsman should not, unless on exceptional grounds, start an investigation if the matter complained about is older than two years.

Complaints should be made in writing. When necessary, however, a member of the staff will assist the complainant with the wording of his letter.

Approximately 40 % of all complaints are dismissed without any investigation and another 35 % are dismissed after summary investigation.

There are many reasons for dismissing a complaint. Often the matter is already being investigated by another agency, e.g. a public prosecutor, or it might be pending in a court of law or an administrative court. Sometimes the complainant asks the ombudsman to do something that the ombudsman is not allowed to do, e.g. change or repeal a judgement or an administrative decision. In many cases it is obvious either immediately or after a summary investigation that there is no reason to believe that the authority has acted incorrectly. Complaints against the police e.g. often turn out to be unfounded or, in any case, impossible to substantiate.

Some 25 % of all complaints are investigated in lull. This is usually done by correspondence. The ombudsman asks the head of the authority to provide him with an account of the relevant circumstances in the case and to State his own view in the matter. If the case concerns a police authority the commissioner of police will avail himself of his special investigatory unit, when he investigates the matter at the request of the ombudsman. If the ombudsman is not satisfied with the Investigation and the commissioner's answer he will write back asking for more and better information. This method of investigation makes it possible for the ombudsmen to deal in a satisfactory way with a great number of complaints using only a comparatively small staff.

If the complainant is personally concerned in the matter he will (hen be given the opportunity to comment on the explanation of the authority. Sometimes further correspondence will rake place and the opinion of experts or competent bodies might be requested.

If it is considered necessary e.g. in order to obtain more or better evidence, the investigation is instead carried out by members of the ombudsmen's staff. When there is a suspicion that a police officer is guilty of a criminal offence - e.g. negligent use of public power - the preliminary investigation is often carried out on the ombudsman's behalf by a public prosecutor. This prosecutor and the police officers assisting him are selected in such a way that there are no connections between them and the suspected police officer and the police authority where he is employed The final outcome of the handling of all the complaint cases is that 10-15 % give cause to some kind of criticism by the ombudsman. As far as the police is concerned the figure is slightly lower, usually 5-8 %.

When the investigation is completed the ombudsman gives his decision. The decisions in the cases that have been investigated in full are often very detailed and in many respects written in the same way as the judgements of the courts of law The ombudsmen take great pains to make the text easy to understand so that the decisions can give the officials guidance in their future work. The decisions concerning the police are used in the teaching at the

National Police College, and this fact is taken into consideration in the drafting of the decisions.

The decisions are often reported in the media, and such decisions as are of special interest to the members of the Riksdag, the authorities, legal scientists etc. are afterwards published in the ombudsmen's annual report. The decisions are also often distributed by the competent central agency to its subordinate authorities. The decisions concerning the police are distributed to every police authority by the National Police Board.

Due to the Swedish principle of public access to official documents most of the complaints to the ombudsmen and all the ombudsmen's final decisions are open to the public. In the premises of the ombudsmen's office there is a special room for the press, where the incoming and outgoing mail is made available to the journalists. The media usually take a special interest in the investigations and decisions concerning the police.

Ever since the ombudsman office was set up the ombudsmen have inspected authorities all over the country. The ombudsmen together usually spend 50-70 days annually inspecting authorities of different kinds When a prison, mental hospital or a similar establishment is inspected the inmates will be given the opportunity to express their grievances directly to the ombudsman. The same opportunity is given to the conscripts when (he ombudsman inspects a unit of the armed forces.

When an ombudsman inspects a police authority he takes a special interest in reading documents concerning activities by the police involving the deprivation of liberty, the searching of a person or his house, the use of telephone tapping and other such measures. The ombudsman also tries to find out whether the investigations of reported crimes are carried out in an efficient and lawful way.

Sometimes observations made during an inspection will give the ombudsman cause to start an investigation on his own initiative. It might also happen that an ombudsman, when he is investigating a complaint case, discovers errors or unsatisfactory conditions that are not covered by the complaint. He will then act on his own initiative and open a new investigation. An initiative might also be caused by a report in the media. It is not unusual that an investigation concerning the police is initiated in this way.

Under the Ombudsman Act the ombudsmen shall submit a printed report to the Riksdag every year. This report is also distributed to every authority supervised by the ombudsmen. The annual report, which usually contains about 500 pages, gives a full account of all those cases dealt with by the ombudsmen that are considered to be of general interest. A summary in English has been appended to the report since 1969.

The supervision by the ombudsman of the police is considered to be of special importance, even though it makes up only a comparatively small pan (10-15 %) of the total work of the four ombudsmen. The main reason for this is of course the character of the powers given to the police. As I have already mentioned these powers often involve limitations of the constitutional rights and freedoms of the individuals. It is quite natural that a constitutional institution that has been given the duty to protect these rights and freedoms shows a keen interest in the work of the police. The confidence aspect is of special importance in this respect. As I have already mentioned the ombudsman institution is one way of avoiding the problem of "the police investigating itself". It might be added that the ombudsmen supervise also the regular supervisory organs. I have recently initiated an investigation concerning the way in which the police and the public prosecutors deal with reports against police officers.

The supervision by the ombudsmen of the security police is considered to be of special importance since the activities of this branch of the police for natural reasons are surrounded by great secrecy. The Ombudsmen can be described as the eyes of the citizens in this sensitive area. Here they take a special interest in matters concerning telephone tapping and surveillance of a person's correspondence.

Furthermore the interpretation of the police legislation by the ombudsmen is of great importance for the practical work of the police, since their pronouncements carry a special weight compared with the statements made by institutions within the police itself. The main reasons for this are the special legal competence of the ombudsmen and the fact that they have no other interest in the matter than the maintenance of the principle of the rule of law.

Cases Concerning the Police

Some years ago it was noticed that the Stockholm police had adopted special tac tics for dealing with crowds that were disturbing public order. These interventions were referred to in the press as instances of "collective taking into custody".

When dealing with such crowds the police simply took everybody on the spot into custody without inquiring into the activities of the individuals As a result several innocent bystanders were apprehended. The position of the ombudsman was that the assessment whether there are sufficient grounds for an arrest must be made on an individual basis.

At the outset the official police attitude was that tactics of his kind were legal The National Police Board recommended, however, that the law should be changed in order to "clarify" matters. This suggestion was rejected both by the government and by the Riksdag, which shared the ombudsman's view on the matter. After that the police accepted the ombudsman's interpretation of the law, and their tactics were changed accordingly.

The ombudsman some years ago also looked into some cases where the police had searched a person's body or home. According to the Code of Judicial Procedure such measures can be taken by the police only in order to investigate a crime that has already been committed. The police in different parts of the country made such interventions, however, against persons with a criminal record in order to frighten them off from committing new crimes. When the ombudsman had pointed out that these actions were illegal they were discontinued.

The ombudsman has also contributed to bringing about important changes in the legislation regulating the work of the police. For instance the ombudsman in several decisions called attention to the fact that many provisions regulating the powers of the police were insufficient or outdated and consequently very difficult to apply correctly. In consequence of this the government set up a special commission with the task of reviewing the legislation in question. On the basis of the work of this commission the Riksdag has recently decided on important changes in the Police Act, and changes in

the Code of Judicial Procedure are being considered within the Ministry of Justice.

The ombudsmen's decisions cover most aspects of police work. The ombudsman has e.g. discussed such matters as the use of entrapment for the purpose of acquiring evidence during a preliminary enquiry, the actions that can be taken against foreign residents suspected of traffic offences and the legal grounds for the searching of the premises of a convent during a search for aliens who were to be expelled from the country.

