



The Relationship between Family Law and Female Entrepreneurship in Germany

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The Relationship Between Family Law and Female Entrepreneurship in Germany

Jorge Guerra González
January 2013

[Verbindung zwischen Familienrecht und weibliche Entrepreneurship in Deutschland]

Jorge Guerra González
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The Relationship between Family Law and Female Entrepreneurship in Germany

Jorge Guerra González *
January 2013

Abstract:

[Many fewer women than men try the entrepreneurial way in Germany. Any explanation for this phenomenon must be complex, as many factors are relevant for its production. Among other things, it is possible to speculate on sexual/gender discrimination, on more or less voluntary decisions of women or on different starting conditions for potential entrepreneurs. We assume that these options are closely related. This paper will concentrate, though, on the third alternative. Its focus will be set on the “family field,” or more precisely, on the role of family law in hindering women from trying self-employment. The family field in Germany has not evolved in the sense of gender equality along with all other areas of society – e.g., entrepreneurship. No gender equality is possible if the family field is not part of it. This paper analyses causes and consequences for this phenomenon]

Key Words: [Gender studies, Family Law, Entrepreneurship, chance equality, social sustainability]

Zusammenfassung:

[Weit weniger Frauen als Männer machen sich beruflich selbstständig in Deutschland. Eine Erklärung für dieses Phänomen muss komplex sein, als mehrere Faktoren sind dafür relevant. Unter anderen kann man über Gender-Diskriminierung, über mehr oder weniger freiwillige Entscheidungen von Frauen, oder über unterschiedliche Startbedingungen für potentielle Unternehmer spekulieren. Es wird angenommen, dass diese Alternative eng zusammenhängen. Dieser Aufsatz wird sich dennoch auf die dritte konzentrieren. Sein Schwerpunkt wird auf dem Familienbereich, insbesondere auf dem Familienrecht als Hindernis für Frauen und Entrepreneurship. Der Familienbereich hat sich nicht mit der gesamten Gesellschaft hinsichtlich Gender Gleichstellung – z.B. Entrepreneurship – entwickelt. Dennoch ist keine Gender Gleichstellung möglich wenn das Familienfeld nicht dazu gehört. Dieser Aufsatz untersucht die Ursachen und Folgen dieses Phänomens]

Schlüsselwörter: [Gender studies, Familienrecht, Entrepreneurship, Chancengleichheit, soziale Nachhaltigkeit]

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1 Introduction

Once we understand reality properly (i.e., causes and effects), we can decide to change it, if necessary, with a higher chance of effectiveness.

Fewer women than men try the entrepreneurial way in Germany. Any explanation for this phenomenon must be complex, as many factors are relevant to its production. Among others, it is possible to speculate on sexual/gender discrimination, on more or less voluntary decisions of women or on different starting conditions for potential entrepreneurs. We assume that these options are closely related. This paper will concentrate, though, on the third alternative. Its focus will be set on the family field, or more precisely, on the role of Family Law in hindering women from trying self-employment.

We may define a *family*, while still acknowledging the variations that exist nowadays, as a constellation in which mostly a father, a mother and a child or children live together and support each other. Highly simplified, we can agree that we spend about one third of our life with our family - unless we do not want to or cannot be an active part of it - during our productive years, and as long as children are still young. Families have an extraordinary influence on our lives as result, be it positive or negative. If we sleep another third of our lives, at most eight hours a day would be the remaining time to work.

We can further assume that self-employment is probably the most time-intensive occupation with the most number of unforeseen irregular hours worked, at least on average: it is usually not possible to work "from nine to five" just on weekdays. For this reason, family life and entrepreneurship are not easily compatible. Therefore, it can be stated that either entrepreneurs have strong and/or flexible support at home - or perhaps outside the home - or they may have to give up their family life, that is, they must choose between the two of them.

Men and women traditionally have distinct roles in the family. There are both connate and acquired aspects to this. Biology connects a woman closely to her child through the cycle of pregnancy, birth and breastfeeding. During this first phase they are both particularly vulnerable. Their protection and sustenance was the traditional family role of men. Society may stress this mother-offspring link even more. Germany seems to be a special case in this regard (see the probably unique concept *Rabenmutter*, or "uncaring mother", for women that apparently are not concerned about their children). And law can strengthen this link for its part.

This is astonishing, particularly at the present time, and in Germany, given that the successful female equal rights movement was committed to separating women from their traditional role, and this movement is notably robust in this country. However, Family Law has become a special case in the German legal system:



whereas equality between women and men is an obvious part of it, Family Law is rooted *de iure* and especially *de facto* in their inequality. It ignores its own constitution (the *Grundgesetz*), which attaches both parents equally to their children and forbids any unequal treatment based on sex/gender. It throws men and women back to culturally ingrained patterns. For example, if the courts were to decide, in 80-95% of conflict cases children would be (totally or at least most of the time) raised by their mothers, and fathers would be consequently "freed" from them (and in Germany every other marriage/partnership fails, half of them with little children). Partly as a result of legal decisions or norms, 90% of single parents in Germany are women - the proportion is even higher with regard to young children.

Given the importance of family in life, it is logical that the mentioned inequality in this field would hinder equality in other areas - for example, the self-employment of women. Those mothers will not be in an equal position to compete in the labour market with those fathers. For all these women, entrepreneurship will be a (much) more difficult task to carry out.

This paper will show the mechanisms of this fundamental inequality in German family law and German society, will investigate its causes and consequences and offer possible solutions.

