ANALYSIS

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Amendment of the Law on Defence and Law on the Serbian Armed Forces: One step forward, three steps back

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Abstract

We have identified some positive trends as well as some missed opportunities and inadequacies concerning the latest provisions to amend the Laws on Defence and on the Serbian Armed Forces. The strengthening of the role of the Defence Inspectorate is certainly commendable. On the other hand, an opportunity has been missed to properly regulate the rights of defence sector unions and the relationship between the military and civil society. There is also room for improvement in provisions governing logistical support, documents pertaining transfers and also disciplinary offences.

One of the goals of the forthcoming session of the National Assembly of Serbia will be the amendment of the Law on Defence (henceforth LD) and the Law on the Serbian Armed Forces (LSAF). Even though a new government is yet to be formed, the Ministry of Defence has organised a public consultation on draft amendments of the two laws. We hope to use this opportunity to present and discuss some significant changes the amendments will introduce but also to highlight provisions the legislature has failed to introduce in spite of several years of pressure from the expert community.

Amendment of the Law on Defence

Strengthening the Defence Inspectorate

It is important to note the progress we have observed in the legal regulation of the inspectorate. The Draft Amendment of the Law on Defence (henceforth DALD) expands and specifies the duties of the Inspectorate (LD, Article 16). Particularly noteworthy is the introduction of explicit duties regarding oversight of the material and financial functioning of the defence sector, including the purposeful and legal use of financial resources by the Ministry of Defence and the Armed Forces (DALD, Article 10, Section 2, Item 6). As things stand, the duties of the Inspectorate regarding the material and financial operations of the Ministry of Defence and the Armed Forces are regulated only indirectly by Article 18 of the current Law on Defence. Article 18 states that the Minister of Defence is responsible for setting standards for, amongst other things, the evaluation of material and financial operations of the command structures, units and institutions of the Armed Forces and organisational elements of the Ministry itself; the Inspectorate is then responsible for submitting regular reports to the President and the Minister of Defence. Article 18 remains unclear due to the fact that some of the duties it reserves for the Inspectorare are absent from other articles of the Law on Defence that define the functions of the Inspectorate. The proposed amendments also remove Section 2 of Article 18, making it unclear to whom the Inspectorate is expected to submit reports.

The Draft Amendment also specifies the regulatory authority and duties of inspectors and others authorised to perform supervisory or inspection functions. Inspectors are explicitly granted the authority to review "general and individual acts, records and other documents" (DADL, Article 11, Section 2, Item 3); to inspect offices, buildings, facilities, equipment and other materiel (DADL, Article 11, Section 2, Item 5); and to take statements, or if necessary, written statements by relevant officials (DADL, Article 11, Section 2, Item 5). Above all, the Defence Inspectorate submits reports of "significant breaches of the independence of the Inspectorate and of unlawful attempts to influence the work of the Inspectorate or others authorised to perform supervisory or inspection functions" directly to the Minister of Defence (DADL Article 12, Section 3). Nevertheless, since it is possible to imagine that violation of the Inspectorate's independence could come from the Minister, it would be preferable for the Draft Amendment to make provision for the Inspectorate to report to the National Assembly in the event of such a breach. This could be introduced in a manner analogous to Article 57, Section 3 of the Law on Military Security Agency and Military Intelligence Agency, according to which those tasked with internal supervision within the Military Security Agency (MSA) and the Military Intelligence Agency (MIA) "shall inform the Inspector General and, when needed, the relevant National Assembly Committee, when they have findings that the MSA or MIA Director has failed to prevent illegality or irregularity in work identified by Internal Control."

