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A German Foreign Legion?

On Having Foreign Nationals Serve in the Bundeswehr

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A German Foreign Legion?

On Having Foreign Nationals Serve in the Bundeswehr

1 Introduction

Currently, the Bundeswehr has 180,992 uniformed personnel.¹ This number is expected to increase to 203,000 active servicemen and women by 2031.² The number of personnel that is actually required, however, is likely to be significantly higher. If a NATO ally was attacked and Article 5 invoked, it seems that we would need a total of 465,000 servicemen and women – including both regular and reserve forces –, as recent press reports suggest.³ The Bundeswehr, therefore, needs a large number of additional uniformed personnel for the active-duty force and the reserve alike.

There is, however, a potential group of personnel that has been given little attention so far in the discussion on the shortage of servicemen and women in Germany: foreign nationals. Given the demographic developments in Germany, their potential is quite significant. In the overall population, the age cohort of 18 to 25-year-olds is particularly suitable for recruitment. At the end of 2023, 6% of this cohort was made up of EU foreigners, which amounts to 463,000 potential applicants.⁴ If we included all members of this age cohort who are not German nationals – i.e. also non-EU foreigners –, 19% or 1.38 million would be suitable for recruitment.⁵

The idea of opening up the military profession to people of foreign nationality is not a new one though. As early as 1981, the Bundeswehr demanded that foreigners permanently living in Germany be called up for military service.⁶ However, proposals by politicians to do so have so far been limited to EU citizens.⁷ Nonetheless, the idea of having non-EU foreigners serve in the Bundeswehr should also be considered.

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1 This figure was published on 31 August 2024 (Bundeswehr 2024).

2 Bundesministerium der Verteidigung [Federal Ministry of Defence] 2024.

3 Gebauer/Kormbaki 2024: 26.

4 Krome 2023: 3 (with further references).

5 Ibid.

6 Walz 1982: 41.

7 See, for example, the recent publication by Grosse 2024; see also Pieroth 2019: 63 (with further references).

2 Foreign Volunteers and the German Legal Status of Military Personnel Act

Notwithstanding the above, having persons serve in the Bundeswehr who are not German nationals is generally precluded by Section 37 (1) (1) of the German Legal Status of Military Personnel Act (Soldatengesetz – SG). According to this Section of the Legal Status of Military Personnel Act, only individuals who are Germans within the meaning of Article 116 of the German Basic Law (Grundgesetz – GG) may be appointed career soldiers or temporary-career volunteers. Apart from German nationals, the status of being German as per Article 116 of the Basic Law also applies to expellees from former German territories – often referred to as ‘status Germans’.⁸ However, with regard to the question whether non-EU foreigners should serve in the Bundeswehr, this legal category is only of historical importance and, therefore, obsolete.⁹ So the crux of the matter is, in fact, German citizenship. If a Bundeswehr soldier loses German citizenship, they will be discharged from the armed forces without exception as stipulated by Section 46 (1) of the Legal Status of Military Personnel Act. In accordance with Section 58b (2) of the same Act, men and women who wish to volunteer for military service must also be German citizens.

However, Section 37 (2) of the Legal Status of Military Personnel Act does offer an exception to the rule, stating that the Federal Ministry of Defence (Bundesministerium der Verteidigung) may, in individual cases, allow derogations from Section 37 (1) (1) in order to meet military requirements. At the time the Act was passed, this was justified by Alliance policy considerations, meaning it was assumed that a situation might arise where soldiers from allied Western European countries had to be integrated into the Bundeswehr.¹⁰ However, it is the unanimous opinion of subject-matter experts that Section 37 (2) is not applicable to a large-scale inclusion of foreigners as servicemembers in the Bundeswehr but strictly limited to isolated cases.¹¹ The above is supported by the Section’s clear wording, establishing a rule-exception principle.¹² In addition, the wording of Section 37 (2) clearly shows that the legislator wanted these exceptions to be used only to a very limited extent,¹³ which is emphasised by the fact that the approval of a supreme federal authority is required for such an exception to be granted.¹⁴ Moreover, exceptions must concern isolated cases in the interest of the Bundeswehr.¹⁵ Thus, the general shortage of German applicants is an insufficient legal basis to warrant such an exception.¹⁶ To put it bluntly, as long as Section 37 (2) of the German Legal Status of Military Personnel Act is in force, there will be no foreign legion in Germany.¹⁷

⁸ For an international law perspective on the matter of the expulsion of Germans, e.g. from Czechoslovakia, see Ermacora 1992.

