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Democratic control over the armed forces in the legal order of the member states of the Council of Europe

Summary

The control of the military is an indispensable element of a democratic government. Author of the article says that the degree and type of such control will vary considerably according to the system of government, historical traditions and also cultural values.

The democratic control over the armed forces has two dimensions, which both enhance and promote confidence – building and peace. The domestic dimension implies the primacy of the civilian general interest of the principles of a democracy over the military. The international dimension prohibits in general the threat or use of force against a State.

The democratic control of the armed forces is a complex matter. The author has focused in particular on aspects related to the armed forces: ‘traditional’ issues such as military expenditure or military budget and appointment of top commanders and issues which correspond to the change in the role of the armed forces, both at national and international level.

Indeed, since the end of the cold war, armed forces have undeniably undergone a profound shift in both the range and focus of their role. This refocusing of defence and security policy in many Council of Europe member States has led to more national participation in international peace missions.

Likewise, the changing nature of the threats posed to national security and in particular the rise of international terrorism has resulted in the re-emergence of an international role of the army in many European states, which requires a specific control of the conditions by which a state uses the army in domestic issues.

Keywords: Council of Europe, armed forces, democratic control over the army.

Introduction

The armed forces are part of the administrative structure of the state. However, there are no specific international regulations addressing the role of the armed forces. This may stem from the fact that each sovereign state defines the mandate of the armed forces subject to the limitations of international law (in particular the Charter of the United Nations¹).

One of the basic problems of effective state governance was the permanent inclusion of the armed forces in democratic processes², regardless of whether it is about new democracies³ or countries with a long tradition of creating ‘healthy’ civil-military relations⁴.

Particularly noteworthy is the issue of control over the army, which should be treated as an important element of a democratic government. There is no doubt, however, that the degree and type of such control will vary substantially depending on the system of government, historical traditions, or cultural values.

Therefore, democratic control over the armed forces can be considered in two dimensions: national and international. Both dimensions are related to increasing and promoting confidence and peace building. The national dimension assumes the primacy as well as the general interest of civilian institutions in the principles of democratic control over the army. The international dimension, in turn, prohibits the use or threats of use of force against the state at all⁵.

A noticeable evolution in the armed forces has taken place since the end of the Cold War⁶. The changes have been made, among others, in terms of strengthening their role in a democratic state ruled by law. In many states of the Council of Europe, the change in the orientation of defense and security policy contributed to an increase in participation in international peacekeeping missions. The nature of threats to national security has also changed, and in particular the increased threat of international terrorism. As a result, many European countries began to re-expose the internal role of the army and emphasize the importance of controlling the conditions within which the army is responsible for the internal affairs of state.

¹ United Nations Charter, *Journal of Laws* 1947, no. 23, item. 90.

² E. Radwan, *Civilian leadership and democratic control of the army*, [in:] J. Kunikowski (ed.), *The army in society and democratic system. Materials from a nationwide scientific conference and symposium, November 97 – June 98*, Warsaw, 1999.

³ *Armed Forces and Security Services: what Democratic Controls?* Council of Europe, Strasbourg 2009, source: book.coe.int/eur/en/oaints-of-view-points-of-law/4244-armed-forces-and-security-services-what-democratic-controls.htm, p. 12–17, date of access: 18.03.2021.

⁴ M. Wichłacz, *Democratic control over the army – standard, trial, normative goal*, “Acta Universitatis Wratislaviensis” 2008, no. 3079, p. 191.

⁵ J. Robel, *The influence of the Council of Europe on the implementation of the concept of democratic security in the member states*, Torun 2016, p. 168.

⁶ D.J. Mierzejewski, *European security in the conditions of globalization changes*, Torun 2011, p. 87–128.

From the point of view of control over the armed forces at the national level, constitutional standards are of particular importance. By focusing on the executive level, the impact of these regulations is particularly important. In parliamentary republics and monarchies, the president and monarch will have symbolic or formal control over the army. On the other hand, however, the president, in the presidential system, will have considerable powers as the commander-in-chief or chairman of the national council.

