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*)

By Karen Raible

A. Introduction

The European Court of Justice (ECJ) decided, in the case *Tanja Kreil v. Germany*,[1] that Council Directive 76/207/EEC of 9 February 1976 (equal treatment directive)[2] precludes the application of national provisions, such as those of German law, which impose a general exclusion of women from military posts involving the use of arms. The ECJ found that such policies violated the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions. Since this ruling both the *Bundesverfassungsgericht* (BVerfG – Federal Constitutional Court) and the ECJ have had to confront the question whether the German system of compulsory military service for men is compatible with Article 3.2 and 3.3 of the *Grundgesetz* (GG – German Basic Law)[3] and the equal treatment directive.

B. The Decision of the Federal Constitutional Court of 27 March 2002[4]

I. The application of the District Court of Düsseldorf

In an application for concrete judicial review brought pursuant to Article 100.1 and 100.2 of the German Basic Law, a process which permits an ordinary court to seek

[1] Case C-285/98, *Tanja Kreil v. Germany*, [2000] ECR I-69.

[2] OJ 1976 L 39, p. 40.

[3] An English translation of the German Basic Law can be found at <http://www.iuscomp.org/gla/>.

[4] *See*, Russell Miller, *Dodging the Draft: Federal Constitutional Court Evades Review of Germany's Military Service Law*, 3 GERMAN LAW JOURNAL No. 5 (1 May 2002), <http://www.germanlawjournal.com>.

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guidance regarding constitutional principles relevant to an issue upon which the validity a ruling depends, the *Amtsgericht* (District Court) Düsseldorf expressed misgivings as to whether Sections 1.1 and 3.1 of the *Wehrpflichtgesetz* (federal law on compulsory military service)[5] are compatible with Article 3.2 and 3.3 of the German Basic Law and, therefore, constitutional.[6]

The federal law on compulsory military service provides, in Section 1.1: "All men who have attained the age of 18 years and are Germans within the meaning of the Basic Law are obliged to perform military service."

Under Section 3.1 of that law, "[t]he obligation to perform military service is satisfied by military service or, in the case referred to in Section 1 of the law on refusal to perform war service [*Kriegsdienstverweigerungsgesetz*] of 28 February 1983 (BGBl. 1983 I, p. 203) by civilian service."

The German Basic Law provides in Article 3.2: "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."

Under Article 3.3 of the German Basic Law, "[n]o person shall be favoured or disfavoured because of sex [...]".

The District Court of Düsseldorf sought review of the constitutionality of the federal law on compulsory military service from the Federal Constitutional Court, specifically citing the ECJ judgment in the case *Tanja Kreil v. Germany*. The District Court reasoned that the *Tanja Kreil* case necessitated an amendment to Article 12a.4 of the German Basic Law.[7]

Article 12a (4) of the German Basic Law now provides: "If, during a state of defense, the need for civilian services in the civilian health system or in stationary military hospitals cannot be met on a voluntary basis, women between the ages of eighteen and fifty-five may be called upon to render such services by or pursuant to a law. *They may under no circumstances be required to bear weapons*."[8]

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[5] BGBl. 1995 I, p. 1756.

[6] FCC, 2 BvL 2/02, 2002 NEUE JURISTISCHE WOCHENSCHRIFT p. 1709 *et seq*.

[7] The question if the the ECJ judgment in the case *Tanja Kreil v. Germany* necessitated an amendment to Article 12a .4 of the German Basic Law was widely debated in Germany. *See, e.g.*, Karl Doehring, *Die erste Seite: Vorwärts Amazonen*, 2000 RECHT DER INTERNATIONALEN WIRTSCHAFT No. 3.

[8] BGBl. 2000 I, p. 1755. Article 12a.4 of the German Basic Law used to read: "If, during a state of defense, the need for civilian services in the civilian health system or in stationary military hospitals cannot be

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Excluding women from compulsory military service, could, according to the reasoning of the District Court, neither be justified with reference to biological differences nor as specific preferential treatment for women, compensating in part for the periods of interruption of work due to maternity and child-rearing.