The Impact of the Ombudsman

On the whole I think that it is true to say that the Swedish ombudsman institution has been very successful. One important reason for this success is that it functions as a stabilising factor in the Swedish society by offering the ordinary citizen a cheap and simple way of having the actions of an authority impartially scrutinised as to their legality and fairness.

The ombudsman institution also is of great help to the authorities by offering advice and clarifying the contents of the law concerning e.g. administrative and judicial procedure. In this area the effect of the ombudsman institution to a large extent is of a preventive nature. Administrative errors do no happen simply because of the existence of the ombudsman. As I have already mentioned the activities of the ombudsmen have had a clearly observable effect on the work of the police.

For these reasons it is important that the ombudsman institution keeps a rather high profile it is essential that its existence and its activities are well known both by the general public and by the officials.

The task of preserving the rule of law and protecting the rights and freedoms of the individual cannot of course be left exclusively to the ombudsmen. The ombudsman institution thus cannot replace such law-preserving agencies as the courts, the public prosecutors or other regular institutions with supervisory powers. In Sweden it has, however proved to be an indispensable complement to them. The specific qualities of the ombudsman institution give it a practical and psychological effect that cannot be taken over

by any other agency, and this applies not the least to the ombudsmen's supervision of the police.

Luíz António Guimarães Marrey | Attorney General of the State of São Paulo – Brazil

POLICE CONTROL AND HUMAN RIGHTS. THE BRAZILIAN REALITY.

1 – The importance of controlling police activity in a democratic state of Law

Democratic regimes presuppose not only the choice of the governors by the people, but also the existence of constitutional and infra-constitutional mechanisms of control of the exercise of power.

The essence of democracy entails respect for human rights, which are contemplated in each country's Constitution, without prejudice of the application of rights and guarantees contemplated in the international judicial and political instruments that exist to this effect.

Democracies live with the permanent challenge of making possible for democratic judicial order to coexist with the right of the State to punish criminals, respecting the rights and fundamental guarantees on the part of the public organs. These organs, which hold a monopoly over the use of force for imposing the observance of the law, and avoiding its transgression, for investigating the authorship and circumstances of crimes that have occurred, and for supplying acts that will lead towards the promotion of the penal responsibility of the criminals.

All exercise of power requires some form of control or surveillance in order to avoid abuses.

Police institutions detain the exercise of an enormous parcel of real power, and their conduct, correct or incorrect, legal or arbitrary, serene or violent, brings effective consequences to the daily reality of the common people.

Therefore, police control on the part of the political institutions as well as from civil society itself is an imperative in order to guarantee the respect of human rights and the democratic regime itself, whose existence, many a time throughout history, has been threatened or suppressed by utilising the police organs.

2- Historical background of the Brazilian case

Such a concern is so much the greater in countries that have had the misfortune of coexisting with totalitarianism or authoritarianism, as is the case of Brazil, which has alternated, throughout this century, between brief, effectively democratic periods and long periods of dictatorship or even with formally democratic constitutional regimes which were oligarchic in their composition and administration.

In our country the police institutions (Military Police, Civil Police and Federal Police) utilised a number of their forces for political repression during the military regime.

Torture and homicide were methods utilised not only against political dissidents, but were also methods of combating common criminality.

As an example, we recall the existence of the so-called “Death Squadrons”, made up of police that killed criminals in the name of “public safety” at the beginning of the seventies in São Paulo and Rio de Janeiro. They also did it to eliminate competition that bothered other burglars and traffickers.

The return of the country to democracy and the validity of the 1988 Constitution was not able to carry with it, as some kind of a magic trick, the automatic end to violence and corruption in parts of the Brazilian police corporations.

To this we must add that there exist in the country, as is evident, intense social contrasts, an extreme coexistence between prosperity and misery. Brazil becomes an important route for the traffic of cocaine arriving from neighbouring countries. The internal consumption of this narcotic is also on the increase. The large cities, especially São Paulo and Rio, with their misery belts in the periphery, assist to an increase of violent criminality and also of violence in the police organs (not confusing them simply with the legitimate and legal use of public force).

Such a fact has stimulated the “political discourse of crime” on the part of some governors, which serves as an incentive for part of the police forces to eliminate criminals or mere suspects, adding to the large increase of the number of dead citizens.

In the State of São Paulo, with its 30 million inhabitants and a large parcel of the country’s GDP, the number of civilians killed by the police in the year 1988 was 294, increasing to 1140 in 1992 and to approximately 1400 in 1992, the year that reached the climax of official violence with the death of 111 mutinied prisoners in the Detention House of São Paulo (there were no hostages, the prisoners were surrounded, without any light, and no policeman was badly injured).

To conclude, it is important to register that, unfortunately, many significant activities related to organised crime have the participation or protection of police agents.

It is clear, therefore, that external control of the activity is normally necessary and absolutely indispensable in contemporary Brazil.

3- External control of police activity and the Prosecuting Council

The Constitution of the Republic of 1988 brought great advance to the organisation of the Prosecuting Council in Brazil.

In its article 127, the Prosecuting Council is defined as “a permanent institution, essential for the jurisdictional function of the State, entrusted with the defence of legal order, of the democratic regime and of social and individual benefits which are not readily granted”.

The Prosecuting Council is established outside the traditional tri-partite division of the State Powers, having at its disposal an independent operation and an autonomous administration.

Its main attributions are to promote penal public action; to oversee the effective respect of the public powers over the rights safeguarded in the Constitution; to promote civil enquiry and public civil action in defence of the environment, public patrimony, rights of consumers and other diffuse and collective interests; to promote action on unconstitutionality and apply external control of police activity.

The people who make up the Prosecuting Council are admitted by public contest and have the same rights and limitations of the judicial magistrature (with an organisation that is analogous).

The Prosecuting Council of the State of São Paulo, which I have the honour of directing, is made up of 1541 members, which alone represent more than 20% of the Brazilian Prosecuting Council.

Let it be noted that on account of the federal organisation of the country, the Member-States hold the larger part of this judicial competence, which is reproduced in the division of attributions between the federal Prosecuting Council and the States.

It was therefore an innovation of the 1988 Constitution to have brought external control of police activity (article 129, paragraph VII) into the scope of the institutional functions of the Prosecuting Council, to be disciplined according to the organic law. In the same way, article 129, ξ 5º, also in the Magna Carta, determined that the organisation and attributions of the Prosecuting Council of the States be designed by their organic laws, granting the respective Prosecutors General of Justice their legislative initiative.

In this way, the Organic Law of the Prosecuting Council of São Paulo (Complementary Law nº 734, of 26-11-1993) article 103, paragraph XIII prescribes the exercise of external control of the police by means of administrative and judicial measures. Among other activities, the representative of the Prosecuting Council can:

a) have free access to police or prisoner establishments ;
b) have access to any documents related to judicial police activity;

c) represent the competent authority through the adoption of the pertinent dispositions to restore, or prevent or correct the illegality or abuse of power;

d) requisition from the competent authority the opening of a police enquiry for the clarification of penal illegal acts occurred within the exercise of police activity;

e) to receive immediate notification of imprisonment of any person by state police authority indicating the site where the prisoner is being held and a copy of the confirmatory documents of the prison's legality;

f) receive petition or representation from any person or entity communicating disrespect for the rights contained in the Federal and State Constitutions (Article 103, ξ 2º of the Organic State Law of the P.C.), for the pertinent dispositions.

