The Undefined Remains Unprotected: Tensions Between Conscience and the Law in Germany by Way of Joseph Isensee

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I. INTRODUCTION

Most English-speaking lawyers are unfamiliar with the work of Joseph Isensee,[1] an eminent jurist and sometime contender with Jürgen Habermas,[2] as well as a leading writer on the law of the German Constitution. Isensee's *Handbook of German Constitutional Law* has been a leading text for many years,[3] and his various interventions over

1. Isensee is well known in the field of constitutional law of the Federal Republic of Germany and the author, inter alia, of HANDBUCH DES STAATSRECHTS DER BUNDESREPUBLIK (J. Isensee & P. Kirchhof eds., 2014), now in thirteen volumes. According to Jo Eric Khushal Murkens, "the statistics are mindboggling. [The *Handbuch*] has involved 132 authors (roughly a third of all constitutional scholars in Germany) in ten volumes (eight are in their third edition) with almost 12,000 pages. It contains the biggest discussion by far of the state." *See* JO ERIC KUSHAL MURKENS, FROM EMPIRE TO UNION: CONCEPTIONS OF GERMAN CONSTITUTIONAL LAW SINCE 1871, at 81 (2013).

As well, his name appears in English databases quite frequently—for example, there are 125 references under "secondary sources" of the Westlaw legal database. The most recent include the following: Stephan Jaggi, *Revolutionary Constitutional Lawmaking in Germany—Rediscovering the German 1989 Revolution*, 17 GERMAN L. J. 579, 581 (2016); Michael Lysander Fremuth, *Patchwork Constitutionalism, Constitutionalism, and Constitutional Litigation in Germany and Beyond the Nation State—A European Perspective*, 49 DUQ. L. REV. 339, 340 (2011). David Currie of Chicago Law School was, according to Peter E. Quint, known to be fond of citing Isensee's *Handbuch des Staatsrechts der Bundesrepublik Deutschland*. *See* Peter E. Quint, *David Currie and German Constitutional Law*, 9 GERMAN L.J. 2081, 2094 (2008).

2. *See* MATTHEW G. SPECTER, HABERMAS: AN INTELLECTUAL BIOGRAPHY 159-60, 164, 187 (2010) (contrasting Isensee's views with those of Habermas). Habermas's role as a public intellectual includes the following on religious pluralism: Jürgen Habermas, *Religious Tolerance: The Pacemaker for Cultural Rights*, 79 PHILOSOPHY 5, 5-18 (2004).

3. *See* HANDBUCH DES STAATSRECHTS DER BUNDESREPUBLIK, *supra* note 1; MURKENS, *supra* note 1; Fremuth, *supra* note 1; Jaggi, *supra* note 1; Quint, *supra* note 1.

time have led to a number of significant awards, including the Ring of Honour of the Görres-Gesellschaft in 2013.[4]

The aim of this Article is to translate[5] and comment upon some of Isensee's work and the arguments surrounding conscience protection under the German Basic Law (*Grundgesetz*).

Debates in Germany over conscience-protection can take many forms and concern many perennial issues. By way of example, Germany's longest-serving Chancellor,[6] Angela Merkel, has often expressed concern about immigration and the increasing strains placed upon the German Basic Law by competing visions of the democratic state.[7] The recent German federal election of 2017, with its blurred result and half-built coalitions, has only exacerbated these tensions.[8]

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4. Awarded yearly since 1977 to "deserving personalities of scientific and public life." Other recipients include philosopher Josef Pieper (1990) and theologian Walter Cardinal Kasper (2008). *Bearers of the Ring of Honor Since 1977*, GORRES GESELLSCHAFT, https://www.goerres-gesellschaft.de/gesellschaft/ehrening.html (last visited Oct. 25, 2018).

5. According to David Bellos, "The variability of translations is incontrovertible evidence of the limitless flexibility of human minds." DAVID BELLOS, IS THAT A FISH IN YOUR EAR?: TRANSLATION AND THE MEANING OF EVERYTHING 9, (2011). Within reason, I hold with this flexibility.

6. Technically, the noun denoting a female Chancellor is "*Bundeskanzlerin*." Judith Vonberg, *Angela Merkel Sworn in for Fourth Term as German Chancellor*, CNN EUR. (Mar. 14, 2018), https://edition.cnn.com/2018/03/14/europe/merkel-chancellor-fourth-term-germany-intl/index.html.

7. Philip Oltermann, *Angela Merkel Pledges to Cut German Immigration Figures but Rejects Limit*, GUARDIAN (Dec. 14, 2015), https://www.theguardian.com/world/2015/dec/14/Angela-merkel-pledge-cut-german-immigration-figures.

8. No party won an outright majority and, as at the time of writing, negotiations over government formation were ongoing. The rise of the previously unrepresented party known as *Alternativ für Deutschland* (Alternative for Germany) has also complicated matters. Article 21(2) of the Basic Law protects the German constitution and allows for the banning of political parties:

> 21 (2) Parties that, by reason of their aims or the behaviour of their adherents, seek to undermine or abolish the free democratic basic order or to endanger the existence of the Federal Republic of Germany shall be unconstitutional. The Federal Constitutional Court shall rule on the question of unconstitutionality.

Such attempts were successful in 1952 and 1956 (against neo-Nazi and Socialist groups respectively). GRUNDGESETZ [GG] [BASIC LAW], art. 21 § 2 (Ger.), *translation at* https://www.btg-bestellservice.de/pdf/80201000.pdf; *see* Donald P. Kommers, *German Constitutionalism: A Prolegomenon*, 40 EMORY L.J. 837, 854 (1991). In 2017, the Federal Constitutional Court declined to take action against the National Democratic Party (NDP): "Although the National Democratic Party 'pursues aims contrary to the Constitution,' there was a lack of 'concrete supporting evidence' that the neo-Nazi party would be able to successfully achieve its goals and to pose a genuine threat, said Andreas Vosskuhle, the president of the court." Melissa Eddy, *German Court Rejects Effort to Ban Neo-Nazi Party*, N.Y. TIMES (Jan. 17, 2017), https://www.nytimes.com/2017/01/17/world/europe/german-court-far-right.html.

The idea of welcoming immigrants out of compassion—and perhaps at the same time with an eye to continuing economic security—has, for the past fifteen or more years, been tempered with the concept of a *Leitkultur* (dominant culture), in which German-ness plays a central role in binding the country together during stressful or centripetal times.[9] This sets up a debate imbued with a heady mix of law, economics, religion, and fundamental rights.[10] German constitutional cases centered upon Islamic headscarves,[11] witness's oaths,[12] Christian crucifixes on Bavarian classroom walls,[13] ritual slaughter,[14] ceremonies of circumcision,[15] and blood transfusions[16] have all contributed to the legal framework within which the broader debate over *Leitkultur* takes place.[17]

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9. The debate over *Leitkultur* has resurfaced in recent years:

> The concept of a *Leitkultur*—a guiding, dominant or leading culture—is back after the debate had died down somewhat for a while. This controversial term, which has been haunting Germany since the start of the millennium, is now experiencing a renaissance in view of the sharp rise in refugee numbers. Everything revolves around one fundamental question: what is the basis for Germany society?

Pascal Beucker, *Integration Debate: The Leitkultur Renaissance*, GOETHE INSTITUT (Chris Cave, trans., Mar. 2016), https://www.goethe.de/en/kul/ges/20721837.html. The debate became more impassioned following an amendment to German citizenships laws in 2000, in which the *jus sanguinis* principle overtook the principle of *jus soli*.

10. Axel Frhr. von Campenhausen, *The German Headscarf Debate*, 2 BYU L. REV. 665, 665 (2004); Press Release, Bundesverfassungsgericht, Constitutional Court Rules a General Ban on Headscarves for Teachers at State Schools Is Not Compatible with the Constitution (Mar. 13, 2015), https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2015/bvg15-014.html.

11. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] 2015, 1 BvR 471/10, 1 BvR 1181/10, paras. 1-31 (Ger.) ("The protection afforded by the freedom of faith and the freedom to profess a belief (Basic Law art. 4 secs. 1 and 2) guarantees educational staff at interdenominational state schools the freedom to cover their head in compliance with a rule perceived as imperative for religious reasons. This can be the case for an Islamic headscarf."); *see* von Campenhausen, *supra* note 10.

12. BVerfG 1972, 2 BvR 75/71 (23, 33) (Ger.) (holding that the German Constitution should accommodate a Priest who refused to swear an oath because of a prohibition against oath-taking).

13. BVerfG 1987, 11 BvR 1087/91 (Ger.) ("The affixation of a cross or crucifix in the classrooms of a State compulsory school that is not a denominational school infringes art. 4(1) Basic Law.").

14. BVerfG 2002, 1 BvR 1783/99, paras. 1–61 (Ger.) (holding that ritual slaughter is an allowable exception under Article 4 of the Basic Law).

15. *See* Marianne Heimbach-Steins, *Religious Freedom and the German Circumcision Debate* 1-16 (European Univ. Inst., Robert Schuman Ctr. for Advanced Studies, EUI Working Paper RSCAS 2013/18), http://cadmus.eui.eu/handle/1814/26335 (discussing a controversial court ruling in May 2012, which decided that the circumcision of boys was equal to grevious bodily harm; after wide debate, including amongst the Jewish and Muslim communities in Germany, the law was changed to protect the practice on religious grounds).

Often, the United States also focuses on such matters, especially recently, when a new Justice was appointed to the U.S. Supreme Court.[18] So too, in England,[19] Northern Ireland,[20] the European Union (EU),[21] Australia,[22] and in other nations,[23] the strains of accommodating conscience and religious identity are becoming more apparent.[24]

Parts I and II of this Article will introduce and describe the problem in the context of recent German history on the topic. Parts III–IX will outline Isensee's thought, as set out in his 1993 essay, *Gewissen im Recht: Gilt das allgemeine Gesetz nur nach Maßgabe des individuellen*

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16. BVerfG 1971, 1 BvR 387/65 (Ger.) (holding that under Article 4 of the Basic Law, the criminal law of Germany must yield to the right to refuse blood transfusions on the basis of religious belief).

17. For a quick overview of the case law until 2004, *see* Edward J. Eberle, *Free Exercise of Religion in Germany and the United States*, 78 TUL. L. REV. 1023, 1030 (2004).

18. *See* Tara Helfman, *Patriotic Gorsuch*, COMMENTARY (Feb. 2017), https://www.commentarymagazine.com/articles/patriotic-gorsuch/ ("In *Hobby Lobby v. Sebelius*, [nominated Justice] Gorsuch sided with the majority of the Tenth Circuit in holding that the Religious Freedom Restoration Act exempted closely held corporations from providing coverage for contraceptives that they viewed as abortifacients on the ground that doing so would violate sincerely held religious beliefs. And in *Little Sisters of the Poor v. Burwell* [794 F. 3d 1151, 1151 (2015)], Gorsuch joined in a blistering dissent that took the majority to task for denying the plaintiffs' appeal from HHS certification requirements for contraceptive coverage."). At the time of writing this article, upcoming cases to be decided by the U.S. Supreme Court include *National Institute of Family & Life Advocates v. Xavier Becerra*, 138 S. Ct. 464 (Nov. 13, 2017), *cert. granted* (on whether the California Reproductive FACT Act violates of the First Amendment) and *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 137 S. Ct. 2290 (June 26, 2017), *cert. granted* (on whether Colorado's public accommodations can compel the creation of expression that may violate sincerely held religious beliefs).