II. The findings of the Federal Constitutional Court

In its decision of 27 March 2002, [9] the Federal Constitutional Court found the District Court's application for concrete judicial review to be inadmissible, pursuant to Article 81a of the *Bundesverfassungsgerichtsgesetz* (Federal Constitutional Court Act).[10] It held that the District Court did not substantiate why the Federal Constitutional Court should re-examine the constitutionality of the federal law on compulsory military service.

First, the Federal Constitutional Court reiterated its consistent line of jurisprudence, in which the limitation of military service to men has been repeatedly found to be constitutional.[11] The Court has previously held that Article 12a.1 (formerly Article 73.1, according to which the federation has exclusive power to legislate with respect to compulsory military service) and Article 12.3 of the German Basic Law (according to which forced labour may be imposed only on persons deprived of their liberty by the judgment of a court) are of equal constitutional rank with Article 3.2 and Article 3.3 of the German Basic Law.[12]

The Court then reproaches the District Court for failing to demonstrate how the amendment to Article 12a.4 of the German Basic Law could have influenced this line of jurisprudence. The Federal Constitutional Court elaborated that Article 12a.1 only authorizes the German parliament to require men who have attained the age of eighteen to undergo compulsory military service, but not women. It stresses

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met on a voluntary bases, women between the ages of eighteen and fifty-five may be called upon to render such services. *Under no circumstances may they render service involving the use of arms*."

[9] FCC, 2 BvL 2/02, 2002 NEUE JURISTISCHE WOCHENSCHRIFT p. 1709 *et seq*.

[10] BGBl. 1998 I, p. 1823. An English translation of the Federal Constitutional Court Act can be found at <http://www.iuscomp.org/gla/>.

[11] BVerfGE 22, 199, (203*et seq*.); BVerfGE 39, 169 (181); BVerfGE 65, 178 (181); BVerfGE 78, 38 (48); BVerfGE 87, 341 (346); BVerfGE 94, 315 (323).

[12] BVerfGE 12, 45 (52).

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that, even according to the amended version of Article 12a.4 of the German Basic Law, women may under no circumstances be required to bear weapons.

III. Comments

Obviously, the Federal Constitutional Court did not believe itself compelled by the ECJ judgment in the *Tanja Kreil* case and the amendment to Article 12a.4 of the German Basic Law to deviate from its consistent line of jurisprudence on the constitutionality of the federal law on military service. This is understandable as the ECJ judgment in *Tanja Kreil v. Germany* did not concern the limitation of compulsory military service to men and did not, on its face, necessitate a more far-reaching amendment to Article 12a.4 of the German Basic Law.

One could further argue that the Federal Constitutional Court exercised judicial restraint, since, at the time of the deliberations over the District Court's application for concrete judicial review, the extension of compulsory military service to women was the topic of a tense political debate in Germany.[13]

Although the application was declared inadmissible and the Federal Constitutional Court did not elaborate on the merits of the case, it is unlikely that future applications brought pursuant to Article 100.1 and 100.2 of the German Basic Law will be more successful. This is regrettable because the Federal Constitutional Court will not have the opportunity to address the criticism that was raised by some German legal scholars regarding the Court's assumption that the German Basic Law is able to make exceptions to the principle of equal treatment that is laid down in Article 3.2 and 3.3, without explicitly providing for such exceptions.[14]

C. The Judgment of the European Court of Justice of 11 March 2003 in the case *Alexander Dory v. Germany*

I. Facts

Alexander Dory, a German national who is at an age where he is liable for compulsory military service, lodged an application for exemption from military service with the *Kreiswehrersatzamt* (district recruiting office) competent for his conscription. Relying primarily on the ECJ judgment in *Tanja Kreil v. Germany*, he argued that the *Wehrpflichtgesetz* (law on compulsory military service) violated Community

[13] Dieter Waltz, 2002 NEUE ZEITSCHRIFT FÜR WEHRRECHT p. 173.

[14] *See, e.g.*, Felix Ekardt, *Wehrpflicht nur für Männer – vereinbar mit der Geschlechteregalität aus Art. 79 III GG*, 2001 DEUTSCHES VERWALTUNGSBLATT p. 1171-1179.

