

COMPARATIVE AND LEGAL CHARACTERISTICS OF THE NORMS OF POSITIVE LAW IN THE FIELD OF THE NATIONAL SECURITY OF UKRAINE, USA AND FEDERAL REPUBLIC OF GERMANY

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The author of the article studies domestic and international experience of normative and legal regulation for ensuring national security. The author has accomplished a systematic and comprehensive study of regulatory legal documents of Ukraine, the United States of America and Germany (constitutions, legislative acts, concepts, doctrines, strategies and messages) regulating the issues in the specified area; has assessed this situation for further improvement of the legal mechanism for ensuring national security. It is noted that there is the need to improve the regulatory legal base for implementing the state policy in the field of ensuring national security of Ukraine.

The purpose of the research is to solve the indicated scientific problem by conducting a systematic and comprehensive study of regulatory legal documents regulating the issues of ensuring national security taking into account general theoretical positions, as well as to assess this situation for further improvement of the legal mechanism for ensuring national security of Ukraine.

The research is based on a wide range of general scientific and special legal methods of cognition. General scientific methods are represented by: methods of empirical research (comparison, description); methods of theoretical study (formalization, axiomatic method); logical methods (analysis, generalization, analogy). Special legal methods include comparative and legal, formal and legal, the method of interpretation of law norms. General scientific methods are mainly used in theoretical substantiation of the problem, while considering the issues of understanding the phenomenon of national security, the regulatory base for its provision, determining their role in the legal system of the studied states. The comparative and legal method was used to identify the peculiarities of domestic and foreign normative and legal regulation of national security issues. The formal and legal method served as the basis for the analysis of the current regulatory legal acts in this area. The method of interpretation of legal norms assisted to clarify the content of the provisions of legal documents regulating the national security issues.

The current situation of Ukraine in the field of ensuring national security is due to the nature of socio-political and economic development of the state, as well as to tendencies in developing challenges, dangers and threats that require adequate measures of legal regulation of these changes. To this end, the Ukrainian authorities need to improve the legal base for the implementation of the state policy in the field of ensuring national security. Analysis of regulatory legal documents of Ukraine, the United States and Germany regulating the national security issues, allowed us to conclude that the national interests of a particular state are the basis for ensuring national security even if there are external differences in constitutions, laws, concepts, doctrines, strategies and messages, as well as in legislation in the field of national security. In this regard, certain contradictions in the understanding of the doctrinal national interests of Ukraine, the United States, Germany and other states are still inevitable.

Key words: *national security, regulatory base, concepts of national security, doctrines of national security, national security strategies, messages on national security.*

INTRODUCTION

Ensuring national security is one of the priorities of any state's policy. Nowadays, the interest in the problems of ensuring national security both in Ukraine and at the international level is steadily growing. Such increased interest is primarily manifested by the emergence of new threats that humanity has faced – international terrorism, local armed conflicts, cybercrime and many other crises. Ukrainian socie-

ty, which is suffering from the consequences of Russian aggression, especially needs the formation of an effective mechanism for ensuring national security from both external and internal threats.

Issues of theory and practice related to national security, including its normative and legal regulation, require a systematic and comprehensive approach, which includes both general theoretical research and achievements of branch sciences, as well as the

needs of practice in the interests of personal security, society and state's security. They become more relevant in connection with the increase and change of security types in general, the emergence of new threats and challenges, dynamic changes in the global geopolitical space.

At the same time, the science has practically no general theoretical conceptual idea both about the legal nature, essence and content of national security, and about the legal basis of the mechanism of its provision. The unresolved problem does not contribute to the elimination of conflicts in the current Ukrainian legislation, as well as contradictions in law-enforcement practice, which results in negative impact on the effective provision of national security.

Such situation necessitates a general theoretical study of the conceptual bases of the state policy on ensuring national security and its legal regulation. Such a study, based on domestic and international experience, will allow us to get closer in clarifying specific features of normative and legal regulation of the mechanism for ensuring national security.

