BETWEEN GOOD INTENTIONS AND PRACTICAL DEFICIES: DEMOCRATIC CHECKS ON NATIONAL SECURITY SYSTEM

Atanas Slavov

Abstract

This article presents a critical review of constitutional foundations and draft legislation regarding the mechanisms for democratic checks on the national security system. First, the Bulgarian constitutional framework is presented which distributes the competence in the national security field between the three political branches – National Assembly, Council of Ministers and President – each of them adopting specific acts in the field. Second, the mechanisms of constitutional checks and balances and parliamentary oversight is analyzed. Third, the recently proposed (November 2012) draft legislation in the field is critically studied. A closer look to the draft laws reveals a state of good intentions and weak implementation. There are both positive and negative sides in the proposed legislation. Among the positive sides are the attempt to provide statutory ground and systematic regulation of this field by defining common principles, organization and accountability for the national security system; the regulation of procedures for democratic and parliamentary checks; clear allocation of national security agencies among the political branches of government. As negative sides are presented the lack of sufficient procedures for citizens' monitoring on the system, the missing explanation for the reorganization of the intelligence agency changing the institutional balance between the government and the president, as well as existing gaps in the legislative systematization. The major challenge in reorganizing the national security system remains that it functions under the weak rule of law and insufficient mechanisms for checks and balances.

Introduction

Issues of national security are decisive for the existence of constitutional democracy in the age of transnational organized crime and arising new geopolitical divisions and tensions. Democratic states are preoccupied with the process of striking the right balance between national security and human rights without eroding the foundations of limited government and the separation of powers.

National security relates to the core constitutional principle of popular sovereignty as well as to the survival of constitutional order. Problems of national security could be interpreted within different paradigms. One could be the conceptual framework of a state of exception/ state of emergency - thus forming a basis for the elaboration of a secular political theology centered on the preservation and existence of the modern state.[1] Other could be that of social values and community building. Yet another could be that of the rule of law and the limited government - when national security issues are at stake, key questions remain those of empowerment (*who makes the decision?*) and accountability (*who reviews and monitors?*).

National security may be interpreted as a form of specific *public good* that a modern pluralist state is expected to provide in order to sustain civil society. This public good, however, is often overshadowed by the existing challenges to public governance – paternalism, authoritarianism, consumerism and fragmentation. Placed in such negative context, security is often transformed in uncivil forms which fell into conflict with basic values and virtues of a democratic society. As Walker and Loader maintain, being "monopoly holders of the means of

[1] C. Schmitt, *Political Theology. Four Chapters on the Concept of Sovereignty* (Chicago: The University of Chicago Press, 2005), 5-7. P. Kahn, *Political Theology. Four New Chapters on the Concept of Sovereignty* (New York: Columbia University Press, 2011).

legitimate and symbolic violence, modern states posses a built-in, paradoxical tendency to undermine the very liberties and security they are constituted to protect." To prevent this, the state and its functions in the field of national security, should be put under discursive contestation, democratic scrutiny and constitutional control. Furthermore, the security itself may have a civilizing role, thus being a condition for a good society, active and concerned citizens. Lacking the basic security, citizens often move to either private isolation or to the demand of the firm hand of authority that would promises to solve the social problems overnight, thus eroding fundamental freedoms. In a positive sense, security is civilizing as a constitutive condition for a political community and solidarity.[2]

The traditional interpretation of national security issues understands the preservation of domestic peace and security as a key function of government. Challenges to peace and security are a particular test to governmental efficiency and may question its existence. If the government fails to secure these conditions, its legitimacy would be severely eroded. Thus the requirement for democratic checks and balances is at stake: the government itself is an interested part – it exercises control over the information and decides whether to make public existing threats, to present them as real and critical for the surviving of the state. The government could announce and inform, but also manipulate. In such a situation, the government is very likely to require allocation of more resources to the security sector, as well to receive new competences for an effective combat with the threats.[3] Hence, it may undergo a dubious transformation – from a guardian of human rights and liberties to an internal oppressor. These challenges are clearly visible in a post 9/11 context. The legitimate "war on terror", however, should not be accepted as a sufficient ground for limiting the safeguards of the rule of law and restricting the fundamental rights as they are laid down in the international conventions or national constitutions.[4]

National security system in Bulgaria is not isolated from these challenges. Moreover, it needs to address the global and regional threats, while undergoing a fundamental reform of inherited institutional structures which reflect the deficiencies of the post-communist transition and the hampered democratic consolidation. The existing constitutional framework on national security in Bulgaria and the proposed draft legislation on the national security system are expected to provide answers to those conceptual questions. The draft laws will be examined in the light of constitutional principles and procedures providing for decision-making in the security sphere and democratic checks on governmental power.

