

A

Comparative Law

It is indisputable that the abstract missions of the armed forces and the police differ already as a basic principle. This principle applies not only to Germany but also to the whole European Community. This difference is a product of traditions, history, sociology and geography.

I. Frame of Reference: Germany's Principle of Strict Separation

Since the implications of the rather specific German principle of strict separation and its future development are to be evaluated, a review from a German point of view seems appropriate to convey understanding for the distinctiveness and the consequences in the light of this particular nature. Thus, the German approach of dividing labour will be the frame of reference, quasi the lens through which the approaches of other European member states will be examined.

The safeguarding of internal security was perceived as assigned mission of the police forces while the guarantee of external security was understood as assigned mission of the armed forces. This clear-cut distinction was principle at the time of the integration of the military constitution (defence constitution amendment) into the German basic law.¹ Though this distinction was integrated in the year 1956, it became watered down in the true sense of the word during the floods of 1962 already. And although the general maxim of the strict separation was retained, the *Notstandsverfassung* from 1968 comprised police-related assignments of the *Bundeswehr* for the first time. Sparked off by the events of September 11th 2001, the discussion concerning a deployment of armed forces in the fight against terrorism arose once again just as the discussion concerning a differentiation of internal and external security did.

¹Bode, "Militärische und zivile Verteidigung", in *Deutsche Verwaltungsgeschichte*, ed by Jeserich, Pohl, von Unruh, vol. 5, Die Bundesrepublik Deutschland, p. 518–541 (527).

In the case of Germany, the mission of the armed forces is laid down in the constitution. Corresponding provisions can be obtained from Articles 87a and 91 of the constitution.

1) Historical Setting: “Only Soldiers Can Fight Democrats”

Since a strict separation between the missions of armed forces and those of the police forces is quite unique in Europe, the need to examine the reason for this significant development obviously exists. The specific motivation for the strict separation of the missions was to never again allow a situation to arise in which German soldiers take arms against their fellow citizens. Parallel incidents happened in times of the Empire, the Weimar Republic and the Third Reich.

Definitions of the term policing were put forward for scientific discussions already in times of absolutism. The term “*Polizey*” comprised the entirety of public administration. It was not until the seventeenth and eighteenth century that administration of justice, finance and the army became separated. The term “*Polizey*” arose for the first time in Germany in an Episcopal ordinance of the city of Würzburg in the year 1476 and became integrated into several *Reichspolizeiordnungen* in the following decades.² An absolute monarch did not limit police activities to the preservation of public order but could virtually boundlessly trench upon the judicial sphere of his subjects. Following the implementation of the separation of powers, a new two-tiered conception of police forces emerged. According to this approach, a distinction was drawn between the averting of dangers on the one hand and the ensuring of scope for personal development as well as the creation of relevant installations such as schools and hospitals in terms of a welfare police force on the other hand. Likewise, the Prussian General Law contained regulations and provisions concerning the maintenance of public peace, security and order though it assigned additional tasks of welfare and social service to the police forces, thus rendering the scope of responsibilities of the police as almost limitless.

a) The German Confederation

The signing of the Constitution on June 8th 1815 was the weightiest event during the timeframe of the German Confederation from 1815.³ Endorsed by several subsequent agreements, the federal army was no coherent and integrative armed

²Uwe Volker Wentz “Die Entwicklung des Polizeibegriffs vom Mittelalter bis zum Nationalsozialismus” “*Anwaltsblatt: Nachrichten für die Mitglieder des Deutschen Anwaltsvereins e*”.V., 38 (1988) 5, p. 264–270.

³Ernst Rudolf Huber, “Dokumente zur Deutschen Verfassungsgeschichte”, *Corpus Juris Confoederationis Germanicae*, vol. 2, p. 1 *et seq.*

force, but rather a cumulated army, consisting of contingents from all federal states and under the sole command of one federal commander according to case-by-case decisions during crises. According to Article 25 (1) of the last act, the safeguarding of internal peace and order was preferably the responsibility of the federal states. Consequently, a few incidents occurred, during which military measures against political movements were executed. But the army was more than only an instrument of suppression against citizen straying from the given political path. Due to the authorisation of the Execution Order, it could also be employed as an instrument of power against federal states not complying with federal duties. Speaking of a breach of duty giving rise to an employment of the army, the exercising of leniency towards claims of the subjects of having a right to a say could already be regarded as sufficient.

