

LEGAL AND SOCIAL DIMENSIONS OF THE MALE-BREADWINNER MODEL IN GERMANY – CURRENT WELFARE-STATE REFORMS AND GENDER EQUALITY

Maria Wersig¹

SUMMARY

German women find it more difficult than men to establish financial independence through the labour market or social (security) benefits and are more often dependent on the income of the husband or partner. The structural inequalities between women and men in welfare state regimes are described by social scientists 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 is the strict division of the public and private sphere, founded by alimony law and the protection of marriage as a constitutional value and right. 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, their gendered impact is the financial dependence of women on men, because their personal entitlements to social security benefits are inadequate and alimony is given priority to means-tested benefits. This raises questions concerning equality law and efficient strategies for change. The paper aims to show the interrelation of apparently neutral regulations, and their meaning for men and women (as groups), and their influence on 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 poorer-quality 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 is observing changes towards an adult-worker model across Europe (Lewis 2001) the decline of

¹ Paper for presentation at the International Interdisciplinary Conference "Equality and Diversity in Europe: Comparative Perspectives on Equality, Law and Politics" 12 - 13 January, 2006 Helsinki, Finland. The paper presents results of the interdisciplinary research project "The system of marital maintenance and the principle of subsidiarity in social law - are they substantial barriers for gender equality? - The legal and political foundation of the German male-breadwinner model", financed by the Hans-Böckler Foundation, situated at the Otto-Suhr-Institut for Political Science of the Freie Universität Berlin from 2004 until 2006; ermodell@zedat.fu-berlin.de. Author to whom correspondence should be sent: Maria Wersig, Otto-Suhr-Institut für Politikwissenschaft, Freie Universität Berlin, Ihnestraße 22, 14195 Berlin Germany; mwersig@zedat.fu-berlin.de. First draft, if you wish to quote this work please contact the author.

the male-breadwinner model is not to be regarded as a matter of course. In Germany it seems quite persistently to be a part of current policy, although gender equality is claimed to be an important aim of the agenda.

It includes incentives to marriage and a traditional division of labour between husband and wife, in the now predominantly accepted modern variation. The husband working full-time and the wife working 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, where 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 German women as a rule 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, their gendered impact is the financial dependence of women 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 sketch the German concept of maintenance law, its role in shaping the legal system, as well as the constitutional concept of marriage. Finally the recent changes of benefits in case of unemployment will be discussed and the question of indirect discrimination raised.

STRUCTURAL INEQUALITIES

Although the labour market participation of women has been growing constantly within the last decades, the labour market participation of women and men still differ greatly from each other. 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. Of course these patterns do not affect all women in the same way, they also play a part in reinforcing differences between groups of women (class, educational background, citizenship, age, and “race” are dimensions of difference that should not be forgotten as well but cannot be addressed in this paper).

In 2003 the employment rate of women aged between 15 and 65 added up to 65 %, of men it 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 growing part-time employment (13 -23%) of 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 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 works 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 labour force participation of women. In 2003 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, by the legal profession, being declared to be 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. However, this motive has since then not been replaced by a clear commitment to an adult worker-carer-model. Instead, the contribution to family life by care work and payed work was declared to be equal. This equality was not supported by financial security for the predominantly female carer 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 already mentioned the model of the “housewife marriage” has been changed to 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 found (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 who had already lived many years as housewives and mothers and had been 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 but at the same time many legal reasons for entitlements to maintenance claims after divorce were designed so that lifelong entitlements to payments would very much be 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. Although even when the 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 political 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 the care for children (a reform will very likely come into force in 2006).

Maintenance obligations exist not only after marriage but also during marriage, called family maintenance (*Familienunterhalt*; §1360 BGB). Family maintenance is conceived not in terms of money (except for housekeeping and spending money for the housewife) but an obligation to work towards the wellbeing of the family no matter if this happens through payed work or

care work (Scholz 2004, § 3 Rn. 1)². Within marriage therefore an individualized principle of self-reliance does not exist, the spouses are viewed as a unit that work 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 alimomial obligation of the breadwinner is taken into account through joint taxation of married spouses with an income-splitting tarif. Because of the progression of the tax scale, the reduction to half the taxable income results in 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. Taken into account the inadequate child-care infrastructure and the fact that child-care expenses can not 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 but stress the point that there has to be taxation according to financial ability and that the family maintainance obligation reduces the financial ability of the breadwinner. The constitutional protection of marriage protects 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-tarif 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. Also it should not be considered a tax-privilege

² Because of the special nature of the claim it is hardly ever enforced by legal action.

but a form of taxation according to financial ability. Although it 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 breadwinners 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. But in social security law many benefits are calculated based on the monthly income after deductions – married womens 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 there were finally preparations being made that have not reached a conclusion yet. 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 Germany social security schemes have been criticized 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 entitlements³. Very much discussed in recent years and until now not sufficiently solved has been the access of short hours part-time workers to social security benefits.

