

#GIDSstatement 1 / 2024

Christian Richter

The Swedish Conscription Model and the German Basic Law

An Assessment in the Context of Germany's Security
Policy and Constitution

#GIDSstatement | No. 1/2024 | March 2024 | ISSN 2699-4372

The German National Library lists this publication in the German National Bibliography; detailed bibliographic information is available online at <http://dnb.dnb.de>

ISSN 2699-4372

This contribution is available under Creative Commons License CC BY-NC-ND 4.0 International (Attribution-NonCommercial-NoDerivatives). For further information on the license, please refer to: <https://creativecommons.org/licenses/by-nc-nd/4.0/deed.en>



#GIDSstatement is published by the German Institute for Defence and Strategic Studies (GIDS).

Contributions are available free of charge from the GIDS website: www.gids-hamburg.de

#GIDSstatement reflects the personal opinions of the authors and does not necessarily represent the point of view of the GIDS.

Translation by: Federal Office of Languages, Language Services Branch SMD 15.

Proposed citation:

Christian Richter, The Swedish Conscription Model and the German Basic Law. An Assessment in the Context of Germany's Security Policy and Constitution, #GIDSstatement 1/2024, GIDS: Hamburg.

GIDS

German Institute for Defence and Strategic Studies
Bundeswehr Command and Staff College
Manteuffelstraße 20 · 22587 Hamburg, Germany
Tel.: +49 (0)40 8667 6801
buero@gids-hamburg.de · www.gids-hamburg.de

Lieutenant Colonel (Res.) Dr. Christian Richter | German Institute for Defence and Strategic Studies

The Swedish Conscription Model and the German Basic Law

An Assessment in the Context of Germany's Security Policy and Constitution

Introduction

Since its transformation into a volunteer army, the Bundeswehr has almost always failed to achieve its envisaged personnel strength, which indicates a fundamental problem. Furthermore, since 2016, the Bundeswehr has returned its focus to its primary task of national and collective defence.¹ Russia's war of aggression against Ukraine, which has been ongoing since February 2022, has also significantly increased the urgency to restore the Bundeswehr's operational capability and thus its readiness for a defensive war.² This requires not only sufficient materiel but also sufficient personnel.³ Against this background, it is only logical that various recruitment systems for the armed forces, including compulsory military service, are now being reviewed in Germany. However, the 'Swedish' selective conscription model, which has become part of the public debate, has already met with strong opposition: Firstly, reinstating conscription in whatever form has been either categorically ruled out⁴ or described as a difficult endeavour on the grounds of Germany's constitution.⁵ Secondly, Sweden's selective conscription model is said to be incompatible with the German principle of conscription equity, and thus unconstitutional.⁶

Conscription in the German Basic Law

First of all, it must be noted that conscription in Germany has not been abolished but only suspended at the non-constitutional level. Thus, Article 12a of the German Basic Law (Grundgesetz) remains valid, stating the following: 'Men who have attained the age of eighteen may be required to serve in the Armed Forces, in the Federal Border Police, or in a civil defence organisation.' In accordance with § 2 of the German Compulsory Military Service Act (Wehrpflichtgesetz) amended in 2011, conscription

¹ Cf. Die Bundesregierung [The Federal Government] 2016: 90.

² Richter 2022a.

³ To my knowledge, and remarkably so, security policy experts have not pointed out this fact in the political debate since 24 February 2022, except Richter 2022b: 979.

⁴ SPIEGEL online 2023; Decker 2024.

⁵ Staib 2023.

