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COMMENTS

**ON DEMOCRATIC OVERSIGHT OF SPECIAL SERVICES
IN EASTERN EUROPE**

by

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DEMOCRATIC OVERSIGHT OF SPECIAL SERVICES IN EASTERN EUROPE

1. General specific character of creation and functioning of the special services in the East European countries

1.1 During the post-Soviet democratic transformations in the countries of the Eastern Europe previous composition, structure and legal basis of the special services functioning could not, for understandable reasons, be preserved. These very state institutions which served as piers of the previous regime have been destroyed in the first place and most deeply in the course of the post-Soviet political transformations.

But not only the institutions as such have been destroyed. In many East European countries special services have been not only reorganized structurally, but also underwent almost total personnel purge.

In particular, the Czech lustration law of 1991 concerning communist activists and special services staff has once again been confirmed by the Parliament in 2000 and gained force without time-limit, in spite of the criticism from Parliament Assembly and the European Commission. Similar measures, although not always legally formalised, have been taken in Poland, Croatia, Slovenia, Hungary, Macedonia and some other countries.

As a result of these "lustrational" tendencies, special services in the majority of the East European countries were created anew and practically from zero level, parallel with the creation of the new system of political power and government.

There were no staff, resources and experience to create full value special services from zero level in the countries of Eastern Europe, therefore the results of the first stage of the post-Soviet reforms have become:

-acute shortage of staff, which led to incorporation into the special services, including their leadership, large amount of non-professionals;

-specific accent during the formation of staff on the loyalty to the post-Soviet authorities (or at least emphasized hostility to the previous regime), which led to deep and often non-constructive politisation of the new staff-members;

-impossibility to rapidly create adequate new legislative basis for the special services functioning, the consequence of which was massive non-critical, contradictory, eclectic and unsystematic copying of some legal provisions of the developed democratic countries of Europe and the USA or own ineffective and unstable legislation. Such legislation could not provide neither for full value legal basis for the special services actions nor for the full value mechanisms of the legal democratic control over these most important state institutions.

It should be recognized that, despite numerous transformations of the special services in the East European countries, the problems enumerated above have not been resolved.

1.2 The problems of the legal and staff supply of the special services' activity in the East European countries are aggravated by the special character of public mentality of each country and the macroregion as a whole. The main thing in this specificity is lack of experience of living in democratic legal system.

This determined relatively low value status of democracy in the eyes of masses of population, on the one hand, and inadequate interpretation (both in everyday life and in politics) of democratic principles. Namely, their interpretation "from below" as rights without duties (i.e. all permitted) and "from above", by the political and economic elite, as new mechanisms of suppression of competitors.

These circumstances were accompanied by opening of the frontiers with the West and new possibilities of transnational mobility and communications as well as actualization of “dozing” ethnonational, political and religious conflicts which led to wars (first of all, on the Balkans).

The above circumstances were first used by the East European criminality which soon became international. This created in the Eastern Europe a strong wave of criminalization of society, including corruption, relatively low spread in the past, which affected all strata and social groups.

1.3 Before the terrorist attacks of 2001 special services of the East European countries (with the exception of countries at war on the Balkans) did not pay much attention to the problem of terrorism. The creation of antiterrorist services in these countries was accelerated just after 2001, and in many cases in the context of their joining the NATO and EU structures.

At the same time in some countries (Czechia, Romania, Bulgaria, Poland, Baltic countries) a new wave of reforming of the special services started, aimed to adapt structure, legislation and mechanisms of interaction to the relating norms of the European countries. But these processes almost everywhere encounter serious difficulties.

These difficulties are determined both by the contradictory understanding of the priorities of national security and strategic orientations of the external policy (first of all Western-European or American) by the East European political leadership and unreadiness of the majority of political class and societies of the Eastern Europe to accept relating Western legal standards.

2. Basic principles of organization of special services and mechanisms of democratic control in the key countries of Eastern Europe.

2.1 In the initial post-Soviet period in the majority of the East European countries special services were deeply fragmented with duplication of functions, constant reorganizations, rotations of the higher staff, impossibility to coordinate and control their activity.