Democratic control over the armed forces relates mainly to the existence of democratically elected bodies. Parliament also plays a key role. Parliament's power over the military sector can include lawmaking, budget approval and control. One of Parliament's most appropriate decisions to use force today is participation in international peace-keeping operations.

1. Defense in the axiological system of the Council of Europe

The Statute is of fundamental importance in the axiological system of the Council of Europe⁷. Its analysis leads to a reflection on the breadth of the competences of this international organization mentioned in it, that it could assume almost complete responsibility for all areas of cooperation between member states. From the point of view of the analysis undertaken in this article, it is worth noting that the field that was explicitly excluded from the activities of the CoE was national defense, because in accordance with Art. 1 d of the Statute: "Matters relating to national defence do not fall within the scope of the Council of Europe"⁸.

F. Benoit-Rohmer points out that the reason for this state of affairs was the reaction of neutral states that did not want to join the military organization, while others – which belonged to the military pact – did not want to interfere with its competences. In fact – out of the ten countries of the CoE, only Austria, Ireland, Sweden and Switzerland remained outside NATO⁹.

Also in the Parliamentary Assembly of the CoE, until the 1960s, there was no question of debates on issues related to national or joint defense. When Winston Churchill, speaking as a member of the Parliamentary Assembly in August 1950, proposed the creation of a European army, there was a vehement response from the Committee of Ministers which reminded the Assembly¹⁰, that it is not entitled to a debate on this subject. In response, the Assembly began to demand the repeal of Art. 1 d of statute. The Committee declined, but in 1951 suggested

⁷ Statute of the Council of Europe, adopted in London on 5 May 1949, "Journal of Laws" 1994 no. 118, item. 565.

⁸ Ibidem.

⁹ F. Benoit-Rohmer, *Towards a pan-European legal space*, Strasbourg, Warsaw 2005, p. 19.

¹⁰ Parliamentary Assembly Recommendation 5 (1995).

that defense topics could be part of the discussion on how to ensure peace based on justice and international cooperation, which, according to the preamble to the Statute, is the basis of the Council of Europe's action in this field¹¹.

It was a turning point from which the Assembly was able to debate the political aspects of security and peace in Europe, leaving other organizations with strictly technical military problems. These matters were also dealt with by the Western European Union (WEU). In the field of defense, the two organizations actually complemented each other, and member states began sending the same delegations to their parliamentary assemblies¹².

2. Division of competences between the Council of Europe and its Member States in the area of armed forces

It has become important in the Council of Europe to pursue the goal of creating a civil society¹³, also counteracting the phenomenon of 'democratic deficit' as a premise for building a democratic society. The experiences of countries with internal conflicts (such as Turkey) undoubtedly show the relationship between security and democracy, although this problem should be perceived in all the complexity of its determinants. The relationship between democratic stabilization and security was highlighted in Albania¹⁴. Assistance under the "Partnership for Peace" led there to the formation of civilian control over the army, and the development of democratic institutions and the free market became the premise of 'democratic security'¹⁵.

In the CoE, democratic methods of solving such conflicts became the main premise of stabilization in Europe. The idea was not only to create standards in this area, but also to seek mechanisms for their effective implementation. Moreover, the problem of including the armed forces in democratic processes continued.

The Council of Europe started looking for solutions in the standards of the so-called 'soft law'. In 2005, the Parliamentary Assembly of the Council of Europe adopted Recommendation 1713/2005, in which it called on the member states to observe the principles of democratic supervision over the security sector, including services, police and border services. With regard to the armed forces, the recommendation states that security is their primary concern. Moreover, it is stated that the deployment of troops abroad should be in line with the United

¹¹ Committee of Ministers Resolution (53) 18.

¹² D. Liszczyk, *Dissolution of the Western European Union*, Biuletyn PISM, 18 May 2010, no. 76.

¹³ F. Hondius, *The Notion Civil Society in Grater Europe*, "Transnational Associations – The Review of the Union of International Associations" 1995, no. 3, p. 132.

