
National (State) Security – Treaty Determinants

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Justyna Kurek¹

Abstract:

Purpose: The aim of the article is to recognise the values, objectives and legally protected goods that should determine the boundaries of autonomy and sovereignty of a Nation State in the aspect of alliance commitments and superiority and precedence of the common policy and objectives of the European Union.

Design/Methodology/Approach: The following methods were used in the study, literature analysis, UE and national provisions analysis.

Findings: The concept of national security is a non-normative term. In accordance with the EU jurisprudence it is left to be specified in the national systems of the Member States. This concept is at the same time the border point between the sphere of exclusive legislative competence and a specific dominion of Nation States. The specification of national goals is carried out in the spirit of values and axiology of the common EU environment, taking into account historical conditions and existential threats to a given Nation State. Despite the tendency to unify national goals in the global multicultural society of the 21st century, it is still crucial to set boundaries and search for referents for the concept of national (State) security. It is justified to emphasise the national context and the use of the concept of national (State) security, even indicating which State is meant.

Practical Implications: The analyze shows a tendency to perceive its conceptual boundaries broadly as strongly determined by current priorities and vital national interests, as well as historical background and geopolitical situation. Although being a border point of the sphere of the exclusive legislative competence and dominium of Nation States as members of the European Union, the concept has not been defined in EU law.

Originality/Value: The study contributes to the discussion on borders of national (states) security.

Keywords: National (State) security, axiology, borders and limits of national law.

JEL codes: Y9 state security, K49 national law.

Paper type: Research article.

¹Professor, Attorney-at-law, National Security Faculty, Head of the Political Security Department at the State Security Institute of the War Studies University, ORCID 0000-0002-8754-5243, j.kurek@akademia.mil.pl

1. Introduction

The concept of national security has been widely analysed in security studies. The literature shows a tendency to perceive its conceptual boundaries as strongly determined by current priorities and vital national interests, as well as historical background and geopolitical situation. Performing a cross-cutting analysis of how national security is perceived, it is worth asking some questions about the advisability of searching for universal understanding of national security, both in the transnational and historical context, and the existence of common axiological conditions, if any, that underlie the concept. Is it justified to search for boundaries and referents of the concept of national (State) security in the global and multicultural society of the 21st century? Or has the concept's practical importance diminished in the wake of the unification of societies and increasing decline of national identity?

The purpose of this study is to analyse the advisability of extracting boundaries of national (State) security as shown by the example of the Republic of Poland in the context of the State's functioning within the European Union. The proposed approach to the national (State) security is an attempt to practically recognise the values, objectives and legally protected goods that should determine the boundaries of autonomy and sovereignty of a Nation State in the aspect of alliance commitments and superiority and precedence of the common policy and objectives of the European Union.

2. A Cross-Cutting View of National Security

The concept of national security has been widely analysed in security studies. For example, W. Kitler defines national security as a process which is comprised of *various endeavours in the area of international and internal relations, as well as protective and defensive ventures (in the broadest sense of the word) aimed at creating favourable conditions for a State to function internationally and internally, and at facing the challenges and threats to national security* (Kitler, 2011, 48).

As noted by W. Kitler, *national security can be perceived as the most important value, a national need, a priority objective of activities of a State, social groups and individuals, and at the same time a process that involves various measures that guarantee sustainable and disturbance-free national (State) existence and development, including the protection and defence of the State as a political institution, and the protection of individuals, the society as a whole, as well as goods and natural environment against threats which either significantly restrict the State's functioning or affect sensitive goods* (Kitler, 2020, 32).

M.A. Kamiński notes that it is *one of the key elements of the functioning of a State that ensure the survivability as well as development and freedom of pursuing national interests* (Kamiński, 2019, 72).

The literature shows a tendency to perceive its conceptual boundaries as strongly determined by current priorities and vital national interests, as well as historical background and geopolitical situation. As noted by A. Pūraitė and N. Šilinskė, when the Treaty of Westphalia was signed in the 17th century, national security was understood as peaceful resolution of disputes between States (Pūraitė and Šilinskė, 2017, 137). Interestingly, the postwar period and 1960s were characterised by perceiving State security first and foremost from the perspective of a nation's protective ability.

For example, in the *International Encyclopedia of the Social Sciences*, a 1968 publication referred to by A.M. Bolborini, the concept of national security was perceived as *the ability of a nation to protect its internal values from external threats* (Sarcinschi, 2005, 7, quoted in A.M. Bolborini, 2016, 158).

