

Overcoming Joint Taxation: The German Case¹

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Abstract

In German income tax law, the alimomial obligation of the male breadwinner is taken into account through joint taxation of married spouses with the income-splitting tariff. This form of taxation exists since 1958. Because of the progression of the tax scale, the reduction of the tariff 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 and discriminating against married women. Legally recognized homosexual partners can not choose the income splitting option, even though their maintenance obligations are crafted after the model of marriage. This contribution explores the debate about the gendered impact of joint taxation in Germany and the model of family it implies, as well as resistance to and efficient strategies for change.

I. Introduction

Since its introduction in 1958 the joint taxation with income-splitting tariff is being disputed over in Germany. It is argued that this form of taxation creates and perpetuates inequality between women and men, married and unmarried couples, high and low incomes, as well as between tax payers in the east and west of Germany (Vollmer, 1998; Sacksofsky 2000; Berghahn 2004; Spangenberg, 2005; Färber/Spangenberg/Stiegler, 2008). It has created political and scholarly controversies but even though this is the case many scholars today do not anticipate the chances to be great for the law to be changed (Rüling/Kassner, 2007: 83). While some argue that the risks of new legislation being overturned by the Federal Constitutional Court are too high, others point out the important role of income splitting within the strong male-breadwinner-model German welfare state (Daly, 2000: 94, Dingeldey, 2000). From an international perspective, it seems that income splitting in Germany has stronger effects and is more difficult to overcome than in other countries. This contribution explores the debate about the gendered impact of joint taxation in Germany and the model of family it implies, as well as resistance to and efficient strategies for change.

¹ DRAFT FOR DISCUSSION PURPOSES ONLY.

II. History, Effects and Legal Debate

In German income tax law (Einkommenssteuer) married spouses can choose to be taxed as one taxpayer (joint filing, § 32 a Abs. 5 EStG) with an income-splitting tariff (§ 32 a Abs. 5 EStG) which works as follows. The income of both spouses is first added then divided by two. The standard rate of income tax is then applied to each half of the joint income. The amount of tax thus calculated is then doubled to give the couple's total tax liability for the year. When there are differences in income between the partners, and particularly when one of them has little or no income, this method of assessment means that the total household income – in this case that of a single breadwinner – is subject to a significantly lower rate of progression than the earnings of single people or of married couples with more equal incomes. This is also called a “splitting effect”. Because of the progression of the tax scale, the “splitting effect” results in the greatest savings if only one partner earned it. There is no difference to individual taxation if both partners earned the same amount of money.

The “splitting effect” varies according to the difference of income between the spouses and the taxable income they receive. The following tables² illustrate the achievable “splitting effect” if one partner earned the household income or if the spouses followed an one- and – a half breadwinner arrangement (70:30).

100:0

Bruttolohn in €	1998 in €	1999 in €	2000 in €	2001 in €	2002 in €	2003 in €	2004 in €	2005 in €
30.000	3.239	3.418	3.498	3.462	3.464	3.464	3.588	3.493
50.000	4.772	4.930	5.359	5.433	5.426	5.426	5.443	4.875
80.000	9.903	9.926	9.746	9.653	9.651	9.651	9.096	7.981
100.000	12.276	12.300	11.534	11.127	11.140	11.140	10.179	8.922
120.000	13.384	13.406	12.205	11.477	11.474	11.474	10.299	9.032

70:30

Bruttolohn in €	1998 in €	1999 in €	2000 in €	2001 in €	2002 in €	2003 in €	2004 in €	2005 in €
30.000	395	530	629	727	890	890	1.018	1.024
50.000	87	117	240	253	429	429	405	265
80.000	1.313	1.238	1.216	1.293	1.520	1.520	1.433	1.177
100.000	2.180	2.140	1.795	1.689	1.946	1.946	1.622	1.449
120.000	2.163	2.161	1.559	1.164	1.444	1.444	1.023	1.086

This form of taxation is criticised as privileging marriages with a single breadwinner or with a significant difference between the spouses income: they achieve a tax reduction that dual-earner couples are not able to achieve (Sacksofsky, 2000: 1898; Vollmer, 1998: 127). Supporters of

² Information provided to the German Parliament in 2006, BT-Drs. 16/2231, Bruttolohn = “gross wages”.

income splitting argue that it is a method of taxation according to ability to pay and supported, if not called for by the protection of marriage (Kirchhof, 2000).

Following this brief description of the law, I shall turn to its origins in the 1950s and the redistributive effects of income splitting today.

