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Legal and social dimensions of the male-breadwinner model in Germany

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Summary

German women find it more difficult than men to establish financial independence through the labour market (and social security benefits) and are often dependent on the income of their husbands or partners. The structural inequalities between women and men in welfare state regimes are described by empirical scholars as a result of the male-breadwinner model. The German welfare state is the prototypical example of a conservative welfare regime (Esping-Andersen 1990) and a strong male-breadwinner model (Lewis/ Ostner 1994). Its legal basis lies in the strict division of the public and private sphere, founded by alimony law and the protection of marriage as a constitutional value and right. Although regulations appear to be sex-neutral in terms of wording, the gendered impact is the financial dependence that women have on men, due to inadequate personal entitlements to social security benefits and the priorities given to alimony based on means-tested benefits. This raises questions concerning equality law and efficient strategies for change. This paper aims to identify the elements of the male-breadwinner model within the German legal system to show the interrelation between apparently neutral regulations, and to describe the influence of these issues upon men and women (as groups and individuals).

Introduction

The concept of citizenship is central in the analysis of the gendered dimension of welfare states. Feminist welfare-state research in the social sciences has shown how welfare states, to differing degrees, have developed a poor quality of citizenship for women as they neglect the specific conditions of women's social rights (Orloff, 1993; Sainsbury 1994). In these terms Germany has been described as a strong male-breadwinner model because it gives strong incentives to married couples with children and is designed to economically support husbands and fathers in their breadwinner function (Ostner/Lewis 1994). Although current research observes changes towards an adult-worker model across Europe (Lewis 2001), the decline of the male-breadwinner model is not to be regarded as a matter of course. In Germany it seems to be a persistent part of current policy, although gender equality is claimed to be an important aim of the agenda.

This includes incentives for marriage and a traditional division of labour between husband and wife, in the now predominantly accepted modern variation: the husband who works full-time and the wife who works part-time because of her family responsibilities. The usually lower income of the wife is therefore regarded as an addition to the family income that continues to be mainly provided by the male-breadwinner. Care work is essentially to be secured through

private transfers or mediated entitlements between the spouses (maintenance) rather than individualized entitlements to social security or social assistance benefits. The consequence is a lower income of women and financial dependence on others. This problem is especially obvious after divorce, when women are more dependent on maintenance than men and suffer significant financial losses (Andreß et. al. 2003).

As Tove Stang Dahl has put it, an “...independent income of one’s own is a prerequisite for participation in and enjoyment of life in a number of respects, privately as well as publicly” (Stang Dahl 1984, p.137). Still, as a rule, German women find it more difficult than men to establish financial independence through work or claims to social security benefits and are more often dependent on the income of the husband or partner. Although recent welfare state reforms of the labour-market policy have stressed the principle of self-responsibility, this principle still seems to apply to families and marriages rather than individuals. This paper aims to identify the elements of the male-breadwinner model within the German legal system. Although regulations appear to be sex-neutral in terms of their wording, the gendered impact is the financial dependence that women have on men. I will argue that the concept of marital maintenance and its structural impact on other areas of law is the core of the male-breadwinner model in Germany. First, I will outline the structural inequalities of women’s labour market participation and income sources on the basis of current data. Second, the German concept of maintenance law, its role in shaping the legal system, as well as the constitutional concept of marriage, will be described. Finally, the recent changes of benefits in case of unemployment will be discussed and the question of indirect discrimination raised.

Structural Inequalities

Although the participation of women in the labour market has been growing constantly within the last decade, the labour market participation of women and men still greatly differs. Many often interrelated factors are to be taken into account that can not all be tackled in this paper: part-time work, unequal pay, job segregation, unequal division of labour in the home and poor availability of childcare. While these patterns do not affect all women in the same way, they do play a part in reinforcing the differences between groups of women. Other important dimensions of difference not addressed in this paper include: class, educational background, citizenship, age, and race.

In 2003, the employment rate of women aged between 15 and 65 added up to 65 %, that rate for men was 80 % (Bothfeld 2005). The growing labour market participation of women in Germany has largely been accounted for by the growth in part-time work. Between 1992 and 2002 the number of women in full-time employment has actually decreased but part time work has increased greatly (see chart 1). The growing employment rate of West German women aged

between 35 and 55 is entirely attributed to their growing engagement in part-time work. In East Germany, the growth (from 13 -23%) of part-time employment by women in this age group has prevented a drop of the employment rate of women.