As shown by examples dating from the 1980s, national security was seen more broadly as extending beyond the protection from external threats. According to I. Bellany (1981), security in itself is a relative absence of war. In his publications from early 1980s, L. Martin perceived security while additionally underlining its economic dimension. In his opinion, security means ensuring the future wellbeing (Sarcinschi, 2005, 158). Similarly, Jordan and Taylor (1981) suggested a broader meaning of the concept, extending beyond threats of physical nature.

According to the authors, national safety means protection of economic and political interests the loss of which could threaten the fundamental values and vitality of the state (Andreescu, 2001, 17, quoted in: Bolborini, 2016, 158). In late 1980s, C. Maynes (1989) stressed that "*national safety is best defined as the capacity to control external and internal conditions which the public opinion of one community considers necessary to ensure its own autonomy, prosperity and welfare*" (Andreescu, 2001, 17).

The end of the cold war and the 1990s highlighted new trends, and the fear of a nuclear conflict between the two great powers had been replaced by a series of specific threats to national security (Bolborini, 2016, 159). The author points to such threats as *inter alia* ethnic clashes, the necessity for former communist States to transform, an increase in the number of immigrants and refugees, the growing importance of cultural and religious affiliations in international relations, environmental degradation, integration in various regional structures etc. The transformations and the 2000s had led to further changes in how national security was perceived.

The period of relative military calm in the first two decades of the 21st century contributed to perceiving national security as largely isolated from military threats. As rightly noted by W. Kitler, *the contemporary perception is characterised by a departure from the historically established beliefs regarding State security as freedom from external threats, with the focus shifted more towards the process of*

building and ensuring (guaranteeing) conditions for development, stability and prosperity of the State, the society as a whole and individual citizens alike, including their tangible and intangible goods (Kitler, 2011, 28). In turn, P. Tarnoff notes that the 21st century is characterised by perceiving national security through the prism of economy. According to the author, economy plays a more important role in ensuring national security than the military sector (Tarnoff and Kreisler, 2022).

The developments of the third decade of the 21st century and threats related with the COVID-19 pandemic have triggered a change in how the key values for the survival of a Nation State and new challenges faced by States are perceived (Kurek, 2020, 101). Likewise, the armed conflict in Ukraine will certainly contribute to a return to building national security around military threats.

3. National (State) Security in Primary Law of the European Union

Defining the boundaries of spheres and activities involved in execution of State tasks and mission in the area of national security is a key factor that determines the limits of the organisational and normative sovereignty of Nation States within organisational structures of the European Union EU (Kurek, 2021).

The concept of "national security" sets turning points on the boundary between areas of activity of a (nation) State as a player in international relations, functioning within the framework of precedence of the rules and principles that are established in EU law and specified by the Court of Justice of the European Union, and the sphere of activities of Nation States which do not involve implementation of alliance commitments but are left to the exclusive competence of Nation States and serve attaining internally set strategic objectives. Therefore, in practice, the concept sets the boundaries of autonomy of the *dominium* of a Nation State within the European Union's political and economic alliance.

Although crucial for the functioning of the European Union, the concept of national security does not have a legal definition. It most certainly encompasses the areas which are reserved for the exclusive competence of Member States. The concept was the subject of numerous court judgements, including by the Court of Justice (Case C-208/09 Ilonka Sayn-Wittgenstein v Landeshauptmann von Wien, Case C-391/09 Malgožata Runevič Vardyn, Łukasz Paweł Warydyn v Vilniaus miesto savivaldybės administracija and Others, Case C-601/15 J.N. v Staatssecretaris van Veiligheid en Justitie).

As transpires *explicite* from Article 5 of the TEU, the limits of Union competences are governed by the principle of conferral. The use those competences is governed by the principles of subsidiarity and proportionality. Therefore, the Union acts only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union remain with the Member States. In accordance with TFEU, the Union has

exclusive competence in five areas, i.e., regulating the customs union, establishing of the competition rules necessary for the functioning of the internal market, monetary policy for the Member States whose currency is the euro, conservation of marine biological resources under the common fisheries policy, and common commercial policy (Article 3 of the TFEU and Declaration 18 in relation to the delimitation of competences).

