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**Europeanizing the Military:  
The ECJ and the Transformation of the Bundeswehr**

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# **Europeanizing the Military: The ECJ and the Transformation of the Bundeswehr**

Ulrike Liebert, Bremen, November 2002

## **Introduction**

Compared to the armed forces of her NATO-partners, the German Bundeswehr until recently remained a relict as regards its gender homogeneity. Whereas by the beginning of 2000, most member states of the European Union had military forces with sizable minorities of female soldiers ranging between 4 % – 10 %, the Bundeswehr continued to marginalize women<sup>2</sup>. Women were conceived as the “weaker gender” in need of protection and not as equal partners in arms, working shoulder to shoulder with their male comrades. Though some 4.300 women among 340.000 Bundeswehr soldiers represented 1,3 % of the whole, they remained restricted to two domains – the health service and the music band – and completely invisible in public representations. The combination of women’s defenselessness and exclusion from armed forces, and a Bundeswehr limited by the German constitution to defense purposes and prohibited to take part in offensive ventures was suddenly broken by a young woman. In 1996, Tanja Kreil, an electronic technician, applied for service in the weapon electronics maintenance section of the Federal Armed Forces (Bundeswehr). Her application was rejected on the ground that German law bars women from military posts involving the use of arms. Two years later, Ms Kreil brought an action in the Hanover Administrative Court, claiming that the rejection of her application only on the grounds of sex was contrary to the 1976 Equal Treatment Directive. This latter then turned to the European Court of Justice (ECJ) in Luxembourg for a preliminary ruling about whether the German Government had a right

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<sup>1</sup> This article originates in a paper given at the Conference “Europeanization in Transatlantic Perspective” – *Institute for European Studies (IES), Cornell University & Jean Monnet Centre for European Studies (CEuS), University of Bremen; Bremen, Dec. 8-9, 2000*. I am grateful for comments by Mary Fainsod Katzenstein, Peter Katzenstein, and Heidi Gottfried, and for research assistance by Henrike Müller.

<sup>2</sup> While in 2000, in Great Britain women constituted 7,4 %, in the Netherlands 7,2 %, in Belgium 7,2 %; in France 6,3 %; in Portugal 5,1 %, in Denmark 4,8 %; and in Greece 4,0 % of the military forces; within the European Union only Luxembourg and Italy until 2000 excluded women completely, and outside the EU

to do that and claim that EU equal treatment norms did not apply to the national military forces.

The ECJ – depicted by law scholars as the driving force behind legal integration in the EU – took its time. Finally, with its judgment issued on January 11<sup>th</sup> of 2000, it opened a new era for the Bundeswehr. In fact, the changes every soldier had to cope with as a consequence of this judgment were considered fundamental, affecting “the very nature and character of the German armed forces” (Kümmel/Biehl 2000: 9). This statement by two researchers of the Social Research Institute of the Bundeswehr is not an exaggeration. In fact, the EU Court left no doubt that it backed Tanja Kreil’s case against the German Government. Regarding *Case C-285/98 Tanja Kreil v Federal Republic of Germany [2000] ECR I-69*, the ECJ ruled that German legislation generally barring women from military posts involving the use of arms was contrary to the Community principle of equal treatment between men and women, although derogations concerning certain special combat units were possible.

Even more important, the ECJ’s judgment also obliges member states to implement EU-gender equality laws not only within the civilian realm but also in those core state institutions invested with the monopoly of legitimate violence. Up to now, the scope of the EU’s working women’s rights<sup>3</sup> has been restricted to the civilian – public and private – sector. Cases of women claiming rights to inclusion in the police forces in Northern Ireland or in the marine corps in Britain had been turned down by the ECJ. In the case pressed by Tanja Kreil against the German government, the ECJ-judges dared for the first time to break a breach for European legal integration, affecting also the military as a core institution of nation state sovereignty. In this process, the Bundeswehr – among EU-militaries arguably the least sovereign – served as a test case.

