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POSITION OF THE SECURITY AND COUNTERINTELLIGENCE SERVICE IN THE SYSTEM OF RULING ORGANIZATION IN THE REPUBLIC OF MACEDONIA – CONDITIONS AND CHALLENGES

Summary

Despite the proclaimed constitutional principles for democratic legal order, the Security and Counterintelligence Service as a successor of the former secret police, the first years of independence of our country was influenced by the presence of the relics of the previous totalitarian regime. The paradigm for such a claim regarding the Macedonian security services, also applies to the Security and counterintelligence Service which in fact exists as the most conservative and hardest structure that by all forces opposed to the reforms of the system. Due to the lack of will for freedom from his past and not accepting the changes, altogether with its democratic habitus, its functioning at certain periods was a real threat to democratic processes. The process of the slow transforming of the pillar of the communist nomenclature only affirmed the power of the Service for state security. Her task in the entire past transitional period was to defend and protects the system, its political leadership, and itself from the fictional “Internal enemy”. That exclusive position allowed the security services continuously to be inextricably linked to the system and its members acted by party political instructions and abuse.

Key words: Security and Counterintelligence Service, Legal Order, Reform of the Security System, Constitution, System of Ruling Organization, Republic of Macedonia

Introduction

The system of authority organization in the country established by the Constitution of 1991 was characterized by significant changes in the regulatory, organizational and functional aspect. The basis of these changes were pro- European reforms which regulate “the relationship of man, a citizen, and people towards the government and it’s organs.”¹ A key priority of the overall institutional reforms of security and defense was their departisation and depoliticisations which were thought to be part of the security foundation for years. The decade drill fist of the communist party in power, the secret police ,also fell in the hands of democracy. Europeanization of the security system was an imperative! Strategic targets set for integration into NATO and the European Union and the liabilities assumed on the harmonization of the Macedonian legislation with the EU acquis in the field of security and defense could be realized by building a model that will make the system compatible with the European model. Moreover, there is no a magic formulae for creating the perfect model of structure and functioning of the security system in Europe and worldwide, and determining the model of it’s operation is left to the disposition of each country (depending on its circumstances, environment and needs).

The reform of the security system in the Republic of Macedonia, at the same time was in response to the challenges of globalization, the need for integrated border management, conflicts in the cross-border regions, migration, technological development and new dynamics and structure of crime and other socio-pathological phenomena.²

Bearing in mind these new fundamental conditions and threats, the reform wave also hit the Security and counterintelligence Service as a

¹ Климовски С., Уставно право, „Просветно дело” АД Скопје, 2009 година, стр. 197.

² Kozarev A. Parliamentary control and surveillance over the security sector in the Republic of Macedonia, Skopje, 2011, p. 9.

holder of the counterintelligence function with a reason. The reforms started with cleansing of the ideological elements and continued through changes in the name of SSA³, SCD⁴, SCO⁵, including new organizational design and authorization.

Nowadays, the Security and counterintelligence Service is a key institution in the security system of the Republic of Macedonia placed in the Ministry of Interior Affairs with its special position in the system of state law organization(organ within an organ⁶). That uniqueness is derived from special authorizations of their members, their secret operation, the nature of authorities and members of The Service. Namely, "counterintelligence is concerned with deterrence and detection. It is a security-focused function, but is not a security. However, security is used defensively within counterintelligence. To be more specific, the thrust of counterintelligence is to protect an agency (or its client) from infiltration by an adversary, to protect against inadvertent leakage of confidential information and, to make secure its installations and material against espionage, subversion, sabotage, terrorism, and other forms of politically motivated violence and the transfer of key technologies and/or equipment."⁷

However, despite the proclaimed constitutional principles for democratic legal order, the Security and Counterintelligence Service as a successor of the former secret police, the first years of independence of our country was influenced by the presence of the relics of the previous totalitarian regime.

The paradigm for such a claim regarding the Macedonian security services, also applies to the Security and counterintelligence Service which in fact exists as the most conservative and hardest structure that by all forces opposed to the reforms of the system. Due to the lack of will for freedom from his past and not accepting the changes, altogether with its

³ SSA – State Security Agency

⁴ SCD – Security and Counterintelligence Directorate

⁵ SCO – Security and Counterintelligence Office

⁶ Article 14, Official Gazette of the RM, No. 42/2014.