¹⁴ A. Copani, *The Democratic Process and the Albanian Security Policy*, "NATO Review" 1992, no. 2, p. 24.

¹⁵ J. Robel, *The influence of the Council of Europe...*, p. 167.

Nations Charter. However, all conduct of the armed forces should be subject to the International Criminal Court (Art. IV – e)¹⁶.

With this Recommendation, the Parliamentary Assembly of the Council of Europe has established a framework for national security to which all member states, especially those taking part in peacekeeping missions, should adhere to.

It is worth noting that some states have equipped their armed forces to perform tasks in defense of specific national values or institutions against external threats. For example, the Italian law on rules for the professional military service provides that one of the tasks of the armed forces is to ‘secure free institutions’¹⁷.

A number of Council of Europe states also belong to alliances that require collective defense. This is especially about NATO, because in accordance with the provisions of the North Atlantic Treaty, NATO members strive to “safeguard the freedom, common heritage and civilisation of their peoples, founded on the principles of democracy, individual liberty and the rule of law and they are resolved to unite their efforts for collective defence and for the preservation of peace and security”. The most important article 5 says that an armed attack against one of the members will be considered an attack on all members, in which case each country will take either individually or jointly with the other parties to the treaty “such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area”¹⁸.

The role of the armed forces of the member states of the Council of Europe in the UN and the European Union is also increasing, which was caused by their participation in peacekeeping missions in this region. It is true that the regulations concerning the participation of armed forces in such missions differ in each country, but their importance is of similar value. For example, in Denmark, the purpose and tasks of the armed forces were laid down in the Act No. 122 of 27 February 2001¹⁹; in Poland, the rules on the use of the Armed Forces outside the state were set out in the Act of 17 December 1998²⁰. The basis for the participation of both German and Italian armed forces in this type of mission is somewhat less clear. Italian armed forces may participate in peacekeeping operations that are in accordance with international law and in accordance with decisions of international organizations of which Italy is a member. It is not clear whether they will be entitled to participate in the peacekeeping mission, which has no. basis in the

¹⁶ Democratic Oversight of the Security Sector in Member States’, Recommendation 1713/2005 of the Parliamentary Assembly of Council of Europe, Strasbourg 23 June 2005, source: <http://assembly.coe.int/Documents/AdoptedText/TA05/EREC1713.htm>, date of access: 18.03.2021.

¹⁷ G. Nolte, H.K. Rieger, *European Military Law Systems: General Comparative Perspective*, [in:] G. Nolte (ed.), *European Military Law Systems*, Berlin 2003, p. 37.

¹⁸ Article 5 of the North Atlantic Treaty, April 1949, source: <http://www.nato.int/docu/basicxt/treaty.htm>, date of access: 18.03.2021.

¹⁹ Law. No. 122 of February 27th 2001, in force since March 1st 2001.

²⁰ Act of 17 December 1998 on the rules of use or stay of the Armed Forces of the Republic of Poland abroad, *Journal of Laws* 2021.396.

Charter of the United Nations²¹. In Germany, the armed forces have the right to take part in peacekeeping operations if they take place within the framework of a collective security agreement²².

The increase in the internal role of the army in many European countries was influenced by the changing nature of threats to state security, in particular the emergence of international terrorism²³.

The literature indicates that in many cases the support of the armed forces proved to be helpful. A. Forester, points out, inter alia, to strengthen the actions of civil authorities unable to cope with maintaining order and enforcing the law²⁴. However, such military assistance is a particularly controversial area and varies significantly between Council of Europe member states. The extent of the military's potential role in this field is often dependent on the existence of a militarized police force. In states where intermediary forces exist, the armed forces are generally more limited in this regard. In most cases, the use of the armed forces to maintain law and order is governed by strict legal regulations.