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Turkey (0,9 %) and Poland (0,1 %). At the same time, 14 % of 1.4 million American and 11,3 % of Canadian soldiers were recruited among women (Bundesministerium der Verteidigung 2000: 22)

<sup>3</sup> The body of EC gender equality law includes treaty provisions (Art. 119 of the 1958 Treaty of Rome, the protocol and agreement on social policy of the 1992 Maastricht Treaty, and articles 2, 3, 13 and 141 of the 1997 Amsterdam Treaty), as well as nine Council Directives (CD 75/117/EEC on Equal Pay; CD 76/207/EEC on equal treatment; CD 79/9/EEC on Social Security; CD 86/378/EEC on Occupational Social Security; CD 86/613/EEC on Self-Employment; CD 92/85/EEC on Pregnant Workers; CD 96/34/EC on Parental Leave; CD 96/97/EC Second Occupational Social Security; CD 97/80/EC Burden of Proof), and, most recently a joint European Parliament and Council Directive D 2002/73/EC, amending CD 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (Source: [http://europa.eu.int/comm/employment\\_social/equ\\_opp/rights\\_en.html](http://europa.eu.int/comm/employment_social/equ_opp/rights_en.html))

The ECJ-judgment and its impact on military change in EU member states – including besides Germany also Italy – are part of an accelerated process of Europeanization. This is to be understood here as a process triggered by European norms and enhancing changes at the domestic level, involving in some cases conflict and stubborn resistance, in others adaptation and convergence towards European shared norms. I will test these two propositions for the case of Germany, by examining the adjustments made by the government to the ECJ's Kreil-judgment. In so doing, three questions are at center stage:

- First, how pervasive are the impacts of the Kreil-judgment on the Bundeswehr in light of the adjustments made by the German legislator and government? Has the Bundeswehr – in answer to the challenge to integrate women – simply adopted superficial adjustment measures, or did it embark on profound institutional change?
- Furthermore, in case that with its new gender set up the Bundeswehr also changed its institutional culture, which role did the European Court of Justice play, vis-à-vis other mechanisms that pushed for and those that resisted such transformations?
- Finally, will domestic adjustments to EC norms – as a consequence of ECJ-decisions in the domain of the military forces – contribute to the emergence of a European vis-à-vis the national identity?

The aim of this paper is to use the case of the Kreil judgment and the German Bundeswehr in order to explore the type of impact which EC gender equality norms can have on state institutions,<sup>4</sup> and to explain why the ECJ was able to play such a vital role in what I will describe as quite a profound transformation of the institutional identity of the Bundeswehr. My account of Germany's exceptional compliance in this case emphasizes the interaction of three sets of explanatory mechanisms (see Liebert 2002a): First, the ability of the ECJ to justify its claim by drawing on common European aims and global values. Second, the long- as well as the short-term strategic goals of the German defense policy in the context of European cooperation; c) the politicization of the issue of women not having access to the Bundeswehr in Germany, that, in contrast to the nineteen seventies, in the nineteen nineties is shaped by widely diffused egalitarian – and less gender based differences – attitudes in German mass publics.

Put in a nutshell, I claim that ECJ-judgements may provoke a collision of norms at the domestic level that serve as a catalyst in making the legal and institutional setup of the Bundeswehr adjust to externally and internally changing political, social and cultural realities. In my conclusion, I will speculate why the Kreil-judgement would contribute to enhancing the Europeanization of the military in a specifically European way.

In the following I will

- first discuss the scope and depth of the gendered transformations of the Bundeswehr in the aftermath of the ECJ-judgement;
- secondly assess the role of the ECJ vis-a-vis other opportunities and constraints on domestic change; and
- third, examine the discursive frames and mass public attitudes and what sense they contribute to the Europeanisation of the military.

## **1. Transformations of the Bundeswehr in response to the ECJ-Kreil judgement**

In its judgement on the Kreil case, the ECJ made clear that member state governments are to make sure that women are granted equal treatment not only in the civilian public sector but also in military working places. The question is: to what extent might ECJ judgements trigger effective changes in the institutionalised practices that rule gender relations within the state, and whether and to what extent might they be conducive to profound institutional transformations, as well.

