

THE DEFENSE COMMISSIONER OF THE BUNDESTAG  
OF THE FEDERAL REPUBLIC OF GERMANY

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## I. BACKGROUND

When it was proposed that armed forces again be established in the demilitarized and divided Germany only a few years after World War II, there was a serious and long-lasting internal resistance to be overcome in the Federal Republic of Germany.

The reservations against rearmament were founded on numerous reasons of various kinds and import. Among them was the concern that it might not be possible to integrate armed forces into the new, just-established free democratic basic order without seriously upsetting its inner equilibrium. In the debate on how to resolve this issue there was a broad political consensus that the extra power that would accrue to the executive branch of government as a consequence of the buildup of armed forces would have to be counterbalanced by a specific fashioning of the possibilities of exercising legislative influence. The general control rights of the German Bundestag vis-a-vis the executive branch of government were therefore to be reinforced in the newly to be established defense sector.

To that end two specific instruments for the exercise of parliamentary control were created. Patterned on a model from abroad, the Defense Committee of the Bundestag was invested with a special legal status and special powers and constitutionally undergirded by the insertion of a new article, 45a, in the Basic Law of the Federal Republic of Germany. In addition, "a Defense Commissioner of the

Bundestag to safeguard the basic rights and to assist the Bundestag in exercising parliamentary control" was constitutionally anchored in the Basic Law in the newly inserted article 45b.<sup>1</sup>

In this context it should be noted that the enactment of the constitutional foundation required for the subsequent defense legislation and thus for the buildup of the federal armed forces would not have been possible without, among other things, the institution of the office of Defense Commissioner. When the parliamentary opposition at the time did not prevail with its demand that the Minister of Defense - unlike the other cabinet ministers but like the Federal Chancellor - be required to resign upon a special parliamentary vote of no confidence, the two-third majority needed for the adoption of the constitutional provisions on defense was in jeopardy. The proposal advanced by opposition Bundestag deputy Ernst Paul that additional parliamentary control be exercised through a Defense Commissioner - patterned on the model of the Swedish "Militieombudsman" - then enabled the compromise which led to the entry into force of the Constitutional Provisions on Defense on 20 March 1956.

## II. TERMS OF REFERENCE

In all his activities the Defense Commissioner is confined to matters within the domain of the legislative branch of government. His duties lie exclusively in the

field of parliamentary control. This follows from the genesis of the institution and the Defense Commissioner's assignment to the legislative branch by article 45b of the Basic Law<sup>2</sup>.

The Basic Law mandates the Defense Commissioner "to be provided for by a federal law.<sup>3</sup> The implementing Law on the Defense Commissioner was subsequently enacted on 26 June 1957 and provides in subsection 2 that the Defense Commissioner shall act:

"- *at the direction* of the Bundestag or the Defense Committee to examine certain matters (paragraph 1), and  
- *at his own dutiful discretion* if in the exercise of his right to visit troops, through communications from Bundestag deputies, complaints by soldiers, or otherwise he learns of circumstances suggesting that the basic rights of soldiers or the principles of internal leadership (Innere Fuehrung) have been violated (paragraph 2)."

This mandate highlights the spirit by which the lawmakers intended the armed forces to be governed. Wholly under the impression of the rule of force and the abuse of power in the National Socialist past, but also reflecting their conception of a re-arisen liberal state governed by the rule of law, they wanted the rights of the individual citizen, set forth as basic rights in the Basic Law, to also be mainly enjoyed by the soldier, and, moreover, that the safeguarding of these rights - in addition to their being

otherwise effectively protected by the due process of law - be specifically verified by parliament. Furthermore, the reform program expressed in the "principles of internal leadership" (*Grundsätze der Inneren Führung*), intended to govern the buildup of the federal armed forces and the development of their internal structure, was designated an eminent task of parliamentary control, and the Defense Commissioner was charged by law to take action whenever these principles were violated.