It can be pointed out, thus, that control of police activity came to be regulated by law only five years after the Fundamental Law, and its importance is emphasised by AFRANIO SILVA JARDIM, who teaches us that:

"…the true State-of-Law can not do without mechanisms of control over its public organs. Thus control must be made effective either through the institutions of civil society, in a tenuous way, or by the very state organs. On the other hand, it must be pointed out that the way to make effective the necessary verification is not necessarily important in what concerns violation of the autonomy or the independence of a specific organ of the Public Power. It becomes imperative to become moderately removed from merely corporate conceptions, which bear a strong conservative connotation and which do not address the interest of society as a whole". (v. Revista Forense 322/3 - Prosecuting Council and control of police activity").

4- The need for an effective achievement of external control

In spite of the innovative ordering for the external control of the Police - after almost ten years after the promulgation of the Federal Constitution- only in

the last few years have the legal conditions been obtained and the political will developed for carrying out this activity in a systematic manner.

Nevertheless, this way of acting is still limited and, in national terms, it has not yet achieved an integral success such that would inhibit illegalities and corruption on the part of members of the police organs or even an improvement in the effectiveness of the work carried out by the judicial police.

On the other hand, an increase in criminality is noticeable with the involvement of civilian and military police in squadrons dedicated to drug traffic, crimes against patrimony –the theft and interception of cargo and vehicles, for example – acts of corruption with the objective of impeding investigation and culminating with acts of violence or abuse of authority.

In reaction to such a variety of criminality, the Prosecuting Council of the State of São Paulo has achieved some of its greatest successes in the repression of the penal infractions practised by the police by acting in collaboration with either the office of the Civil or Military Corrector or with the Judicial power.

In what concerns the role of the Judicial Power, there has been a noticeable retraction of the exercise of the ancient and traditional role of the Corrector of the Judiciary Police in view of jurisprudential understandings by which judicial orders have presently substituted that function. To this regard, the decision of Recourse of Habeas Corpus of the Federal Supreme Court , nº 59.722-0 Rel. Min. RAFAEL MAYER RTJ 103/139) is illustrative, as indicated below:

“Thus, the determination of disciplinary responsibility of the judiciary police agents -which is a service integrated into the State Executive Power through syndication in any branch of administrative enquiry- extravasates from the competence of the Corrector of the Judiciary Police, because it is a matter that pertains exclusive and legitimately to the scope of the Public Administration.

The revelation of an illegal action that is caught into a judicially correct procedure should follow a line of competencies that will give rise to provisions of the consequent rights. It is unacceptable, therefore, that the Correcting Judge

compel the police authorities to bear responsibilities in a syndicate, without a jurisdictional character and without there being a hierarchical subordination.

In spite of the urgency of assuming this institutional function, the legal discipline of external police control attributed to the Prosecuting Council is backward in some States of the Federation and advanced in others.

In some States not even the State Organic Law of the Prosecuting Council –(which is the diploma in which external control should be dealt with, in compliance to article 129 of the Federal Constitution) has been approved.

In others, in spite of the existing legislation that normalises the exercise of external control, the development of this activity restricts itself to the normal accompaniment of the enquiries of the most serious cases involving policemen, in which specific designations of the Promoters of Justice take place.

The Organic law of the Prosecuting Council of the Union (LC nº 75, of 20-05-93), also contains decisions about external control of police activity, similar, as a matter of fact, to those contained in the Organic Law of the PC of the State of São Paulo.

Article 9th of this law determines that the Prosecuting Council of the Union shall execute external control of police activity by means of judicial measures, being able to I) have free access to police or prisoner establishments; II) have access to any documents related to police activity-end; III) represent the authority responsible for the adoption of provisions to make up for any undue omission, or to prevent or correct illegality or abuse of power; IV) requisition from the competent authority the opening of a police enquiry upon the omission or illegal act committed during the exercise of police activity; V) promote penal action on account of abuse of power. Article 10 of this law contemplates, furthermore, that taking any person prisoner, on the part of a federal authority, or of the Federal District and Territories, shall be communicated immediately to the competent PC, with the indication of the place where he is being kept and a copy of the corroborative documents of the legality of his imprisonment.

The Federal Prosecuting Council recently published an Act by which the activity of external control in the scope of its functions is disciplined.

In the Federal District and Territories, external control is carried out by the Promoter of Justice of Defence of the Judicial Criminal Order, which accompanies police activities by visiting police districts in order to observe a particular act of power abuse and by requesting provisions from the Corrector of the Civil Police or the competent military organ.

A differentiated treatment is foreseen for the matter in the State of Minas Gerais, in which a Public Prosecutor's office exists and specialises in the accompaniment of police activity; its performance, however, is limited to selected crimes carried out by policemen.

In the State of Amazonas, the exercise of external control is also treated in a specialised way by a Public Prosecutor's Office.

It is noteworthy to point out that in the State of Rio de Janeiro the accompaniment of the Prosecuting Council is carried out by the Police District or by the Specialised police Delegation, with specific Public Justice Prosecutor's offices, whilst in the latter State the activity of the Public Prosecutor is limited, according to the matter being dealt with (crime against life, against patrimony, etc.), to the Police Enquiry Sectors.

The activities of the Penal Investigation Prosecutor's office in Rio de Janeiro stand out because of the specialisation given to the appreciation of police enquiries and the accompaniment of the activity of certain police districts or specific areas where the Police carry out their activities (Specialised delegations).

Such a system is rewarded by a greater proximity between the Justice Prosecutor and the police authority, allowing a better development of the penal prosecution and a better analysis of the criminal problems of the region, in order to implement a criminal policy.

In Pernambuco, the Attorney General purports to regulate the execution of the activity, by means forming a team that is duly equipped to carry out supervision in police delegations and penal establishments.

In the States of Sergipe and Goiás there are already Co-ordinating Offices working exclusively on external control. Paraná is developing such an organ for the same purpose.

In Piauí, the Centre for Support to Infant and Youth Prosecutors develops an external control of the police, by means of visits to the police delegations and

the establishment of investigative procedures when children and adolescents are the victims of a penal illegality and the police are the suspects.

In general terms, there is a similarity between state legislation, in what concerns external police control, and the prerogatives and actions of the Prosecuting Council. The States of São Paulo, Rondônia, Sergipe, Amazonas, Pernambuco, Rio Grande do Norte, Paraíba, Mato Grosso, Mato Grosso do Sul, Maranhão and Roraima are also in the same situation. In Piauí, state legislation is identified with that of the States mentioned above, but different, however, by the fact the Justice Prosecutor is able to assume the direction of the police enquiry when designated to do so by the Attorney General.

What can be observed in this context, nevertheless, is that in a general way, the Prosecuting Councils of the States, of the Federal District and of the Union, still act in a fragmented way and are still neither totally organised for developing a policy that addresses the combat of macro-criminality and promoting an improvement in the penal investigations, nor for that matter, for inhibiting the abuses and illegalities practised by policemen in the exercise of their duties.

Thus, it is the Prosecuting Council's responsibility to integrally assume the objective with which it was constitutionally entrusted. That is, to follow the activities of the Judicial Police in a closer way, in an attempt of taking measures that lead to a decrease of criminality and to an improvement of the penal findings, but, especially, by making it assume a stronger presence when irregularities or abuses on the part of the police officials are detected.

It is imperious to totally computerise the work being carried out, not only in order to have all data on hand on the work that police are doing, but also to learn about what is not being done. For example: if a particular Police Delegation presents a great number of drug traffic cases and the Delegation geographically next to it presents practically none, it is necessary to obtain an explanation of the reason for this. How can it be done without controlling police statistics?