⁶ Rath 2023a; idem 2023b.

will be revived should the German Parliament (Bundestag) declare a state of tension or defence. This requires a two-thirds majority of the votes cast.⁷

Legislative Freedom to Reinstate Conscription

Aside from the above, and according to the established case law of the Federal Constitutional Court (Bundesverfassungsgericht), the legislator is free to choose any conscription model – i.e. either voluntary or compulsory military service. This means that the Government may, by a simple majority in Parliament, reinstate conscription through a legislative act. Thus, the Government has a lot of discretionary power in this respect.⁸ For the legislator to be able to decide to reinstate conscription through a legislative act, no specific threat to security is required under constitutional law. The legislator's decision is, thus, an act of independent policy-making and requires a complex political assessment.⁹

The Imperative to Establish Effective Armed Forces

However, the discretionary power exercisable by the German Government is limited. According to the established case law of the Federal Constitutional Court, the operability of the Bundeswehr is a matter of constitutional importance,¹⁰ Böckenförde rightly speaks even of a constitutional imperative.¹¹ The laconic dictum of Article 87a (1) of the German Basic Law stating that '[t]he Federation shall establish Armed Forces for purposes of defence', is therefore to be understood as meaning that the Federal Government must establish effective armed forces able to fight a defensive war.¹²

The Swedish Conscription Model

The selective conscription model referred to as the 'Swedish' model was first introduced in Norway.¹³ Consequently, it would be more accurate to talk about the 'Norwegian' conscription model – even though selective conscription has also been introduced by Denmark and is, thus, current practice in all Scandinavian states. Therefore, one may also call it the 'Scandinavian' conscription model¹⁴, although Norway and Sweden are the only countries to conscript women.¹⁵

Sweden has all 18-year-old citizens complete a comprehensive digital questionnaire on health, education, interests and personality. The form closes with a question on the

⁷ On the current and prospective legal framework, see Richter 2022b: 979 ff.

⁸ Mehde 2023: marginal 57 ff (with further references).

⁹ Kokott/Hummel 2021: marginal 2.

¹⁰ Cf., above all, Bundesverfassungsgericht [Federal Constitutional Court] 1970 and Sevecke 2024: 18 (with further references).

¹¹ Böckenförde 1964: 261.

¹² Kirchhof 2006: marginal 13 (with further references).

¹³ For details on conscription in Norway, see Stampehl/Diersmann 2023: 257 ff.

¹⁴ Cf. Braw 2019; Strand 2021: 6.

¹⁵ The Danish Government, however, has recently introduced a legislative proposal in the Danish Parliament which provides for extending conscription to women; cf. Wiegold 2024.

personal attitude towards the armed forces and military service, determining in advance the young people's aptitude and motivation. The Swedish then muster those persons – about one third of a cohort – they deem, in principle, suitable for serving in the military. In the end, however, only about eight percent of a cohort are selected for military service.¹⁶

Sweden's conscripts generally do not refuse to perform military service for two reasons: firstly, because they have been selected and, secondly, because they feel that serving in the military will be advantageous for their future professional development. This means that, ultimately, Sweden's conscripts serve in the armed forces on a voluntary basis.¹⁷ Norway is even said to regularly see illegal attempts by relatives trying to get their loved ones to be selected for military service.¹⁸ In its current practice, Sweden's selective conscription *de facto* constitutes duty without coercion. However, Sweden's legal system also provides for legal consequences, including imprisonment, for those refusing to take up military service.¹⁹ Notwithstanding the above, performing military service is really a legal obligation in Sweden, Norway and Denmark. Therefore, the constitutional aspects discussed hereunder would have to be taken into account if the selective conscription model were to be introduced in Germany.

Conscription Equity

If a selective conscription model were to be introduced in Germany, this could, in principle, violate Germany's principle of conscription equity (Wehrgerechtigkeit). This term is used in political debate and was established in law based on the principle of equality.²⁰ In the view of the Federal Administrative Court (Bundesverwaltungsgericht), an all too apparent gap between the number of conscripts available to the Bundeswehr and the number of conscripts actually called up may contradict the principle of conscription equity.²¹ The Federal Constitutional Court, however, had not yet decided on this issue when compulsory military service was suspended in Germany in 2011. In a decision taken in 2004, the Federal Constitutional Court did state that the question had to be clarified as to whether conscription equity was still ensured if only a small proportion of the male conscripts were called up for serving in the Bundeswehr.²² Therefore, it is not possible to predict what position the Federal Constitutional Court might adopt specifically on the question of conscription equity, should Germany choose to introduce selective conscription.