Regarding the above, the research of regulatory legal guaranteeing of the national security of Ukraine, as well as developed countries such as the United States and Germany, is of significant scientific and practical interest in the general theoretical perspective and in the practical refraction. These circumstances determined the substantive focus of the research, the result of which formed the basis of this article.

RESEARCH PURPOSE AND OBJECTIVES

The purpose of this work is to solve the specified scientific problem by conducting a systematic and comprehensive study of normative and legal documents regulating national security, as well as to assess this situation for further improvement of the legal mechanism for ensuring national security of Ukraine.

RESEARCH METHODOLOGY

The methodology of this study includes two groups of methods: general scientific, special and legal ones.

General scientific methods are represented by: methods of empirical research (comparison, description); methods of theoretical study (formalization, axiomatic method); logical methods (analysis, generalization, analogy). Special and legal methods include comparative and legal, formal and legal, as well as the method of interpretation of law norms.

General scientific methods are mainly used in theoretical substantiation of the problem, while considering the issues of understanding the national security phenomenon, the regulatory base for its provision, determining their role in the legal system of the studied states.

The comparative and legal method was used to identify specific features of domestic and foreign normative and legal regulation of national security issues. The formal and legal method served as the basis for the analysis of the current regulatory legal acts in this

area. The method of interpretation of legal norms facilitated to clarify the content of the provisions of legal documents regulating national security issues.

RESEARCH RESULTS AND DISCUSSION

Ukrainian experience of normative and legal regulation for ensuring national security

The basis for ensuring national security is the formation and maintenance of its regulatory framework as a legal mean for achieving real arrangement of the national security system.

The regulatory framework is an organizational and functional image of the national security system, expressed in legal language and that corresponds to its purpose. At the same time, legal norms guarantee modeling of the national security system and its subsystems, standardization and formalization of their functional, organizational and information structures, as well as perform an information function.

The constitution, as well as laws and bylaws determining the functions and tasks of state and non-state entities of national security forces both in general and in specific areas, subsystems and management levels are the initial legal framework for the functioning of the national security system of Ukraine.

The Constitution of Ukraine as the Basic Law defines the general principles for functioning of the system on ensuring the national security of the Ukrainian state. Part 1 of the Art. 17 of the Basic Law of Ukraine states that "protecting the sovereignty and territorial integrity of Ukraine, ensuring its economic and information security, shall be the most important functions of the State and a matter of concern of all the Ukrainian people" [1].

The Constitution of Ukraine contains a number of provisions that provide guarantees for national security: Part 2 of the Art. 17 – "The defense of Ukraine and protection of its sovereignty, territorial integrity and inviolability shall be entrusted to the Armed Forces of Ukraine"; Part 3 of the Art. 17 – "ensuring the security of the State and protecting the State borders of Ukraine shall be entrusted to the respective military formations and law enforcement bodies of the State, whose organization and operational procedure shall be determined by law"; Part 4 of the Art. 17 – "The Armed Forces of Ukraine and other military formations shall not be used by anyone to restrict the rights and freedoms of citizens or with the intent to overthrow the constitutional order, subvert the public authorities or obstruct their activity"; Part 6 of the Art. 17 – "Establishment and operation of any armed formations not envisaged by law are prohibited in the territory of Ukraine"; Part 2 of the Art. 32 – "The collection, storage, use, and dissemination of confidential information about a person without his consent shall not be permitted, except for the cases determined by law and only in the interests of national security, economic welfare, and human rights"; paragraph 17 of the Art. 92 "the fundamentals of national security, the formation of the Armed Forces

of Ukraine and ensuring public order shall be determined exclusively by laws of Ukraine" [1].