1. Constitutional foundations of national security: a general overview

The constitutional model of 1991 provides a general framework on the exercise of powers in the national security sphere. These constitutional powers are not concentrated in a single constitutional body. Rather they are distributed between the different branches of government in order to provide guarantees against the abuse with power. Constitutional competence in the sphere of national security is shared among tree institutions – parliament, president and government. As long as Bulgaria has a modified form of parliamentary government with a directly elected president, the executive competences in the field of national security are shared between the president and the government.

The parliament exercises a competence to adopt legislation and decisions in regard to the national security sphere. One of the key political documents adopted recently is the *Strategy for*

[2] I. Loader, N. Walker, *Civilizing Security* (Cambridge: Cambridge University Press, 2007), 7-8, 199-232.
[3] C. Turpin, A. Tomkis, *British Government and the Constitution* (Cambridge: Cambridge University Press, 2007), 755-756.
[4] A. W. Bradley, K. D. Ewing, *Constitutional and Administrative Law* (Harlow, Essex: Longman/Pearson Education Limited, 2007), 599.

National Security of Republic of Bulgaria[5]. It is a remarkable strategic document, which represents a paradigm shift in the way national security is defined and considered. Most notably, national security is defined as founded on democratic values and directed to the protection of fundamental human rights and human dignity. Against the background of a totalitarian past, this new concept of national security is clearly an achievement. Within the document, *principles* of national security policy are clearly defined. Among them are those of interconnection and interdependence between national security and fundamental rights and freedoms, dialogue and extensive partnership between citizens, society and the state, transparency and responsibility in the process of policy formulation and implementation, democratic oversight over the national security system. Among the most fundamental *national interests*, formulated in the strategic document, are safeguarding rights and freedoms, security and welfare of the citizen, society and the state, preservation and development of national identity, guaranteeing the integrity of the Bulgarian civil society, overcoming negative demographic processes, along with traditional national security issues (safeguarding constitutional order, sovereignty, state territory, unity of the nation).

These broad definitions of national security and national interest have both positive and negative sides. The positive is grounded in the new approach that focuses on fundamental rights and freedoms and the role of civil society. The negative is in the over-extensive definitions that may be used in justification of a very broad competence of institutions dealing with national security. In a long term that may endanger the very same values the Strategy is designed to protect. Imagine the State Agency for National Security (SANS) to be charged with the responsibility to protect the integrity of the Bulgarian civil society or to address the national security issues arising form the negative demographic processes. The effect of such measures would be negative, as it would open the stage to the abusive power and unlimited encroachments of civil liberties. Such broad competences could be used in silencing opposition civic movements or blocking political initiatives. One needs not to recall the involvement of the State Agency for National Security (by order of the Prime-minister) in the process of investigating the signature collecting for the first national initiative for popular referendum, to consider the dangerous effect of political use of the national counter-intelligence agency.

The broad understanding of national security finds its way to legislation. In a definition of national security, the State Agency for National Security Act (SANSA)[6] stipulates: "National security" shall be a dynamic state of the public where the territorial integrity, sovereignty and Constitutionally established order in the country are protected and the democratic functioning of the institutions, the fundamental rights and freedoms of citizens, sustainable economic development and the well-being of the population are guaranteed and where the country successfully protects its national interests and fulfils its national priorities." The same definition is accepted in the new draft legislation on regulating the structure and competence of intelligence services (the draft of State Agency "Intelligence" Act), as well as the general system of governance of national security system (draft of Governance and Functioning of National Security System Act) which were presented for public consultation in September 2012.[7] Similarly, other legal systems rely on broad definitions of the interests of national security, varying from issues of national defense and foreign policy to economic well-being and the prevention of serious crimes or not defining the term admitting that it is "a question of fact and degree" (as it is in the UK Intelligence Services Act 1994 and Security Service Act 1989).[8] The major difference with the Bulgarian legal system, however, is the existence in the UK of a well

