

Chapter XIV

Law Enforcement

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1. History and basics

The Constitution of Hungary, drawn up according to the Soviet model, had not regulated the national armed forces for four decades, from 1949 until the Transition in 1989. The national armed forces were regulated by lower-level legislation like the National Security Act¹ – which ruled the operation of the Hungarian People's Army – or the statutory decree on the State and Public Security.²

First of all, the terminology of the topic needs to be clarified: namely, law enforcement and protection of public order. Sometimes even the academic literature uses these terms as synonyms, even though they do not mean the same thing. The theoretical debate of this question is not closed, relationship of the definitions and the meanings of them are still not clear. According to the opinion of advocators of the definition of law enforcement, it is part of public administration, which is for detection and prevention of infringements using legitimate force. Notwithstanding

this, the school of protection of public order has started to use the expression protection of public order body in 1990, which emphasises its military character (termination of service, the uniform and the right to be armed, a strict hierarchy, etc.). It is understood that the second is better related to defence. The definition of protection of public order was used first in 1993 in the National Security Act.³ This legislation set out first the protection of public order bodies such as the police, the civil national security services, the prison service, customs and the finance guard, civil protection and the professional, national and municipal fire services. The legislator emphasised that these services work in some tasks of national security as well.⁴ The Police Act⁵ of 1994 uses the terminology “protection of public order body” but in contrast to the National Security Act it sets out the border guard as well. With the expression protection of public order body (meaning military character, centralisation and hierarchy) the “old regime” appears, even though the legislator emphasised the importance of demilitarisation of services. The issue was decided in the Termination of Service Act.⁶ It was declared that the failure of demilitarisation is based on the purpose of building military protection of public order. Thereafter more than 300 pieces of legislation applied the expressions protection of public order and protection of public order body without defining them. Even the bodies meant under the expression were not defined. As the title of this chapter shows I accept the terminology of law enforcement, regarding it as part of public

administration, and I use it consistently. Nevertheless I would like to declare that according to my opinion law enforcement is not only police administration; it means a more complex activity, the implementation of which is shared between police service and other services.

The Constitution of Hungary used the expression of law enforcement yet, although according to the functioning of national armed forces (army, police) was regulated separately from public administration, in hierarchical order, with centralised confirmation, in termination of service – following military principles.⁷ The Constitutional Amendment of 2004 (Act CIV of 2004) brought the expression protection of public order body into the Constitution (change of terminology), until then in Chapter VIII “Armed forces and the police force” was used. Armed forces were the army and the border guard. For better understanding, it must be mentioned that the border guard became a body with two legal bases – military and law enforcement – through the amendments of the Constitution in the 1990s. A few years after socialism, this reasonable distress ran foul of the constitutional principle that forbids armed bodies to fulfil order-protection tasks. The Constitutional Amendment of 2004 has abrogated this situation and brought the terminology protection of public order body in.

The citation from 2009 states:

According to the original constitutional purpose, the

regulation of armed bodies and the police force is already partly operative, then just some of the order protection bodies are regulated by them together with the Army.⁸

This appears in the Constitution of 2011 as well – Article 40/A-C rules the army and the police force, but does not regulate the other protection of public order bodies. The Constitution has never included the protection of public order bodies. Chapter VIII, which contained these rules, was amended the most times during the two decades since the Transition in 1989. Even the title of the chapter went through a kind of metamorphosis in this period. A smaller technical legal mistake was to write in the original text the word police without capital letter in the title of the chapter, when it was written with capitals in the Police Act. A unique solution was the amendment of the title, the word “police” was deleted, so the expression of usual protection of public order body was brought into use. In the text the word “police” has been modified “quietly”.

2. Constitutional framework

The principle of legality means that law-enforcement authorities have to exercise their powers in the way, form and coverage that legislations order. This incorporates the observance of procedural requirements in police measures. The aggrievements of procedural requirements are strictly adjudicated.⁹ On the other hand, other

legislations – regulations, decisions – have to conform with the principle of legality. Supreme Court Decision No. 1/1999 said that exercising law enforcement – declared in the Police Act – is administrative activity. Police forces – according to their public power – take measures by unilateral declarations and lay charges on customers that are validated by them.¹⁰ Legal clarification of an outside police measure is quite problematic and it can be understood as an immediately enforced oral decision. This is the reason why rules and effective legal remedies are so important.

The legislature kept the processing of legal remedy for police measure (complaint) within the organisation; passing judgment is the task of the measuring body's leader. Judging on appeal against decision of complaint is the task of the inspector.¹¹ There are two more alternatives for citizens: the Law Enforcement College of Complaint and the judicial way in special cases.¹² It is a usual practice abroad – for example in Germany – that against police measures legal action can be taken immediately.

Literature has no standard opinion on the question of the principle of opportunity. According to certain views law-enforcement authorities have to perform their tasks – when somebody or something is in danger – with “deliberation in duty bound”, even though it is known that deliberation can be used just in accordance with its purpose. “Deliberation in duty bound” is a described definition in Prussian law: authorisation that gives right to the police force to decide

the method and degree of intervention. This interpretation can cause significant anomalies or even abuse.