As a matter of fact, it is necessary to take a nuanced approach when it comes to the Federal Administrative Court's understanding of conscription equity. If there was an all too apparent gap between the number of conscripts available and the number of conscripts actually called up, Germany would have no constitutional legitimacy to call up more conscripts than actually needed by the Bundeswehr only to maintain the façade

¹⁶ For the current recruitment practice in Sweden, see Hård af Segerstad 2024.

¹⁷ Strand 2021: 8 f.

¹⁸ Braw 2019: 15.

¹⁹ Egleder 2024: 35.

²⁰ Cf. Blom 2012: 6 ff.

²¹ Bundesverwaltungsgericht [Federal Administrative Court] 2005.

²² Bundesverfassungsgericht [Federal Constitutional Court] 2004.

of conscription equity. The same would hold true for a decision to suspend compulsory military service because the cohort of available conscripts was bigger than the Bundeswehr's actual need for conscripts in the given security situation. This can hardly be interpreted any differently. Otherwise, Germany's ability to establish effective forces for purposes of defence would ultimately be determined by two parameters reflecting the status quo and not the desired status to be achieved.

In fact, the Federal Administrative Court also states that the selection of conscripts to be called up must be determined²³ 'solely in the Bundeswehr's interest to optimally satisfy its personnel requirements based on the specific numbers of available conscripts and, therefore, for specific reasons of public interest'.²⁴

Accordingly, the principle of conscription equity can only be interpreted in such a way that the principle of equality before the law as per Article 3 of the German Basic Law must be observed, meaning equal burdens and obligations for all citizens alike. In a constitutional selective conscription system in Germany, conscripts who have not been called up could be required to pay a special tax, i.e. a kind of individual conscription fee, as compensation.²⁵ However, this might pose a risk of people with fewer resources being disadvantaged socially,²⁶ which is why conscripts could, for example, be exempted from income tax for a limited period of time after having performed military service. Introducing financial incentives for training and education would also be an option. The corresponding provisions of this selective conscription system could be laid down in § 2 of the German Compulsory Military Service Act without the legislator having to amend the constitution.²⁷

It is unclear how to proceed in the theoretically possible case that two conscripts are equally eligible to serve in the military and only one post is to be filled. Whether a lottery system²⁸ would be constitutional is highly questionable. In fact, random selection is explicitly rejected in expert literature.²⁹

Conscription for Women

Extending conscription to women would offer a lot of potential with a view to increasing personnel strength. The involvement of women should at least be discussed for legal policy reasons.³⁰ Most voices in the literature seem to agree³¹ that extending conscription to women is neither required under German constitutional law nor under

²³ Bernzen/Bertram 2010: 111.

²⁴ Translated from the German original cited in Bernzen/Bertram 2010: 111.

²⁵ A similar idea has been expressed before by Bernzen/Bertram 2010: 112.

²⁶ This has been pointed out before by Stampehl/Diersmann 2023: 263.

²⁷ Ipsen 2001: 471 takes a negative view of the matter. What is more, Ipsen is of the opinion that selective conscription would be unconstitutional even after an amendment to the German Basic Law; idem: 472.

²⁸ Denmark makes use of a lottery system for the final selection of its conscripts. Sweden and Norway, on the other hand, do not use lotteries.

²⁹ Kämmerer 2021: marginal 20; Kokott/Hummel 2021: marginal 1.

³⁰ A similar view has been expressed by Kokott/Hummel 2021: marginal 8.

³¹ As far as I am aware, Schiffbauer 2022: 58 is the only reference supporting the view that extending conscription to women is required, albeit using unreasonable arguments.

European or international law.³² Given the existing burden on women who, even today, still demonstrably bear the greater share of caring responsibilities for children and older relatives, it should be acceptable, both legally and politically, to avoid imposing any additional legal obligations on women – a view that is also in line with the current case law.³³

Introducing a conscription model in Germany that also includes women would require a constitutional amendment.