5- Limits of External Control

The Federal Constitution and the Complementary State Law nº 734/93 (Organic Law of the Prosecuting Council of the State of São Paulo), attributes the exercise of external control to the Prosecuting Council. This latter legislation outlines, in a more minute way, the general activities that the Justice Promoter must develop in order to exercise Police Control.

It is indispensable, however, to distinguish the limits of the external control which shall be exercised by the Prosecuting Council in order to better interpret and apply the pertinent legal norms.

It is pertinent to recall that the Civil, Military and Federal Police are organs of the Executive Power, to which they are subordinated, and have the attribution to apply disciplinary punishment, to proceed to a replenishing of authorities and police agents, etc. Such subordination, therefore, encompasses both the administrative as well as the disciplinary areas. Thus it can be inferred that the control exercised by the Prosecuting Council can not fall upon matters related to these areas, and therefore the solutions found can be only obtained before the competent organ of that Power.

The lesson put forth by AFRÂNIO SILVA JARDIM is written to this effect:

“Let it be emphasised that the control of the activity of the judicial police we have dealt with does not presuppose any hierarchical connection between police authority and the promoters of Justice or prosecutors of the Republic. The link here is merely functional or procedural.

On the other hand, heading the public penal actions – and therefore the exercise of penal prosecution- is entrusted to the Prosecuting Council, sometimes by requisitioning the opening of police enquiries by requisitioning diligences from the police authority for ongoing investigations. With this penal prosecution, the State-Administration takes notice of the criminal fact, and of its author, to the State-Judge, so that the punishments can proceed.

This said, those police activities that must be controlled can in principle be only those related to penal prosecution. In the event of the Prosecuting Council facing disciplinary or administrative problems on the part of the Police, any relative measures must be required or requisitioned from the competent organs of the Executive Powers for their appreciation (Correctors of the Civil or

Military Police and other higher organs of the Police or even the Secretary of State for Public Safety).

It should not be forgotten that a police enquiry is destined to subsidise the activity of the Prosecuting Council in cause, by providing it with the necessary instructional elements to initiate the persecution criminis in judicio (STF, RECr 136.239, Rel. Min. Celso de Mello, RTJ 143306). In this way, the Ministerial interest in perfecting the penal persecution is exercised still at the police phase, in the name of promptness and efficacy, and even to surmount failures in the production of evidence and in the prevention and correction of illegalities and abuses of the police agents related to the activity of criminal investigation. All of this is aimed towards the integration of the functions of the Prosecuting Council and the Judicial Police in favour of the prevention of criminality and public interest.

Other forms of control are:

I - It can be verified that Art. 144 of the Constitution establishes that “Public safety is a duty of the State and a right and responsibility of all”.

It is the Prosecuting Council’s duty to watch over the effective respect of the public powers in regards to the rights vested in this Constitution (art. 129, II).

This way, even if police organs are subordinated to the Executive Power, their absence or inoperativeness can be the object of a judicial questioning via a public civil action, based on the above-mentioned mechanism. Such omission can be verified in a civil enquiry presided by a member of the Prosecuting Council.

The above is new constitutional matter, but there are precedents of successfully proposed actions for the obtention of a positive rendering on the part of the State.

II – Even though there is no room for administrative interference on the part of the Prosecuting Council and, as a consequence of the Judicial Power, in police internal matters, it is evidently responsible for assuming judicial measures when there are proven irregularities in the police administration, such as the recent episodes occurred in the city of Santo André, in the State of São Paulo, when several Police Delegates were processed for having forged fiscal

bills obtained from gas stations in order to steal money they informed was being spent on fuel utilised for public service.

In this case, they are prone to penal action for crimes of falsification and peculate as well as to actions for administrative improbity. (Law 8429/92).

III- Another form of exercising external control of police activity is the very judgement of penal actions for the practice of the crime of torture and other delinquent acts when they are.

6- Instruments for the exercise of External Control

The State Law of the Prosecuting Council directs the means by which external control will be applied, in its article 103, paragraph XIII (LC 734/93). Police activity must be controlled through judicial and administrative measures, promoted before the competent authority, even by requisitioning a police enquiry in order to disclose the illegal act committed by a policeman in the exercise of his duty; by visiting to the police and prison establishments with free access to all departments, as well as to documents relative to the police activity during penal persecution and by the immediate reception of the notice of prison of any person and of representations or petitions of any person or entity that informs of violations of the constitutional rights carried out by police agents.

The visits to Police Delegations or jail establishments must be surprise visits. Otherwise there is a risk of turning the verification into a work of fiction.

Apart from the provisions contemplated in the State Organic Law, recurring from the entitlement to the right of action, it is the Provider of Justice's obligation to carry out, in addition, investigative dilligences in order to amend any omission or deficiency of police authority which may be harming the penal investigation.

Furthermore, before the Organic Law of the State of São Paulo, the member of the Prosecuting Council can initiate, in the exercise of his functions, civil enquiries and other pertinent procedures.

The fact is that experience has demonstrated the immense difficulty of the police itself investigating crimes committed by its very members.

In this way, only the accompaniment of the investigation or its direct execution by the Prosecuting Council will many times be the only means of getting at the truth of the matter and declaring the responsibility of the criminals.

In the State of São Paulo the Prosecuting Council published Act (N) nº 98 of 30/09/98, of the College of Justice Prosecutors, establishing the norms for the exercise of external control of the judicial police's activity, in which the objectives, the form and the instructions destined to its abidance are clearly stated:

"Art. 1st – The external control of police activity by the Prosecuting Council has as its objective the certification of the regularity and the adequacy of the procedures employed in the performance of the Judicial Police as well as the integration of the functions of the Prosecuting Council and the Judicial Police towards penal persecution and public interest.

Only paragraph. To this end, in his control activity, the Prosecuting Council shall endeavour:

I - the prevention of criminality;

II - the finality, swiftness, improvement and concretising of penal persecution;

III - the prevention or correction of irregularities, illegalities or abuses of power related to the activity of criminal investigation;

IV - strive to surpass the failures in the production of evidence, including technical evidence, for the purpose of criminal investigation;

Art. 2 – The Prosecuting Council, through the Promoters of Justice shall carry out the external control of the activity of the judicial police, by means of administrative and judicial measures of a preparatory slant, inherent to their quality of receiver of that function, being responsible, in particular, for:

I- carrying out visits to the Police Delegations, ensuring free access to those establishments for the member of the Prosecuting Council, which is invested with the respective duties;

II- carrying out visits to the prison establishments and Public Jails;

III- examining any documents related to the activity of the judicial police, with the possibility of obtaining copies;

IV- receiving immediate communication of the imprisonment of any person, from the state police authority, with mention of the place where the prisoner is and a copy of the confirmatory documents of the legality of the imprisonment, without prejudice of the communication due to the Judicial Power;

V- exercising control of the regularity of the police enquiry;

VI- receiving representation or petition of any person or entity, on account of disrespect to the rights assured in the Federal Constitution and the State Constitution, related to the exercise of police activity;

VII- initiating administrative procedures in the area of his attribution;

VIII- representing the competent authority for the adoption of provisions that purport to amend omissions or prevent or correct illegalities or abuses of power related to the activity of penal investigation;

IX- requisitioning from the competent authority the opening of a police enquiry related to the omission of the illicit fact occurred during the exercise of the police activity.

II- ON THE VISITS TO POLICE DELEGATIONS AND PENAL ESTABLISHMENTS

Art. 3rd The Organ of the Prosecuting Council shall promote monthly visits, at least, to the Police Delegations, prison establishments and Public jails.