CHART 1: LABOUR FORCE PARTICIPATION OF WOMEN IN EAST GERMANY AND WEST GERMANY 1992-2002 (%)

AGE GROUP	EAST GERMANY		WEST GERMANY	
	1992	2002	1992	2002
16-34 YEARS				
EMPLOYED	63	63	62	58
FULL-TIME	41	36	43	31
PART-TIME	13	18	11	16
IN EDUCATION	9	9	9	12
35-55 YEARS				
EMPLOYED	66	73	75	76
FULL-TIME	36	34	61	53
PART-TIME	29	39	13	23
IN EDUCATION	0	0	0	0
Statistisches Bundesamt (Federal Statistical Office) 2004, p.504				

The labour market participation rate of married women is significantly lower than that of unmarried women: twice as many unmarried women work full time hours (36 and more hours per week) as married women. The majority of married women work part-time. Still, there are crucial differences regarding views and habits between East Germany, e.g. the former socialist part, and West Germany. In East Germany motherhood and marriage have no significant impact on the labour force participation of women. In 2003, in a survey of East German mothers who worked part-time, 52 % stated that their reason for doing so was that they could not find a full-time job. Only 5 % of West German mothers gave this reason; for them, the predominant grounds for working part-time were family obligations (81 %). An important source of income for many women is the sharing of income earned or received by others (mostly by a male partner).

Alimony Law And The Gendered Division of Labour

These different lifestyles are being declared by the legal profession as the result of individual choices rather than regulations. The reason for this view is that West German Family Law officially abandoned the model of the “housewife marriage” in the 1970s. Since then, however, this notion has not been replaced by a clear commitment to an adult worker-caregiver model. Instead, the contribution to family life by care work and paid work was declared to be equal.

This equality was not supported by financial security for the predominantly female caregivers through social security benefit systems or sufficient attempts to integrate women into the labour market. Maintenance law attempted to establish this security, by assigning the responsibility to the family sphere through private transfers. Marriage is still understood as a means of securing the existence of women. This is closely linked with the gendered division of labour and the assignment of women into the private sphere.

As previously mentioned, the model of the “housewife marriage” was exchanged for a sex-neutral model with the reform of family law in 1976. Before then, family law upheld a concept of difference – husband and wife had different roles within the family assigned to them. The wife was responsible for care work, the husband’s role was providing for the financial needs of the family. Since then labour force participation and unpaid care work were declared to be equally valuable and the decision about the division of labour viewed as a private decision without interference though the state. In the 1976 reform it was also necessary to modernize divorce law and change from strict fault-based grounds for divorce to the more liberal concept of “deep and permanent breakdown of the marriage”.

Within this context a new model of maintenance law also had to be established (within the fault-based model maintenance obligations were assigned according to fault). The Social Democratic Party (SPD) favoured a model of equality, all adults should be workers and there would be no long-lasting need for maintenance after divorce. The Christian Democratic parties (CDU/CSU) stressed the point that the traditional model of marriage still had to be made possible. It was believed by a majority of political actors that it would lead to hardship for many women if alimony entitlements would be taken away. This point of view was also taken by women’s groups. They argued that married women, having lived many years as housewives and mothers and therefore kept out of the labour market through family policy, could not be expected to join the labour market as soon as the marriage had ended. This political conflict ended with a compromise: after marriage, the principle of self-reliance would make up maintenance law, while legal reasons providing for entitlements to maintenance claims after divorce would be designed to keep lifelong entitlements to payments possible. The obligation to work after divorce was restricted to work that was suitable (*angemessen*) according to the standard of living reached *through marriage*. This regulation attempted to recognize the wife’s contribution to the family’s standard of living through care work. She should not be expected to fall back on the standard of living she had before the marriage. In a certain way, post-divorce maintenance law has taken a very considerate point of view towards women by finding many reasons why they should not be expected to work. Even when this political compromise was crafted it was very much debated if an ex-husband should be expected to pay maintenance for risks that did not result from marriage (for example unemployment). Recently the debate across

political parties has challenged these regulations and demanded shorter duration and fewer grounds for entitlements to maintenance after divorce and a more strict examination of the cause of maintenance claims. Considerations like the duration of the marriage and decisions about the division of labour by the partners will then be used to determine the duration of maintenance entitlements. The most legitimate reason to claim maintenance will be for the care of children (a reform will very likely come into force in 2007).

