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The “Parlamentsheer” – Feasible Concept or Wishful Thinking?

The Relationship between Society and Armed Forces in Germany

German Case

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This article deals with the development of the relationship between society and armed forces in the Federal Republic of Germany from the time of the German division up to now under the perspectives of the parliament as the representatives of the society and of the public opinion. Under the parliamentary perspective the author is stressing that the German Federal Armed Forces, the Bundeswehr, is – and was from the beginning – conceived as a “Parlamentsheer”, what means an army controlled by the German Parliament, the Bundestag, and not only commanded by the Federal Government. Under the perspective of the public opinion it can be shown that the Bundeswehr is in defiance to its high acceptance not a real people’s army.

1. The Influence of the Bundestag to the Military in the Time of the German Division

After World War II ended with Germany’s unconditional surrender, Germany was completely disarmed and divided into three western occupation zones, controlled by the U.S., the U.K. and France, and an eastern occupation zone, controlled by the Soviet Union. Moreover, those parts of the former Deutsches Reich that were located east of the rivers Oder and Neisse came under the definitive government of Poland and, in the case of northern East Prussia, under that of the Soviet Union. The three western zones were merged in 1949 and the Federal Republic of Germany (FRG) was founded, constituting the second German experiment with liberal democracy in the 20th century. At the same time the Soviet Union established the German Democratic Republic (GDR) in the East as an authoritarian socialist state. Until 1955, neither the FRG nor the GDR were sovereign states with the right of building a national army, but already since 1952 there were deliberations to prepare the rearmament.

When the Western German army, the Bundeswehr, was founded in 1956, it was fully integrated into NATO immediately. For one, the new allies feared any German military solo attempt, and secondly, a German participation in the defence of Western Europe seemed necessary in view of a feared further expansion of the Soviet Union. Just when Western Germany joined NATO, the Soviet Union and her allies founded the Warsaw Treaty Organization (WTO) and, later on, integrated the army of the GDR (Nationale Volksarmee) into the troops of this military organization. Even though NATO and WTO were enemies to each other, they had one common interest: to prevent any revival of German militarism.

But also the German public and politicians as well as the officers of the new armies showed no noteworthy tendencies during the post-war period to re-attribue the military a special value of its own. Moreover, when the West German state was founded, its constitution, the Basic Law (Grundgesetz, GG), was strictly peace orientated, *expressis verbis* the Preamble. With the same intention Art. 26, 1 GG forbids any preparation or waging a war of aggression, while in Art. 4, 3 GG secured the basic right to conscious objection years before a new army was in sight. Consequently, after the German

rearmament in 1956, the parliament, the Bundestag, amended the constitution to ensure the defensive character of the new army (Art. 87a, 1) and the parliamentary control over the military.

The Basic Law generally grants far reaching competences in security and defence politics to the German Bundestag: Legislation (and thus the ratification of international contracts according to Art. 59, 2 GG) as well as the appointment of the government for respective legislative periods combined with the authority to exchange it through a constructive motion of no-confidence against the Federal Chancellor are incumbent upon the parliament. A more concrete exertion of influence lies in the parliament's right to decide on the federal government's budget inclusive the budget for the Ministry of Defence, out of which according to Art. 87a, 1 GG the numerical strength and the main features of the organization of the Bundeswehr must become obvious. Up to this point the competences of the German Bundestag do not differ considerably from those of parliaments in other democracies.

However, there are some peculiarities originating from in the fact that West German parliamentarians of the first post-war decades laid special stress on protecting the second republic against uncontrolled exercise of power by its own executive. Firstly, both a declarative statement of a case of tension (Art. 80a, 1 GG) as well as a statement of a case of defence (Art. 115a, 1 GG) require for the high hurdle of a two third majority of the votes of the Bundestag. In addition to that, the commitment of armed forces must be stopped if the Bundestag or the second chamber, the Bundesrat, requires it without the necessity of providing an absolute majority (Art. 87a, 4 GG).

Secondly the parliamentary control of the armed forces shall be ascertained through the Committee of Defence of the Bundestag to whom as the only one the right was attributed by constitutional law, to constitute itself as a commission of inquiry. "A commission of inquiry is the strongest weapon within the parliament to control the behaviour of the government", as a self-portrayal of the Committee of Defence (2005:4) states correctly.

Upon request, even by only one fourth of its members, the committee is bound to make an issue to a subject of investigation (Art. 45a, 2 GG), which also strengthens the capacities of the parliamentary opposition in this field.

Finally, the Bundestag appoints a Parliamentary Commissioner for the Armed Forces according to Art. 45b GG "to safeguard basic rights and to assist the Bundestag in exercising parliamentary control over the Armed Forces." He or she is elected for a period of five years which implies that his or her term of office exceeds the legislative period and makes him or her independent from the governing majority. The Parliamentary Commissioner has a comprehensive right to information and suggestion vis-à-vis the parliament and the minister of defence as well as all troop units. Male and female soldiers as well as civil servants may - adapted to the Scandinavian law and sense of justice - appeal directly to this ombudsperson to address especially offenses of the basics of the concept of "Internal Leadership" ("Innere Führung") and to object in case of violations against basic rights. From the yearly "Report of the Parliamentary

Commissioner the parliament may conclude deficiencies ... and arrange for changes. The Parliamentary Commissioner himself is not authorized to do so. He is not authorized to decide on a matter himself instead of parliament or government.” (Penner 2005: 4). This self estimation of the last Commissioner marks an irrevocable limit of the controlling function of his office because it is only a parliamentary assistant institution (see Rosenow 2007).

The individual rights of all citizens related to the armed forces and the civil rights of the soldiers as “citizens in uniform” should also be mentioned in this respect. Among those it should especially be pointed at the basic right of objection for conscientious reasons according to Art. 4, 3 GG and the civil liberties and political rights of the soldiers as they are guaranteed in § 6 of the Soldier’s Law.