19. Bull v. Hall [2013] UKSC 73 (Eng.) (holding that hotel owners had discriminated against a civilly married couple of the same sex).

20. Lee v. Ashers Baking Co. Ltd. [2015] NICty 2 (N. Ir.) (holding that a baking company had unlawfully discriminated against the Plaintiff on the basis of sexual orientation). Upheld on appeal in Lee v. McArthur & Ors [2016] NICA 39 (N. Ir.).

21. Genov v. Bulgaria, 40524/08 Eur. Ct. H.R. 275 (2017) (E.U.) (holding that Bulgaria had violated Article 9 of the Convention for the Protection of Human Rights and Fundamental Freedoms by refusing to register the "The International Society for Krishna Consciousness (ISKCON)—Sofia, Nadezhda"). Bulgaria has been a member of the EU since 2007.

22. See for example, the case of Moutia Elzahed, who refused to stand for a judge in the New South Wales District Court in 2016 and has been charged with "disrespectful behaviour in court." *See* Ursula Malone, *Islamic State Recruiter's Wife Moutia Elzahed Charged for Refusing to Stand in Court*, ABC NEWS (May 8, 2017), http://www.abc.net.au/news/2017-05-08/isis recruiters-wife-charged-for-refusing-to-stand-incourt/8508332; *see also* Daniel Pietrowski, *EXCLUSIVE: Burqa-Wearing Muslim Wife of Terrorist Recruiter Must Cough up $250,000 for Failed Lawsuit—and Faces Jail for "Refusing to Stand for a Judge Because She Only Stands for Allah,"* DAILY MAIL (June 30, 2017), http://www.dailymail.co.uk/news/article-4652992/Moutia Elzahed-ordered-pay-police-250k-legalcosts.html#ixzz54rqmZnHr.

23. For example, France.

24. REINHOLD ZIPPELIUS, ALLGEMEINE STAATSLEHRE: POLITIKWISSENSCHAFT 198-201 (17th ed. 2017).

Gewissens? (*Law and Conscience: Does the General Law Apply Only According to the Measure of Individual Conscience?*).[25] These Parts will emphasize rendering the original work in English as accurately as possible, while providing ease of understanding for non-German speakers and non-lawyers alike. Where appropriate, complexities will be explained and concepts expanded.

Part X will offer some brief suggestions for further investigation.

II. THE PROBLEMS OF PLURALISM

The problems of pluralism (*Pluralismus*) are much discussed in German legal culture. Particular expression of the concept is found in the foundational texts on politics and law. Thus, we find Reinhold Zippelius, in his much cited and widely translated *Allgemeine Staatslehre* (*General Political Science*),[26] devoting considerable space to the idea of *Der pluralistische Staat* (the pluralist state) and the various "opportunities for influence" inside democracy. Zippelius notes at the outset that "pluralism is disruptive"[27] and that Thomas Hobbes was a decisive opponent of associations within the state—which act like "worms in the entrails of a natural man."[28] The solution to this weakness for conflict is centralized power.[29]

But the German Basic Law has pluralism as one of its "constitutive structural principles,"[30] and this means that other solutions must be found. Zippelius notes: "In contrast to [Hobbes], and according to the current understanding of democracy, social and political groupings express influence on the state's decision-making process via the [public] assertion of their interests and opinions."[31]

This expression then leads to a search for "consensual compromises"[32] and a form of "open competition of interests and

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25. Josef Isensee, *Gewissen im Recht; Gilt das allgemeine Gesetz nur nach Maßgabe des individuellen Gewissens?* [*Conscience in Law; Does the General Law Only Apply in Accordance with the Individual Conscience?*], in DER STREIT UM DAS GEWISSEN 41, 41 (Gerhard Höver ed., 1993) [hereinafter Isensee, *Conscience in Law*].

26. ZIPPELIUS, *supra* note 24. The work has been translated into Portuguese, Spanish, Latvian, and, in 2011, Chinese.

27. *Id.* at 198.

28. THOMAS HOBBES, LEVIATHAN, OR, THE MATTER FORME AND POWER OF A COMMONWEALTH ECCLESIASTICAL AND CIVIL ch. 29 (eBooks@Adelaide ed., 2016) (ebook).

29. ZIPPELIUS, *supra* note 24, at 199.

30. *Id.*

31. *Id.*

32. *Id.*

opinions"[33] as well as the formation of coalitions.[34] The ultimate compromise is found at the ballot box.

This multiplicity of views and ideas provides a defense against totalitarianism states and adds to the "trial and error" nature of the democratic process.[35] There are, however, a number of acknowledged disadvantages to this system, including the short-term nature of agreed upon compromises, their potential lack of philosophical coherence, and excessive bureaucracy. Such disadvantages are seen as the price to be paid for keeping totalitarianism at bay.[36] They also allow for a wide range of folkish, economic, religious, and ideological factors to become *politically* engaged, which is only achievable when citizens are prepared to dispose of their own preferences for an ideal state in favor of "the legitimation of a multi-perspective viewpoint."[37] Zippelius quotes Krüger, his intellectual predecessor,[38] to drive home his point:

> Thus the citizen must forego the [fantasy] state that reflects only his own cherished ideals and accept that state power will enforce, even violently, ideas quite contrary to his own. Rather, such a citizen can be sure that the same "fate" will not be extended to others as he originally had in mind for them.[39]

This is not to deny that the admission of such serious divergences can only safely take place within the context of a larger and more fundamental constitutional consensus (*Grundkonsenses*). The first and fundamental "rule of the game" of an open society, however, is that the equal participation and dignity of each is to be constantly respected and maintained.[40] Such equal participation belongs to each individual

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33. *Id.* at 200.

34. *Id.* at 202.

35. *Id.* at 199-201 (mentioning this "trial and error" process [using those English words] multiple times in his exegesis).

36. *Id.* at 200.

37. *Id.* at 119, 201.

38. Kruger is the author of an earlier text on the same theme as Zippelius's. *See* Wilhelm Henke, *Allgemeine Staatslehre. 3. neubearb. Aufl. by Reinhold Zippelius*, 11 DER STAAT 561, 561-63 (1972).

39. ZIPPELIUS, *supra* note 24, at 201 (quoting HERBERT KRUGER, ALLGEMEINE STAATSLEHRE 184 (2d ed. 1964)).

40. *Id.* at 201. There are obvious echoes of KARL R. POPPER, THE OPEN SOCIETY AND ITS ENEMIES (1954). Popper is, indeed, acknowledged in the beginning of this section along with others such as JOSEPH A. SCHUMPETER, KAPITALISMUS, SOZIALISMUS UND DEMOKRATIE (engl. 1942); JAKOBUS WÖSSNER, DIE ORDNUNGPOLITISCHE BEDEUTUNG DES VERBANDESWESENS (1961); and KENNETH J. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES (3d ed. 1966). Popper had a serious influence on post-war Germany. *See* IAN CHARLES JARVIE & SANDRA PRALONG, POPPER'S OPEN SOCIETY AFTER FIFTY YEARS: THE CONTINUING RELEVANCE OF KARL POPPER (1999).

regarding their contributions towards the building up of public opinion (*öffentliche Meinung*) in the political process.[41] Zippelius then ties this into specific provisions of the Basic Law in Articles 1, 18, 20, 21, and 79, sentence 3.[42]

A. The Problem in the Context of the Law of German Military Service

The case of German compulsory military service sharply illustrates tensions that can exist between conscience and an individual's duties to the state during times of major conflict or even threats to its existence. Decisions of the *Bundesverfassungsgericht* (Federal Constitutional Court) since World War II[43] are particularly noteworthy[44] owing to two important sections of the Germany Constitution (Basic Law).

In the first place, one considers freedom of faith, conscience, and creed, which are guaranteed by Article 4 of the Basic Law:

> (1) Freedom of faith and of 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 render military service involving the use of arms. Details shall be regulated by a federal law.[45]

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41. ZIPPELIUS, *supra* note 24, at 201.

42. The Basic Law guarantees human dignity and contains the well-known statement, "Human Dignity shall be inviolable" (*Die Würde des Menschen ist unantastbar*). GG art. 1 (Ger.). These words famously appear on the wall of the Landgericht in Frankfurt am Main. Article 18 threatens a forfeiture of the basic rights set out in earlier Articles for those who work against the "free democratic basic order." *Id.* art. 18. The Basic Law derives all state authority from the people and gives Germans "the right to resist any person seeking to abolish this constitutional order, if no other remedy is available." *Id.* art. 20. It acknowledges political parties but brands as unconstitutional those who "by reason of their aims or the behaviour of their adherents, seek to undermine or abolish the free democratic basic order or to endanger the existence of the Federal Republic of Germany." *Id.* art. 21. Sentence 3 provides, "Amendments to this Basic Law affecting the division of the Federation into *Länder*, their participation on principle in the legislative process, or the principles laid down in Articles 1 and 20 shall be inadmissible." *Id.* art. 79.

43. The Court was established in 1951. Taylor Cole, *The West German Federal Constitutional Court: An Evaluation After Six Years*, 20 SOUTHERN POL. SCI. ASS'N 278, 278 (1958).

44. *See* Josef Isensee, *Bundesverfassungsgericht quo vadis*?, 51 JURISTENZEITUNG 1085, 1085-93 (1996).

45. Translation taken from the website of the German Federal Government, GG art. 4 (Ger.), *translated at* https://www.btg-bestellservice.de/pdf/80201000.pdf. This section was drafted within the historical context of Section III (comprising Articles 135-141) of the Weimar Constitution, which dealt with religious freedom). *See also* Jan Ginter Deutsch, *Some Problems of Church and State in the Weimar Constitution*, 72 YALE L.J. 457 (1963). *See generally* Gerhard Robbers, *Religious Freedom in Germany*, 2001 BYU L. REV. 643 (2001).

In the second place, there exists a distinctive aspect of the German Constitution, by which citizens may object to participating in a form of national conscription known as *Wehrpflicht*,[46] under which males of a specified age were constitutionally required to participate in military service. Placed in abeyance in 2011,[47] the Basic Law retains Article 12(a)(1) under which: "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 defense organization."[48]

This provision is modified by Article 12(a)(2), which provides in part: "Any person who, on grounds of conscience, refuses to render military service involving the use of arms may be required to perform alternative service."[49]

Both of these provisions use the noun "conscience" and so necessitate some judicial consideration of the term.

B. Conscientious Objection—The Case Law

In deciding upon the validity of the wording of the modification in Article 12(a), the judges of the German Federal Constitutional Court in the Second Conscientious Objection Judgment of 1985 (BVerfGE 69, 1) recognized directly what was at stake:

> Constitutionally mandated equality as regards civic duty in the form of universal military service . . . gives rise to the duty of the legislature to ensure that only those persons are exempted from military service who have decided to refuse to render military service involving the use of arms on grounds of conscience under Article 4.3 sentence 1 of the Basic Law; this duty represents an obligation of high order towards the community. This means on the one hand that the state, which gives precedence to decisions to refuse to render military service involving the use of arms even in the event of a threat to its existence, must be protected against abusive invocation of this fundamental right. On the other hand, it is also

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46. *See* Wehrpflichtgesetz [WPflG] [Conscription Act], July 21, 1956 (Ger.).