Furthermore, under Article 73 of the TFEU, *it shall be open to Member States to organise between themselves and under their responsibility such forms of cooperation and coordination as they deem appropriate between the competent departments of their administrations responsible for safeguarding national security.* Therefore, the provisions of the Treaty on the Functioning of the European Union leave matters of national security to the competences of the Member States. The Treaty on European Union also states absolute exclusion of the EU legislative competence in the area of national security.

Under Article 4(2) of the TEU, *the Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional (...). It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.*

However, in order to precisely define the limits of the dichotomous division of competences between the European Union and Member States, one must attempt to define the concept of national security. The dichotomous division of activities and interests, which is a pillar of the correct functioning of a democratic State from the perspective of specificity and certainty of law, is made additionally difficult by the flexibility and dynamics of national security priorities arising from the diversity and temporal variability of threats. (Kurek, 2017, 47).

4. National Security in the Jurisprudence of Supreme Jurisdictions of the European Union

The concept of national security has not been defined in the provisions of primary law. It was the subject of numerous judgements by the Court of Justice, the European Court of Human Rights and the European Commission of Human Rights.

According to Paragraph 55 of the Opinion of CJEU Advocate General Francis Jacobs delivered on 6 April 1995 in Case C-120/94, *issues of national security are primarily a matter for the appraisal of the authorities of the State concerned. (...) It falls in the first place to each Contracting State, with its responsibility for the life of [its] nation, to determine whether that life is threatened by a public emergency and, if so, how far it is necessary to go in attempting to overcome the emergency. By reason of their direct and continuous contact with the pressing needs of the moment,*

the national authorities are in principle in a better position than the international judge to decide both on the presence of such an emergency and on the nature and scope of derogations necessary to avert it.

In its case law, the Court included such issues as asylum policy, protection of the national language and rules of awarding titles of nobility in areas of national security. These fields are therefore reserved for the exclusive competence of Member States in the area of security and national identity.

Also the European Commission of Human Rights considered that the notion of national security could not be precisely and comprehensively defined, thus giving it a degree of elasticity and hence flexibility, which is reflected by the margin of appreciation which states have in this sphere (national security report). In its judgement of 24 April 2008 in case 1365/07 e.g., and others v Bulgaria, the court noted that the notion of national security may be very wide, with a large margin of appreciation left to the executive to determine what is in the interests of that security.

For example, in its judgement in case of Ireland v the United Kingdom, the European Court of Human Rights considered that *it falls in the first place to each contracting state, with its responsibility for "the life of [its] nation", to determine whether that life is threatened by a "public emergency" and, if so, how far it is necessary to go in attempting to overcome the emergency.*

In its judgement of 18 January 1978 in case of Ireland v the United Kingdom, the European Court of Human Rights noted that the national authorities are in a better position than the international judge to decide both on the presence of such an emergency and on the nature and scope of derogations necessary to avert it. As rightly pointed by A. Grzelak, *national security is most often understood as one of the primary functions of every state, one that includes issues of opposing any external and internal threats to the existence and development of the nation and state. in order to ensure its national security, a state determines a set of internal values which it thinks should be protected against threats. national security is therefore perceived as the capacity of a nation (state) to defend its territory and values* (Grzelak, 2017).

5. National Context of National (State) Security

As it transpires from case-law of supreme courts of the European Union, leaving Member States free to formulate the scope of the notion of national (State) security in question is a deliberate action, not a loophole in the primary law regime. In this context, it is by all means justified to emphasise the national context and even use the term indicating which specific State is meant. Indeed, the term will have a universal character in only a very narrow aspect of EU axiology arising from the Preamble of the Treaty on European Union and the Treaty on the Functioning of the European Union. Specification of key values for a specific Nation State is

materialised in normative documents of the highest order – Preambles and Constitutional rules.

When searching for values which should determine how the concept of national security must be perceived in the context of the functioning of the Republic of Poland, one must start from the Preamble and Article 5 of the Constitution of the Republic of Poland, the latter of which can be seen as specification of the political and socio-economic manifesto provided in the introduction to the Basic Law of Poland.