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law, in particular the equal treatment directive. He claimed that, following the ECJ judgment in *Kreil*, there were no longer any objective reasons for excluding women from compulsory military service on gender-related grounds. After his application had been rejected by the district recruiting office and the *Wehrbereichsverwaltung* (military area administration) Mr. Dory appealed to the *Verwaltungsgericht* (Administrative Court) of Stuttgart, which, according to Article 234 of the EC Treaty, requested a preliminary ruling from the ECJ on whether Community law, in particular the equal treatment directive, precludes compulsory military service for men only. Referring to the judgment of the ECJ in the case *Julia Schnorbus v. Land Hessen*,[15] the Administrative Court of Stuttgart pointed out, *inter alia*, that compulsory military service necessarily results in men suffering delayed access to employment and vocational training.

II. The Opinion of Advocate General Stix-Hackl

In her opinion of 28 November 2002, Advocate General Stix-Hackl took the view that the German system of compulsory military service for men does not come within the scope of the equal treatment directive, as the scope of the equal treatment directive is limited to national measures the subject-matter of which is the regulation of working conditions, access to employment or vocational training.[16] She concluded that the German law on compulsory military service does not regulate access to employment,[17] but is a national measure that merely *affects* access to employment. The access of men to employment is only temporarily prevented and subsequently delayed.

III. The findings of the European Court of Justice

In its judgment of 11 March 2003 in the case *Alexander Dory v. Germany*, the European Court of Justice reached the same conclusion as Advocate General Stix-Hackl:

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[15] Case C-79/99, *Julia Schnorbus v. Land Hessen*, [2000] ECR I-10997. In this case, the ECJ decided that the equal treatment directive does not preclude national provisions governing the date of admission to the practical legal training which is a necessary prerequisite of access to employment in the civil service, in so far as such provisions are justified by objective reasons and prompted solely by a desire to counterbalance to some extent the delay resulting from the completion of compulsory military or civilian service.

[16] Advocate General Stix-Hackl in case C-186/01, ‚I>*Alexander Dory v. Germany*, opinion of 28 November 2002, not yet published, para. 98 *et seq.*

[17] Compulsory military service as such cannot be regarded as employment. *See, e.g.*, Advocate General Stix-Hackl in case C-186/01, *Alexander Dory v. Germany*, opinion of 28 November 2002, not yet published, para. 73; Carl Otto Lenz, *Frauen im Dienst mit der Waffe – nationales Reservat oder europäische Gleichberechtigung?*, 2000 ZEITSCHRIFT FÜR RECHTSPOLITIK p. 265, 268.

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Community law does not preclude compulsory military service being reserved to men, albeit with different and less extensive reasoning.[18]

First, the ECJ held that measures taken by the Member States concerning the organisation of their armed forces are not excluded in their entirety from the application of Community only because they are taken in the interests of public security or national defence.[19] The ECJ underlines that, according to its jurisprudence in the cases *Marguerite Johnston v. Chief Constable of the RUC*,[20] *Angela Maria Sirdar v. The Army Board and Secretary of State for Defense*[21] and *Tanja Kreil v. Germany*,[22] the EC Treaty contains no inherent general exception for measures taken in the interests of public security. The Court noted that the few specific exceptions from Community law provided for by the EC Treaty only concern the fundamental freedoms[23] and not the social provisions of which the principle of equal treatment of men and women forms a part.[24]

Referring once more to its jurisprudence in the cases *Angela Maria Sirdar v. The Army Board and Secretary of State for Defense* and *Tanja Kreil v. Germany*,[25] the ECJ then reiterated that the equal treatment directive is applicable to access to posts in the armed forces and that it is for the ECJ to verify whether the measures taken by the national authorities, in the exercise of their recognised discretion, did in fact have the purpose of guaranteeing public security and whether they were necessary and appropriate to achieve that aim.[26]

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[18] Case C-186/01, *Alexander Dory v. Germany*, judgment of 11 March 2003, not yet published, Rec. 42: "[...] Community law does not preclude compulsory military service being reserved to men."

[19] Case C-186/01, *Alexander Dory v. Germany*, judgment of 11 March 2003, not yet published, Rec. 30.