1. Family Policy in the 1950s and Introduction of the Income Splitting in 1958

The income splitting tariff was introduced in 1958. At this point in time family policy the West German family policy was centred on protecting the nuclear family against perceived threats, including the gainful employment of married women and mothers. Family policy followed the concept of a strong male-breadwinner model, the husband and father earning the family wage and the wife and mother taking care of children at home. This gendered division of labour in the family was part of family law and supported by a number of means as well as public opinion. Politicians like the first minister of family affairs Franz Joseph Wuermeling argued, that the family needed to be protected against “the wrong kind” of interpretations of gender equality that included working women and mothers, as policy included in East Germany at the time. The aim was not only to establish the traditional family model and gender roles after the Second World War but also to establish the dissociation from the competing political system in the socialist Federal Republic of Germany.

The introduction of the income splitting tariff was the result of a decision of the Federal Constitutional Court that rejected the former mandatory joint taxation without the splitting tariff as unconstitutional³. Because of the progression of the tax scale the joint taxation of married couples could result in a marriage penalty, the couple would end up to pay higher taxes than they would paying if taxed individually. This would function as a disincentive for the secondary wage earner, married women to enter or stay in gainful employment, concluded the Federal Constitutional Court⁴. The court argued, that the Constitutional principle of gender equality and non-discrimination based on sex (art. 3 sec.2 German Basic Law) included women’s right to work with the same chances and earning prospects as men⁵. The court also pointed out income

³ BVerfGE 6, 55 (77).

⁴ BVerfGE 6, 55 (77).

⁵ BVerfGE 6, 55 (77).

splitting as one constitutional option available to the legislator⁶. The introduction of the income splitting tariff was a compromise (Niehuss, 2001: 194), and aimed to enable married women to work without wage penalties (Seel, 2007:2) but also support the male breadwinner marriage.

Since the 1950s labour market participation of women has increased and marriage isn't the dominating socially acceptable form of life and starting family anymore. Especially after reunification strong differences in attitudes regarding working women and mothers can still be assessed in east and west.

2. Impact assessment of Income Splitting

Following the description of the origins of the law and the intentions of the legislator in the 1950s, I will now turn to the effects of income splitting today. While many things remain unknown about the gendered impact of taxation in Germany, especially who within the "black box" family profits from tax benefits (Spangenberg, 2005: 20) the effects of income splitting have been studied (Bach/Buslei, 2000). The redistributive effects that can be shown include differences between single-breadwinner and dual breadwinner marriages, marriages in east and west Germany, married couples with and without children. Also married couples with high household income profit considerably more than couples with low or midrange income.

In 2005, the overall volume of income splitting was 20.5 Billion Euro. In 2003, 61 per Cent of this amount was received by one-breadwinner couples (Bach/Buslei, 2000, 47). Because of several differences between families, marriage rates, labour market participation of women and wages (the gender pay gap is not as great as in the western states) between East and West Germany, married couples in West Germany profit most from income splitting. In 2003 93 per Cent of the volume of tax savings because of joint taxation, in numbers 19.3 Billion Euros, were received by couples in West Germany (Bach/Buslei, 2003: 47). Often it is argued that income splitting is part of family policy, since it takes differences of income due to unpaid care work within the family into account. Studies to back up this argument have aimed to show, that the majority of couples profiting from income splitting have children (Gottfried/Witzak 2006). The differences of the splitting effect according to income brackets between married couples with children are great. The tax relief varies between 17 € and 5300 € (Spangenberg, 2005: 24). Many families are not eligible for joint taxation, if the parents are not married, divorced, in a homosexual partnership or solo-parents.

⁶ BVerfGE 6, 55 (77).

3. Criticism of joint taxation today

a. Gendered Impact of Income Splitting

Feminists argue this form of taxation makes the usually lower income of the secondary wage earner, often 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. Even a small additional income of the secondary wage earner will result in significantly diminishing tax savings. Taking into account the inadequate child-care infrastructure and the fact that child-care expenses can only limitedly be set off against tax liability, the incentive for married women, especially 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 has to be taxation according to ability to pay and that the family maintenance obligation reduces that ability of the breadwinner. The argument is basically, that a family with one person earning 50.000 Euro per year and another who doesn't work is no wealthier than a couple where each earns 25,000 Euro, yet the former will be taxed at a higher rate due to progressive taxes.