Almost all member states of the Council of Europe (except those that do not have a standing army, i.e. Andorra, Iceland, Liechtenstein, Monaco and San Marino) have constitutional provisions on military orientations and decisions. Only a few of them make explicit reference to 'democratic' and 'civil' control of the army. The Croatian constitution, for example, states that the constitution and the law regulate the organization of defense, command, management and democratic control over the armed forces (Article 7), and that the exercise of 'civilian control' over the armed forces and security service of the Republic of Croatia is the responsibility of Parliament (Art. 80)²⁵. The Constitution of the Republic of Poland provides that the armed forces are subject to civil and democratic control (Art. 26 para. 2)²⁶.

There is general agreement that Parliament has remarkable role in exercising control over the army²⁷. Regardless of the system of government, the decision to use force must be upheld by Parliament.

²¹ G. Tercovich, *Italy and UN peacekeeping: constant transformation*, "International Peacekeeping" 2016, no. 23, p. 681–701.

²² J. Gotkowska, *Bundeswehr 3.0. The political, military and social dimensions of the reform of the German Armed Forces*, „Punkt Widzenia” 2012, no. 28, p. 10.

²³ K. Jałoszyński, *Terrorism and the army*, „Zeszyty Naukowe AON” 2000, no. 2, p. 188–198.

²⁴ A. Forester, *Armed Forces in Society*, Basingstoke 2006, p. 228.

²⁵ *Constitution of the Republic of Croatia of 22 December 1990. Ed. 2 changed and updated*. transl. T.M. Wójcik, M Pertyńska, Warsaw 2007.

²⁶ *Constitution of the Republic of Poland of 2 April 1997*, "Journal of Laws" 1997, no. 78, item 483.

²⁷ H. Born, M. Luri, P. Johansson, *Parliamentary Oversight of the Security Sector. Principles, Mechanisms and Practices*, Geneva & Belgrade 2003, p. 6.

3. Institutions responsible for the democratic control of the armed forces

For control to be effective, parliaments should have specialized staff. Most of the parliaments of the member states of the Council of Europe over the years created special committees involved in the supervision of the armed forces, i.e. the National Defense and Security Committees or the National Defense Committee.

Each such commission performs the functions and powers established by specific regulations. Powers can be divided into: development of defense legislation, advice on defense budget and monitoring of spending, review of defense policy; consultation on international treaties, advising Parliament on the use of force and military deployment, and monitoring defense procurement.

These powers can be developed through a number of mechanisms and activities, such as hearings, questions to the Ministry of National Defense or the government, requests for access to documents, requests for audits, checks on transparency and efficiency of expenditure, consideration of petitions and complaints about military and civilians.

The activities of the National Defense Committees in most member states of the Council of Europe are regulated by law. However, in Austria, Germany and Denmark, their activities have been regulated in the Constitution.

1. Under the Austrian constitution, permanent subcommittees are elected by the competent National Council Committees to control the measures taken to protect constitutional institutions and their capacity to act, as well as the intelligence measures taken to ensure military defense (Art. 52a). Subcommittees are entitled to request relevant information from the competent Ministry and to control relevant materials, apart from material or sources whose disclosure could endanger state security or the safety of individuals (Article 52 a) (2))²⁸.
2. The German Defense Committee is, like all committees in the Bundestag, a body that deals with defense matters and prepares decisions to be taken in plenary sessions of Parliament using the control function of government. The main task of this commission is parliamentary supervision of the German armed forces. It also deals with matters related to international security policy. Its functions to some extent overlap with those of the Foreign Affairs Committee, which results in close cooperation between them. An important task is to approve the defense budget and large tender projects²⁹. It is the only Commission with the right to convene a committee of inquiry (without Parliament's decision on this). In Art. 45 a (2) of the German Constitution we

²⁸ Federal Constitutional Law of the Republic of Austria of 1 October 1920, source: <http://www.libr.sejm.gov.pl/tek01/txt/konst/austria.html>, date of access: 16.03.2021.

²⁹ The information comes from: http://www.bundestag.de/htdocs_e/committees/a12/index.html, date of access: 18.03.2021.

read: „The Defence Committee shall also have the powers of a committee of inquiry. On the motion of one quarter of its members it shall have the duty to make a specific matter the subject of inquiry”³⁰.