[20] Case 222/84, *Marguerite Johnston v. Chief Constable of the Royal Ulster Constabulary*, [1986] ECR 1651, Rec. 26.

[21] Case C-273/97, *Angela Maria Sirdar v. The Army Board and Secretary of State for Defense*, [1999] I-7403, Rec. 16.

[22] Case C-285/98, *Tanja Kreil v. Germany*, [2000] ECR I-69, Rec. 16.

[23] *See*, Articles 30, 39, 46, 58 and 64 of the EC Treaty.

[24] Case C-186/01, *Alexander Dory v. Germany*, judgment of 11 March 2003, not yet published, Rec. 33.

[25] Case C-273/97, *Angela Maria Sirdar v. The Army Board and Secretary of State for Defense*, [1999] I-7403, Rec. 28; case C-285/98, *Tanja Kreil v. Germany*, [2000] ECR I-69, Rec. 25.

[26] Case C-186/01, *Alexander Dory v. Germany*, judgment of 11 March 2003, not yet published, Rec. 34.

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However, the ECJ considered that Community law does not govern the Member States' choices of military organisation for the defence of their territory or of their essential interests.[27] Germany's decision to ensure its defence in part by compulsory military service is the expression of such a choice of military organisation to which Community law is not applicable.[28] The Court held that that choice, enshrined in the German Basic Law, consists in imposing on men an obligation to serve the interests of territorial security, even if this may entail a delay in the access of men to employment.

Finally, the ECJ considered that the unfavourable consequences for access to employment cannot compel the Member State either to extend the obligation of military service to women, thus imposing on them the same disadvantages with regard to access of employment, or to abolish compulsory military service. This, the Court concluded, would encroach on the competences of the Member States.[29]

IV. Comments

In my opinion, the ECJ took a U-turn in this judgment. Contrary to the statements in its previous judgments, there are national measures taken for reasons of public security that are *a priori* excluded from the application of Community law. These national measures concern, as the ECJ made clear, the Member States' choices of military organisation for the defence of the territory and the essential interests of the Member States, such as Germany's decision to ensure its defence in part by compulsory military service. Unlike Advocate General Stix-Hackl, the ECJ did not even attempt to examine if and to what extent the German system of compulsory military service for men comes within the scope of the equal treatment directive. Instead, it repeated the legal and political arguments of the German government in its written observations and at the oral hearing and stated that these arguments find their basis in the German Basic Law.[30]

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[27] Case C-186/01, *Alexander Dory v. Germany*, judgment of 11 March 2003, not yet published, Rec. 35.

[28] Case C-186/01, *Alexander Dory v. Germany*, judgment of 11 March 2003, not yet published, Rec. 39.

[29] Case C-186/01, *Alexander Dory v. Germany*, judgment of 11 March 2003, not yet published, Rec. 41.

[30] Case C-186/01, *Alexander Dory v. Germany*, judgment of 11 March 2003, not yet published, Rec. 37 *et seq*. The German government stated that "the institution of [compulsory military] service makes a contribution to the democratic transparency of the military, national integration, the link between the armed forces and the population, and the mobilisation of the manpower needed by the armed forces in the event of a conflict."

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Thus, the main criticism that was raised against the judgment in the case *Tanja Kreil v. Germany*[31] cannot be raised against this judgment. The ECJ refrained from establishing a coherent overall constitutional structure for the European Union, but took the particular national cultural background into account and even commented on the possible implications for the particular national legal order, had it decided otherwise.

One could argue against this judgment that even decisions of national security should be examined judicially, at least if they touch upon individual rights, such as the right to equal treatment of men and women. However, one should ask whether the ECJ, as a distant judicial organ, is always in a good position to judge the legitimacy of a particular national measure when it is based on aspects concerning the protection of national security of one of the Member States.[32] One should also ask whether the ECJ should be competent to do this in all cases. Security matters are still part of the second intergovernmental pillar of the European Union, *i.e.* the Common Foreign and Security Policy (CFSP), and, therefore, outside the institutional and legal structure of the European Community.[33] One could contend that Community law, in particular the equal treatment directive, can only set limits to the competence of Member States with regard to security matters in so far as Community law can be enhanced and the core of the competence of Member States regarding security matters is not affected. Deciding that Community law precludes compulsory military service for men only would have compelled Germany, as the ECJ made clear, to either extend the obligation of military service to women which would not have enhanced Community law as the access to employment of both, men and women, would have been delayed, or to abolish compulsory military service which would have touched upon the core of the competence of Member States with regard to security matters.