Ukraine as a full-fledged subject of international law actively participates in all areas of activity of such international organizations as the UN, OSCE, NATO and the EU, aimed at maintaining international peace and security, including national security. Such activities of Ukraine at the international arena fully comply with the Art. 18 of the Constitution of Ukraine – "The foreign political activity of Ukraine shall be aimed at ensuring its national interests and security by maintaining peaceful and mutually beneficial co-operation with members of the international community in compliance with the generally acknowledged principles and norms of international law" [1].

In addition, the Constitution of Ukraine contains a number of provisions that enshrine the powers of certain state agencies that are part of the public and legal mechanism for ensuring national security of Ukraine (the Art. 85 – the powers of the Verkhovna Rada of Ukraine; the Art. 106 – the powers of the President of Ukraine; the Art. 107 – general principles of the legal status of the National Security and Defense Council of Ukraine as a co-ordinating body on the issues of national security and defense under the President of Ukraine; the Art. 116 – powers of the Cabinet of Ministers of Ukraine) [1].

Fundamentals and principles of national security and defense, purposes and basic principles of the state policy that should guarantee protection to society and every citizen from threats is defined by the Law of Ukraine "On National Security of Ukraine" dated from June 21, 2018. This document defines national security as "protection of state sovereignty, territorial integrity, democratic constitutional system and other national interests of Ukraine from real and potential threats" (paragraph 9 of the Art. 1) [2].

The main purpose of Ukraine's national security system is to achieve national security purposes, i.e. to prevent real and potential threats. The specified Law "On National Security of Ukraine" understands the threats to the national security of Ukraine as "phenomena, tendencies and factors that make it impossible or difficult or may make it impossible or difficult to realize national interests and to preserve national values of Ukraine", (paragraph 6 of the Art. 1 of the Law) [2].

The normative and legal basis for ensuring the national security of Ukraine is the National Security Strategy. Thus, the President of Ukraine by the Decree No. 392/2020 of 14 September 2020, put into effect the Decision of the National Security and Defense Council of Ukraine of 14 September 2020 "On the National Security Strategy of Ukraine" [3].

The Strategy defines the main directions of the state policy in the field of national security, in particular: priorities of national interests of Ukraine and ensuring national security, purposes and main directions of the state policy in the field of national security; current and forecast threats to Ukraine's national

security and national interests, taking into account international and domestic conditions; the main directions of foreign policy of the state to ensure its national interests and security; directions and tasks of security and defense sector reform and development; resources needed for its implementation.

The strategy is based on three main principles of the state policy in the field of national security:

- deterrence – development of security and defense capabilities to prevent armed aggression against Ukraine;
- resilience – the ability of society and the state to quickly adapt to changes in the security environment and maintain sustainable operation, in particular by minimizing external and internal vulnerabilities;
- interaction – development of strategic relations with key foreign partners, first of all with the EU and NATO and their Member States, the USA, pragmatic cooperation with other states and international organizations on the basis of national interests of Ukraine.

Priorities of national interests are determined by: defending independence and state sovereignty; restoration of territorial integrity within the internationally recognized state border of Ukraine; social development, especially the development of human capital; protection of the rights, freedoms and legitimate interests of the citizens of Ukraine; European and Euro-Atlantic integration.

The Strategy was developed taking into account the latest changes in national security and defense sector, due to the downturn in the world economy, the spread of COVID-19, the emergence of new factors affecting international security, as well as increasing the risks of natural and man-made emergencies.

The National Security Strategy of Ukraine is the basis for the development of other regulatory legal documents of strategic planning, which should determine the ways and tools of its implementation: Strategy of Military Security of Ukraine, Strategy of Public Security and Civil Defense of Ukraine, Strategy of Defense Industry of Ukraine, Economic Security Strategies, Energy Security Strategies, Environmental Security and Climate Adaptation Strategies, Biosafety and Biological Protection Strategies, Information Security Strategies, Cyber Security Strategies of Ukraine, Foreign Policy Strategies, State Security Strategies, Integrated Border Management Strategies, Food Security Strategies and National Intelligence Program [3].

