

Dodging the Draft: Federal Constitutional Court Evades Review of Germany's Military Service Law

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[1] The incendiary image of German soldiers, serving as members of a proposed UN peace keeping force assigned to the Palestinian territories, formed the emotionally-charged and highly controversial backdrop to the Constitutional Court's recent consideration of the constitutionality of Germany's military/civil service obligation. (1) The conflict in the Middle East aside, the military/civil service obligation has also emerged as a hot domestic issue as the campaign for the September federal elections catches its stride. (2) Given this political climate it is hardly surprising that the *Bundesverfassungsgericht* (Federal Constitutional Court) opted to dismiss, on procedural grounds, two cases that posed distinct but related challenges to Germany's military/civil service obligation. It is, however, precisely the Court's explicit recognition of the politically-loaded nature of questions concerning Germany's military/civil service obligation that makes its decision in the first of the two cases remarkable.

[2] The first case was referred (3) to the Court by the *Landgericht* (Regional Court) Potsdam, which sought the Court's clarification regarding the constitutionality of criminal penalties the Regional Court would be statutorily obligated to impose on one accused of refusing to fulfill his obligation to perform civil service. The constitutional issue, in the reasoning of the Regional Court, was whether, in light of the radically changed geo-political circumstances, the laws that require the imposition of criminal penalties for refusing to fulfill the obligation to serve are (constitutionally) proportional. (4)

[3] The second case was referred to the Court by the *Amtsgericht* (District Court) Düsseldorf, following on the Potsdam Regional Court's referral, but presenting the Court with the distinct question whether the changed geo-political circumstances rendered the male-only draft a violation of the *Grundgesetz's* (Basic Law's) gender equality provision (Article 3.2 and 3.3). (5)

[4] The Court dismissed both cases on procedural grounds. But in its judgment in the Potsdam referral, the Court explicitly (albeit in dicta) referred to the *political* gravity and quality of the military/civil service obligation. The following comment: (A) generally introduces Germany's military/civil service obligation and the Constitutional Court's related jurisprudence and (B) outlines the decisive procedural law which served as the basis of the Court's dismissal in both cases. Finally, (C) this comment takes note of the Court's reference in the Potsdam case to the political nature of the issue.

A. Germany's Military/Civil Service Obligation

1. Constitutional and Statutory Framework

[5] The Basic Law secures occupational freedom for all Germans, including a prohibition on forced labor. (6) The constitution, however, exempts from this protected liberty the "traditional duty of community service that applies generally and equally to all." (7) The precise constitutional framework governing this "traditional duty" is set out in Article 12a, which explicitly provides that 18 year old men "may be required to serve in the Armed Forces, in the Federal Border Police, or in a civil defense organization." (8) Conscientious objectors are, however, constitutionally entitled to refuse to render military service but "may be required to perform alternative service." (9)

[6] The details of the German draft are regulated across a network of general laws, including the *Wehrpflichtgesetz* (WPfG – Military Service Act), the *Kriegsdienstverweigerungsgesetz* (KDVG – War Service Refusal Act), the *Zivildienstgesetz* (ZDG – Civil Service Act), and the *Wehrstrafgesetz* (WStG – Military Criminal Code).

[7] The complicated regulations governing military service require that all men, who qualify as German citizens according to the constitutional definition, and beginning with their 18th year, perform military service. (10) The obligation persists until they turn 45 years old, (11) and can include service in the army as well as participation in military exercises as a reservist. (12) Service in the army lasts nine months, usually beginning in the year during which the subject turns twenty years old. (13) Participation in a military exercise as a reservist, at the longest, lasts three months; the combined length of such military exercises may not exceed nine months (for regular soldiers), fifteen months (for junior officers) and 18 months (for ranking officers). (14) Any soldier, including those fulfilling their military service obligation, are subject to a sentence of as many as three years imprisonment if they go absent from their post without leave. (15)

[8] The War Service Refusal Act (KDVG), however, makes provision for alternative civil service for conscientious objectors. As noted earlier, the constitution protects this exception to military service in Article 12a.2, which

complements the constitution's protection of the freedom of faith, conscience and creed. (16) The civil service exception to military service is reserved for those who, "on the basis of conscience refuse to participate in any armed engagement between states." (17) A complicated application process administers the grant or denial of requests to avoid military service on the basis of conscience. The decision is made by a War Refusal Committee chaired by an appointee of the Federal Minister of Defense who must be at least 28 years old and qualified for service as a judge. (18) The chair is accompanied by two voluntary committee members, who must be at least 32 years old and possess the qualifications to serve in the juvenile administrative system. (19) The voluntary committee members are elected to the committee in local elections. (20) The committee should recognize the applicant's conscientious objector status when it is convinced that, to an adequate degree of certainty, that the refusal to serve is based on matter of conscience as protected by Article 4.3 of the Basic Law. (21)

