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In the military appeal proceedings

of the Mr ...

AZ.

and

of the Mr ...

AZ. ...

In view of the legal questions which the Discerning Senate, in accordance with its communication of 24 March 2022, would like to discuss at the hearing on 2 May 2022, I would like to make the following comments on the question of the formal legality of the "amendment to the decree" which is the subject of the dispute here, or of the decision to include corona protection injections in the basic vaccination scheme of the Federal Armed Forces.

With regard to the question of which vaccines and gene-based injections - with a binding effect for all affected members of the armed forces - can be included in the basic vaccination scheme of the armed forces, the Federal Minister of Defence obviously has no competence to prescribe.

According to Art. 2 para. 2 sentence 3 GG, however, the right to life and physical integrity "may only be interfered with on the basis of a law".

The fact that the corona protection injections interfere with these fundamental rights has already been made sufficiently clear by our colleague Prof. Dr. Martin Schwab and therefore does not need to be elaborated on here.

In any case, such a competence to issue ordinances cannot be inferred from § 17 a SG, § 93 SG also not, but there it should actually be found.

What in § 93 SG not everything is regulated at ordinance authority. There it says (quote):

"(1) The Federal Government shall issue the statutory instruments relating to.

1. the secondary employment of soldiers in accordance with section 20(7),
2. the careers of soldiers under section 27(1),
3. the leave of soldiers under section 28(4),
4. the provisions on parental leave for soldiers under section 28(7), second sentence,
5. the anniversary bonuses pursuant to § 30 (4),
6. the regulations on maternity protection for female soldiers in accordance with § 30 Para. 5 Sentence 2,
7. the extension of the period of service of temporary soldiers under section 54(3)(1),
8. the reimbursement of expenses, loss of earnings and representation costs pursuant to section 70 subs. 1 sentence 6,
9. the competence and the procedure in the case of indisposition pursuant to section 68 subs. 2 third sentence.
10. (omitted)

(2) The Federal Ministry of Defence shall issue the ordinances on

1. the regulation of the relationship of superiors in accordance with § 1 paragraph 3,
2. the requirements for the appearance of soldiers in accordance with § 4 paragraph 4,
3. the non-commissioned officer examinations and the officer examinations in accordance with section 27(7),
- 4.

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- the arrangements for allowing free transport under section 30(6),
 - 5. the arrangement of part-time employment in accordance with § 30a,
 - 6. the regular working hours and the measures to ensure the best possible occupational health and safety in the case of special activities in accordance with section 30c(5),
 - 7. the non-application of section 30c(1) to (3) and (5) under section 30c(6),
 - 8. increasing the maximum permissible average weekly working time pursuant to section 30d(1), first sentence, and ensuring the best possible occupational health and safety pursuant to section 30d(2),
 - 9. the minimum periods of service in accordance with Article 46(3).
- (3) The Federal Ministry of Defence shall, in agreement with the Federal Ministry of the Interior, for Building and the Federal Ministry of the Interior and the Federal Ministry of Finance, issue the statutory orders on
- 1. the training allowance referred to in Article 30(2),
 - 2. the reimbursement of the costs of family and domestic help in accordance with Article 31(8).
- (4) The statutory instrument under subsection (1)(9) shall require the consent of the Bundesrat. " **(End of quote)**

It is therefore all the more surprising what has clearly not been regulated there.

It is highly remarkable that regulatory complexes such as the appearance of soldiers, which obviously cannot be connected with measures of particular intensity of intervention, can only be regulated by legal ordinance, but nowhere in the SG is there a clear legal authorization or a competence to issue ordinances for the concretization of the obligation to vaccinate or even for - moreover still experimental - genetic injections.

The competence to issue regulations according to § 20 para. 6 IfSG - in contrast to § 17 a SG - explicitly refers to "protective vaccination" (and thus not to genetic injections), but concerns a different group of addressees and, moreover, exclusively empowers the Federal Minister of Health, not the Federal Minister of Defence.

It also applies to § 17 a SG that the wording of a law sets the limits of its grammatical interpretation. In the interest of clarity, Section 20(6) IfSG also speaks of "protective vaccinations" and not of "medical measures".

And since the colleague Prof. Dr. Martin Schwab has already exhaustively explained why the coronavirus injections in dispute cannot be "medical measures" within the meaning of § 17 a para. 1 no. 1 SG, reference is also made to this in order to avoid repetition.

But anyway:

It is most remarkable that a question as far-reaching and affecting so fundamentally the basic rights of soldiers to life and physical integrity as that of which vaccines and injections should be included in the basic vaccination scheme of the Bundeswehr has so far apparently been regulated merely on the basis of a kind of "administrative practice" reminiscent of customary law, i.e. by a "daily order" or an "injunction" or a "decree" of the Federal Minister of Defence.

It is indisputable that the coronavirus protection injections have not been included in the basic vaccination scheme of the Federal Armed Forces by a statutory order, just as the entire basic vaccination scheme of the Federal Armed Forces has not been made obligatory by a statutory order.

Such a practice must finally be clearly rejected on the basis of constitutional principles such as legal certainty.

The lack of a clear basis for authorisation cannot be compensated for by carrying out a kind of "co-determination procedure" prior to such "amendments to decrees" or "orders of the day".

The participation of a staff council cannot compensate for the lack of a basis for authorisation. Nor can the members of the staff council - which requires no further justification - decide in a legally binding manner to the detriment of the other soldiers whether they must tolerate encroachments on the fundamental rights affected here.

Schmitz
Lawyer