The Constitutional Imperative to Establish and Maintain Effective Armed Forces

The decision whether or not to reinstate traditional conscription in Germany or introduce selective conscription is a political one and Germany's constitution leaves a lot of discretionary power to the legislator. However, if there were a specific threat to security and the Bundeswehr were unable to recruit sufficient personnel on a voluntary basis, the obligation to maintain effective armed forces as foreseen by Article 87a (1) of the German Basic Law would probably reduce this discretionary power.³⁴ In this case, reinstating conscription in Germany would be the only permissible decision for the legislator. The imperative to maintain effective armed forces for Germany's defence represents a legal policy argument of particular importance in favour of a compulsory recruitment model.

At present, the Bundeswehr does not seem to be able to reach the necessary personnel strength within four key areas: with regard to its peacetime strength, the Bundeswehr is unable to meet its requirements – even more so as there are plans to increase its personnel by more than 20,000 servicemen and women.³⁵ Due to the lack of a sufficient number of reservists, building up forces for national and collective defence is only possible to a negligible extent, if at all.³⁶ Consequently, the Bundeswehr's staying power to survive intense fighting and high-intensity combat in a national and collective defence scenario is currently expected to last for a few days only.³⁷ The Bundeswehr is only now establishing homeland defence units that will be able to effectively protect critical infrastructure in such a scenario. Their personnel numbers, however, are not even close to what they should be.³⁸

Against this background, a conscription model urges itself upon us when it comes to legal policy. Nevertheless, Germany should examine very carefully which conscription model could be used to build up personnel in the respective areas. Furthermore, it cannot be ruled out that introducing or reinstating conscription may even be a requirement under constitutional law.

³² Kokott/Hummel 2021: marginal 5 ff (with further references); Mehde 2023: marginal 48 ff.

³³ Mehde 2023: marginal 50 (with further references).

³⁴ Mehde 2023: marginal 61, with reference to Richter 2022b: 985. According to Freudenberg 2024: 20, this is already the case in view of the current security situation.

³⁵ Fehr 2024.

³⁶ For a comprehensive analysis see Mühle 2023.

³⁷ Ibid.: 14.

³⁸ Ibid.: 29.

Conclusion

As far as Germany's constitution is concerned, it would not be difficult to reinstate conscription. There are two possible ways conscription can be reinstated – in a state of tension or defence or through non-constitutional legislation by a simple majority in Parliament. Only if women were to be included would a constitutional amendment be required. According to the German Federal Constitutional Court, compulsory military service is normal in a democracy.³⁹ Translating this form of military service into selective conscription would probably not be unconstitutional *per se*. In the event of a specific threat to security arising without there being any alternative voluntary military service model, selective conscription might even be obligatory given the constitutional imperative to maintain effective armed forces. However, a selective conscription model would also have to take into account the imperative of conscription equity. This means that the specific legal provisions of such a selection procedure would have to be in compliance with the principle of equality before the law as per Article 3 (1) of the German Basic Law expressing the equal burdens and obligations of citizenship.