2 Female Entrepreneurship: A Holistic View of Causes and Effects

2.1 Previous assumptions

To implement gender equality, in this case in the entrepreneurial field, means to change reality. If we aspire to change it, it is necessary to understand reality as accurately as possible. Otherwise, we will lose control of the things we want to change, or of the consequences of our actions, to such an extent that taking action could be ineffective or even counterproductive.

Some assumptions are important in this regard:

- Reality does not have categories to describe itself. It is we who need them (mountain, hill, tree, bush, human being, air, justice, dignity, etc.) in order to refer to parts of and to comprehend reality.
- None of these categories is closed or compact. Its elements may vary in space or time. There will always be exceptions or elements that are not easy to assign to one particular category.
- It is not correct to derive deontology from ontology, to develop an "ought" from an "is" (this is the *naturalistic fallacy*). Nothing in reality permits us to value or to judge elements of reality (something/somebody *is* better/worse than something/somebody) - at least with an absolute and incontestable value. It is we who apparently need it and do it, but there is no unambiguous objective ba-



sis for those judgments - unless we move to the level of religious or philosophical beliefs, in which case our judgments are valid only among those that share these convictions.

- The goal of every human action is directly or indirectly related to the pursuit of happiness.
- There are two possible ways, as opposite poles of the same decision line, to approach to this pursuit: on the one side fear/safety, and on the other side love/freedom¹. Either you want to take something or you want to avoid something; or you want to give or share something, i.e., to be free and to let yourself be part of "the whole reality". Every human action takes place somewhere on the spectrum between these poles.
- Both poles are - in fact, the whole decision line - grounded in emotions. Apparently, it is possible to make rational decisions. However, the system you are using to make those decisions was determined beforehand by human emotion.
- Both poles have foundations. We require safety as we have a body that demands the satisfaction of at least three fundamental needs: nourishment, protection/health and affection. The satisfaction of these needs is paramount - otherwise we die - but we cannot be really happy if do not move from the safety end to the opposite end. Happiness can only be achieved when we (can) pursue love or the attainment of inner freedom.
- You cannot rationally ground this line, its poles or our goal: it is grounded rather in the essence of humans, of human action (the pursuit of happiness, whether it be through fear or love). This essence cannot be ignored or despised. You can just live, experience it and be empathetic or not with regard to others².
- Anything you do or omit to do will have a more or less strong influence on the whole context. You can be aware of and should even control some of these interactions, but you cannot foresee all the consequences.

2.2 Gender Equality: The Highlights

After this brief introduction, it is the first goal of this paper to understand why half as many women as men are self-employed in Germany. If comparatively so few women try the entrepreneurial way, this can be seen as a question of gender inequality. In order to determine if this is the case, I will try to give a short overview

¹ Certainly we could discuss at length the definition and content of these concepts. Concerning their delimitation, I will draw from Erich Fromm and his work *The Art of Loving* (1956).

² Antoine de Saint-Exupéry 1943, *The Little Prince*. "Now here is my secret, very simply: you can only see things clearly with your heart. What is essential is invisible to the eye".



of gender equality and its movement, origins, consequences and foundation. Afterwards I will try to determine, what and how it should be changed in society so as to guarantee equal chances for any individual. Gender equality may be understood as the goal of a struggle performed by mainly women to achieve the same rights and opportunities as men. Some of the main highlights of this struggle will be subsequently embedded in their historical context regarding their causes and effects. The aforementioned assumptions will be taken into account.

2.2.1 The fight for equality: charismatic leadership

The sociological theory on charismatic leadership is rooted in Max Weber. Charismatic leaders are those gifted to transform, more or less deeply, whole societies so that they become presumably more equal, more just, etc., than before.

Once they obtain their goals, the change has to be consolidated. This is the role of bureaucracy, as will be expounded upon in Section 3.2.1.3. Weber's third sort of leadership, the traditional one, will not be considered here.

Even though the fight for women's rights started earlier, we may state that the 20th century was the time to bear and collect fruits. The point of no return was then achieved. Focusing on Germany, for example, women won the right to vote in 1918³; in the second half of the century, they won the right to work or to manage their property without any male permission (e.g., that of their fathers or husbands). Decisive for this success was the Basic Law (GG: *Grundgesetz*) in 1949, which consecrated equality between both sexes even before it was established in the German society. The GG consecrated the prohibition of any kind of discrimination⁴. In family concerns, it determined that father and mother have equal rights and duties⁵, which at that time was not obvious - family law being discriminatory against women, especially unmarried mothers. This top-down approach was flanked by the Constitutional Court (BVerfG: *Bundesverfassungsgericht*) by way of several fundamental decisions⁶ until equality was accomplished in German Law and society.

³ Verordnung über die Wahlen zur verfassungsgebenden deutschen Nationalversammlung (30.11.1918).

⁴ Article 3 GG [Equality before the law] "(1) All persons shall be equal before the law. (2) Men and women shall have equal rights. The state shall promote the actual implementation of equal rights for women and men and take steps to eliminate disadvantages that now exist. (3) No person shall be favored or disfavored because of sex, parentage, race, language, homeland and origin, faith, or religious or political opinions. No person shall be disfavored because of disability".

⁵ Article 6 GG (2) "The care and upbringing of children is the natural right of parents and a duty primarily incumbent upon them. The state shall watch over them in the performance of this duty."

⁶ For instance: BVerfGE 29.7.1959: "In solcher Lage kann die Mutter ihre Pflicht gegenüber dem Kinde nur erfüllen, wenn das Gesetz ihr den gleichen Einfluß gewährt wie dem Vater".