47. *See, e.g.*, Lauren Tucker, The End of the Wehrpflicht: An Exploration of Germany's Delayed Embrace of an All-Volunteer Force (2011) (unpublished M.A. thesis, University of North Carolina at Chapel Hill) (on file with the Carolina Digital Repository), https://cdr.lib.unc.edu/record/uuid:361d39a1-71ec-4381-94cb-d5bc383e201f. There have been recent calls for its reintroduction. *See* Timo Frasch, *Die Aussetzung der Wehrpflicht war ein Fehler* [*Suspension of Military Service Was a Mistake*], FRANKFURTER ALLGEMEINER ZEITUNG (May 11, 2017), http://www.faz.net/aktuell/politik/inland/afd-politikeruwe-junge-im-gespraech-ueber-die-bundeswehr-15010648.html.

48. GG art. 12(a)(1) (Ger.).

49. *Id.* at art. 12(a)(2).

> necessary to protect the freedom of conscience itself, which is threatened precisely when it can be used to avoid fulfillment of general civic duties.[50]

Drawing the line of demarcation between the fundamental freedom of conscience and the state's right to call upon citizens to bear arms in its defense is fraught with uncertainty, as leading authors have only recently attested.[51] The Conscientious Objection Judgment itself was also seen as controversial since (as it has been argued) the case was illogically decided.[52]

Questions of gender discrimination in the area of compulsory military service have also been the subject of debate but lie beyond the scope of this Article, as does the issue of overrepresentation of former East-Germans in the military.[53]

In 1993,[54] Isensee considered the question of conscience, including the *Wehrpflicht* conscience clause, in a discussion that appeared in a book of essays entitled *Der Streit um das Gewissen* (the *Conscience in Controversy*).[55]

Isensee observed that the major issues at stake here include:

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50. Translation by Donna Elliott of the Second Conscientious Objection Judgment—Decisions of the Federal Constitutional Court (*Entscheidungen des Bundesverfassungsgerichts*—BVerfGE 69, 1), 60 YEARS GERMAN BASIC LAW: THE GERMAN CONSTITUTION AND ITS COURT LANDMARK DECISIONS OF THE FEDERAL CONSTITUTIONAL COURT OF GERMANY IN THE AREA OF FUNDAMENTAL RIGHTS 269 (Jürgen Bröhmer et al. eds., 2d ed. 2012).

51. *See, e.g.*, Kent Greenawalt, *Individual Conscience and How It Should Be Treated*, 31 J.L. & RELIGION 306, 306-20 (2016).

52. *See* JUSTIN COLLINGS, DEMOCRACY'S GUARDIANS: A HISTORY OF THE GERMAN FEDERAL CONSTITUTIONAL COURT, 1951-2001, at 211-12 (2015) (outlining the case and its contested reasoning that would "redden the cheeks of proverbial Jesuit"). The controversy centered on the court's finding that a twenty-month "alternative" to military service—in opposition to a fifteen-month military service—was not contrary to the exact wording of Article 12 of the Basic Law, which stated that "the duration of the alternative service may not exceed the duration of military service." Justices Böckenförde and Mahrenholz offered strong dissents and *Der Spiegel* responded with a scathing headline, *20=15*, on April 29, 1985.

53. Karen Raible, *Compulsory Military Service and Equal Treatment of Men and Women—Recent Decisions of the Federal Constitutional Court and the European Court of Justice* (Alexander Dory v. Germany), 4 GERMAN L.J. 299 (2003); Alan Cowell, *The Draft Ends in Germany but Questions of Identity Remain*, N.Y. TIMES (July 1, 2011), https://www.nytimes.com/2011/07/01/world/europe/01germany.html ("[G]ender seems to be less of an issue in the German debate than the origin of those who do volunteer. . . . [W]hile only 16 percent of the German population of 82 million lives in the former East Germany, easterners make up 30 percent of military personnel.").

54. Isensee, *Conscience in Law*, *supra* note 25.

55. My own translation. A more literal translation might be "the dispute(s) surrounding the (legal concept of) conscience" or, more loosely, "conscience in dispute."

- The inherent tensions between individual conscience and the state,[56]
- The diminution of any potential conflict between conscience and the state by employment of a concept of state neutrality,[57]
- Conflicts in the so-called *forum externum*,[58] and
- The juridical problems inherent in declaring a legal definition of conscience.[59]

We turn now to his explication of these issues.

III. THE INHERENT TENSIONS BETWEEN CONSCIENCE AND THE STATE

A. The Tension Defined

Like other scholars in the area,[60] Isensee acknowledges the ever-present tension between a law of general application and "the law" inherent in the conscience of the individual human person.[61] In German jurisprudence, this is often expressed as the relationship between a "subjective" conscience and an "objective" law.[62]

Isensee notes that the constitutional lawyer and the moral theologian both stand before these diverging concepts and both must attempt to build a satisfactory intellectual bridge between them.[63] On the one hand, conscience represents a subjective law "inside of me" (*in mir*) while, on the other hand, there exists an acknowledged external or objective parameter that is drawn from both morality[64] (*Sittlichkeit*) and from the publically promulgated law, and which presents itself to the individual as a preexisting measure or boundary of action.[65]

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56. Isensee, *Conscience in Law*, *supra* note 25.
57. *Id.*
58. *Id.*
59. *Id.*
60. As one example, see Martha C. Nussbaum, who states, "[i]n the tradition we hear a lot of talk about 'liberty of conscience,' 'equal liberty of conscience,' and so on. I shall argue that the argument for religious liberty and equality in the tradition begins from a special respect for the faculty in human beings with which they search for life's ultimate meaning." *See, e.g.*, MARTHA C. NUSSBAUM, LIBERTY OF CONSCIENCE: IN DEFENSE OF AMERICA'S TRADITION OF RELIGIOUS EQUALITY 19 (2009); *see also* JOCELYN MACLURE & CHARLES TAYLOR, SECULARISM AND FREEDOM OF CONSCIENCE (2011).
61. Isensee, *Conscience in Law*, *supra* note 25, at 41.
62. *Id.*
63. *Id.*
64. *See* HANS REINER, DIE GRUNDLAGEN DER SITTLICHKEIT (1974).
65. Isensee, *Conscience in Law*, *supra* note 25, at 41.

Conscience demands of each individual an absolute moral authenticity; that is to say, an insight into what is "truly moral,"[66] as well as into the "inner justice"[67] of each individual case. Like many commentators, Isensee analyzes this as an individual "court of conscience," in which the individual "I" (*Ich*) functions as both party and judge.[68] Or, in other words, as an individual called upon to act both as an *interpreter* of the law and as the one who *applies* it in each distinct case (*Gesetzesinterpret* and *Gesetzesanwender*, respectively). Notably, the only role that is foreclosed to this individual is that of the "lawgiver" (*Gesetzgeber*).

According to Isensee, this puts the individual conscience in a unique position: it must, in each case, *presuppose* the validity of the (external) law, which it then subsequently interprets.[69] However, since conscience relies upon an (external) moral command, it is not an arbitrary voice, but rather one of moral necessity[70] that, nevertheless, expresses itself subjectively.

Paradoxically, asserts Isensee, this can give rise to a grave tension between "law" and "conscience": there can be no guarantee that the inner-conceived moral command will always coincide with that sourced from the moral law or the legal system. This conflict between the "inner voice" and the external law can arise at any time and is a seminal fault line in their interaction. This fault line can be conveniently named the "Dilemma of Conscience."

B. The Hegelian Solution

The above analysis is preliminary to Isensee's foray into Hegel's twofold nomenclature of the Dilemma of Conscience: the distinction between "authentic" (true) conscience and "formal" conscience.

Hegel recognized the Dilemma of Conscience when he acknowledged a certain "ambiguity" of conscience and differentiated between the idea (*Idee*) of conscience (also called the "authentic" conscience in his terminology *das wahrhafte Gewissen*)[71] and the

66. *Id.*
67. *Id.*
68. *Id.*
69. *Id.*
70. *Id.*
71. Hegel's work on conscience is notoriously difficult. According to Moyar,

> [Hegel's] reference to "true conscience" (§ 137) seems to define anyone's conscience as no more than the disposition to respond correctly to the objectively fixed ethical requirements. This appears to make freedom solely a matter of being disposed to

conscience of a particular individual (called the "formal" conscience, again using his terminology).

Authentic conscience is the "disposition [or conviction] to desire what is good, in and of itself."[72] This conviction has fixed foundations in objective rules and duties.[73] For Hegel, the "idea" (*Idee*) of conscience (i.e., authentic conscience) is sacred, and any interference with it amounts to a sacrilege.[74] This, however, only applies to the idea of conscience and not necessarily to the conscience of the particular individual.[75] "Whether what is held to be good is in fact good is only discernible through the content of what is perceived as good" (*Gutseinsollenden*).[76] Thus formal conscience must be measured and tested against the authentic conscience, which itself represents a rule of reason and a generally valid mode of acting. Mere reliance on "the self" (*das Selbst*) is not sufficient to pass this test.[77] As the keeper of the "reality" of morals, the state is built upon the authentic (but not the

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> behave according to the right norms, and not at all a matter of being self-conscious that one is following the right norms.

See DEAN MOYAR, HEGEL'S CONSCIENCE 15 (2011). Moyar's recent summary (and defense) of his own work on Hegel's Conscience (in his book of the same name) is instructive:

> We can formulate the main problem of modern freedom as the problem of how to understand the relation of conscience's authority to the authority of good reasons or objective ethical content. Does conscience in its full authoritative sense reflect (objective) rational content, or does it (subjectively) determine the content? If it just reflects content that is valid on its own, then conscience seems to be a formal requirement merely tacked on to an already given normative landscape. But if an individual determines content through the appeal to conscience, the very idea of stable rational content available to all agents begins to break down. This unpalatable either/or is met by Hegel with his dynamic account that I call performative freedom, in which content is taken up and altered in the very act of expressing it. Conscience is thus largely a site of combination and synthesis, with the judgments of conscience being concrete instances of ethical action.

See also Dean Moyar, *Summary of Hegel's Consience*, 43 OWL MINERVA 101, 101-06 (2011-2012). Some even question whether Hegel had any coherent body of social thought at all. See, for example, Allen Wood, who warns against the pitfalls of reading too much into Hegel's ethical system and the possibility that readers "will humbug [themselves] into thinking there is some esoteric truth in Hegelian dialectical logic which provides a hidden key to his social thought." ALLEN W. WOOD, HEGEL'S ETHICAL THOUGHT 7 (1990).

72. Isensee, *Conscience in Law*, *supra* note 25, at 40.

73. *Id.*

74. WOOD, *supra* note 71.

75. *Id.*

76. *See* IVAN ALEKSANDROVICH IL'IN, THE PHILOSOPHY OF HEGEL AS A DOCTRINE OF THE CONCRETENESS OF GOD AND HUMANITY: THE DOCTRINE OF HUMANITY (Philip T. Grier ed. & trans., Northwestern U. Press, 2011) (1918).