Maintenance obligations exist not only after marriage but also during marriage, called family maintenance (Familienunterhalt; §1360 BGB). Family maintenance is not conceived in terms of money (except for housekeeping and spending money for the housewife) but as an obligation to work towards the wellbeing of the family, no matter if this happens through paid work or care work (Scholz 2004, § 3 Rn. 1)¹. Therefore, within marriage an individualized principle of self-reliance does not exist; the spouses are viewed as a unit which works together to secure each others' existence (and that of any children).

This principle does not only structure family law but is found in other legal aspects where maintenance obligations are often taken into account. For instance, this can be found in income tax law and the law of social assistance benefits; elements are also found within employment law. By relying on and considering private maintenance obligations these areas of law, as will now be argued, shape strong incentives for the male-breadwinner model.

Income Tax Law

In income tax law (Einkommenssteuer), the obligation of the breadwinner's alimony is taken into account through the joint taxation of married spouses with an income-splitting tariff. Because of the progression of the tax scale, the reduction to half the taxable income results in the greatest savings if only one partner earned it. This form of taxation is criticised as privileging marriages with a single breadwinner or a significant difference between the spouses income: they achieve a tax reduction that dual-earner couples are not able to achieve (Sacksofsky 2000, p.1898; Vollmer 1998, p. 127). Feminists argue this form of taxation makes the usually lower income of the woman seem more dispensable, her work is only then economically advantageous for the family if she can earn more than the tax savings would be. Taking into account the inadequate child-care infrastructure and the fact that child-care expenses cannot be set off against tax liability (with the amount actually spent but a lump-sum for every parent), the incentive for married mothers to reduce their labour market participation is high. On the other hand, many do not share this point of view and stress the point that there

¹ Because of the special nature of the claim it is hardly ever enforced by legal action.

has to be taxation according to financial ability and that the family maintenance obligation reduces that ability of the breadwinner. The constitutional protection of marriage upholds the free decision about the division of labour between husband and wife and therefore the breadwinner situation has to be taken into account by income tax law. Spouses with two incomes are therefore not disadvantaged because their financial ability is to be judged differently (Kirchhof 2000, 2003). The Federal Constitutional Court has not made a clear statement about the splitting tariff so far. It noted in 1982 that the taxation of spouses cannot be subject to any regulation. The income-splitting, it argued, would enable the spouses to freely decide about their division of labour. Although it should not be considered a tax privilege but a form of taxation according to financial ability, the Court also pointed out the prerogative of legislation for deciding on a different regulation. Critics of the income-splitting deduct from this last point that there are other ways available to tax married couples. Defenders of income-splitting use the ruling to argue that this form of taxation is necessary to comply with the constitution.

Since 2001, homosexual partners can enter into a legally recognized partnership similar to marriage, the “eingetragene Lebenspartnerschaft.” In terms of maintenance obligations this partnership is crafted after the model of marriage. Even though this is the case, the income-splitting option has not been opened to them and they are still taxed individually. Several Finance Courts have rejected the application of income-splitting rules on homosexual partnerships and stressed the point that the income-splitting exists for married couples only, because only they are protected by the constitution.

Income tax is collected on a monthly pay-as-you-earn basis (Lohnsteuer), where the breadwinner-income is once more privileged. The pay-as-you-earn income tax is calculated by taking differences between spouses’ incomes into account. If such differences exist almost all tax exempt amounts of both persons are used to reduce the monthly tax burden of the person with the higher income (Spangenberg 2005). The person who earns less pays part of the breadwinner’s taxes and therefore has a reduced amount available at the end of the month. Yet it seems more economically advantageous to tax this way if the couple’s income is viewed as one unit that lumps together. In the annual adjustment of income tax there will usually be a repayment. However, in social security law many benefits are calculated based on the monthly income after deductions – married women’s entitlements are therefore often lower. That this specific way of collecting income tax from married couples is also protected by Article 6 I GG can hardly be argued. A reform has been demanded for many years but only in 2005 were preparations finally being made, though that have not yet reached conclusion. However, the achievement of more gender equality does not seem to be the first priority of changing the Lohnsteuer, but to simplify administration (Spangenberg 2005).