In short, the proposed amendment of the Law on Defence expands the jurisdiction of the Defence Inspectorate, broadening and tightening its powers and strengthening its position

within the defence sector. In this sense, the Belgrade Centre for Security Policy (BCSP) supports the proposed amendment of the articles of the Law on Defence that determine the role of the Defence Inspectorate. At the same time, BCSP is committed to the introduction of additional legal provisions that would further define the circumstances and frequency (e.g. annually or biannually) of the Defence Inspectorates reports. Additionally, it would be good if the Law contained provision for the Defence Inspectorate to submit an annual report to the National Assembly or a relevant National Assembly Committee. Similar provisions have already been established for the Inspector General of the military security and intelligence services. Reports submitted to the National Assembly would, by linking internal and external supervision and oversight, strengthen democratic control and oversight of the Ministry of Defence and the Armed Forces.

More expensive logistics for the Armed Forces?

The regulation of logistical support by Article 45 of the proposed amendment, appears to be promblematic. Section 3 of Article 45 stipulates that only "military institutions [...] that are functionally linked to the Ministry of Defence" can provide logistical support. We are of the opinion that in certain areas (e.g. transport security) there is no need to narrow the selection only to military institutions and that other activities should not be within the scope of the military sector at all (e.g. forestry or hunting). In this regard, we believe that this article should be rephrased in order to allow other agencies (from within the state or private sector) to offer logistical services to the Armed Forces. This could help to avoid 'mismanagement' and reduce the potential for abuse within the system. On the other hand, it would be possible to introduce a section (or additional regulation pertaining to Section 2) giving "advantage to military institutions when bidders offer equivalent price and quality". As things stand, it may be possible that military institutions offer competitive rates and terms but that does not mean to say that some services within the defence sector are not more expensive than current market rates.

Amendment of the Law on the Serbian Armed Forces

Some of the proposed changes in the Draft Amendment of the Law on the Serbian Armed Forces (DALSAF) are worthy of note but it is also evident that the legislature has failed to propose some necessary changes.

Rendering military sector trade unions pointless

One of the perceived failures of the proposed amendment is contained within Article 14, which regulates the right of members of the armed forces to engage in political or trade union activity. Changes to this article propose the designation of "professional soldier" to "professional member of the Armed Forces", in keeping with the spirit of the transition from a conscripted service to a professional army. On the other hand, even though Article 14 allows for the engagement of trade unions, its provisions curtails their reach and prevents those raising relevant issues. Unions are, for example, prevented from engagement

on issues of equipment or management. For the purposes of comparison, Article 134 of the Law on the Police stipulates that unions are to operate in a manner "regulated by law". In reality, members of the police force are faced with uniform and footwear shortfalls even though, according to regulations, these should be issued annually. In practice, this rarely happens and in any case does not apply to the whole force, and officers frequently go to work in their own footwear, resulting in dissatisfaction and petty corruption (taking bribes for footwear), for which the fee is merely 1,000 dinars. Similarly, members of the Croatian Army refused to go to Afghanistan when it transpired that they would be sent without adequate equipment and weapons[1]. In this context, the equipment and other conditions for soldiers due to be deployed on foreign missions has become a subject of some controversy and trade unions are the right forum for its resolution.

Likewise, we believe that trade unions should have the right to discuss the management of organisational units within the military but not the right to question commands. In the event that a serving member of the armed forces should wish to complain, the relationship between employees within the military and their management is a matter that can be addressed more effectively through mediation by a trade union than in the traditional office-subordinate relationship. That this more than mere theory can be seen from the 2011 case in the Military Intelligence Agency, which, due to reliance on traditional complaint resolution mechanisms, had to be brought before the Ombudsman's office. In this case, MIA staff complained about the criteria for their evaluation to the Inspector General but to no great effect; the Ombudsman's office intervened, confirming flaws and abuses within the MIA management[2].