77. GEORG WILHELM FRIEDRICH HEGEL, PHILOSOPHY OF RIGHT (T.M. Knox trans. Oxford Univ. Press 1967) (1952).

formal) conscience: accordingly, "[T]he state cannot recognize the conscience as subjective knowledge, any more than science can grant validity to subjective opinion, dogmatism, or the appeal to a subjective opinion."[78]

In the end, and according to Hegel's theory of the state, the individual conscience is only compatible with the State when it has imbibed the objective laws of the state.[79] Hegel thus (dis)solves the Dilemma of Conscience in a one-sided way, and in favour of an objective rationality, as pronounced by the State.[80]

IV. REDUCTION OF CONFLICT POTENTIAL IN THE CONSTITUTIONAL STATE

A. Religious Neutrality—No Access to Morality

At first glance, it would seem as if the constitutional state finds a solution to this Dilemma in favor of complete subjectivity. The constitutional state is open to the conscience of the individual, but this is so only because freedom of conscience, which the state guarantees to every human being as a fundamental right, is not directed to the authentic conscience, which exists as an idea on the Hegelian plateau of morality, but to the unskilled formal conscience of everyone.[81]

Thus, from the outset, the possibility of a legal (constitutional) conflict with an individual's conscience has been reduced to a bare minimum.[82] This is achieved by the particular structural limitations placed upon state power and places no reliance at all upon the (recognition of) a fundamental right to freedom of conscience for the citizen. In this way, the concept of conscience is confined to maintaining an external framework for the realization of its inner-workings. The democratic constitutional state is founded not on integral, ultimate truth but on the practical needs of human coexistence.[83] The religious and moral basis of action lies outside its secular horizon.[84] It also follows

78. Isensee, *Conscience in Law*, *supra* note 25, at 42; *see also* HEGEL, *supra* note 77.

79. HEGEL, *supra* note 77.

80. One possible interpretation of this is that Hegel's theory hereby devours the more traditional concept of conscience, leaving only a state-defined husk. *Id.*

81. Isensee, *Conscience in Law*, *supra* note 25, at 42.

82. WOOD, *supra* note 71.

83. JOSEF ISENSEE, VOM STIL DER VERFASSUNGOSEF: EINE TYPOLOGISCHE STUDIE ZU SPRACHE, THEMATIK UND SINN DES VERFASSUNGSGESETZES [ON CONSTITUTIONAL STYLE: A TYPOLOGICAL STUDY OF THE LANGUAGE, THEMES AND MEANING OF THE CONSTITUTION] 13 (2013) [hereinafter ISENSEE, ON CONSTITUTIONAL STYLE].

84. *Id.*

that the question of God's existence—either the God of revealed religion or the god of the philosophers, including even the world-judge and the moral superego in the internalized tribunal of conscience—lie outside the secular horizon. The secular state thus holds itself aloof from the field of religious conflicts.[85]

The constitutional state also avoids the sphere of moral codes out of which moral conflicts arise: the conscience. Such a state endows legality, not morality. It calls for external obedience to legal norms but never for internal assent. The law is modest in its heteronomic validity and does not touch the inner motivation of the citizen. The state does not get involved with conscience. Nor does the state compel the conscience. In the end, conscience lies outside the constitutional system.[86]

B. Conscience Enjoys a "Negative Freedom" Against State Power

It follows then that *conscience itself* is not the foundation stone of the constitutional state (*Rechtsstaat)*[87] but only the *freedom of* conscience.[88] Only this *freedom* can be regarded as a basic right, and it is only this basic right that the individual enjoys when confronted by state power. In other words, it forms a defense in the form of a *status negativus*[89]: an area of private self-determination, which is shielded from state interference. Thus, the basic right protects the integrity of one's moral personality by limiting the action of the state.[90] The concept of

85. Isensee, *Conscience in Law*, *supra* note 25.

86. *Id.* at 43.

87. This is a variation of "rule of law" with additional aspects of justice—the opposite of *Obrigkeitsstaat* (a state with arbitrary use of power).

88. Isensee, *Conscience in Law*, *supra* note 25, at 40.

89. The concept of *status negativus* receives considerable space. ZIPPELIUS, *supra* note 24, at 198. It refers to fundamental rights of the citizen as a defense against the power of the state. It is compared with *status positivus* fundamental rights as "performance rights"—where the citizen can demand something of the state. *See* GG art. 6 § 4 (which provides, "Every mother shall be entitled to the protection and care of the community", *status activus*, fundamental rights as "participation rights"); *id.* art. 38 § 1, para. 2 (voting rights); *id.* art. 33 paras. 1-3 (access to public office); *id.* art. 4 para. 3, art. 12(a) para. 2 (deciding between military and alternative service); and *status passivus* (where someone has only duties and no rights at all, e.g., pure military service without a right to object to the same). The different classifications are part of Georg Jellinek's (1851-1911) positivist theory of the *Rechtsstaat* formulated at the time of Wilhelm II. *See* Gustavo Gozzi, *Rechtsstaat and Individual Rights in German Constitutional History*, *in* THE RULE OF LAW 248 (Pietro Costa & Danilo Zolo eds., 2007).

90. ISENSEE, ON CONSTITUTIONAL STYLE, *supra* note 83.

freedom, from which the basic right of liberal observance[91] originates, is determined negatively, as an absence of state compulsion.[92]

From this, it follows that the state is shut out from the religious or ethical aspects of any "decisions of conscience."[93] The state is no moral censor of conscience.[94] Nor does the state care whether the individual conscience makes the (intellectually) correct decisions.[95] Rather, it merely guarantees a "freedom of conscience." Thus, the Basic Law does not protect any eternal truth but only the individual's exercise of their subjective moral autonomy (*Subjektivität des Menschen*).[96] Again, it follows, at least from the perspective of basic rights (*grundrechtlich qualifiziert*), that nobody has a "bad conscience"—or even a "good conscience"; there is simply no room for any concept akin to "erroneous conscience."[97] The "sunshine" of the Basic Law sheds its light on the just and unjust alike, upon the wise and the foolish, the prudent and the impenitent, together.[98]

In addition, there is no requirement that the individual meet any specific criteria to enjoy the benefits of fundamental rights: these rights are conferred independent of any moral maturity or powers of decision-making attributable to the particular individual and refer only to the person as they are in "the here and now."[99] Consequently, this also excludes any reference to the person as they "should" be or become. It also follows that the formal conscience (in the Hegelian sense of the term) need not undertake any inquiry into whatever may be the claims of the authentic conscience, and there is no requirement that these two concepts of conscience cohere, or even communicate.[100]

This shows the practical consequences of the concept of a "negative freedom,[101]" to which freedom of conscience is bound, as indeed are the other classical fundamental rights.[102]

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91. Isensee uses this phrase (in German, *liberaler Observanz*) elsewhere in his writings. *Id.*

92. Isensee, *Conscience in Law*, *supra* note 25, at 43.

93. ZIPPELIUS, *supra* note 24.

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. The obvious reference is to *Matthew* 5:45 "for he makes his sun rise on the evil and on the good, and sends rain on the just and on the unjust.." *Matthew* 5:45 (Rev. Std. Version).

99. *Hic et nunc* (Latin).

100. *Matthew*, *supra* note 98.

101. Josef Isensee, *Keine Freiheit für den Irrtum* [*No Freedom for Error*], 104 ZEITSCHRIFT DER SAVIGNY-STIFTUNG FÜR RECHTSGESCHICHTE 296, 314 (1987) [hereinafter Isensee, *No Freedom for Error*].

This concept of "freedom" was condemned by the Popes of the nineteenth-century, who accepted only "true" freedom, which was positively defined as freedom to act rightly—"right," that is, from the objective perspective of the Church's Magisterium.[103] Thus, they rejected the claims of subjectivity as encountered in *freedom of* conscience, *freedom of* religion, and *freedom of* expression and teaching. The Popes defended the "rights of truth" against the enlightened and liberalized "rights of freedom."[104] Citing Augustine, they could not accept freedom for error, since "error has no rights."[105]

V. CONFLICT IN THE EXTERNAL FORUM (*FORUM EXTERNUM*)

The potential for conflict between the subjective order of conscience and a law of general application would be almost completely defused if the basic right of freedom of conscience was applied in the *forum internum* (internal forum) alone.[106] That it does so apply is undisputed.[107] The right to "freedom of conscience" is, however, of little practical importance here, since the ability of the state to interfere with the interior person, for example by way of suggestion, narcoanalysis,[108] hypnosis, brainwashing, etc., is also denied by other fundamental rights[109] and objective legal maxims.

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102. *Id.*

103. *Id.*

104. *Id.*

105. Isensee, *Conscience in Law*, *supra* note 25, at 44; *see also Matthew*, *supra* note 98; George Weigel, *Are Human Rights Still Universal?*, COMMENTARY, Feb. 1995, at 41 (noting that the concept was overtaken by the Second Vatican Council). Weigel states,

> A bit closer to modern concerns, the contemporary Roman Catholic development of doctrine on the question of religious freedom nicely illustrates the concept of "emergent understanding." Prior to the Second Vatican Council, it was frequently argued in official Catholic circles that there was no such thing as "religious freedom," because, as the phrase had it, "error has no rights." Vatican II's Declaration on Religious Freedom transcended this sterile debate by insisting that persons, whether their religious opinions were erroneous or not, had rights over against coercive state power; and the Council justified this position by an appeal to the very traditional Catholic notion that the act of faith must be freely made if it is to be, in truth, an act of faith.

For earlier formulations, see the German author. *See* Hans Rommen, *Church and State*, 12 REV. POL. 321, 321-40 (1950). He is not to be confused with the Catholic scholar Heinrich Albert Rommen, 1897-1967.

106. Isensee, *No Freedom for Error*, *supra* note 101.

107. *Id.*

108. E.g., "truth serum" drugs.

109. Including important constitutional rights.

However, according to prevailing (judicial) interpretation, freedom of conscience protects not only the internal decisions of the individual but also their implementation by way of active (and external) action.[110] The right of conscience contains the *freedom to act* in accordance with the "commandments" of one's conscience, which commandments are "inwardly experienced and thereby binding and absolutely imperative."[111] The sphere of protection of a fundamental right extends to the *forum externum* (external forum).[112] This leads in turn to the programming of an inevitable conflict between the conscientious action of the citizen-actor and the general law of the democratic legal state.[113]

VI. A LEGAL EXCEPTION: PRIORITY OF CONSCIENCE BEFORE COMPULSORY MILITARY SERVICE

In one very special case, a conflict in the *forum externum* is governed by the German Basic Law:[114] No one may be forced into

110. Isensee, *No Freedom for Error*, *supra* note 101.

111. Quoting from BVerfG 1978, 2 BvF 1, 2, 4, 5/77 127 (163) (Ger.) (the Conscientious Objector II case). Isensee also refers to Ernst Wolfgang Böckenförde, *Das Grundrecht der Gewissensfreiheit*, 28 VVDStRL 33, 55 (1970). Ernst Wolfgang Bockenforde was "a Catholic associated with the so-called Ritter School in Munster, who [was] a social democratic judge and legal theorist best known for his attempts to liberalize without wholly abandoning the political-theological insights of Carl Schmitt." Peter E. Gordon, *Between Christian Democracy and Critical Theory: Habermas, Böckenförde, and the Dialectics of Secularization in Postwar Germany*, 80 SOC. RES. 173, 185 (2013). Böckenförde left the Court in May 1996.