International experience of normative and legal regulation for ensuring national security

Analysis of regulatory legal base of the leading states of the international community allows us to conclude that there are different approaches of foreign legislators to the problems of ensuring national security. Moreover, the very term "national security" in the legislation of different countries has an ambiguous interpretation. In this article we will try to give a

comparative analysis of the current situation of legislative security of the two most developed countries in the world – the United States and Germany.

It is important to note that the term of “national security” is not used in the provisions of the US Constitution. However, it provides the ability of a State to keep Troops or Ships of War in time of Peace, enter into any Agreement or Compact with another State or with a foreign Power, or engage in War without the Consent of the US Congress, unless actually invaded or in such imminent Danger as will not admit of delay (the Art. 1, Section 10 of the US Constitution) [4].

In addition, the Second Amendment to the US Constitution stipulates that a well regulated Militia being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed [4].

The German Basic Law unlike the US Constitution pays more attention to national security issues, although the term itself is not used. Thus, Part 2 of the Art. 11 of the German Constitution provides restrictions on freedom of movement throughout the Federation in cases where it is necessary to avert an imminent danger that threatens the existence or principles of the free democratic basic order of the Federation or of a Land [5].

The Art. 24 of the German Constitution provides the possibility for the Federation to join the system of mutual collective security in order to maintaining peace. But in this case, Germany can agree to limit only those sovereign rights that will lead to the establishment and maintenance of peaceful and sustainable order in Europe and among the nations of the world [5].

In order to maintain or restore public order or security in particularly important cases, the Lands (administrative and territorial units) may require sending them the forces and units of the Federal Border Guard (the Art. 35 of the German Constitution). If a natural disaster or catastrophe threatens the territory of more than one Land, the Federal Government may instruct the Land Governments to provide police forces at the disposal of other Lands, as well as use the formation of the Federal Border Guard and Armed Forces to support the police force. In addition, the Federation has exclusive legislative competence in the field of defense and protection of civilians (the Art. 73 of the German Constitution). The Federation and the Lands cooperate in matters of protecting the free democratic order, existence and security of the Federation or the Land (constitutional protection), protection against the use of force or preparation for its use, which threatens Germany's external interests [5].

Germany holds the Armed Forces – the Bundeswehr for its defense. In terms of defense or tension, the Armed Forces have the authority to protect civilian objects and to address traffic control issues to the extent necessary to carry out their defense tasks. The Armed Forces during a period of defense or tension may be tasked with protecting civilian objects within the support of police operations. In this case,

the Armed Forces act jointly and in contact with the competent authorities.

To prevent a threat to the existence or free democracy of the Federation or of a Land, the German Federal Government may use its Armed Forces to assist the Police and the Federal Border Guard in protecting civilians and combating organized and armed groups. The actions of the Armed Forces must be stopped if required by the Bundestag (German constitutional and legislative agency at the federal level) or the Bundesrat (Upper House of the German Parliament, representation of the Federal Lands at the federal level) (the Art. 87 of the German Constitution) [5].

According to the German Constitution, in order to avert an imminent danger to the existence or free democratic basic order of the Federation or of a Land, a Land may call upon police forces of other Lands, or upon personnel and facilities of other administrative authorities and of the Federal Border Police and other institutions. If the endangered Land is unprepared or unable to withstand the danger, the Federal Government of Germany may subordinate the police of that Land and the police forces of other Lands, as well as may use the units of the Federal Border Guard (the Art. 91 of the German Constitution) [5].

The Bundestag with the approval of the Bundesrat may declare a state of defense. The Bundesrat may request that the Bundestag consider this issue. The state of defense must be abolished immediately if the conditions preceding its introduction ceased to exist. The procedure for returning to normal is regulated by federal law (the Art. 115-I of the German Constitution) [5].

Analysis of international legislation regulating national security sector shows that it is largely based not so much on state constitutions, but on concepts, doctrines, strategies and messages.

