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## **Defense Law as the Foundation of the State Defense System in the Republic of Poland**

### **Introduction**

The protection of its independence and integrity of its territory is the primary task of every state. This is very clearly indicated in Art. 5 of the Constitution of the Republic of Poland. This is because independence is the supreme value, and the task of ensuring the integrity of a state's borders underlines the importance of a territory as one of the main attributes defining the state (alongside population and sovereign political power).<sup>1</sup> In implementing the task of safeguarding the independence and integrity of the territory, a key role is played by an efficiently functioning state defense system, in which both the Polish Armed Forces and non-military authorities perform their functions.

The system of state defense is sometimes described in security science literature as a collection of interrelated elements – people, organizations and equipment – acting to ensure state security.<sup>2</sup> Another definition of the state defense system is a coordinated internal set of elements of governance (political-administrative) and executive elements (military and non-military), deliberately separated from the structures of the state, of an organizational and supportive nature.<sup>3</sup>

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1 The Constitution of the Republic of Poland of 2nd April, 1997, Journal of Laws of 1997, no. 78, item 483.

2 B. Balcerowicz, *Obronność państwa średniego*, Bellona, Warszawa 1997, p. 13.

3 W. Kitler, *Bezpieczeństwo narodowe RP: podstawowe kategorie, uwarunkowania, system*, Warszawa 2011, p. 255.

On the other hand, the set of legal norms regulating the sphere of state defense is referred to as defense law and this is what I focus on in this article.

The aim of the publication is to analyze defense law as a part of the legal system of the Republic of Poland in the context of its importance for the defense of the country. I formulated the main research problem in the form of the following question:

1. Does the defense law of the Republic of Poland require reform and in what direction should changes in this field of law be directed?

Also, I formulated three specific questions:

1. What is the importance of national defense in ensuring national security?
2. What is the place of defense law in the legal system of the Republic of Poland?
3. What is the subject matter of defense law?

Due to the fact that defense law issues are interdisciplinary in nature, in my research I used both a critical analysis of literature on legal sciences and security sciences. In addition, I relied on an analysis of source materials - primarily acts of universally binding law (the Constitution, statutes, regulations) and acts of local law, as well as acts of internally binding law (instructions, orders, resolutions, decisions, guidelines, and the agreements of various state authorities). I also took into account the defense planning documents.

### **The Importance of National Defense and of the State Defense System**

The concept of national defense is inextricably linked to national security. The relationship between those two terms is pointed out by Ryszard

Jakubczak, who emphasizes that if national security is the highest need and value of a nation and the main objective of a state, then national defense is its implementation structure, i.e. the main organization and function that protects national values and defends them against both military and non-military threats, as well as external and internal ones.<sup>4</sup>

In the “Dictionary of basic terms in the field of state security” prepared by the Strategic and Defence Faculty of the National Defence Academy in 1993, there is a brief definition of national defense as a sum of the forces and means (institutions) of a society (a nation) and their actions related to counteracting threats to national interest.<sup>5</sup> However, a similar publication prepared by the same department of the NDA, but published in 2008, contains a much broader definition, since the term “national defense” is defined there as an activity aimed at adequately preparing and using the forces and means that are at the disposal of the state to counteract all kinds of external and internal threats to the national interest. It should be emphasized that the authors of this definition of national defense considered as external threats the threat resulting in an increased probability of loss or limitation of sovereignty or territorial integrity, where the source of this threat is another state. On the other hand, internal threats are threats that result in the likelihood of a decrease in the ability of authorities to maintain law and order in the state.<sup>6</sup>

On the other hand, Józef Marczak suggests that the understanding of the traditional term “national defense” should be extended to include national protection and defense. In his opinion, such a formulation includes all the civil and military actions that guarantee the survival of national interests in the face of military and non-military threats. Moreover, it draws attention to the inseparability of the preparation of armed forces

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4 R. Jakubczak, *Pojęcie oraz zakres bezpieczeństwa narodowego i obrony narodowej*, in: *Obrona narodowa w tworzeniu bezpieczeństwa III RP*, eds. R. Jakubczak, Bellona, Warszawa 2003, pp. 62–63.