ECJ-preliminary rulings clarify how and to which degree public and private actors in member states are expected to comply with EC-norms, such as regulations or directives. In the domain of gender equality jurisdiction, the ECJ issued 133 “preliminary rulings” between 1970 and 2000 (Ketelhut 2002). Among the fifteen EU member states, German courts were directly affected in 33 of these cases. But in the majority of these gender equality conflicts that German courts brought to the ECJ, only two of the ten gender equality directives issued between 1975 and 2002 as well as Article 119 of the EEC-Treaty

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<sup>4</sup> As a consequence of the Kreil-judgement of the ECJ, Italy, Luxembourg and to some degree also Great Britain will have to face similar changes.

on equal pay were in question: in no less than 21 rulings, the ECJ was asked to interpret the Treaty article and the directive on equal pay (75/117/EEC) and in 10 rulings the directive on equal treatment of women and men (76/207/EEC). The Kreil-judgement is a further case to be included in the latter category of legal conflicts. By contrast, the EEC-social security directive was of interest for women mostly in member states other than Germany: Of 40 judgements, 14 came from the Netherlands and 16 from Great Britain, but none from Germany.

To date, systematic empirical studies on how member states transpose and implement EC-norms in the area of gender equality and how they adjust their legal and institutional settings in order to get in line with ECJ-interpretations of primary and secondary EC-law are rare (Duina 1997; Tesoka 1999; Caporaso/Jupille 2001; Liebert 2002; Falkner 2002). In “Gendering Europeanisation”, a systematically comparative analysis of the patterns of implementation of EC-gender directives in six member states is conducted. One of the results is that – in the area of gender equality – Germany belongs to the laggards among member states that have been most out of sync with the deadlines stipulated by the respective EC-provisions within which domestic adjustments are expected to take place. For the period of 1975-1998, Germany can be described not only as a “laggard” but also as an example of legislators choosing the strategy of “minimizing impact” of EC-norms in the domestic realm (Kodré & Müller 2002), at least at the national level.<sup>5</sup>

To explain patterns of under-performance or even outright non-compliance, alternative accounts have been put forward. Following a legal-political approach to compliance, Michael Zürn distinguishes between four sources of non-compliance (cf. Zürn 2000: 11)<sup>6</sup>: the ambiguity of the EC-norm; because the member state challenges the supranational norm on legal or constitutional grounds; intentional “cheating” by the member state, without challenging the norm; and for the lack of state capacity for implementing the EC-norm at the domestic level. By contrast, if we adopting the framework of comparative Europeanisation analysis, institutional, cognitive and agency-

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<sup>5</sup> However, there are also opposite cases of women friendly Länder in Germany – such as Bremen – that sought to advance gender equality by adopting affirmative action measures for their public sector, but that have been constrained by the ECJ-judgement on “Kalanke” (1995).

<sup>6</sup> Voluntary non-compliance would take 1. the form of cheating if it does not challenge the rule; while it would 2. challenge the rule openly if the norm would be considered wrong. Involuntary non-compliance would 3. Not challenge the norm if this was ambiguous; and 4. It would challenge the norm in case of a lack of capacities to implement (Zürn 2000).

related mechanisms and their combinations need to be explored to account for different modes of Europeanisation, ranging from resistance towards EC-norms; formal compliance and domestication to transformation (Liebert 2002a).

The account developed here is based on the framework of Europeanisation and will therefore go beyond the notion of formal compliance. It aims at assessing the scope and depth of domestic adjustments and – possibly – institutional transformations that result from the transposition of EC-norms into the domestic realm. In the present context of the ECJ-judgement on women in the military, we will therefore ask whether in the German case governments complied at all, and if they did, whether their compliance was formal and restricted to domestic legal and legislative adjustments to EC-norms; or whether Europeanisation triggered domestic changes, including discursive shifts and elite learning, conducive to a “domestication” of the relevant EC-gender norm, or even to profound and sustainable institutional transformations.