2. The Society and the Bundeswehr during the Cold War

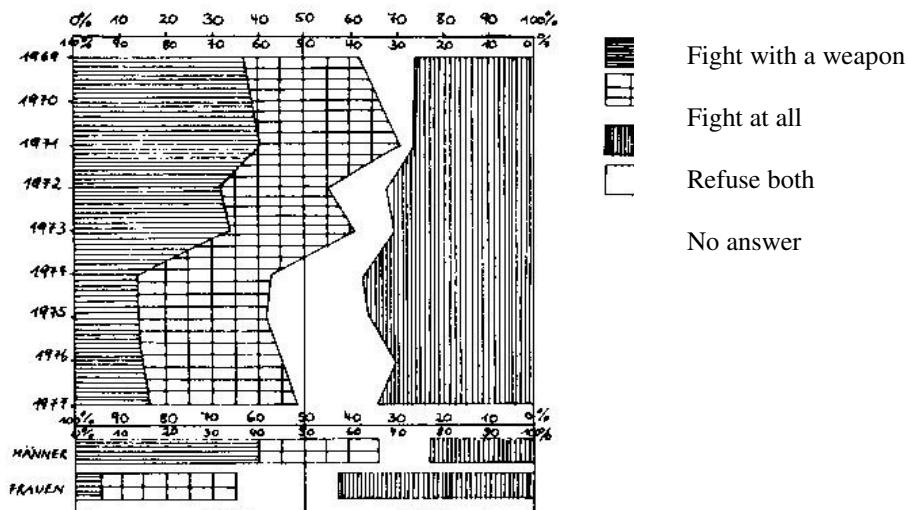
From 1949 to 1989 the border line between the two German states also marked the central part of the Cold War division line of Europe. Over four decades people on both sides were living in the fear of a new major war. At least in the West there was a common agreement between politicians and public that only military deterrence would keep the other side from waging war which then would escalate into a nuclear disaster.

Bearing these perceptions of danger in mind, both German states were turned into the most highly militarised regions of the world. In the FRG 495.000 German soldiers of the Bundeswehr stood side by side with more than 400.000 NATO troops from several countries, while in the GDR 170.000 German soldiers of the Nationale Volksarmee (NVA) were accompanied by about 380.000 Soviet troops. Assuming the necessity of mass armies, both sides took for granted that all young men were conscripted for more than a year, although the cores of the armies consisted of a high number of professional soldiers and temporary-career volunteers.

Although the institution Bundeswehr as an instrument of national defence was highly accepted by the society, not all men were prepared to join the army to take part in the defence (and women were not allowed to do). Since the 1960s three of four interviewed persons regarded the Bundeswehr as (very) important. During the 1980ies the acceptance receded, especially among young people, from 85 to 45 %, while the position “not so important/unimportant” grew from 10 to 33 % (Hoffmann 1992: 182). The preparedness of defence also dropped considerably, when in the poll not only was asked if the FRG should defy a military aggression (acceptance 1977 to 1980: 57 to 64 %, non-acceptance about 20 %) but also showed the consequences of such a situation: When parts of NATO’s strategy were included into the question, the answers changed completely: e.g. when the defence were to take place on German soil, 38 % were not prepared to accept this, or when it was mentioned that nuclear weapons would then detonate in the FRG, acceptance fell to 19 (1977) and 15 % (1980), while 60 to 81 % were against defence under this condition (Zoll 1982: 65).

Other polls showed that the acceptance receded as soon as the interviewed persons were asked if they themselves were prepared to take part in defence. The following figure stems from the question asked by EMNID from 1969 to 1977: “What would you do in a case of an armed aggression: would you fight with a weapon? Would you fight at all, if you were not trained with weapons? Or would you refuse both?” (Figure from Meyer 1983: 184). It shows a strong drop down of the part who is prepared to fight with firearms from 1973 to 1974, and a slow increasing of the part who is refusing both over the whole time.

Figure 1: Personal preparedness to defence 1969-1977



Another development confirms this tendency. As mentioned, the Basic Law provides citizens with a basic right of conscious objection. Nevertheless, there have been several restrictions to assert this right in the past. Up to 1982 young men who referred to their right of conscious objection, had to prove in an interrogation that their reasons were honestly, and, if they passed the examination, had to carry out a longer alternative civilian service.¹ Since then a written declaration of the reasons has sufficed enough but the duration of the civilian service has still been one third longer than that of the military service. In spite of these restrictions the number of objecting young men grew in the FRG since the end of the 1960ies to the end of the Cold War from a few thousand a year to more than a third of each age-group.

1 In the GDR conscious objection also was allowed, but the objectors were collected in building units of the army.

A different picture seems to appear on the female side of the young generation: Until the 1970ies in women were not allowed to join the Bundeswehr to serve as a soldiers, but could only work in the administration. After that time the Bundeswehr allowed joining female doctors and paramedics. This opened also a debate among women who claimed for equal rights in the professional life. Therefore, their motivation was not so much to take part in the defence rather than not to be excluded from “male” jobs.

3. Changing Tasks of the Bundeswehr after the Unification

In 1990, after Germany was unified and the Cold War had vanished, a reduction of the troops, both Allied and German, was necessary. The Germans had to demobilize the NVA of the GDR totally and to integrate some 10.000 personnel from it into the Bundeswehr, which itself had to be reduced from 495.000 to 340.000 within four years. This was a unique process, because the former officers of the NVA had to switch the political side in their own mind. But also a whole generation of young people of the former GDR, had to deal with a strange situation as they were suddenly conscripted into the Bundeswehr, of which they had learnt at school all the time before that it was the army of their enemy. Therefore, in the early 1990s the adherence to the military structure of a conscription army had more societal reasons than a military sense. It seemed to be an ideal vehicle for the integration of the eastern part of the society into the western value system. But this necessity ended within ten odd years after the unification when the age-groups that had been politically socialized by Soviet orientated teachers had passed through the Bundeswehr and other western institutions.