Today, it is obvious that there is no difference before the law between men and women - or more exactly, as we will see later (See 3.2.1.3.2.1), that women are not discriminated against before the German Law. They have the same rights and chances, and therefore in principle the same starting position, as men.

Nevertheless, it has to also be mentioned that the struggle for equal rights for women did not strictly mean a struggle for gender equality, that is, an equal position (*Gleichstellung*) for men and women:

- This movement fought for equal rights for women, but there has never been a fight for equal duties, where there was a discriminating treatment that disadvantaged men. For example, there was no intention for women to be obliged to serve at the German Army as men were (Art. 12a GG⁷). However: if a woman *voluntarily* agreed to be a soldier, she could not be prevented from doing so, as this would be gender discrimination according to Art. 3 GG⁸.
- The fight for equal rights meant the (temporary) achievement of privileges in order to compensate circumstantially disadvantageous situations. However, there has never been any intention to reverse such positive discrimination once equality had been established and the disadvantage has been removed⁹.
- The fight for gender equality tends to refer only to situations in which women are outnumbered by men and which, in general, are perceived as advantageous¹⁰, thus making the goal at least a 50-50 proportion of both sexes¹¹.

2.2.2 The gender theory

Although this subsection does not refer to a chronological phase, gender theory does inform the scientific foundations and legitimation for the next subsection. However, it cannot be the goal of this paper to analyse this theory to the probably necessary depth. We aim here to just obtain a glimpse of its foundation and of its effects on the German society.

⁷ Article 12a GG [Compulsory military or alternative service] "(1) Men who have attained the age of eighteen may be required to serve in the Armed Forces, in the Federal Border Police, or in a civil defense organization". The compulsory military or alternative service lasted in Germany from 21.7.1956 to 1.3.2011.

⁸ The German Army was open to women only after 1975, was voluntary and only concerned the sanitary and the music service. After 2001 (Judgment of the European Court of 11.1.2000. - Tanja Kreil v Bundesrepublik Deutschland - Case C-285/9), the German Army opened to women all of the other fields.

⁹ See 4.2, p. 13ff.

¹⁰ The Northern German Media public company NDR introduced a quota for both men and women when any of them should be underrepresented in a certain company area. Strong protest - from women representing actors - broke out: thus, quotas are now likely only be set for women and will only concern leading positions (Titz 2012).

¹¹ Mayer 2013.



Gender theory - or theories, if we simplify and consider them unitarily - is now firmly consolidated. It is a highlight in the context of gender equality as it has and has had an immense direct and indirect influence in society and on the way society is understood even today.

The gender theory, especially its constructivist version, was embraced from the beginning by the equal rights movement, presumably because it offers the possibility to relativize the differences between both sexes¹²: if we are all - at least potentially - equal, if those differences are in reality arbitrary, accidental or hazardous, then we all deserve the same rights and the same opportunities. Another consequence would be that re-education would be practicable - men could be educated as women, or *vice versa*¹³, or anyone could be educated to be "men" or "women", as sex (for this theory: the genetic component of the difference between men and women) is insignificant compared to gender (the social component). Not least: through (re)education, it would be also feasible to compensate, to limit or even to model or to eliminate "wrong" properties or qualities usually shown by either one of the genders (aggressiveness, lack of self-esteem, etc.) The male or the female sex would hardly exist as such, but rather only the social - culturally constructed - sex: the gender that society made any one of us live in. The difference between men and women - apart from the visible physical ones - would be hence basically acquired and not innate¹⁴. The result is that it would not be appropriate to refer to two sexes but to (many) more.

In order to be respectable, the gender theory needed a scientific foundation:

- Apparently, the principal influence of parents on the development of the gender roles is proven¹⁵. As it seems, parents - and also other social actors - speak and treat boys and girls differently, even when they are just babies. This makes them behave later as men or women as we know them in society.
- The arbitrariness of gender behaviour would be proven through the fact that there would be and would have been societies where paternalistic patterns are not the rule¹⁶.
- Finally, even in the world of the great apes (gorillas, chimpanzees and orangutans), from which humans descended through evolution, many bonobos have developed matriarchal societies¹⁷.

From the logical point of view, the gender theory leaves many questions open, though:

¹² See, e.g., Schröter 2002.

¹³ Göring-Eckardt: "Schools have to take care about the role models they transmit. If boys have the impression that the greatest example is a macho, we should talk about it. But we do not need any new politics for men, it is just usual educational politics" (Lau/Niejahr 2013).

¹⁴ Beauvoir 1951, 334: "*On ne naît pas femme, on le devient*". C.f. Butler 1990, 111ff.

¹⁵ See, e.g., Witt 1997; Beal 1994.

¹⁶ C.f., e.g., Tanner 1974; Metje 2004; 1999.

¹⁷ See White 1996; Steinlein 2008.