Art. 4th ……

Only paragraph. The visits to the prison establishments shall also evaluate what the conditions of the prisoners are, and recommend that they may be heard by the Organ of the Prosecuting Council.

Art. 5th . The Prosecuting Council shall compulsorily have access to any documents, files or procedures related to the activity of the judicial police, as well as to the books that the Police Delegations maintain…

Only paragraph. By having access to the books related to the activity of the judicial police, the Promoter of Justice shall verify that:

I – In the book of Registration of Occurrences there is a record, in the appropriate column, of what the solution was for each case and if the police enquiry was initiated or not;

II – in the book of Registry of Police Enquiries there are columns reserved for keeping records of the filed copies of the police enquiries and the date of their remittance to the Judges as well as of the remittance of the copy of the prison act “in flagrante” to the Prosecuting Council;

III – in the book of General Registry of Prisoners the entries are made continuously, without leaving blank spaces, reserving columns for specifying the reasons for imprisonment and for noting down the communication made to the Judge and to the Prosecuting Council;

IV -in the book of Registry of Receipt of the Prisoners, the list of valuables carried by them is specified at the time when these were removed from them.

V – in the book of Registry of Occurrences referring to Law 9.099/95 the basic data of the occurrences are consigned, in the same fashion as the ones noted down on the book of Registry of Police Enquiries, specifying whether the Detailed Terms in it registered are numbered.

Art. 6th. The Organ of the Prosecuting Council shall verify the copy of the Bulletins of Occurrences that do not generate the initiation of a police enquiry as well as the reasons given for such a diligence on the part of the police authority. He shall be able to requisition the initiation of the enquiry if he deems it necessary.

Art. 7th. During the visits, the organ of the Prosecuting Council shall observe the destination given to arms, money, drugs, vehicles and other apprehended objects of special interest, mainly in those cases where the police enquiry has not yet been initiated, and, when necessary, he shall have access

to the respective registries and the right to request information from the agent of the public organ responsible for keeping the objects.

Only paragraph. In the cases when dealing with apprehended drug substances, the Justice Promoter shall certify the conditions of its safekeeping on the part of the police authority, in the terms of the ξ 1st of art. 40 of Law nº 6.368, of 21st October, 1976.

……..

III- OF THE NOTICE OF PRISON AND THE JUDICIAL DUTY

Art. 10th. It is of the Prosecuting Council's competence to ensure the communication of the Police Authority to the Prosecuting Council itself and to the Judicial Power about the imprisonment of any person, indicating the reason of the custody and the place where he is being kept, accompanied by the documents that prove the legality of the act, which shall be transmitted to the Justice Prosecutor's Office with the attribution for the exercise of external control, without prejudice of a similar dispatch being remitted to the competent Court.

Only paragraph. If there should be a file on judicial duty, it shall be of the competence of the Organ of the Prosecuting Council that is officiating the case to become acquainted with the communication from the prison.

Art. 11th . The Organ of the Prosecuting Council shall pronounce itself about the regularity of the prison and shall adopt the necessary measures to correct any illegality or abuse of power, as well as pronounce itself about the pertinence of conditional freedom, with or without bail, having to transmit this decision to the competent Court.

……

Art. 14th. Once the illegality of procedural prison is verified, the Organ of the Prosecuting Council shall make known its declaration and shall make provisions for the immediate remittal of the acts to the competent Court, in order to ensure the right to freedom.

……..……..

Art. 26th . The Organ of the Prosecuting Council shall be able to promote investigations directly by means of an administrative procedure of its own, to be defined in and Act of the Attorney-General of Justice, once the College of Attorneys is heard if:

I - there should arise the need for a warrant provision;

II - when the peculiarities of the concrete case demand so for the sake of efficacy of the penal persecution.

Since the Military Police also carries out duties in the area of criminal investigation, through its own means (Section of Justice and Discipline), a Normative Act was also published dealing with its external control, similar to that of the Civil Police, nº 119 of 13-05-1997.

7- Resistance of the Police to external control

The Civil Police, through the association of Police Delegates – ADEPOL, have systematically moved actions in order to try to obstruct the activity of control.

Despite a lack of success, the impugnation has been carried out in the Supreme Federal Tribunal of Colendo (Direct Actions of Unconstitutionality n. 1547-SP, 00011154/600-DF, 1336-0-Paraná 1138-3-RJ).

At other times, some police sectors have acted in the Legislative Assemblies of the States in order to prevent the mechanisms of the Prosecuting Council related to the matter in question from being approved.

All of the above just reaffirms the dire need for external control to be carried out and leads to an inevitable inquest as to the regularity of the performance of organs that fear being scrutinised.

8-Some cases with repercussions in São Paulo

The Prosecuting Council of São Paulo, as head of the public penal action, has promptly acted in cases of abuse of authority, of violent crimes and of corruption, in which there was involvement of civil or military policemen.

8.1.- In the so-called case of the “Bodega Bar”, at least two denunciations were made against Police Delegates and other policemen (investigators and notaries) , 8 (eight) in total, for crime of abuse of authority, kidnapping and private imprisonment, torture, corporal injuries, gang or mobbing and even for sexual crime (violent attack against chastity). The facts occurred from the 22nd to the 26th of September, 1996, within the 15th Police District, when 11 (eleven) suspects of the practice of robbery were the victims of these crimes.

8.2.- Related to the occurrence of March 1997, in the city of Diadema, in the well known “Naval” Slum, 10 (ten) military police were denounced by the Prosecuting Council for having committed consummated and attempted homicide, abuse of the use of authority, theft and gang or mobbing, having as their victims the residents of the place, who were stopped during the operation of the Military Police for “search and detention”.

On the 6th of October 1998, the trial of policeman Gamba, known as “Rambo”, was initiated on account of his responsibility for having effectively fired the shots that caused the death of Mário José Josino. He was condemned for various crimes to more than 60 years imprisonment.

8.3.- The Prosecuting Council also promoted a penal action against a Police Delegate and other three policemen for, on the 22nd of June 1998, for having a deposit of a great amount of “maconha” and cocaine in the office of the Sectional Delegation of Santo André , without legal authorisation, plus arms without the necessary permission (an AR 15 rifle, a cal. 12 shotgun, a two barrel cal. 12 shotgun, a carbine and two revolvers). In a police vehicle of the involved investigators were found, apart from yet another larger amount of cocaine and maconha, 16 printed DUT documents, licensing and registry

certificates, all removed from the DETRAN/SP offices. In the police quarters were found still other instruments destined to the practice of torture (shock machines and finger hanging).

The four denounced policemen are imprisoned and the process is in the phase of instruction of the defence (6/10/98).

8.4.- In what concerns the multiple homicide which took place in the House of Detention (Carandiru), where 111 prisoners died, it is worth pointing out that the military police were denounced, including the commander of the operation, and that the process is presently in the phase of recourse of decision of remittance of the process for judgement by the plenary of the Jury.

Considering that the crimes took place six years ago, and further taking into consideration that there are more than one hundred accused and that the Prosecuting Council had to fight in the Supreme Court of Justice to bring the case from Military Justice to civil Justice, it is easy to have an idea of the difficulties found all along the way.

8.5.- In what concerns the case of the 18 prisoners that suffocated in the minuscule cell nº 42 of the Police District of São Paulo, where they were placed as retaliation for their escape attempt, two of the three accused have already been condemned to long sentences and the third one is about to be judged again after having been absolved in the first judgement.