Social Benefits – The “Hartz IV” Reform

Not only in German social security schemes has there been criticism for providing security for male risks and the male model of working life - the financial security of women and female risks (as care work) has traditionally, especially in Germany, been mediated through the husband. The direct entitlement to benefits has only gradually been implemented in social security law, an example is inclusion of child care as a legal basis for pension entitlements². Very much discussed in recent years, and until now not sufficiently resolved, has been the access of short hour part-time workers to social security benefits.

Because the access to social security benefits is in many ways inadequate, means-tested benefits have been the basic net for a lot of women. The smallest unit of means-testing, however, is not the individual but the couple. The income of the partner as possible maintenance plays a role in determining the need of the claimant. Benefits of the basic net are therefore only available if the spouse cannot provide. This principle of subsidiary has structured social assistance (Sozialhilfe) and, since January 1st, 2005, has become part of the new unemployment allowance (Arbeitslosengeld II). Through a number of new laws, called the “Hartz-Reforms”, the German labour market policy has been reformed between 2003 and 2005. The main elements of the Hartz reforms were the commitment to an active employment policy, the restructuring of the unemployment administration, and, through a law informally called “Hartz IV,”³ the introduction in 2005 of a new basic benefit called unemployment allowance (Arbeitslosengeld II).

The unemployment allowance was designed to secure the [subsistence level](#) (Existenzminimum) and is strictly subsidiary to other forms of income, the last resort scheme for people between 15 and 65. This new allowance replaced the former social assistance (Sozialhilfe), a strictly means-tested benefit, and the unemployment aid (Arbeitslosenhilfe), a hybrid system financed by tax revenues which was only available after the social security scheme unemployment benefit (Arbeitslosengeld) was no longer paid. It was oriented on the former net income (57% for parents, 53% for childless) but reduced means-testing also applied. After the reform, if there are no entitlements to the social security scheme unemployment benefit (Arbeitslosengeld)⁴ and the

² Although, as Ott 2003 has shown, it is (in German pension schemes) still more economically advantageous to work than to care for children.

³ Because it was the fourth law passed as part of the so-called “Hartz”-Reforms, the official title of the now in force law is Sozialgesetzbuch II Grundsicherung für Arbeitsuchende (SGB II).

⁴ This can be the case for several reasons: the period of eligibility is only one year, also low hour part time employed and self-employed do not have the option to enter into the social security scheme.

claimants fulfill the means-testing and other requirements⁵, they are entitled to unemployment allowance (Arbeitslosengeld II). Because the unemployment allowance was designed as a family allowance, the incomes of partners are also taken into account. Therefore the financial need of the members of the household group⁶ is calculated and added jointly. Components of the household group (Bedarfsgemeinschaft) are adult jobseekers (erwerbsfähige Hilfebedürftige), their partners, and any children. The need is defined to be 345 € in West Germany and 331 € in East Germany for all living expenses; there are extra payments for rent and heating. If there are two adults members of the household group then they are only entitled to 90% of that sum. The means to satisfy the basic needs are provided if income⁷ or other resources of *both partners* are not sufficient to cover these needs. If this is the case, all members of the household group that are able to work 3 hours a day and not currently engaged in education are expected to actively look for work and accept almost any job (no matter if it is less qualified or paid than their previous work or in a different occupation). It is argued by the government that this is an improvement for women because they become “clients” of the unemployment administration. Former “housewives” would be expected to work and contribute to the family’s income. To summarize the concept: if there is a breadwinner present, the rest of the family should not work. If there isn’t, they all should work to provide for the family.

