“Juridified” Control

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Events are flying thick and fast in the field of foreign policy. With the end of the Afghanistan mission, at the latest, has come an acknowledgement of what was long apparent: that the previous policy of military interventions has failed. In neither Iraq, Libya nor Afghanistan have interventions led to sustainable stabilization and democratization. At the same time, the Russian aggression against Ukraine has brought the issue of national and alliance defense back into the spotlight. A political-strategic turn is emerging, as a result of which foreign deployments of the Afghanistan type are likely to become obsolete and questions of defense will come into focus. This raises a number of complex questions of a political, strategic and legal nature. In this article, I would like to refer to the institutional actors that play or should play a role with regard to the Bundeswehr’s foreign deployments. Important lessons can be learned from the experiences of the last decades, which remain relevant under changed political-strategic conditions. I argue that there should be a greater separation of powers with regard to foreign deployments than has been the case to date. In addition to the actors who have so far been primarily involved in decisions on foreign deployments – the German Federal Government and Bundestag – the German Federal Constitutional Court should also be given a clearer basis of responsibility for clarifying constitutional issues that have arisen. In this way, the constitutional framework can be made more concrete and strengthened in the long term.

The Current Legal Framework

Constitutional law establishes a significant regulatory framework for foreign deployments of the Bundeswehr. Especially relevant under the Basic Law are: the prohibition of wars of aggression (Article 26 (1)); the domestic application of the general rules of international law (Article 25); provision for the Federal Republic to join a system of mutual collective security (Article 24 (2)); and regulations on the armed forces (Article 87a). However, these norms clearly date back to a time when foreign deployments of the Bundeswehr were unimaginable (last reformed by the emergency legislation of 1968), so that in parts there was and still is considerable legal uncertainty.

Core elements of today’s law are therefore not found in the Basic Law, but rather in the jurisprudence of the Federal Constitutional Court, particularly in its 1994 decision on „out-of-area“ missions, in which the Court developed the parliamentary reservation (“Parlamentsvorbehalt”), according to which the Bundestag must decide on deployments of the Bundeswehr abroad. As Thomas Kleinlein explained in this symposium, the parliamentary reservation has a compensatory function. The Court granted the government far-reaching powers to continue to develop international treaties – in this case, the NATO treaty – even without the participation of the Bundestag pursuant to Article 59 (2) of the Basic Law and to align the alliance

toward new purposes beyond the original treaty purpose of alliance defense. As compensation for this lack of say, which was highly criticized at the time, the Bundestag was given the right to decide on „whether“ a military deployment in a specific case should be conducted. The decision on military operations thus depends to a large extent on the Federal Government, which draws up the deployment mandate that must then be approved by the Bundestag.

Judicial Control Options

For more than two decades now, the constitutional debate and also the case law of the Federal Constitutional Court have focused primarily on the scope of the parliamentary reservation. This focus follows from the fact that a judicial review of foreign deployments takes place within the framework of court proceedings between governmental bodies (“Organstreit” proceedings). In these proceedings, parliamentary groups in the German Bundestag can assert the participation rights of the Bundestag on a proxy basis. On the downside, however, compliance with the other objective constitutional requirements cannot be reviewed in these proceedings. This applies, for instance, to the question of the conformity of foreign deployments with international law, as required by Articles 25 and 26 (1) of the Basic Law, but which is not a parliamentary right and therefore cannot be asserted by way of a dispute between governmental bodies. Cases of highly controversial compliance with international law, for example the deployments in Kosovo (1999) and Syria (as of 2015), therefore remained unaddressed in constitutional law terms. Nor can compliance with other constitutional provisions be reviewed. This applies, for example, to the question of whether the requirements have been met for deployment within the framework of a system of mutual collective security (Article 24 (2) of the Basic Law). This was highly doubtful in the recent case of the Syria military mission, since it was not carried out within the framework of either the United Nations or NATO. However, it was not possible to review these questions in view of the current legal situation, as the Federal Constitutional Court deemed the Organstreit proceedings inadmissible [BVerfG, para. 24 et seq.]