The goal pursued with the principles of internal leadership was and still is to integrate the soldier in the Federal Republic of Germany as a "citizen in uniform" into the armed forces and to integrate the armed forces in turn into society and its order in such a way that the federal armed forces would understand themselves to be an integral part of that society and its order and could be seen as such from outside. This goal, whose achievement has gone far toward eliminating the distrust of large segments of the population of all things military and which has removed from the outset any possible basis for fears of a "state within the state", can be concretized as follows:

- Internal leadership is first of all a 'basic-rights-concerned' concept aiming to limit the soldier's freedoms as a citizen by the duties of the soldier only to the extent that this is inevitable under prevailing circumstances to ensure the effectiveness of the armed forces.

- Internal leadership follows the basic criteria of the constitution: liberty, democracy, rule of law, and social obligation, and is thus part of a system of competing values and demands with respect to the shaping of the state and social order.

- Internal leadership is also to assure that the soldier participates in the political, intellectual, cultural and social life and evolution in the Federal Republic of Germany; enhances his consciousness of the value of the constitutional order in the Federal Republic of Germany or is assisted in developing such consciousness;

- is ready to fulfill his military mission and to defend the constitutional order from conviction; and that, on the other hand, the soldier

- receives the consideration and care for himself and his family which the specific burdens of military service merit;

- in an environment determined by constant change, mechanization, material and progress, specialization, rationalization and centralization, and the requirement for goal-oriented military leadership remains at the center of military acting and military planning and that this is a primary concern in the shaping of his tasks.

- Internal leadership is designed, last but not least, to strengthen the operational readiness of the armed forces as a whole.

Internal leadership is thus an inseparable part of military leadership at all levels, of central importance for the training and continuing training of the federal armed forces, and a connecting link between the military mission and its controlling constitutional order.

The principles of internal leadership constitute the moral framework for the leadership behavior of all military superiors; they are at the same time the norm of action for those who lead and those who are led; and they are continuously further developed in a dynamic process in the light of new knowledge and experience.

The principles of internal leadership are to a high degree infused with the law, so that their application is at the same time also the application of the law. But internal leadership is more than only that; it cannot be realized merely by compliance with laws, decrees, or internal instructions or ensured by the promulgation of rules and regulations. Internal leadership transcends these bounds.

It can be seen from the above what range of responsibilities has been assigned to the Defense Commissioner in that respect. It also shows that the scope and limits of the Defense Commissioner's mandate are not so clearly defined that they could not give rise to differences of opinion. Hence, they have in the past been the subject of occasional controversy.

The authority of the Defense Commissioner with respect to safeguarding the basic rights and the principles of

internal leadership is, incidentally, limited to cases where soldiers are concerned<sup>4</sup>. The civilian personnel of the federal armed forces (approx. 170,000 employees) do not come within the purview of the Defense Commissioner's mandate.

Over and above his control activity to safeguard the basic rights and the principles of internal leadership the Defense Commissioner has not been assigned any functions in the defense field as an agency to assist the Bundestag in exercising parliamentary control. Thus the Defense Commissioner is prohibited from taking up matters on his own initiative, such as the areas of the armament sector, the budget, or defense planning, and have them examined.

On the other hand, the Defense Commissioner may be directed by the Bundestag or its Defense Committee to investigate certain matters.<sup>5</sup> Such specific assignments may pertain to the safeguarding of the basic rights or the principles of internal leadership but may also be more comprehensive in scope and cover other aspects of defense; but they may in no event extend beyond the legitimate scope of parliamentary control.

### III. AUTHORITY OF THE DEFENSE COMMISSIONER

To safeguard the basic rights and the principles of internal leadership the Defense Commissioner may act on his own initiative only if he learns of circumstances which suggest that the principles of internal leadership and the basic rights have been violated.<sup>6</sup> He is not authorized,

however, to take protective measures of a prophylactic nature.

In order to obtain the information he deems necessary he can avail himself of a number of legally established rights to information and in connection therewith initiate a comprehensive investigation into matters that have come to his attention. He thus may:

- require the Federal Minister of Defense and all agencies and persons subordinate to him to answer queries and afford him access to their files;

- direct a case to the agency authorized to initiate criminal or disciplinary proceedings;

- visit all troops, staff, administrative offices of the federal armed forces and their facilities at any time unannounced;

- request from the Minister of Defense coherent reports on the exercise of disciplinary authority in the federal armed forces;

- be present at court hearings in all criminal and disciplinary actions connected with his field of responsibility. He has the same right of access to records as the public prosecutor.

