



COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

Strasbourg, 26 September 2007

Study no. 389 / 2007

CDL-DEM(2007)008*
Engl. only

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

STUDY ON DEMOCRATIC CONTROL OF ARMED FORCES

HOW TO EXERCISE THIS CONTROL?¹

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1. General Overview

Generally speaking, control means a degree of intervention on the decisions adopted of the controlled organ. Separating decisions and control on these permits, on the one hand, to have two views over the same issue, and, on the other hand, to assure the compliance of an act or decision with democratic principles. The model of control or oversight needs not to be fixed expressly and once and forever, but sometimes the transference of competences is gradual and thereby the control system adopts progressively an optimal shape.

The democratic control over armed forces refers to the existence of an organ or institution democratically elected that reviews and supervises the decisions adopted by the organs or authorities with military competences. The types of decisions and acts under control are as diverse as the different necessities that are satisfied by the military acts and decisions. Thus, the political system gives the army, the navy, the air force, and other authorities and entities the capacity of deciding regularly about different issues. These decisions are administrative decisions, as organs of the State Administration adopt them.

In this sense, for example, the concept of security itself has become broader, comprehending not purely military aspects, but also other geopolitical and contingent international issues. The regional disputes for territory or space in nearby zones, political instability of some countries linked economically with others, ethnic, religious, cultural or demographic tensions, unsatisfied nationalisms, are all factors that could deeply affect national interests. This is why it was urgent to articulate new answers and solutions related to armed forces mission and decisions².

² CENTRO SUPERIOR DE ESTUDIOS DE LA DEFENSA NACIONAL (2003), "Adecuación de la defensa a los últimos retos", Madrid, Ministerio de Defensa, Secretaría General Técnica, p. 51.

In the same way, armed forces have been forced to adapt their functioning and activities to the new international requirements of security. From decisions focus on clear and defined threats to peace and security, they have moved to face diffuse threats such as terrorism, organized crime, biological or informatics attacks, among others, and to plan defence and security accordingly.³

Finally, the armed forces hold a relevant position as a consequence of globalization, since the states integrate in collective security and defence systems, to receive and collaborate with military support in different kinds of international missions⁴. In fact, one of the most significant changes in the post-Cold War period was the increase of the participation of armed forces in peacekeeping and humanitarian operations. This is one of the main functions developed by military forces in the modern Europe. But this growth of the functions of the armed forces in the international sphere leads to new challenges and problems. One of them is the democratic control of those operations. A further conflict is the subordination to different commanders: on the one hand, national forces act under the command of the international organization, but, at the same time, they are partly subordinated to the control system of their states⁵. This double control can cause important difficulties because each control can be organized according to a particular logic and purpose.

All these changes inside the military systems caused by the transformations of the national and international reality configure armed forces with additional competences, and that adopt new and more complex decisions. Within this group of decisions, one can identify those that have always pertained to the military institutions, as the ones related to the administration of armed forces personnel (appointments, incorporations, retirements, sanctions), or the decisions related to supply of military material. In turn, new types of decisions are, among others, the decision on participation in peacekeeping missions, or the settlement of common defence techniques between several states or inside an international defence organization.

A study of how to control the armed forces has to take into account not only who is the organ or institution that has the competence to control them, but also the abovementioned changes in the traditional functions of the military sphere and the existing control mechanisms. The following paragraphs will refer briefly to: a) the power of the parliament to legislate, as a way of democratic control over the military; b) the existence of an internal control within the State Administration hierarchical military structure and contentious-administrative procedure; c) some military decisions adopted by Parliament itself; d) and the direct and indirect control mechanisms of the Parliament over the military decisions adopted either by the military commanders or by the government exercising military functions. A more comprehensive panorama would require a deep study of the national regulations on military and defence issues

³ INSTITUT DES HAUTES ETUDES DE DEFENSE NATIONALE (2002), "Défense globale et politique militaire de défense", *Rapport de 1ere phase, 54^{eme} Session nationale*, p. 16, [on line] <http://www.ihedn.fr/portail/rapports.php>.