Hence, for assessing the impact of the EC’s equal treatment norms on changes in the German military that emerged from the ECJ-Kreil-judgment, it is necessary to explore legislative as well as discursive and institutional adjustments. For Europeanisation to cause transformational change of the Bundeswehr, three conditions needed to apply: first, the EC’s equality norms needed to be formally transposed into the German constitutional and legislative framework governing the Bundeswehr; second, there had to be organisational changes in order to integrate women practically into the military infrastructure; and, finally, cultural or “discursive” shifts had to occur legitimizing the inclusion of women in the military.

In which of these three different dimensions did the German government, military leaders and public opinion formers cope with EC-equal treatment norms regarding the gender make-up of the Bundeswehr in the aftermath of the ECJ-Kreil judgement? Were they restricted to only formally including women, or were the organisational prerequisites created and even the cultural frames constructed for effectively and legitimately integrating women into the armed forces, as the symbol of sovereign state power?

In all these three dimensions – legal, organisational, and discursive – changes can be detected:

- (1) First, the ECJ-judgement urged the German Government to change the Basic Law provision that during more than 50 years had banned women from being hired by the Armed Forces. Within less than 10 months, by November 2000, the German government adjusted the German Constitution and, thus, the legal bases of the Bundeswehr. Although the governing coalition of Social Democrats and the Green party initially considered not changing that part of the Basic Law prohibiting women from serving under arms but to only re-interpreting it, both parties finally agreed in constitutional change in order to prevent recourses to the German Constitutional Court: With an impressive cross-party near unanimity, the Bundestag dropped the restrictive article 12a of the Basic Law that had stipulated “Women ... in no case may be drawn to serve the arms”. Since January 2001, women have unrestricted access to all careers within the German Bundeswehr.
- (2) Simultaneously, the ECJ-norm of equal treatment for women and men was implemented by organisational changes in the Bundeswehr necessary for including women into Bundeswehr practice. In the German Ministry of Defense, a steering group “Women in the Armed Forces” was created under the leadership of Brigade General Jörg Sohst. Its tasks comprised: 1) legal questions such as changes in the soldier law and the soldier carrier regulations; 2) infrastructural and logistic-organizational requirements regarding uniform, accommodation, or hygiene; 3) ergonomic aspects such as the adjustment of arms and equipment to women soldiers; 4) changes in the guidelines for education and formation; 5) information and preparation of interested women; 6) the problem of the degree to which the army should open its ranks to women (Kümmel/Biehl 2000b: 7).
- (3) Finally, also in a cultural and cognitive dimension, studies were launched about the ambivalent attitudes held by male soldiers toward opening the military to women, and their underlying notions of masculinity, femininity and gender relations (Kümmel & Biehl 2001). Courses in “gender training” were developed to dismantle resistance on the part of male soldiers based on “justified or non justified” gender stereotypes (Kümmel & Biehl 2000b).

As a result, the number of women in uniform between 1999 and 2002 nearly doubled, from 4173 to 7734. Among these, 2752 women soldiers serve in the armed

troops, while 4982 form part of the health service and music corps. To summarise, the approach adopted by the German government towards implementing the ECJ-judgement on women in the military was to transform the Bundeswehr profoundly. This response is particularly exceptional, if compared to the pattern of non-compliance or underperformance characteristic of Germany with respect to implementing EC gender equality law between 1975 and 1998. Although Germany clearly still belongs to the “laggards” with respect to the percentage of women included in other national armies, the impact of Europeanisation is unusual, since it was not limited to the formal level, but included organizational as well as cultural changes. Thus, traditional cognitive frames were questioned and training programs developed to trigger learning processes necessary to challenge the male exclusiveness of the Bundeswehr effectively.

The question is how it can be explained that the German Government was eager to pave the way for women in the Bundeswehr as much or even more as in the state bureaucracy, the courts or state universities – considering that in these various branches of the state “gender training” for removing cognitive constraints and informal impediments to equal treatment have hardly ever been contemplated. Hence, the Bundeswehr as a pioneer in the area of egalitarian gender relations?

In the following section, I will discuss some rational accounts for why the ECJ could have an important impact on transforming the Bundeswehr. Then, in the last section, I will adopt an interpretative perspective to capture some of the underlying cognitive and discursive aspects of this puzzle.