In my opinion, the judgment in the case *Alexander Dory v. Germany* also has to be seen in the context of the ongoing debate on a more precise delimitation of powers

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[31] *See, among others*, Iris Canor, *Harmonizing the European Community's Standard of Review?*, 2002 EUROPEAN PUBLIC LAW p. 135-166; Karl Doehring, *Die erste Seite: Vorwärts Amazonen*, 2000 RECHT DER INTERNATIONALEN WIRTSCHAFT No. 3; Carsten Stahn, *Streitkräfte im Wandel – Zu den Auswirkungen der EuGH-Urteile Sirdar und Kreil auf das deutsche Recht*, 2000 EUROPÄISCHE GRUNDRECHTE-ZEITSCHRIFT p. 121-135; Torsten Stein, *Frauen in der Bundeswehr – Anmerkung*, 2000 EUROPÄISCHE ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT p. 213-214.

[32] Iris Canor, *Harmonizing the European Community's Standard of Review?*, 2002 EUROPEAN PUBLIC LAW p. 135, 141.

[33] According to Article 46 of the Treaty on European Union, the provisions of the EC Treaty concerning the powers of the ECJ shall not apply to the provisions on the CFSP.

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between the European Union and the Member States, and, therefore, is evidence of judicial restraint. The Laeken Declaration on the Future of the European Union (15 December 2001) specified the prevention of an encroachment upon the exclusive areas of competence of the Member States as one of the key elements of a more precise delimitation.[34] The Commission underlined at the oral hearing that, since compulsory military service did not belong to the competence of the Community, consequences resulting from compulsory military service law had to be accepted in Community law. It could not be, so the argument seems to go, that Community law always prevails over national law; under certain circumstances national law had to assert its own scope of application.[35]

Different from this judgment, the preliminary draft Constitutional Treaty of 28 October 2002[36] does not enumerate exclusive areas of competence of the Member States which are *a priori* excluded from the application of Community law. However, the European Union's respect for the national identity of its Member States is not only emphasized in a very prominent place, namely in Article 1.3. What is more, Article 9.6 of the draft of Articles 1 to 16 of the Constitutional Treaty of 6 February 2003[37] lists certain features of national identity that specifically require legal recognition when the European Union is exercising its competences. According to Article 9.6, the European Union "shall respect the national identities of its Member States, inherent in their fundamental structures and essential State functions, especially their political and constitutional structure, including the organisation of public administration at national, regional and local level." Unfortunately, the wheel did not turn full circle, since the ECJ did not refer to the concept of national identity.

D. Concluding Remarks

The ECJ judgment in the case *Tanja Kreil v. Germany* does not have further repercussions on the federal law on compulsory military service. Called upon to decide on the compatibility of the federal law on compulsory military service with the princi-

[34] *See*, <http://europa.eu.int/futurum/documents/offtext/doc151201_en.htm>.

[35] *See*, the reference of Advocate General Stix-Hackl in case C-186/01, *Alexander Dory v. Germany*, opinion of 28 November 2002, not yet published, para. 51.

[36] CONV 369/02. An English version can be found at <http://register.consilium.eu.int/pdf/en/02/cv00/00369en2.pdf>.

[37] CONV 528/03. An English version can be found at <http://european-convention.eu.int/docs/Treaty/CV00528.EN03.pdf>.

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ple of equal treatment of men and women, both courts, the Federal Constitutional Court and the European Court of Justice, demonstrated, due to the political sensitivity of the topic, judicial restraint and punted the ball back to the political organs. Whereas the judicial restraint exercised by the ECJ in the case *Alexander Dory v. Germany* seems to be justified, one wishes the Federal Constitutional Court had analyzed the constitutionality of the German law on compulsory military service more thoroughly.

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