While the effects of taxation on individual decisions to enter or withdraw from the labour market cannot be viewed without other aspects of social security law, the coordination with other welfare state regulations, and particularly with employment and family policy, as well as the cultural environment and couples' working time preferences and attitudes to the balancing of family responsibilities and paid work (Dingeldey 2000), in Germany income splitting plays an important role within a welfare state system, that supports the male-breadwinner-model. Since there have been many changes within the German welfare state model, especially regarding family policy and reconciliation of work and family, income splitting remains one of the most contested elements of the traditional German welfare state.

b. Further impact on net income through "Lohnsteuer"

The monthly income of the breadwinner can be increased further, the second earner at the same time is taxed higher than it normally would be the case. The educational effect, that some people attribute to income splitting, is therefore part of every-month income of many women. 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 can be calculated by taking differences between spouses' incomes into account, if the spouses choose to do so. If

they want to, they can also pay the Lohnsteuer according to the rules applied to single people and would then receive a payback at the end of the year. If they choose the option to take spouses difference of income into account, 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, 91% of the people in this Lohnsteuer-group are women. Yet it seems more economically advantageous to tax this way if the couple's income is viewed as one unit that lumps together – there is more money at the end of the month. 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 than married men's. That this specific way of collecting income tax from married couples is also protected by article 6 section 1 basic law can hardly be argued. A reform has been demanded for many years but only in 2009 were preparations finally being made. Unfortunately the legislator did not choose to dispose of the "Lohnsteuer" option for single-breadwinner couples but decided to offer one more option to choose from that results in a more equal distribution of tax burden between spouses. Even though discriminating effects of one way of collecting the Lohnsteuer have been shown, politicians decided not to take that option away from couples but to offer one more way to choose from. The reason is hesitation to take something away from voters that is perceived as a privilege.

c. Unmarried couples and same-sex-partnerships

From a family policy point of view it can be argued, that couples who are not married and solo-parent families do not have the option of joint taxation with a splitting tariff even though their ability to pay may be compromised by their family situation as well. Also an increasing number of parents (20% in West Germany, 25% in East Germany) are not married and cannot choose joint taxation. In legal discourse these argument so far didn't convince courts. But is equal treatment in taxation not required for partners that decide to legally take on a similar commitment to marriage? Since the introduction of the partnership for homosexual couples the question of equal treatment of marriage and partnership has been raised, homosexual spouses have claimed equal treatment in comparison with married couples.

Homosexual partners in Germany can enter into a legally recognized partnership similar to marriage, the "eingetragene Lebenspartnerschaft" (civil partnership) since 2001. In terms of

maintenance and other obligations this partnership is crafted after the model of marriage. Many legal privileges connected to marriage (including joint taxation) have not been extended so far to partnerships. Even though maintenance obligations exist and may affect ability to pay, the income-splitting option has not been offered to them and they are still taxed individually. Several finance courts including the Bundesfinanzhof (federal court of finance) 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 marriage is protected by article 6 section 1 of the basic law and therefore the legislator is permitted to extend taxation privileges⁷. The difference in treatment between married partners and civil partners is according to these rulings justified by Article 6 section 1 Basic Law. Because of its importance the matter has been accepted for appeal to the Federal Constitutional Court⁸.

4. Constitutional debate

As Kirsten Scheiwe pointed out, the demand for tax fairness combined with the protection of the family (Art. 6 sec. 1 German Basic Law) has been a point much stressed in decisions regarding taxation by the Federal Constitutional Court yet the implications of gender equality and non-discrimination based on sex in tax law have not been explored very far since the important decision regarding joint taxation in 1957.

In the Basic Law, article 6 section 1 (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.

⁷ BFH 19. 10. 2006, III R 29/06; BFH/NV 2007, 663-666.

⁸ BFH 14. 12. 2007, III B 25/07; BVerfG 2 BvR 288/07.

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.

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). Income splitting according to this point of view is the only form of taxation that can take into account the ability to pay based on the division of labour between spouses and is therefore the only constitutional option for the taxation of married couples. Many others regard income splitting at least one option available to the legislator.

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 is not variable at will and not to be viewed as a taxation privilege, but one possible form of taking ability to pay and the protection of article 6 section 1 basic law (protection of marriage) into account.¹⁰ 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.

IV. Policy Alternatives

There are two alternative routes being discussed: individual taxation combined with other forms of taking maintenance obligations into account or a family tariff based on the count of family members (including children).