⁹ A similar conclusion has been drawn by Jarass 2024: marginal 2.

¹⁰ Sohm 2021: marginal 5.

¹¹ Lucks 2022: marginals 4, 13; Pieroth 2019: 64; Sohm 2021: marginal 16; Vergun/Poretschkin 2012: 66.

¹² Vergun/Poretschkin 2012: 66.

¹³ Pieroth 2019: 64; Sohm 2021: marginal 16; Vergun/Poretschkin 2012: 66.

¹⁴ Sohm 2021: marginal 16.

¹⁵ Ibid.

¹⁶ Explicitly discussed by Sohm 2021: marginal 16.

¹⁷ Vergun/Poretschkin 2012: 66.

Legal practice confirms this finding. Some publications claim that to date there has been only one such case, namely a Romanian physician serving as an officer in the Bundeswehr Medical Service.¹⁸ But what is true is that from 1997 until the end of 2020, there were actually six cases in which exceptions were made according to Section 37 (2) of the Legal Status of Military Personnel Act.¹⁹ As of November 2022, there were still two foreign nationals serving as temporary-career volunteers in the Bundeswehr.²⁰ This shows that Section 37 (2) has so far been applied in the way it was intended – as a very narrow exception rather than a rule. The current personnel shortage in the Bundeswehr is not limited to individual specialist positions, but represents a general and significant problem. Since Section 37 (2) of the Legal Status of Military Personnel Act precludes the general inclusion of foreigners in the Bundeswehr, it would have to be changed for the Bundeswehr to be able to address the significant personnel shortage it is currently facing.

3 Conscription and Foreign Nationals – A Digression

In 2011, conscription was suspended by a simple majority vote in the Bundestag, the German Parliament. However, it can be reinstated in a state of tension or defence. If the Bundestag – by a two-thirds majority of the votes cast – determines that a state of tension or defence exists, the provisions of the German Compulsory Military Service Act (Wehrpflichtgesetz – WPflG) apply.²¹ According to the current version of Section 1 of the Compulsory Military Service Act, only men from the age of 18 who are Germans as per the Basic Law would be obliged to perform military service should conscription be reinstated in Germany.

The idea of having foreigners complete compulsory military service is currently not a subject of debate. In the 1980s, however, this idea was taken into consideration.²² Contrary to Section 1 of the Compulsory Military Service Act, the wording of Article 12a (1) of the Basic Law does not limit conscription to German nationals:

Men who have attained the age of eighteen may be required to serve in the Armed Forces, in the Federal Border Police, or in a civil defence organisation.

However, the current version of Article 73 (1) specifying the Federation's exclusive legislative power with respect to matters of defence – including compulsory military service – pursuant to the Act Amending the Basic Law of 1954²³ clearly shows that the reference to *men* in the above was only made to highlight the fact that conscription for women was not taken into consideration.²⁴ Nevertheless, up until 2005, the Compulsory

¹⁸ For example Pieroth 2019: 64. He refers to an expert opinion from the Wissenschaftliche Dienste des Deutschen Bundestages [Research Services of the German Bundestag] 2016: 4, which in turn refers to an enquiry made to the FMoD, but without citing the source.

¹⁹ Deutscher Bundestag [German Bundestag] 2022: 28.

²⁰ Ibid.

²¹ On the current and prospective legal framework, see Richter 2022: 979 ff.

²² In 1981, there were calls within the Bundeswehr to have foreigners fulfil compulsory military service, see Walz 1982: 41.

²³ Cf.: Bundesministerium der Justiz [Federal Ministry of Justice] 1954.

²⁴ Walz 1982: marginal 45 (with further references).

Military Service Act did provide for the possibility of obliging foreigners and stateless persons to perform military service. It was never used, though.²⁵

Irrespective of whether one thinks that having foreigners and stateless persons render compulsory military service is legitimated by Article 12a of the Basic Law, it should be pointed out that state practice at the level of international law has for a long time indicated that, as a matter of principle, conscription is linked to citizenship.²⁶ Meanwhile, the rule that foreigners may not be subject to military service is apparently being applied less strictly. It is assumed that foreigners living permanently in Germany with a genuine intention to stay may be subject to compulsory military service if, otherwise, they could avoid serving in the Bundeswehr by not applying for naturalisation.²⁷ As far as can be ascertained, Singapore currently operates a conscription system called National Service (NS), under which all male Singapore citizens and permanent residents must serve either in the military or other security forces such as the Singapore Police Force (SPF).²⁸ It is not within the scope of this paper to further examine whether the development of customary international law has advanced to a stage where foreign nationals may be subject to general conscription. From a constitutional point of view, however, the question of equal obligations for all citizens certainly arises when it comes to foreigners living permanently in Germany, even if the difference in treatment between citizens and permanent residents can be justified in principle. Remarkably, a similar problem was discussed in literature even in the 19th century when foreigners permanently living in Germany were not registered for conscription.²⁹