List of References

- Bernzen, Christian/Bertram, Christoph (2010): Auswahlwehrpflicht: eine zeitgemäße Weiterentwicklung der allgemeinen Wehrpflicht?, in: S+F – Sicherheit und Frieden 2/2010, pp. 110–113.
- Blom, Thomas (2012): Das Grundrecht auf Wehrgleichheit, Peter Lang: Frankfurt am Main.
- Böckenförde, Ernst-Wolfgang (1964): Die Organisationsgewalt im Bereich der Bundesregierung, 1st ed., Duncker & Humblot: Berlin.
- Braw, Elisabeth (2019): Competitive National Service. How the Scandinavian Model Can Be Adapted by the UK (RUSI Occasional Paper, October 2019), Royal United Services Institute: London, <https://rusi.org/explore-our-research/publications/occasional-papers/competitive-national-service-how-scandinavian-model-can-be-adapted-uk>, last accessed on 5 March 2024.
- Die Bundesregierung [The Federal Government] (2016): White Paper 2016: On German Security Policy and the Future of the Bundeswehr, Berlin, <https://www.bundeswehr.de/resource/blob/4800140/fe103a80d8576b2cd7a135a5a8a86dde/download-white-paper-2016-data.pdf>, last accessed on 5 March 2024.
- Bundesverfassungsgericht [Federal Constitutional Court] (1970), BVerfGE 28, 243, Dienstpflichtverweigerung [Refusal to render military service], Beschluss vom 26. Mai 1970 [Order of 26 May 1970], 1 BvR 83, 244 and 345/69.
- Bundesverfassungsgericht [Federal Constitutional Court] (1985), BVerfGE 69, 1, Kriegsdienstverweigerung II [Conscientious objection II], Urteil des Zweiten Senats vom 24.04.1985 aufgrund der mündlichen Verhandlung vom 30.01.1985 [Judgment of the Second Senate of 24 April 1985 held on the basis of the oral hearing of 30 January 1985], 2 BvF 2, 3, 4/83 and 2/84.
- Bundesverfassungsgericht [Federal Constitutional Court] (2004), Beschluss vom 17.05.2004 [Order of 17 May 2004], 2 BvR 821/04, https://www.bundesverfassungsgericht.de/SharedDocs/Downloads/DE/2004/05/rk20040517_2bvr082104.pdf?__blob=publicationFile&v=1, last accessed on 5 March 2024.

³⁹ Bundesverfassungsgericht [Federal Constitutional Court] 1985: marginal 44.

- Bundesverwaltungsgericht [Federal Administrative Court] (2005), Urteil vom 19.01.2005 [Judgment of 19 January 2005] - 6 C 9.04 -, <https://www.bverwg.de/190105U6C9.04.0>, last accessed on 5 March 2024.
- Decker, Markus (2024): FDP gegen Pistorius: „Mit uns gibt es keine Wehrpflicht“, in: RND dated 17 February 2024, <https://www.rnd.de/politik/pistorius-fuer-wehrpflicht-fdp-strikt-dagegen-JRHH4EBNMBDO7NCRJMMJYKZITI.html>, last accessed on 5 March 2024.
- Egleder, Julia (2024): Blick auf zwei Länder Europas – Schweden, in: Loyal 2/2024, pp. 34–35.
- Fehr, Mark (2024): Die Bundeswehr braucht 20.000 neue Soldaten und Soldatinnen, in: FAZ dated 5 February 2024, <https://www.faz.net/aktuell/wirtschaft/schnellerschlau/bundeswehr-braucht-20-000-soldaten-wo-die-meisten-stellen-offen-sind-19493030.html>, last accessed on 5 March 2024.
- Freundenberg, Dirk (2024): Die Wehrpflicht als verfassungsrechtliches Gebot, in: Zeitschrift für Rechtspolitik – ZRP 1/2024, pp. 17–20.
- Hård af Segerstad, Jonas (2024): Wehrpflicht in Schweden: Mythen und Wahrheit (guest commentary), in: Augen geradeaus! dated 5 January 2024, <https://augengeradeaus.net/2024/01/wehrpflicht-in-schweden-mythen-und-wahrheit/>, last accessed on 26 February 2024.
- Ipsen, Knut (2001): Auswahlwehrdienst und Grundgesetz, in: Zeitschrift für Rechtspolitik – ZRP 10/2001, pp. 469–473.
- Kämmerer, Jörn-Axel (2021): Art. 12a, in: von Münch, Ingo/Kunig, Philip (eds.), Grundgesetzkommentar, 7th ed., C.H. Beck: Munich.
- Kirchhof, Ferdinand (2006): § 84 Verteidigung und Bundeswehr, in: Isensee, Josef/Kirchhof, Paul (eds.), Handbuch des Staatsrechts der Bundesrepublik Deutschland, vol. IV, 3rd ed., C.F. Müller Verlag: Heidelberg, pp. 633–669.
- Kokott, Juliane/Hummel, David (2021): Art. 12a, in: Sachs, Michael (ed.), Grundgesetz Kommentar, 9th ed., C.H. Beck: Munich.
- Mehde, Veith (2023): Art. 12a, in: Dürig, Günter/Herzog, Roman/Scholz, Rupert (eds.), Grundgesetz – Kommentar, LfG 102, August 2023, C.H. Beck: Munich.
- Mühle, Johannes (2023): Ohne Reserve ist alles nichts. Zu Sachstand und Handlungsbedarfen der personellen Bundeswehrreserve (#GIDSresearch 3/2023), German Institute for Defence and Strategic Studies: Hamburg, https://gids-hamburg.de/wp-content/uploads/2023/08/GIDSresearch_2023_03_Muehle_230717.pdf, last accessed on 5 March 2024.
- Rath, Christian (2023a): Schwedisches Modell nur mit Grundgesetzänderung, in: Legal Tribune Online dated 27 December 2023, <https://www.lto.de/recht/hintergruende/h/schwedisches-modell-in-deutschland-personal-bundeswehr-wehrpflicht-verfassung/>, last accessed on 5 March 2024.
- Rath, Christian (2023b): Debatte um neue Wehrpflicht: Wehrdienst wie in Schweden?, in: TAZ dated 28 December 2023, <https://taz.de/Debatte-um-neue-Wehrpflicht/!5979430/>, last accessed on 5 March 2024.
- Richter, Christian (2022a): Wir müssen den Frieden in Europa militärisch sichern, in: FAZ Einspruch Magazin dated 25 February 2022, <https://www.faz.net/einspruch/militaerische-absicherung-17835122.html#void>, last accessed on 26 February 2024.
- Richter, Christian (2022b): Die demokratische Antwort des Staatsbürgers auf den Angriffskrieg. Über die gebotene Wiedereinsetzung der allgemeinen Wehrpflicht, in: Die Öffentliche Verwaltung 23/2022, pp. 979–988.
- Schiffbauer, Björn (2022): Verfassungsrechtliche Aspekte einer allgemeinen Dienstpflicht, in: Zeitschrift für das gesamte Sicherheitsrecht – GSZ 5, special edition 2022, pp. 55–60.
- Sevecke, Torsten (2024): Notstandsverfassung in der Zeitenwende (Teil 1), in: Neue