[9] Those granted conscientious objector status are required to complete a term of civil service lasting no longer than 10 months. (22) Absence from one's civil service post without leave is punishable with up to three years imprisonment. (23) An effort to evade service altogether is punishable with up to five years imprisonment. (24)

2. The Constitutional Court's Jurisprudence

[10] In a 1960 decision the First Senate of the Constitutional Court ruled that Article 4.3 of the Basic Law (freedom of conscience) did not preclude military service but only applied to the use of weapons and that the basis for the refusal to perform armed-service must be an objection to all war. (25) Refusal to serve based on conscience, the Court explained, must take the form of "an inner moral command against the use of arms of any kind and in all circumstances, an interior force that touches the very depths of his personality, steering him away from evil and toward good." (26)

[11] The strict limits to conscientious objection imposed by the Court's interpretation of Article 4.3 of the Basic Law were overridden by the amendment of the constitution in 1968 to include Article 12a, which (as noted above) "constitutionalized the principle of compulsory alternative service for conscientious objectors and stipulated that the length of such service 'shall not exceed the duration of military service.'" (27) Legislation implemented nearly a decade after the insertion of Article 12a into the Basic Law further loosened access to conscientious objector status, substituting the former process that required each applicant to submit to an oral examination of his views with a notice-only process. (28) The increasing number of objectors, facilitated by the ease with which that status could be now be obtained, led the Union parties in the *Bundestag* (Federal Parliament) to bring a challenge to the notice-only law in the Constitutional Court. The resulting decision of the Second Senate rolled-back the legislative liberalization of the conscientious objector process. Finding a firm constitutional basis for the Federal Government's defense policies, including universal conscription (and the alternative civil service), the Court ruled that military and civil service implicated constitutional matters requiring stricter scrutiny. (29)

[12] A subsequent amendment to the legislation administering the military and civil service obligation, which again did away with the oral examination requirement for obtaining conscientious objector status but extended civil service to 20 months (as opposed to the 15 month obligation of military service), was brought before the Constitutional Court. (30) The new law seemed, on its face, to run afoul of the clear terms of Article 12a of the Basic Law, which explicitly provides that "[t]he duration of alternative service shall not exceed that of military service." (31) The Second Senate, in upholding the statute establishing the unequal terms of service, engaged in a rough accounting of the actual time commitment imposed by military and civilian service and found that military service (including 15 months active-duty and nine months reserve-duty) could lead to a total of 24 months served and that the 20 month civil service obligation was not, therefore, onerous. (32)

B. Concrete Judicial Review and Dismissal of the Draft Cases on Procedural Grounds

1. Procedural Requirements for Concrete Judicial Review

[13] Both recent cases involving Germany's military service requirement were brought before the Constitutional Court pursuant to its Concrete Judicial Review jurisdiction, which is provided by Article 100 of the Basic Law and is reaffirmed by Article 13.11 of the *Bundesverfassungsgerichtsgesetz* (Federal Constitutional Court Act). This jurisdiction requires an ordinary court to stay the proceedings before it and refer to the Constitutional Court any norm which, in the judgment of the ordinary court, is both (a) determinative of the dispute and (b) unconstitutional. (33) The referral *must be accompanied by a clear statement from the referring court, especially as to the determinative nature of the constitutional question and the governing constitutional norm with which the law is believed to be in conflict.* (34) A unanimous three-judge Chamber of the Court may dismiss as inadmissible any referral which fails to meet these procedural standards. (35) Concrete Judicial Review has the dual objective of protecting the constitutionally endowed authority of the Parliament from erosion by judicial interpretation and ensuring constitutionally consistent decisions in the context of specific, concrete legal disputes. (36)