The following incidents were of grave character. Prussian military forces played a fatal role during the period between the mid nineteenth century and 1945 where no clear distinctions between military and police tasks were drawn. During the civil-democratic uprisings in the years 1848/1849, the Prussian Army even played their role of a counter-revolution. Thus, the monarchic military-state became restored and bolstered by military forces. Martial law was declared in Berlin and the Prussian National Assembly was dissolved by force. The motto of that time among governing authorities was: only soldiers can fight democrats.⁴

b) The German Reich

Changes regarding the relevancy of the army in the German Reich from 1871 were of relatively little account. As in the Confederation, the army was again not arranged in a centralised manner but rather compiled by several military contingents of the single states. The Emperor ensured the military's loyalty by having all troops at his command, except for the Bavarian Contingent during peacetime, enabling him to declare martial law without consent of the *Bundesrat* in almost every part of the German Reich if public security was endangered.⁵ Based on the Prussian Law on the State of Siege, the executive authority passed over to the military commander, allowing for a response with military means to political unrest.⁶ Though the scope of deployments became regulated to a higher degree at a later point, the army could be called in for civil administration functions or to fulfil police related tasks such as the guarding of public objects. By and large, the military had a significantly high rating in everyday life, exemplarily documented by the former § 758 III Code of Civil Procedure (*Zivilprozessordnung*), according to which a bailiff could call for military help as a robust support to overcome active resistance of the obligor. Based on a resolution of the *Bundesrat*, the Emperor was

⁴General Karl Gustav von Griesheim.

⁵Tobias Linke, "Innere Sicherheit durch die Bundeswehr?" AöR 129 (2004) p. 500.

⁶Adolf Arndt, "Das Staatsrecht des Deutschen Reiches", 1901, p. 479 *et seq.*

furthermore empowered to dispatch troops in the event of states breaching their duties within the federal system as he was in times of the Confederation.

In the further development, the armed forces increasingly raised their claim to play an important role in domestic political affairs, even after the foundation of the German Reich 1871 and in the following decades. This comprised the fending of any social-revolutionary or democratic tendency. Thinking in military categories, oppositional movements were summarised under the general expression of the *Reichsfeind* and were thus to be fought strictly. The deriving conflict has to be regarded as a crucial one in the history of the monarchy and was not fought on the streets alone but also within military perimeters and structures. Core of the conflict was a significant number of the recruits coming from families which were part of this oppositional movement and were therefore suspected to foster a revolutionary spirit. The German Emperor exacted his toll in calling for a willingness of the young recruits to fight their friends and families on his demand in his fight against socialistic tendencies to secure the future of the Reich. One of the most important instruments in this context was the so-called *Belagerungszustandsrecht*, a Prussian Act from the year 1851, allowing for an adaptation of the rules of war to internal conflicts. Civil rights could be limited, civil authority transferred to military commands, and soldiers could be deployed in armed conflict facing their fellow citizens. A fundamental part of the authority was transferred to the Prussian Ministry of War and the subordinate *Generalkommandos* during the beginning of the war in 1914.⁷ On this basis, the armed forces gained a decisive position during the first years of war as far as their influence on internal national affairs was concerned. In fact, the armed forces held a position enabling them to control entire political processes by censorship, power to intervene in the right of assembly, to change the curriculum in schools and to assume the leadership of crucial industries.

The second half of the war was hence depicted as a military dictatorship, deriving from the military structures that the public administration was based upon. The *Oberste Heeresleitung* developed into the leading entity of home affairs, mobilising against the call for reforms and the rise of the democratic ideal. This made this part of the armed forces become the real opponent of the masses, demonstrating for peace and freedom since 1916.