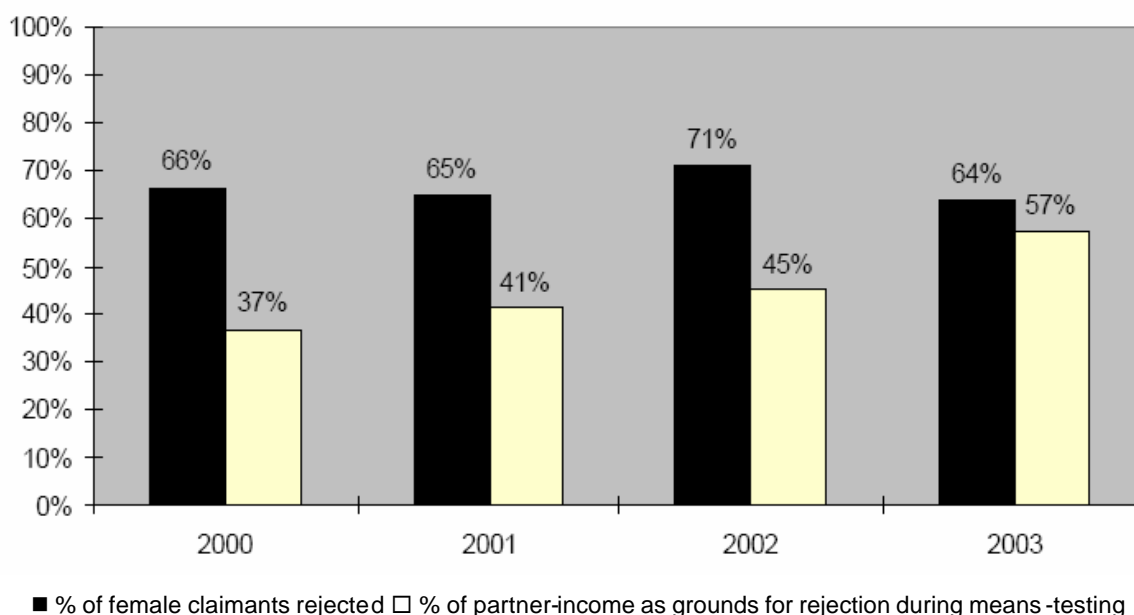
Although this means-testing rule is sex-neutral in wording, it is strongly suspected of having a gendered impact. Because of the specific way women work and earn, they are more likely to have a partner that can act as breadwinner than vice versa. Women’s groups and unions have made this argument during the legislation process and warned that steps should be taken to deal with this. For those women who have received unemployment aid (Arbeitslosenhilfe), it would be a drawback because the means-testing would result in cut-backs on their benefits more often than before, though the former statistics of means-testing of unemployment aid reveal two thirds of the claimants rejected (based on income of a partner) were women (see chart 2).

⁵ Aged between 15 and 65, not currently engaged in an education, able to work at least 3 hours a day, actively looking for work and signed the jobseekers -agreement (Eingliederungsvereinbarung).

⁶ The new, shaped through the new law, German word is „Bedarfsgemeinschaft“, it translates word-to-word as “household community of needs”.

⁷ Income is defined as every source of money. From income is to be deducted: taxes, costs of insurance and social security contributions, expenses necessary to achieve the income (at least 100 €); §11 SGB II.

CHART 2: REJECTED CLAIMS TO UNEMPLOYMENT AID (ARBEITSLOSENHILFE) 2000-2003 ON GROUNDS OF PARTNER- INCOME (%)



An analysis of the data from 2005 cannot be presented at this point as it has not been published, though it does not seem likely that the gendered impact of means-testing will disappear. Also, the claimants who do not receive benefits will still have trouble receiving other forms of support. The Sozialgesetzbuch II does not apply to them, because they are not considered “needy.” Therefore, they cannot receive other forms of support from the Jobcenters that carry out the Sozialgesetzbuch II, such as money for necessary childcare expenses. Instead they have to apply for help with another administration, the Arbeitsagentur (for the unemployed who receive social security unemployment money). There they have fewer claims that go largely unenforced. Also, the Arbeitsagentur primarily tries to reintegrate the more “expensive” unemployed recipients of social security benefits rather than other claimants. An empirical analysis was carried out as part of our research project in Berlin of those persons who do not receive benefits due to their partners income. It showed that East German women find it especially difficult to deal with the situation as they feel unwillingly pressed into the model of the West German “housewife marriage.” But married couples are not the only ones affected, because means-testing also applies to heterosexual persons living together as if they were married (the legal term is “eheähnlich” - alike-marriage) as well as homosexual persons that have entered the legally recognized partnership “eingetragene Lebenspartnerschaft.” The reason for this is to be found in constitutional law.

Marriage in German Constitutional Law

In the Grundgesetz⁸, Article 6 I (Rights of the Family) states that “*Marriage and family shall enjoy the special protection of the state.*” Marriage is conceptualized in constitutional law as a place of security, a safe haven. It is a strong shared belief that the state should protect, yet not intrude into, the private family-sphere⁹. Part of this understanding of protection and guaranteed freedom from intrusion is the decision about the division of labour between the spouses. The traditional “housewife marriage” has to remain an option, it is argued. Protection is also interpreted as providing access to the institution of marriage which must not be blocked by incentives that make marriage unattractive compared to other lifestyles. The charges and restrictions of marriage therefore have to be extended to non-married couples.