⁷ Prunckun H., Counterintelligence Theory and Practice, Rowman&Littlefield Publishers, Inc, , UK, 2012 u., pp.23.

democratic habitus, its functioning at certain periods was a real threat to democratic processes. The process of the slow transforming of the pillar of the communist nomenclature only affirmed the power of the Service for state security. Her task in the entire past transitional period was to defend and protect the system, its political leadership, and itself from the fictional "Internal enemy". That exclusive position allowed the security services continuously to be inextricably linked to the system and its members acted by party political instructions and abuse.

1. Legal regulation of Security and Counterintelligence Service (UBK)

"When the rules for conducting the state government are set on the basis of law and when guarantees of the performance of that power are primarily in the constitutional act, laws and other regulations adopted on the basis of law and in accordance with it, then should you say that the state is organized according to the principles of the rule of law."⁸

The application of the principle of legality of working of the state administration in general and the Security and counterintelligence Service (UBK) is determined firstly by the model of legal regulation of its organization and as secondly, by the authorizations applied by its members. Any other form of regulation presents an introduction to arbitrariness, lawlessness, derogation of human rights and democratic values in society.

It is undisputed that as a part of the state apparatus that has authority to exercise legal force, the Security and Counterintelligence Service is an inseparable part of the system of state administration, where they belong together with many other governments, departments, bureaus, etc. "Diferencia specifica between these and the rest state institutions consists in the fact that the former are entitled to apply to use force on behalf of the state."⁹

⁸ Savić A. i Stajić Lj., "Osnovi civilne bezbednosti", Fakultet za pravne i poslovne studije Novi Sad, 2006 god. str. 224-225.

⁹ Timothy E., "Security sector reform in transforming societies: Croatia, Serbia and Montenegro", Manchester: Manchester University Press, 2007, p.23.

As a special administrative area of the security system (and therefore for the Security and Counterintelligence Service) applies the rules of general administrative and legal regime and norms that are part of the special legal regimes. "From a legal point of view, the special legal regime is built through specific or special laws (*lex specialis*), so that they make other legal decisions that deviate from the general legal regime, namely the established general laws (*legi generali*). Where this is not the case, then the rules of the general law (*lex specialis derogate legi generali*). To put some season to the job, when some services, such as police, have special legal regulation (suppression of organized crime or terrorism), then we come to a new level of uniqueness to something which can be conditionally called *lex specialis*. Then at first is used the special, then separate and at last the general mode. Particularities of normative security concept, is especially prominent in the functioning of the police, which in the European civil law is displayed as "police of the rulers" while in the common law jurisdictions is the "police of the people." Subsequently, in the first legal system there is more specificity (*lex specialis*) in arranging the apparatus of state power, and in the other the tendency is this apparatus as much as possible, to be subsumed under the general legal regime (*lex generalis*), streaming to less deviation from general law (common law) and for it again, wherever possible, to apply what is applied for persons - private law."¹⁰

To the security sector as a special administrative region, apply the Constitutional articles that are relating to the state administration and its functioning. Namely, according to Article 95 of the Constitution, state administration consists of ministries and other administrative bodies and organizations determined by law, upon which the constitutional ban of political organization and activity of the state bodies is equally designed for (Article 95, paragraph. 2); The activities within its jurisdiction the State Administration bodies are conducted on the basis and within the framework of the Constitution and the Laws and for their work they are responsible to the Government (article 96) and at the end the constitutional guarantee that the administrative bodies in the field of defense and police are headed by

¹⁰ Милосављевиќ Б., „Уставноправни статус сектора безбедности и апарата силе у Србији после доношења Устава од 2006 године”, Факултет политичких наука у Београду, 2007 године, стр. 9.

civilians who just before their election to these jobs were in the civil sector at least three (Article 97) .