Soldiers can cooperate with foreign, but not domestic, associations

Another controversial article, Article 14, is unfortunately not part of the proposed amendment. This article contradicts the Constitution of the Republic of Serbia as well as the Law on the Armed Forces and is a step back for the country as a whole. The Constitution does not prevent anyone – including members of the armed forces – from participating or associating with civic associations in the manner suggested by Article 14a. The article is also in contravention of Article 141 of the Constitution, which states that, "the Armed Forces are under democratic and civilian control" as well as Article 29 of the Law on the Serbian Armed Forces, which states that, "democratic and civil control of the Serbian Armed Forces shall be exercised by the National Parliament, Ombudsman, and other state bodies in accordance with their competences, the citizens and the public". This raises the question of how citizens can exercise control over the military if citizens' associations are denied contact with members of the armed forces. Furthermore, if Article 14a is adopted, it will create

1 Dnevni.hr: "Afganistan: Hrvatski vojnici odbili otići na zadatak bez opreme" 16 September 2009. http://dnevnik.hr/vijesti/hrvatska/afganistan-hrvatski-vojnici-se-oglusili-na-zapovijed.html, accessed 24 February 2014.

2 See: Confirmation and recommendation by the Ombudsman (Ser. Utvrđenje i preporuka Zaštitnika građana), 23 May 2013, Internet, http://www.ombudsman.rs/index.php/lang-sr/2012-02-07-14-03-33/2866-2013-05-28-11-26-57 accessed 20 February 2014.

the paradoxical situation in which military personnel are allowed to become members of foreign professional associations (Article 50 of the Law on the Serbian Armed Forces) but are prohibited from involvement with domestic associations. In addition, according to the proposed amendment of Article 12, Item 24a of the Law on Defence, "the government will decide which scientific research projects are of importance to the defence sector [...] these will be implemented by other state bodies, scientific institutions and organizations." If the government retains the power and has an interest in such activities then Article 14a is in contravention of both existing and proposed legislation. On the other hand, it has been shown that, in practice, members of the military do participate in the activities of civic associations so the rationale behind provisions like Article 14a is not clear. In any event, Article 14a is no novelty; it was passed as a provision in the Law on the Serbian Armed Forces in 2009, in spite of strong resistance and critics from civil society organizations[3].

Procedures against documents of transfer prohibited

Article 139 of the Law on the Serbian Armed Forces is expected to be amended to prohibit administrative procedures against legal documents pertaining to admission to service, transfer and promotion (DALSAF, Article 56, Section 4). Currently, the Law on the Armed Forces explicitly allows for administrative procedures against the aforementioned legal documents (LSAF, Article 139, Section 3). The negation of administrative procedures against transfers is particularly problematic and it is not at all clear what the lawmakers hoped to achieve with this amendment. This change would not necessarily lead to financial efficiencies because it could contribute other expenses. For example, the Draft Amendment provides for a new Article 72a, according to which the spouse of a serving member of the armed forces, who is forced to terminate their employment due to a transfer order and who cannot find new work, retains the right to pension and invalid contributions and termination of employment compensation.

Degradation of the professionalism of the Armed Forces and MoD?

According to Article 149, Item 20 of the Law on the Serbian Armed Forces, disciplinary offences include "additional work by Serbian Armed Forces personnel outside the conditions prescribed by law", more precisely defined as "paid or compensated work outside of the unit or institution or independent engagement in professional activities contrary to conditions prescribed by law". It remains unclear, however, what "conditions prescribed by law" actually entails. On the other hand, the proposed amendment (see DALSAF, Article 60, Section 6) removes a number of other disciplinary offences from the list in Article 149, including: becoming a director, deputy director or assistant director in a legal entity without approval from the competent state body or violation of restrictions pertaining to membership in legal entity bodies by a professional Serbian Armed Forces member (LSAF, Article 149, Item 21); foundation of an industrial company, public service or dealing with

[3] Ejdus, F. (2009) The Return of 'Internal Enemies', Western Balkan Security Observer no. 15, p. 31-34.

entrepreneurship by a professional Serbian Armed Forces member (LSAF, Article 49, Item 22); and failure to transfer administrative rights in an economic entity to another person, failure to provide the manager with information pertaining to the person to whom the administrative rights have been transferred or failure to inform the manager of the evidence of transfer of administrative rights by a professional Serbian Armed Forces member (LSAF, Article 49, Item 23). The removal of these disciplinary offences does not in itself necessarily signify anything sinister but it can be interpreted as enabling conflict of interest and the degradation of professionalism within the Serbian Armed Forces. These changes highlight the need to introduce, as urgently as possible, new, tighter regulations that will prevent conflicts of interest for members of the Serbian Armed Forces and the Ministry of Defence.