1. Individual Taxation

Individual taxation of married couples is favoured by those who regard the current law as being discriminating against women. Because of the rulings of the Federal Constitutional Court regarding fairness in taxation and the necessity to leave the existence-minimum of each family member untaxed, maintenance obligations need to be taken into account. Therefore a

¹⁰ BVerfGE 61, 319,347.

popular demand is the introduction of individual taxation with the possibility to deduct the existence minimum of a spouse if he or she doesn't have taxable income (Spangenberg 2005).

2. "Family Splitting"

While some proponents see the "family splitting" as a way to allocate more money to families with children, others even hope to abolish the strong disincentive to work for secondary earners under the existing income splitting for married partners. The Christian Democratic Party (CDU) favours the introduction of some form of family splitting in addition to the income splitting for married couples, the demand is part of the election program since 2008. The current Federal Minister of Family Affairs, Senior Citizens, Women and Youth Ursula von der Leyen (CDU) has also declared her preference for this concept yet not been able to introduce a concept during the rule of a coalition between CDU and the Social Democrats (SPD). It is not by accident, that conservative politicians now favour a reform, because family policy has been in high demand in Germany for the last few years. Reforms introduced by the current government like a new parental benefit ("Elterngeld") and investments in child care infrastructure have been met with much approval. Lowering the tax burden of families with children would be a highly popular demand in the upcoming elections in the fall of 2009. There is opposition to the introduction of a "family splitting" as well. It has been shown empirically, that a "family splitting" after the model of France for Germany would not affect the labour supply of married women (Beblo et. al. 2004; Althammer 2000). Another analysis shows that the popular belief (in Germany) that French high income families with children face lower average tax rates than their German counterparts is true, however not due to the French Family splitting but rather to the different definitions of taxable incomes in both countries. Actually, low income families with less than three children even fare better in terms of tax relief in Germany than in France. The French system leads to lower average tax rates than the German one (over a large range of the income distribution) only for families with three children (Baclett/Dell/Wrohlich 2005). Because of these impacts of a "family splitting" this option is generally rejected by opponents of the current regulations. In 2007 a large group of NGOs concerned with family policy and gender equality and in favour of individual

taxation made a public statement asking the government to aim for family policies that support all families, not only the ones with high incomes and a large number of children¹¹.

V. Strategies for Change

When the introduction of income splitting was discussed in Canada in 2005, there was much opposition to it. It was especially argued, that this would benefit male-breadwinner-marriages with a stay-at-home wife the most, investing billions of dollars in one lifestyle. In Germany this argument can be made as well. Billions of Euros are invested in single-breadwinner-marriages, especially the ones in the high income brackets. Still there is a lot of reluctance to attempt to change the law. The most important reason is the importance of the lifestyle “housewife marriage” in the western part of Germany. It has been the favoured and nurtured by various means and strategies and was the leading model for family and social policy.

As it is probably the case in most countries around the globe, the argument of a gendered impact of certain regulations alone does not ensure legal reforms, especially if it is the state and not a private entity discriminating against women or other groups. The question I would like to raise now is the question of efficient strategies for change. Does the German case of joint taxation suggest that legal change can only be brought about after society at large has changed? It is often suggested in the debate about income splitting, that as the male-breadwinner marriage is still very much a dominating way of life, for a majority of couples it would be a hardship to change the law. On the other hand: Since rules and regulations, especially the re-distributing effects of tax law very much shape the conditions of decision-making of couples and individuals, these rules have to be subject to change if they indirectly discriminate women. The question of how to change the law needs to be separated from the prior question of the necessity for a reform. Even severe critics of income splitting today talk about transitional regulations on the way to individual taxation (Spangenberg, 2008: 167). In the case of joint taxation an attempt to introduce a law that at least puts a cap on the splitting effect was not followed through by the government of Social Democrats (SPD) and the Greens (Bündnis 90/Die Grünen) due to the opposition the proposal faced. Both parties now demand the individual taxation in their election programs.

¹¹ Originally published in Frankfurter Rundschau, 13.1.2007, available at http://www.sozialpolitik-aktuell.de/tl_files/sozialpolitik-aktuell/_Politikfelder/Familienpolitik/Dokumente/Verbaende_FR_Doku.pdf.