As stated in Article 5, *the Republic of Poland shall safeguard the independence and integrity of its territory and ensure the freedoms and rights of persons and citizens, the security of the citizens, safeguard the national heritage and shall ensure the protection of the natural environment pursuant to the principles of sustainable development.* The regulation determines the objectives of the Polish State that should be taken into account in every aspect of its functioning (Florczak-Wątor, 2016, 284). It therefore refers to the values which, when seen from the perspective of Poland's historical experiences, can be classed as fundamental to the survival and existence of the nation, and which guarantee harmonious and prosperous development of the State and its citizens. These values represent the so-called "hard core" that sets national security objectives and interests (Constitutional Tribunal, K 32/09).

They are therefore the values and goods which are critical to safeguarding the values of fundamental importance to national existence and identity. Indeed, Polish experiences do not allow disregarding the historical memory when defining the pillars of national security. A corresponding tendency can also be observed when analysing other provisions of Constitutional rank – for example, the Preamble of the Basic Law of the Federal Republic of Germany underlines the fact of building the national unity.

Actions taken by a State in a legally regulated sphere should therefore refer to protection and defence of national values against external and internal threats, both military and non-military. These areas of State activity should remain in the national policy domain, and competences held therein by State authorities should not be delegated to an international organisation or institution pursuant to Article 90 of the Constitution. Although the provision in question does not define any specific spheres of State policy or areas of State activity, it is underlined in the doctrine that its *ratio legis* undoubtedly refers to the concept of sovereignty and constitutional identity (Szpunar, 2016, 139).

As regards the concepts of order and constitutional identity within the meaning of the Constitution, one must mention *inter alia* the judgement of the Constitutional Tribunal of 24 November 2010, in which the Tribunal analysed the conformity of certain norms contained in the Treaty of Lisbon with the Polish Constitution on the

grounds of Article 90(1) of the Constitution. As rightly pointed by L. Garlicki, *competences subject to the prohibition of conferral form constitutional identity, and thus they reflect the values the Constitution is based on* (Garlicki, 1997, 148).

In the said judgement, the Tribunal noted that constitutional identity is a concept which determines the scope of *excluding - from the competence to confer competences - the matters which constitute (...) "the heart of the matter", i.e. are fundamental to the basis of the political system of a given state. Regardless of the difficulties related to setting a detailed catalogue of inalienable competences, the following should be included among the matters under the complete prohibition of conferral: decisions specifying the fundamental principles of the Constitution and decisions concerning the rights of the individual which determine the identity of the state, including, in particular, the requirement of protection of human dignity and constitutional rights, the principle of statehood, the principle of democratic governance, the principle of a state ruled by law, the principle of social justice, the principle of subsidiarity, as well as the requirement of ensuring better implementation of constitutional values and the prohibition to confer the power to amend the Constitution and the competence to determine competences* (Działocha, 2007, 14; Wojtyczek, 2007, 284).

It must therefore be assumed that these are the values, and at the same time vital State interests, which are protected by national security and remain outside the scope of EU law. As pointed in the literature, constitutionalisation of State objectives reflects, on the one hand, social expectations regarding State priorities, but also the State's readiness to implement them. It also influences the stability and sustainability of those objectives. Their inclusion in the Constitution guarantees that they will not become an element of a current political game or a programme of a currently ruling political group (Florczak-Wątor, 2016, 284). This is why those objectives should be defined in a balanced manner.

The first pillar is comprised of protection of independence and territorial integrity – the independence of a State means its freedom from other external bodies as well as autonomy and self-reliance on the international scene. Protecting the independence in this sense is a natural task of every State (Florczak-Wątor, 2016, 285). Independence is closely related with the value of sovereignty. According to W. J. Wołpiuk, independence should be associated with the process in which the nation that comprises a State becomes self-reliant, while sovereignty is linked with exercising full powers by an independent State (Wołpiuk, 1998, 59). Independence should be therefore perceived as a *sine qua non* condition for sovereignty.

Furthermore, M. Florczak-Wątor points that the concept of independence reflects a State's freedom, whereas sovereignty reflects the ability to act and make independent decisions (Florczak-Wątor, 2016, 286). Protection of independence and sovereignty come closely together with protection of territorial integrity. As noted in the literature, formulation of this objective is a consequence of such events in Polish

history as the partitions by three powers in the second half of the 18th century and the division made under the Ribbentrop–Molotov Pact of 23 August 1939. Indeed, in addition to population and political power, territory is a cornerstone element of a State in international relations. A State which loses its territory not only loses its independence, but also ceases to be a State as defined by international law. The concept of territorial integrity is also linked with the concept of territorial sovereignty.