Still the access to social security benefits is in many ways inadequate therefore 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 can not provide. This principle of subsidiarity has structured social assistance (Sozialhilfe) and is since January 1st 2005 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”⁴, in 2005 the introduction of a new basic benefit called unemployment allowance (Arbeitslosengeld II).

The unemployment allowance is 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. It replaced the former social assistance (Sozialhilfe) a strictly means-tested benefit and the unemployment aid (Arbeitslosenhilfe) that was a hybrid system, financed by tax revenues but only available after the social security scheme unemployment benefit (Arbeitslosengeld) was no longer payed. 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)⁵ and the claimants fulfill the means-testing and other requirements⁶, they are entitled to unemployment allowance (Arbeitslosengeld II). The unemployment allowance is designed as

³ Although, as Ott 2003 has shown, it is (in German pension schemes) still more economically advantageous to work than to have children.

⁴ Because it was the fourth law passed as part of the Hartz-Reforms, the official title of the now in force law is Sozialgesetzbuch II Grundsicherung für Arbeitsuchende (SGB II).

⁵ 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.

⁶ 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).

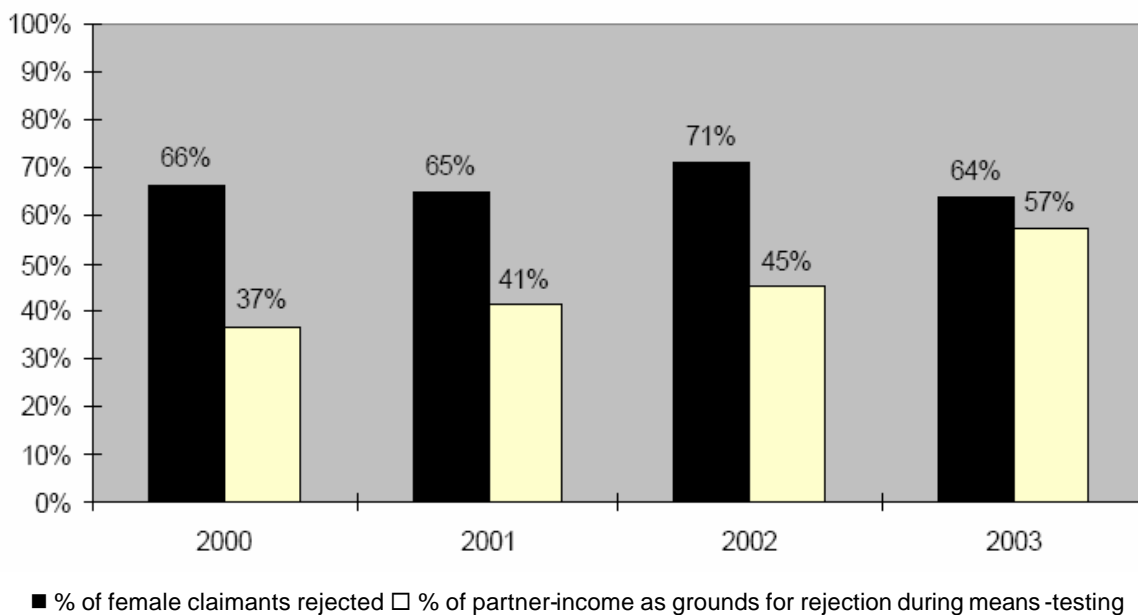
a family allowance, income of partners is also taken into account. Therefore the financial need of the members of the household group⁷ is calculated and added jointly. Part of the household group (Bedarfsgemeinschaft) are adult jobseekers (erwerbsfähige Hilfebedürftige), their partners and any children. 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 two adults are members of the household group they are only entitled to 90% of that sum. The means to satisfy basic needs are provided if income⁸ 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 payed 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 family 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, then vice versa. Women's groups and unions have made this argument during the legislation process and warned to take these steps. For women who 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. But even then the statistics of means-testing of unemployment aid showed that two thirds of the claimants who were rejected because of the income of a partner, were women (see chart 2).

⁷ The new, shaped through the new law, German word is „Bedarfsgemeinschaft“, it translates word-to-word as “household community of needs”.