Another view of the principle of opportunity appears in Prussian law. Law-enforcement authorities can dispense with interpretation or with a method of it when it would be unfeasible under the circumstances. The principle of deliberation appears in this doctrine too, although it cannot be used in criminal-law enforcement. The principle of legality has to prevail in criminal actions. To draw a conclusion, it is ascertainable that the problem of principles "legality – opportunity" reduces the question of how broad a right of deliberation the security forces (police) should have. Principle of legality has to succeed in the activity of security forces (police); it cannot be diluted by the principle of opportunity.

It is useful in this context to analyse the decisions of the Constitutional Court of Hungary regarding law-enforcement aspects. Protection of public order and public security (former maintenance of public security and protection of internal order) as the basic task of the police force are constitutional purposes as well. According to the interpretation of the Supreme Court this means the assurance of constitutional working of social bodies and undisturbed public life and additionally it means the protection of citizens' fundamental rights together with personal and property security.¹³

It is primarily important in a constitutional approach to law

enforcement that fundamental rights be enforced and the problem of abridgement is considered. As the Constitutional Court sets out, the

state can use abridgement only under the circumstance when protection or enforcement of other rights, or affecting other constitutional purpose, cannot be achieved in any other way, and it can be just as broad as definitely needed. Significant abridgement of fundamental rights can be used when it happens without force and if it is not in proportion with the importance of the wished purpose. Legislature has to apply the lightest implement to achieve its certain purpose. If the abridgement is inappropriate in achieving its purpose, the offence of fundamental rights can be ascertained.¹⁴

It is the concept of “necessity and proportionality” that is used consistently in the adjudication of the magistrate body. The usual test of necessity and proportionality is an abstract methodology rule, which is used in certain cases, for certain statutes, in relation to the subjects protected by the fundamental rights at issue in each case.¹⁵ The test has three parts. Firstly, the legitimate purpose of legislator, examining the logical connection of constitutional cause of abridgement, purpose and implement. Secondly, necessity, whether abridgement is inevitable, the analysis of forcing cause. And thirdly, proportionality, it has to be decided

whether abridgement and its purpose are in relation. These three aspects are equal; either of them can cause unconstitutionality.¹⁶

Alluding to the settled case-law, the Constitutional Court's Decision 22/1992 CC says that "abridgement of fundamental rights is constitutional under that circumstances when it does not affect the basic entity of it, when it is inevitable, so it has force causes, furthermore when the significance of abridgement is not out of proportion as compared to its purpose".¹⁷ It cannot be overlooked that, as the Constitutional Court pointed out, law-enforcement bodies work as militarised, hierarchical and centralised organisations, separated from administration.

One of the most problematic parts of law-enforcement functionality is the engagement of enforcing illegal command. The Constitutional Court has pointed out the following: "engagement of enforcing illegal command, which would be naturally unconstitutional in civil sphere (in connection with armed forces), cannot be considered unconstitutional in itself, without any quest".¹⁸

The Court of Justice of the European Union and the European Court of Human Rights of Strasbourg have examined mainly the Police Act and the Termination of Service Act,¹⁹ but because of the limited extent of this text they are not explained here.

3. Contrasting changes of the texts

First of all, I focus on the changes introduced by the new Basic Law. In the Constitution the last title of Chapter VIII was: “The Hungarian Army and Law Enforcement Bodies”. As it has been mentioned above, even this title and the whole Chapter VIII has been changed many times during the last two decades. “This chapter title is one of the nadirs of constitutional regulation (actually its shame)” wrote András Patyi in the Commentary on the Constitution.

- The first – maybe the most significant – change is the partition of regulation of the Hungarian Army and the police force. Article 45 of the new Basic Law regulates the army and Article 46 regulates the police force and the national security forces. In addition, I would like to note that it could be a really interesting grammatical essay to examine how the use of an initial capital letter on the word “police” affects constitution-making. Until the end of 2011 the Constitution used it with a capital letter but from 1 January 2012 we will use a small first letter in accordance with the new Basic Law.
- It can be considered as a leap forward that Article 46 does not use the terminology protection of public order body anymore. However, we notice later that this delight was baseless: Article 53 – about the former defensive situation – uses the expression, and so maintains the constitutional status of it, without any definition. Using this expression by the Basic Law without definition can cause

uncertainty. Maybe the limited extent of the text was the main cause of this situation, but under these circumstances it would not have been necessary to use this problematic expression.