⁴ In 1991, the NATO reviewed their Strategic Concept, and, in the presence of new risks according to which the foreign military threaten became less important, proposed to export security. This, through the creation of forces of less scope that support peacekeeping and conflict prevention. In 1999, in Washington, the Alliance considered the experience of the last years, in which their intervention was centred on peacekeeping in the Balkans, and approved the 'New Strategic Concept', more clearly oriented to missions of exportation of peace. CENTRO SUPERIOR DE ESTUDIOS DE LAS DEFENSA NACIONAL, "Adecuación de la defensa a los últimos retos", (note 2), p.52.

⁵ HALTNER, K. (2002), "Democratic control of Armed Forces: Renaissance of an old issue?", Born, H., Caparini, M.: Fluri, P. *Security Sector Reform and Democracy in Transitional Societies*, Baden-Baden, Nomos, p. 76.

2. The exercise of the power to legislate of the Parliament as a control of military activities

Legislation is one of the principal ways in which the Parliament controls military activity. Through different modalities of rules, the democratic organ defines the mission, functions, structure, and competences of armed forces, specifying the constitutional mandate; in other words, it shapes the legal framework within which the military develops their defence and security activities.

Several constitutions explicitly mention the legislative powers of the parliament on military and defence issues. Examples of this are Austria (Art. 10(1), (15)), Azerbaijan (Art. 94 (18)), Estonia (Art. 126), France (Art. 34), Georgia (Art. 98(3)), Germany (Art. 87b(2), by federal statutes), Lithuania (Art. 139), Luxembourg (Art. 96), Moldova (Art. 108(2), requires an organic law), Portugal (Art. 163(i)), Romania (Art. 118 (2), requires an organic law), Slovenia (Art. 124, two-thirds majority), Spain (Art. 8(2)), Switzerland (Art. 60(1), federal matter), "The former Yugoslav Republic of Macedonia" (Art. 122, with a special majority of the two-thirds), Turkey (Art. 72), and Ukraine (Art. 17)

The normative delimitation of the mission of the armed forces at constitutional level can act as a limit to the exercise of the power to legislate, since the Parliament must subject to the constitution when developing the related legislation. Not all the constitutions settle the missions of armed forces, although some of them do. Cases of the later are Austria (arts. 9A and 79), Germany (Art. 87a), Italy (Art. 52), the Netherlands (Art. 97), Poland (Art. 5 and 26(1)), Portugal (Art. 275) and Spain (Art. 8 (1)). Germany has, perhaps, the constitution that limits and delimitate in a better form the mission of armed forces (only for defence purposes), and thereby, the permissible operations.

Counterexamples are Belgium, Denmark, Luxembourg and Poland, states all in which the mission of armed forces is defined by means of parliamentary statutes. In Belgium, the Law of 20 May 1994, on the "*mise en oeuvre des forces armées, à la mise en condition, ainsi qu'aux périodes et positions dans lesquelles le militaire peut se trouver*", settles an administrative classification of permissible operations⁶ For this reason, the parliament do not have additional constitutional restriction to model the functions of the military sphere, more than the one exercise by the principle of legality, common to both public and private spheres. In the cases of France and UK, the exercise of the power of the Parliament to regulate the military is quite general. In both states, the mission of the armed forces is defined not by statutes, but by Government Administrative Acts⁷.

Nevertheless, and as a general feature, the legal framework of the mission and permissible activities of the armed forces fixed by the constitutional or by statues remains relatively open. This means that their powers and competences are not quite limited. This openness permits, for example, that the Belgian missions abroad, which conform to certain political conditions, and which do not violate the general rules of public international law, are permissible. The same pattern exists in France, were the only constitutional limitation is that the armed forces may not be used for "conquest" and "against the freedom of any people"⁸. Only in few countries, like Germany or Spain, their constitutions make a significant determination about whether or not certain missions are permissible.

