

CCBE: Recommendations on Protection of Fundamental Rights in “National Security” Context

News

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The concept of “national security” is often used in modern democratic societies to justify intrusive surveillance measures or other interference in an individual’s fundamental rights. A universally accepted definition of national security is lacking, however, which makes it difficult for courts to review state actions by adequately applying the necessity and proportionality test. Therefore, the Council of Bars and Law Societies of Europe (CCBE) published a paper at the beginning of April 2019, which seeks to clarify the concept of “national security” as a justification ground. It also makes concrete recommendations as to how the invocation of national security by the executive can adhere to the rule of law. The paper is available in [English](#) and [French](#).

After explaining the background and context of the subject matter and describing the existing legal instruments and case law at the European level, the paper presents the results of a survey conducted with a representative sample of members of bars and societies (Austria, Belgium, the Czech Republic, France, Germany, Greece, Hungary, Italy, Poland, Spain, and the United Kingdom). The survey included questions on the legal concept of national security, on how the concept is employed, on whether national security is defined in the law, and under what circumstances the term is invoked. The conclusion is drawn that the concept of “national security” is not precisely defined in most states’ legal systems, but, when the state wishes to overcome legal restrictions, all legal systems use the concept.

Against this background, the following definition of national security is suggested: “(N)ational Security is understood as the internal and external security of the state, which consists of one or more of the following elements:

- the sovereignty of the state;
- the integrity of its territory, its institutions and its critical infrastructure;
- the protection of the democratic order of the state;
- the protection of its citizens and residents against serious threats to their life, health and human rights;
- the conduct and promotion of its foreign relations and commitment to the peaceful coexistence of nations.”

The CCBE does not stop at the definition, however, but emphasises that “procedural justice” is also needed. This means that state authorities must heed rule-of-law principles if they invoke the rationale of “national

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security” and citizens must receive a clear and fair procedure in the event of infringements of their fundamental rights. In this context, the CCBE makes four recommendations:

- Need for legislative control;
- Judicial and independent oversight;
- Effective legal remedies and sanctions;
- Protection of the professional secrecy and legal professional privilege.

The CCBE concludes that its contribution is designed to enable “democratic societies (to) respond to internal and external threats (...), whilst yet upholding the democratic values on which they are founded.”

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