- If the gender theory were right, we should find according to elemental statistics (uniform distribution and probability) any model of societies and of gender roles, of behaviour patterns of “men” and “women”, irrespective of being played by men or women, more or less homogeneously distributed through space and time. However, at least regarding essential aspects (behaviour, social structure, distance between men and women, etc.), the contrary is the case¹⁸.
- Scientifically, it is not easy to verify that human beings treat baby boys differently than they treat baby girls. More difficult still is proving evidence that such apparently different treatment may have any effect on our becoming men or women. In any case, it has to be made plausible that this is and was always the case - according to the uniform patterns for masculine and feminine behaviour in time and space. Even more important would be to show why parents would need boys to be precisely "masculine" and girls "feminine", i.e., to find out where this constant wish for parents regarding their children comes from.
- Such constructivist gender theory gives no plausible explanation for the reality of homosexuality. It would be hardly acceptable to affirm that it is the result of baby boys being treated like girls or *vice versa*: why would parents do this? If the gender theory were right, homosexuality would not be possible, as parents and society, which are not always tolerant of differences, indeed declare us constantly to be men and women from the very beginning. Finally: compared to heterosexuality, homosexuality remains exceptional in every human population¹⁹, so it seems not to be a random phenomenon in time and space²⁰.
- Re-education against our own nature may cause (high) psychological damages. Consider the negation of living according to one's sexuality or the compulsory conversion from left- to right-handedness²¹.
- This distance and behaviour patterns of men and women are consistent with the male and female ethology of mammals, especially of our closest ancestors: (great) apes²².

¹⁸ Brizendine 2008; 2011; Baron-Cohen 2008; Spiegel 2003. See, e.g., Lippa 2009; 2001; Campbell 2008.

In any case, there is no agreement on what a matriarchate (or a patriarchate) is, or on what are their patterns of characteristics - and their relevance - would be. For example, is matrilineality *per se* a sign of a matriarchate? For this reason, it cannot be said to what extent there are or were matriarchal or patriarchal societies.

¹⁹ Male homosexuality seems to refer at most to about 5% of the population, whereas female homosexuality refers to even less than this percentage. See, e.g., Diamond 1993.

²⁰ In fact, it seems that the biological component has a strong influence in homosexuality (e.g. LeVay 2011). The hypothalamus of homosexual men appears to be similar to that of women (LeVay 1991).

²¹ See, e.g., Crossdreamers 2012; C.f. Dagbladet 2010; Schmidt 2000; Klöppel et al. 2007.

²² See Herreros 2013; Bekoff 1997 (updated 2006). Science is, moreover, not sure about the sharp differences between bonobos and other primates. Even the existence of bonobos has been negated: Herzfeld 2007.

- The gender theory would negate nothing less than the theory of evolution. Probably every biological characteristic of living beings emerged and then persisted (or at least can be explained) because it once meant an evolutionary advantage for those individuals that achieved them, that is, a better guarantee of their survival²³. For the gender theory, however, the observed and admitted gender differences would have no explanation; they would be an exception to the evolution rule, constituting a kind of social creationism. With no special reason there would be a "tabula rasa" area in which evolution would have played no role: male and female behaviour, and only that of human beings²⁴.
- Differences between men and women persist in countries where they, in principle, may most freely decide about their lives²⁵. To negate this statement - that they also make society-conditioned choices, that is, that individual freedom would correlate with non-free choices – one would need a sound foundation.

For all these reasons, the most probable conclusion is that the constructivist gender theory is predominantly wrong. Therefore: if it does not reflect reality properly, it is highly possible that any diagnostic or action based on it would be useless - or harmful:

- There would be consistent - natural - differences and characteristics concerning both sexes. To admit this would increase the acceptance of the individuals' own sex and its qualities or properties, as well as acceptance of the characteristics or differences of the opposite sex.
- Compulsory or re-education would be ineffective - or counterproductive.
- Insisting on 50-50 in every societal position would mean resource waste from the societal perspective - individuals would not perform the activities that they were best gifted for - or frustration from the individual point of view, particularly if individuals have to perform a function that is not perceived as his/her own, or else for not being allowed to perform another one that would be²⁶.

The gender theory was important at its time to obtain equal rights for women. Perhaps there would have been an alternative way for them to obtain equal rights and opportunities without a scheme that, at its root, is equalizing – at least from the legal point of view: just to maintain that everyone is and must be free and

²³ See, e.g., Campbell 1999.

²⁴ See Buss/Schmitt 2011.

²⁵ Eia/Ihle 2010. See Eia's seven-part series "Hjernevask" (brainwashing), The Gender Equality Paradox (<http://www.youtube.com/watch?v=p5LRdW8xw70> - 31.1.2013). The reality of Norway - number two worldwide regarding gender equality - and its gender discourse was reflected in this report. They were confronted with the most prestigious and recent scientific knowledge. This triggered a strong debate in the whole country, as a consequence of which the Nordic Gender Institute (Norwegian: Nordisk Institutt for Kunnskap om Kjønn) was closed.

²⁶ See Edge 2002.

may not be treated differently for any reason based on his or her sex, whichever it is or however it is voluntarily experienced. Equality is a fundamental right founded on human dignity, which all human beings are entitled to despite individual differences of any kind. Even if we cannot demonstrate it – due to the naturalistic fallacy - we want it to be this way and without exceptions.

The gender theory tried to establish that capabilities are not a matter of being man or woman. But this is true also without that theory. No human feature is or could be an absolute attribute of either of the sexes. Furthermore, to say that one capability is better or worse than another, or to say that having this capability makes somebody better or worse than somebody else, would be to commit the naturalistic fallacy. However, it seems that some of these features may be naturally more present in a higher percentage of individuals of one sex than in the other.