At the same time the reduction of the Bundeswehr created a new problem of equal treatment of those who were concerned by conscription (Wehrgerechtigkeit), which was caused by the fact that there were much more young men in every age-group than the Bundeswehr could take in as recruits. Although more than a third of the age-groups were conscious objectors and decided to complete an alternative civilian service, the gap between the declining number of places for recruits and the number of those who nominally could be conscripted grew continuously. Therefore, at least since 2000, the political parties of the Bundestag are debating a structural reform into a voluntary or a professional army. But also the new “Grand Coalition” (CDU/CSU and SPD) under Chancellor Mrs. Merkel – as can be seen in the White book from 2006 – is adhering to the conscript army, while all oppositional parties in parliament (Bundestag), Liberals, Greens and the Left are favouring a change for different reasons.²

2 Since the German unification the Bundestag includes members of five parties:
CDU (with a separate Bavarian “Sisterparty” CSU) = Christlich Demokratische Union/Christlich Soziale Union, a large conservative party in the broad centre of a left-right scheme;
SPD = Sozialdemokratische Partei Deutschlands, a large social democratic party in the left centre;
FDP = Freie Demokratische Partei, a small liberal party with a neoliberal right wing and a civil rights left wing;
The Greens = Bündnis 90/Die Grünen, a small ecologic party with recruitments from the peace movement;

Meanwhile, the large majority of its members considers the Bundeswehr an army of volunteers. After a judgment of the European Court of Justice in January 2000 women can since 2001 join the military over the whole broadness of professions. Today, in the rate of women in combat units still is very small. In November 2006, the number of women in the German Army consisted of 13.600 (i.e. 7 % of the professional and temporary-career soldiers). After the opening, there was a small debate on the question whether it would be necessary also to launch conscriptions for women or, in case they remained volunteers, also to end the time of conscription for men.

During the decades of the Cold War, the defence of the own country or the Atlantic Alliance was the central task of the Bundeswehr. In addition, if capacities were free at all, soldiers rendered humanitarian aid at home and abroad. Further requests were refused by the Federal Government with a reference to the restrictions in the Basic Law (Art. 24, 2 and Art. 87a, 1 and 2 GG). It corresponded with the basic position of the at that time still *West* German Federal Government not to obey the request of the United Nations as of August 26, 1990, to make available naval forces of the member states to enforce embargoes imposed against Iraq. A few weeks before the German reunification, this was possible because the old Federal Republic had not yet received the “full” sovereignty. However, Bonn committed a naval fleet to the East Mediterranean, where it still was in NATO area, the borders, up to that date had to be regarded as maximum cruising range for the deployment of the Bundeswehr, according to the Washington Treaty. After the UN Security Council in its resolution 678 on November 29, 1990, authenticized the “use of necessary means” to force Iraq to withdraw from Kuwait, the meanwhile *All*-German Federal Government did not follow the request of its American ally and did not commit troops to the Gulf, but only some air force units into South East Turkey. “After the allied air offensive against Iraq had been started, the presence of German armed forces in Turkey (...) increased. Another fleet compound of the German naval fleet (...) entered the East Mediterranean, so that end of February roughly 3000 German soldiers rendered service in the surroundings of the operational zone, however without interfering with combat operation.” (Mutz 1991: 225)

Before and during the war the German Bundeswehr above all assisted the Allies by transporting weapons and other material stored in their German depots and also out of depots of the Bundeswehr to the US air-bases Ramstein and Rhine-Main in order to have them transported to the Gulf. In addition, the German Federal Government paid 17 billion DM (8.7 billion €) into the Allies’ war chest. All this could not prevent the perception abroad that Germany tried to buy itself off; the lack of will to participate directly in the war was vehemently criticized as “checkbook-diplomacy”. After the Federal Government claimed a permanent seat in the UN Security Council after a change in the head of the Department of Foreign Affairs from Genscher to Kinkel (both FDP party) in May 1992, the continued practice of military reluctance was less and less understood and appreciated in the international community.

However, already in spring 1991 a debate had been started between the parties of the German Bundestag, what kind of tasks the Bundeswehr might and should take over beyond the mere national defence and support for allies after the end of the East-West-conflict. It was connected to a discussion about what parliamentary majority were required to decide on such commitments which according to Art. 115 a, 1 and 2 GG cannot be classified as a matter of defence.

CDU and CSU wanted to deploy the Bundeswehr beyond NATO commitments in the scope of the UNO as well as in context of a common European Union security policy. They considered a sole decision by the Federal Government as being sufficient. Their then partner in coalition – FDP – agreed to extend the possible commitments, but considered a prior consent of the Bundestag to be necessary in such cases with varying qualified majorities for different forms of sorties. The SPD was only willing to agree to an extension to “classical” UN peace-keeping missions, i.e. only authorized for self-defence.

Subsequently, one year later the SPD unsuccessfully tried to overthrow far reaching resolutions of the Federal Government in connection with the conflicts in Yugoslavia as infringements of constitutional law in the Bundestag. The smaller opposition parties - the Greens and PDS – even refused a participation of the Bundeswehr in blue-helmet missions (see Meyer 2004: 4).

In February 1992 the Ministry of Defence presented to the commission of defence of the Bundestag a study about “Military policy and strategic basics and conceptual directions for a new organization of the Bundeswehr”, allowing changes in the NATO strategy towards “*out-of-area*”-missions (NATO 1991: 1034) as well as an extended spectrum of tasks of WEU (“Petersberg-tasks”, see Meyer 2004: 6). The study contained a catalogue of German security interests, namely:

- “Prevention, containment and *termination* of conflicts of whatever kind, that *could* impair the integrity and stability of Germany;
- Stimulation and safeguarding of *worldwide* political, economical, *military*, and ecological stability;
- Maintenance of *free world trade* and *access to strategic raw materials*.” (cited in: Mutz 1992: 25)

That happened just before the change in the head of the Ministry of from Stoltenberg to Rühle (both CDU) took place. Together with Rühle’s assumption of office, the out-of-area activities considerably increased in quantity as well as in quality without the statutory framework having been clarified before: Among others the Bundeswehr maintained a military hospital for the UN-mission in Cambodia (UNTAC); the Federal Navy took part with some ships in supervising the embargo against the Federal Republic of Yugoslavia (Serbia and Montenegro); German soldiers worked in multinational crews on NATO AWACS airplanes supervising the no-flight-zone imposed by the UNO for Bosnia-Herzegovina and they also supported the UN-mission in Somalia for nine months with round about 1.700 men, the largest German contingent of the time.

