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On the actual status of the “right for security” problem

S u m m a r y

The article presents a review of the current state of the problem about the right for security in Bulgaria. The modern democratic countries have adopted the French model which has been historically imposed. In this model, personal security has been regarded as supreme value guaranteed by the state. The legal definition adopted in Bulgaria in 2015 deviates from that line and goes another direction where “national security” is regarded as alternative to the “legal order” category.

Key words: security, personal security, right for security, national security, legal order

The modern understanding of the security problem goes back to the era of the bourgeois-democratic revolutions in 17th–18th centuries. Regardless of the nuances that the representatives of the humanistic direction of the world political thought add to the process of clarification of the meaning of the “security” term, the focus falls on the “human peace of mind” (Montesquieu), “man who’s been saved in perspective from a sudden attempt on his person or property” (A. Smith). (Quote from Мыхяев)

T. Hobbes for the first time (1651) regards the social phenomenon of “security” as unity and interrelation between security of person, society and state. The purpose of the state, according to him, is to control the natural state of man and to impose order. In order to protect the security of the population, the state power should have the relevant rights: to punish offenders of the law; to declare war and make peace; to provide the required amount of armed forces and resources to wage war; to protect in court every citizen from the injustice of another; to create subordinate bodies and structures; to prohibit harmful doctrines and propaganda leading to breach of peace.

The state, according to Hobbes, cannot implement the above rights without the respective legal institutes, state bodies, specialized forces and means. Really, in the centuries to come, protection of security has been regarded exceptionally as activity to be performed by the state. Fundamental political and legal acts which have remained from that era are authoritative evidence of that. The English Bill of Rights (1689) sets security in line with unity, peace, human peace of mind and welfare of the state. The American Declaration of Independence (1776) is distinguished in that the creation of guarantee for personal security has been declared both as right and obligation of the people, and the task of the authorities is to provide security and happiness for the people.

Modern democratic states follow in general the model which historically belongs to France. In the Declaration of the Rights of Man and of the Citizen (1789) it has been noted that: “The goal of any political association is the conservation of the natural and imprescriptible rights of man. These rights are liberty, property, safety and resistance against oppression” (Art. II). Further on, it stipulates that the guarantee of the rights of man and of the citizen necessitates a public force (Art. XII). For the maintenance of the public force and for the expenditures of administration, a common contribution is indispensable; it must be equally distributed to all the citizens (Art. XIII), which necessitates public taxation (Art. XIV).

In the variant of the Declaration from 1793 (Art. XVIII), a special definition has been given: “Security consists in the protection afforded by society to each of its members for the preservation of his person, his rights, and his property”. Mon-Gilbert who in the same year wrote one of the most profound studies on this topic, noted that: “Security consists in opposing the pressure to protect your

person and your rights against any arbitrary and unlawful action". (Теоретични проблеми на правата на човека, София, 1998)

From the quoted texts, as well as from Mon-Gilbert's interpretation it becomes clear that what they mean is personal security. Its protection, however, is a function of the capability of the state to neutralize any resistance to the action of the law, as well as any violence against state officials empowered with law enforcement duties. "Man having once entered the society, i.e. the citizen – writes on this topic J. Buino – could request the society to recognize his natural rights and protect them through its political, legal and administrative organization". (Теоретични проблеми на правата на човека, София, 1998)

The ideas contained in the Declaration of the Rights of Man and of the Citizen from 1789 are stipulated in the Preamble to the Constitution of the French republic from 1946 where it has been indicated that the nation provides the person and the family with the necessary conditions for their development. The two acts indicated above – Declaration of the Rights of Man and of the Citizen from 1789 and the Preamble to the Constitution from 1946, in their part concerning the rights of man and of the citizen and the national sovereignty, have been declared fundamental principles of the current Constitution of the French republic (from 4th October 1958).

The solution of the problem in the Constitution of USA is similar, as is in the constitutions of most countries of the European Union. Without any conditions, clearly and precisely, the person has been declared as the supreme value which has to be protected. The protection of the territorial integrity, independence and sovereignty of the states has been regarded as conditions under which the function of the Constitution can be secured together with the rights of man and of the citizen guaranteed by it.

In the Preamble to the Constitution of Republic of Bulgaria it has also been indicated that the rights of the person, his dignity and security are declared as supreme principle. However, the observance of this principle has been questioned because the "national security" term has been used in the provisions for restriction of citizens' constitutional rights, while providing no definition of what this term implies.

In the first place, as per the Constitution, the protection of the national security serves as a reason to limit the right of anyone to choose freely his place of residence, to move freely along the territory of the country and to leave its boundaries (Art. 35, par.1), as well as limiting the right of inviolability of one's privacy (Art. 32).

Secondly, in the laws adopted based on the Constitution, the "national security" term is included in the reasons for limitation of the right for inviolability of personal home (Art. 33, par.1), of the right for freedom and privacy of correspondence and other communications (Art. 34, par.1), as well as limiting the right

of foreigners residing in the country on a legal basis not to be expelled from it or handed over to other countries against their will (Art. 27, par. 1).

As per the Ministry of Interior Law (Art. 163, par. 1, pkt. 6, 8, 9, 10, 11), the limitation of the indicated constitutional rights is implemented in the frame of the operative and investigating activities, via use of special intelligence means and other specific methods and means. Presence of a threat to the national security is one of the reasons to conduct operative and investigating activities.

The Special Intelligence Means Act requires the authorization to use special intelligence means to be issued by a judge. However, Art. 161 of the Ministry of Interior Law where the objective of the operative an investigating activity has been set, stipulates that it's the judge who will determine at his own discretion whether certain activities, other than crimes or other breaches of law, pose a "threat to the national security". This allows the judge to make a decision based on criteria beyond the legal ones which is in direct conflict with Art. 117, par. 2 of the Constitution which stipulates that the judge when performing his functions is obeying the law and the law only.