5 Wydział Strategiczno-Obronny Akademii Obrony Narodowej, *Słownik podstawowych terminów z zakresu bezpieczeństwa państwa*, Warszawa 1993, p. 15.

6 Wydział Strategiczno-Obronny Akademii Obrony Narodowej, *Słownik terminów z zakresu bezpieczeństwa narodowego*, Warszawa 2008, pp. 7, 179.

and civil defense organizations for both national defense (in the meaning of defense against aggression) and national protection (in the meaning of prevention of non-military threats). J. Marczak believes that national protection and defense creates the basis for the effectiveness and credibility of foreign policy in creating external conditions for national security.<sup>7</sup>

Waldemar Kitler, on the other hand, points out that the subject of national defense is not only the state as a subject of international relations, but also the nation defined as a society inhabiting a given state. In presenting his first definition of national defense, W. Kitler described this term as the sum of all civil and military actions aimed to ensure the security of a country and a society, i.e. actions that determine the sustainability of the state (as an institution of international relations) and the society in the face of challenges and threats hindering vital national interests. National defense is a sphere of national security, and thus constitutes an internally coordinated set of elements performing governance functions (political and administrative) and executive functions (military and non-military – civilian).<sup>8</sup> However, in the course of further research on the issue of national defense, W. Kitler verified his definition of this concept. The change concerned, among other things, the abandonment of the division into military and non-military defense in favor of a functional approach (separation of a superior subsystem of national defense management and an executive subsystem) and the abandonment of the assumption that the aim of national defense is to prevent and counteract all threats to national interests in favor of protection and defense of vital national security interests.<sup>9</sup> Thus, W. Kitler's new definition of national defense is the following: "national defense is an internally coordinated set of elements of the superior management subsystem and detailed functional executive sub-

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7 J. Marczak, *Powszechna ochrona i obrona narodowa*, in: *Podstawy bezpieczeństwa narodowego Polski w erze globalizacji*, eds R. Jakubczak, J. Marczak, K. Gąsiorek, W. Jakubczak, Warszawa 2008, pp. 163–164.

8 W. Kitler, *Obrona narodowa w wybranych państwach demokratycznych*, Warszawa 2001, pp. 6 and 155.

9 W. Kitler, *Obrona narodowa III RP: pojęcie, organizacja, system*, Warszawa 2002, p. 15.

systems, defined by interaction and substance relations, serving to protect and defend the vital interests of national security.” According to W. Kitler, the supreme subsystem of national defense management is a collection of supreme authorities and public administration bodies, within which decision-making and information functions are performed in relation to the system and its environment. However, the functional executive subsystems include three key subsystems, i.e. diplomatic defense, economic and economic infrastructure defense, military defense, as well as other subsystems, i.e. civil protection, health protection, constitutional order protection, security and public order, state border protection, information protection, education for security, and defense in the field of national culture.<sup>10</sup>

Bolesław Balcerowicz, in his reflections on national defense and the influence of mutual allied obligations on it, supports the aforementioned definition presented in the Dictionary prepared by the Strategic Defense Department of the AON. He also indicates that the concept of national defense now also extends to cover such spheres of activities of the state that are not connected only with narrowly-defined military defense activities. Bolesław Balcerowicz also mentions three dimensions in which national defense should be considered:

- the activity dimension – counteracting threats to state security and their consequences;
- the structural dimension – armed forces, non-military defense cells, and leadership bodies;
- the functional dimension – tasks for each of its elements.<sup>11</sup>

The definition of the state defense system in the literature on the subject (both by B. Balcerowicz and by W. Kitler) and its importance are presented in the introduction to the article. It should be mentioned, however, that apart from the state defense system, there are also a number of other

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<sup>10</sup> Ibidem, p. 343.

<sup>11</sup> B. Balcerowicz, *Sojusz a obrona narodowa*, Warszawa 1999, p. 13.

specific systems related to national security. These include the security and law enforcement system, the anti-terrorist system, the cyber defense system, the critical infrastructure protection system, the border protection system, the constitutional order protection system, the classified information protection system, the civil protection and civil defense system, and the crisis management system. Of course, this is not a closed catalogue, but the number of systems clearly shows how complicated the sphere of national security is. Moreover, each of the systems mentioned above intertwines with the elements of the state defense system and complements it to a certain extent. However, different state services and institutions (both military and civilian) are responsible for the implementation of tasks in a given system. This underlines the important role of defense law as the foundation of national defense and the system of state defense.