For example, the issue of US national security is the subject matter of the annual Address of the President of the United States to Congress. It is noteworthy that the first but still relevant conceptual document in the field of US national security – the Monroe Doctrine was proclaimed in such Address on December 2, 1823. It contains such provisions as the obligation of non-interference of the United States into internal affairs of European countries, and vice versa – non-interference of European states into internal affairs of America. The Doctrine stipulates the requirements for the combat capability of the Armed Forces, their financing as the main conditions for ensuring US national security [6].

It is important to note that the Monroe Doctrine includes fundamental interests that have not been changed for more than 200 years. These are, first and foremost, the national interests that must be protected by the security, prosperity, and freedom of the American people, and the country's current mission reflecting the national interests of the United States as understood by the President of the United States.

The doctrinal provisions of US national security were reflected not only in the mentioned document,

but also in other legal acts: the National Security Act of 1947 [7], the McCarran Act "On Internal Security" of 1950 [8], Goldwater-Nichols Act "On Reorganization of the Ministry of Defense" of 1986 [9]. Besides, the President of the United States annually presents the National Security Strategy to the US Congress.

The terrorist attacks of September 11, 2001 in the United States forced American statesmen and politicians to reconsider their views on the issue of national security. A new US National Security Concept was introduced in 2002, and the US Presidential Decree established the Department of Homeland Security on November 25, 2002 [10], whose main task is to protect the US population and territory from any threats.

The innovations of the US National Security Concept of 2002 are not limited to the creation of the Federal Department of Homeland Security. It clarifies the task of ensuring internal security – it is a joint action and the responsibility of the federal government and the authorities of each state. In fact, it is a new phenomenon in US practice, since this task was part of the exclusive prerogative of the federal government.

The US National Security Strategy is an important document in the field of ensuring national security in addition to the US National Security Concept. This document, which is periodically developed by the US Federal Government, contains a list of existing national security problems and the ways to overcome them. The US National Security Strategy of 2002 stated that the United States is ranked second to none in military power, political and economic influence in the world. Protecting the country from enemies is the primary responsibility of the Federal Government. It is possible to use the full arsenal of tools: military power, modern defense systems, law enforcement agencies, intelligence, etc. in order to prevent threats to US security. This provision remains the main focus of US foreign and domestic policy.

The structure of the US National Security Strategy includes the following sections: overview of the US international strategy; measures to support people's aspirations to ensure respect for their dignity; measures to strengthen alliances to defeat global terrorism and prevent aggression against the United States and its allies; ways to de-escalate regional conflicts; ways to eliminate threats to the United States and its allies through the use of weapons of mass destruction; criteria for global economic growth through the development of free markets and free trade; ways to expand the number of developing countries by helping to make their societies more open and to build the democracy infrastructure; joint action plans with other major centers of global influence; transformation of American institutions in the field of national security taking into account the challenges and opportunities of the XXI century.

The US National Defense Strategy's strategic objectives in the military field include: protecting the United States from the direct attack; ensuring strategic access and maintaining global freedom of own

actions; strengthening alliances and partnerships; creating favorable conditions in the field of security; providing guarantees to allies and partners; warnings of potential opponents; deterring aggression and resisting coercion; risk management, etc.

In addition to the Basic Law, the German legal acts regulating national security include: "The 2006 White Paper on German Security Policy and Future of the Bundeswehr" (approved by the Federal Chancellor of Germany on October 24, 2006); "The Main Directions of Germany's Defense Policy" (adopted by the Minister of Defense of Germany on May 18, 2011); "The Bundeswehr Concept" (adopted by the German Minister of Defense on August 9, 2009); "Directive of the Inspector General for the Further Development of the Armed Forces" (adopted by the Inspector General of the Bundeswehr on March 1, 2004) and "Plan for Equipping the Bundeswehr with Weapons and Military Equipment" (the plan is updated annually) [11]. They provide the general and private tasks, forces and means of the Bundeswehr, which are consistently determined by the projected security situation and Germany's commitments as a security partner within NATO and the EU. It is important that the documents, despite the Art. 87 of the German Constitution, which provides the creation of armed forces solely for defense purposes, also note the need for their participation in conflict and crisis prevention, joint actions to resolve crises and rebuild infrastructure [5]. In other words, defense is no longer limited to national borders, but involves participation in ensuring security in all cases, where it is threatened. The German Constitutional Court and Parliament confirmed the legitimacy of these Bundeswehr tasks in the context of Germany's collective security.