For instance, in Czechia, the initial post-Soviet structure of the special services included 10 organizations, 9 – in Poland and Croatia, 8 – in Bulgaria, 6 – in Slovakia, Lithuania and Latvia. Political leadership of the majority of the East European countries as the main task put forward maximally fast and full deliverance of “Soviet heritage” which meant, first of all, internal personnel purge as well as “unfastening” from the CIS connections and preventing from agent actions on the part of the “Eastern neighbours”.

During this very period new special services of the East European countries began to intercept the experience of the “new democratic friends” from the Western Europe and USA, send groups of their staff-members to study complete internships at the CIA, BND, Surté etc. As a result, on the one hand, new staff who came to the middle level of the East European special services leadership began to pay foremost attention to legality in the course of operative and search activity and special operations, and to establish informational connections with the intelligence communities of the West and NATO, on the other.

It became, however, quite clear in the beginning of the 90s that main threats to the security of the East European states come not from the CIS countries but from the growing organized crime, illegal immigration and corruption at all branches of power. Besides, lack of personnel and adequate new legislation in the field of security led to rude violations of human rights by the special services.

These new challenges to security were understood and caused large-scale reorganization of the East European special services. This reorganization was aimed, in the first place, at staff reduction and amelioration of the special services’ activity, at more rigid legislative definition

of their competencies and prerogatives, at establishing of various forms of control from legislative, executive and judicial powers.

It should be noted that almost in all countries of the Eastern Europe reorganizations have concerned the military intelligence and special services to the least extent. In Czechia the attempts to organize their deep 'lustrational purge' were cut by President V.Havel who explained that this could lead to irreplaceable damage to the national security of Czechia.

2.2 In the post-Soviet era the adoption of the new constitutions has become the main mechanism to establish legal framework to the special services' activity. In them, as norms of direct action, conditions and limits of permissible human rights violations in extraordinary situations are defined, as well as parliament and government committees and commissions, judicial instances are set up in order no guarantee co-ordination, control and supervision over special services' activity.

For example, the normative basis for the special services of Poland in the field of human rights is defined by the Constitution of 1997, namely, its art. 31. It gives the exhaustive list of the legal regimes of the state of emergency (martial, exceptional, natural disaster) which permit violation of human rights and determine the "proportionality principle" in such violations (violation must be proportionate to the sharpness of the situation and to the necessity to provide for security). The Constitutional tribunal decides on the correspondence of the special services' actions to the principle of proportionality.

Similar system of constitutional provisions functions in Czechia, Hungary, Slovenia and some others.

2.3 In spite of this common constitutional attitude, the structure and organization of special services in the East European countries vary in functions, organs and mechanisms of control.

In some East European countries (Poland, Bulgaria, Serbia, Albania etc.) the system of the special services' supervision heads for the experience and legislation of the Great Britain and France, namely, orients itself on the executive power (President and Government) and does not presuppose control of the Parliament.

In others (Hungary, Czechia, Slovakia, Baltic countries) the control functions are duplicated in both executive and legislative powers, sometimes including special judicial instances.

In some countries special legislative acts have been adopted (Czechia) or are being prepared (Poland, Bulgaria) in addition to the constitutions, regulating the special services' activities in detail.

At the same time, up to now not all constitutions and legislation of the East European countries provide for Ombudsman's post and functions. While there exists Ombudsman on human rights and Ombudsman on protection of information in Hungary, in Albania, Slovakia and some other countries introduction of such instruments of human rights' protection is envisaged in the future.

2.4 The largest disagreement in the regulation of the special services' activities in the countries of the Eastern Europe can be found in the field of operational and search activity. In most countries the legal basis for it consists of departmental acts, often strictly confidential. Although the reservation on obligatory use of constitutional limits for the human rights violations is always used, in practice, as numerous public scandals show, these constitutional limitations are often simply not taken into account.

In recent years most critical conflicts in this field are associated with the more brutal activity of the special services with regard to the new international terrorism threats. The main topics of the conflicts are illegal operative collection and use of private information, including

perlustration of the e-mail and telephone eavesdropping, as well as illegal actions related to arrest and detention of foreign citizens.

As far as the collection and use of information is concerned, the Europarlament's decision of 20 May 2002, permitting the law-enforcement organs to monitor telephone conversations and the e-mail of private persons, has given certain fundamentals to create normative base in this field. But it is categorically questioned by many human rights organizations and gains no support in some East European parliaments, thus hindering adoption of the relevant laws.