Looking at the question of whether or not to extend conscription to foreign nationals and stateless persons, one quickly realises that the topic of foreigners and their potential service in the Bundeswehr is a highly complex one. In the event that German politicians decide to make it mandatory for young people to serve the society for one year, it would not be an issue under international law to also include foreigners in the scheme, giving them the same choice of either serving in the Bundeswehr or performing alternative service.³⁰ In fact, this would be appropriate both legally and politically.

4 Amendment of the Basic Law and Section 37 (2) of the Legal Status of Military Personnel Act

If foreign nationals were to serve under military status in the Bundeswehr not only in isolated cases but in general, Section 37 (2) of the Legal Status of Military Personnel Act would have to be amended. The clearly predominant opinion in literature is that

²⁵ For details, see Gornig 2018: marginal 29.

²⁶ Jaenicke/Doehring 1955/1956: 557.

²⁷ Hailbronner/Gogolin 2013: marginal 13; Weber/Richter 2022: 298 (with reference to *ibid.*); Dahm/Delbrück/Wolfrum 2002: 127–130 still state the traditional opinion, but also point to emerging changes.

²⁸ Ministry of Foreign Affairs Singapore 2024.

²⁹ Cf. Weber 2022: marginal 147 (with further references).

³⁰ Weber/Richter 2022: 300.

generally allowing EU foreigners to serve in the Bundeswehr would not be unconstitutional.³¹

However, the traditional application of the provisions of the Basic Law concerning defence and the basic constitutional decisions that have led to the ‘citizen in uniform’ concept give rise to certain constitutional doubts about recruiting foreigners on a regular basis. After the experience of WWII, the newly-established Bundeswehr was to be democratic to the core. It was founded on the 200th birthday of Prussian army reformer Gerhard von Scharnhorst, whose frequently quoted sentence became the historical starting point for the new type of soldiers that was required for the Bundeswehr:

All citizens of the State are its natural-born defenders.³²

The Bundeswehr soldier is essentially characterised by the conscious decision to harmonise the principles of freedom that all citizens enjoy and that are laid down in the Basic Law with the military’s indispensable principles of order and operation. A ‘state within the state’ was to be avoided.³³ According to Baudissin, Bundeswehr soldiers should ‘in principle, retain all civil rights which are the Bundeswehr’s responsibility to protect against external threats.’³⁴ Under constitutional law, the ‘citizen in uniform’ concept implies that soldiers have the same status as other citizens, meaning that all fundamental rights are also applicable to them.³⁵ Their fundamental rights may only be restricted by the requirements of military service, and any such restrictions must be in accordance with general rules and are subject to law-making.³⁶ Bundeswehr soldiers should not defend their country and freedom out of a subject’s sense of duty, but out of a citizen’s sense of responsibility.³⁷

Foreign nationals do not naturally feel this sense of responsibility towards Germany. Certainly, we cannot rule out that someone who is not a German citizen would like to – and will be able to – grow into this civic responsibility, in particular, if they served in the Bundeswehr with the aim of obtaining German citizenship. However, having a large number of servicemembers in the Bundeswehr who do not share a free citizen’s genuine sense of responsibility towards their democratic state would clearly undermine the ‘citizen in uniform’ concept. While not explicitly regulated in the Basic Law, this concept seems to have become a constitutional tradition by now as per the provisions of the Basic Law concerning defence. Article 17a (1) of the Basic Law, on which this tradition is based, represents a link to the ‘citizen in uniform’ concept under positive

³¹ Pieroth 2019: 64; Lucks 2022: marginal 4; Sohm 2021 (marginal 16) does not comment on this, but states that the law would need to be changed for the Bundeswehr to be open to EU foreigners. So, it can be assumed that he has no constitutional concerns either. Vergun/Poretschkin 2012: 66 only discuss requirements under European law; they do not see the possibility for opening up the Bundeswehr to EU foreigners under this law and refer to the matter as a political issue. This implies, at least, that having EU foreigners serve in the Bundeswehr would not interfere with German constitutional law. As far as can be seen, only the Wissenschaftliche Dienste des Deutschen Bundestages [Research Services of the German Bundestag] 2016: 7 take a critical stance towards the matter.