112. For a discussion of the differences and overlaps between the forum internum and the forum externum in the context of section 18 and 19 of the International Covenant on Civil and Political Rights (ICCPR), see Human Rights Council, Rep. of the Special Rapporteur on Freedom of Religion or Belief on Its Thirty First Session, U.N. Doc. A/ HRC/31/18 (2015). On the question of overlap between the two fora, the Report states,

> *Forum internum* and *forum externum* should be generally seen as a continuum. Their conceptual distinction should not be misperceived as a clear-cut separation of different spheres of life. Just as freedom in the *forum internum* would be inconceivable without a person's free interaction with his or her social world, freedom within the *forum externum* presupposes respect for the faculty of every individual to come up with new thoughts and ideas and to develop personal convictions, including dissident and provocative positions. While providing unconditional protection to the inner nucleus of each individual against coercion and interference, the legally enhanced status of the *forum internum* at the same time improves the prospects of free communication and manifestation within the *forum externum*. In other words, it strengthens freedom of religion or belief and freedom of opinion and expression in all their dimensions, both internal and external.

113. Isensee, *Conscience in Law*, *supra* note 25, at 44.

114. *Sondertatbestand*. This may also be translated as *delictum sui generis*.

military service ("with the use of arms": *Kriegsdienst mit der Waffe*) against their conscience.[115]

This guarantee of conscience is granted to the individual even in situations of very serious conflict, including those in which the state asks its citizens to secure the state's continued existence.[116]

The protection provided by the Basic Law is anything but self-evident for constitutional states with highly developed culture of "basic rights" (*Grundrechtskultur*).[117] For the democratic constitutional state sacrifices a thing of considerable substance (*Substanz*) when it relieves the individual, who appeals to conscience, from the general obligations of citizenship and defense of the state.[118] In essence, we see here a rupture of the ethical boundaries between protection by the state and obedience to the state, the connection between justice and duty.[119] The duty to perform military service:

> is justified by virtue of the fact that that the state, which recognizes and protects human dignity, life, liberty, and property as fundamental rights, can meet this constitutional protection obligation in favor its citizens only with the help of these citizens and their commitment to the existence of the Federal Republic. In other words, the individual rights claim to protection and the community-related duty of citizens of a democratically constituted state to contribute to the safeguarding of this constitutional order correspond to each other.[120]

Thus, the substance (essential kernel) of democracy is contained in the duty to bear arms to protect the state.[121] For in it, the "legitimate child of democracy,"[122] that is to say, the military assertion of the state, becomes a matter for the people themselves.[123] The army is "incorporated into" the citizenry, and the danger of political alienation (or disengagement) of the citizenry is removed.[124] Put more plainly, compulsory military service is

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115. Article 4: [Freedom of faith and conscience] . . . (3) "No person shall be compelled against his conscience to render military service involving the use of arms. Details shall be regulated by a federal law." GG art. 4 (Ger.).

116. BVerfG, 2 BvF at 163 (1978) (Ger.).

117. GG art. 4 (Ger.).

118. *Id.*

119. *Id.*

120. BVerfG, 2 BvF at 161 (1978) (Ger.).

121. *Id.*

122. Here Isensee adopts the wording from THEODOR HEUSS, *Rede vor dem Parlamentarischen Rat*, *in* DIE GROßEN REDEN: DER STAATSMANN 72, 72–87 (1965); JöR n. F. 1, S. 77.

123. BVerfG, 2 BvF at 163 (1978) (Ger.).

124. *Id.*

baseline "democratic normality."[125] Thus, in any refusal of universal compulsory military service, the "equal burden" rightly borne by the citizenry—the burden on which the democratic constitutional state is founded—is also at stake.[126] It is, therefore, appropriate that this "inequality" be compensated by the replacement civilian service (*Ersatzdienst*) for conscientious objectors as a "heavy alternative."[127]

Nevertheless, and at the same time, rejection of military service may be well justified by subjective conscience, because military service includes the possibility of killing in case of an emergency, or of at least engaging in potentially deadly actions.[128] No other duty imposed by a democratic constitutional state on the citizen is comparable to this.[129]

The spiritual plight of one who is conscience-bound to avoid killing under any circumstances can go beyond the bounds of the reasonable demands on the citizen. The conflict is typical.[130] A general normative rule to cope with such cases is, therefore, both practical and reasonable.

VII. CONSCIENCE AS A PROBLEM OF JURIDICAL DEFINITION

A. What Is "Conscience"?

Even in the face of the fundamental right to freedom of conscience, the fulfillment of military service remains the rule while relief from the obligation is the exception.[131] Such relief, of course, presupposes that the military service in question conflicts with the conscience of the objector. Whether this prerequisite is satisfied can only be ascertained if the meaning of "conscience" is subject to clear definition, at least in the sense of it being a fundamental right. Thus, for quite practical legal reasons, the concept of "the conscience" becomes an important subject for legal consideration and for definition.

"Conscience," however, is not a general concept in the law.[132] In terms of the history of constitutions, as well as that of the various declarations of human rights, the concept derives from the thesaurus of the Christian religion as well as the general philosophy of the West.[133]

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125. *Id.*
126. *Id.*
127. *See* Böckenförde, *supra* note 111, at 61, 77, 84, 86.
128. GG art. 4 (Ger.).
129. *Id.*
130. *Id.*
131. *Id.*
132. *Id.*
133. Böckenförde, *supra* note 111, at 55.

Despite several thousand years of discourse, neither theology nor philosophy have achieved a consensus on the meaning and conceptual contours of conscience.[134]

The constitution of any neutral state (that includes religious neutrality as a fundamental right) is simply not capable of engaging in the battle of ideas with theologians and philosophers.[135] The state is incapable of deciding these issues, nor does it wish to do so.[136] What the state *can* do is to embrace a uniform understanding of conscience, which is valid for all citizens regardless of their beliefs or views of the world (*Weltanschaungen*).[137] These realities reveal the underlying dilemma, for here, we encounter a genuinely extra-legal concept with no firm conceptual identity or outline. Thus, "conscience" urgently needs a legal definition.[138]

The temptation is to leave conscience as a simply indefinable concept (*definiens indefinibilis*), which presumes that it is too vague or complex for precise definition. Unfortunately, such sidestepping is not satisfactory for anyone required to interpret a constitution. It is only possible for a norm to obtain practical validity when its underlying concepts can be precisely defined and generally applied.

B. The Problem of the Expansion of "Conscience"

The Federal Constitutional Court professes to have found a valid definition for the idea of conscience taken from "common language usage."[139] According to Isensee, this is not the case.[140] Everyday usage is diffuse and inconsistent.[141] In present times, citizens' reliance on a "broad conscience argument" is swift, easy, and all too frequent.[142] Such inflationary use of the term means that conscience has become a cheap currency in daily moral traffic.[143] The concept is stretched and so has become relatively elastic.[144]

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134. *Id.*
135. GG art. 4 (Ger.).
136. Böckenförde, *supra* note 111.
137. BVerfG, 1 BvL 21/60 45 (1960) (Ger.); *see also* Isensee, *Conscience in Law*, *supra* note 25, at 46 n.13.
138. GG art. 4 (Ger.).
139. BVerfG, 1 BvL 21/60 45 (Ger.)
140. GG art. 4 (Ger.).
141. *Id.*
142. Böckenförde, *supra* note 111.
143. *Id.*
144. *Id.*

By way of example, public discussion of unquestioning availability of abortion in all cases is supported by the argument that it is a "decision of conscience" of the mother.[145] This produces a rhetorical effect such that abortion based on the grounds of conscience is drawn into a taboo-zone of subjective morals and is raised to a type of public justification.[146] In the end, questioning the legal and moral permissibility of abortion has become no longer permitted.[147] Indeed, this is so not only in individual cases, but also quite generally.[148]

C. The Analogy with Art

The extended concept of art to be found in the sense used by Joseph Beuys[149]—who famously shouted, "[E]verything under the sun is art!"—also finds its parallel in today's public popular ethical touchstone: "Everything is conscience."[150]

For lawyers and those who must find a workable jurisprudence, however, such an expanded terminology is infeasible *per se*, because the conceptual borders of conscience have now melted away and the differences between conscience and mere "subjective arbitrariness" have been lost.[151]

The further this tendency infringes upon the interpretation of basic norms (basic rights), the closer the concept of freedom of conscience comes to a general and unfettered freedom of action and, thus, a "free right" to act out (*ad libitum*) whatever is not formally forbidden through a validly enacted state law.

The general freedom to develop one's personality[152] is the widest of all the freedom rights, at least in terms of its thematic reach, but it is also the most easily curtailed by legal regulation.[153]

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145. BVerfG 1993, 2 BvF 2/90 (Ger.).

146. *Id.*

147. *Id.*

148. Isensee, *Conscience in Law*, *supra* note 25, at 47. The issues surrounding abortion and conscience have been recently debated in the United Kingdom. *See* Abortion Act 1967 § 44, 1 (Eng.) (Section 4 (1) (The Conscience Clause and the role of conscience in healthcare)).

149. Beuys (1921-1986) was a controversial and influential "performance artist" who co-founded the Green Party in Germany in 1980. *See generally* ALLAN ANTLIFF, JOSEPH BEUYS (2014). For a critique of Beuys's work, *see* Benjamin H.D. Buchloh, *Beuys: The Twilight of the Idol*, 5 ARTFORUM 51 (1980). In 2017, Beuys was the subject of a documentary film entitled *Beuys*, under the direction of Andres Veiel. BEUYS (Zero One Films 2017).

150. Isensee, *Conscience in Law*, *supra* note 25, at 47.

151. Böckenförde, *supra* note 111.

152. Article 2 I of the Basic Law provides,

Freedom of conscience is, by contrast, unreservedly guaranteed by the Constitution (Basic Law).[154] It is resistant to restriction by law.[155] These circumstances show that conscience is restricted by its own nature—that necessary boundaries can only lie within the concept of conscience itself.[156]

D. Who Gets to Define the Concept of Conscience?

A way out of the dilemma created by any attempt to define "conscience"—as set out in Article 4(1) of the Basic Law—seems to arise when the definition of the basic legal status is left to the respective rights-holder and the latter decides, by way of self-understanding, exactly what conscience is.[157]

This subjective approach is clearly expressed in the special vote of a judge of the Federal Constitutional Court: Freedom of conscience is not subject to a state reservation.[158] The power to define conscience lies with the conscientious objector and not with an authority outside their individual conscience. The exercise of the right to basic rights should not be placed under a "cognitive reserve of others."[159]

At first blush, this seems to be the solution to the precarious problem of definition—a solution both practical and liberating. By it, the possessor of the fundamental freedom also decides on the kind of constitutional right this freedom affords, and the extent to which it is

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(1) Every person shall have the right to free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral law.

(2) Every person shall have the right to life and physical integrity. Freedom of the person shall be inviolable. These rights may be interfered with only pursuant to a law.

GG art. 2 (Ger.).

153. Böckenförde, *supra* note 111.

154. GG art. 2 (Ger.).

155. *Id.*

156. Böckenförde, *supra* note 111.

157. Isensee, *Conscience in Law*, *supra* note 25, at 48. German courts may not resort to contested U.S. doctrines such as "original intent," which "plays no significant role in German constitutional interpretation." Kommers also notes that while "it might seem that the 'aims and objects' approach of teleological inquiry [denoting a German focus on 'the unity of the text as a whole from whence judges are to ascertain the aims and objects'] differs little from the determination of original intent . . . the German judicial mind distinguishes sharply between these methods." Kommers, *supra* note 8, at 845.