8.6.- I recently issued a recommendation to the Justice Promoters who have attributions for the external control of police activity in order for them to take the necessary measures to force the police to watch over the physical integrity of criminals and men suspected of having committed sexual crimes, in view of the risk of having them placed in cells packed with prisoners and therefore prone to experiencing sexual violence themselves, if not death.

8.7 It is necessary to note, however that these condemnations, processes and attitudes are taken in order to guarantee rights are never taken without controversy, since a part of public opinion sympathises with any policeman that kills a criminal, even if he does so against the law.

9- Conclusions

In any society the control of police activity is essential for the defence of human rights.

Every person has the right to live, to physical integrity, to not be submitted to torture or any other degrading or cruel treatment.

There is no justification for tolerance of criminal activities of public agents in any circumstances, under penalty of the State becoming equal to the criminals and having an arbitrary regime installed.

In order for these abuses to be avoided it is necessary that there be the provision of constitutional and legal mechanism for the exercise of external control of police activity.

Apart from this, it is fundamental that the members of the Prosecuting Council and the judicial magistrates have a firm political will to make the Constitution prevail and to repress the abuses that may come to occur, especially in the cases where the victim is poor or marginalised, where the offended parties have little or no power to make themselves heard in society.

If such determination of will should be non-nexistent, then laws shall not be more than a homage to hypocrisy.

In contemporary Brazil, in spite of the difficulties posed by the lack of a democratic tradition, there have been advances in the defence of human rights and repression of cases where it is violated.

The existence of a “National Plan for Human Rights”, in which the exercise of external control of police activity is set as one of the objective to be attained is helping in the ideological, political and judicial battle that is fought on all fields to become a reality.

Raising torture to the level of crime and the changing of competencies to judge deceitful crimes against life committed by military-police from the Military Justice to the rule of common Justice, the creation of police auditorships as well as other organs to keep watch of the police, the introduction of courses on “Human rights” in the curricula and police academies, among other measures,

have helped decrease the amount of abuses, although reality is quite diverse in the various parts of that continent called Brazil.

The punishment of policemen that are responsible for serious crimes such as that of the “Favela Naval” in Diadema-SP, or the massacre of street children in the “Candelária” in Rio de Janeiro show that, in spite of all difficulties, the chances of impunity have diminished.

In order for this evolution to continue it is necessary, above all, for democracy to consolidate itself and to grow deeper into the country. It is necessary for society to become convinced of the need to make human rights be respected and that it must demand from the authorities the strong and unequivocal stand for the repression of possible abuses.

The Brazilian Prosecuting Council must play its part in the defence of human rights by carrying out with efficacy the external control of police activity. This concern is specifically registered in the “Report on the situation of Human Rights in Brazil” of the Inter-American Commission of Human Rights of the OAS, published id 1997.

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The Control of the Police Performance

Portugal reassumed, in its full right, its role and its place in the context of the democratic nations on the 25th of April in 1974, assuming as a State of Justice and as a Republic based on the dignity of the human person.

The Portuguese police force is engaged, still today, in a process of conquest and of adhesion of the population to its performance and,as one expects,the police force will get the respect and the unequivocal credebility of the Portuguese only by its daily behaviour.

The truth, however, is that the police force and the police officers that exist in this country today consubstantiate on the whole an institution of the State of Democratic Law, having to protect the democratic legality and the rights of the citizens under constitutional demand.

Thus, the Poruguese police force exercises, in a legitimate way, a meaningful part of the democratic power of the Portuguese state.

It’s a police force in democracy.

Like other police forces, its performance is centralized in the potential conflict between the authority of the democratic state and the freedom of each citizen.

We expect quality and efficiency in the performance of the forces of security and of the police forces as well, but the fudamental rights of those citizens are a limit to their efficiency.

So it becomes necessary that the police performance develops obeying to the principles of necessity and of proportionality, being unacceptable any neglectful intentional behaviours that may question the right of the citizens to have security.

Reinforcing what have always been told, the efficiency of the police forces has a reason ob being and a limit which are the fundamental rights of the citizens.

The superintendence and the control of the exercise of power are marks of the democratic systems, only with these we can give an useful context to a system where the transparency is the rule and where its essence is consubstanciated in the equality of the citizens before the law.

That's why the States of Democratic Law are developing more and more prominently a great reflexion on the way of control of the police activity, so that the fulfilment of a full citizenship, of the strict defence of the Human Rights and of each individual (with its own face and identity) may be reached.

Although young, the Portuguese democracy has already established its systems of control of the police activity,being the General Inspection of the Internal Administration (IGAI) the last system of control.

These systems are worthy of being talked about briefly.

Portugal has at its disposal courts that constitute organs of sovereignty that are independent from the political power and the behaviours that have criminal relevance are judged by common courts according to the common laws and by common judges ,obeying to the principle of the natural judge.

Two professional, parallel, autonomous and independent from the political power magistratures integrate the Portuguese courts, that is, the magistrature of the State Prosecutor and the Judicial Magistrature.

The duties of the State Prosecutor are to defend the democratic legality and to exercise the penal performance, being consubstanciated in this magistrature the first step of external control which is independent from the police performance.

Portugal established the «Ombudsman» on the 21st of April in 1975, an institution that is consecrated in the 23rd article of the Constitution of the Republic, and which is within the rights and fundamental duties.

It’s of common knowledge, that the «Ombudsman» is an independent from the executive power entity,that is nominated by the parliament .

The «Ombudsman»‘s office is, though, another instance of external control of the police activity.

Despiteof these two instances of independent and external control of the police activity, some events that were published on the press as well as some reports of international organizations led the Portuguese government to create another instance of external control of the police activity, which is completely independent from the police forces and which is under the juresdiction of the Minister of Home Affairs in 1995.

As a result, the General Inspection of the Internal Administration was created but it would be only implemented on 26th of February in 1996, when the General Inspector, that was appointed by announcement of both the Prime Minister and the Minister of Home Affairs, took over.

One can read in the preface of the bill no 227/95 of 11th of September ,that the government committed itself to create an inspection of high standard which means a service of « ...superintendence which is specially guided to the control of the rights of the citizens and to a better and quicker administration of disciplinary justice in those events which have greater social relevance.»

On 26th of February in 1996, when the General Inspector made his speech, the Minister of Home Affairs defined the distinctive, typical essence of the IGAI as follows:

«None organization of control and of high superintendence within the MAI has operated in the last ten years ,although the services and the forces which have an important role to play in the exercise of the activity of internal security are concentrated there.»

He added:

Twenty years after 25th of April, today’s situation emphasizes the need of giving to this ministry a service of control and of superintendence of high level « which is specially guided to the control of legality,to the defence of the rights of the citizen and to a better and quicker administration of disciplinary justice in events of greater social relevance.» (DL no 227/95)

At last the minister emphasized the urge to establish the IGAI as a way to contribute relevantly « ... to a process of civic,professional,institutional and

cultural modernization within the area of internal security,a modernization that the Portuguese ask for,wait for and deserve.»

Almost three years after the beginning of its activity, and when the end of the 1st cycle of that same activity is getting near, I must say that the IGAI hasn't been subjected to any hostile attitude from the forces of security,that have been taking part, in a co-operated way, in a clear process of modernization and of significant changes of behaviour when it comes to the relations between police force and citizen .

Indeed this is not surprising. One couldn't understand a hostile attitude towards the appearance of the IGAI, unless Portugal had autocratic police forces, which are associated with non-democratic governments, which support them actually, since the IGAI would be considered as another way of external control of the police activity, specially in the area of the strict defence of the human rights.