Besides, these documents set out the principles of defense policy, priorities and capabilities of the armed forces within the general obligation of the state to take preventive measures to ensure national security.

Unlike the US National Security Strategy, the regulations governing Germany's national security provide the possibility of conducting military operations only in conjunction with allies and partners within the UN, NATO and the EU.

The main risks to Germany's national security, which regulate national security issues, include: religious extremism and fanaticism, combined with the worldwide spread of international terrorism; spread of mass destruction weapons; conflicts involving violence on national and ethnic grounds; regional crises, especially those on the continent's southern and south-eastern periphery; political, ethnic, religious, economic and social conflicts combined with international terrorism and organized crime. The vulnerability of the modern information society and communication systems occupies a special place among the risks. Freedom of access and application, as well as imperfect means of protection, increase the degree of risk to which states, societies and their infrastructure are exposed, and facilitate information warfare in all its forms.

In contrast to the US National Security Strategy, the documents governing Germany's national security are characterized by the fact that their national security is based on the norms of international law and, in particular, on the provisions of the UN Charter.

Analysis of these documents demonstrates that the main purpose of Germany's national security policy is to protect the country's population. Germany can use the help of existing global and regional international organizations in achieving this purpose, whose activities are related to international peace and security (UN, OSCE, NATO, EU). The diversity of tasks requires a coherent national policy in the field of ensuring national security involving the use of flexible and coordinated tools, which in the medium term perspective should be combined within the national security concept. In this regard, the mentioned documents state that security cannot be mainly or exclusively guaranteed by military means. Preventive security policy should include political and diplomatic initiatives, actions in the field of economic and development policy, as well as constitutional, humanitarian and social measures.

According to the content of regulatory legal acts in the field of ensuring national security in Germany, the basis of German national security is the transatlantic partnership; the European zone of stability is strengthened by a broad, effective, cooperation-based EU security and defense policy; Germany takes an active part in the activities of international organizations in order to strengthen its own national security, to ensure respect for human rights and international law throughout the world, and to promote sustainable economic and social development.

CONCLUSIONS

Summarizing the above, we can state that the current situation of Ukraine in the field of national security is stipulated by the nature of socio-political and economic development of the state, as well as by the tendencies of increasing the challenges, dangers and threats that require adequate legal regulation measures for these changes. To this end, the Ukrainian authorities need to improve the legal basis for the implementation of the state policy in the field of national security.

Given the strong security potential of Ukraine and its actual participation in numerous events to maintain international peace and security under the auspices of international organizations, we consider further deepening of cooperation with international and regional security organizations (UN, NATO, OSCE, EU, etc.), states – guarantors of Ukraine's security (USA, UK, France) as the most perspective direction in ensuring national security and therefore demonstrating readiness for open dialogue on the formation of normative and legal base for implementing security policy on the principles of the rule of law, protection of

human rights and freedoms, depoliticization and civil democratic control.

Analysis of regulatory legal documents of Ukraine, the United States and Germany regulating national security issues, indicates that the national interests of a particular state are the basis for each of them, despite external differences in constitutions, laws, concepts, doctrines, strategies and messages, as well as legislation in the field of national security in general. In this regard, certain contradictions in understanding the doctrinal national interests of Ukraine, the United States, Germany and other countries are still inevitable.

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