4. The Judgment of the Federal Constitutional Court from July 12, 1994

Some of the above mentioned measures had to be regarded as humanitarian aid and thus were hardly disputable among the parliamentarians. In three cases, namely the WEU/NATO commitment in the Adriatic Sea, the AWACS flights across the Balkans and the participation in the UN blue-helmet mission in Somalia, the SPD as oppositional party considered the decisions of the Federal Government to be unconstitutional from the matter as well as from the action and thus appealed the Federal Constitutional Court for an institutional claim (*Organklage*). Acting like this was common in the history of the second German democracy, in which oppositional parties who had lost a ballot tried to prevail later in a judgment of the highest court. However, it was unusual that the co-governing FDP party tried to get an interim measure of the Federal Constitutional Court in this affair, after its ministers were defeated in the cabinet in this point before. In its application, an aspect was elaborated on would not have been picked out in such a form in a normal defence sortie of the German Federal Army as a central theme, namely, “that eventually life and health of German soldiers would be risked, without it having been decided and accounted for with all consequences by the parliament”. (cit. in: Meyer 2004: 8).

Also in the application of the SPD as to the Somalia mission, the soldiers in charge played an important role. It was stated therein that the total situation in the East African country would lead “to a highly dangerous exposure of lives and health of German soldiers in Somalia”. As it could not be avoided that the German contingent, while logistically supporting the “combat forces” of the UN, would come into situations, during which they would be compelled to self-defence, the German contribution to UNOSOM II should be abandoned until the main issue was decided upon: “Soldiers of the German Federal Army are deployed under infringement of the constitutional law and exposed to substantial life danger. Such an endangerment of life and health of the soldiers without a constitutional basis must be terminated through legal action calling for an injunction.” (cit. in: Meyer 2004: 8f).

It becomes apparent from these citations that the claiming fractions did not only want to defend the rights of the legislative against the demand of the executive and – according to at least the SPD party - to interpret the constitution restrictively. They rather wanted to prevent a situation in which the members of the Bundestag one day could be held responsible for the victims of a mission of their own side politically and morally, although they eventually did not want it at all and which they could not co-decide.

The applications for an injunction were refused in all cases. In the main proceeding the questions had to be dealt with, whether deployments of the Bundeswehr that do not serve in the closer sense of Art. 87a, 1 GG the (national) defence nor in the broader sense the defence of the alliance, fall under purposes that the Constitution expressly permits. In its judgment as of July 12, 1994, the Federal Constitutional Court contradicted the interpretation of Art. 24, 2 GG practiced until then: This article “authorizes the Federal

Republic to integrate into a system of interrelated collective security to ensure peace. This authorization not only entitles the Federal Republic to enter into such a system and to agree to involved restrictions of its sovereign rights. It rather also offers the constitutional basis for taking over tasks typically connected with the association to such a system and thus to the use of the Bundeswehr for sorties, taking place in the frame and according to the regulations of this system” (Decisions of the Federal Constitutional Court (BVerfGE) 1994: 345). Accordingly, “also alliances of collective self-defence may be systems of mutual collective security according to Art. 24 para. 2 GG”. However, this sentence of the senate ends with an important restriction: “if and to the extent they are strictly committed to peace-keeping.” (BVerfGE 1994: 349³)

The German legislator would virtually have agreed to an “integration of the German armed forces into integrated alliances of the NATO” simultaneously with the agreement to enter the NATO (treaty). This also includes the case, in which “integrated troops are deployed in the course of an action of the United Nations, a member of whom is the Federal Republic of Germany” (BVerfGE 1994: 355). This general authorisation, however, would not mean that the Bundestag would have to keep out of decisions concerning deployments of the Bundeswehr. Just the opposite! Via Art. 59 para. 2 sentence 1 the parliament has to ratify contracts under international law, also those that could result in military deployments. Therefore, so the more important part of the judgment in this connection, the Federal Government has to ask the Bundestag for a constitutive approval prior to each individual deployment.

This “requirement of prior approval” shall protect the Bundestag’s right to control the government through the binding effect under international law, “that cannot be cancelled by a later parliamentary disapproval.” (BVerfGE 1994: 357). The Bundestag could “if it disapproves of the foreign policy of the government, especially if it fears the development of unrequested obligations under international law, confront the federal government with its various means of political control.” As such developments appear publicly, the parliament “is at any time in a position to intervene on its own initiative ... in the process of decision-making taking place between the states.” (BVerfGE 1994: 364f.)

As to the proviso of the parliament in a close sense, the judgment was much more severe: The senate followed the applicants that the Federal Government has infringed upon the constitutional law “to obtain for the deployment of armed forces – the principally prior – constitutional consent of the German Bundestag” by deploying armed forces on July 15th 1992, April 2nd 1993 and April 21st 1993 without having obtained the prior constitutional consent of the Bundestag.” (BVerfGE 1994: 290)

The constitutional regulations about the army principally foresee “a participation of the parliament for the deployment of armed forces.” (BVerfGE 1994: 381) They “always aim at leaving the Bundeswehr not as a power potential solely to the executive, but to integrate the army as a “Parlamentsheer” (army of the parliament) into the democratic constitution, i.e. to secure the parliament a relevant influence as to organization and disposition of armed forces.” (BVerfGE 1994: 382). The judges respond with the