Official secrets live on

Regarding Article 149, it is noteworthy that Item 15 still lists "violation of official secrets" as a disciplinary offence. The Law on Classified Information has repealed the category of "official secret", introducing new regulation at the end of 2013 to more precisely define four levels of secrecy. As a result BCSP sees the retention of the classification "official secret" in the Law on the Serbian Armed Forces as an obsolete and non-functional solution that can only have any practical value in the interim until all secret information is reclassified. Provisions in the Law on Classified Information proscribe a six month timeframe from the time the law enters into force and the preconditions for the allocation of new classifications were, to all intents and purposes, achieved in the autumn of 2013.

The VJ lives on

Although provisions from the Law on the Yugoslav Army (VJ) have been superseded by the Law on the Serbian Armed Forces, we are of the opinion that some of the provisions pertaining to Article 197 no longer have a place in a modern defence system. These provisions from the Law on the Yugoslav Army principally pertain to the Federal Republic of Yugoslavia, a state which no longer exists but, on the other hand, reflect the transition from a conscripted army to a professional one that has already been enacted by the National Assembly. Primarily, this pertains to Articles 279-336 of the Law on the Yugoslav Army governing military service, which is not in line with the current orientation and organisation of a professional military. In addition, these provisions (specifically Article 283) are highly discriminatory in the sense that women are not subject to military service. Even though in its elucidation of these provisions the legislature paid little heed to functionality or compatibility with current practices, we believe that, if mobilisation is to be a last resort in times of war, all citizens should be equally liable to a call to arms. This would of course require the maintenance of military records on all citizens of Serbia. Also controversial are Articles 340-345 governing punitive measures for failure to respond to recruitment calls and the failure, by family members and labour organisations, to report the absence of a recruit to the military authorities. In this regard, reference to these provisions of the Law on the Yugoslav Army should be replaced by provisions that are in keeping with professional military service.

Recommendations

1. Amend Article 17a of the Law on Defence to anticipate possible violation of the independence of the Defence Inspectorate or inspectors being unduly influenced, and enable the Inspectorate to report directly to the relevant National Assembly Committee.
2. Introduce Article 18a into the Law on Defence in order to regulate how often and under what circumstances the Defence Inspectorate should report its findings.
3. Include provision in Article 18a for the head of the Defence Inspectorate to submit a regluar annual report to the National Assembly detailing the activities of the preceding year and any significant findings.
4. Reformulate Article 45 of the Law on Defence to allow other bodies (whether state-owned or private) to carry out activities referred to in Section 1. A provision can be included, either as a section in the existing article or as an associated regulation, to give "advantage to military institutions when bidders offer equivalent price and quality".
5. Amend Article 14 of the Law on the Serbian Armed Forces to allow trade unions to participate in the resolution of issues pertaining to equipment and the management of defence sector institutions.
6. Completely remove Article 14a of the Law on the Serbian Armed Forces as unconstitutional and unlawful.
7. The Ministry of Defence should further publically elaborate on the abolition of administrative disputes against documents pertaining to admission to service, transfer and promotion that will result from the proposed amendment.
8. Urgently pass additional regulatory acts that will precisely define and regulate conflicts of interest for members of the Serbian Armed Forces and employees of the Ministry of Defence.
9. Rephrase Article 149, Item 15 to "violation of classified data" in order to comply with provisions of the Law on Classified Information and to cover all relevant disciplinary offences during the transition period.
10. Remove reference to provisions of the Law on the Yugoslav Army and replace them with provisions that are in keeping with professional military service.

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