### **Defense Law in the Legal System**

Defense law is a separate part of national security law that regulates an extremely important aspect of national defense. Its special position is emphasized especially by the provisions of the Constitution of the Republic of Poland. The relevant legal regulations can be found, *inter alia*, among the main principles of the system of government (chapter I), the freedoms, rights and obligations of man and citizen (chapter II), the tasks of the legislative and executive authorities (chapters IV, V, and VI), and matters related to states of emergency (chapter XI). Although, as can be seen, these regulations are located in different parts of the Constitution, they are strongly interrelated and should be considered together, as indicated by verdicts of the Constitutional Tribunal, as well as the views of the doctrine of legal sciences and security sciences.<sup>12</sup>

Also Art. 1 of the Act on the universal defense duty indicates that “the defense of the Fatherland is a matter and duty of all citizens of the

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12 W. Wołpiuk, *Siły Zbrojne w regulacjach Konstytucji RP*, Warszawa 1998, p. 15.

Republic of Poland”, while Art. 2 emphasizes that defense of the Republic of Poland, preparation of the population and national property for a war and performance of other tasks within the universal defense duty is the responsibility of all authorities and government administration bodies and other state institutions and bodies, local government bodies, businesses, and other organizational units, social organizations, as well as each citizen to the extent specified in specific statutes.<sup>13</sup>

However, defense law, like national security law, is not a separate branch of law. The defense law system consists of legal acts from various branches and fields of law related to national defense (first of all, constitutional, administrative and criminal law provisions, but also, to varying degrees, provisions of other branches of law). This is a very large number of acts of universally binding law (starting with constitutional regulations, through statutes and regulations) and numerous acts of local law (issued by authorized entities and binding in the territory of a given local government community). In addition, decisions of the President of the Republic of Poland, decrees (of the President, the Prime Minister, and ministers), resolutions of the Council of Ministers, decisions of the Minister of National Defence, guidelines and agreements of the Minister of National Defence, and some legal acts of other central state bodies, should be taken into account.<sup>14</sup>

The defense law system, therefore, consists of several hundred legal acts of various importance, which makes any discussions of this subject very complicated.

### **Subject Matter of Defense Law**

Several attempts to systematize the defense law have been made in the literature on the subject, and scientists from the Institute of Law and

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<sup>13</sup> Ustawa z dnia 21 listopada 1967 r. o powszechnym obowiązku obrony Rzeczypospolitej Polskiej, *Journal of Laws* of 1967, no. 44, item 220.

<sup>14</sup> M.A. Kamiński, *Military Law in the Republic of Poland*, “Safety & Defense” vol. 5, no 2, 2019.

Defence Administration of the Academy of War Arts are particularly active in this field.

An analysis of the content of the multi-author monograph entitled “Defence law of the Republic of Poland – outline of a lecture” leads to the conclusion that the scope of national law directly regulating the subject of national defense includes legal regulations concerning, among other things, the following:

- organization of the national defense;
- defensive planning;
- the tasks and competences of the supreme and central state authorities in the field of defense (including the lower chamber of the parliament, the President of the Republic of Poland, the Prime Minister, the Minister of National Defence, other ministers, courts and tribunals, and the central government administration bodies and the offices serving them);
- the tasks and competences of local public administration bodies in the field of defense (including the province governor, the marshal, and the provincial board, the district head and the district board, the mayor and the president of a city);
- the tasks and organization of the Armed Forces of the Republic of Poland as a subject of defense law and the broad matter of military law;
- the normative basis for the introduction, validity, and abolition of martial law;
- civil defense;
- defense services.<sup>15</sup>

On the other hand, in the monograph titled “Organization of the national security of the Republic of Poland. System of government, legal-