⁸ 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 (%)



New data of 2005 can not be presented at this point, because the data analysis has not yet been published. However, it does not seem likely, that the gendered impact of means-testing will disappear. The claimants who do not receive benefits will also 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, like money for necessary childcare expenses. Instead they have to apply for help with another administration, the Arbeitsagentur (of unemployed that receive social security unemployment money). There they have fewer claims that can in a majority not be enforced. Also the Arbeitsagentur will primarily try to reintegrate the “expensive” unemployed receivers of social security benefits rather than others. An empirical analysis carried out as part of our research project in Berlin with persons who do not receive benefits due to their partners income showed, that especially East German women find it very difficult to deal with the situation as they feel pressed into the model of the West German “housewife marriage” against their will. But not only married couples are affected, because means-testing also applies to heterosexual persons living together as if they were married (the legal term is “eheähnlich” - alike-marriage) and 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 Grundgesetz⁹ 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. And it is a strong shared belief that the state should protect, yet not intrude into, the private family-sphere¹⁰. 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. This access, it is argued, 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 takes into account not only the marriage partners but also of heterosexual non-married partners income. 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 through the “Hartz IV” reform many couples have been confronted with these obligations. The federal constitutional court has ruled in 1992¹¹ for the then in-force unemployment aid (Arbeitslosenhilfe) that not any non-married couple could be subject to the rigid means-testing but only couples whose relationship could be considered similar to a marriage (eheähnlich). Not any heterosexual partnership falls under the term similar to a marriage (eheähnlich), by ruling of the Federal Constitutional Court there have to be close bonds alike existing in a marriage, that cause the willingness and expectation to secure each others existence. How to deduct from evidence the existence of these bonds in administrative daily routine is controversial. Although it is without controversy that “Eheähnlichkeit” does not exist if the couple does not cohabit, Social Courts have not approved the deduction on basis of cohabitation alone.

⁹ Basic Law, German Constitution.

¹⁰ 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.

¹¹ BVerfG 17.11.1992, *NJW* 1993, p. 643.

¹⁴ Jackson and Cresswell v. Chief Adjudication Officer, Joined Cases C-63/91 and C 64/91 (1992) ECR I-4737.

Other evidence has to be found like children or a joint account. Still it is attempted to find evidence of a financially able partner by visiting suspected claimants at home and looking for a shared bedroom or wardrobe as evidence for “eheähnliche” relationships. 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 in August 2005 the moral obligation to share in the hour of need was stressed and couples not doing so were accused 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 the assignment of the burden of proof to the claimant instead of the administration (Koalitionsvertrag 2005).

INDIRECT DISCRIMINATION

To cope with the problems the concept of indirect discrimination seems to be most 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 shall focus on the effects of the basis of means-testing of the unemployment allowance (Arbeitslosengeld II). Although most recent data can at this point not be used to support the argument, it is very likely that the means-testing rules of the unemployment allowance (Arbeitslosengeld II) have the effect that more women than men are not entitled to 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 can not come within the material scope of the Directive. The ECJ has decided that a general social assistance scheme that is paid if other schemes that provide protection against

unemployment do not apply and expects the claimants to accept job-offers can not be viewed as “supplement” and therefore do not come into the material scope of the directive¹⁴. Basically this means that 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, simply by redesigning schemes, bring schemes out of the scope of Directive 79/7/EEC (Sohrab 1996, p.96). Since a basic means-tested benefits net is spreading across Member States and the provision of basic social benefits to everyone is also part of the European Employment Strategy this is even more regrettable. Other sources of European Law are not concerned with access to social assistance benefits as well.

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 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 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 of the lives of women and men and therefore concerns itself with social reality¹⁶. 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

¹⁶ 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, DStR 2005 S.1244-1247.

treatment is the result direct or indirect discrimination. The court had to answer a question concerning the German Pension Fund of Lawyers (Versorgungswerk der Rechtsanwälte)¹⁷. 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 predominantly are 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. Applied to the unemployment allowance (Arbeitslosengeld II) one would have to ask for reasonable grounds. The reason for the strict subsidiarity is of a financial nature – an individualized concept of means-testing would cost the state a great deal more. So the question remains if 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 the male-breadwinner model have proved to be resistant to change as they have been. As already mentioned, the “Hartz IV” reform was attacked by many feminists and the income-splitting tariff in tax law has been debated for many years –yet there have been no changes. It also seems necessary that future research include a comparative dimension focusing on the gendered impact of reregulation of the welfare state in different countries and the principles they follow.

¹⁷ BVerfG v. 5.4.2005, Az: 1 BvR 774/02, DStR 2005 S.1244-1247.

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, Sigrud (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.
- Schratzenstaller, 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.