- Zeitschrift für Wehrrecht – NZWehrr 1/2024, pp. 14–35.
- SPIEGEL online (2023): SPD-Chefin Esken stemmt sich gegen Wehrpflicht-Vorstoß von Pistorius, 20 December 2023, <https://www.spiegel.de/politik/deutschland/bundeswehr-saskia-esken-gegen-wehrpflicht-idee-von-boris-pistorius-a-5339becd-706b-4791-b6fb-3907248675ef>, last accessed on 5 March 2024.
- Staib, Julian (2023): Taugt Schwedens Wehrpflicht als Vorbild?, in: FAZ dated 19 December 2023, <https://www.faz.net/aktuell/politik/ausland/wehrpflicht-taugt-schwedens-modell-als-vorbild-fuer-deutschland-19393494.html>, last accessed on 26 February 2024.
- Stampehl, Linus/Diersmann, Tim (2023): Mehr Norwegen wagen(?). Verfassungsrechtliche Zulässigkeit einer Wehrpflicht nach norwegischem Modell, in: Neue Zeitschrift für Wehrrecht – NZWehrr 5/2023, pp. 257–264.
- Strand, Sanna (2021): The “Scandinavian model” of Military Conscription: A Formula for Democratic Defence Forces in 21st Century Europe? (Policy Analysis 5, 23 December 2021), Österreichisches Institut für Internationale Politik: Wien, <https://www.oiiip.ac.at/cms/media/policy-analysis-scandinavian-model-of-military-conscription.pdf>, last accessed on 26 February 2024.
- Wiegold, Thomas (2024): Dänemark will Wehrpflicht auch für Frauen einführen, in: Augen geradeaus! dated 13 March 2024, <https://augengeradeaus.net/2024/03/daenemark-will-wehrpflicht-auch-fuer-frauen-einfuehren/>, last accessed on 18 March 2024.