³² [Translated from the German original:] Hornung 1997: marginal 203 (with further references).

³³ Schwarz 2022: marginal 46.

³⁴ [Translated from the German original:] Baudissin 1970: 195.

³⁵ Ipsen 2009: 84.

³⁶ Ibid.

³⁷ Dietz 2011: 517.

law. This Article states that soldiers generally enjoy the full protection of basic rights, but that certain basic rights can be restricted by laws regarding defence. In this context, we should remember that the Federal Constitutional Court (Bundesverfassungsgericht – BVerfG), in its statement of reasons on the judgment on the requirement of parliamentary approval for deployments of German armed forces abroad, not only relied on a summary of various constitutional norms, but also referred to traditional applications of pre-constitutional military law without obvious links to the Basic Law.³⁸

In its established case law, the Federal Constitutional Court has affirmed that the citizens of Germany have an obligation towards the community to contribute to protecting the Basic Law's democratic constitutional order against external threats. In particular, the Court takes the view that it is the citizens' duty to stand up for the protection of freedom and human dignity – something that they themselves enjoy. In addition, the Court has pointed out that the state can only fulfil its obligation to protect its citizens' basic rights with their help.

For the citizens of a democratic state, the protection of their individual fundamental rights under the constitution entails an obligation on their part towards the community to contribute to the safeguarding of this constitutional order.³⁹

From a constitutional point of view, special attention should thus be paid to the manner in which foreigners would be included in the Bundeswehr – if the military profession was generally opened up to them. Special units only recruiting foreigners, such as the French Foreign Legion or the Spanish Legion, do not really correspond to the Basic Law's idea of a soldier.

5 Incentives

The question arises as to whether granting citizenship to foreigners after several years of exemplary service in the armed forces – a model that has been practised successfully in other states, such as the US – would be an option for Germany. With the latest amendment to the German Nationality Act (Staatsangehörigkeitsgesetz – StAG), the period foreigners must reside in Germany before they are entitled to naturalisation has been reduced from eight to five years as per Section 10 (1) (1) and, under certain circumstances, even from six to three years according to Section 10 (3) of the same Act.⁴⁰ Having thus made it significantly easier for foreigners to be naturalised, the idea of motivating them to join the Bundeswehr by offering them a path to citizenship after a successful period of service loses some of its appeal. It would be conceivable to include service in the Bundeswehr as a demonstration of an exceptional level of integration in Section 10 (3) of the German Nationality Act, reducing the length of residence required for naturalisation to three years. However, since outstanding achievement at school, at work or involvement in the community are already considered proof of an exceptional level of integration, there is little reason to expect that people

³⁸ Cf. Wiefelspütz 2010: 231 f.

³⁹ [Translated from the German original:] BVerfGE [Decision by the Federal Constitutional Court] 48, 127 (161).

⁴⁰ See Friehe 2023: 3626 ff.

willing to naturalise would enlist for military service. Given the extensive institution of EU citizenship, naturalisation in Germany is hardly of interest to EU foreigners.⁴¹ What could be of interest to them is offering financial incentives for military service in Germany. Compared to the armed forces of all other EU member states, the salaries of Bundeswehr soldiers across career groups are in the upper third.⁴² In the enlisted personnel career group, the Bundeswehr even has the lead in terms of salary.⁴³ So, in general, there are financial incentives for EU foreigners to serve as soldiers in the Bundeswehr, and these incentives are likely to be even higher for non-EU foreigners.

6 Domestic Criticism

Political proposals to have EU foreigners perform military service in the Bundeswehr have regularly been met with domestic opposition, not only from outside the Bundeswehr⁴⁴, but also from inside the armed forces.⁴⁵ Critics refer, in particular, to the special relationship of mutual loyalty between the German state and its military personnel and the ‘citizen in uniform’ concept.⁴⁶ This outright rejection of having foreign nationals serve in the Bundeswehr as well as the lack of positive response to the idea could arise from the fact that this endeavour might confront the Bundeswehr with significant military and cultural challenges.⁴⁷

7 Frictions Within the EU

Another aspect that should be taken into account is that extensively recruiting EU foreigners would also have a considerable impact on Germany’s relations with its European friends. In 2018, when Ursula von der Leyen was Germany’s Minister of Defence, the FMoD is said to have precisely calculated the number of EU foreigners who could potentially serve in the Bundeswehr. At that time, the age cohort of 18 to 40-year-olds in Germany included about 255,000 Poles, 185,000 Italians and 155,000 Romanians – about half of all EU foreigners living in Germany. The Ministry is said to have assumed that, realistically, 10 percent – i.e. 50,000 applicants – could have been recruited.⁴⁸