3. The Foreign Affairs Committee of Denmark is another example of a defense committee with constitutional status. This committee is governed by § 19 (3) of the Basic Law, according to which: „The Folketing shall appoint from among its Members a Foreign Affairs Committee, which the Government shall consult prior to the making of any decision of major importance to foreign policy”³¹. The functions of the Committee on Foreign Affairs coincide with the Committee on European Affairs. In practice, as in the case of Germany, both these committees cooperate with each other.

In some countries, the National Defense Commission has extensive security and defense policy functions. This is the Republic of Macedonia. However, it should start with the fact that the issue of civilian control over the army appeared, inter alia, when the Federal Republic of Yugoslavia (created by Serbia and Montenegro) was included in the Council of Europe. The Federation Parliament applied for special guest status on 7 November 2000; two days later, an application for membership in the Council was submitted. The first motion was approved on 22 January 2001, while the Assembly issued an opinion on the second³².

The adoption of the opinion was preceded by a letter from the president, prime minister and chairmen of the houses of parliament saying about ‘determination to honor the following commitments’: to fully implement the Dayton Agreement, to ratify a number of conventions, to amend legislation (provide the army with civilian control, reform the police, pass the law on radio and television, the law on refugees), to cooperate with legal experts of the Council of Europe, to cooperate with the Criminal Court (especially to prosecute key persons accused of crimes against humanity and war, to find witnesses), to determine the fate of the missing, to accept United Nations resolutions in Kosovo and to show willingness to make a peaceful decision about its future³³.

The Federation became a member of the Council of Europe on April 3, 2003. There is no doubt that this decision was to convince people to continue reforms and make a pro-European political choice. But at the same time the Federation was subjected to the monitoring procedure. However, the conclusions of the reports produced by it were pessimistic. The required changes were slow, while

³⁰ *Constitution of Germany*, transl. B. Banaszak, A. Malicka, Warsaw 2008.

³¹ *Constitution of the Kingdom of Denmark*, transl. M. Grzybowski, Warsaw 2002.

³² Parliamentary Assembly Opinion no. 239 (2002) The Federal Republic of Yugoslavia’s application for membership of the Council of Europe, source: <http://www.assembly.coe.int/Main.asp?link=/Documents/AdoptedText/taO2/EOP1239.htm>, date of access: 18.03.2021.

³³ I.C. Kamiński, *Conditions and consequences of membership of the Balkan states in the Council of Europe and the European Union*, [in:] P. Czubik (ed.), *The Balkans on the threshold of a united Europe*, Cracow 2008, p. 18.

simultaneously refraining from contacts with Kosovo institutions, sabotaging cooperation with the Criminal Court, the difficult situation of the media, no. guarantees for the independence of the judiciary³⁴.

The fights that took place in 2000–2001 between the Macedonian armed forces and units of the Albanian separatists became the subject of concern for the Council of Europe. The Council institutions issued several resolutions calling for peaceful methods of resolving tensions and also participated as a mediator between the parties to the dispute.³⁵ Macedonia was also subjected to the procedure of monitoring the implementation of commitments. Despite negative observations, the procedure was closed in 2000 in order not to exacerbate national tensions in the state. The assembly then dealt with the situation in Macedonia under the so-called post-monitoring dialogue. Changing the formula did not weaken, but even intensified control³⁶.

One of the most important competences is the decision on the military budget, which results from the overall financial power of Parliament. Defense budgeting is the process of allocating funds to the Ministry of Defense and varies across Council of Europe member states.

The manner of executing decisions and controlling the budget is also variable in individual countries of the Council of Europe. In fact, in some countries, such as Denmark and Luxembourg, Parliament receives information on each budget item. However, in other countries such as France, Greece and Poland, only a parliamentary committee can manage detailed information on defense budget items, not Parliament as a whole (which is the last decision making body).