[5] Parliamentary Decision, SG No.19/08.03.2011
[6] Promulgated, State Gazette, No. 109/20.12.2007
[7] http://www.government.bg/cgi-bin/e-cms/vis/vis.pl?s=001&p=0211&n=47&g=
[8] Bradley, Ewing, *Constitutional and Administrative Law*, 604-607.

designed system of parliamentary checks and judicial review that safeguards against arbitrary exercise of powers.

Along with the general competence of the parliament to adopt strategic documents and legislation in regard to the national security system, the executive branch (Council of Ministers) has a constitutional competence in this sphere (Art. 105, 2: "The Council of Ministers shall ensure the public order and national security"). It is important to note, that in its functions the government is limited by the legislative framework adopted by the parliament. It is the legislation that provides certain competences in the national security sphere to be *shared* with the president. For instance, the SANSA stipulates that the Chairperson of the Agency is appointed by a decree of the President, subject to a proposal by the Council of Ministers, for a term of 5 years (Art. 8). Furthermore, SANSA provides that the Chairperson of the Agency shall report simultaneously, by supplying information identical in volume and content, to the President of the Republic of Bulgaria, the Speaker of the National Assembly and the Prime Minister (Art. 131). The most important decisions should be taken in close cooperation with other political branches of government. Within the structure of Council of Ministers and in accordance with the Strategy for National Security operates Council on Security. It exercises consultative and coordination functions and elaborates policy proposals regarding strategic tasks and decisions in national security sphere, crisis management, coordinates and monitors the implementation of the Strategy.

The competence of the President of the Republic in national security issues is constitutionally defined: "The President shall preside over the National Security Consultative Council, the status of which shall be established by law" (Art. 100, 3). The National Security Consultative Council Act establishes the structure and procedure for operation of the Council.[9] In this consultative body representatives of the legislative branch (the Chairperson of the National Assembly and one representative of each parliamentary group), of the executive (Prime-minister and specified ministers, Chairperson of SANS and Chief of Defense) and the President meet to discuss issues related to foreign and domestic policy of the country related to national security, activities on eliminating or preventing any emerging threats to national security (Art. 2 and 3).

The constitutional framework, provided for shared competences in the field of national security, is ensured trough the collaboration between the political branches of government in case a state of emergency is declared. For instance, the parliament declares a state of martial law or another state of emergency on the entire national territory or on a part thereof (Art. 84, 12 of the Constitution). The President proclaims a state of war in the case of an armed attack against Bulgaria or whenever urgent actions are required by virtue of an international commitment, or shall proclaim martial law or any other state of emergency whenever the National Assembly is not in session and cannot be convened. The National Assembly shall then be convened forthwith to endorse the decision (Art. 100).

Under the legislation in force, different national security agencies fall under the general competence of the government and the president, following the constitutional model of shared competences in the field of national security. The status of SANS is clearly defined within the executive branch, while the place within the system of government of National Service for Protection (NSP) and National Intelligence Service (NIS) is not legislatively established. However, according to their by-laws and internal regulations NSP and NIS are placed under the general oversight of the president. Their chairpersons are appointed by the president. This insufficient status quo is mainly due to the lack of a special legislative framework establishing NIS and NSP and providing for their accountability. There are high expectations the existing problems will be overcome with the adoption of the new laws, planned for the first half of 2013.

2. Democratic checks: constitutional and legislative foundations

[9] Promulgated, SG. No. 13/11.02.1994

Democratic checks and monitoring over the national security system and decisions falls within the existing constitutional framework. Generally, the parliament reserves the controlling function in regard to the national security agencies and the competent ministries (Ministry of Interior and Ministry of Defense). This function could be exercised in several ways. First, the procedure of political accountability could be initiated by the parliamentary opposition (1/5 of the MPs) when the government fails to protect citizens and society from emerging threats. According to the Bulgarian constitutional model the procedure is realized through a motion of no confidence (Art. 89). However, this procedure is not effective when a stable parliamentary majority is present. Though it is unlikely to succeed, it has a positive effect – it facilitates political discussion and transparency in the sensitive and often arcane field of national security. It requires an active involvement of the government and the competent ministries in the parliamentary debate preceding the voting procedure.