## **2. Institutional mechanisms and agency in Europeanising the Bundeswehr**

The traditional debate on the driving forces of European integration provided alternative clues to the question of why the German Government adjusted to the ECJ judgement by transforming the Bundeswehr. The controversial issue in this debate was whether to qualify the ECJ as a supranational agent acting in alliance with national courts and interest groups, or whether the ECJ is only a catalyst where member governments are in control of domestic adjustments to legal integration. The Europeanisation framework

bridges this artificial dichotomy, by exploring the interactions of supranational with domestic mechanisms – including institutional provisions, frames and agents.

With the expansion of EC-jurisdiction, supranational law gradually penetrates the domestic legal realm, due to an interplay between “functional” and “political spillovers” that are conducive to an “incremental upgrading of common European interests” (Burley/Mattli 1993). Following this argument, the central actors who pursue the aim of including women in the military in the EU are located above and below the nation state: the ECJ-judges in their role as arbiters serve their own institutional interests; and domestic Courts and interest groups support the ECJ because of their complementary self-interests. Both categories of actors are engaged in processes of reciprocal empowerment, while limiting their operations to a legal context that is neatly separated from the political.

In the case of the Bundeswehr, the ECJ proved a powerful mediator since a) it confirmed domestic critics of the German government's constitutional, legal and normative justifications for the exclusion of women in the Bundeswehr (Reich 1999; von Münch 1999); b) it enforced EC-norms in Germany through the unambiguity of its judgment. In this case, the ECJ, hence, was thus an important mechanism for transforming the Bundeswehr, and, hence, for domestic change. Regarding subnational allies, the Court could rely on two groups: the Bundeswehrverband – an interest association of military personal – on one hand, and the Liberal Party (FDP), on the other. Furthermore, the Kreil case stirred up an intense public debate in practically all the major German mass media. When it came out on January 11, 2000, it even superseded for some days the attention devoted to the party finance scandal of the CDU.

At the domestic level, the German government acted as a crucial agent, as well, working hand in hand with the ECJ. In the Tanja Kreil case, the ECJ-ruling fit in with changed national German interests as much as the other way round. The renewed national interest in including women in the military can be explained, in part, as the result of a government change in 1998. This made it evident that the German government had changed its position on the issue of women in the Armed Forces: Appearing in front of the European Court in June 1999, only a few months after taking office, the representative of the German SPD-Green's government defended the exclusion of women by traditional gender norms, emphasizing differences between men and women, where the latter needed

to be protected by the former. After January 2000, Rudolf Scharping, the SPD Minister of Defense, endorsed the mission to open the Bundeswehr for women. He became the most visible actor in the reform process, although some of his actions were concealed by the press and only published by the Internet: for example, a “hearing” held with 50 women soldiers, to discuss women’s problems in the Bundeswehr health corps. The introduction of “gender training” programs in the Armed Forces was initiated by the “brain trust” of the “Social Scientific Research Institute of the Bundeswehr” (Kümmel/Klein/Lohmann 2000; Kümmel 2000) to affect cognitive changes of the traditional Bundeswehr culture.

In two debates about the revision of the Basic Law in the Bundestag, the representatives of the governing SPD and Greens’ parties deployed a radically changed discourse<sup>7</sup>. The Christian Democrats, who had been in charge of the government in 1996 when Tanja Kreil’s case was brought to the ECJ, changed their position, too, allowing the new article of the Basic Law that allowed women to join the Bundeswehr on a voluntary basis to be approved by a near unanimous vote of MPs. On the basis of arguments presented in favor of the provision, there were two pragmatic motives for German legislators opting in favor of it: First, women were seen as a resource to balance the shortage of male candidates volunteering for a professional career in the Bundeswehr. In this context, the norm of equal treatment of men and women promises to make the Bundeswehr become “more attractive” in competition with civilian workplaces. Second, women’s inclusion in the Bundeswehr was seen as a strategy to create a new appeal and image for it, to counter the bad press the Bundeswehr had been suffering from in recent years.