All federal, state, and local government authorities are required to assist the Defense Commissioner in conducting the necessary investigations.

In addition, the Defense Commissioner may "give the competent authorities an opportunity to settle a matter".<sup>7</sup>

This action is frequently taken, for instance, as a result of the processing of petitions by soldiers.

However, this does not confer upon the Defense Commissioner the right to give directives or other instructions to the Federal Minister of Defense and his subordinate agencies. The authority of the Defense Commissioner as an auxiliary agency of the legislative branch of government obviously does not exceed the powers of parliament itself. These in turn are governed by the principle of the separation of powers and thus by the principle that the legislative and the executive branches of government are independent of each other, and parliamentary control as one of the functions of the legislature does not manifest itself in measures of the executive being superseded or replaced by actions of parliamentary control.

Nevertheless, the suggestions which the Defense Commissioner makes to the competent authorities are, as a rule, heeded and translated into concrete action unless these authorities take and justify a different position. In this connection the Defense Commissioner also makes use of the possibility, when necessary, of bringing a matter to the attention of the next-higher superior, even up to the Federal Minister of Defense and thus giving added weight to his ideas.

The Defense Commissioner is required to inform the Bundestag of the results of his investigations, either in individual reports or in the mandatory annual overall

reports, and in them he may also address such cases whose disposition by the competent authorities has not been to his satisfaction.

#### IV. PETITIONS

According to ss. 7 of the Law on the Defense Commissioner, "every soldier has the right to address himself individually to the Defense Commissioner directly without going through channels. He may not be officially disciplined or prejudiced because of the fact that he appealed to the Defense Commissioner". This provision affords to the soldier a special right of petition, free from any time limitation.

Within the scope of his legal mandate the Defense Commissioner is duty-bound to examine whether the facts alleged in the petition suggest that any basic rights or the principles of internal leadership have been violated. If no such violation is apparent or if the petitioner is not a soldier, the Defense Commissioner is barred from further pursuing the matter unless the Bundestag or its Defense Committee direct him to do so.

Petitions to the Defense Commissioner cover the entire range of problems of an official, personal, or social nature in everyday military life<sup>8</sup>.

If the facts alleged in the petition suggest that the basic rights of the soldier or the principles of internal leadership have been violated the petition is, as a rule,

brought to the attention of the respective unit or agency of the federal armed forces with the request that the matter be examined and commented on. In this manner the unit or agency concerned is put in a position to clear up misunderstandings and correct ascertained inefficiencies of its own accord; on the other hand, it is a simple and effective means for the Defense Commissioner to "give the competent authorities an opportunity to settle a matter". When acting on a petition it is within the discretion of the Defense Commissioner to divulge the facts of the petition and the name of the petitioner but he should refrain from doing so if the petitioner so desires.

Special cases, questions of principle arising from a petition, and matters of a certain political significance are, as a rule, brought by the Defense Commissioner to the attention of the Federal Minister of Defense directly.

Whenever there is pending, in the same matter as that addressed in a petition and concurrently therewith, a complaint regarding disciplinary, criminal or administrative action, it has been standing procedure with all Defense Commissioners not to interfere, as a rule, in a pending proceeding with his value judgments and to defer or suspend any investigations of his own until a final decision has been obtained. An exception to this rule is conceivable if the particular matter, including its interlocutory adjudication, can be separated from considerations and conclusions which transcendently arise from the matter at

hand and a general statement by the Defense Commissioner concerning such considerations or conclusions appears necessary.

From the foregoing it is evident that the Defense Commissioner fulfills the function of a special law/petitions addressee for soldiers. The processing of these petitions occupies a very large part of the working capacity of the Office of the Defense Commissioner; this signifies the importance which the right of petitioning the Defense Commissioner has for the soldiers.

But this reality should not obscure the fact that the institution of Defense Commissioner was conceived as an agency to assist in the exercise of parliamentary control and that the petitions of the soldiers constitute only one source of information - although an important one - and thus an auxiliary means in the discharge of the transcendent constitutional mandate of exercising parliamentary control. Among the other sources of intelligence available to the Defense Commissioner, mention is made here only of the voluminous information he receives during his frequent, usually unannounced, visits of troops<sup>9</sup> in conversations with members of all grade groups.