158. Böckenförde, *supra* note 111.

159. *See* BVerfG 1978, 2 BvF 1, 2, 4, 5/77 127 (185, 188, 192) (Ger.); *see also* JOSEPH ISENSEE, WER DEFINIERT DIE FREIHEITSRECHTE? [WHO DEFINES THE LIBERTIES?] 7, 12 (1980) [hereinafter ISENSEE, WHO DEFINES THE LIBERTIES?].

available.[160] The self-determination of the individual seems to be an ultimate purposive end;[161] that individual cannot only exercise freedom of conscience within the given normative framework but can also make a binding decision about the *extent* of this normative framework.

Once a fundamental right becomes dependent on the self-understanding of the rights bearer, it loses its fundamental ability to measure individual's freedom[162]—not to mention its ability to measure the limits of state power. Thereafter, it is up to the individual conscientious objectors to decide whether their objection to military service is merely an opinion or a matter of conscience. In the case of mere opinion, the duty to serve remains; in matters of conscience, refusal becomes a matter of invoking a fundamental right. The adoption of such a "subjectivizing" approach means that the area protected by the "fundamental right" varies from person to person according to each's self-understanding. The basic right no longer guarantees the "freedom of equals," since the measure of individual freedom (as protected by fundamental rights) is now determined by the individual's dexterity in articulating their interests.[163]

As such, any conflict of fundamental rights becomes totally insoluble if the self-understanding of these pretenders to fundamental rights (*Grundrechtspratendenten*) is contrary to—and thus incompatible with—the exercise of the freedom of conscience of another or others. In a battle between subjectivities, only general objective criteria can solve the conflict between the two subjective claims. Thus, the right to freedom of conscience, like the other freedom-based rights, can only exist under the framework conditions supplied by the (legal) state. Subsequently, such a state then has the task of coordinating the freedom of its citizens. In Kantian terms, this can be formulated as follows: the state ensures that the freedom of one can exist with the liberty of the other according to a general law.[164] The law, however, can only be guaranteed by the state, which itself is not partaking in freedom, and not a party in the conflict of interests, and which itself is exclusively

160. ISENSEE, WHO DEFINES THE LIBERTIES?, *supra* note 159, at 7, 12.

161. *Id.*

162. *Id.*

163. *Id.*

164. For an objective interpretation of "conscience," see Hans Bethge in HANDBUCH DES STAATSRECHTS DER BUNDESREPUBLIK, *supra* note 1, § 137, at 7; *see also* J. ISENSEE, WER DEFINIERT DIE FREIHEITSRECHTE? 26 (1980). *See generally Grundrechtsvoraussetzungen und Verfassungserwartungen an die Grundrechtsausubung*, *in* HANDBUCH DES STAATSRECHTS DER BUNDESREPUBLIK, *supra* note 1, §§ 115, 117.

committed to the freedom-determined social welfare and thus capable of determining the scope of basic rights in the event of a conflict. The task of definition power by the state is unavoidable. For what the state cannot define, cannot be protected.[165]

E. The Problem of Quis Iudicabit?

In view of a constitutionally defined concept of conscience, Hobbes's question of sovereignty comes immediately to the fore: *quis iudicabit?*[166] (Who is to judge?) The answer is: the state.[167] Thus, while dispensing with some of the authoritarian contours of the Hobbesian state, the formal basic structures of the modern state as a unit of decision and as a legal unit are retained.[168] This necessarily includes the uniting "interpretative" arm.[169] In the realm of fundamental rights, areas of private self-determination are removed from the state's access and their actions are subject to prescribed legal norms. But the state remains sovereign by interpreting the limits of its actions.[170] Therefore, it has no interpretative monopoly.[171] The interpretation of the concepts of fundamental rights is open to everyone under the conditions of freedom of expression and the freedom of scholarship. Despite all this, however, the state has the right to issue a binding final decision, without which legal unity and legal peace are impossible.[172] The basic right to "freedom of conscience" has a "pre-state" (anterior) foundation as a human right, and as a constituent of constitutional law it is a state right, oriented to the state as an indispensable guarantor, and also as its potential adversary.[173] It is molded by the structures of the modern state.[174]

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165. *See* Adolf Arndt, *Die Kunst im Recht*, 1-2 NJW (NEUE JURISTISCHE WOCHENSCHRIFT) 25, 28 (1966).

166. CARL SCHMITT, POLITICAL THEOLOGY II: THE MYTH OF THE CLOSURE OF ANY POLITICAL THEOLOGY 116-30 (Michael Hoelzl & Graham Ward trans., Polity 2008) (1970).

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. Isensee, *Conscience in Law*, *supra* note 25.

174. *Id.* at 49. This fits with the objective hierarchy of values in the Basic Law: Kommers notes, in its search for constitutional first principles, the Constitutional Court has seen fit, as noted earlier, to interpret the Basic Law in terms of its overall structural unity. Perhaps "ideological" unity would be the more accurate term here, for the Constitutional Court envisions the Basic Law as a unified structure of substantive values. Kommers, *supra* note 8, at 858-59. The centerpiece of this interpretive strategy is the concept of an "objective order of values," a concept that derives from the gloss the Federal Constitutional Court has put on the text of the

F. The Secular Concept of Basic Rights of Conscience

Thus, there remains the difficulty of defining the term "conscience" within the realm of fundamental constitutional rights. This difficulty has been exacerbated by the fact that, according to more recent doctrine, the basic right of freedom of conscience has emancipated itself from the fundamental right of freedom of religion, which was always an integral part of it.[175] In the same context, the Weimar Reich's Constitution (1919-1933) ensured "full freedom of belief and conscience".[176] In the Basic Law of 1949, freedom of conscience is framed by religious guarantees: "Freedom of faith, conscience, and freedom of religious and ideological confession are inviolable".[177] In its origin, freedom of conscience is a derivative of religious freedom.[178] Prototypical is the conflict between the external law of the state and the inner commandment of God, as exemplified by the Christian martyrs through the ages, from the Apostles to St. Thomas More and beyond.[179] The "collision norm" of Christianity

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Basic Law. According to this concept, the Constitution incorporates the "basic value decisions" of the founding fathers, the most basic of which is their choice of a free democratic basic order; i.e., a liberal, representative, federal, parliamentary democracy—buttressed and reinforced by basic rights and liberties. These basic values are objective because they are said to have an independent reality under the Constitution, imposing upon all organs of government an affirmative duty to see that they are realized in practice. Isensee, *Conscience in Law*, *supra* note 25.

175. There has been much discussion in international law circles regarding the link between religious rights and rights of (military) conscientious objection. *See* Leonard Hammer, who states, "Focus on the view that the capacity for military conscientious objection in the international human rights system derives from the right to freedom of religion and conscience." Leonard Hammer, *Selective Conscientious Objection and International Human Rights*, 36 ISR. L. REV. 145, 145 (2002).

176. Article 135 states, "All Reich inhabitants enjoy full freedom of liberty and conscience. Undisturbed practice of religion is guaranteed by the constitution and is placed under the protection of the state. General state laws are not affected hereby." DIE VERFASSUNG DES DEUTSCHEN REICHS [CONSTITUTION OF THE GERMAN REICH] art. 135, Aug 11, 1919, *translation at* http://lawcollections.library.cornell.edu/nuremberg/catalog/nur:01840 (Weimar Constitution).

177. GG art. 4 (Ger.).

178. Ulrich Scheuner, *Die verfassungsmaßige Verbürgung der Gewissensfreiheit* [*The Constitutional Recognition of Freedom of Conscience*], *in* SCHRIFTEN ZUM STAATSKIRCHENRECHT 65, 68, 77 (Axel Frhr. von Campenhausen, Christoph Link & Jörg Winter eds., 1970).

179. The author notes a current iconic display in the Basilica of *San Bartolomeo all'Isola* (St. Bartholomew on the Island) in Rome, commemorating recent Martyrs. *See* Vatican Radio, *Testimonies of Families and Friends of the "New Martyrs,"* ST. JOSEPH ROMAN CATH. CHURCH (Apr. 22, 2017), https://stjoerayne.org/2017/04/22/testimonies-of-family-and-friends-of-the-new-martyrs/.

is the New Testament *clausula Petri*: "We must obey God rather than men."[180]

When, in conscience, the voice of God is heard, the decision of conscience preserves its unconditionality, with which character stands and falls, according to the sacred earnest by which it is obeyed.[181]

It is easy for one who, for the sake of conscience, refers to objectivized religious foundations—for example in the Scriptures, doctrines, and the traditions of a community of faith—to simply make it clear to others that this is the fundamental basis of their decision. This also makes their decision of conscience plausible to others. Such a presupposition cannot apply if the conscience is cut away from its religious roots, as is the case with the current understanding. Thus, the objective specification, which binds even the religious dissenter, is removed. The "religious neutrality" of the constitutional state does not compel this development. For it is not a matter of whether the state identifies itself with religious statements, but whether freedom of conscience—a secular fundamental right—is a component of the freedom of religion, an equally secular fundamental right, or stands independently beside it.

Henceforth, it will become more difficult for the interpreter of fundamental rights to make use of the conscience as an essential legal feature (*Tatbestandsmerkmal*)[182] alongside other fundamental principles such as freedom of expression or freedom of action.[183] Above all else, in praxis, it will become more precarious for relevant state officials to qualify (and prove) that any cognitive act, whether word or deed, is in fact based in conscience, let alone—and for legal purposes—demonstrate conscience-based motivation.[184]

G. Definition via the Federal Constitutional Court

The Federal Constitutional Court has had a lot of trouble in attempting to legally construe the concept of conscience.[185] It describes "conscience" as "a [however justified, yet always] truly experienced

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180. *Acts* 5:29 (Rev. Std. Version).

181. Gregory Sullivan, *The Legal and Moral Genius of St. Thomas More*, CATH. WORLD REP. (Mar. 27, 2018), https://www.catholicworldreport.com/2018/03/27/the-legal-and-moral-genius-of-st-thomas-more/.

182. The *Tatabestände* are, in approximate common law terms, the material facts of a case upon which its outcome depends.

183. *See* Scheuner, *supra* note 178.

184. *Id.*

185. BVerfG 1988, 2 BvR 701/86 (Ger.).

spiritual phenomenon" whose "demands, admonitions, and warnings for the one [person] in question are immediately evident commandments of absolute imperative."[186] The decree of conscience, which under Article 4(3) of the Basic Law justifies the refusal of military service, will be heard by the individual as a "purely moral and unconditionally binding determination on the behavior required of him."[187] Decisions to be categorized as decrees of conscience are those which are "serious, morally oriented decision[s] (i.e., [those] that [are] oriented towards the categories of "good" and "evil") which the individual, when in a particular situation, experiences as inwardly binding and absolutely obligatory, such that they cannot act against [it] without precipitating a grave crisis of conscience."[188]

The tautology created by defining a "determination of conscience" by using the definitional "crisis of conscience" shows the *aporia* (impasse) in which the judicial interpretation of the conscience is currently mired.[189]

Nevertheless, the legal definition of conscience, even when translated into a form that is no longer religiously determined, still clearly displays the formal characteristics of religious conscience: necessity, gravity, unconditionality, and moral obligation.

