The Federal Constitutional Court: Fifty Years of the Struggle for Gender Equality.

By Justice Renate Jaeger
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[1] It has been a long journey from the noble declaration in the Federal Republic's new constitution (*Grundgesetz* [Basic Law]) that women and men have equal rights, to the establishment of concrete laws and jurisprudence that now assure that women and men actually receive equal treatment and that women are no longer disadvantaged in society (and even more, laws and jurisprudence that assure that women receive support if they encounter structural disadvantages). This article, in looking back on its first fifty years of service, surveys the decisive role that the *Bundesverfassungsgericht* (Federal Constitutional Court) played in that journey. (1) [2] The constitutionally required equality between women and men that Elisabeth Selbert pushed through at the drafting of the Basic Law has, in the meantime, become a far-reaching legislative reality. (2) The guarantee of equality in Article 3(2) had, however, an uncertain start. Frequently, the struggle required the encouragement of the Federal Constitutional Court. [3] It is possible to divide the direction the Federal Constitutional Court has given to the Parliament with respect to gender-equality legislation into three distinct phases, each of which reflected the social understanding and mood of its time: (1) In the 1950s and 1960s the Court's jurisprudence emphasized a "natural distinction" between women and men; (2) In the 1970s and early 1980s the Court's decision's turned to emphasizing the equality of the sexes; and (3) In the 1980s the Court began to consider the persisting social distinctions between women and men. [4] In 1961 the Federal Constitutional Court still accepted that "in light of the present-day understanding of the character of the German marriage, the wife is to be the life-long helper of her husband." (3) This perspective, promoted by the Federal Constitutional Court in the 1950s and 1960s, relied on the belief that there were natural differences between women and men that should be reflected in the law. The obligation, established by the Basic Law, to guarantee women and men the same status before the law was interpreted to mean that the natural differences of the genders should be maintained and respected by the law (and not negated by a form of pure equality). The objective of this line of interpretation was to prevent women from being disadvantaged as a consequence of the "*Andersartigkeit der Frau*" ("different nature of womanhood"). [5] The Federal Constitutional Court began to have a decisive impact on the real struggle for equality in the 1970s and early 1980s. (4) In a 1974 decision the Court held that: "The idea that the father is the head- or middle-point of the family is legally replaced by a partnership between men and women." (5) In a 1978 decision the Court ruled that: "The model of the woman, which previously cast her as the care-taker of the family and homemaker, has thoroughly changed." (6) The Court declared, in a 1979 decision, that: "It does not belong to the distinctions between the sexes that women are homemakers." (7) [6] The division of roles between the sexes, which to that point was seen as natural, was thereafter regarded as nothing more than tradition and heritage, which could not be justified in the face of Article 3(2) of the Basic Law. [7] The right to affirmative support for women, in order to reconcile past disadvantages, was, for the first time in 1994, expressly established through the addition of the second sentence to the "Equal Status Before the Law" paragraph of Article 3 of the Basic Law. After the 1994 amendment, Article 3(2) now reads: "Men and women shall have equal rights. The state shall promote the actual implementation of equal rights for women and men and take steps to eliminate disadvantages that now exist." [8] The 1994 amendment was the result of a constitutional debate that followed German reunification in which there was consensus among women that, in spite of the substantial progress with regard to women's rights wrought by the Basic Law, there was still a need to amend the Basic Law to expand those rights because we had not yet achieved social and economic equality. Farther reaching proposals for the amendment of Article 3(2) (like: "the State guarantees the equal status of women in all areas of society"), although they had support among constitutional law experts and the cooperation of women members of the Parliament from the various parties, lacked the necessary parliamentary majority. [9] Many women's groups and organizations supported the movement in the 1990s for the expansion of women's rights in the constitution and contributed to the resulting amendment, even if the amendment was small. Again, it was no easy success; based on a number of proposals in the spirit of Elisabeth Selbert. Finally, in 1994, the Basic Law was amended to include an obligation on the part of the State to support and promote gender equality. It would no longer be enough to settle for the equal status of women before the law; affirmative support and promotion of women is now the State's objective. [10] The path to this point was long. The following are a few of the decisive steps taken by the Federal Constitutional Court along the way, since the establishment of a fundamental right to equality in 1949: - In 1957 the Court ruled that the so-called "*Zusammenveranlagung*", i.e. the joint assessment of married individuals under tax law, was unconstitutional. This policy, which resulted in especially high taxes on the individual earnings of women, was found to be unconstitutional because the policy sought, as its objective, to prevent women from engaging in business activities in competition with men. (8) - In 1959 the "*Stichentscheid*" (the decisive authority) of the father was found to be unconstitutional. The Court was required to make this ruling after the Parliament finally established that the parental authority no longer exclusively resided in the father. The Parliament had, however, maintained an exception to this principle for crisis situations, in which the father's decisive authority was supposed to continue in force. (9) - In 1963 the "*Höfeordnung*", i.e. antiquated regulations pertaining to the administration and organization of family farms, certain of portions of which gave priority to male heirs in estate matters, was declared unconstitutional. (10) - In 1963 the Court clarified that the failure to