3 This formula also entered the paragraphs 5 a) and b) of the head note of the judgment, page 286 ff.

metapher “Parlamentsheer” and also the constitutive parliamentary proviso substantiating an argumentation on the German constitutional tradition since 1918, when shortly before the end of the first World War Art. 11,2 of the legislation of the Reich from 1871 had been changed to the extent, that “for a declaration of war in the name of the Reich ... the consent of the Bundesrat and Reichstag” is required (BVerfGE 1994: 383). In 1919, this basic idea was taken over by the republican constitution of Weimar in Art. 45,2, defining that a declaration of war and conclusion of peace shall be effected on the basis of and by implementing a resolution made by the Reichstag (BVerfGE 1994: 383). When the Bundeswehr was established, the constitutional law of 1956 was supplemented by Art. 59 a, which seized the idea in modern words and required, that the ascertainment of the “case of defence” was to be made by the Bundestag. When this article was replaced by Art. 115a, para 1, in 1969 the legislator even increased the parliamentary weight in ascertaining a case of defence determining that the application of the Federal Government must find the approval of the Bundestag with a two-third majority of the casted ballots or, at least, with a majority of its members as well as of the members of the Bundesrat.

These regulations fixed in the Basic Law are according to “the German constitutional tradition since 1918 which expressed a decision for a comprehensive parliamentary control of the armed forces. They reveal a principle for the constitution of the army, according to which the deployment of armed forces is subject to the constitutive, principally prior approval of the Bundestag.” (BVerfGE 1994: 387)

By this summarized interpretation, the Federal Constitutional Court put force a “constitutional stroke of genius” (Wiefelspütz 2003: 27), “inventing” a “constitutional parliamentary reservation”. It could do so, “because the constitutional organs Federal Government and Bundestag are bound to the judgment by § 31 para. 1 Federal Constitutional Court Law, up to this judgment, however, the practice of the state has not been put to insurmountable problems because there were no convincing alternatives in form of alterations of the constitution law “on the market”. (Wiefelspütz 2003: 29).

It was also controversial in the debate about the parliamentary proviso, whether there should be a higher quorum for more intensive forms of deployment. In this question the senate decided that it would be up to the legislator to give the parliamentary participation a more specific form and extent (BVerfGE 1994: 390).

Regarding the aspect of responsibility mentioned in the lawsuits of SPD and FDP as to the welfare and sorrow of the soldiers, the senate responded indirectly and only once, citing the introduction speech to the relevant article of the Basic Law of 1956 regarding the establishment of the Bundeswehr. Then, the commentator, Mrs. Schwarzhaupt, defined: “the fateful political decision upon war and peace ... has to be made by the top representatives of the nation whose fate is concerned, i.e. by the parliament.” (cited in: BVerfGE 1994: 384)

Remembering to this, the Federal Constitutional Court also assigned the constitutive responsibility for foreign assignments to the Bundestag which implies an essential side effect under the ethic aspect of responsibility: The Parliament’s own responsibility and

the individual responsibility of the members of the Bundestag for foreign deployments also relieves the government from the sole responsibility for consequences of possibly wrong decisions.

5. Ten Years of Foreign Missions without a Special Law of Parliamentary Participation

Since 1994, the Federal Government stuck to the judgment of the Federal Constitutional Court as far as possible and presented its intention to deploy its Bundeswehr outside the NATO area to the Bundestag in due course. Only the confidential operation “Libelle” (dragonfly), by means of which on March 14th 1997 under exclusive national heading approx. 100 persons of different nationalities were evacuated by helicopters out of Tirana, was only presented to the Bundestag for consent afterwards on March 20. Insofar it can be noted that the government accorded to the judgement of the “Parlamentsher”.

Including multiple prolongations for the troops deployed in the Balkan and in Afghanistan, until December 3rd, 2004, the Bundestag altogether had to decide in 43 cases upon deployments of the Bundeswehr. Up to this point in time the members of parliament voted according to Art. 42, 2 GG, although they had been explicitly encouraged to pass a special law. During that time no application for consent of a new or prolongation of a current mandate was refused; however, some of the approvals got a majority only after controversial discussions.

Considerable problems arose as to an adequate implementation of the parliamentary proviso – starting with the personal responsibility of the members of parliament as “representatives of the whole people, not bound by orders or instructions, and responsible only to their conscience” (Art. 38, 1 GG), which the following four examples will show:

Firstly: The decision on a participation in a deployment against the Federal Republic of Yugoslavia (Serbia and Montenegro) came about in an extraordinary meeting at the end of the 13th legislative period on Oct. 16th, 1998. The application had been introduced by the still officiating CDU/CSU/FDP Federal Government, however, in accordance with the designated SPD/Greens coalition. Although the missing UN mandate for the deployment caused concern on all parliamentary parties because a self-mandation of NATO was problematic under international law, in the end 500 members voted for a participation and 62 against it in a ballot vote by name, while 18 abstained from it (see Meyer / Schlotter 2000: 29 ff.). Obviously, in this case the fear to endanger the closeness of the alliance by refusing participation as well as the fear to provide the government with bad international starting conditions played a considerable role in the decision. Apart from that it was a matter of a dubious resolution made ahead, because when the air force went to the Kosovo War, also without UN mandate, the discomfort of some members of the Bundestag was even larger. However, this could no more influence the operations, as the government – legally correct – renounced a renegotiation about the deployment, although it would have made sense to check the framework conditions.

Secondly: The decision about a participation of the Bundeswehr in a humanitarian assignment of the UN in East Timor on Oct. 7th, 1999 was problematic under several aspects: For one, Foreign Minister Fischer had already agreed in his General Assembly speech on Sept. 22nd on a German participation, although at this point of time he had not consulted neither the cabinet nor the fractions of the Bundestag. “In view of the international commitment, even if it did not have a binding character according to international law, it was utterly impossible for the Federal Government and the Bundestag to decide differently without impairing Germany’s external reputation.” (Limpert 2002: 80). Also the Minister of Defence Scharping had declared in a public hearing of the budget committee that the monthly expenditure of presumably approx. 5 million DM (2.55 million €) should not be met out of the budget for defence. When, however, the opposite fractions of CDU/CSU and FDP parties were on side on Oct. 7th and applied to pay the costs for this deployment out of General Funds, the red-green majority of the Bundestag refused to follow their suggestion (see:<http://www.bundestag.de/bp/1999/bp9909/990990117>). Although a relatively small and short deployment was considered (that was unforeseeable), the question arose in view of the small financial budget of the Bundeswehr, whether the government filing the application as well as the concluding parliament did not give preference to a prestige in foreign policy instead of considering budget necessities and whether they were aware of the financial consequences of their decisions.