Since the *forum internum* of the human person is impermeable to the constitutional state—not least because of the freedom of conscience—it remains to be seen whether a decision of conscience exists in any particular case.[190] This can be made clearer using a parallel metaphor, that being the treatment of electricity in teaching physics, which, in times past at least, meant that while it was impossible to explain what electricity is, it was, nevertheless, possible to say how electricity actually works. Similarly, conscience can be recognized by its effects.[191] The effect of a serious, unconditional, moral decision, in which the identity of the agent's moral personality is at stake, is the corollary of action.[192] The willingness to bear annoying consequences is

186. BVerfG, 1 BvL 21/60 45 (138) (Ger.); BVerfG, 2 BvR 701/86 at 395.

187. Böckenförde, *supra* note 111, at 55.

188. BVerfG, 1 BvL 21/60 at 55; ZIPPELIUS, *supra* note 24, at 51.

189. Böckenförde, *supra* note 111; BVerfG, 2 BvR 701/86 at 184.

190. Isensee, *Conscience in Law*, *supra* note 25.

191. Compare similar comments with respect to beauty. For example, "Beauty is more easily described by its effects than by its components." *See* THOMAS GILBY, BARBARA CELARENT: A DESCRIPTION OF SCHOLASTIC DIALECTIC 160 (1949) (paraphrasing Aquinas).

192. Isensee, *Conscience in Law*, *supra* note 25.

indicative of such a decision.[193] Thus, willingness to perform non-military substitute service (*Zivildienst*) is a sign of the authenticity of the grounds of conscience advanced.[194] A presupposition, however, is that the burden of the replacement service is generally no lighter than that of the military service; thus, the temporal apportionment of the substitute service has the special function of indicating the conscientious nature of the refusal of a regular civic duty.[195] This function would be even more pronounced if the substitute service were moderate but noticeably longer than the regular service.[196] This variation, however, is denied by the Basic Law, which stipulates that the duration of the substitute service must not exceed that of the military service.[197]

VIII. FROM FREEDOM OF CONSCIENCE AS A SELF-EMPOWERMENT TO DENUNCIATION (DESTRUCTION) OF OBEDIENCE TO THE LAW?

A. The Phenomenon of an Expanding Concept of Conscience

In the Federal Republic of Germany, it has become almost a matter of fashion for individuals or groups, spontaneously organized, to renounce the right of legal obedience by citing conscience and "freedom of conscience."[198] Intermittently such groups also rely on this claim to refuse to comply with statutory or other contractual obligations.[199] This inflated appeal to the conscience can be partly explained by the *Vergangenheitsbewältigungssyndrom* (coping with the past) of the German people.[200] This phenomenon is based on a national need to cleanse the country of the national "original sin" by means of a form of "retrospective resistance" and to dispense it from the ominous obligation of "duty" into the inherently good position of the (noble) "deserter."[201] The moralism that corresponds with this state of mind finds a trite vehicle in the arguments associated with freedom of conscience.[202]

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193. *See* Ernst Wolfgang Böckenförde (Arun. 4), *In Niklas Luhmann, Die Gewissensfreiheit und das Gewissen*, 90 AöR 257, 283-86 (1965); *see also* BVerfG 1985, BvF 2, 3 4/83 (Ger.) (the decision of Judge Mahrenholz and Judge Böckenörde).

194. *See* Böckenförde, *supra* note 193, at 283-86.

195. It is, in some sense, "advertising" that this is a conscience-based refusal to participate in military service. *Id.*

196. *See* BVerfGE 69 57, 74 (Ger.) (the decision of Judge Mahrenholz and Judge Böckenörde); *see also* BVerfG 1985, BvF 2, 3, 4/83 and 2/84 (Ger.).

197. GG art. 21 § 2 (Ger.).

198. Scheuner, *supra* note 178.

199. *Id.*

200. *Id.*

201. *Id.*

202. Isensee, *Conscience in Law*, *supra* note 25.

In practice, one also finds a variety of occasions during which the individual makes use of freedom of conscience as a form of self-empowerment and as a means of dispensing oneself of otherwise valid legal obligations. Three variations of this denial of duty, relying on grounds of conscience, can be distinguished:

- where the obligation to perform absolutely contradicts the conscience of the objector, such as the obligation to assist at an abortion, or the statutory duty to take an oath as a witness, or to imbibe an oral vaccination;[203]
- where the questioned obligation indirectly promotes actions that the conscience deplores, for example the payment of charges for electricity from nuclear power plants, health fund contributions which could be used for the financing of "abortions by insurance," or taxes that could be used for armament expenditures;[204]
- where the broken law as such has no relation to the (real or supposed) wrong against which the protest of the conscience is directed; rather the violation of the law is only a means in the struggle against the real or supposed injustice, for example, the blockade of road traffic as a form of civilian or militant resistance to a threat to peace or the environment.[205]

The third case type belongs to the associated field of the "resistance fighter."[206] The first and, in a somewhat weakened sense, the second are, in some respects, comparable with the refusal of military service.[207]

B. The Exceptions Clause of Article 4 Sentence 3 Basic Law Taken as a General Rule?

To extend the express conscience exception of Article 4(3) (i.e., to refuse military service) to all legal obligations would seem to be logical.[208] Whether this interpretation is possible depends on whether the fact of the refusal of the military service is a declared subset of the general freedom of conscience or whether it constitutively expands it. It is submitted that the second interpretation is more appropriate. The right of avoiding military service opens a loophole in the case of a crisis of

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203. For example, in the case of a polio vaccination, *see* Naveen Thacker & Niranjan Shendurnikar, *Controversies in Polio Immunization*, 70 INDIAN J. PEDIATRICS 567, 567-71 (2003).

204. Isensee, *Conscience in Law*, *supra* note 25.

205. *Id.*

206. *Id.*

207. *Id.*

208. GG art. 21 § 2 (Ger.).

conscience, which is not generalizable.[209] Only in the case of compulsory military service does the Basic Law provide for the possibility of a substitute service.[210] Whoever denies military service cannot refuse, likewise for conscience, any substitute service.[211] The right to refuse to comply with Article 4(3) Basic Law regulates exclusively the effects of freedom of conscience in the field of compulsory military service.[212] The solution to this dilemma can only be sought within the framework of the general fundamental right of conscience.[213]

C. State Structures as Immanent Limits of Freedom of Conscience

The basic right to freedom of conscience prevails within the framework of the essential structures of the modern state as a monopoly of power and decision making.[214] Its foundations are obedience to the law, which the citizen owes to the Constitution, and to individual acts of administration and exercises of judicial power. The fundamental right of freedom of conscience presupposes obedience to the law. It does not put it in question.[215] The law of the democratic state—based on the rule of law—sets the preconditions for the possibility of effective freedom and equality of all citizens.[216] If freedom of conscience were to give anyone the power to refuse to accept constitutional and objectively valid norms, for merely subjective reasons, it would amount to an anarchical explosion that could destroy the peaceful unity of the nation and its decision-making processes, as well as majority democracy.

Arguably, a monarchy or a feudally constituted state could more generously circumvent the law.[217] It is easier for such a state to make arrangements with outsiders about their duty status than it is for a democracy, which is based on the rule of law, and on foundational principles of universality and equality.[218] To avoid jeopardizing their

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209. *Id.*
210. BVerfG 1965, 1 BvR 112/63 135 (139) (Ger.); BVerfG 1968 1 BvR 579/67 127 (132) (Ger.).
211. BverfG, 1 BvR 679/67 at 132.
212. BVerfGE 1 BvR 112/63 at 139.
213. Scheuner, *supra* note 178.
214. *Id.*
215. *Id.*
216. *Id.*
217. *Id.*
218. *Id.*

legitimacy, democratic states must insist on the enforcement of the law universally.[219]

This does not mean, however, that the fundamental right to freedom of conscience shrinks before any normative obligation whatsoever. This fundamental right is not relativized by its legal limitations, as it may happen, for example, to freedom of expression or freedom to work. The freedom of conscience is, as a fundamental right without exception, limited by conflicting rules and legal objectives at the level of the constitution itself, by the other so-called "intrinsic" fundamental rights which, from the outset, reduce the thematic scope of guaranteed freedoms.[220] These limitations include the existence and basic structures of the constitutional state as an integral unity of liberties, and as a guarantor of security both internally and externally. The state's monopoly of force forms an *a priori* frontier of freedom of conscience. This basic right can only be realized within the framework of the state-pacified polity. It does not provide any right to the private individual to apply physical violence to others or indeed to threaten them. An additional immanent barrier is contained in the commandment *alterum non laedere* (injure nobody).[221] The freedom of conscience, like other fundamental rights, provides a right to defend but not a right to actively attack.

If individuals violate the constitutionally protected legal rights of others, such as the right to life, health, freedom, or property, they trigger the fundamental protection obligation of the state, which must guarantee the integrity of the fundamental rights *inter privatos*. No person can invoke the right to freedom of conscience in cases of interference with the legal rights of others, for example in case of killing or assault, or in cases of willful damage to property.[222] Blocking road traffic, for example, as an act of civil disobedience cannot be based upon the freedom of conscience of those who created the blockade, regardless how ethically pure their aim,[223] because the blockade encroaches directly

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219. *Id.*

220. *Id.*

221. Alternatively expressed, "injure no one." An edict most recognized in the law of torts. This is arguably the legal equivalent of the ancient medical principle of "do no harm."

222. COLLINGS, *supra* note 52, at 214-15.

223. For citation of numerous German works on the topic of civil disobedience, see ZIPPELIUS, *supra* note 24, at 55 n.37. The "blockade cases" refer to *Sitzblockade* ("sit-ins") in protest against military expansion of missile sites. Protesters eventually won their right to blockade based on Article 103(2) of the Basic Law. GG art. 103 § 2 (Ger.) (a ban on retroactivity). For more detail, see COLLINGS, *supra* note 52, at 214.

upon others' basic freedom of movement and, incidentally, its negative concomitant right to freedom of speech.[224] Such an action is also incompatible with the prohibition against violence.[225] Indeed, in such a case, the (Kantian) categorical imperative would be turned upside down; in so doing, the maxim of one's own action is raised to the maxim of general action and then imposed on the general public.

Here the ambition of a minority takes effect in there *being* a conscience, in order to relieve themselves of the burden of having to *have* a conscience, which is the only relevant constitutional point.[226] The result is that actions of civilian or militant disobedience, of nonviolent or violent resistance, lie outside the thematic range of fundamental rights.[227] In the context of state-generated normalcy, there is no room for actions that violate the basic obligations of civility, the duty not to engage in industrial action, or the duty to obey.[228] They can only be justified, if at all, by the right to resist, but this is only enlivened when the basic rules of the normalcy guaranteed by the state are suspended.[229] This appeal to the basic right of freedom of conscience—apart from the right to resistance—is neither necessary nor possible in the context of this "exceptional" exception.[230]

Freedom of conscience as a basic right means only self-determination.[231] It does not encompass determination of the interests of others.[232] Thus, freedom of conscience does not provide any justification for abortion, for example, because it is not a matter solely of the self-determination of the pregnant woman but also, essentially, concerns the right to life of the unborn child, which is independent of the protection of the fundamental rights of the mother.