recognize the value of the service performed by mothers, housewives and helpers in the household in the social insurance system constituted a violation of the equal status of women and men before the law. (11) - In 1967 it was decided that, with respect to the care and maintenance of their next-of-kin, women and men serving in the public administration should be treated equally. (12) - In 1974 it was determined that the rule that granted citizenship to the children of German fathers but not German mothers, was unconstitutional. (13) - In 1991 equality with respect to marital name was fully enforced. Since then both partners to a marriage have the opportunity to choose their own name. Furthermore, when the partners can't agree on which name to adopt, the husband's name is not automatically used. (14) - Since 1992 the time spent raising children has been assigned value as a legitimate contribution to public retirement insurance. (15) [11] Primarily, the biological difference between women and men has stood at the center of the debate and different abilities and functions have been derived from this biological difference. The care for and upbringing of the family have not been treated as the rights and obligations of both parents, rather primarily as a concern of the mother. This attitude shaped the case law that characterized the woman's role in the family as that of helpers in the household. [12] Many explicit distinctions, which worked to the disadvantage of women, vanished from the legal order as early as the 1970s. Thereafter the struggle came to focus on extending privileges to women as compensation for disadvantages suffered or protective regulations, which in truth had disadvantageous consequences for women. An example of the first of these efforts (compensation for suffered disadvantages) is the Federal Constitutional Court's 1998 decision in which the Court ruled that women victims of the so-called "Zölibatsklausel" (the rule in place until 1953 that prohibited married women from holding positions within the public administration) could close this gap in their public-service biography, and thereby reacquire privileges lost as a result of reduced tenure (with respect to public retirement benefits). (16) An example of the second of these two efforts (correcting disadvantageous, protective regulations) includes the Federal Constitutional Court's 1992 decision concerning the Nachtarbeitsverbot (prohibition on women working at night). In that decision the Court held: *The prohibition on women working at night actually protects many women, who are occupied fulltime with child-care and housework, from night-time labor that might threaten their health. This protection, however, is linked to considerable disadvantages. Women are, thereby, disadvantaged in their search for employment. Working women are handicapped in the free command over their working hours. Women cannot, for example, earn over-time wages for night-time labor. All of this can also have the consequence that, to a greater degree than men, alongside their work outside the home, women will also be burdened with the care of children and house-work, thereby reaffirming the traditional division of roles between the sexes. In this respect, the prohibition on women working at night creates obstacles to the elimination of the social disadvantages from which women suffer*. (17) [13] The most recent decision in which the Federal Constitutional Court presented a radical concept of equality concerned the fire protection services in Baden-Württemberg. It is possible that this decision in fact introduces a new era in the jurisprudence of equality by introducing an "equality of obligations". In its decision the Federal Constitutional Court held that the previous absence of women in the fire protection services of the old (West German) *Bundesländer* (Federal States) violated the equal rights of women because women were treated as the weaker gender without any consideration of their individuality. [14] To the degree that this body of jurisprudence relies upon the fundamental right to equality guaranteed by the Basic Law, Elisabeth Selbert, with her addition to our constitution in 1949, had already achieved all that can be won through the law. The amendment of the constitution in 1994 merely confirmed this a retreat from the constitutional value of gender equality can only be made with a two-thirds majority of the parliament. (18) [15] Finally, a word with respect to the relationship of the Federal Constitutional Court and the law of the European Union on this issue. The treaty forming the European Union (Maastricht Treaty) entered into force on 1 November 1993, establishing only an obligation on the Member States to pursue collective foreign and security policies and to cooperate in judicial and police affairs. The issue of gender equality was not on the table at the Maastricht conference. Subsequent to the Maastricht conference the issue of women's rights was raised and promoted through public meetings and other forms of pressure brought by women's organizations. Women members of the European Parliament as