According to Bismarck's imperial constitution, the organisation of police forces was principally a matter of the federal states, at least as far as the averting of dangers was concerned. The so-called "*Kreuzbergurteil*" by the Prussian Administrative Appeals Tribunal confined the scope of responsibility of the police to the averting of dangers.⁸ In addition, special laws and special police forces such as a building-, immigration or sanitary police were established. To the towns, communities and districts of the Weimar Republic, gendarmes were delegated who where

⁷Even before the war, soldiers were deployed in a bloodless conflict with striking mineworkers in 1912.

⁸The "*Kreuzbergurteil*" of June 14th 1882 decided that the police was not competent to safeguard aesthetic interests, thus limiting the responsibilities of the police forces and rendering the underlying police act void.

historically regarded as a member of the military within the framework of Prussian civil service law.

c) After the First World War

During the revolutionary uprising between 1918 and 1920, the leaders of the Reich were for the first time forced to deploy soldiers in their struggle to maintain law and order and to fend off the impending Bolshevik influence. Although *Wilhelm II* never carried out his threat from 1851, *Gustav Noske*, designated commissary for the army and navy and later *Reichswehrminister* turned this scenario into brutal reality. On the occasion of an occupation of several editing offices of newspapers by a few radicals during January 1919 in Berlin, he assigned voluntary units, so-called *Freikorps*, to take up the fight against the left-orientated disturbers, ensuring the political survival of the government.⁹ In the following months, the *Freikorps* murdered hundreds of civilians, including the leaders of the new communist party *Rosa Luxemburg* and *Karl Liebknecht* as well as Foreign Minister *Walther Rathenau*. In the time after the *Kapp-Putsch* 1920, the *Reichswehr* remained relatively apolitical by granting no suffrage to its members, however it also remained hardly controllable due to its development to a “state within the state”.

After the First World War and the subsequent collapse of the monarchy, the new republican constitution assigned the military sovereignty to the centralistic state alone. The numerous military contingents became conjoined and incorporated into the much more modern and homogenous *Wehrmacht*.¹⁰ This *Wehrmacht* was under the supreme command of the *Reichspräsident*, who in turn required the consent of the minister concerned to authorise any military command. The Weimar Constitution authorised solely the President of the Reich to deploy the *Reichswehr* to safeguard internal stability. Still, military means could be employed against both civil agitators as well as disobedient federal states.

In winter 1923/1924 the *Reichspräsident Friedrich Ebert* had to declare a state of emergency due to the internal turbulences and riots, leading to a shift of executive authority to the military command. In the wake of these turbulences, the intensity of the military's fight against the riots increased, though aiming at a powerful military state rather than at a democratic state. Most soldiers were motivated by the opposition against anything leftist, which marks the cornerstone of the continuity of their history since 1848/1849. The envisioned military state became reality on January 30th 1933, marking the turning point into the Third Reich.

⁹These uprisings are also known as the “*Spartakusaufstand*”.

¹⁰Although the year 1935 is often referred to as being the year of foundation of the *Wehrmacht*, laws on the establishment of a preliminary *Reichswehr* from April 1919 as well as the constitution of the German Reich from August 11th 1919 use the term *Wehrmacht* to describe armed forces. This designation might however be due to common parlance of that time, relating to the general notion of armed forces.

d) The Third Reich

During the reign of *Hitler* in the Third Reich, the amalgamation of police and military tasks became inverted. While in the years before the military often discharged police related tasks, the police now began to perform military tasks in turn. This development later culminated in an integration of police battalions in the war of extermination.

Compared to the preceding period and in accordance to the concept of *Gleichschaltung*, the German police became centralised in Prussia. As from 1935, the police became structured into the *Ordnungspolizei* and the *Sicherheitspolizei*. Whereas the former was responsible for the maintenance of public order, the latter was assigned the task to supervise public security and became subdivided into the *Geheime Staatspolizei* and *Kriminalpolizei*. Allocated to the *Ordnungspolizei* became the *Schutzpolizei* of the Reich and the communities, the Gendarmerie and also the fire brigade. Control over both the *Geheime Staatspolizei* and the *Kriminalpolizei* was executed by higher SS personnel.