Certainly this does not mean that there are two categories in reality, men and women, which remain the same without variations or exceptions. There is no such category, as it was exposed, and maintaining it would mean classical creationism. On the contrary: our individual chemistry/biology, and also our circumstances make of us unique beings. Nonetheless: this potentially enormous variation among individuals seems not to contradict the fact that being male or female offers a reliable explanatory pattern of individual behaviour, even if, hence, there are countless ways of being a person, be it as a man or a woman. Indeed, we can recognize some tendencies among men and women, surely with plenty of nuances and exceptions, but which may be relevant for politics or economics concerning, among other things, resource allocation, social balance, etc. In this regard²⁷:

- Men tend to be, among other things, venturesome, self-oriented, rational in decision-making, monofocused, less empathetic, more or less unconformable with authority and tend to have a (too) positive self-image. They often project self-insecurity outwards, and frustration is more frequently worked out through physical aggressiveness.
- Women seem to be, among other things, risk-averse, oriented toward a social environment, to involve more emotions in decision-making, to be multi-focused, empathetic, more or less adaptive to authority and inclined to have a (too) negative self-image. They frequently project self-insecurity toward themselves; frustration is more often worked out with psychical aggressiveness.

Nothing reveals whether these characteristics are good or bad, right or wrong in themselves. They have to be put in perspective and in relation to goals and circumstances (that is, good or bad for what, where and when).

²⁷ C.f. Bund/Heuser 2012; OECD 2012, 138ff.; DPA 2011; Röchling 2009, 169-70; Fabach 2007; Snir/Harpaz 2006; fn 18.

These characteristics are most probably the result of evolution, of the best possible strategies for human beings trying to exist and to perpetuate as a species. We are born extremely weak and vulnerable because of our one biological advantage, our intelligence (i.e., the comparatively large size of our head), and thus have to live in deep dependency for a relative long time²⁸. For the goal of childrearing, both sexes developed dissimilar but complementary physical (and psychical) qualities that assured their subsistence and that of all of us. These complementary qualities are the optimized response of evolution, with the result being that we are still here. Other gene pools must just have gotten lost on the way.

Two remarks finally. Those basically connate characteristics are not static and fixed. Any individual can learn or evolve²⁹, which I presume is desirable, as it must be convenient to be able to adapt to diverse situations by dominating various registers. The condition is though that nobody should be forced to play a role that he or she rejects. Finally, being or acting different is not only unproblematic in itself, but also enriching for society and for all of us, a kind of societal complementariness. Equalisation would be the contrary to that - the rejection of differences. Differences could also be seen as something natural and acceptable, not as a proof of discrimination.

2.2.3 Consolidation of achievements: bureaucratic structure

2.2.3.1 The importance of a bureaucratic structure for gender equality

In order to consolidate the victories of the charismatic struggles for gender equality, as well as to assure their durability, it was necessary to create and to promote a corresponding bureaucracy. This structure was indispensable, as we must be constantly reminded of how far away we were from equal rights before the movement: not only was the law contrary to parity between men and women, but also economics, politics and the whole society. Among other obstacles, prejudices prevented women from taking responsibility in all these fields. Hence, the general unspoken opinion of women - and of men - had to be changed, as well as its whole traditional base.

As far as Germany is concerned, women's equal rights offices and agents were erected and named in almost every city, university or major enterprise; women houses were founded in order to protect women as well as their children, or to give them advice; etc. What is more, equal rights for women were included in the program of every political party, and gender was accepted as a multidisciplinary area scientific research.

²⁸ Giving birth is, among humans, a much more risky issue than for other species. Our brain makes our head proportionally large with regard to that of other species. For this reason, we have to be born relatively early and frail, as otherwise we would not be able to pass through the birth channel (See Rosenberg/Trevathan 2001).

²⁹ See, e.g., Schnurr 2007.

With the support of this structure, this equal rights movement achieved, little by little, all of its goals. A point of no return was reached.

Nowadays, there is no doubt that this movement is a success-story. No solid argument can contradict that women have - at least - opportunities equal to those of men. It is true that there are still gender differences in society. But, as we will see subsequently, it is complicated to state whether they are due to discrimination.

The consequence of this movement and of its sustaining structure is that women's issues are heard, considered and implemented. Women have at last gained power and are in a position to determine the discourse in politics, society and the economy.

2.2.3.2 Discrimination against women in Germany: three examples

Discrimination means to separate somebody from others, i.e., to treat him or her differently, so that he or she becomes depreciated or degraded in the eyes of the discriminating persons³⁰. Discrimination needs, therefore, in principle, two subjects and an action or omission that involves treating somebody in a different and negative way without any objective or legal reason: one subject that wilfully (or negligently) performs this action or omission, and another one that suffers this degradation.

In order to confirm or to discard the hypothesis stated above – that gender equality concerning women and equal opportunities is a fact in Germany, i.e., that women may freely choose what they want to do with their lives at least as freely as men can - I will focus on three examples that are recurrently used as proof of the contrary, i.e., that women are still discriminated against in Germany. Presumably, these examples are the strongest arguments in this regard.

2.2.3.2.1 *Law*

It is extremely difficult to agree that women are discriminated against by German Law. There are no directly discriminating norms against women in Germany nowadays. It could be possible to discuss whether or not the application of some norms could be more or less discriminating against them, but a positive answer would not be undisputed.

On the contrary, it is unquestionable that nowadays only males are discriminated against by German Law just on the basis of their sex/gender. After the elimination of the compulsory military service, practically all norms discriminating against men are related to the Family Law (see 4.2).

³⁰ Strauß/Harras/Haß 1989, 12.