Previous governments had sought to include women in the Bundeswehr before, but without success – primarily the SPD headed government between 1969 and 1984. To understand why these former attempts failed while they succeeded in 2000, an “instrumental” account may highlight two major contextual changes: First, the pressure on the Bundeswehr to function effectively in out-of-area actions grew with NATO-obligations increasing after the Gulf-War, and especially with the Kosovo-War. Second, in the seventies, women’s organizations successfully mobilized against attempts to draw women to serving under arms succeeded – for instance the initiative of 1979 supported by public figures and intellectuals “Women into the Bundeswehr – We say NO” (Janßen 1980).

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<sup>7</sup> See German Bundestag, 107<sup>th</sup> session, June 7<sup>th</sup>, 2000; and 128<sup>th</sup> session, October 27<sup>th</sup> 2000.

Bearing this historical antecedent in mind, one could expect that any renewed attempt to “militarize women” would have been blocked again – if not by the women's movement, by the German peace movement. Ultimately, during the seventies and eighties, both movements repeatedly rallied against attempts by German elites to “legitimate militarism” by including women, instead of abolishing the Bundeswehr altogether.

To understand why in the aftermath of the ECJ's judgment on women in the military a counter mobilization did not materialize, it appears necessary to include a further variable into the account: public opinion. Arguably the changing patterns of public attitudes towards the issue of women and the military created the strikingly new constellation to overcome the old stalemate – a social democratic-liberal government coalition trying to “promote” women in the Army, but women activists resisting it. By 2000, German mass publics displayed an overwhelmingly positive attitude toward the issue of women in the Bundeswehr. As a representative survey conducted by EMNID in March 2000 revealed, 79 % of men and women valued a women applying for a job in the Bundeswehr positively, and 34 % extremely positively; 59 % of the women welcomed the decision of the European Court of Justice to open the Bundeswehr for women, 33 % were in favor of opening all units of the army for voluntary female soldiers (Bundesministerium der Verteidigung 2000: 18-21). This change was the result of a diffusion of egalitarian attitudes in German mass publics.

### **3. Gender Equality, Europeanisation and the reframing of the Bundeswehr**

Europeanization comprises, apart from promoting equal treatment of men and women, also the project of building EU rapid intervention forces, serving as crisis intervention troupes, as well as a common security and defense policy, seen as “a logical consequence of the process of European integration” (Berlin, 46<sup>th</sup> annual meeting of the Parliamentary Assembly of the NATO, November 2000). If Europeanization helps to diffuse European norms and common frameworks across a diversity of domestic contexts, this will be the result not only of institutional and interaction mechanisms, but will require also cognitive and discursive shifts. Is there evidence in the German case that cognitive frames changed in domestic discourses related to the issue of women in the Armed Forces?

Can newly dominant cultural frames be identified that help to explain the transformation of the Bundeswehr? More specifically, has a “European”, egalitarian gender frame replaced traditional and masculinist notions in German public debates about women in the Bundeswehr?

One question is whether in German public debates the issue of the inclusion of women in the military is reframed by referring to the “normal situation” typical of other EU-member states. Do discourses draw on cognitive, normative or emotional symbols with a European dimension? Are there arguments sustaining the legitimacy of the ECJ-judgment, or conversely protesting against the intrusion of the ECJ in domestic affairs? “Norm collisions” will result from competing and incompatible normative frames of the issues at stake in situations of “misfit” between European regulations and national practices. Women’s inclusion in the military will be a controversial issue of public debate to the extent to which people frame this issue in contrasting terms – in particular, if they draw on differing conceptions of “gender” and “equality”<sup>8</sup>. The question is to what extent do the gender equality discourses of the ECJ and in Germany converge, thus explaining the Europeanisation of the Bundeswehr, or do they continue to differ or even clash.