Second, in accordance with the parliamentary form of government, the MPs have a constitutional right to address questions and interpellations to the Council of Ministers and to individual ministers, who are obligated to respond (Art. 90). Following the parliamentary practice, questions are of a more concrete nature and address a concrete issue, while interpellations are directed to a more general problem. There is a procedural opportunity, one-fifth of the MPs to require a discussion following the interpellation and the parliament to pass a resolution.

Third, political control could be exercised through the work of *parliamentary committees*. There is a general constitutional provision securing the right of the committees to require mandatory attendance of their sessions by ministers who are also obliged to answer questions (art. 83, 2). Furthermore, there is also an extensive opportunity for a parliamentary committee to order officials or citizens to be present during the session and to testify and present any required documents (Art. 80). In the latter case, officials required to take part in the session may be chairpersons of the national security agencies or other public servants in charge of national security system. In the current system of parliamentary control, a specialized committee is established with a competence to monitor the functioning of the SANS. The competence of this specialized committee is allocated by the Rules of Organization and Procedure of the National Assembly.[10] According to the Rules, the Committee on Control of the State Agency for National Security is established on the basis of a *parity principle* - one member from each parliamentary group. In the course of two consecutive sessions, it is presided over, on the principle of rotation, by an MP from a parliamentary group other than the largest one. The Committee has several important competences: to exercise parliamentary control over the activities of the SANS; to decide on and propose to the National Assembly the budget of the SANS; to decide with majority the control measures on operations of the Agency that have been completed. The Rules provide that the committee holds meetings open to its members only (Art. 18, 5 and 6).

Provisions, concerning political and democratic oversight of SANS exist in the special law. SANSA (Art. 132) stipulates that the parliamentary oversight on the performance of the Agency shall be carried out by a specialized permanent committee of the National Assembly. Further, it provides that the Chairperson, deputy Chairpersons and officers of the Agency are under obligation to report, when invited to do so, to the National Assembly or the specialized committee, and supply the required information. The law also ensures accountability of the agency on a yearly basis - not later than January 31st, the Chairperson of the Agency shall submit to the Council of Ministers a report in the activities of the Agency. The Council of Ministers shall submit the report to the parliament for approval by a parliamentary decision. In relation to the budgetary function of the parliament, the law provides that the specialized committee should

[10] Promulgated in State Gazette No. 58/27.07.2009

consider the program budget and the three-year budgetary forecast of the Agency, as presented by its Chairperson.

At the present state of development, the parliamentary oversight on the national security system lacks the depth and the strategic approach necessary in the context of emerging transnational threats to Bulgarian national security. In a number of cases, Bulgarian MPs members of the specialized committee use the access to classified information to fuel the political discussion and to serve the narrow-minded agenda of their party-politics, rather than to identify risks and analyze the prospects towards a better functioning national security system.

3. New draft legislation on national security system: a critical review

The following analysis will be focused mainly on the draft of Governance and Functioning of National Security System Act (NSSA) with cross-references to the connected draft laws. The general overview supports a rather positive account on the proposed legislation. The core principles are formulated in accordance with the Constitution and international agreements in force. Among the principles that support a democratic oversight on the national security system, three deserve special attention: cooperation with citizens; transparency of the process of policy formulation and implementation; effective democratic oversight in the process of planning and implementation of the activity in protection of national security (Art. 5). Furthermore, it could be positively evaluated the proposed legislative technique to place the regulation regarding political and democratic oversight in a separate chapter (Chapter Three). It is provided that the general oversight on the national security system is implemented by the parliament, the government and the citizens. The draft law stipulates that the parliamentary oversight on the functioning of State Agency for National Security, State Agency "Intelligence" and Military Information Service will be enforced by a *specialized permanent parliamentary committee* (Art. 18). This regulation is based on the existing model under SANSA. It follows the procedures already in place, with one important exception. The draft law requires that the committee should be formed on the *principle of proportionality* according to the size of the parliamentary groups. This could be viewed as backsliding from the *parity principle* practiced under the existing regulation. If the proportionality principle is implemented, it may endanger the necessary balance and transparency in the work of the parliamentary committee. To be effective, this committee should not replicate the existing majority in the parliament, otherwise the incentives for adequate supervision and control will be hampered. Moreover, it will fail to hold the national security agencies accountable and will not be able to implement important checks against the abuse with power.

