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Constitutional and Legal Framework of Gender Justice in Germany

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Abstract:

It has been a long journey to get from the 1950s when the "natural difference between men and women" was accepted as a reasonable ground for legal and social inequality to today's laws and jurisprudence that aim at compensating for structural disadvantages of women, especially in the workforce. The article lines out this journey, showing that the legal framework for gender justice rests on three pillars: firstly Art. 3 of the Constitution with its different phases of a more and more far-reaching interpretation, secondly equal treatment provisions in European Community Law, which have massively influenced the development of the third pillar, German statute law with a growing number of gender justice oriented labour law provisions on the one hand and Equal Treatment Acts for the public service on the other hand.
The subject of gender justice is more than ever on the agenda of the legislator as several EC-directives on the matter have to be implemented in German law. The draft of an Anti-Discrimination Act is likely to be enacted in the second half of 2006.

Contents:

A. Introduction:

In the 1950s and 60s the "natural differences between men and women" were considered to be an acceptable reason for social inequality. It was common sense that these natural differences should also be reflected in the law. Consequently, German courts held that "the wife is the life-long helper of her husband". A wife could be overruled by her husband in any family-related decision, as the husband was seen to be the head of the family.[1] This went so far as to the wife having to get the consent of her husband for working outside the house.

The other side of the coin was the many restrictions placed on working women. In the public service women had to give up their posts as soon as they got married. This rule was in force until 1953, but the airline Lufthansa found it so attractive that it applied the rule to its employment contracts with stewardesses for a much longer period. Even when this practice was considered to be unconstitutional, Lufthansa very creatively adapted to the new situation by inserting a clause in the stewardesses' contracts stating that the contract would terminate if the stewardess became pregnant.

Some decades later, times have changed. Nearly every girl in Germany expects to enter the workforce, more girls than boys finish secondary school and girls get the better marks. In many subjects, such as law and business administration, 50% of the university students are female and they graduate with better results. Nevertheless, women in Germany still earn 30% less than men in the same type of position[2]; women disappear along the career ladder: only some 10% of university professors are women and woman are seldom to be found on boards of companies. On the other hand, 90% of part-time workers are female. Women have the biggest share of unprotected, low-paid jobs and they are more often on fixed-term contracts.

[1] So-called *Stichentscheid* (decisive authority), found unconstitutional in 1959 (BVerfG 10, 59). However, the law maintained an exception to the new principle of equal parental authority for crisis situations where the father's decision counted.
[2] Süddeutsche Zeitung, 15.4.2005 (“Gleicher Job, ungleiche Chancen”).

B. Legal framework for Gender Justice

The legal framework in Germany for creating gender equality is threefold:
First and foremost is the constitutional level. Here we will have a closer look at Art. 3 of the Basic Law (GG). Secondly, we have to deal with the European level. It is probably not an exaggeration to say that without European Community law, Gender Justice would look very different in Germany. Thirdly, there is the general statute law level.

I. The Constitution (Basic Law)

Art. 3 guarantees that all persons should be equal before the law. Paragraph 2 deals specifically with gender equality: Between 1949, when the Constitution was first enacted, and 1994, Para. 2 only contained the first sentence: Men and women shall have equal rights. It was up to the Federal Constitutional Court to inject life into this statement and the Court did this according to the social values and mores of the time. We can distinguish three phases of its jurisprudence:

1. Three phases of interpretation of Art. 3 para. 2 GG

a) In the first phase, reaching up to the 1960s the Court concentrated on the biological difference between men and women and interpreted the "same status before the law" as a guarantee that the natural differences should be respected by the law and that women should not have disadvantages due to the "different nature of womanhood" ("Andersartigkeit der Frau"). In this phase the Court declared unconstitutional the family law principle of the “supremacy of the husband”[3].

b) In the second phase - the 1970s and early 80s - the Court's decisions turned to emphasizing the equality of the sexes. The division of roles between women and men, which also the Federal Constitutional Court had seen as natural for two decades, was then regarded as no more than tradition that could no longer be justified under Art. 3 para. 2 of the Constitution. In this phase the Court declared e.g. that "the model of the woman, which previously was that of the care-taker of the

[3] BVerfGE 37, 217, 251.