This point of view is especially relevant in the law of means-tested social benefits where the means-testing not only takes into account the income of the marriage partners but also that of heterosexual non-married partners. This is problematic since these non-married couples share no legal maintenance obligations (there are no other legally recognized forms of partnerships for heterosexual couples besides marriage, especially no regulations of co-habitation). How close the partners have to be to legitimize these consequences has been much discussed lately, as many couples have been confronted with these obligations through the “Hartz IV” reform. In 1992¹⁰, the Federal Constitutional Court ruled that no unmarried couple could be subject to the rigid means-testing of the then in-force unemployment aid (Arbeitslosenhilfe) - only those couples whose relationship could be considered similar to a marriage (eheähnlich) were subject. No heterosexual partnership falls under a term similar to a marriage (eheähnlich), the ruling of the Federal Constitutional Court maintaining that there have to be close bonds (as those existing in a marriage) that cause the willingness and expectation to secure each other’s existence. The administrative process by which the existence of these bonds can be deduced from evidence remains controversial. Though the notion that “Eheähnlichkeit” does not exist if the couple does not cohabit, Social Courts have not approved the deduction on basis of cohabitation alone.

Though other indicators, such as children or a joint account, are sought, finding evidence of a financially able partner by visiting suspected claimants at home to look for a shared bedroom or wardrobe as evidence for “eheähnliche” relationships is still attempted. Many couples have taken legal actions against the consequences of means-testing by denying the “Eheähnlichkeit” and succeeded, because the administration could not provide acceptable evidence. Now the political debate has changed course - a paper published by the Federal Ministry of Employment

⁸ Basic Law, German Constitution.

⁹ The private sphere is of course not entirely inaccessible to the law, abuse and (sexual) violence are not accepted and battled with several legal strategies.

¹⁰ BVerfG 17.11.1992, NJW 1993, p. 643.

in August 2005 stressed the moral obligation to share in the hour of need and accused couples not doing so to be parasites within the “Volks” –body (BMWA 2005). The new coalition of CDU/CSU and SPD has therefore decided to look for ways to change the definition of “Eheähnlichkeit” and to assign of the burden of proof to the claimant rather than the administration (Koalitionsvertrag 2005).

Indirect Discrimination

The ability to cope with the problems of indirect discrimination seems to be promising. It is a concept in European law as well as German constitutional law. As I have shown, there are several elements of the male-breadwinner model that could possibly be viewed as indirect discrimination. I will now focus on the effects of the basis of means-testing of the unemployment allowance (Arbeitslosengeld II). Although the most recent data cannot be used at this point to support the argument, it is very likely that the rules of means-testing for the unemployment allowance (Arbeitslosengeld II) have the effect that more women than men are ineligible for benefits because of the income of the partner.

In European Law, Directive 79/7/EEC is most applicable because it is directly concerned with social benefits. Article 4 (1) of Directive 79/7/EEC states that there shall be no “discrimination on grounds of sex either directly or indirectly by reference in particular to marital or family status.” The material scope of the directive applies to “statutory schemes that provide protection against sickness, invalidity, old age, accidents at work and occupational diseases, and unemployment” (Article 3 (1) (a)). “Social assistance in so far as it is intended to supplement or replace the schemes referred to” is also covered by the Directive. General social assistance schemes that provide benefits regardless of the cause of poverty cannot come within the material scope of the Directive. The ECJ has decided that a general social assistance scheme that is paid cannot be viewed as a “supplement” (and therefore does not come into the material scope of the directive¹¹) if other schemes providing protection against unemployment do not apply and expect the claimants to accept job-offers. Basically, this means benefits that are generally intended to provide against poverty, as opposed to one of the risks covered by the Directive, can not come within the material scope of the Directive. As Sohrab noted in 1996, Member States can bring schemes out of the scope of Directive 79/7/EEC simply by redesigning them (Sohrab 1996, p.96). Since the provision of basic social benefits for everyone is a part of the European Employment Strategy, the spread of a basic means-tested benefits net across Member States is particularly regrettable, as other sources of European Law are not concerned with access to social assistance benefits.