Nor does freedom of conscience provide access to the concerns of the general public.[233] Thus, a member of a statutory health insurance fund, who considers the use of the contribution to finance "abortion on medical insurance" as fundamentally unlawful, cannot derive from their own basic right any claim to a general omission of the use of funds.

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224. *Id.* at 215.
225. *Id.* at 214.
226. *Id.* at 215.
227. Joseph Isensee, *Ein Grundrecht auf Ungehorsam*? [*A Right to Disobedience?*], *in* FRIEDEN IM LANDE: VOM RECHT AUF WIDERSTAND (Heinrich Basilius Streithofen ed., 1979).
228. *Id.*
229. *Id.*
230. *Id.*
231. *See* COLLINGS, *supra* note 52, at 153.
232. *Id.*
233. *Id.* at 254.

They cannot demand that "their firm belief is made the measure of the validity of general legal norms or their application."[234] Similarly, a utilities consumer, whose conscience condemns particular types of power stations (for example, nuclear), cannot refuse to pay their electricity bills by invoking Article 4 of the Basic Law. By their own self-determination, they could abstain from the consumption of nuclear power but not from paying the charges incurred on consumption. They cannot, by virtue of the freedom of conscience, prevent a definite form of energy production. The freedom of conscience does not contain any authority to refuse to surrender taxes. A taxpayer could not even make plausible the basic legal relationship between the tax liability and the conscience of "government spending," of which they disapprove, because the tax liability is free of countermeasures and is not linked to a specific output. The necessary (if not also sufficient) condition for an exemption from a general legal duty to even be discussed is that the pretender claimant can make the impairment of their conscience plausible.

D. Conflict Resolution through Partial Exemption

In the literature, a "system of tolerances and partial exemptions" has been called for in order to resolve conflicts of conscience.[235] An example is the case of an evangelical Priest who, as a witness in court, and appealing to his understanding of the Bible,[236] refuses to swear the prescribed witness oath, despite the fact that the oath in question does not involve an obligatory, religiously formulated affirmation. The Federal Constitutional Court sees the fundamental right of Article 4(1) of Basic Law as a thematic infringement and interprets it as a refusal based on a "valid legal reason," in its conformity with the relevant standard of the procedural law.[237]

The exemption from the statutory obligation to swear an oath in a particular case does not imply the general validity of the obligation-based standard. The state, in its enforcement of the guarantee of the

234. BVerfG 1974, BvF 1, 36 (Ger.); BVerfG 1974, 1 BvF 1, 2, 3, 4, 5, 6/74 (Ger.).

235. *See* Adolf Arndt, 1 *Das Gewissen in der oberlandesgerichtlichen Rechtsprechung*, 2204, 2204–05 NJW (NEUE JURISTISCHE WOCHENSCHRIFT) (1986).

236. *Matthew* 5:33-37 (Rev. Std. Version) ("[33]'Again you have heard that it was said to the men of old, "You shall not swear falsely, but shall perform to the Lord what you have sworn." [34]But I say to you, Do not swear at all, either by heaven, for it is the throne of God, [35]or by the earth, for it is his footstool, or by Jerusalem, for it is the city of the great King. [36]And do not swear by your head, for you cannot make one hair white or black. [37]Let what you say be simply "Yes" or "No"; anything more than this comes from evil. . . .'").

237. GG art. 4 § 1 (70) (Ger.).

fundamental right, is merely proffering an exception "to resolve an inevitable conflict between the state's commandment and the doctrine of faith that affects the person concerned in his intellectual and moral existence."[238] In order to satisfy the public interest in having functional administration of justice—which the witness's oath is designed to serve—there could be entered an equivalent duty, with the same penalties for abuse, which does not contain any religious affiliation or corresponding associations.[239] The state would simply surrender to the individual conflict of conscience without harming the state's ability to administer justice.[240] Thus runs the argument of the Federal Constitutional Court.[241]

However, the democratic constitutional state cannot measure every legal obligation against the "burdensome alternative" in order to counter possible conflicts with the freedom of conscience. This would involve examination of the seriousness of the decision, the ability to preserve the equality of burden imposed, and to prevent the appeal to conscience as a pretext for the "shirker."[242] For practical reasons, these limits have to be imposed.[243] Thus, the state need not develop a second-degree alternative to the alternative obligation, with the result that the fundamental right caused a *progressus in infinitum* (infinite progression).[244]

It is only within a certain range of its obligations that the democratic constitutional state can react flexibly to individual conflicts of conscience, to offer up possibilities of compromise, to activate administrative measures that protect basic rights—such as removing the discretionary powers principle in administrative law and the laws governing police—and to manipulate the means of dispensation in individual cases.[245]

In the uncertain legal border zone, the state is well advised not to ask so much what it *must* constitutionally guarantee for the sake of freedom of conscience by way of dispensation, as what it *can guarantee*

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238. *See Compendium of the Social Doctrine of the Church*, VATICAN, http://www.vatican.va/roman_curia/pontifical_councils/justpeace/documents/rc_pc_justpeace_doc_20060526_compendio-dott-soc_en.html (last visited Dec. 3, 2018).

239. BVerfG 1972, 2 BvR 75/71 (23, 33) (Ger.).

240. *Id.* at 32. On the issue of freedom of belief, see also ISENSEE, *supra* note 164, at 7, 12 (on the issue of freedom of belief).

241. BVerfG, 2 BvR 75/71 at 23, 33.

242. *See* IMMANUEL KANT, CRITIQUE OF PURE REASON (Paul Guyer & Allen W. Wood, trans. & eds., Cambridge Univ. Press 1998) (1781).

243. *Id.*

244. Infinite progression. A term used *inter alia* in Kant's *Critique of Pure Reason*. *Id*.

245. Böckenförde, *supra* note 111.

without contradicting the constitution. The fundamental rights holder is well advised not to become overly excited by the legal standpoint and, where such a standpoint is indeed found, to be content with goodwill where it is to be found.

However, the democratic state based on the rule of law cannot withdraw its norms if rights of third parties or essential interests of the public could potentially be harmed.[246] It is only thus that the one acting on the basis of his "conscience" is prevented from standing free of any possible sanction.[247]

The Federal Constitutional Court derives from the freedom of conscience—not in its function as a defensive right but rather as an evaluative normative principle—a "commandment of good will" with regard to those who claim to be acting on the basis of conscience.[248] However, the same court holds the consequences of that "commandment" to be in abeyance and dependent upon the circumstances of the individual case, according—on the one hand—to the importance to be placed upon the necessary right of the state to inflict punishment in order to ensure the proper ordering of that state and the authority of the settled law and—on the other hand—the strength of the pressure of the conscience and the state of conflict that is thereby created.[249]

The motive of conscience need not always result in a moderating effect upon the assessment.[250] It can be shown in individual cases that the force of moral motivation derived from a perverted conscience—such as in cases of terrorism—can increase the level of danger as well as the degree of contradiction to the legal order when compared against regular, self-interested criminality.[251]

Generally, the democratic constitutional state must ensure that citizens' readiness to adhere to the law and their trust in legal institutions are not destroyed by an imprudent indulgence of or abusive appeals to conscience.[252] However, respect for this fundamental right lends legitimacy to the democratic constitutional state and therefore bolsters its internal stability.[253]

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246. *Id.*
247. KANT, *supra* note 242.
248. *Id.*
249. Böckenförde, *supra* note 111.
250. KANT, *supra* note 242.
251. Böckenförde, *supra* note 111.
252. *Id.*
253. *Id.*

IX. RECONCILIATION OF FORMAL AND AUTHENTIC CONSCIENCES IN EVERYDAY LIFE

The proposed ways out of the dilemma of law and conscience do not provide a consistent and integrated solution, which could satisfy the basic dogmatic constitutional as well as practical requirements. Certainly, the community based on freedom of conscience is independent of the moral high plains at which this freedom is realized. As a whole, it is impossible to rule out undesirable constitutional developments. As put by Ernest-Wolfgang Böckenforde, "[I]t is part of the structure of the liberal state that it lives on prerequisites which it itself cannot guarantee without questioning its own freedom."[254]

This shows that the two interpretations of the conscience that Hegel gives cannot stand inconsequentially alongside one another in the constitutional state, as it may prima facie appear.[255] It is true that the basic right, as a defense law, is based on the formal conscience, as it stirs within the individual.[256] Yet the true common good is only established when the conscience in everyday life is predominantly actualized "correctly," in a societal ethos beneficial to the common good, or at least compatible with it.[257]

The formal conscience must in some way approach the authentic one.

In this, however, there is no enforceable legal obligation but only a meta-legal constitutional expectation.[258] The state is denied jurisdiction here. Nevertheless, it is not condemned to resignation.

Rather, the state has had to work outside the realm of command (*Befehl*) and compulsion (*Zwang*) to work towards the citizens' fulfillment of what can be constitutionally expected of them. Its means are the academic education of the young, exemplary role models offered by state officials, and the co-operation with the forces of society—at least those not subjected to the neutrality and distance obligations of the constitutional state—which a holistic ethos can mediate.[259]

Here, expectations are raised of the Church, whose very *raison d'etre* is not the "freedom of belief" protected by the state, but faith itself,

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254. *Id.*; ERNST WOLFGANG BÖCKENFORDE, DER STAAT ALS SITTLICHER STAAT [THE STATE AS MORAL STATE] 36 (1978).

255. Böckenförde, *supra* note 111.

256. KANT, *supra* note 242.

257. ISENSEE, *supra* note 164, at 7, 12.

258. In addition, *see id.* § 115, at 163, 233.

259. Böckenförde, *supra* note 111.

not "freedom of conscience," but the doctrine of the proper use of conscience.

The Church would deprive the secular constitutional state of an essential service if she were to expend herself out of respect for the freedom of conscience; that is, if she were to remain static on the standpoint of the formal conscience.

That which signifies the inner necessity of the constitutional state would, for the Church, be a waste of its mission; what is a constitutional virtue for the state is permissiveness for the Church.

The Church ought principally to align with the authentic conscience, "authentic" not in the statist Hegelian sense, but in a Christian sense, which is compatible with the meaning of the constitutional state.

The role of the Church is to train and sharpen the conscience of the individual in the truth of Christianity.[260] In doing so, it is not necessarily its intention to strengthen the functional requirements of the modern legal state.[261] Yet this effect can be the objective incidental-benefit of its service to humankind.[262] At this point, of course, the constitutionalist can refer the mandate on the matter of conscience to the moral theologian.

X. FURTHER INVESTIGATIONS

Isensee's rich exegesis on conscience and law strikes a number of targets, which few other analyses have attempted.[263] In the first place, it gives breathing room to state and non-state institutions in a way that preserves the dignity of both.[264] Second, it provides serious counterweight to the Hegelian analysis, which labors under difficult contradictions.[265] Third, it highlights the problems inherent in separating the concept of conscience from its religious roots.[266] Finally, it indirectly raises the extraordinary "Böckenförde dilemma" for constitutional analysis.[267] These matters deserve further exploration.

260. *Id.*
261. *Id.*
262. Isensee, *Conscience in Law*, *supra* note 25.
263. *Id.*
264. *Id.*
265. *Id.*
266. *Id.*
267. *Id.*