⁶ D'ARGENT, P. (2003), "Military Law in Belgium", Nolte, G. (ed.), *European Military Law System*, Berlin, De Gruyter Recht, p. 191.

⁷ NOLTE, G.; KRIEGER, H. (2003) "Comparison of European Military Systems", NOLTE, G. (ed.), *European Military Law System*, Berlin, De Gruyter Recht, pp. 34ff.

⁸ NOLTE, G.; KRIEGER, H. (2003) "Comparison of European Military Systems", NOLTE, G. (ed.) *European Military Law System*, Berlin, De Gruyter Recht, p. 39.

The definition of competences through statutes, then, acts as a first filter and mechanism of control over military acts and decisions, since the parliament fixes and delimitates the sphere inside which the decisions shall be adopted. Only the decisions adopted within this legal framework will be legitimate, and the ones that run outside can be contested before the courts, or through the correspondent channels.

3. The internal control of armed forces acts

The internal control of the acts of the armed forces takes place, first of all, inside the hierarchical military structure. The superiors or commanders have the power to sanction the personnel for infringements of the military duties. This internal control continues, in a further stage, as contentious-administrative procedures. The ordinary contentious-administrative procedure for reviewing administrative acts, or acts and decisions of the State Administration, is also applicable to military acts. Thus, this step in the study about the ways and mechanisms of control over military acts and decisions considers the internal administrative control practiced by contentious administrative courts as a special jurisdiction. These systems of internal control vary among the different states. The question about how to control, then, coincides with the procedures for contesting, reviewing and sanctioning the acts and decisions that exceed the competences of the military organ, or infringes a legal prohibition or obligation.

4. Military decisions taken by the Parliament

Some relevant military decisions correspond directly to the Parliament. In this sense, they are not properly mechanisms of control or oversight over armed forces, but the execution or direct exercise of its own competences in the military field.

a. Military Budget

One important competence is the decision over the military budget that derives from the general budgetary power of the Parliament. The power to fix the military budget means that the parliament can decide to spend more in one issue than in another, and by this way, it can make conditional the decisions adopted by the commanders of armed forces.

The importance of this type of decisions is quite evident. In 2005, for example, the budget of the US Defense Department was raised to a total of US\$ 478.2 billions, while UK assigned US\$ 48.3 billions and France US\$46.2 billions⁹. These data reveal that the decision to assign these sums of money to defence activities requires democratic legitimacy.

The way of exercising the decision varies between different states, particularly concerning the procedure for adopting the military budget. Correspondingly, the efficiency of the decision will also vary. For a better-informed decision, parliaments should have access to all the documents related with the defence budget. In fact, in some countries like Denmark or Luxemburg, the parliament is provided with information on each item of the budget, in other words, with the most detailed level of the budgeting. However, in other countries such as France, Greece and Poland, the parliamentary committee on defence, and not the whole parliament that at the end is the one who decides, is the only one that can manage information on the defence budget items¹⁰.

⁹ Vid. data of the Stockholm International Peace Research Institute [on line] http://www.sipri.org/contents/milap/millex/mex_major_spenders.pdf.

¹⁰ BORN, H., FLURI, P., JOHANSSON, A. (2003) *Parliamentary Oversight of the Security Sector. Principles, mechanisms and practices*, Geneva/Belgrade, Inter-Parliamentary Union/Geneva Centre for the Democratic Control of Armed Forces, p. 131.

Related with the budget, the Constitution of Latvia states that the budget and laws concerning the military may not be submitted to national referendum (Art. 73). Other constitutions also make special mentions to the military budget. In this sense, Chapter 9, Art. 3(3) of the Swedish Constitution prescribes that in fixing the military budget the parliament shall take into account the need of funds for defence of the realm in time of war, danger of war, or other exceptional circumstances. The German Constitution states that the numerical strength and general organization structure must be shown in the budget (Art. 87a(1)).

b. Declaration of war

A further decision is the resolution to declare war, when it corresponds exclusively to the Parliament. Some cases of co-decision on this issue are mentioned below. The declaration of war is competence of the Parliament in Armenia (Art. 81(3)), Austria (Art. 38), Georgia (with reinforce quorum, Art. 62)), Latvia (Art. 44), Moldova (Art. 66 m), and Serbia (Art. 73 (6)).

c. Power to ratify and denounce international treaties.