¹¹ Jackson and Cresswell v. Chief Adjudication Officer, Joined Cases C-63/91 and C 64/91 (1992) ECR I-4737.

¹³ BVerfG v. 18. 11. 2003, Az: 1 BvR 302/96, NZA 2004 S.33-39; BVerfG v. 5.4.2005, Az: 1 BvR 774/02, DSStR 2005 S.1244-1247.

Therefore I shall turn to German Constitutional Law. Within German Constitutional Law, the concept of indirect discrimination has not been as extensively applied and enhanced through case law as it has in European law. However, the Federal Constitutional Court has used the principle and applied it lately in two important cases. It has based the rulings on Article 3 II GG: *“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.”*

In a case concerning maternity leave (Mutterschutz), that principle comes into force 6 weeks prior to and 8 weeks after delivery. Employers had argued that their share of continuation of wage-payments during that period would violate their constitutional right to freely choose their trade or profession (Article 12 I GG). The Federal Constitutional Court negated this and pointed out, instead, that the state is obliged to design protective regulations in a way that minimizes the danger of discriminatory effects in social reality. Because there was no apportionment procedure between companies with more than 20 employees the court found the § 14 I MuSchG (Mutterschutzgesetz) to be a potential restraint of employment of women and therefore incompatible with Article 3 II GG.

In a more recent decision, the Federal Constitutional Court has ruled that Article 3 (2) GG aims to provide equal circumstances in the lives of women and men and therefore concerns itself with social reality¹³. The enforcement of equality, the Court judged, is constrained by regulations that are sex-neutral by wording but because of biological differences or social conditions affect more women than men. It is therefore not important for the material scope of Article 3 (2) GG if unequal treatment is the result of direct or indirect discrimination. The court had to answer a question concerning the German Pension Fund of Lawyers (Versorgungswerk der Rechtsanwälte)¹⁴. Within the pension funds, high monthly payments arose even during parental leave (Elternzeit) when there might not be sufficient income to cover them. This could only be avoided by resigning the entitlement of practicing as a lawyer during parental leave, a decision that would entail several disadvantages. The court argued that in social reality women are predominately responsible for care work and parental leave and are therefore predominantly affected by the regulation.

This indirect discrimination would then have to be justified based on reasonable grounds. Since the financial stability of the Pension Fund would not be affected by a membership free of charges during parental leave, the Federal Constitutional Court judged that this was not the case. According to the unemployment allowance (Arbeitslosengeld II), one would have to ask for reasonable grounds. The reason for the strict subsidiary is of a financial nature – an individualized concept of means-testing would cost the state a great deal more. So the question

¹⁴ BVerfG v. 5.4.2005, Az: 1 BvR 774/02, DStR 2005 S.1244-1247.

remains whether financial considerations can legitimize indirect discrimination of women. The political answer to this is that they do not suffer any hardship because they are cared for by their spouses.

Conclusion

The concept of maintenance and marriage plays an important role in shaping the gendered division of labour and the access of women to independent income in Germany. Within a political system where both men and women are better integrated into the labour market – like the Nordic Model - the forces I have described would have little effect. As German policy has never taken steps towards that model beyond wording, marriage and maintenance preserve the male-breadwinner model and the division of the public and the private. Further research should determine why the criticised elements of this male-breadwinner model have proved to be so resistant to change. To recap, the “Hartz IV” reform has been attacked by many feminists while tax law’s income-splitting tariff has been debated for many years, yet there have been no changes. It also seems necessary that future research should include a comparative dimension focusing on the gendered impact of redesigned regulations of the welfare state in different countries and the principles they follow.