- Article 46 sets more details concerning the tasks of police force than the Constitution. Next to the classical functions of preserving public order and public security, preventing and detecting crime has been drawn up, too. The extension can be seen as classical law-enforcement functions have been set out, because preventing crime can be identified with presence, guarding over and applying legal physical force; while detecting can be matched with the obtaining of information, as with criminal law enforcement. According to experts on the subject, the expression of state border protection does not harmonise with the demands of the EU and with the Schengen Agreement.²⁰ The main point is that according to the demands of the EU and the Schengen Agreement police force – as the successor of the former border guard – has responsibility for guarding the state border and maintaining its order and control of cross-border traffic, but the protection of the state border is not part of it. The workings of the police force are inferior to the government, as it used to be.
- The specification of basic tasks of national security forces are a new aspect of the Basic Law. According to the Basic Law the main duty of national security forces is the protection of Hungary's independence and order and

assertion of its national security interests. It works under the Government. Accepting that national security is a special form of obtaining information and its functioning raises many unpleasant questions; this text alteration can be evaluated as the legislature intended to raise the regulation of this field to the constitutional level.

- It is not a new rule in the Basic Law that professional members of the police force and national security forces are forbidden to be members of the party or to carry out political activity. The special meaning of this rule is regulated in the Termination of Service Act.²¹ In Chapter III of this Act about the abridgement of fundamental rights – among others, abridgements of freedom of speech and assembly – these are defined in connection with termination of service.
- As it is “usual”, organisation, functioning and other special rules of the police force and national security forces – like conditions of using secret service’s devices and methods or the rules of national security activity – are regulated in statute law.

In comparison with other EU Member States’ constitutions it can be ascertained that there are significant differences between law-enforcement regulations of these constitutions and the new Basic Law of Hungary. Some of these charts regulate the organisation and functioning of law enforcement in details, while others do not even mention them.²² On the basis of this fact, there are three groups of

Member States. In the first group constitutions regulate law enforcement in detail. This is the “positive constitutional regulation” of law enforcement. The Austrian Constitution, for example, is in this group.

In the second group, constitutions specify the legal framework of administration but do not go into detail on law-enforcement authorities; this is the indirect regulation of law-enforcement administration. This is typical of Finland’s constitution. The constitutional base of security is in the regulation of administration’s framework in the Constitution and the limits of police power. Constitutional rules are a firm base for the functioning of protection of public order, whereas the protection of public-order bodies is not even mentioned in the text.

The third group has a different logical order than the first two. These contain the list of fundamental rights in detail, so contain indirectly what forces can do. This is true even when the measure of force is in the interest of protecting public order and public security. This is the “negative constitutional regulation” of law enforcement. The constitution of Belgium contains specified regulations neither for law enforcement, the police force nor for administration, but it contains several rules for fundamental rights.

The new Basic Law of Hungary can be categorised in the first group, as it specifies the most important blocks of the police force, which is the essential element of law

enforcement.

Consequently, it can be ascertained that during the creation of the new Basic Law, law enforcement was not one of the most stressed topics where significant modifications have been accomplished. It is not surprising that compared to the former legislation the new act does not contain many significant new aspects.

Notes

¹ Act I of 1976 on national defence.

² Statutory Decree 17 of 1974 on state and public security.

³ Act CX of 1993 on the national defence.

⁴ Article 65 para 1 of Act CX of 1993 on national defence.

⁵ Act XXXIV of 1994 on the police force.

⁶ Act XLIII of 1996 on the termination of service of armed forces.

⁷ Finszter, Géza, *A rendészetelmélete* ("The Theory of Law Enforcement"), Budapest, KJK KRESZÖV, 2003, pp. 30–31.

⁸ Patyi, András, *A Magyar Honvédség és egyes rendvédelmi szervek* (VIII. fejezet) ("The Hungarian Army and the protection of Public Order Bodies [Chapter VIII]") in Jakab, András, *Az Alkotmánykommentárja I-II* ("Commentary on the Constitution I-II"), 2nd edn, Budapest, Századvég, 2009, p. 423.

⁹ Szamel, Lajos, *A rendészetés a rendőrség jogszabályozásának elméleti alapjai* ("The Teroretical Basis of Law Enforcement and Police Force"), Budapest, MTA programme office of the researches of political science, 1990, pp. 42–44.

¹⁰ Device Decision of Supreme Court No. 1/1999.

¹¹ Article 93/B para 3 Police Act (Act XXXIV of 1994).

¹² Article 93/A para 9 Police Act (Act XXXIV of 1994).

¹³ Decision 88/B/1999 CC.

¹⁴ Decision 7/1991 CC.

[15](#) Decision 6/1998 CC.

[16](#) Patyi, *op. cit.*, p. 421.

[17](#) Decision 22/1992 CC.

[18](#) Decision 8/2004 CC.

[19](#) Act XLIII of 1996 on the termination of service of the armed forces.

[20](#) Hautzinger, Zoltán, *Regulation of the armed forces in the Basic Law*, Script, 2011.

[21](#) Act XLIII of 1996 on the termination of service of the armed forces.

[22](#) Badó, Attila, and Trócsányi, László, *Nemzeti alkotmányok az Európai Unióban* (“*National Constitutions in the European Union*”), Budapest, KJK Kerszöv, 2005.