At the bottom line, the police forces became drastically centralised and at the same time disengaged from the state. In addition, the police forces became heavily politically entangled. Between 1933 and 1945, the police forces engaged in politics, e.g. by the constitution of political police departments such as the “*Abteilung Ia*” of the Berlin police headquarters which comprised the counter-intelligence corps or later the formation of the Gestapo. This advancing disestablishment of the police was symptomatic for the social and political rootedness of the police in the Third Reich. As early as 1933, the process of joining the political police forces to a uniform Secret State Police began. Milestone of this development was *Heinrich Himmlers* appointment as “*Reichsführer SS und Chef der Deutschen Polizei*” 1936, adding to the separation of the police forces from the state and the simultaneous integration into the party. Since this integration contradicted *prima facie* the general trend of centralisation, it conduced to the increase of power of the police. In addition, this remarkable dualism carried with it the inherent aggravation of authority in relation to the judiciary. Characteristically, jurisdictional protection against measures of the *Geheime Staatspolizei* was withheld, allowing for an unopposed development of the police into an instrument of national socialist judiciary and political prosecution.

e) 1945–1948 and the Following Period

After the end of the Second World War, an organised administration of the police developed tardily. Offices and positions were regularly taken over by homecomers. The further development of the structure of the police was coined by the different occupying powers. In the American zone of occupation missions of the police were assigned to units of the Military Police. This strategy brought about quite diverse approaches since every branch of the US forces held its own Military Police Contingent with its own criminal police. In addition, the US Constabulary became

installed, adding to the multifaceted approach to policing in post war Germany. A similar strategy was employed in the British occupation zone, assigning police tasks to the Military Police. In addition, local or municipal police forces were not permitted while it was not until the denazification that deliberations concerning police forces of the individual federal states were made. In the French occupation zone, Military Police units took over police assignments until municipal police forces were established. In addition, French Gendarmerie was engaged in police issues in the occupied areas. In the Soviet zone of occupation, police tasks were assigned to the Military Police as well and it was not until October 2nd 1990 that this engagement was brought to an end. Due to the soviet influence, the structure of the police forces of the GDR were distinctly centralised and politically organised. Besides, the *Volkspolizei* was tightly organised along military lines though subordinated to the Ministry of Interior. The area of responsibility of the *Volkspolizei* ended a few miles off the border. These last miles were within the scope of responsibility of the *Grenzpolizei*. After the reunification, the *Volkspolizei* was dissolved and became integrated into the police corps of the new federal states while members of the *Grenzpolizei* were partially taken over by the Federal Border Police.

During the 1950s, approx. 90% of the civil servants and mainly members of the police forces of the Third Reich were reintegrated into police structures in western Germany. In addition, a number of police organisations were established in coexistence. Beside the police forces of the federal states, police forces of the federation such as the Federal Border Police, Federal Criminal Police Office, the Federal Parliament Police, the Railway Police, and the Security Service of the Federal Mail were created.

The formation of the *Bundeswehr* of May 5th 1955 led to considerable political discussions, especially due to the fact that it was for the greater part composed of former members of the *Wehrmacht*. The Federal Border Police is regularly referred to as the progenitor of the *Bundeswehr*.

2) *General Conscription*

Regardless of the above-mentioned aspects, historical reasons do not suffice to account for this unique separation of responsibilities. Moreover, it is also a stringent consequence of general conscription. One of the focal ideas behind the principle of general conscription is to tie the armed forces in the remaining population. The more families with a member in the armed forces, the more understanding, support, and sympathy the forces obtain and the more the forces get integrated into the basis of a nation. On the other hand discontent and unrest of the population is likely to find its way easier into the forces, leading to a major impact on the moral and the integrity of the soldiers involved. Though the vow to be obedient implied quite naturally the willingness to oppose the residual population including the own families in the days of the German Empire, modern times call for a different way

of coping with this kind of conflict. This perception led to the insight that armed forces were to be kept out of any internal conflict to ensure a functioning defence. Only neutrality concerning domestic and political affairs is considered suitable to guarantee the internal peace of a conscription army, thus enhancing the military's efficiency in fulfilling their primary mission to defend the country.¹¹