The annual reports and their treatment in parliament have made it increasingly clear over the years that rather than his petitionary function, the transcendent parliamentary control mandate is the central task of the Defense Commissioner and that this is not only in accordance

with the express intent of the constitution and the lawmaker but also in keeping with the expectations of parliament and the public.

#### V. THE DEFENSE COMMISSIONER AND PARLIAMENT

The Defense Commissioner's office is with the German Bundestag. Apart from the fact that the Bundestag or the Defense Committee can direct him to examine certain matters, he is not bound by instructions.<sup>10</sup> The Bundestag and the Defense Committee may, however, lay down general guidelines for his work, however, to date they have not done so.

The annual reports of the Defense Commissioner are regularly debated by the Bundestag in plenary session. Following a respective change in the rules of procedure of the Bundestag, the Defense Commissioner could, in 1967, for the first time speak on his report in the Bundestag. This right to speak was further expanded by another change in the rules of procedure in 1980. It is dependent on a certain number of members of the Bundestag demanding that the Defense Commissioner take the floor.

The treatment of the annual reports by the Bundestag in plenary session and in Defense Committee, and the debate of the reports by all political parties represented in the Bundestag are largely determined by the desire to lend weight to the findings of the Defense Commissioner from the standpoint of parliamentary control or from other political considerations. This has not failed to have an impact on the

prestige of the institution of Defense Commissioner in the public and on his day-to-day work.

Irrespective of the parliamentary deliberation of the annual reports, the Defense Commissioner endeavors to maintain a close relationship and constant contacts with the German Bundestag and especially the Defense Committee. Thus, the Defense Commissioner informs the parliament of special events and occurrences that have come to his attention in the discharge of his office. Frequently Bundestag deputies turn to him with requests to look into certain matters. The Defense Commissioner may attend the meetings of the Defense Committee where he is afforded the opportunity to speak at any time on matters within his cognizance. Also, members of the Defense Commissioner's staff are asked by the Defense Committee for their expert opinion. The Defense Commissioner has set up regular consultation hours in spatial proximity to the deputies.

The perception of the Defense Commissioner by parliament and the public nowadays corresponds more closely to the above self-portrayal than was the case in the early years. After initial uncertainties, which can essentially be explained by the fact that creating the institution of Defense Commissioner meant breaking new constitutional and political ground, it has increasingly come to be realized that the Defense Commissioner is not, for instance, the "advocate of the soldiers vis-a-vis parliament"<sup>11</sup> in the strict sense of the word, but that he must first and

foremost be the parliamentary controller of the armed forces as willed by the lawmaker. This definition of his position is not altered by the fact that in consequence of a control measure the Defense Commissioner may, in the parliamentary sphere, act on the behalf of the soldiers.

While in practice interaction with parliament unfolds in multiple ways on many levels, there are as yet a number of open questions of a constitutional and organizational nature regarding the Defense Commissioner's association with parliament; they are to be settled by an amendment to the Law on the Defense Commissioner.

## **VI. THE DEFENSE COMMISSIONER AND THE FEDERAL MINISTER OF DEFENSE**

When first established, the institution of Defense Commissioner was received in the armed forces with considerable reservation and as an expression of a special mistrust, felt to be unjustified, since similar institutions were not created for other branches of the executive. Another factor was that in the early years the federal armed forces and the Defense Commissioner still had to define their positions within the framework of the constitution and the laws and also to delimit these positions from each other. In the course of this process there were, apart from inadequacies, also misunderstandings and disputes over competences which contributed to the strained relationship with the defense sector, which by the nature of the Defense

Commissioner's mandate and the will of the lawmaker, is already and necessarily a tense one. In the meantime, the Defense Commissioner and the perception of him, have long ceased to be questioned. He is even increasingly sought out as a partner to assist in solving problems in the sphere of internal leadership, with the result that he must sometimes remind his counterparts of his control mandate in order to correct any misconceptions that may occasionally arise.