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<sup>15</sup> *Prawo obronne Rzeczypospolitej Polskiej w zarysie*, eds M. Czuryk, W. Kitler, Warszawa 2014.

organizational, and systemic aspects”, W. Kitler suggested the following typology of defense law:

1. constitutional law containing norms regulating and influencing the field of defense;
2. law directly regulating defense issues, including:
  - b. the general organization of national defense;
  - c. the defense competencies of state authorities;
  - d. establishing missions in the various fields of national defense (including law directly dedicated to defense in the fields of economy, transport, health, communications, civil protection, and others);
  - e. acts of local law concerning defense issues;
  - f. the sources of the internally binding law;
3. law supporting national defense – according to the subject matter of the regulations, including customs, banking, aviation, energy, environmental, construction, and tax law, as well as according to the method of regulation: civil, labor, criminal, and administrative law.<sup>16</sup>

It should also be noted that, in addition to national regulations, defense law also includes a number of regulations in the field of international law that regulate military security, such as the extensive field of international humanitarian law on armed conflicts concerning the right to use armed forces and restrictions on the use of military force, as well as the protection of civilians.

An important element that influences defense law is defense planning. Key documents in this area include the National Security Strategy of the Republic of Poland, the Political and Strategic Defence Directive of the Republic of Poland, the Main directions of the development of the Polish Armed Forces and their preparations for defense of the

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16 W. Kitler, *Organizacja bezpieczeństwa narodowego RP. Aspekty ustrojowe, prawno-administracyjne i systemowe*, Toruń 2018, pp. 134–145.

state, the Guidelines of the Council of Ministers for programming of defense preparations, the Defensive Response Plan of the Republic of Poland, the Operational Plan of the Polish Armed Forces, the Guidelines of the Ministry of Defence on defense planning and programming in the ministry competent for national defense.

### **The Need for Reform of Defense Law**

The systematization of defense law and the indication of its subject matter is hampered by the fact that there is no single law in Poland that regulates the fundamental issues of national defense and act as a kind of a signpost in this field. Certainly, it cannot be said to be the Act on the universal duty to defend the Republic of Poland, which in Polish legislation is a rare example of a legal act that has been in force for over fifty years. This Act was passed by the parliament of the People's Republic of Poland on 21 November 1967. Since then not only profound political changes have taken place – the transition from a totalitarian state to a democratic state ruled by law – but also the function and character of the Armed Forces have changed, as well as the very perception of national defense (where today, besides the military aspects, great emphasis is placed on the tasks of non-military defense). Over the last five decades, the Act on universal defense duty has been amended as many as 113 times in total. Thirteen announcements have been issued concerning the publication of a consolidated text of the Act, 900 implementing acts have been issued<sup>17</sup>, and the Constitutional Tribunal has issued three opinions on the compliance of the provisions of the Act with the Constitution. Over the course of fifty years, this legal act was repeatedly supplemented with successive tasks and powers of various state bodies in the field of defense and with competences of the commanders of the Armed Forces and of individual military formations. Also, on some occasions,

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<sup>17</sup> It should be stressed, however, that a large part are decisions made by the President of the Republic of Poland concerning appointments to the rank of a general.

some provisions were transferred to other new laws (e.g. legal regulations concerning the Military Police and the Minister of National Defence). As a result, the Act on the universal defense duty is currently, on the one hand, an extremely extensive legal act and, on the other hand, some of its provisions have exactly the same content as they did in the period of the People's Republic of Poland (e.g. the regulations concerning civil defense have been practically unchanged since 1979). Consequently, the Act is an archaic legal act that is not suitable for the current situation, and is a chaotic combination of various aspects of defense law and military law.<sup>18</sup>

For many years, there have been calls for a completely new national defense law to be drafted from scratch. In 2010, there were even proposals for the assumptions of a draft defense bill, preceded by a great deal of discussion, but then no specific legislative works in this area were started.

In 2018, W. Kitler suggested dividing defense law into four parts: a defense law act, a Polish Armed Forces act, an act on the universal duty to defend the Republic of Poland, and a military service act.<sup>19</sup> Such an interesting and innovative approach to the subject could in practice lead to a separation of defense law as a separate branch of law. With the adoption of the act, defense law could also be applied to issues regulated in laws and implementing acts belonging to other branches and fields of law (for example criminal law). Thus, defense law would certainly gain its identity in the system of national law.