3) *Present Division of Labour and Federal Structures*

The problem of deploying armed forces with police-related missions has long been regarded as a question of federalism. The Federal Constitutional Court emphasised this on various occasions,¹² supported by many voices in the literature.¹³ In contrast to France or Italy, the obligation to ensure internal order by a security agency is not imposed on the Federal State. The basic law allows for the establishment of federal authorities like the Federal Police or the Federal Criminal Police Office only in particular cases. This allocation of responsibilities regulates the possible scope of employment according to a special constitutional justification.

The maxim to preserve the division of labour implies that police-related assignments of the *Bundeswehr* must remain an exception. Thus, the permitted assignments strictly need to be functionally and temporally limited. In addition, the *Bundeswehr* may only be deployed if the police forces do not rise to the occasion and are incapable of fulfilling the mission itself. This functional and temporal limitation as well as the principle of necessity prevents the armed forces from becoming a standby police force to which federal states could revert to for lack of adequate personal and technical equipment.

In respect thereof, tasks of private security companies and guards services are restricted to protecting private buildings, companies, events, money transporters and other objects.

a) *Bundeswehr*

Main point in this section is the question of genuine tasks in the field of German Armed Forces. The armed forces are defined as all military units, i.e. having particularly effective weapons and being organised to the principle of military command and control.¹⁴ This definition does not comprise officers of the federal

¹¹Martinez Soria, "Polizeiliche Verwendungen der Streitkräfte" DVBl (2004): p. 599.

¹²E.g. the decision of the Federal Constitutional Court of February 15th 2006 – 1 BvR 357/05; NJW 2006 (11) p. 751.

¹³E.g. Manfred Baldus, in: *Das Bonner Grundgesetz*, ed. by Mangoldt/Klein/Starck, vol. 3, 4th Edition, Article 87a margin no. 1.

¹⁴Bodo Pieroth in "Grundgesetzkommentar" Hans D. Jarras, Bodo Pieroth (Eds), 8. Edition, Munich 2006, Article 87a, margin no. 4.

police forces or of a federal state. Likewise not comprised are members of the Federal Defence Administration,¹⁵ judicature of the Bundeswehr¹⁶ and the Military Chaplaincy.¹⁷

The German Constitution provides a number of opportunities on which armed forces can legitimately be deployed. Beside defence, any further mission must be expressly permitted by the basic law, according to Article 87a II of the constitution. This legal norm is restrictively formulated, since the Federal Constitutional Court interdicts any operation of the Bundeswehr on the inside, regardless of its substantiation.¹⁸

To begin with, conceivable tasks of the armed forces have to be distinguished into two main groups, "Einsatz" and "schlichte Verwendung". A borderline between the perceptions of these terms in the light of an applicability of the constitutional reservation of Article 87a II can either be drawn by military armament,¹⁹ a special military structure of organisation²⁰ or even by simply acting within the scope of executing authority.²¹ Further attempts suggest the criterion of "mission to use force" or the permission to act as sovereign authority and to use means of coercion as being the conclusive borderline. Though these criteria are regularly stated alternatively or even combined, a majority in the German literature accepts an acting as part of the executive authority as "Einsatz" in the sense of Article 87a II of the basic law.²² Briefly said, if the intensity remains below the "Einsatz" or mission threshold depicted in Article 87a II of the constitution, an application of armed forces is referred to as "schlichte Verwendung" or utilisation.²³ Thus, a mission in a constitutional sense can be defined as an armed application of the forces and moreover any unarmed application being a sovereign act and not neutral as far as home affairs are concerned.²⁴

¹⁵Under the terms of Article 87b of the German Basic Law.

¹⁶Under the terms of Artt. 96 II and IV of the German Basic Law.