2. Dismissal of the Draft Cases on Procedural Grounds

[14] The Second Senate (in the case involving the referral from the Potsdam Regional Court) and the Fourth Chamber of the Second Senate (in the case involving the referral from the Duesseldorf District Court) dismissed both cases after concluding that the procedural requirements for Concrete Judicial Review had not been fulfilled. First, the Court found that the ordinary courts had not adequately explained why the possibly imminent invalidation (on constitutional grounds) of the military service obligation was determinative of the cases. Second, the Court found that the ordinary courts had not met the high standards of clarification applied to referrals involving a question for which there is clear Constitutional Court precedent regarding the norm's constitutionality. (37) The Court explained that it defers to the referring court's judgment regarding the determinative nature of the questioned norm (in these cases, the constitutionality of the military/civil service obligation). (38) This deference is not, however, unlimited. The Court noted that this deference is dependent upon the ordinary court's adequate presentation of the determinative nature of the question. (39)

[15] The Court ruled that the ordinary courts had not carried their burden of adequately pleading the determinative nature (in these respective cases) of the possibly imminent unconstitutionality of the military/civil service obligation. In the Potsdam Regional Court referral, the Court found that the Regional Court had not adequately explained why contemporary geopolitical changes were determinative to the case at hand, which had arisen out of events in 1993. (40) Furthermore, the Court noted that the ordinary court's certification failed to address the principle that a potential invalidation of the military service obligation (on constitutional grounds) should have no impact on the case at hand, which involved the obligation to perform civil service. (41) In the Duesseldorf District Court referral, the Fourth Chamber of the Second Senate found that the ordinary court's pleading inadequately established the determinative nature of the constitutional issue because it failed to present, for the Constitutional Court's consideration, the basis upon which the accused might be acquitted. (42)

[16] The Court also found that the ordinary courts had not, in their referral pleadings, fulfilled the high standards for engaging the controlling precedent of the Constitutional Court with respect to the submitted question. In the Potsdam case, this meant the Constitutional Court's jurisprudence generally establishing the constitutionality of the military/civil service obligation. (43) It also meant the Constitutional Court's jurisprudence specifically establishing the inapplicability of the constitutional Proportionality Doctrine to the military/civil service obligation. (44) The Potsdam Regional Court had, in part, based its referral (of the constitutionality of the military/civil service obligation) on the concern that, in the changed geopolitical circumstances, imposition of criminal sanctions for failing to fulfill the military/civil service obligation violated the Proportionality Doctrine. In the Duesseldorf case, the referring court's pleading failed to adequately address the Constitutional Court's case law upholding the male-only military/civil service obligation. (45)

[17] The Court, with respect to both cases, conducted at least a partial substantive analysis of questions posed by the ordinary courts' referrals (proportionality of imposing criminal sanctions for failing to fulfill the civil service obligation and constitutionality of the gender discrimination inherent in the male-only military/civil service obligation). In both cases this analysis suggests that the Court would not have found the military/civil service obligation unconstitutional on these grounds. Significantly, to the degree that the Court engaged the substantive questions, this analysis serves only as dicta. The basis for the Court's dismissal of the referrals was not its controlling precedent with respect to proportionality of criminal sanctions and gender discrimination. Instead, the dismissal was strictly limited to procedural shortcomings of the ordinary courts' referrals.

C. Constitutional Court's Political Question Dicta

[19] The Second Senate settled on a procedural basis for dismissing both the Potsdam Regional Court and Duesseldorf District Court referrals. Nonetheless, as noted above, the Court in its judgment in the Potsdam case engaged in an analysis of the underlying substantive question presented by the referral (*i.e.*, the constitutionality of the military/civil service obligation). Particularly interesting, in one of these substantive albeit superfluous analyses, was the Court's rejection of its authority over the issue because of its inherent and complex political nature. The Court borrowed heavily from its 1978 *Conscientious Objector (II)* judgment in concluding that:

The present, public discussion in favor of and in opposition to the universal military/civil service obligation demonstrates quite clearly that the issue involves a complex political decision. Questions regarding, for example, the nature and extent of military preparedness, democratic control, the recruitment of qualified young servicemen and women, as well as questions regarding the costs of a conscript or a volunteer army, are questions involving political judgment and economic objectives that cannot be reduced to a constitutional question. As the Constitutional Court already concluded in its judgment from 13 April 1978, the Parliament's choice between a conscript and a volunteer army is a fundamentally political decision. This choice presents a dramatic range of priorities to be valued and

weighed against one another, especially considering the considerable number of areas of public and social life it impacts and the policy areas at stake, including defense policy but also general, economic and social policy. Therefore, the separation of powers established by the Basic Law's constitutional order obliges the Parliament and the Federal Organs responsible for defense matters to determine which measures are necessary in order to fulfill the constitutional obligation to provide for a military defense. These Organs, out of regard for the far reaching political nature of their responsibility and with reference to the constitution and the scope of their federal authority, must decide what rules and regulations appear to be necessary to ensure a functional defense. (46)