Other examples may be demonstrated where the use of "national security" term in various laws opens the door for administrative arbitrariness. In the Law for Control of Foreign Trade Activity with Arms, Commodities and Technologies with a Possible Dual Use (art. 2), it has been indicated, for example, that the said foreign trade activity is subject to control by the state for protection of the national security. This control is implemented via a special procedure which includes issuance of licenses and permits following a certain order and conditions. However, in the additional provisions it has been indicated that the Council of Ministers in exceptional cases where risk for the national security may arise has the right to ban the deal, regardless of the license and permit already issued.

The Law for Control and Functioning of the National Security System has become effective as of 1th November 2015. (Published in the State Gazette, issue 61, dated 11th August 2015). Its Article 2 reads: "National security is a dynamic state of society and state in which territorial integrity, sovereignty and constitutional order of the country are protected and the democratic functioning of the institutions and the principle rights and freedoms of the citizens are guaranteed, in a result of which the nation increases its welfare and progresses, as well as when the country successfully protects its national interests and realizes its national priorities".

The adoption of such a law for the national security providing also a legal definition is undoubtedly an important step. The question is – is this step in the right direction? There are grounds for reasonable doubts.

The most serious of them is that the legal definition of the national security has not been prepared in the field of legal science. This is manifested by the obvious deficits in the process of its creation: first – of legal culture, secondly – of knowled-

ge about the effective legislation and the principles on which the structure of the national legal system is based, and in the third place – of theoretical knowledge about the subject of legal regulation.

Legal culture guarantees compliance with the circumstance that the mechanisms of legal regulation set in the norms are constructed via legal means – legal norms, presumptions, legal facts, legal stimuli, limitations, bans, etc. On the other hand, the legal means themselves are not directly observed phenomena – they are ideal creations, achieved via theoretical abstraction. That's why the legal norms, together with the rest of the legal means would have remained ephemeral had they not been fixed by means of legal terminology. If required, the content of specific terms acquires verbal expression via legal definitions. In the modern world, if there is no definition of legal notions, in practice it is impossible for the state to express its will "concisely, clearly and precisely" to impose obligations, to provide possibilities for implementation of rights and legal interests and to impose limitations and bans. The practical unsuitability of the legal definition in question to accomplish its purpose can be seen with the naked eye, if in any provision of the effective Bulgarian legislation, regulating the limitation of rights and freedoms of Bulgarian citizens, the "national security" term is replaced by its legal definition.

But this is not all, because having been once defined, the legal notions begin to fulfill the responsible task of completing the construction and development of the legal system. From the point of view of the systematic approach, the legal definitions are the "code" required to identify these legal norms, normative acts, legal relations and legal subjects which can be suitably connected into a sub-system. The efficiency of the legal acts, as well as the efficiency of the activity related to their application and the reliability of the guarantees for their legal soundness depend on the degree of synergy that has been obtained.

The inexhaustible variety of forms of social phenomena, processes and relations provides broad possibilities for their study in the frame of philosophy, sociology, political science, theory and history of international relations and other social sciences. Often, the results from these studies are not suited for use in lawmaking, because the social relations in them are not structured by criteria related to the possibilities of the legal system to subject them to legal regulation. Here, in addition to legal culture, more profound knowledge of the principles set in the structure of the legal system is required.

The American researcher E. Rothschild reveals in a convincing way that regardless of the way in which the ideas about the essence of security have been changing in historical plan, including during all changes of the "political understanding" of its meaning, it has always been a state or goals that have built relations between individuals and states or societies (Rothschild). In other words, from the point of view of political science, security in all of its manifestations is a social

phenomenon which is realized via emerging, development, regulation and protection of a certain scope of social relations.

According to one of the successful definitions made in the legal theory, social relations are regulated via non-biological regulators, relations between people which emerge and develop in their mutual activity and coexistence (Hesina). The emergence, at a certain stage of the evolution of the civilization, of the right as one of the non-biological regulators and of the state which has the necessary tools to realize the normative requirements, creates the legal order (means) for regulation of social relations. As far as it has been implemented where and when the normative prescriptions have been adhered to, the legal order is an essential feature of the state with a rule of law. The structure of the space of legal regulation corresponds completely to the four main types of common human activities: 1) legal order in the social sphere – education, healthcare; 2) legal order in the material and production sphere – industry, agriculture, trade; 3) legal order in the spiritual sphere – art, culture, science, religion; 4) legal order in the organizational sphere – management in various spheres of social life, including defense, social order and security. By virtue of this logic, even ancient Greek philosophers and Roman lawmakers have defined the purpose of state power – to create and uphold such legal order that will guarantee the welfare and security of the people.

An alternative way has been foreseen in the Law for Control and Functioning of the National Security System via which the state power is to fulfill its goal, creating conditions for the nation to “preserve and increase its welfare and to progress”. This alternative is the replacement of the legal order with a multi-component dynamic state, the content of which is revealed in Art 2 of the above indicated law to legally define the “national security” term. So far, this fact has not been paid attention to. It can quite easily be ignored as the next in line “legislative paradox” of the “reforms” which have been flooding us with the persistence of sea waves for over a quarter of a century. But when we are speaking about the right for security we cannot ignore the circumstance that on the occasion of a similar understanding of national security, Harold Laswell and his followers have some convincing and substantiated concerns about a possible transformation of such a state - from a state with the rule of law into a garrison state, governed by specialists in violence.

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