*(1) The legal discourse by the European Court of Justice*

In the June 1999 Court deliberations on the case “Tanja Kreil against Federal Republic of Germany” held in Luxemburg, the ECJ backed Tanja Kreil’s claim that the denial of a job to her by the Bundeswehr represented direct discrimination because of her gender and therefore was in conflict with the EC equal treatment norm. The Court also adopted the argument of the European Commission that the norm of equal treatment applied to all public employment relations and hence was valid for the Armed Forces, too. The Court concluded that “a stronger protection of women against the dangers that affect men and women in the same way cannot be justified” (p. 4). In its opinion, the prohibition of discrimination applied to all sectors of public employment, including the Armed Forces. The EC-Treaty would only allow for exceptions from Community law in cases of war or serious tensions, not in peace times. Exceptions were only legitimate if it was “necessary”

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<sup>8</sup> At least five conceptions of “gender equality” can be distinguished in European policy and legal discourse: the egalitarian norm of “gender sameness”; the norm of gender neutrality; the formal norm of equality of opportunity; the conception of substantial equality as an outcome; equality understood as gender equity, depending on individual needs, resources and rights.

that a specific function was exercised by men; and it was the business of national courts to establish whether jobs to which women aspired made part of those activities that only men could do. They had to examine whether women's exclusion from the armed service had disadvantages, and balance these against the claim to serve the protection of the women. In particular, excluding women from "crisis resistant" work places and chances of qualification, such as the military provided to men, could be a handicap also with respect to competing in the civil labor market.

In their judgment as well as in the report accompanying it, the ECJ judges reaffirmed that the inclusion and promotion of women in the military helped to upgrade common interests held by the EU in its entirety: the equal treatment of men and women. Although the EU left it to member states to adopt adequate measures for assuring their internal and external security, this did not necessarily imply that national defense and security policy was completely detached from Community-law and, in particular, from equal treatment norms for women and men. Exceptions are limited to extraordinary cases. For instance member states have the right to exclude professional activities, for which gender constitutes an undeniable prerequisite, from the domain to which gender equality regulations apply. But such exceptions may not go beyond that which is necessary for the relevant aim. The Court has to examine whether national state institutions do in fact guarantee public security and whether their measures are adequate and necessary to reach these aims. Given that women are generally excluded from nearly all branches of the military, this cannot be justified as an exception any more; and it does not make part of the types of unequal treatment that are admitted as legitimate for protecting women.

*(2) The defensive discourse by the German government*

In 1956, in the parliamentary debate on the constitutionalization of the new German Army, Christian Democrat Elisabeth Schwarzhaupt argued that "our conception of the nature and destination of women prohibits women to serve with arms". Social Democrat Annemarie Renger saw women in uniform "in contradiction to the feminine". The stereotype of women as the physically weak gender was the basis for the introduction of provision 11a in the German Basic Law: "Women are in no case admitted to serve with arms". By 1999, Germany was one of only three European Union member states where women are not admitted to all branches of the Armed Forces, and where with its 340.000 soldiers the Bundeswehr is the largest public employer, practicing a "Berufsverbot" (job

prohibition) for women. This “misfit” of German practices with EU-equal treatment norms is in contradiction also with the Constitutional reform of 1994 where Article 3, paragraph 2, sentence 2 stipulates “The state promotes the effective realization of equal rights of women and men and contributes to the abolition of existing disadvantages” (Münch 1999: 7).

Still in 1999, in the proceedings of the ECJ-case in Luxembourg on June, 29<sup>th</sup>, the German Government continued to argue that this “disadvantage” was justified, since Community law should not apply to the domain of defense, as part of the common foreign and security policy which remained in the sovereignty of the member states. Furthermore, it held that experiences with the National Socialist Regime dictated legislators a “moral obligation” to protect women from being exposed to combats and the arms of enemies, without considering whether women were willing to expose themselves to such dangers.

In the October 2000 Bundestag debate on the revision of the German Constitution to enable women for getting access to military careers, there was little complaint about the “intrusion” of the ECJ in domestic affairs. Only Rupert Scholz, the speaker of the CDU-opposition party in the Bundestag, judged the ECJ-judgement to be “a clear transgression” (“Kompetenzenverstoß”). The domain of the military, he argued, did not belong to the competences of the EC. Citing a number of decisions of German Courts he affirmed that women serving the arms even on a voluntary basis was anti-constitutional. Finally, Scholz had to admit that the “protection norm in favor of women” that had become state practice was in contradiction with the “meanwhile changed societal consciousness” in Germany that required that the “women citizen in uniform” would become an integral part of a democratic society (DBT 27. 10. 2000).