well as women members of the national and local parliaments raised the profile of the issue in Europe, making use of NGO's and events like the Peking World Women's Conference. At the government conference in Amsterdam in October, 1997, the final version of the treaty brought further progress with respect to the issue of gender equality. (19) [16] As in 1949, with respect to Germany's Basic Law, women were successful at the European level. Article 2 of the Maastricht Treaty made equality between women and men one of the EU's fundamental objectives. (20) The equality of women and men was, moreover, declared to be an over-arching point on the EU's agenda, meaning that all organs of the EU, especially the Commission, are obligated to work towards the equality of women and men in all areas of policy. Pursuant to this obligation, affirmative measures providing support for and the promotion of women are protected as primary law (with priority over domestic legislation). This legal interest, however, did not attain the status of a fundamental right the violation of which could be addressed directly to the Court of Justice of the European Communities. [17] (21)The legal interest in gender equality that has its basis in European law was recently invoked to make a dramatic stride in the struggle for gender equality in Germany. The provision of the Basic Law that prohibited women from rendering military service involving "the use of arms" (22) was challenged as (among other arguments) a violation of a Directive of the Council of Ministers of the European Community that prohibited discrimination, either direct or indirect, on the grounds of sex. (23) The local German court hearing the case referred the question concerning the Council Directive to the Court of Justice of the European Communities. The European Court of Justice found the ban to violate the Directive's prohibition on gender

discrimination, explaining that the broad, non-specific scope of the constitutional ban on women serving in armed posts "cannot be regarded as a derogating measure justified by the specific nature of the posts in question or by the context in which the activities in question are carried out." (24) In response to the decision of the European Court of Justice, Article 12a(4) of the Basic Law has been amended to read: "Under no circumstances may women be obligated to render service involving the use of arms." At the beginning of this year the first women were admitted to posts involving the use of arms in the *Bundeswehr* (German Armed Forces). [18] Progress at the European level with respect to the issue of gender equality should not be underestimated. The European system now supports the accomplishments of the Basic Law, as interpreted by the Federal Constitutional Court over the last fifty years, on the issue of gender equality.

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(1) This article was originally published, in German, in the German magazine Emma: Renate Jeager, "Wie das Grundgesetz in unsere Gesetze kam," EMMA, July/August 1999, at 82. Subtle differences between the article as it appears here and the original are a result of the translation into the English language and the editors' efforts to harmonize the article with the theme of this special issue of the German Law Journal.
(2) Elisabeth Selbert and three other women participated as representatives in the Parliamentary Council that met in Bonn in September 1948 to draft the Federal Republic's (West Germany) new Constitution, called the Basic Law. She featured prominently in the inclusion of a gender equality clause (as paragraph 2) in Article 3 of the Basic Law, which read (until its amendment in 1994) as follows: "Men and women shall have equal rights."
(3) BVerfGE 13, 290 (301).
(4) This shift coincided with the election in 1977 of Gisela Niemeyer as the first female Justice of the Federal Constitutional Court.
(5) BVerfGE 37, 217 (251).
(6) BVerfGE 48, 327 (338).
(7) BVerfGE 52, 369 (376).
(8) BVerfGE 6, 56.
(9) BVerfGE 10, 59.
(10) BVerfGE 15, 337.
(11) BVerfGE 17, 1 (38 and following); BVerfGE 17, 62.
(12) BVerfGE 21, 329 (353).
(13) BVerfGE 37, 217 (250).
(14) BVerfGE 84, 9 (20).
(15) BVerfGE 87, 1.
(16) BVerfGE 98, 1.
(17) BVerfGE 85,191 (209).
(18) Article 79(2) of the Basic Law stipulates: "Any such law [amending the Basic Law] shall be carried by two thirds of the members of the Bundestag and two thirds of the votes of the Bundes-rat.
(19) "The expanded scope of Art. 119 of the EC Treaty [Art. 141 of the Consolidated EC Treaty - which requires states to ensure gender equality in wages] was firmly rooted in the 1997 Treaty of Amsterdam." THOMAS OPPERMAN, JURISTISCHE KURZ-LEHRBÜCHER: EUROPARECHT (2d. edition) § 1660 (1990).
(20) Article 2 of the Maastricht Treaty reads (in pertinent part): "The Union shall set itself the following objectives: . . . to maintain and develop the Union as an area of freedom, security and justice, . . ." Article 141(1) of the Consolidated Treaty of the European Community establishes an obligation on the part of Member States to "ensure that the principle of equal pay for male and female workers fore equal work or work of equal value is applied."
(21) The original version of the article was published before the judgement of the Court of Jus-tice of the European Communities in the *Tanja Kriel* case. This paragraph has been added by the editors to reflect this recent development.
(22) Article 12a(4) of the Basic Law (in pertinent part) read: ". . . women between the ages of eighteen and fifty-five may be called upon to render such services by or pursuant to a law. Under no circumstances may they render service involving the use of arms."
(23) Council Directive 76/207, art. 2, 1976.
(24) Case C-285/98, Tanja Kriel and the Federal Republic of Germany (2000), http://curia.eu.int/jurisp/cgi-bin.