On the whole, the Defense Commissioner today encounters little difficulty in the execution of his control mission in the area of responsibility of the Federal Minister of Defense. Recently, the Federal Minister of Defense characterized the reciprocal relationship as constructive. This assessment is confirmed by the Defense Commissioner.

## VII. THE DEFENSE COMMISSIONER AND HIS OFFICE

The Defense Commissioner is elected, without prior debate, by secret ballot with a majority of the votes of the members of the Bundestag. The president of the German Bundestag appoints the Defense Commissioner-elect. Authorized to nominate a candidate for election are, among others, the parliamentary groups and the Defense Committee. Any German eligible to be elected to the German Bundestag, who has completed his 35th year of age and at least one year of military service is eligible to be elected Defense Commissioner. The Defense Commissioner's period of office is five years, re-election is permissible. The Defense

Commissioner may not hold any other paid office, practice any trade or profession, or belong to the management or supervisory board of any enterprise engaged in business for profit, or to any legislative body of the federation or a state. On assuming office the Defense Commissioner takes the following oath:

"I swear that I will dedicate my efforts to the well-being of the German people, enhance its benefits, ward harm from it, uphold and defend the Basic Law and the laws of the federation, fulfill my duties conscientiously, and do justice to all."<sup>12</sup>

While in office the Defense Commissioner is exempt from military service.

The Defense Commissioner is a public officer whose status corresponds to that of a federal minister. His tenure of office ends, otherwise than by death, by the appointment of a successor, discharge by the president of the Bundestag, or resignation.

Since the promulgation of the Law on the Defense Commissioner in 1959, the Bundestag has elected six Defense Commissioners.

To assist him in the discharge of his functions the Defense Commissioner is to be provided with the requisite staff.<sup>13</sup> They form his office and are subject to his supervision. In his office the Defense Commissioner is represented by his executive officer.

Earlier hopes that the Defense Commissioner would be able to perform his functions with only a small staff have proved wrong. The volume of the work was so extensive and the subject areas so varied that the office had to be organized into several sections and today comprises over sixty members.

Notes:

1. Writings on the Defense Commissioner of the German Bundestag (selection): Hartenstein, Frank H., "Der Wehrbeauftragte des Deutschen Bundestages. Zuständigkeiten und Befugnisse im Rahmen der parlamentarischen Kontrolle der Bundeswehr," *Europäische Hochschulschriften, Reihe II, Rechtswissenschaft* (Frankfurt: Peter Lang GmbH, 1977). Muser, Andreas., "Wehrbeauftragter und Gewaltenteilung. Zur Erfüllbarkeit von Emanzipationsansprüchen an parlamentarische Kontrolle," *Schriften zum öffentlichen Recht*, Vol. 303 (Berlin: Duncker & Humblot, 1976).
2. That the Defense Commissioner was to be uniformly considered an auxiliary organ of the German Bundestag in the discharge of all his functions has not always been the prevailing opinion, particularly not in the early years of the institution's existence. Cf. Peter Wolf, "Der Deutsche Bundestag und sein Wehrbeauftragter - zugleich ein Beitrag zu ss. 16 Wehrbeauftragtengesetz,"

- Neue Zeitschrift für Wehrrecht* (1977) 121-134.
3. Basic Law Article 45b, sentence 2.
  4. Under certain conditions the Defense Commissioner may also deal with matters brought to his attention by ex soldiers (reservists).
  5. Law on the Defense Commissioner, ss. 2, paragraph 1.
  6. *Ibid.*, ss. 2, paragraph 2.
  7. *Ibid.*, ss. 3, paragraph 2.
  8. In 1979, 5,059 of the total of 6,595 cases pursued originated from petitions; 3,815 of these cases dealt with personnel matters and matters of welfare.
  9. In 1979, the Defense Commissioner made thirty-eight troop visits.
  10. Law on the Defense Commissioner, ss. 5, paragraph 2.
  11. This was still the Defense Commissioner's perception of his role in his 1968 annual report, section I, p. 4 (*Verhandlungen des Deutschen Bundestages. 5. Wahlperiode. Drucksach V/3912*). By the ordering principles of the Basic Law this function belongs solely to the Federal Minister of Defense.
  12. Basic Law, Article 56.
  13. Law on the Defense Commissioner, ss. 16, paragraph 2.

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