As a result, the compliance of military operations with constitutional law can hardly be reviewed beyond the parliamentary reservation (see Ley, p. 331 ff). Only the Federal Government and the Bundestag act as institutional actors. Effective legal control, however, is not thereby provided. When it comes to decisions on military missions, the Bundestag finds itself in a ratification situation. It can either approve or reject the mandate proposed by the government. Rejection, however, is unlikely, since this would mean the Bundestag opposing the government it supports. It is therefore not surprising that the Bundestag has so far approved all mandates. In 2001 alone, the then government of Gerhard Schröder nearly failed to secure approval for the Afghanistan mission and was only able to do so by linking the decision on the mission to a vote of confidence posed by Schröder.

This problem of inadequate judicial control has been identified for some time. In its 2019 decision on the anti-IS deployment, the Federal Constitutional Court pointed out that it was incumbent on the legislature to counteract any value contradictions in the density of control (BVerfG, para. 44). Accordingly, in the past two legislative

periods there have already been two legislative initiatives to reform the Federal Constitutional Court Act (see BT-Drs. 18/8277 and 19/14025). A new type of procedure was to be inserted into this law that would allow the Constitutional Court to review Bundestag decisions on the foreign deployment of the Bundeswehr. The initiative, which was introduced by The Greens and supported by the Left Party and parts of the Social Democratic Party, failed to gain a majority in the Bundestag. The current coalition agreement does not address the issue. However, the current necessary National Security Strategy discussion, which was relaunched by the Foreign Minister a few days ago and which this symposium critically accompanies, gives considerable cause to revisit the efforts to establish constitutional control options.

Arguments in Favor of Extending Constitutional Court Control

This raises the fundamental question of what role judicial review should play, if at all, in the area of foreign policy. The classic constitutional point of view, which is still dominant today and reflected in policy, has always been pro-executive. In the past, measures in the area of foreign policy were even qualified as „judiciary-free acts of sovereignty." This, however, is misguided. The requirements of the Basic Law obviously apply to foreign policy actions as well. For example, the requirements of Article 24 (2) of the Basic Law, or the requirement of conformity with international law (Article 25 of the Basic Law), are each constitutional concepts that the Federal Constitutional Court is in principle the right body to interpret and ensure compliance with.

Another frequently used counter-argument against extending judicial control is that the legalization of foreign policy in Germany is already excessively advanced and that, moreover, there is a risk that the Federal Republic's ability to act would be restricted. This argument, however, does not hold water: Other states are not under strong constitutional requirements equivalent to those imposed by the German Basic Law. Moreover, it would seem positive that the Federal Republic is a pioneer in legalizing foreign policy action. One can really only see this as a restriction of the ability to act if one would like to relieve the Federal Government of constitutional requirements.

Finally, a look at other areas of law shows that an institutional corrective is often needed to overcome outdated legal concepts. With regard to the applicability of fundamental rights abroad, for example, the Federal Government and the Bundestag maintained the legally untenable position that fundamental rights did not apply in the context of intelligence by the Federal Intelligence Service (BND). It took a decision by the Federal Constitutional Court to finally overcome this legal view.

Involving the Court does not mean, after all, that there should be judicial micromanagement, or that the Federal Constitutional Court could or should presumptively determine the positions of the Federal Republic of Germany under international law by acting as Germany's „court of international law". What matters

here is the right balance in the Court's jurisdiction, which would certainly be the subject of conflict in individual cases.

The emerging realignment of the spectrum of Bundeswehr deployments abroad also makes it necessary to now think about the institutional framework in which legal control of deployments can take place. The alliance defense that has come back into focus equally raises numerous questions, such as: Can the Bundeswehr also be deployed directly for defense purposes via Article 87a (2) of the Basic Law without acting within the framework of a system of mutual collective security? Can defense operations only be carried out for the benefit of allies, or is collective self-defense generally permissible? The legal prerequisites for effective judicial control of possible future foreign deployments should now be established.

I have elaborated on this in more detail in my habilitation thesis *„Völkerrechtsordnung und Völkerrechtsbruch“*, esp. pp. 507-518.

A German version of this article has been published here.