It is important that the new defense law will cover soldiers' actions in operations outside the country. Soldiers are not only subject to local law but above all to Polish defense law.<sup>20</sup>

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18 M.A. Kamiński, *Ujednolicenie prawa w zakresie systemowych rozwiązań ochrony ludności i obrony cywilnej, Współczesna obrona cywilna wyzwania, ryzyko, zagrożenia*, eds. J. Gawęcka, J. Wojtycza, Piotrków Trybunalski, pp. 67–69.

19 W. Kitler, *Organizacja bezpieczeństwa narodowego RP...*, pp. 132–133.

20 B. Pacek, *Polish new „Rules of Engagement” – soldiers' legal security*, in: *Zasady użycia siły zbrojnych – wybrane materiały*, ed. B. Janusz-Pawletta, Warszawa 2011.

Another reasonable solution could be to adopt an act on national defense that would mainly regulate the tasks and powers of the state and local authorities in the field of national defense. Such legal regulations are successfully operating in many European countries. For example, in 2015, the parliament of the Republic of Estonia adopted the National Defence Act, which unified three other security laws and became a key national defense law. At the same time, the law introduced a new command system in accordance with the principle that all public authority institutions will perform the same functions in times of peace, crisis, and war.<sup>21</sup>

In the discussion on the systematization of defense law in Poland, one must also remember about the need to properly regulate the issue of civil defense. Here, too, there has been a debate for many years on the exclusion of civil protection issues from the Act on the universal defense duty and on the adoption of a new legal act treating civil protection issues in a comprehensive manner (adapted to the European standards in this field). Unfortunately, despite widespread agreement on the justification for such solutions, it has not yet been possible to carry out the legislative process effectively. Several attempts have been made, but none of them have been successful.

## Conclusions

National defense and the state defense system are key issues in the field of national security. However, the basic condition for the smooth functioning of the state defense system is to build its permanent legal basis, which is referred to as defense law. Without this element, it is impossible to create a good organization and achieve effective cooperation between the various bodies (military and non-military).

However, defense law does not constitute a separate branch of law in the Polish legal system. This is because defense law consists of le-

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21 More: M.A. Kamiński, *Obrona Narodowa Republiki Estonii*, Toruń 2018, pp. 131–141.

gal acts falling within the scope of constitutional law, administrative law, and criminal law, as well as other branches of law to varying degrees. Additionally, defense law comprises a very large number of acts of universally and internally binding law, which makes it very difficult effectively discuss this matter. The literature on the subject suggests dividing the subject matter of defense law into laws that directly regulate the subject of national defense and the laws that support it.

Undoubtedly, defense law is also in need of decisive reform, since the current legal solutions are often archaic and completely inappropriate for the current situation (especially the 1967 Act on universal defense duty). In addition, the very large number of amendments has introduced enormous legislative chaos.

One of the options for reform suggested in the security science literature is to divide the subject matter of defense law into four parts: a defense law act, an act on the Polish Armed Forces, an act on the universal duty to defend the Republic of Poland, and an act on military service. Another option could be to adopt an act on national defense that would mainly regulate the tasks and powers of the state and local authorities in the field of national defense (e.g. similar to the Estonian National Defence Act).

Such actions would certainly lead to a better organization of defense law and also could result in the formation of defense law as a separate branch of law.

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## SUMMARY

### **Defense Law as the Foundation of the State Defense System in the Republic of Poland**

The article presents an analysis of defense law in the legal system of the Republic of Poland in the context of its importance for the defense of the state. The author discusses the role of the state defense system in ensuring national security and presents defense law as a foundation for effective organization of this system. Moreover, the author analyzes the subject matter of defense law and points out the difficulties in its proper organization. The key issues discussed in the article are the need for defense law reforms and indication of the proposals as to the direction in which changes in this field of law should go.

Keywords: defense law, defense law in Poland, national defense, state defense system, defense law reform.

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DOI 10.14746/ppuam.2020.11.12