2.2.3.2.2 Women and senior positions in enterprises

Only 10-20% of top positions in German companies, 3,1% of its stock-exchange enterprises, are held by women³¹. No doubt, the difference is remarkable. The question is, though, whether or not this difference is proof of discrimination against women in Germany. The answer would be obviously "yes, of course!" for most of German society and its politic leadership³². Yet it is not easy to agree with this view if you look attentively at this reality and at its causes:

- Senior jobs are habitually characterized by a requirement of exceptional availability and flexibility (in time and space) - they usually cannot be performed at fixed times from one's office, just on working days. Hence, they are hardly easily compatible with a family life, unless the other partner assumes the main role - or unless appropriate structures support this prospect. To give up (most) of one's family life or the growing-up of one's children to such an extent is, however, not the first choice for many women³³. Both aspects are, for them, essential - in the sense of a work/private life balance³⁴. So those women will probably decide not to be available for these positions.
- In the case of divorce or parental separation, family courts, when they are to decide, will strongly tend to entrust the care of the children concerned to their mothers. For these women, the in fact voluntary decision to raise their children alone – which they had the option to either consent to or not in court - will necessarily mean a handicap with regard to the assumption of the responsibilities of those high positions.
- Devoting too much time to work may be frowned upon in German society if you are a mother (see the concept *Rabenmutter*)³⁵. Society, hence, can pressure mothers not to work too much so as not to neglect their children. On the contrary, men are expected to take financial care of their families, or even to earn as much as possible for them. Both social expectations make men more likely to be candidates for high-paying jobs - and make men more likely to be chosen for them. Equal sharing of rights and responsibilities in the family field would reduce both expectations of society, or at least make them less sex/gender-dependent.
- Economics is mostly a rational business. The theory that "men" (or the *patriarchate*, or a mysterious *glass ceiling*) connive in order to prevent women from accessing the economic elite is not convinc-

³¹ Körner/Günther 2011, 450; Weckes 2011, 1.

³² See, e.g., Wehler 2012; Zeit 2012.

³³ See, e.g., Raether 2012.

³⁴ See, e.g., Warren 2004. Cf. Krolla/Pokuttab 2012. Perhaps a last example: Most teachers in primary schools in Germany are women. Teachers choose voluntarily who will be the director of their school. Overproportionally, a man is chosen and assumes this position.

³⁵ Bund 2012.

ing. In economics, measurable factors such as costs, productivity and capability are crucial for decision-making. And nowadays there is no doubt regarding the capability of women to succeed professionally at any entrepreneurial level³⁶.

If it is really the case that women apply for these jobs against men and are not chosen, then there must be something other than a gender conspiracy at work: e.g., psychological affinity for the decision-makers, lack of self-confidence or inability to meet the expected commitment, etc. These reasons, though, may affect men as well as women.

Moreover, to play or to impose these hiring-decision rules is not a question of whether the candidate is a man or a woman³⁷: women in high positions also act according to economic patterns, as they are answerable to share- and stakeholders, not to anybody else.

- If children - or the possibility of having them - may mean that women do not climb the career ladder, this would be the problem, not their sex/gender, i.e. discrimination against women at such. Better child care structures, a gender-blind Family Law or a change in working conditions - e.g., to a more "family friendly" style - could solve this problem.
- The goal of "50-50" as the optimal gender proportion for senior jobs is rational, clear and apparently fair. But it remains a relational one (i.e., for all senior positions, how many are carried out by men, and how many by women). However, it is complicated to say whether or not it is the optimal goal for each sex outside of this logic. No such "50-50" goal seems to be realistic in engineering or for social jobs. The reasons for this could also apply to senior positions.

2.2.3.2.3 *Women and men earnings*

Women earn less than men. This is simply true. But again, analysis is required in order to determine whether or not we face gender discrimination, as here, too, the issue is more complex than it looks.

In this sense, a general misunderstanding is to be first clarified. Contrary to some beliefs, the statement above does *not* mean that certain women, doing the same job with the same qualifications at the same company or institution under the same circumstances, etc., as certain men, receive however a lower salary. If this were the case, then it would be unmistakably gender discriminatory. These women could then make a claim before the competent social court and would most probably have their fundamental right to equal treatment acknowledged and receive adequate compensation. However, it seems that such cases have a marginal meaning nowadays - scarcely any cases are known.

³⁶ They could even be assessed as performing better than men: Bund 2012a; see Bund 2012.

³⁷ C.f., e.g., Altmeier 2012; Rohwetter 2011.

The statement "women earn less than men" is a statistical comparison; it does not concern direct discriminations. It refers to the average earnings of men and women – often men and women who have the same qualifications, age, position, location, etc. According to it, male earnings are mostly higher (the difference is more significant for the top positions, and is less relevant at the secretarial level) than those of women³⁸. In any case, and even as a merely statistical comparison, this dissimilarity seems to be a strong argument for gender discrimination. Some arguments could undermine this conclusion though:

- As this is a statistical comparison, the subjective elements of discrimination are not given. It is not clear who would be the discriminator, and who would be discriminated against - unless we start to talk about "men" in general as discriminators and about "women" in general as discriminated against, which would be highly questionable. Unsatisfying as too simplistic or unconvincing would be to blame the "discriminating" structures of society, or more abstractedly "the patriarchy" or the mentioned "glass ceilings". It would be difficult to find a discriminatory action or set of actions as well.