The Court's abdication based on the political nature of the issue, though not at all determinative of the case, was seized upon by the press (47) and heralded by politicians for the judicial restraint it demonstrated, especially as the final decision of retiring President Jutta Limbach. (48)

[20] This Court's dicta raises some significant questions about the Court's engagement of political questions. First, though the Court's case law clearly establishes the general constitutionality of the military/civil service obligation, the very existence of this body of jurisprudence contradicts the Court's claim that it has no role to play with respect to the issue. The Court has, in fact, frequently engaged the question of the constitutionality of the regulatory scheme governing the military/civil service obligation. Particularly in its 1978 *Conscientious Objector (II)* judgment, the case from which the present Court drew much of the above cited language, (49) the Court intervened in dramatic fashion to *overturn legislation (passed by the political organs!)* that had the *de facto* effect of abolishing the military service obligation. (50) The 1977 *Wehrpflichtänderungsgesetz* (WPfIÄG – Military Service Amendment Act) permitted men to claim conscientious objector status simply by sending a letter asserting their objection to military service to the responsible agency. (51) For 1977, following the enactment of the notice-only provision, a total of about 70,000 draft eligible men registered as conscientious objectors in comparison with only 40,000 in the year 1976. (52) Faced with this development the Court engaged in the very policy-based analysis of the economic and social costs of the amendment it foreswore earlier in the judgment, and again rejects in the present decision.

[21] Perhaps more significant than the specific contradictions at work within the 1978 *Conscientious Objector (II)* judgment (which was ultimately rendered moot by the reintroduction of the notice-only provision by the Union parties in 1983 (53)) and the specific historical/jurisprudential contradictions resulting from the reassertion of that language in this case, are the echoes of a kind of "political question doctrine" that resonate in the Court's language and particularly the public's response thereto.

[22] It is commonly claimed that the Federal Republic's constitutional jurisprudence knows no "political question doctrine." (54) Certainly, the Federal Constitutional Court lacks *certiorari* discretion, the most significant device at the disposal of the United States Supreme Court for exercising judicial restraint in the face of political controversies. The Constitutional Court must decide all questions presented to it within the framework of its jurisdiction. (55) It is also true that the Constitutional Court, though fully a court in the common meaning of that term, unlike any other German court uniquely occupies a political sphere as one of the independent constitutional organs. Professor Friedrich Klein argues, in his essay "*Bundesverfassungsgericht und Richterliche Beurteilung Politischer Fragen*" (The Federal Constitutional Court and the Determination of Political Questions by the Judiciary), that this unique, dual role inherently endows the Court's decisions with a certain political quality. (56) Klein does not base this claim on the political ramifications that can be attached to nearly any judicial decision, whether civil or criminal. (57) Instead, it recognizes the Court's simultaneous status as an independent constitutional body. Klein finds expression of this political/judicial power in the Court's forfeiture of rights jurisdiction (pursuant to Article 18 of the Basic Law), the Court's party ban jurisdiction (pursuant to Article 21.2) and in the rule, outlined in Article 31 of the Federal Constitutional Court Act, that the Court's judgments have the force of law often meriting publication in the Federal Law Gazette (especially when treating the constitutionality of legislation). (58) "In these cases," Klein argues, "the Court is materially involved in the fields of law-making, . . ." (59) Klein further notes that the Court expressed an awareness of its political role in some of its earliest decisions. (60)

[23] The Court, whatever profile it might like to strike in cases involving the military/civil service obligation, has, in fact, built its domestic credibility and international reputation far more on its deft handling of intensely political disputes and less on its judicial conservatism. A recitation of only some of the vast range of (sometimes dangerously) political matters it has resolved suffices to prove this point: Banning the Social Reich Party (BVerfGE 2, 1 (1952)), Overturning the criminal sanctions imposed on the Editors of *Der Spiegel* Magazine (BVerfGE 20, 162 (1966)), Prohibiting life imprisonment (BVerfGE 45, 187 (1977)), Permitting NATO deployment of nuclear weapons in Germany (BVerfGE 66, 39 (1983)) and Monitoring the domestic effect of European Community/Union law (BVerfGE 89, 155 (1993)). Let us hope, for Germany's sake, that the Court's second fifty years is characterized by the same kind of aggressive social and political engagement and not by the self-imposed powerlessness suggested by its dicta in the Potsdam military/civil service obligation referral case.