References

- | | |
|--|--|
| Andreß, Jürgen Borloh, Barbara/
Güllner, Miriam/ Wilking, Katja
(2003) | Wenn aus Liebe rote Zahlen werden. Über die wirtschaftlichen Folgen von Trennung und Scheidung. Wiesbaden 2003. |
| Berghahn, Sabine (2004) | Ist die Institution Ehe eine Gleichstellungsbarriere im Geschlechterverhältnis in Deutschland?, Oppen, Maria; Simon, Dagmar (ed.): Verharrender Wandel. Institutionen und Geschlechterverhältnisse, Berlin, 99-138. |
| BMWA 2005 (Bundesministerium für Wirtschaft und Arbeit) | Vorrang für die Anständigen - Gegen Missbrauch, `Abzocke` und Selbstbedienung im Sozialstaat. Ein Report vom Arbeitsmarkt im August 2005. |
| Bothfeld, Silke (2005) | Arbeitsmarkt. In: WSI FrauenDatenReport 2005, 109-186. |
| Esping-Andersen, Gosta (1990) | The Three Worlds of Welfare Capitalism. Cambridge. |
| Hausen, Karin (1997) | Arbeiterinnenschutz, Mutterschutz und gesetzliche Krankenversicherung im Deutschen Kaiserreich und in der Weimarer Republik. Zur Funktion von Arbeits- und Sozialrecht für die Normierung und Stabilisierung der Geschlechterverhältnisse. In: Gerhard, Ute (ed): Frauen in der Geschichte des Rechts. München, 713-743. |
| Kirchhof, Paul (2000) | Ehe- und familiengerechte Gestaltung der Einkommensteuer, NJW 2000, 2792 . |
| Kirchhof, Paul (2003) | Die Einkommenbesteuerung von Ehegatten während des Zusammenlebens und im Falle von Trennung und Scheidung, |

- FPR 2003, 387-390.
- Koalitionsvertrag (2005) Gemeinsam für Deutschland. Mit Mut und Menschlichkeit, 11.11.2005.
- Leitner, Sigrid (1999) Frauen und Männer im Wohlfahrtsstaat: zur strukturellen Umsetzung von Geschlechterkonstruktionen in sozialen Sicherungssystemen. Suhrkamp, Frankfurt am Main, Berlin, 1999.
- Lewis, Jane (2001) The decline of the male breadwinner model: implications for work and care, *Social Politics* 2, 152-169.
- Lewis, Jane/ Ostner, Ilona (1994) Gender and the Evolution of European Social Policies. Arbeitspapier No. 4, Zentrum für Sozialpolitik der Universität Bremen, Bremen.
- Orloff, Ann (1993) Gender and the Social Rights of Citizenship: the Comparative Analysis of Gender Relations and Welfare States. In: *American Sociological Review* 58(3), p.303-328.
- Ott, Notburga (2003) Besser kein Job oder keine Kinder? Zur Rolle der Sozialversicherungssysteme für die Vereinbarkeit von Familie und Beruf, in: Lange, Joachim (Hg.) *Kinder und Karriere. Sozial- und Steuerpolitische Wege zur Vereinbarkeit von Beruf und Familie*, *Loccumer Protokolle* 56/2002, pp. 123-.
- Rosenfeld, Rachel A./Trappe, Heike /Gornick, Janet C. (2004) Gender and Work in Germany: Before and After Reunification. In: *Annual Review of Sociology* 30, 103-124.
- Sacksofsky, Ute (1998) Steuerung der Familie durch Steuern, *NJW* 2000,1896-1903.
- Sainsbury, Diane (ed.) (1994) *Gendering Welfare States*. London.
- Scholz, Harald (2004) Ehegattenunterhalt. In: Wendl, Philipp /Staudigl, Siegfried (ed.):*Das Unterhaltsrecht in der familienrichterlichen Praxis*. München.
- Schratzstaller, Margit (2003) Frauen und Männer im deutschen Steuersystem. In: Wrede, Birgit (ed.):*Geld und Geschlecht. Tabus, Paradoxien, Ideologien*. Opladen, 103-116.
- Sohrab, Julia A. (1996) Sexing the Benefit. Women, Social Security and Financial Independence in EC Sex Equality Law. Brookfield.
- Spangenberg, Ulrike (2005) Hans-Böckler-Stiftung Arbeitspapier Nr. 106, Neuorientierung der Ehebesteuerung: Ehegattensplitting und Lohnsteuerverfahren, 2005.
- Stang Dahl, Tove (1984) Women's Rights to Money. In: *International Journal of the Sociology of Law*, 12(2), 137-152.
- Statistisches Bundesamt 2004 *Leben und Arbeiten in Deutschland - Ergebnisse des Mikrozensus 2003*. Wiesbaden.
- Vollmer, Franziska (1998) *Das Ehegattensplitting. Eine verfassungsrechtliche Untersuchung der Einkommensbesteuerung von Eheleuten*. Baden-Baden.