Other decisions related with the military are also competence of the Parliament, for example, the decision to declare state of emergency, in those states in which the later does not belongs to the Head of the State or of the Government, or the power to ratify and denounce international treaties and agreements on military and defence issues. Examples of constitutional provisions of the later are Albania (Art. 120(1)a)), Bulgaria (Art. 85 (1)1)), Croatia (Art. 139), Estonia (Art. 121(4)), and Georgia (Art. 100(1)).

5. The democratic control of the decisions of armed forces

The democratic control of military decisions is the one exercised over decisions adopted by organs with military competences. The most important are the decisions taken by the own armed forces through their commanders, and the ones adopted by the Head of State or the Government.

The decisions and acts of the armed forces can be subjected to several types of control. The parliamentary oversight can be classified in direct control and indirect control, based on the type and impact of the interference on the decision of the organ that exercise military competences.

a. Direct Control

The direct control consists of the possibility assigned to an organ democratically composed or elected to substitute the decision of the competent organ in military or defence affairs. Within this type of control, one can distinguish the following subspecies:

i. Co-participation in the decision

Co-participation in the military decision means that the democratic body takes part in the decision-making. In fact the decision is adopted jointly by the Parliament and the body with military competence.

Regarding the declaration of war, the Danish Constitution states that "except for purposes of defence against an armed attack upon the Realm or Danish forces, the King shall not use military force against any state without the consent of the Parliament". In France it is also necessary the parliamentary authorisation for a declaration of war and the continuation of domestic states of emergency. The same co-participation is a constitutional requirement for declaration of war or states emergency in Germany (Art. 115a), Italy (Art. 87), Luxembourg (Art. 37), the Netherlands (Art. 96.1 and 103), and Spain (Art. 63.3 and 116).

The decision about sending troops abroad in countries like Czech Republic, Denmark, Germany, Hungary, Italy, Netherlands, Norway or Sweden, need to be approved by the Parliament. The Constitution of the Czech Republic states explicitly that authorization of the parliament is needed to dispatch of Czech military forces outside the territory of the Czech Republic, unless these decisions have been reserved to the government. This latter power of the government is referred to deployment military forces to comply with international obligations against aggressions or to rescue operations of national disaster, and it is, however, temporally limited (up to 60 days) and can be revoked by the Parliament. (Art. 43)

ii. Control *a posteriori* of the military decision with the possibility to revoke it or substitute it

This type of control implies that the Parliament can review the decision of the competent organ, but only after it is adopted. This is the case, for instance, of the declaration of martial law and state of emergency in Poland. This decision is taken by the President, but he must submit the regulation to the Parliament within 48 hours of signing such regulation. The *Sejm* may annul the regulation of the President (Art. 231)

This is also the case of urgent decisions. In Germany, for example, it is possible to take the decision to deploy armed forces to combat the danger in cases of natural disaster (Art. 35) or internal emergency (Art. 91). In both cases, the decision can be revoked by the *Bundesrat*.

To the cases mentioned above, one can add the general procedures of impeachment and the mechanisms to make the government legally accountable for its acts and military decisions violating or exceeding its competences.

b. Indirect Control

The indirect control by the democratic organ consists of some degree of interference on the military decisions or in introducing conditioning factors to the decision. It is possible to identify several mechanisms of indirect control.

iii. Appointment and dismissal of high commanders as decision-maker

In the case of the appointment of high commanders by the head of the state or by the government, this type of indirect control is not really present. However, there is an indirect control when the Parliament intervenes in the appointment of high commanders. The Constitution of Estonia, for example, states that the high commanders shall be appointed by the Parliament on the proposal of the President of the Republic (Art. 127). Similarly, Art. 84(14) of the Constitution of Lithuania requires the assent of the Parliament to appoint and dismiss high commanders.