Statistics do not differentiate between daily working times. Full-time or part-time jobs would imply important salary differences – logically, the longer a person works, the more pay he or she should earn. The relevant question for identifying discrimination is not the working time in itself though, but the freedom to choose and to realise this choice. Traditionally, men, (who were somehow committed to be) the principal earners of the family, would probably work long hours - or it would be expected that they do so. Women may have freely chosen part-time jobs - e.g., as their way to their own work/private life balance, or because such working time is more easily compatible with family life. Or, some women may have chosen not to work at all and to dedicate their whole active time to their families - even if it may have been a non-free decision, for instance, in cases where they do not want to be seen as a "*Rabenmutter*" in their social environment. According to the average salary statistics, it would seem that men earn much more than women who have the same qualifications. But the decisive question of lack of voluntariness as an indication of discrimination would not be easy to answer.

- If more men occupy senior positions and these positions are better paid than the average, part of the salary difference between both sexes will be due to it. So the reasons exposed before would apply also here.

³⁸ Statistisches Bundesamt 2012.

Salaries for top positions are often a question of negotiation. And apparently women sell themselves "worse" or "lower" than men³⁹. This fact may be considered discriminatory, but not obligatorily, as the reason for the unequal pay could affect man or women. It would be a matter of self-marketing and self-confidence, and both men and women could be direct (and thus successful) or not in the concrete salary negotiation talk.

Moreover, as it was aforementioned, our rational economy is cost-conscience. It means that if a company had the choice between a man and a woman for the same job with equivalent qualifications and the same productivity expectations, the company would logically choose the woman, as it would *a priori* obtain the same benefit for less money. In this sense, the statistic may still reflect a gender difference concerning salaries - compared to other male earners from the same and from other companies. But it could mean that it was the women who obtained the job and not the too-expensive man, and this would not appear in this statistic.

And again: those hiring or firing decisions are also taken by women, as they must also act according to the current economic rules in the best interest for their enterprises.

- The expectancy of pregnancy and posterior baby/child care could indeed prevent young women from obtaining better paid jobs - even if this problem would have been more acute some years ago, when lives followed a more uniformed pattern. Even still: equality of opportunities in the family field and its promotion would make it less foreseeable for corporations which parent would take care of the children, and thus result in more equality of opportunities in the workplace.
- Women tend to work in areas that bring in smaller salaries – social work, office assistance, health care, etc. - whereas men tend to work in fields that are more profitable - technology, engineering, informatics, etc. This cannot be seen as discriminatory, as men and women are represented on both sides and are free to choose, and the reasons for differences in salary among those jobs instead have to do with our present growth-based economy.

For all these reasons, it is at least not obvious that the differences detailed above could be easily seen as equivalent to gender discrimination against women in Germany nowadays. This is the success of the equal rights movement for women and its supporting structure.

³⁹ See, e.g., Groll 2010.

2.2.3.3 The inconvenience of a bureaucratic structure for gender equality

At this point of consolidation, though, it is probably this structure that is the main obstacle to gender equality, i.e., the reason why inequality is still a problem currently in Germany. As it was seen, there are excellent reasons to enjoy the accomplishments mentioned and to work to solve any residual questions. Nevertheless, the general impression this structure continues to transmit to society is that gender equality is still far out of reach⁴⁰. Many reasons could explain this phenomenon:

- The conviction of many active persons in such bureaucratic structures is that they believe in what they are doing, so they heartily fight for a better position for women in the German male-dominated society.
- Routine: it has long been done like this, so it must be right to keep on doing so, i.e., to act according to known schemes without really inquiring as to whether their foundations are still valid or without investigating the consequences for the general purpose of equality of opportunity.
- Fear of swimming against the tide may be one part of it⁴¹.
- One typical characteristic of bureaucracy is that it tends to perpetuate itself. This structure and its members may not have any particular interest in declaring gender equality as already having been attained, given that the logical effect would be to dismantle itself, to extinguish its different posts and to renounce the power obtained⁴². The result of saying, "We did our job!" would be farewell⁴³. Thus, it is understandable that - on the contrary - reasons are looked for in order to justify the bureaucracy's continued activity. For example, any situational dissimilarity between the sexes tends to be interpreted as a sign of discrimination itself - and there are many gender differences in society - as long as women are in the minority in any field that may bring a presumable economic or political advantage⁴⁴. You can state that only 10% of technical jobs, or of all political posts, or of leading positions in enterprises are performed by women. This would be an issue of gender discrimination, as it is assumed that there are or could be enough women willing to assume and capable of assuming these activities, but that they are directly or indirectly hindered from doing so. On the contrary, if you stated that 10% of social jobs, or of the jobs related to health care or to child education are

⁴⁰ Niejahr 2012; "By the way, modernising: Do we need politics for men?" Göring-Eckardt: "We have had it for many thousands of years" Lau/Niejahr 2013.

⁴¹ See fn 77, *supra*.

⁴² See Meurer 1974, 95.

⁴³ This structure seems not to be able to admit its own success: Wessling 2012; Spiegel 2011; Niejahr 2012.

⁴⁴ COM (2010) 491, 5: "The proportion of female entrepreneurs [in the EU], at 33% (30% in start-ups), is some way short of optimum and most women still do not consider entrepreneurship as a relevant career option". The "optimum", the attainment of absolute gender equality, would be apparently 50-50%.

done by men⁴⁵, this would not be discriminatory - as it is supposed that men are either not capable of doing, should ideally not try to do, or are hindered from doing whatever they want and from deciding freely where to work.