An important dimension in the proposed legislation is the opportunity for *civil monitoring* over the national security system provided in the draft NSSA (Art. 21). However, this opportunity is not well developed. Unquestionably, it is important to have a well designed system and procedures of civil monitoring and oversight. It is not sufficient only to proclaim the opportunity in a general way, when some general restrictions in the field of national security apply – e.g. restricted access to information, rules for classified information, exclusionary rule for judicial review of legal acts concerning national security issues (Art. 128, 3 Administrative Procedural Code: "Any administrative acts, whereby the national foreign policy, defense and security are immediately implemented, shall not be subject to judicial appeal, save as otherwise provided for in a law."). Hence, it remains unclear what kind of citizens' monitoring will be applicable, when the specialized law does not guarantee detailed procedures, while the general framework in the field is also restrictive.

Furthermore, it should be noted that a relative inconsistency in the regulation of the parliamentary and democratic control exists in the draft legislation. The general provisions in the

proposed NSSA are not systematically decomposed in the specialized laws. For instance, the draft State Agency "Intelligence" Act in a separate Chapter "Accountability and Oversight", provides detailed procedures for parliamentary control and for the necessary cooperation between the parliament, the government and the president in the functioning of the national intelligence service. It is noteworthy, however, that no detailed procedure for citizens' monitoring of the agency exists.

Furthermore, under the proposed legislation, the restructuring of the intelligence service into the State Agency "Intelligence" means also placing the agency under the competence of the executive branch (Council of Ministers). Up to this moment, the agency falls under the shared competences of both the government and the president. Hence, there is a significant change in its institutional status which goes without proper motivation and explanation, thus challenging the constitutional balance between the president and the government.

In the draft of the Military Intelligence Act, the Chapter "Accountability and Oversight" is very brief, not well developed. The wording of the provisions is not detailed enough to be properly implemented by the institutions. This statutory part does not correspond to the general idea of systematization of legislation in the national security field.

According to the draft NSSA the parliamentary oversight on the functioning of the National Service for Protection is exercised by the parliamentary committee in the field of internal security and public order. This could be justified as long as this special agency does not have competences in the field of intelligence or counter-intelligence. However, the information that the agency may collect during the provision of its services to the highest political officials, may be classified and of importance for the national security. This means, that a special procedures should apply in the process of parliamentary supervision.

It is nonetheless clear that the government has good intentions in proposing a systematic statutory regulation of the national security system. To be effective, however, and to escape the empty rhetoric, the future laws should safeguard the right of the citizens to be properly informed and to monitor the functioning of the national security system. Moreover, the laws in the field should respect the constitutionally designed mechanism of checks and balances between different branches of government.

Conclusion

The critical overview of mechanisms for democratic checks on the national security system reveals a state of good intentions and weak implementation. It should be given a positive account on the planned adoption of new legislation providing the statutory ground for the national security system. It is no doubt progressive to have a systematic regulation of this field defining common principles, organization and accountability. The procedures for democratic and parliamentary checks are designed in the right direction however their implementation would be the correct test for their effectiveness in holding national security agencies accountable. Further, it remains unclear how the civil society monitoring is possible under the new institutional design. Though some general provisions are enabling for citizens' monitoring, it is also decisive to have more specific procedures to be effective. Otherwise, it will remain pure rhetoric. In a system of governance where the rule of law is shaken, where the mechanisms of checks and balances are often dysfunctional, it is of paramount importance to ensure external checks on the executive power in the field of national security – where all abuses with power directly affect the fundamentals of constitutional democracy and the personal rights and liberties. The proposed draft legislation is a first, however insufficient step in that direction.