Thirdly: Before the decision on Germany’s participation in the operation “Enduring Freedom” on Nov. 16th 2001, that was heavily disputed within the Red-Green Coalition, Federal Chancellor Schröder chose the strongest instrument he had at his disposal in order to get the mandate through the Bundestag: He associated the decision with his call for a vote of confidence and assured himself an even narrow majority of the fractions of the governing coalition – however at a price, that one of the SPD members who did not want to be pressed into a “yes”, left the fraction, and that eight members of the Green Party, who also had pangs of conscience, drew lots who of them was allowed to vote with yes or no. At the same time, both fractions of the opposition, CDU/CSU and FDP, who would have agreed to the mandate itself, refused the application (proposal) because it was linked to the vote of confidence. This affair, being grotesque with a view to the freedom of conscience of the members of the Bundestag (Art. 38, 1 GG), shows how considerations related to a concrete deployment (as e.g. the solidarity with the USA on the one hand and doubts regarding the sense of the Afghanistan War out of a pacifistically based orientation on the other hand), can lose their weight in view of inner- and power-political arguments.

Fourthly: After Turkey in the forefront of the Iraq War sought NATO support on February 10th, 2003, the NATO decided on February 19th to displace AWACS aircrafts, where German soldiers were engaged to one third, to Konya, Turkey, for clearing the airspace. Subsequently, the FDP fraction informed the Federal Chancellor on March 14th in writing, that according to their opinion the Federal Government would be obligated to apply for the constitutive consent of the Bundestag also for this deployment, as the flights could not be regarded as routine flights of AWACS aircrafts to clear the airspace because of the actual political situation. The Federal Chancellor refused this request in the

Bundestag on March 19th with the argument that the NATO aircrafts secured the airspace above Turkey “separated by (the in that area also flying US-AWACS aircrafts, B.M.) and with totally different orders to control (...) and secure. That is the reason for our being convinced that a resolution of the German Bundestag was not necessary.” (cited in: Meyer 2004: 20) When the USA attacked Iraq on the following day, the FDP fraction applied for a motion for a resolution aiming to force the Bundestag to ask the Federal Government to fulfil its obligation according to the constitutional law and to immediately apply for the constitutive agreement for a participation of German soldiers in missions above Turkey. The application scarcely missed the required majority in a namely ballot.

The FDP’s attempt to achieve by a preliminary injunction to eventually manage to reach a vote about the participation of the soldiers of the Bundeswehr failed on March 25th, 2003 before the Federal Constitutional Court. This case is the only one to this date in which the Federal Government refused to ask the Bundestag to agree to a foreign assignment and where it has been supported by the fractions of the coalition and the Federal Constitutional Court too, although – contrary to the “Libelle” mission - the situation could not be regarded as imminent danger.

6. The Late Law of Parliamentary Participation and its Application

In the German political system the Federal Government normally is supported by a coalition of two of the fractions of the Bundestag while the members of the government remain members of parliament during the election period. The consequence is that *de facto* the Bundestag is not controlling the government as a whole but only the oppositional fractions try to. That also means that there is a stronger structural interest of the opposition than of the coalition to participate in decisions of the deployment of the Bundeswehr. During the 14th election period CDU/CSU, FDP and PDS were opposition parties. But only the FDP fraction made an approach to pass a law of the proceedings in deploying soldiers and failed. In the 15th period the Liberals tried it again. When they introduced their own draft for a law on November 12th, 2003 (German Bundestag, printed matter 15/1985), the fractions of SPD and the Greens followed on March 23rd, 2004 with a mutual draft (German Bundestag, printed matter 15/2742). In great parts it lent against the FDP text, primarily differentiated however insofar as the intended “Committee for special out-of-area missions” (§ 5 of the FDP draft) who would have been authorized to decide on speedy, secret or minor missions, was not included and instead of this a “simplified proceeding of consent” for minor missions was suggested (§ 4 of the coalition draft).

The CDU/CSU fraction, who did not present a draft of its own criticized both drafts in the first reading only selectively and argued to use the committee meetings to elaborate on a draft law across-the-fractions. All fractions unanimously agreed on the aim, to standardize the process of parliamentary involvement and thus to simplify it. In the CDU/CSU fraction the need to simplify and accelerate went so far that some members argued for “making a general decision at the beginning of a legislative period” (von

Klaeden, cited in: Meyer 2004: 31) which would give the Federal Government general power over the deployment of Bundeswehr missions for the following four years. This was to be compensated by strengthened authorizations to control and the parliament's general right to retract. Such a general power would hardly have met the vote of the Federal Constitutional Court of 1994. Therefore the coalition as well as the FDP refused to agree. In fact, despite a hearing of high-ranking experts, both drafts were presented nearly unchanged in the Second and Third Reading on December 3rd, 2004, when the coalition's draft was adopted.

Aiming to simplify the consent process, mandates of "minor intensity or scope of engagement", i.e. humanitarian aid measures and disaster operations, smaller explorations and prearrangements of individual soldiers or their cooperation in steady international staffs should no longer be topic of a parliamentary reservation. Only "missions of *armed forces*" have to be subject to Bundestag decisions. They are defined as cases, if soldiers of the Bundeswehr are involved in an armed venture or if an involvement into an armed venture is to be anticipated.