Apart from this, the Bundestag debate confirmed the legitimacy of the ECJ-judgment in several aspects:

- a) changing public attitudes toward “women citizens in uniform” was acknowledged to have become an “integral part of democratic society” (Rupert Scholz, CDU; 27.10.00)
- b) a high proportion of women applying for jobs in the Bundeswehr was found to reach relatively higher scores in the “performance tests” than male candidates (H.P.Bartels SPD, id.);

- c) In new peace keeping tasks, women would supply specific capabilities in out of area ventures (id.);
- d) Regarding the improvement of the public image of the Bundeswehr, women would contribute to making it a model site where liberal democracy, responsibility and the rule of law were “confirmed” (Margot von Renesse, SPD);
- e) The Bundeswehr was a major workplace site requiring the combatting of discrimination against women (Volker Beck, Greens, 27.10.00); in particular, it commanded to dismantle “the last ‘Berufsverbot’ supported by the constitution” (Jörg van Essen, FDP, id.).
- f) However, the equal treatment norm for women and men was seen as being violated by giving women the choice, and keeping conscription for men, as reform communists (PDS) argued (Petra Bläss, PDS, id.). In the view of Christian Democrats, by contrast, there should be no conscription for women because they provided sufficiently “community service” to society, by working in the family, in child education as well as by their “Ehrenamt” (Karwatzki).
- g) Finally, even female patriotism was invoked to back women’s admission to the army: Women needed the right to participate in the “responsible task of providing security to their country” (Irmgard Karwatzki, CDU, id.).

In view of this range of arguments voiced in the parliamentary debate to pave the way for women into the Bundeswehr we can conclude with a mixed balance: German legislators adopted constitutional and legislative changes necessary to Europeanize the Bundeswehr. But they supported this fundamental change for quite varying reasons: instrumental interests, ideas about the possible effects of women on improving the Bundeswehr; and differing norms of gender and equality.

### **Conclusion: The Bundeswehr on the way toward a European identity?**

Before the Kreil-judgement was issued by the ECJ, High Courts in the U.S. in numerous cases served as catalysts for promoting women’s access to the U.S. Armed Forces, by paving their careers and combating multiple forms of internal discrimination. It can be therefore assumed that, once the national barrier of sovereignty around the military has been perforated by an international and European norm such as gender equality, this

process of erosion will continue. The ECJ as well as the International Criminal Court will continue to make inroads for civil and human rights in a territory where military logics and chains of command operate. In that respect, women in uniform who feel treated unequally and seek redress at the Court are pioneers. Generalizing from the first few military cases, the ECJ could continue to function as a catalyst making internal military affairs more transparent and stimulating mass public debates.

Two questions have remained open in this account thus far: Will expanding transnational military operations – such as NATO joint ventures – further promote convergence towards norms of gender equality framed as “sameness” modeled after male norms. Or will military in the EU progressively pursue a slightly different path: Following the third generation of equal treatment directives developed in the nineteen nineties, and their orientation towards a variety of “gender integrating” militaries, where the “family friendliness” of the military is an issue of making it attractive as a workplace by safeguarding parental, and even marital rights. Thus the reconciliation of work and family life, and even of foreign service and marital sex life, have become issues in the evolution of public debates about the inner life of the Bundeswehr since 2000.<sup>9</sup> If in the future, the gender mainstreaming approach to public policy in the EU (Shaw and Beveridge 2002) will also expand to the Armed Forces, we might expect notions about gender identities and gender relations in European militaries will further depart from traditional masculinist norms.

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<sup>9</sup> Thus, DER SPIEGEL reports that „With strange regulations the high command seeks to control the sex life of German soldiers. But court cases show that out of area service and the rising number of women in the Bundeswehr create problems that commanders are hardly capable of solving“; in DER SPIEGEL, „Verführerische Situationen“ („Seductive situations“); 4. 11. 2002, no. 45, p. 78ff.

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