The dependence of the Minister has been questioned within the area of a true system of external control in our international meetings.The truth is that existing the control of the courts and of the «Ombudsman», the IGAI, while an independent entity from the police forces, has revealed itself as a way of external and efficient control, being noticed the changes of behaviour of the Portuguese police force in its relation with the citizens, one must recognize that this couldn't be achieved without a great engagement in having a modern police force.

This is not the right place to make a balance of the activity,and speaking only about the performances in the more sensitive areas of the police activity, such as the offences against the physical integrity and against life, I must say to you that there is a clear reduction of the number of complaints.

In an universe of about 40.000 elements of the security forces,the complaints about severe physical injuries decreased to a total of 22 during all the year of 1997 from a total of 34 within ten months ' time of the year 1996,when the IGAI began its activity.

Refering to the occurrences of death of citizens associated with the handling of guns, 5 cases happened in 1996 and only 1 happened in 1997.

One may also say that these numbers refer to the complaints made, some of them having been investigated directly by the IGAI in cases they were

considered of having greater seriousness ,which led to the confirmation and to proposals of sanction in a percentage from 20 % to 30% in the year of 1997.

There is not only a clear decrease to insignificant values of complaints made about police inflicted injuries in the « Ombudsman » ‘ s office but also almost a lack of news on the Portuguese press of such occurences .

As the « Ombudsman» said to the press (published on the Público newspaper on 4th of November in 1998) the individual Human Rights are exercised and guaranteed without great difficulties in Portugal today.

We have reasons to believe that there is a great change between the relation police/ citizen and that the Portuguese police force is developing in the right way to a process of proporcional performance, without forgetting the respect for the defence of the fundamental rights of the citizens..Although being in progress, this process hasn’t been achieved yet, according to my opinion, since there are some improvements and developments to be done and , naturally, no one knows the dark numbers.

Before ending, I can’t help saying that Portugal ia a State of Democracy,where there is freedom of speech,of thought,of association and of the press.The external control of the police activity is though also exercised in an effective way by the many non- governmental organizations that are engaged in the defence of the human rights (some of these are here in this seminar), by the International Amnesty, by the public opinion and by a free press, all of these functioning in a clear way as informal systems of control.

The dignity of the Person is an inalienable principle and the human rights are no doubt the reason and the limit of any police performance. The existence of external systems of control of that activity, that are guided to the prevention and to the detection of events that violate those rights, is becoming essential.

The model of the systems can’t be uniform, it depends on the social-economical- cultural situations of each country and of its citizens as well as on the stage of development of the democracies.

Whatever the institutional model of control may be, including that one of the «Ombudsman», the results will be always fragile, if the political power isn’t seriously engaged in.

That's why the governments that are engaged in the defence of the human rights have to develop strong and different systems of institutional control.

One can only answer to the old question of knowing who superintends the superintendent if there is a diversity of institutions of control.

In this area I have to greet the constitutional principle of the external control of the police activity, which is given to the State Prosecutor in Brazil.

The informal, independent from the political power and enforceable of that same power systems of control are considered of greater importance in this area, while dynamical agents of the social participation of the citizens in the defence of their fundamental rights .

The social participation is the great agent of control of the democratic exercise of power.

Now that I'm concluding:

I think that the XXIst century won't deal so often with either the concerns about the physical injuries inside the police stations, like it is happening today, or with a system of control guided to this primary violance of the fundamental rights but with a total different reality in the more developed democratic societies .

The sophistication of the criminality will ask for new ways of control from the police forces, since criminal organizations will use new technologies and will have new ways of interfering within societies and within people's lives.

We will also see new technologies that will be used, the opening of the public and private lives to everybody, the making of registers and of bases of data about people, eventually numerical identifications and as a result of these, different ways of violance against the human rights.

The new systems of the police activity will have to develop and eventually, will have to requalify «our intervention in the XIV Worldwide Conference of IACOLE on 21st of October in 1998.

So the organizations of control will also have to reflect on their processes, instruments and dimension.

The problem of the migrations of the peoples,who are seeking for better living conditions, associated with phenomena of exclusion and of ethnic minorities; the groups of criminals,which the true isles of atavistic urbanization

have helped to create; the phenomena of the trade of narcotics,of the dependence on drugs and of its associated criminality, all of these together bring new challenges to the States and to the Security Forces, that may lead to the reasoning of the need for security, restraining thus, in an effective way, the fundamental rights of the citizens.

The future will bring new demands and challenges to the organizations of control of the police activity.

In my opinion, the activity of these organizations shouldn't develop either in an aggressive or hostile way, but in a pro- active,preventing way, following the pedagogy and the codes of behaviour.

On one hand, one shouldn't follow performances that will help the omission of the police activity, endangering thus people's security.

On the other hand, it's important ,I would say even decisive,that today's organizations of control ,as well those of tomorrow, establish that ,in democracies, the police must face the events with the necessary and proportional force, with transparency and without showing any doubts when it is exercising its legitimate power,which democracy enables it to have, so that the police may defend the citizens and may secure the populations.

The organizations of control should emphasize the difference between the legitimate use of the force from the police forces to secure the fundamental rights of the citizens, becoming that performance a duty of the police,as well as they sanction and criticize that consubstantiates the abuse of power, the torture, the physical injuries, the police violence in its reproachful way.

In this year, when we are celebrating the 50 years of the Universal Declaration of the Human Rights,when the International Criminal Court was established and when a new phase is beginning in the European Court of Human Rights, this Seminar, in Portugal, is - or was - without question, a relevant contribute to the organizations of control in the future, so that they may play a fundamental role in identifying the police officer like a citizen and sothat the citizens may not become police officers.

One should reflect upon what was told here.

Luís Manuel Ferreira Parreirão Gonçalves	Secretary of State for Internal Affairs

On closing this International Seminar, I want to, in my own name and in the name of the Minister of the Interior, whom I hereby represent, to congratulate all of you, organisers and participants, for the work developed along these last three intense days.

A plurality if themes were discussed, from Human Rights and the Police to social exclusion and minorities.

From control of Police Activity to Police and the Citizen.

We were graced by the presence of Academicians, Magistrates, Policemen and Lawyers at this Seminar.

The Ministry of the Interior greets and thanks all of you.

The approach to all these themes was framed by two central ideas:

- The Declaration of the Rights of Man and the Control of Police Activity.

One could hardly find a more adequate framework for a discussion that needs to be urgently addressed in modern societies related to the problems of security, of criminal prevention and combat of crime.

On the one hand, because the Declaration of Human Rights of Man is a structuring document of modern thought and shapes all legal texts currently in force the world over. On the other, because the control of police activity is a concern of society since the police came into existence.

It is important, however, to understand that nowadays societies transform themselves at a pace that was unknown up to very recently. This pace imposes upon all of us, with extreme frequency, the need of finding answers to new situations.

Thus we stand before the challenge of staying permanently alert, of making ourselves always available to apprehend the new phenomena, to act upon the new realities, to integrate new concepts. In sum: to apprehend social reality without prejudices, and to be increasingly and necessarily equipped with armour of fundamental principles that is able to guide all action.

To talk about security today, especially about “internal” security, is to talk about a concern that is becoming more and more central for all of society.

We live in a market economy and Portugal is integrated within a European space in which countries bring their politics close to one another and pursue common objectives.

Objectives of economic growth, social well being, full employment, price stability, and development. Objectives which are only within the reach of safe and solidary societies.

Safety is, in this way, indispensable for the harmonious functioning of society, in the same measure that this functioning is indispensable for economic and social development.