The decision of removing the decision-maker or high commanders by the Parliament could be also considered a case of indirect control of military decisions. It is a way of holding responsible the government when the decision-maker appointed by it adopts and unlawful or inconvenient decision.

iv. Taking decision of special interest to the armed forces

Other types of indirect control are cases in which the Parliament takes decisions of special interest to armed forces functioning. Through them, the democratic body can influence in the decision of the competent organ, deciding issues that are important and relevant to the development of the military sphere.

- Control of the Budget and of the expenditures

As mentioned above, the budgeting corresponds to the Parliament. The approval of the budget can be also considered an indirect control, when some bargaining takes place between the amounts of money fixed to carry out the defence mission and to cover the military expenditures, and a policy that the Parliament is trying to implement. For example, the budget could include special items to promote the incorporation of women to armed forces. By this way, the Parliament controls indirectly the functioning of the military.

In the Netherlands the approval of the Budget is subject to a written phase in which the relevant committee asks questions and obtains written answers before an oral debate takes place, usually in the plenary. Policy questions are discussed in committees and, when sufficiently controversial, also in plenary¹¹. In this discussion the Parliament can tie up other questions of his decisions.

It is also an indirect mechanism of control the power of the Parliament to control the expenditures of the military budget after its approval. The parliament can ask for specific information and documentation about the spending, and carry out inquiries if necessary.

- Control over equipment decision

The Parliament can review contracts of arms equipment. In the Netherlands, for instance, the Parliament can consider contracts above €50 million before the contract is signed. It has a right to put the item in the agenda of the Second Chamber for plenary discussion and vote¹².

Armament procurement and equipment can be reflected also in the budget, and some constitutions mention them as issues that must be regulated by parliamentary statutes (Portugal, Art. 163 (d), Italy (Art. 117(2)d), and Switzerland (Art. 60(1) and 170 (1) (2))

- Inspections and visiting troops abroad

The Parliament, and specially the specialized committees in defence and military affairs, can carry out inspections in the military institutions. Additionally, in many cases the parliament has the right to visit the troops while developing international support operations.

- Control of Arguments

A further mechanism is the control of arguments. It is notably a more diffuse kind of control. The grounds of the working plans and strategies that the own armed forces present to the government or to the parliament, normally annually, for example, can be considered a control parameter of the military decisions, in the sense that the later must be coherent with the formers.

The same type of control of arguments takes place when the parliament calls military personnel or commander to explain or to give reasons of some decisions. Comparably, in the Netherlands, Art. 100 of the Constitution states that the Government "prior to the engagement or making available of the armed forces for the maintenance or promotion of the international rule of law, shall provide Parliament with information concerning the intended action".

¹¹ VAN EEKELLEN, W. (2002) "Democratic Control of Armed Forces: The National and International Parliamentary Dimension", *DCAF Occasional Paper*, (2), p. 22.

¹² VAN EEKELLEN, W. (2002) "Democratic Control of Armed Forces: The National and International Parliamentary Dimension", *DCAF Occasional Paper*, (2), pp. 24-25.

The designation of direct interlocutors between the parliament and the armed forces is also in this same line of control. Thus, for example, in Germany the *Bundestag* appoints a Parliamentary Commissioner for the Armed Forces who works very closely with the Defence Committee and attends its meeting.

Some decisions of the government in urgent or emergency situations must be communicated to the parliament as possible, so this organ can review the arguments and the opportunity of the decision. This is the case, of the declaration of war that the King can makes in Belgium (Art. 167.1.2 of the Constitution)

6. Conclusive ideas

- There are diverse mechanisms of control, that imply different degrees of intervention or influence of the parliament in military decisions
- Military decisions have some special features (celerity or urgency, efficacy, secrecy, discretion) that need to be balanced with the democratic control over them
- The mechanisms for exercising the control can adopt several combinations that go form systems from minimal control to maximum or more comprehensive oversight of military decisions