How can claims for legal change to promote gender equality be brought to success? In the past, claims for legal change in the interest of gender equality were only successful in Germany, if other interests also called for a reform, the socio-economic framework supported it and interest groups within and/or outside the government were sensible to the gendered dimension of the problem (Lucke 1996). Often these are not the conditions, under which legal reforms are debated and often the interest of gender equality are then sacrificed or at least compromised a little due to “political necessity”. Sometimes on the other hand the interests of gender equality can be introduced because legal reforms are already on their way for other reasons or simply happen unnoticed and by accident. Developments in international law can also give leverage for changes on the national level. For example at the moment there is a draft for a new directive discussed at the moment within the European Union that would include the obligation for the member states to introduce equal treatment of marriage and civil partnerships for homosexual couples (if some form of legal partnership option for gay people exists in that state)¹². On the topic of joint taxation with splitting tariff the OECD¹³ and the United Nations CEDAW committee¹⁴ have made statements asking Germany to review the effect of tax law on the labour market participation of married women. Yet the current government has not even included a statement about taxation in the 6. Periodic Report of the Federal German Government on the CEDAW Convention. Pressure from an international level can then be used by interest groups on the national level to argue for a change of the law. The best chances for success seem to be, if strong national and international pressure for a change of law are combined. In other aspects of law pressure from the European Union level has resulted in the introduction of better antidiscrimination laws. Unfortunately, on the level of taxation there is no legal basis for interventions from an European level. To conclude my remarks about chances of and strategies for change I would like to point out, that in Germany the increasing importance of family policy makes it more likely for some form of family splitting to be introduced than individual taxation. Arguments based on Gender discrimination may prove to be less effective than the argument, that the changed nature of family makes it necessary to include non-married families within the splitting tariff. What may be special about the German case is the constitutional aspects of the debate that limit the options of the legislator and make every reform (at least in the eyes of politicians) a risky business.

¹² KOM 2008/420.

¹³ <http://www.oecd.org/dataoecd/27/35/40382005.pdf>, 13.

¹⁴ CEDAW/C/2000/I/CRP.3/Add.7.

VI. Concluding Remarks

This paper is a work in progress. I am looking forward to our discussion in Onati and hope to profit from the experience of my colleagues from around the world. After the workshop I hope to come to a conclusion regarding the future of joint taxation in Germany and to answer the question, why the road to change the taxation of married couples is such a difficult one in my country.

References

- Berghahn, S. (2004) Ist die Institution Ehe eine Gleichstellungsbarriere im Geschlechterverhältnis in Deutschland?, Oppen, Maria; Simon, Dagmar (ed.): Verharrender Wandel. Institutionen und Geschlechterverhältnisse, Berlin, 99-138.
- Kirchhof, P. (2000) Ehe- und familiengerechte Gestaltung der Einkommensteuer, NJW 2000, 2792 .
- Kirchhof, P. (2003) Die Einkommenbesteuerung von Ehegatten während des Zusammenlebens und im Falle von Trennung und Scheidung, FPR 2003, 387-390.
- Leitner, S. (1999) Frauen und Männer im Wohlfahrtsstaat: zur strukturellen Umsetzung von Geschlechterkonstruktionen in sozialen Sicherungssystemen. Suhrkamp, Frankfurt am Main, Berlin, 1999.
- Lewis, J. (2001) The decline of the male breadwinner model: implications for work and care, Social Politics 2, 152-169.
- Lewis, J./ Ostner, I. (1994) Gender and the Evolution of European Social Policies. Arbeitspapier No. 4, Zentrum für Sozialpolitik der Universität Bremen, Bremen.
- Orloff, A. (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.
- Rosenfeld, R. A./Trappe, H. /Gornick, J. C. (2004) Gender and Work in Germany: Before and After Reunification. In: Annual Review of Sociology 30, 103-124.
- Sacksofsky, U. (2000) Steuerung der Familie durch Steuern, NJW 2000, 1896-1903.
- Sainsbury, D.(ed.) (1994) Gendering Welfare States. London.
- Schratzenstaller, M. (2003) Frauen und Männer im deutschen Steuersystem. In: Wrede, Birgit (ed.): Geld und Geschlecht. Tabus, Paradoxien, Ideologien. Opladen, 103-116.
- Spangenberg, U. (2005) Hans-Böckler-Stiftung Arbeitspapier Nr. 106, Neuorientierung der Ehebesteuerung: Ehegattensplitting und Lohnsteuerverfahren, 2005.
- Statistisches Bundesamt 2004 Leben und Arbeiten in Deutschland - Ergebnisse des Mikrozensus 2003. Wiesbaden.
- Vollmer, F. (1998) Das Ehegattensplitting. Eine verfassungsrechtliche

Untersuchung der Einkommensbesteuerung von Eheleuten.
Baden-Baden.