An application of the Federal Government to the Bundestag must include detailed information on the planned mission: besides the legal basis, the order, the amount of armed forces to be deployed and their capabilities, the area and duration of the deployment, also the important figures of anticipated expenses and financing must be provided (§ 3).

The extent to which the law passed only with the votes of SPD- and Greens on December 3rd, 2004 secures or even improves the rights of the plenum is questionable: Henceforth the Presidency of the Bundestag shall pass on applications of the government for deployments of "minor intensity and scope of engagement" only to the chairmen of the fractions as well as to the boards of the Foreign and the Defence Committee as well as distribute it to the remaining members as printed matter of the Bundestag. The agreement to these applications "is considered to be given, if within seven days after distributing the printed matter not one fraction or five per cent of the members of the Bundestag require the application to be dealt with the Bundestag." (§ 4, 1).

This procedure, referred to as "period of concealment" by SPD parliamentarian Erler in the First Reading (German Bundestag, Stenografischer Bericht 15/100: 8979) may be suitable to ensure a minimum of transparency towards the parliament, although the latter does not technically deal with the motion in question. As this paragraph only allows a participation of the Bundestag that is in with the Federal Constitutional Court's judgment in case the necessary quorum is quick enough to evaluate the situation and request the plenary to deal with it, the Bundestag's possibilities to participate are compromised especially when the respective motion is presented during the parliamentary holidays.

A general problem lies in the fact that according to the listing of § 4, 2 practically everything except a "participation in a war" may be counted as a minor form of deployment for which, the government has the sole "power of definition" (Böckenförde 2004: 26). Therefore, the proceeding can be regarded as a silent abolishment of the parliamentary proviso.

Moreover, no prior consent is needed for “deployments in case ‘danger is imminent’ and not permitting any deferral” and in case of rescue missions, where “a public dealing in the Bundestag would endanger the lives of the people to be rescued” (§ 5.1). In these cases the Bundestag should rather be informed “before the start and during the mission *in a suitable manner*” (§ 5, 2). Also in these cases the government has the power of definition as to what kind of missions are of such urgency and confidentiality, that they do not at all need to be presented in the Bundestag. The regulation about an information of the members of the Bundestag acc. to § 5, 2 has been kept so vague that in cases of doubt it can be noted only much later whether information was suitable or of such insufficiency that the members could not in due time make use of their right acc. to § 8, to stop the mission.

A restriction of the parliament results from the Bundestag according to § 3, 3 “may agree to or refuse an application. Amendments to the applications are not allowed.” This point has already been criticised in the First Reading by speakers of the opposition. Then, member of the SPD fraction, Bartels, replied: “In our law we are codifying the approved practice, that the application of the Federal Government to participate with German soldiers in an international operation, may not be changed or supplemented by the parliament (...). We as the Bundestag shall not play the role of the General Staff, and we are not at all authorized to do so.” (Plenary Protocol 15/100: 8986). This even corresponded to the line of the judgment of the Federal Constitutional Court (see BVerfGE 1994: 389); however, it does not solve the problem, which members of the opposition might have in a situation in which on the one hand they are requested to support the soldiers before a difficult mission, but on the other hand have the impression that the government pursues a prestige object by insufficient means, or that it values the loyalty to the alliance higher than the interest to get all soldiers home safely. The latest decision of the Bundestag dated March 9th, 2007, about an extension of the Afghanistan mandate to deploy Tornado aircrafts may be regarded as an example for the latter.

Even if the previous practice will be maintained to vote on an application of the government to deploy units of the Bundeswehr in the same way as an international treaty without amendments it should not be ignored that each government will have great interest in getting a preferably broad consent. Accordingly, up to now at least in the preliminaries of a decision it had been considered that at least the *coalition* fractions could agree. In addition, it is common practice to influence the decision of the parliament by protocollary declarations of members of the Federal Government.

The right to retract a mission agreed to by all Parties which actually results from Art. 87 a, 4 GG, might not be of any advantage, because a resolution of the Bundestag calling for an early withdrawal of the German contingency would negatively expose the government internationally and would therefore scarcely been borne by the members of the respective majority parties. Again, in this situation, the Federal Chancellor could make use of his/her right to vote for confidence.

The opposition’s possibility to participate in the decision of deployments has become difficult since the Federal Government is supported by a Large Coalition of CDU/CSU and SPD with a majority of more than two thirds of the mandates in the Bundestag. A

leading liberal member of the Committee on Defence told the author that after she had argued in favour of a stronger Bundestag's participation in these decisions by using the term "Parlamentsheer" the chairman of the CDU/CSU fraction as well as the chairman of the SPD fraction reacted angrily. Beyond this, she reported the impression that the ministry does not inform the parliamentarians adequately about practical problems that the soldiers have in their sites as well as in their missions abroad.

Altogether it can be noted that with the participation law of the parliament, the government has obtained more elbowroom for out-of-area missions. In fact, the Bundestag did not give up its formal rights by introducing a "period of concealment", but it depends on the alertness of the members of the Bundestag, whether the parliament fulfills its task in future in the accustomed extent and its responsibility for the welfare and sorrow of the soldiers. Nevertheless, this proceeding of a constitutive participation of the Bundestag remains a German speciality, which expresses not only the ambition of the parliament to participate in designing the foreign and security policy, but also the responsibility for the German soldiers.