family and homemaker, has thoroughly changed" (1978).[4] It was also in this period that the Court found it unconstitutional that German citizenship was automatically granted to children of German fathers but not to those of German mothers (1974).[5] Many of the explicit distinctions in the laws, which were discriminatory towards women, were erased in these years so that the Federal Constitutional Court could readapt its focus in the third phase.

c) In this third and lasting phase - the 1980s and onwards - the Federal Constitutional Court began to consider the persisting social distinctions between men and women. In recent years the Court has decided e.g. that equality also has to be guaranteed with respect to the marital name. Since then spouses have been able to freely choose a common name or keep their original one. The Court also held (in 1992) that (some of the) time spent raising children has to be recognized as a legitimate contribution to public retirement insurance.[6] Previously, contributions were exclusively linked to employment. In its current phase, the Court has been concentrating on protective regulations which in reality turn out to be a hindrance to women. Let me mention two key decisions:

(1) In 1992 the Court had to decide on the prohibition on women doing night-time work. The legislature had thought this prohibition protects women, but the Constitutional Court uncovered its discriminatory aspects. In its decision it held:

"The prohibition on women's' night work protects many who are also involved in child-care and housework from night-time labour which might threaten their health. This protection, however, is linked to considerable disadvantages in their search for employment. They cannot freely choose their working hours and therefore cannot, for example, earn over-time wages for night labour. The prohibition of night-work for women reaffirms the traditional roles of the sexes by assuming that only they have child-care duties. Therefore the prohibition on night-work for women is an obstacle to the elimination of the social disadvantages from which women suffer und is thus unconstitutional".[7]

[4] BVerfGE 48, 327, 338.
[5] BVerfGE 37, 217, 250.
[6] BVerfGE 87, 1.
[7] BVerfGE 85, 191, 209.

(2) Some years later the Constitutional Court had to decide on the prohibition on women working in public fire brigades. The Court held that this prohibition violated the equal rights guarantee of women because they were treated as the weaker gender without taking into account their individual abilities.[8]

2. Affirmative Action?

However, Art. 3 para 2 of the Basic Law has also got a second sentence: "The state shall promote the actual implementation of equal rights for women and men and take steps to eliminate disadvantages that now exist".

This 1994 amendment provides for the first time affirmative support for women. It was the result of a constitutional debate following German reunification which considered that social and economic equality had not yet been achieved. There were far-reaching proposals such as: "the state guarantees the equal status of women in all areas of society" which had no chance of being enacted. The version we have now is, of course, a compromise. However, there is a lot of debate about what the second sentence in para. 2 of Art. 3 really means. Even if one sees it as an obligation on the part of the state to support and promote gender equality, it is not clear what the state is supposed or allowed to do. Against the background of German constitutional jurisprudence it is considered to be more of a programme than a legally binding obligation. Nevertheless the Federal Constitutional Court decided in 2003 that Art. 3 para 2, 2nd sentence aims at approximating the living conditions of men and women in order to grant women and men the same chances in life[9].

This provision at least supports affirmative action laws which we have on the level of the Federal States for the public service concerning access to employment. Some of these laws provide that in cases of comparable qualifications women have to be given preferential treatment. It is not surprising that this is a matter of ferocious debate among German lawyers.[10] Some of them argue that this type of regulation discriminates against men, which is why the European Court of Justice had to deal with it.

[8] BVerfGE 92, 91
[9] BVerfG, Beschluss 18.11.2003 – 1 BvR 302/96 (www.bundesverfassungsgericht.de/entscheidungen)
[10] Sacksofsky, Das Grundrecht auf Gleichbehandlung, Baden-Baden 1997, 2nd Ed.

II. European Community Law

Without European law the level of gender equality achieved in Germany would not be what it is now. If one recalls that what today is the European Union started as a mere economic union, it is at first glance quite surprising that this union was concerned with gender matters at the end of the 1950s. The background to this is that one of the major founding countries, France, already had, at the national level, a relatively well-developed anti-discriminatory employment law. Therefore France thought its companies were at an unfair disadvantage in comparison to companies in other member states, which did not have to comply with any anti-discrimination legislation. Consequently France insisted on the insertion of an equal pay article in the very first EC Treaty (1957): now Art. 141. Later on the then European Community passed equal treatment directives, the most important being Directive 1976/207 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion and working conditions. This directive was recently amended (2002/73/EC).