(1) See, e.g., *Foreign Ministry Proposals for Mideast Raise Prospect of German Troops in Region*, FRANKFURTER ALLGEMEINE ZEITUNG (ENGLISH EDITION), 10 April 2002, at 1; *Peace Plan Discussion Heats Up: Prospect of German Troops in Mideast Draws Sharp Criticism*, FRANKFURTER ALLGEMEINE ZEITUNG (ENGLISH EDITION), 11 April 2002, at 1; Georg Paul Hefty, *Breaking Yet Another Taboo*, FRANKFURTER ALLGEMEINE ZEITUNG (ENGLISH EDITION), 11 April 2002, at 1.

(2) See, e.g., *CDU/CSU Leaders Agree Draft Should Stay the Same*, FRANKFURTER ALLGEMEINE ZEITUNG (ENGLISH EDITION), 6 April 2002, at 1; *Female Service not Election Issue, Opposition Says*, FRANKFURTER ALLGEMEINE ZEITUNG (ENGLISH EDITION), 13 April 2002, at 1.

(3) Concrete Judicial Review, see Article 100.1, GG; Article 13.11, BVerfGG.

(4) BVerfG, 2 BvL 5/99 from 20 February 2002, <http://www.bverfg.de/>. The decision is a ruling of the Second Senate.

(5) BVerfG, 2 BvL 2/02 from 27 March 2002, <http://www.bverfg.de/>. The decision is a ruling of the Fourth Chamber of the Second Senate. Article 3.2 of the Basic Law provides: "Men and women shall have equal rights. The state shall promote the actual implementation of equal rights for women and men and take steps to eliminate disadvantages that now exist." Article 3.3 of the Basic Law provides: "No person shall be favored or disfavored because of sex, . . ."

(6) Article 12, GG.

(7) Article 12.2, GG.

(8) Article 12a.1, GG.

(9) Article 12a.2, GG.

(10) § 1 Military Service Act (WPfIG). Article 116.1 of the Basic Law defines German citizenship in these terms: "Unless otherwise provided by a law, a German within the meaning of this Basic Law is a person who possesses German citizenship or who has been admitted to the territory of the German Reich within the boundaries of December 31, 1937, as a refugee or expellee of German ethnic origin or as the spouse or descendant of such a person."

(11) § 2.2 Military Service Act (WPfIG).

(12) § 4.1 Military Service Act (WPfIG).

(13) § 5.2(1a) Military Service Act (WPfIG).

(14) § 6.1 and 6.2 Military Service Act (WPfIG).

(15) § 15.1 Military Criminal Code (WStG).

(16) Article 4 of the Basic Law provides: "(1) Freedom of faith and conscience, and freedom to profess a religious or philosophical creed, shall be inviolable. (2) The undisturbed practice of religion shall be guaranteed. (3) No person shall be compelled against his conscience to perform military service involving the use of arms. Details shall be regulated by a federal law."

(17) § 1 War Service Refusal Act (KDVG).

(18) § 9.2 War Service Refusal Act (KDVG).

(19) *Id.*

(20) § 9.4 War Service Refusal Act (KDVG).

(21) § 14.1 War Service Refusal Act (KDVG).

(22) § 81 Civil Service Act (ZDG).

(23) § 52 Civil Service Act (ZDG).

(24) § 53.1 Civil Service Act (ZDG).

(25) BVerfGE 12, 45 (1960). See, Donald P. Kommers, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 458 (1997 2nd ed.).

(26) BVerfGE 12, 45 (55) (1960) (Translation from Donald P. Kommers, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 458-459 (1997 2nd ed.)).

(27) Donald P. Kommers, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 459 (1997 2nd ed.) (*Citing*, Ingo von Münch, GRUNDGESETZ KOMMENTAR Vol. I 335-337 (1992 3 Vols. 4th ed.)).

(28) Donald P. Kommers, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 459 (1997 2nd ed.).

(29) BVerfGE 48, 127 (1978). See, Donald P. Kommers, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 460 (1997 2nd ed.).

(30) Donald P. Kommers, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 460 (1997 2nd ed.).

(31) Article 12a.2, GG.

(32) BVerfGE 69, 1 (1985). See, Donald P. Kommers, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 460 (1997 2nd ed.).