However, the Constitution of Republic of Macedonia for defense and security area as a segment of the power rule system of government in the Republic of Macedonia contains only separate, principal provisions while its achievement (functions, responsibilities and organization) is regulated by special laws. Only Chapter VII of the Constitution: “The defense of the Republic, military and emergency” provides that: 1.The defense of the Republic of Macedonia is constitutional right and duty of every citizen, while the armed forces are protecting the territorial integrity and sovereignty of the Republic; 2. The Defense of the Republic is regulated by a law adopted by a majority vote of all parliament members.

This exclusive constitutional legislative regulations of the Armed Forces of the Republic of Macedonia as a segment of the security system, without laying the foundations of the police organization and intelligence - security community, including democratic and civilian control, raises the following question: if the defense is broader and more significant function of safety or they are equal, especially if one takes into consideration the fact that the defense is a function of security?

When answering this question, we are guided by the fact that the security system in the Republic of Macedonia country is the logical consequence of the constitutionally established system of government organization and the position of President of the Republic, whose position and power “must be taken into account not only the consideration of functioning of the state government, but also in determining the shape of the political system.”¹¹

Apart from constitutional norms, the legal framework for the security system consists of a number of laws of general and specific, ie special legal regime relating to defense and security sphere in the Republic of Macedonia. At the core of the legislation are the provisions of the general legal regime

¹¹ С.Климовски, Уставно право и политички систем, „Просветно дело” АД Скопје, 2003 година, стр. 383.

- the Law on Organization and Operation of the State Administration¹², which provides that: the state government as part of the executive power of the country are established in areas and spheres that are significant for state functions and for the effective operation of the rights and duties of citizens and legal entities, such as: ministries (to perform the functions of the state administration, grouped in one or more related administrative departments); other state administration bodies (established as : a) independent state bodies, departments, agencies and commissions, b) bodies within ministries, administration, bureau, office, archive, inspectorate and captaincy) and administrative organizations (established to perform certain professional and other activities that require the application of scientific and professional methods and related administrative procedures in the areas where the ministries are established: Institute and Agency).

Despite these laws that contain the general legal regime important for the general legal regulation of security system, the other legal framework consists of more *lex specialis* laws such as the Law on Police, Law on Internal Affairs, Law on Criminal Procedure, Criminal Law, Law on Communications Interception, Law on Money Laundering Prevention and other proceeds of crime and terrorist financing and other laws and regulations.

In particular, the position of the Security and Counterintelligence Sector is normatively regulated in articles 22-31 of the Law on Internal Affairs. Article 23 of this Law is regulates the following: the Department is responsible for conducting the affairs related to security and counterintelligence. Security and counterintelligence purposes of this Article refer to: a) counterintelligence activities; b) opposition and anti-terrorism; c) protection of other activities aimed at jeopardizing or undermining of democratic institutions established by the Constitution and d) serious forms of organized crime originating from democratic institutions(or directed to it)of the system established by the Constitution and endanger or affect the security of the state.

Despite the stated catalog of legal acts by which the position of UBK as a body within the Ministry of Interior affairs is regulated, the situation in

¹² Official Gazette of the RM, No. 58/2000.

terms of legislation of the counterintelligence activities are not satisfactory and in line with European standards. The solution is exactly in the creation and application of legal safety standards that are known in the European countries. This means creating clear, concise law framework for the organization, authorizations and function of core institutions of which security system in Republic of Macedonia consists of, among which The Counterintelligence Sector has a special position.¹³

Of course, this real situation, i.e the absence of *lex specialis* legislation that would provide systematic legal regulation of the security system enabled an abuse of secret powers of the security members (a few known cases of illegal wiretapping, the El-Masri case, monitoring of political parties etc.), which is contrary to international legal standards in the safety area, justice and home internal affairs.

In analogy of the normative framework of the security system in our country, it is important to point out that is not conducted yet a clear framework for democratic control over it. The absence of the real internal and external mechanisms for institutional and extra-institutional oversight represented a real opportunity that democracy become anemic i.e where power is not fully transparent to an open, accountable government. Therefore, the accomplishment mechanisms for protection of human freedom and rights are correlated with the democratic oversight of the security sector, as a key segment executive. Moreover, the degree of openness and transparency of executive law (where, according to its position the Security and Intelligence takes place) will depend on the quality of parliamentary oversight over it and especially over security sector in the state.