The biggest and undamped scandal has been caused by the initiatives of some East European countries to assist the CIA of the USA in creating so called "flying prisons" and illegal transportation of terrorist suspects through Europe.

In June 2006 the Secretary General of the Council of Europe Mr. Terry Davis made a special statement on this issue. Mr. Davis, on the grounds of Senator Marty's report, pointed out that 14 countries – members of the Council of Europe participated in the said illegal operations. In this connection, Bosnia and Herzegovina and Macedonia were called direct "violators of human rights", and Poland and Romania – participants in illegal "active and passive betrothal" with the CIA staff.

2.5 Today in some East European countries it has been considered necessary to work out and adopt special laws on security, which resulted from the above scandals and human rights violations as well as dissatisfaction of citizens with the inability of the special services to stop crime. Polish Prime-Minister J. Kaczynski stated in the Seim in July 2006 that the country needs a special "Law on the national security" which would determine, *inter alia*, precise legal frames for the operational and search activity.

At the same time experts on the law-enforcement activity note that broad civil control over the special services' activity is no guarantee of their effectiveness. For instance, they have most full value mechanisms of control over special services in Hungary, including their observance of human rights, but still they have the highest level of organized crime and corruption in Europe.

3. Reorganization of special services of East European states and democratic oversight: fundamental issues and recommendations

3.1 Inadequate professionalism remains one of the major problems confronting special services of most East European states.

Depletion of personnel which was caused by their reorganizations and lustrations, as well as general depreciation of the social status of the special services in the post-Soviet times, produced large numbers of serving officers with inadequate professional skills, as well as of casual people.

This is the foremost reason of most violations committed by officers, including violations of human rights. In particular, inadequate professional skills in collecting information or in the conduct of special operations and other types of investigative work leads to regular attempts on the part of officers of special services to broadly interpret the notion of "extraordinary measures and circumstances" to their own benefit, even though those measures and circumstances and clearly prescribed by the Constitution and laws.

3.2 The depletion of personnel and ideological peculiarities of the "post-Soviet transition" are directly related to extensive politicization of special services in the East European states.

Firstly, several East European special services feature militant anti-communism and anti-Sovietism, and that attitude is spreading not only to Eastern neighbors in the CIS (first of all, to Russia), but also to major portion of their own citizens who adhere to socialist ideas and vote

for social democratic and ideologically similar parties. Some officers often view such anti-communism as a sort of “indulgence” for their unlawful actions. According to some experts, it is the politicization of special services that oftentimes decisively increases the political polarization of societies and aggravates social and political tensions.

Secondly, in what would appear a paradox, it is in some of the East-European special services of democratic descent that one would find increasing displays of racism, xenophobia, and anti-Semitism. International human rights groups underscore that in several states, like Hungary, Rumania, Poland, or Slovakia such attitudes of special services may be directed both at illegal immigrants, and at law-abiding citizens, like Roma, Jews, or other national minorities.

Thirdly, another paradox related to inability of some East European special services to provide for national security by lawful means is related to their implacable attitude towards such democratic gains as observation of human rights. For example, earlier this year Polish Minister of Education Roman Giertych dismissed, allegedly at the suggestion of special services, for “subversive activities” the Director of Polish In-Service Teachers who distributed among teachers a Council of Europe pamphlet on human rights.

3.3 Another acute problem inherent to the renovated East European special services is their internal ideological and identity heterogeneity. Time and again one would find officers from “older times” with respective attitudes, reluctantly brought in due to their professional skills, co-existing with officers of new generation with their own democratic values.

However, both old-timers and newcomers may, in the environment of an incomplete “post-Soviet” transition and ambiguity as to the development vector of a particular state, lean towards varying ideological orientation (towards liberal democracy, or social democracy, towards the United States or Western Europe, etc.)

As a result special services communities oftentimes split along those ideological and other watersheds, even within a single institution, resulting in special services groupings permeated with particular ideology getting involved in inter-group conflicts with inherent political and other components.

3.4 Another serious impediment to East European special services is direct or circumstantial involvement of their individual members in corruption.

It is a peculiar feature of East Europe that a “pursuit” development of the market economy structures in the region left numerous specific lacuna and ambiguities in legislation, which parts of business community began to reclaim and use to their own benefit. Special services tasked with supervision over illegal business practices thus acquired an opportunity to either permit or interdict the exploitation of those lacuna leading to kick backs for their particular attitude.