The second pillar involves ensuring human rights and freedoms as well as civil rights – the obligation indicated in Article 5 is of dual nature. It must be perceived both in a positive and a negative aspect. In a positive sense, a State has the responsibility to protect rights and freedoms against breaches by bodies other than the State, whereas in a negative sense – the responsibility to respect and not breach those rights and freedoms. Therefore, ensuring the rights and freedoms by the Polish State means guaranteeing that an individual can exercise them to the extent he or she is entitled to (Florczak-Wątor, 2016, 287).

On the other hand, restricting these rights and freedoms is allowed for the purpose of protecting the State's independence and territorial integrity. As noted by the Constitutional Tribunal in its judgement of 3 July 2001 (K 3/01), the reason for which individual rights may be restricted is the protection of the common good, and in particular consideration of the State's security and defence needs. The State's responsibility to safeguard the independence and territorial integrity may, and in some cases undoubtedly must, involve *inter alia* creating mechanisms that interfere with exercising certain constitutionally protected subjective rights and freedoms of citizens and other entities.

As noted in the judgement of the Constitutional Tribunal of 16 February 1999 in Case SK 11/98, individual rights collide here with the advisability of safeguarding the public interest which is closely linked with protecting the State security, i.e., with the value which in every democratic legal system may, to the extent necessary, justify infringement of individual rights, even fundamental rights.

The third pillar involves safeguarding the national heritage. The obligation to safeguard the national heritage is a reflection and consequence of the belief that it has fundamental importance for the national identity. As stated by the Supreme Court in its judgement of 12 December 1997 in Case III RN 74/97, a separate category of legally protected goods has been distinguished under Polish law and called *the national heritage, and the protection thereof has been made one of the four fundamental values in the Polish legal regime. Thus all authorities of the Republic of Poland are under obligation to construe and apply law to allow effective safeguarding this category of goods and values.*

Finally, the fourth pillar involves protection of the environment in the spirit of sustainable development. As noted by the Constitutional Tribunal in its judgement

of 10 July 2014 in Case P 19/13, *under the Constitution, the responsibility to protect the environment is distributed between public and private entities. However, one must not equate them. The legislator foresaw that public authorities are under obligation to support citizens in meeting that responsibility, i.e. to create appropriate - and therefore proportional - legal and factual conditions in this respect. This arises also from the constitutionally proclaimed principle of subsidiarity.*

6. Conclusions

The concept of national security has been widely analysed in security studies. The literature shows a tendency to perceive its conceptual boundaries broadly as strongly determined by current priorities and vital national interests, as well as historical background and geopolitical situation. Although being a border point of the sphere of the exclusive legislative competence and *dominium* of Nation States as members of the European Union, the concept has not been defined in EU law.

As it transpires from case-law of supreme courts of the European Union, leaving Member States free to formulate the scope of the notion of national (State) security in question is a deliberate action, not a loophole in the primary law regime. In this context, it is by all means justified to emphasise the national context and even use the term indicating which specific State is meant. Indeed, the term will have a universal character in only a very narrow aspect of EU axiology arising from the Preamble of the Treaty on European Union and the Treaty on the Functioning of the European Union. Specification of key values for a specific Nation State is materialised in normative documents of the highest order – Preambles and Constitutional rules.

The concept can be perceived as universal only in a broad view of axiological sources. As noted by the Constitutional Tribunal in its judgement in Case K 32/09 *the values being expressed in the Constitution and the Treaty of Lisbon determine the axiological identity of Poland and the European Union.* The specification of national objectives is carried out in the spirit of values and axiology of the common EU environment, taking into account historical conditions and existential threats to a given Nation State. Despite the tendency to unify national goals in the global, multicultural society of the 21st century, it is still crucial to set boundaries and search for referents for the concept of national (State) security.

In the context of the Republic of Poland, the limits of national (State) security must therefore refer to safeguarding values that are fundamental to the existence and national identity. The boundaries of existential priorities of Poland should be defined relatively narrowly in relation to the so-called hard core of key interests that determine the existence of the Polish nation under Article 5 of the Constitution. These key interests can be included in the formula of four pillars - in the case of which also the order of appearance is not accidental - namely: (1) protection of the

independence and territorial integrity of Poland, (2) ensuring freedom and human rights and civil rights, (3) protection of the national heritage, and (4) protection of the environment in the spirit of sustainable development (Kurek, 2021, 69).

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