The Latvian Constitution in Art. 73 states that “The Budget and laws concerning loans, taxes, customs duties, railroad tariffs, military conscription, declaration and commencement of war, peace treaties, declaration of a state of emergency and its termination, mobilisation and demobilisation, as well as agreements with other nations may not be submitted to national referendum”³⁷. Other constitutions also distinguish the military budget. The Swedish Constitution, for example, states that the Riksdag, when establishing the budget, should take into account the needs of the Kingdom in the event of war, threat of war or other extraordinary circumstances related to the defense of the Kingdom (§ 3)³⁸. The Ger-

³⁴ Parliamentary Assembly Resolution 1397 (2004) Functioning of Democratic Institutions in Serbia and Montenegro, source: <http://www.assembly.coe.int/Mainf.asp?link=/Documents/AdoptedText/ta04/ERES1397.htm>, date of access: 18.03.2021.

³⁵ Parliamentary Assembly Resolution 1255 (2001) Situation in the former Yugoslav Republic of Macedonia, adopted on 28 June 2001; Parliamentary Assembly Recommendation 1528 (2001) Situation in the former Yugoslav Republic of Macedonia.

³⁶ Parliamentary Assembly Resolution 1440 (2005) Recent Political Developments in the former Yugoslav Republic of Macedonia in the Context of Regional Stability.

³⁷ *Constitution of Latvia*, transl. L. Gołubiec, Warsaw 2001.

³⁸ *Constitution of the Kingdom of Sweden*, ed. 2 changed and updated, transl. K. Dembiński, M. Grzybowski, Warsaw 2000.

man Constitution, in turn, stipulates that the quantitative composition and general organization of the structure must be entered in the budget (Art. 87a para.1)³⁹.

The examples cited above show significant differences in national budgeting practices. However, the extent to which Parliament is able to exercise its scrutiny in this area depends in principle on the quality and comprehensiveness of the information received.

Defense procurement is an important part of the overall budget. It is designed to follow the process by which national security authorities procure the equipment necessary to fulfill their mission.

4. Final remarks

Democratic control over the armed forces cannot be based only on abstract ideals and standards, but should be a product of historical tradition, social structure, cultural factors, and the existing political structures in the state⁴⁰, the degree of political and economic stability of a given state organization and the influence of its international environment⁴¹. And just as the environment in which the armed forces operate, its structure, dominant values, attitudes, interests or perceived threats change, in the same way both the nature of democratic control over the army and its individual procedures evolve. Therefore, it remains an open issue for the rulers, society, the armed forces themselves and its investigators⁴².

In European conditions, where there is a different approach to the issue of control over the armed forces in individual countries, it is more common to formulate minimum standards that constitute what we call 'democratic control' under the conditions of civil leadership in the formulation of security policy⁴³.

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³⁹ *Constitution of Germany...*, p. 12.

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⁴² See M. Caparini, *Civil Society and Democratic Oversight of the Security Sector*, DCAF Working Paper Series, no. 132, Geneva, January 2004, source: http://www.dcaf.ch/publications/Working_Papers/132.pdf, date of access: 18.03.2021.

⁴³ See J. Burk, *Theories of Democratic Civil-Military Relations*, "Armed Forces and Society" 2002, vol. 29, no. 1, p. 7–29.

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Demokratyczna kontrola nad siłami zbrojnymi w konstytucjach państw członkowskich Rady Europy

Streszczenie

Celem niniejszego artykułu jest przedstawienie demokratycznej kontroli nad siłami zbrojnymi w państwach członkowskich Rady Europy (RE). W artykule dokonano charakterystyki Rady Europy, a zwłaszcza jej podejścia do zagadnień związanych z obronnością. Dokonano także omówienia standardów o charakterze prawnie wiążącym, zwłaszcza przepisów konstytucyjnych wybranych państw członkowskich RE oraz standardów o charakterze tzw. „miękkiego prawa”, tj. zaleceń Zgromadzenia Parlamentarnego Rady Europy.

Słowa kluczowe: Rada Europy, siły zbrojne, demokratyczna kontrola nad armią.