One of the most notorious cases of that kind is the criminal case of Ivan Lexa, former chief of the Slovak Intelligence Service who, along with corruption, faced charges of political crimes, fled the country and was the subject of an international arrest warrant. However, there have been similar cases involving corruption in the highest quarters of special services, although of a lesser scale, in other East European states (Rumania, Bulgaria, Serbia).

There is a relation still to another problem, that of private security firms. Those firms usually recruit former officers of special services and occasionally develop into separate and quite potent “private special services”, though virtually falling outside any democratic oversight, hence occasionally becoming a “power tool” of organized crime.

The main problem created by such private security companies lies in the lack of adequate legislative regulation of their activities in Eastern Europe, while executive, legislative and judicial branches remain in dire need of normative grounds and capacity to monitor and supervise activities of those companies.

3.5 In sum, it should be underscored that in the realm of ensuring that special services function effectively, East European states are confronted with long-lasting conflicts similar to the ones that any other country of the world may have to deal with.

The first conflict is that international terrorism, as well as crime (international crime, inter alia) are beyond normative framework, whereas engaging them requires staying within such framework.

The second conflict is between powerful capacity and resources available to special services to maintain, should need arise, secrecy (even top secrecy), and the need for democratic oversight of those services.

Let me reiterate that these conflicts may be found in any country of the world, however due to reasons stated above they are likely to evolve in the most acute manner in East European states.

3.6 The everyday demands that governmental institutions are confronted with illustrate growing sophistication of the mission that special services are called to accomplish, in particular in light of challenges posed by international terrorism, illegal migration and organized crime.

This predefines obvious need for the build-up of the special services' capacities (including modern equipment and support, as well as adequate powers), including in the area of investigative activities. At the same time there is a danger of transformation of certain special services into a "state within a state" that would ignore the demands of legitimate authorities and civil society.

That dilemma also ordains the urgent demand for new effective mechanism of normative regulation of the activities of special services, as well as for democratic oversight thereof, inclusive of specific areas of their secret activities.

3.7 It would seem that current mechanisms of such regulation and control are inadequate and incapable of managing their tasks.

It is obvious that East European laws regulating special services are not able to provide for all specifics of their activity. Moreover, they often gratuitously restrict such activity, thus provoking violations of law, or, conversely, they are reduced to superficial provisions allowing officers of special services an unlawful "freedom of hands".

The experience of existing supervisory and control machinery in most East European states offers proof of their insufficient effectiveness.

The proposed "Code of Special Services Ethics", similar to the "European Code of Police Ethics" and designed to serve as an internal normative restriction against abuses by special services, is a measure needed though scant.

3.8 What seems to be needed is, firstly, the development of clear and more perfect legislation of direct action which would empower special services to more effectively counter threats to national security, but concurrently would contain a precise and legally refined set of norms. Than should include norms regulating interaction between various national special services on domestic scale, as well as with foreign services and international institutions.

This is a most complicated task that has not yet been fully resolved anywhere in the world. It would seem that work on "standard prototypes" of such legislation should be initiated by the institutions of the United Europe.

Secondly, which is still more complicated, there is a need for effective mechanisms of executive, legislative, judicial, as well as public oversight of special services.

The key and most controversial issue here is the mode and format of such oversight considering that secrecy is the primary attribute and tool that special services have at their disposal in countering threat to national security.

3.9 It would appear that one of the methods of democratic oversight could be “delayed audit” of special services, including special operations procedures and budgets, by executive, legislative and judicial branches.

The order of control measures could be, at first glance, as follows:

- Special services engage in their operations in strict compliance with legislation and under conditions of total secrecy;
- All actions undertaken by special services are meticulously recorded, meeting all requirements of the law;

- Records are archived in the presence of a supervisory body comprising elected and appointed representatives of branches of power according to the “dual key” principle, and put to storage at that body;

- Upon expiration of statutory limitation (secrecy limitation), which is set by law for particular types of investigative activities or special operations, archived records are unsealed jointly by representatives of special services and of the supervisory body, and they are reviewed as to legality and justification of activities of special services in the conduct of respective operations.

3.10 Obviously the proposed mode of oversight is but one of possible options. However, I strongly believe that in the absence of concurrent strengthening of special services and provision of democratic oversight thereof, modern democracies will not be able to deal with terrorism and crime.