Back then, even these rudimentary considerations immediately sparked strong reactions from other European countries. Poland, Bulgaria and Greece, for example, pointed out the risk that their own armed forces could no longer be adequately staffed if the Bundeswehr was generally opened to EU foreigners.⁴⁹

In this context, we must keep in mind that the security situation for these states has changed fundamentally since Russia’s attack on Ukraine in February 2022. This is

⁴¹ For EU citizenship, see Streinz 2023: marginal 1025 ff.

⁴² Schulz 2019: 9.

⁴³ Ibid.

⁴⁴ Knauss 2024.

⁴⁵ Cf. Deutscher BundeswehrVerband 2019.

⁴⁶ Ibid.

⁴⁷ This has been pointed out before by Wollenschläger/Kreßel 1989: 728.

⁴⁸ Becker/Gebauer 2018.

⁴⁹ Ibid.

especially true for Poland. Sharing borders with the Russian exclave of Kaliningrad, Belarus and Ukraine, Poland is almost at the forefront of the North Atlantic Alliance. Bulgaria also shares a border with Ukraine. And although Greece does not border on Ukraine, it is located much further east than Germany. Much the same is true for Romania and the Baltic States, for whose citizens it would also be economically attractive to serve in the Bundeswehr.

Against this background, it is safe to assume that the reactions would be much stronger today, and quite rightly so. At a time when almost all European armed forces are struggling with personnel shortages and Europe is facing an existential threat, a reckless competition for military personnel would be contrary to the European idea.

Besides, in times of crises this conflict of interest could create conflicting legal obligations, that is to say, when the country of origin of a foreigner voluntarily serving in the Bundeswehr reintroduces conscription.

8 Negative Deterrent Effect

The question as to how the Bundeswehr should deal with its personnel shortage has implications not only for domestic social policies and the Bundeswehr's structure, but also for Germany's security. NATO's primary concern is deterrence. Fully operational armed forces are to prevent Russia from conducting further wars of aggression and conquest, and, in particular, from carrying out attacks on NATO territory. If Germany resorted to extensively recruiting foreigners, this would imply that it was either unable or unwilling to motivate its citizens to defend themselves and the Alliance. Others would interpret this – at the very least – as an inconsistency, or even a weakness. In any case, it would probably be detrimental to the idea of deterrence.

9 Specific Personnel Requirements

At present, the number of personnel required to be able to ensure Germany's security is much higher anyway. Not only in the short term, but for many years to come will the Bundeswehr need a large number of young enlisted personnel and lower-level leadership personnel who can serve in a well-organised reserve after active duty. This is the only way to provide the number of staff needed both for the active force in peacetime and to ensure the Bundeswehr's build-up capability and sustainability in times of crises.⁵⁰ In the long term, the Bundeswehr will, in all likelihood, only be able to meet these personnel requirements by continually enlisting more German citizens as Bundeswehr recruits – in other words, by operating a conscription system. This would also help the Bundeswehr to meet its demand for a certain number of highly qualified specialist personnel.⁵¹

⁵⁰ This has been extensively discussed by Mühle 2023.

⁵¹ For the German Navy, cf. Mergener 2022: 58.

10 Conclusions

The current legal situation does not allow for the Bundeswehr to generally enlist a large number of foreigners. If its overall shortage of personnel is to be addressed, among others, by extensively recruiting foreign nationals, Section 37 of the German Legal Status of Military Personnel Act would have to be amended. However, this would imply a tendency to undermine the constitutional concept of the ‘citizen in uniform’. The Federal Constitutional Court believes that Germany’s citizens are obliged to contribute to the defence of the country. In addition, generally having EU foreigners serve in the Bundeswehr would probably lead to tensions with their countries of origin. Whether or not the Bundeswehr might be opened up to EU foreigners is a matter that cannot be decided at the national level alone; it would have to be coordinated at the European level.

In any case, having foreign nationals serve in the Bundeswehr on a general basis would only be a complementary tool in trying to meet the comprehensive personnel requirements it is currently facing. It is only the current shortage of specialist personnel that could possibly be reduced at least slightly by a more frequent and targeted application of the exception provided for in Section 37 (2) of the German Legal Status of Military Personnel Act. It seems that so far, the potential of this narrowly defined exception has never been fully exploited.

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