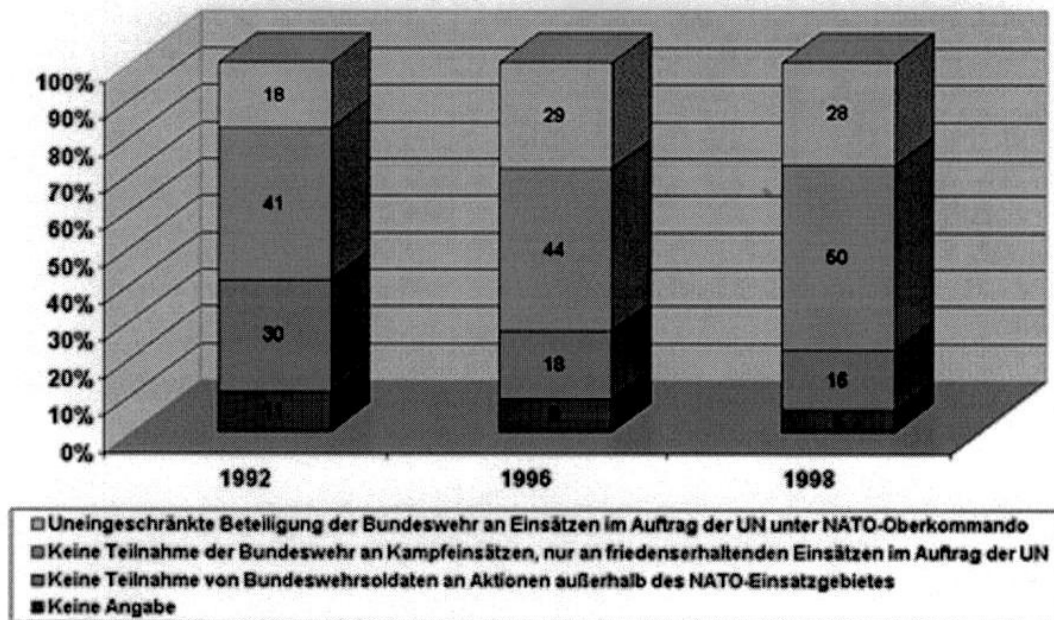
The latter is actually being underlined by an initiative of a group of members of the Bundestag to erect a monument for the soldiers of the Bundeswehr who have given their lives during out-of-area missions, not as it is planned by the Minister of Defence, Jung (CDU), within the complex of the Ministry of Defence (Bendler-Block), but in or in front of the Reichstag Building in Berlin.

7. Public Opinion to the Out-of-area Missions of the Bundeswehr

In the time period shortly after the German unification when the government under Chancellor Kohl and Foreign Minister Genscher abstained from military out of area engagements also the public opinion favoured a policy of keeping out of international conflicts, e.g. a poll of the *Süddeutsche Zeitung* from January 1991 showed that 75 % of the interviewed persons had this opinion and only 20 % favoured the participation in a battle out of NATO-defence. Polls from this time that asked concretely for a participation in the 2nd Gulf War had the result that two thirds were against a German participation, although 81 % were in favour of the war itself. These results can be interpreted as the long shadow of a way of thinking which had for decades associated the task of the Bundeswehr only with national defence (Hoffmann 1993: 77).

The before mentioned smaller missions of the early 1990ies can be seen as an attempt to habituate the public to the new tasks of an "army in sortie". This proved successful as some later polls show: In July 1992, 69 % of the interviewed persons by "Politbarometer" favoured the participation in UN blue-helmet missions. A series of polls of the Allensbach-Institute from 1992 to 1998 shows a strong decline of those who generally oppose to any participation in out-of-area actions from 30 to 16 % and a rising tendency favouring unlimited missions under NATO-command from 18 to 28 % and UN-peace-keeping missions from 41 to 50 % (Boos 2007: 13).

Figure 2: Public opinion to Out-of-area-Missions 1992-1998



In May 2007 the “Sozialwissenschaftliches Institut der Bundeswehr” published the results of its public poll 2006. More than 80 % of the interviewed persons had a positive attitude towards the Bundeswehr in general. But only a small minority notices the army in their every day life; the majority mostly rely on the mass media for information on the Bundeswehr, but do not follow the developments very closely. The poll shows that only less than 50 % know about the several international missions the Bundeswehr is involved in. Therefore the results of the following question to the acceptance of the single missions have to be judged with caution. Nevertheless, compared with the poll from 2005, there is less acceptance of the German participation in missions abroad. Therefore it seems that the more a mission is known (e.g. ISAF, KFOR), the more the acceptance is dropping from 2005 to 2006.

Table 1: Acceptance of single missions of the Bundeswehr 2005/2006

<i>Mission</i>	<i>Ignorance 2006 (%)⁴</i>	<i>Acceptance 2005 (%)</i>	<i>Acceptance 2006 (%)</i>	<i>Acceptance Difference</i>
Afghanistan (ISAF)	51	66	53	-13
Kosovo (KFOR)	56	78	67	-11
Bosnia and Herzegovina (EUFOR)	61	72	68	-4
Horn of Africa (Operation Enduring Freedom)	81	57	53	-4
Mediterranean Sea (Operation Active Endeavour)	81	64	60	-4

Asked what Germany should do, only 44 to 45 % answered in 2005 and 2006 that their country should follow an active foreign policy and help to solve problems, crises and conflicts, but 56 to 55 % said it should keep away from abroad and solve its own problems.

This observation of a growing distance between the German public and its army is corresponding to some important results of an enquiry of the Union of the German Soldiers, the "BundeswehrVerband", which was published in April 2007. A high percentage of the more than 45.000 members (soldiers, reservists and veterans) who took part, said that they were disappointed by politicians as well as by the society: 63 % answered that they "as soldiers" did not feel supported by politics and only 4 % said that they felt supported. Asked, if the German society stands behind the Bundeswehr's missions abroad, 37 % said no, 10 % yes and 52 % partly yes and no.

When accidents occur or soldiers are assassinated such as in Kundus in May 2007 there is a short excitement in the media but a few days later the public has other topics to discuss. An intensive public or parliamentary discussion on the sense of military missions far from home is wanted by the soldiers said chairman of the BundeswehrVerband Gertz after the suicide bombing in Kundus. This may grow to be a large problem, because 65 % auf the soldiers answered in the mentioned study that the spirit and purpose of the

4 Sum of those interviewed persons, who did not know something concrete on the specific mission or had never heard about it.

missions is not communicated enough to the soldiers who have to take part in them. Also, what is more severe, more than 58 % of them said that they would not recommend their children to serve in the Bundeswehr.

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