¹³ While the jurisdiction of the Counterintelligence Agency is regulated by a special law, for the Security and Counterintelligence Service are applied certain provisions of the Law on Internal Affairs; for the Security and Military Intelligence (which works in the Ministry of Defense) apply articles of the Defense Law and other regulations that date since the existence of the former state.

2. Organizational design of the Security and counterintelligence Service

Counterintelligence service in common presents an “integral part of the political process: protects the national security and respect of the individual rights.¹⁴It’s institutional holder is security and/or intelligence service depending on the internal establishment of the security-intelligence system.¹⁵

The Security and Counterintelligence Service as a body within the Ministry of Interior Affairs has an attribute of key security institution with a special organizational design. Article 22 of the Law on Internal Affairs regulates the internal organization of the Security and Counterintelligence Service that is based on a line and territorial principle. In the Administration may be formed separate organizational units to perform duties within its competence and organizational units for performing professional work for the Service.

The Administration is managed by a Director who is proposed by the Minister is appointed and can be changed by the Government of the Republic of Macedonia for a period of four years. The Director may be dismissed at his request, in case when he/she is sentenced for perpetrated crime by imprisonment of at least six months or due to reckless and incompetent working. The Director is independent in the performing of the Work of the security and Counterintelligence Service, and for its work reports to the Minister for Interior Affairs and the Government of the Republic of Macedonia.

Internal organizational structure of the security and counterintelligence Service is regulated by the Rulebook on systematization of the job positions. The reason for this situation is the fact that the organizational design the Security and Counterintelligence Service is implemented in the context of social conditions in the overall functioning of the state apparatus. On

¹⁴ Hastedt P.G., Controlling intelligence: Defining the problem, во: Controlling intelligence, Ed. Glenn P. Hastedt P.G. Psychology Press, Abingdon, 1991, p. 13.

¹⁵ Pajević M., Obavještajni kapital, CEPS, Kiseljak, 2015 godina, str. 117.

the other hand, the actual model of existence of two services, of which one is internal security services and the second one is intelligence service, in conditions of restricted capacities and increased need of unique action and coordinated acting of both components due to more efficient dealing with new modern risks and hazards especially from the acts of terrorism, it has shown that it is not enough successful and efficient in the accomplishment of the tasks with which it faces.

In order to overcome these shortcomings in the organization of the Security and Counterintelligence Service it is necessary to do comparative analysis of organizational design in the majority of member states or candidates for membership in the European Union. The Serbian Parliament enacted a Law on the Bases Regulating Security Services of the Republic of Serbia¹⁶. The bases of the security-intelligence system of the Republic of Serbia, directing and harmonizing of security services work in the Republic of Serbia and supervising of their work, shall be regulated by this law. Security services shall include the Security-Information Agency, as a separate organization, the Military-Security Agency and the Military-Intelligence Agency, as governing bodies within the Ministry of Defense;¹⁷ furthermore, the Law on Security Information Agency¹⁸ provisions that the agency shall be established as an independent organization. In accordance with the Law, the Agency shall have the status of a legal entity.¹⁹

The Croatian Parliament enacted the Act on the Security Intelligence System of the Republic of Croatia 2006, which provisions that the Security Intelligence Agency (SOA) is an independent organization. Military Security Intelligence Agency (VSOA) is a structural unit of the Ministry of Defense intended to provide planning and implementing support to the Ministry of Defense and the Armed Forces in their performance of duties in the area of protection of viability, sovereignty, independence and territorial integrity of the Republic of Croatia.²⁰

¹⁶ Official Gazette of the RS, No.116/2007 и 72/2012.

¹⁷ Article 4, Official Gazette of the RS, No.116/2007 и 72/2012

¹⁸ Official Gazette of the RS, No.42/2002, 111/2009, 65/2014, 66/2014.

¹⁹ Article 2, Official Gazette of the RS, No.42/2002, 111/2009, 65/2014, 66/2014.

²⁰ Article 24 Act on the Security Intelligence System of the Republic of Croatia, 2006.