It is also through the 1976-directive that the concept of indirect discrimination has taken root in German law. According to this concept discrimination may also occur if a regulation, which does not exclude women, nevertheless has more negative effects on them than on men.

One important example of indirect discrimination is the different treatment of part-time workers. At first glance this is not discriminatory as long as all part-timers are treated in the same manner, e.g. all are excluded from company pension schemes. However, if one takes into account that part-time work is performed mainly by women, the discriminatory aspect of specific rules for part-timers becomes more evident.

The indirect discrimination concept in EC legislation has also influenced the Federal Constitutional Court in how it interprets the equal treatment article in the German constitution. Indirect discrimination is today the most common form of discrimination as the direct forms, i.e. laws that exclude women expressly, have become rare in Germany.

Although European law takes priority over domestic legislation, directives are not always easy to implement in the member states. The main characteristic of directives is that they describe the duties of the member states and the aims to be achieved, but leave it to the member states to choose a form of compliance which is in keeping with their own legal system. This means that a directive can be implemented at a high level in one member state and at a very low level in another. As far as gender discrimination is concerned, Germany has tended to belong to the second group of countries. It is then the European Court of Justice which has to decide if a directive has or has not been implemented properly. The Court has been very busy with German discrimination cases in the past, which a most spectacular and very recent example proves: a young woman wanted to join the armed forces but was rejected on the basis of an article in the constitution prohibiting women from rendering service involving the use of arms (Art. 12 a GG old version). The German court dealing with the case referred it to the European Court of Justice, which ruled that the German provision violated the equal treatment directive and had to be changed. It was amended soon thereafter - the first time ever that an article of the constitution has had to be changed because it contravened European law. Now there is an increasing number of German women serving in the armed forces.

III. Statute law level

This leads to the third level of implementing gender justice, general (non-constitutional) statute law.

1. Equal Treatment Acts of the Federal States

A number of public law Equal Treatment Acts have been enacted for the public service at the level of the Federal States.[11] They only bind the state in relation to state employees. As has already been mentioned some of them contain clauses granting preferential treatment to women in cases where they have the same qualifications as a man. In three different German cases concerning different Federal State Equal Treatment Acts, the European Court of Justice had to deal with this matter.[12] The Court concluded that these clauses may discriminate against men, but comply with

[11] See note 10.
[12] Cases *Kalanke* and *Marschall* and *Badeck*, see Körner, Der Dialog des EuGH mit den deutschen Arbeitsgerichten – Das Beispiel der Gleichbehandlung, NZA 2001, 1046, 1051 ss.; Schieck, Sex equality after *Kalanke* and *Marschall*, European Law Journal, Vol. 4, No. 2, June 1998, p. 148.

the Equal Treatment Directive as long as the preferential treatment of the women is not automatic and the interests of every individual male applicant are also taken into account.

2. Labour Law

In the private law sector no specific anti-discrimination provisions have been enacted so far except in the important field of labour law. The European Equal Treatment Directive of 1976 was transposed into German law by adding § 611a to the Civil Code. This key piece of anti-gender discrimination prohibits gender discrimination by employers in relation to employment contracts, especially as far as access to employment is concerned. In the event of discrimination the Directive provides for an efficient sanction. The German legislature, however, only granted compensation for the costs of applying for the job, which normally amounted to the costs for the paper and the stamp. The European Court of Justice did not accept this as an efficient sanction as required by the Directive and demanded an amendment of the German provision. Although the Directive dates from 1976, in the end it took 22 years (until 1998) and three versions of § 611a before the Directive was finally properly implemented in Germany.[13]

Nevertheless, there are still three problematic aspects of § 611a. The first is the burden of proof. Applicants (of whom most will be women) will rarely be in a position to obtain information which shows that they were discriminated against.
The second difficulty with § 611a is that in practice courts only grant small sums of compensation to applicants who have suffered gender discrimination. Finally, § 611a does not give an applicant who has been rejected a right to be employed, even though this would be the most effective remedy in cases of gender discrimination.