(33) Article 100.1, GG.

(34) Article 80, BVerfGG.

(35) Article 81a, BVerfGG. See, Donald P. Kommers, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 13 (1997 2nd ed.) ("The Federal Constitutional Court will dismiss the case if the judges below it manifest less than a genuine conviction that a law or provision of law is unconstitutional if the case can be decided without settling the constitutional question.").

(36) Hans D. Jarass and Bodo Pieroth, GRUNDGESETZ FUER DIE BUNDESREPUBLIK DEUTSCHLAND KOMMENTAR 1034 (2002 6th ed.) (*Citing*, BVerfGE 68, 337 (344 et. Seq.) (1984); BVerfGE 67, 26 (33) (1983)).

(37) BVerfG, 2 BvL 5/99 from 20 February 2002, Para. 31 <http://www.bverfg.de/>.

(38) BVerfG, 2 BvL 5/99 from 20 February 2002, Para. 33 <http://www.bverfg.de/>.

(39) *Id.*

(40) BVerfG, 2 BvL 5/99 from 20 February 2002, Para. 37 <http://www.bverfg.de/>.

(41) The Court explained that the obligation to perform civil service is not arise directly out of the legal obligation to perform military service, but is instead based on a completely independent call to service. BVerfG, 2 BvL 5/99 from 20 February 2002, Para. 35 <http://www.bverfg.de/>.

(42) BVerfG, 2 BvL 2/02 from 27 March 2002, Para. 23 <http://www.bverfg.de/>.

(43) BVerfG, 2 BvL 5/99 from 20 February 2002, Para. 40-41 <http://www.bverfg.de/> (*Citing*, BVerfG 12, 45 (1960); BVerfGE 12, 311 (1960); BVerfGE 48, 127 (1978); BVerfGE 69, 1 (1985)).

(44) BVerfG, 2 BvL 5/99 from 20 February 2002, Para. 42 <http://www.bverfg.de/>. The Proportionality Doctrine has no tautological basis in the text of the Basic Law but has nonetheless, through the case law of the Constitutional Court, emerged as a fundamental element of German constitutional law. The Doctrine permits the Court to analyze whether, in a given case or pursuant to a given law, a right is disproportionately burdened. The Court asks: (a) whether the means used to achieve some legitimate legislative objective (and interfering with a constitutional right) are

appropriate; (b) whether the least restrictive (of a constitutional right) means are employed; and (c) whether the means used are proportionate to the ends. See, Donald P. Kommers, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 46-47 (1997 2nd ed.).

(45) BVerfG, 2 BvL 2/02 from 27 March 2002, Para. 26-27 <http://www.bverfg.de/> (Citing, BVerfG 12, 45 (1960); BVerfGE 48, 127 (1978)).

(46) BVerfG, 2 BvL 5/99 from 20 February 2002, Para. 47-48 <http://www.bverfg.de/> (citation omitted) (translation by the author).

(47) *Court Says Politicians Must Decide Draft's Fate*, FRANKFURTER ALLGEMEINE ZEITUNG (English Edition) 11 April 2002, at 1.

(48) Beck.Aktuell.

(49) BVerfGE 48, 160 (1978).

(50) The Union Party Parliamentarians who brought the challenge to the statute to the Constitutional Court claimed that the new rules established, in fact, the right to choose between military and civil service. They further represented that the statute had been represented to the public as establishing such a choice and "thereby abolishing the military service." BVerfGE, 48, 140 (1978) (translation by the author).

(51) Donald P. Kommers, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 459 (1997 2nd ed.).

(52) BVerfGE 48, 127 (171) (1978).

(53) Donald P. Kommers, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 460 (1997 2nd ed.). The Court upheld that legislation. See, BVerfGE 69, 1 (1985).

(54) David P. Currie, THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY 44-45; 170-171 (1994).

(55) *Id.* at 170.

(56) Friedrich Klein, BUNDESVERFASSUNGSGERICHT UND RICHTERLICHE BEURTEILUNG POLITISCHER FRAGEN (1966).

(57) *Id.* at 10.

(58) *Id.* at 9; 14-15.

(59) *Id.* at 15.

(60) *Quoting*, BVerfGE 1, 208 (1952) ("The decisions of the Federal Constitutional Court are related to the political reality and the Court may not let the political sphere, particularly that which will be affected by its decision, out of its sight.") (translation by the author).