In Bosnia and Herzegovina the Law on Security Intelligence Agency provisions that the Agency is a civil security-intelligence institution with the status of an independent administration unit.²¹

The Slovenian security intelligence agency functions as a central civil security-intelligence service. It is an independent government service and claims authority largely from the Law on Security-Intelligence Agencies.²²

The state agency “National Security” is a specialized body of the Ministry’s council responsible for the realization of the policy for protecting national security. Its field, organization, and operating are regulated with the Law on State Agency for National Security.²³

This analysis shows that counterintelligence and security services are independent government bodies and not organs of law within the ministries of Interior Affairs as is the case in Republic of Macedonia.

Therefore, it is noted that in the Republic of Macedonia the process of institutionalization is unfinished and not fulfilled, primarily due to an insufficient level of political culture in our system of parliamentary democracy, the civil society situation, the rule of law and respect for human freedom and rights. These elements make the system institutions of power insufficiently developed and constituted and primarily, unruly in practice.

²¹ Official Gazette of the BiH. 12/04.

²² (Zakon o Slovenski obveščevalno – varnostni agenciji (ZSOVA), uradno prečiščeno besedilo (Ur. L. RS, št. 81-06-UPB2)

²³ Official Gazette of the RB, No. 109, 2007 година.

Conclusion

According to the Constitution, development and accomplishment of the responsibilities of the institutions in the system of parliamentary democracy in the country is aimed at improvement of life of citizens and promoting democracy as a form of governance. It is a consequence of the need to develop democracy as an attribute of the new elites or new coming democracies that make up the fragile Macedonian political pluralism established after leaving the former one-party totalitarian regime. Institutional establishment of the system in our country was carried out with evident expressed support from the citizens of the first multiparty elections for the independence of our country and within the constitutionally established system of power distribution.

Hence the initial perception was based on the fact that the formal - legal and institutional aspect there is full democracy that will enable future pro-European look of the state. However, deep analysis of these processes from today's point of view, especially in terms of achieving democratic parliamentary control over the security sector, shows that the organization and functioning of political institutions hide substantial deformity as between the distributors of power in the society, as well as between them and citizens. In such conditions Counterintelligence Service in the Republic of Macedonia - Directorate for Security and Counterintelligence was created and reformed . Its position in the Ministry of Interior Affairs as a body whose members have special authorization, leads to the conclusion that according to many elements it differs from other state bodies. The priorities of the holders of legislative and executive powers in the future should be directed towards the adoption of a special law on the Security and Counterintelligence Service that will be positioned in the system of government in a new way. It must be reorganized as a separate government institution which is the European standard and practice.

This regulatory process will result from the new organic law on the security system in the country, with which will be placed the foundations of a comprehensive, integrated and modern security system (with a clearly defined position and role of the entities, to avoid the possibility of

overlapping of their responsibilities and institutional solving of the form and manner of cooperation and coordination of all security and intelligence services in the country!). On a functional level, the security system of the Republic of Macedonia will be able to become a significant factor in the fight of the international community against all threats that endanger or affect the safety of the country and the peaceful and smooth functioning of the democratic institutions of the system, which is the overall or general strategic task on the road to the European Union.

For this reasons it is necessary this service to come out from the scope of the secrecy as a basic characteristic in the previous period and it's migration towards the citizens, of course by restrictions which arises from the specific function which is conducted by this service. Furthermore, there is trend of complete legal establishment of this material by defining the measures and actions for secretly gathering data which are on disposal of this service. The basic intention for adoption of new systematic law for security sector in the Republic of Macedonia will be the establishment of conditions of one comprehensive, integrated and modern security sector in which we can clearly determinate the position and the time of the segments of this sector, bypassing the possibility of overlapping of their competences and institutional settling of the form and manner of cooperation and coordination of all security and intelligence services in the Republic of Macedonia. Baring in mind the possible restriction of the freedom and rights of the citizens by the measures which are undertaken by the UBK, the control and supervision by the Parliament and judicial organs will be shown as a basic precondition and guarantee for the legality in its undertaking. The development of the modern security sector of the Republic of Macedonia which is capable to become significant factor in the right of the international community against all threats which may pose hazard and have influence over the security of the state and peaceful and uninterrupted functioning of the democratic institutions of the system, is the basic or general strategic goal in the road which leads to the EU.

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