¹⁷Under the terms of Article 140 of the German Basic Law in conjunction with Article 141 of the Weimar Imperial Constitution.

¹⁸Decision of the Federal Constitutional Court of July 12th 1994 – 2 BvE 3/92, 5/93, 7/93, 8/93, BVerfGE 90, 286 (p. 356 *et seq.*), mentioning extended interpretation, analogical application on unregulated cases and unwritten authority due to the principle "*Kraft Natur der Sache*".

¹⁹Günter Dürig, in: Maunz/Dürig, Article 87a margin no. 32.

²⁰Manfred Baldus, in: H. von Mangoldt/F. Klein/C. Starck, (eds) Article 87a, margin no. 32 *et seq.*

²¹Klaus Stern, vol. 2, p. 46.

²²A valuable overview by Tobias Linke, "Innere Sicherheit durch die Bundeswehr?" AöR 129 (2004), p. 489–541 (493).

²³Both translations of "Einsatz" and "schlichte Verwendung" by the author.

²⁴According to this definition, examples for a "*Einsatz*" are measures taken according to Chapter VII of the UN Charta, military operations to safeguard German citizens abroad, and military operations supporting police searches within the national territory. No "*Einsatz*" in this sense are assignments of the armed forces for representative purposes such as guards of honour and charitable tasks e.g. concerning military cemeteries, cf. Bodo Pieroth in "Grundgesetzkommentar" Hans D. Jarras, Bodo Pieroth (Eds), 8. Edition, Munich 2006, Article 87a, margin no. 7, 8.

Among the missions depicted as “*Einsatz*”, most important is the defence of the nation, laid down in Article 87a I 1 of the Constitution. Article 87a II of the *Grundgesetz* constitutes: “Apart from defence, the armed forces may be employed only to the extent expressly permitted by this Basic Law”. This reflects the crucial factor in the current debate concerning the constitutional authorisation for a mission of the armed forces on the inside. In very close bounds, Article 87a II offers the possibilities that the *Bundeswehr* may be brought into action in cases other than mere defence from an external threat. A second employment is thus laid down in Article 87a I/II in connection with Article 24 II of the Constitution and concerns a deployment within the scope of a system of mutual collective security. The third possibility is the case of regional disaster relief, regulated in Article 87a II in connection with Article 35 II 2. Another potential deployment is possible under the circumstances of national disaster relief, regulated in Article 87a II in connection with Article 35 III. A fifth deployment of armed forces is admissible in the case of a national emergency as mentioned in Article 87a II in connection with Article 87a III, while the sixth possibility concerns an internal state of emergency and is regulated in Article 87a II in connection with Article 87a IV of the constitution.

Examples for mere utilisation are strictly humanitarian aid missions, harvest assistance, assistance in social and charitable fields, operations of commercial training of the troops and administrative assistance.

aa) National Defence

The first and foremost mission of the armed forces is – in principle – the defence of Germany’s territory. This derives from Article 87a of the Constitution: “The Federation shall establish Armed Forces for purposes of defence”. However, the constitution does deliberately not provide a more precise determination of the term “defence”. At the time when the military constitution was established, the notion of defence could obviously not comprise the defence of the national territory since Germany was still separated. Due to this circumstance, the precursor of the Ministry of Defence, the “Amt Blank”, coined the expression that the object that was to be defended was not a geographic area but rather a value: citizens were asked to ally in the defence of their civil liberties.²⁵

Today, the definition of the term “defence” comprises besides a principal self-defending combat mission, the guarding of military objects, the ensuring of undisturbed service and training of the soldiers.²⁶ The mission of the German Armed Forces is however principally limited to defence in accordance with Article 26 I of the German Basic Law and the inherent commandment of peace. The definition of

²⁵This historic approach was fallen back upon during discussions concerning a statement of the former Minister of Defence Peter Struck to defend Germany also at the Hindukush.

²⁶Pieroth, in: Hans Jarass, Bodo Pieroth “Grundgesetz für die Bundesrepublik Deutschland”, Article 87a, margin no. 9.

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