Internal Security is no longer a concern that pertains exclusively to policemen or governments. Rather it has come to be a concern of the whole of society.

It is important to underline that the political conception of internal security as an area of action traditionally seen in the perspective of the exclusive responsibility of each State corresponds to a conception that is being questioned today.

As a result of the abolition of borders and, above all, of the internationalisation of criminality, the internal security of each State shall become, increasingly, an international problem of harmonisation of politics oriented towards common objectives.

If it is indeed true that each State is capable of autonomously preventing and combating criminality that threatens public peace, it is no less true that it

has nowadays become impossible to combat high criminality, -with its international links and transnational operations- in isolation. This new topology of criminality is the factor that threatens, or can threaten the very foundations of the State of Law and the organisation of the State, as we now know it.

What is truly under discussion here is the model of Internal Security that we want to adopt and the definition, within it, of the role of the police.

This way, the definition of the model of Internal Security shall contain, or pre-suppose, at least, the following realities:

- Internationalisation of high criminality ;
- Existence of supra-national spaces without internal borders;
- Realisation that high criminality causes, or can cause the crisis of the foundations of the State of Law, on account of the resources it has available.
- Verification that criminality is nowadays, from the quantitative point of view, dependent on one single cause – the traffic and consumption of narcotics;
- Combat against criminality requires instruments adapted to the different kinds of criminal agents;
- International co-operation as a fundamental support for the success of internal policies;
- Reinforcement of the technical competencies of the security services and forces;
- Need for national and supra-national co-ordination in the execution of Policies of Internal Security;
- And, furthermore, no less importantly:
- That Internal Security must be a concern of the whole community which much also participate in it;
- That public peace is an essential element for economic and social progress;
- That the fragility of the policies of internal security or of its execution are reflected first and foremost, and even more profoundly, in the weaker social strata;

- That preventing and combating criminality means also to protect the social groups that, for economic or other reasons, are the most ill-favoured;
- That freedom and fundamental rights can only be exercised fully and equally by all if a situation of safety and public peace prevails.

Having verified these givens and defined the model, it is imperative to establish the role to be played by some of its main actors:

- Government, Magistrates, Security Services, Security Forces.

Fifty years after the proclamation of the Declaration of Human Rights, and twenty two years after the Constitution of the Portuguese Republic, the respect for Fundamental Rights has already become part of our collective patrimony - without prejudice of a constant effort for better citizenship and of a greater and greater quality of our democracy.

It is a given for all of us- heads of the organs of sovereignty, members of the Security Forces and Services and citizens- that all of our activity must be exercised with respect for the laws and, moreover, with respect for the principles that shape our judicial-constitutional system.

I take refuge in the thought of Professor Jorge Miranda who, in the inaugural session of this Seminar, made reference to the fact that all constitutional principles applicable to the Public Administration are applicable to the police as well. That is, the police is no longer an exogenous entity nor is it self-regulated by its own norms.

However, it is important not to forget our recent history. To the police of the past that was mistrusted because of being at the service of an illegitimate political regime, we contrast today a “guardian angel” police which citizens trust and who, on their part, trust the citizens.

In fact, with the re-instatement of democracy in Portugal, in April 1974, the conditions were created for the security forces to become forces for the protection of citizen rights, freedom and guarantees. It is of these security forces –the security forces of a Democratic State of law, free and plural- that we are talking about here.

Nowadays our security forces regulate their action with professionalism, civic behaviour, firmness, impartiality, rigour, transparency and proximity in relation to its fellow citizens in order to better understand their problems.

The security forces are thus entrusted with the most noble of duties: on the one hand it is incumbent upon them to defend the State of Law by guaranteeing the sovereignty of the Law in face of the law of the fittest; on the other hand they are the ones that firstly and in the most visible fashion are responsible for the security and the guarantee of freedom of our fellow citizens.

It is the Government's task, through the Ministry of the Interior, to conduct the policy of internal security, by defining and establishing the priorities and strategic political orientations of the security forces, within their respective legal framework of attributions and competencies.

It is fundamentally for this reason that a political power that is irresponsible in regards to the security forces under its tutelage and indifferent to the aspirations of those men and women who guarantee the daily security and peace of the citizens is unfathomable.

Cultural and social globalisation must now be added to the economic and technological globalisation that characterises modern societies.

Our cities are increasingly spaces made up of multiple life experiences, where different kinds of people - hailing from the most diverse origins, of the most diverse races, convictions and credos- mingle.

We are referring to that which sociologists define as a "multi-ethnical or multi-cultural society".

This new multi-ethnical or multi-cultural society is not a "mosaic" of organised communities nor of cultural, ethnical or religious groups juxtaposed without any communication among them.

There is an effective communication and interaction network among the individuals and the groups and, many times, it is from these networks of relations that the conflicts, social tensions and insecurity associated to them spring.

Taking this social reality – marked indelibly by diversity and by the appearance of new forms of marginality: poverty, physical and psychological dependence on drugs, degradation of human life- as a point of departure, we

can say that it also makes sense to continue talking about the role of the security forces, that is, the police.

We demand of the police to be efficient, to combat crime and to promote the security of all citizens. But we also demand of them to be civilised, to respect the rights of man.

In a Democratic State of Law, police action obeys to a set of values that constitute the presuppositions of their whole action. These are the values of freedom, equality in diversity, respect for the dignity of the human being, of the guarantee of the fundamental rights and freedoms.

But recognising that many a time the security forces and the police act in dramatic situations– when it is these values precisely that are at risk- is as important as recognising these very values.

The police are called upon to solve conflicts within spaces and environments plagued with violence, in the name of the freedom and security of each one of us.

In a society dominated by the power of the media, by the image that is being continuously built by the television program or the page in the newspaper, police activity is frequently evaluated through exceptional situations which do not correspond to the normal action of the security forces. Thus we are frequently confronted by false images of “a police that does not do” or “ a police that does not respect the rights of man”.

We are certain that this anathema that has been cast over the police can only be confronted by improving communication and the relationship of the police with the citizens, and between these and the police, through a permanent process of construction and trust.

In our days the legitimacy and authority required for the exercise of police functions does not merely spring from the law or from the obedience to a legitimate power. This authority springs necessarily from the capacity of the security forces in generating the trust of the citizens for whom they work.

And the trust of the citizens springs, as well, from the public knowledge of the instances of control and follow-up of which the Inspection General of the Interior is an example.

The reinforcement of the trust people have on their police corresponds to a profound transformation and to a significant qualitative leap in the services

rendered nowadays by these security forces- with more and better resources, with more and younger agents.

Only with this new police, trained and informed, is it possible to avoid the Declaration of the Rights of Man from becoming a mere text to be respected and make it into a true repository of principles to be concretised in daily action.

The Universal Declaration of the Rights of Man was proclaimed after one of the most barbaric episodes of the recent history of mankind.

Only 50 years ago the States felt the need to proclaim that *" all human beings are born free and equal in dignity and rights, and they must act with one another in a spirit of fraternity".*

A long way has been treaded from the proclamation of the French Revolution to this Declaration of the United Nations. From 1948 to today humanity has given gigantic leaps forward in many domains.

Unfortunately, in many and extensive areas of the world the trilogy of Equality, Freedom and Fraternity, as well as the proclamation of the Assembly General of the United Nations has still to be fulfilled.

Ladies and Gentlemen,

Once this Seminar comes to an end, once conclusions have been arrived at, each one of us, each one of you will return to the exercise of your professional duties more conscious, if such a thing is possible, of the path that has been accomplished and of the path that is yet to be trodden.