Thus, from an economic perspective it will often be cheaper for an employer to ignore § 611a and simply pay a small amount of compensation to the applicants it rejects. All the same, the future does not look too bleak. A new EC Gender Directive was passed in 2002.[14] It is supposed to reform the 1976 Directive. Now it is up to Germany to implement this Directive. This should already have been done by

[13] See Körner, note 12, p. 1049.
[14] Directive 2002/73/EG.

October 2005 but due to the change of government in September 2005 the implementation is pending.

3. Draft of an Anti-Discrimination Act

The plan of the previous government was to implement the new Directive by passing a separate Anti-Discrimination Act, which would also implement one additional directive concerning gender discrimination. So far there is still no Act in Germany which exclusively deals with non-discrimination. However, the far-reaching draft of the previous government's Anti-Discrimination Act (ADG - Antidiskriminierungs-gesetz)[15], could not be enacted before September 2005. However, as the recent anti-discrimination directives have to be implemented the Great Coalition government presented a draft not very different from the previous one, though renamed (AGG - Allgemeines Gleichstellungsgesetz)[16]. The most innovative aspects concerning gender justice are the following:

The labour law field has been mentioned where gender justice, initiated by the European Union, has been on the agenda since the 1970s. One of the new directives covers this field again without changing the structure of the 1976 equal treatment directive.[17] A second equal treatment directive (2004/113/EC), however, widens the scope of gender justice completely. It is supposed to implement the principle of equal treatment between men and women in access to and supply of goods and services and insurance. This means that under this directive it is for example very doubtful if costs for women in health insurances or private pension funds may be higher than for men.[18] This is general practice among German insurance companies today – they justify this practice by arguing that women statistically live longer than men. In a legal context the question is whether this age difference can be regarded as an objective criterion justifying the different treatment of men and women.

[15] Klumpp, Diskontinuität und ihre Folgen für das Antidiskriminierungsrecht, NZA 2005, 848.
[16] Entwurf eines Gesetzes zur Umsetzung europäischer Richtlinien zur Verwirklichung des Grundsatzes der Gleichbehandlung: Allgemeines Gleichbehandlungsgesetz (AGG), to be found in: www.bmj.bund.de
[17] See note 14.
[18] For details on this aspect: Körner, Staatlich subventionierte private Altersversorgung und Gleichbehandlungsgrundsatz - Riester-Rente und Eichel-Förderung, Edition der Hans-Böckler-Stiftung, Nr. 117, Düsseldorf 2004.

C. Conclusion

To sum up it can be concluded that it has been a long journey from the 1949 declaration in the new German constitution that men and women have equal rights to today's laws and jurisprudence that now try to compensate for structural disadvantages that women encounter. However, the last step so far, the draft bill of the Anti-Discrimination Act, shows that gender justice is an ongoing process, even in a country which has been seriously attempting to make progress in this matter for nearly sixty years.

Unfortunately things are slowing down if not to say are going backwards. On the one hand many young German women no longer feel the need for further work on equal treatment since they never felt discriminated against at school or university. Thus they think that equal treatment is a mission which has been accomplished[19]. On the other hand the difficult economic situation in Germany is not a good starting point for extending constitutional rights. Particularly in this climate, it could be easy for the more conservative political forces to push gender justice into the background.

There is, however, a light at the end of the tunnel: in December 2005 the European Court of Justice had to decide on another discrimination matter. In the Mangold-case[20] the court was not concerned about gender discrimination but age discrimination in employment. Although the respective directive[21] is not yet in force in Germany and only has to be implemented by 2007 the Court held that the principle of anti-discrimination is also to be found in conventions of Public International Law, ratified by Germany and thus has to be applied in the national context, even with direct effect on the private parties to an employment contract.[22]

[19] See DIE ZEIT Nr.17, 20.4.2006, S. 61.
[20] EuGH, NJW 2005, 3695.
[21] Richtlinie 2000/78/EG zur Gleichbehandlung in Beschäftigung und Beruf.
[22] For a closer look on the Mangold-case: Körner, Europäisches Verbot der Altersdiskriminierung in Beschäftigung und Beruf, NZA 2005, 1395; Bauer/Arnold, Auf "Junk" folgt "Mangold" - Europarecht verdrängt deutsches Arbeitsrecht, NJW 2006, 6; Preis, Verbot der Altersdiskriminierung als Gemeinschaftsgrundrecht, NZA 2006, 401.

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