Parallel structures, such as the *patriarchate* or the *glass ceiling*, are identified as - or are presumed to be - obstacles that would impede women from rising in society. This would breed the idea that, somehow, well-organized men are conspiring nation- or perhaps worldwide to make life difficult for women or to prevent them from accessing political or economic power⁴⁶. Therefore, they had to be stopped.

- This structure makes an impression of security against societal changes, which most human beings do not easily accept. And these changes could once again bring about a male-dominated society.

This is the paradox: even if it is not possible to confirm - or even if it is simply wrong - that women are generally discriminated against in Germany, women are perceived and perceive themselves as being so, that is to say, as being victims. For the same reason, even if you cannot definitely say why, men are considered and consider themselves discriminators, as somehow being offenders. It is not easy to solve this situation, as men lack a parallel structure to show their perspective, and the existing structures do not easily permit consideration of other viewpoints⁴⁷ - probably for the reasons just mentioned. The result is that, in reality, the roles of victim and offender in Germany might be exactly divergent as supposed, as astonishing as this statement may sound at first sight⁴⁸. Male concerns - as well as the male perspective - are ignored, suspected or just despised, whereas at the same time, female concerns (and the female perspective) are attended to and defended, no matter how well-grounded or consequent they may be, and dominate the political and social discourse. This situation could certainly engender an exceptional potential for conflict.

⁴⁵ Sometimes discrimination can only be a question of perspective. The fact that advertising is targeted much more frequently at women than at men concerning some health questions that affect both sexes may be considered as "low intensity sexism" (Sánchez-Mellado 2012). This is astonishing, as this statement is so unspecific. In fact, you could see this advertising as being discriminatory either way: it could be discriminatory against men, who may also benefit from these products, but are instead just ignored. In any case, the context that is left unconsidered remains, e.g., that advertising - within given ethical/legal limits - pursues just one goal - to sell - not to discriminate anybody, and the advertisers must have discovered women to be the best customers for their products - even products that could be used by men.

⁴⁶ Certainly, there cannot be any objective evidence of any of these statements. It is not possible to define "the patriarchy", how it acts, through whom, etc., just as it is not possible to define the presence of a *glass ceiling* (which obviously cannot be seen). The existence of both structures is deduced from the differences present between both sexes in those areas, and those differences are deduced from their mere existence. It is somehow a tautology. Anyway, it is not promising to try to solve problems whose causes do not exist in themselves - or we are just blind to them. The symbolic violence - from Bourdieu's *La distinction* - can be included among those abstract structures (See Bourdieu 1998).

⁴⁷ For example, so-called "Equality Position Agents" are still called "Women's Agents" - its former denomination (Spiegel 2011).

⁴⁸ See Meves 2003, 48ff.; Fischkurt 1998, 17ff.

All this would be irrelevant if men and women would go different ways and never cross paths: usual lobby-political work. But they do. In fact, their ways of life are closely interrelated. This is the reason why equality cannot be really achieved if it does not involve every single individual, i.e., if it is based merely on discrimination. You cannot solve a problem only partially without causing another one. So we come to the thesis at the beginning. It is precisely the bureaucratic structure that prevents gender equality:

- If women are victims and men offenders, then their positions are not equal. A certain "moral" authority would situate men under women. Reproaches and other upbraiding actions may appear to be justified. If it is true that these roles are, given the way that the bureaucratic structures currently in place distribute power, in fact, interchanged, then the consequences would be even more harmful.
- A climate of reproaches is not the best way to attain equality. In general, it is logical to state that no partnership can solve problems or survive at all in a conflict atmosphere without respectful treatment that sees eye to eye, or where the two partners stand on equal footing.
- Prejudices thrive in this climate. They were once an obstacle hindering women's access to power and responsibility in society, economics and politics. Women were believed to be unable to assume them - e.g., they would react too emotionally, be unpredictable, have only their children in mind, etc. These prejudices have been reduced or eliminated. They would sound bizarre today.

Now the prejudices are against the other side, but they are not less of a nuisance. For an atmosphere of mistrust and reproachfulness against men emphasizes their supposedly "bad", guilt-worthy qualities while at the same time highlighting the allegedly "good" or innocent ones of women. Men would be said to be (potentially) aggressive, violent, dominant or cold, whereas women would be warm, good-hearted, peaceful or harmonizing - somehow by "nature", as a contradiction to constructivist gender theories⁴⁹. Also, these prejudices are certainly wrong⁵⁰.

It is easy to understand that such different prejudices would adversely affect equality in many fields - among them, the family one. Men would not be trusted to be able to take care of children (in- and outside of their families); women would, with the consequence being that their opportunities in the labour market - and in entrepreneurship - would be directly and indirectly hindered.

⁴⁹ Keller 2012; Amann 2009. *Die Zeit*, a renowned German weekly newspaper, has started in early 2013 a series questioning the existence of a worldwide hostility towards women (misogyny). Everyone would agree: it is a moral duty to fight for the fundamental rights of anyone who is suffering their constriction, irrespective of his or her sex. But it is wrong - and indirectly a violation of fundamental rights - to suggest a kind of general conspiracy of "men" against "women", and worse still, one that is global. Such an approach does not look for any reasons in order to solve problems at the root; contributes to the perpetuation of the roles of victims and offenders, which would not help those victims much; is not involved in the solution; and presents indirectly the problem as if the (men in the) German society were part of plot of criminal practices against women.

⁵⁰ COM(2010) 491 (21.9.): Strategy for equality between women and men 2010-2015, 8, refers to gender-based violence, although, depending of the definition of violence, women are responsible for 50% or more of the cases: Amendt 2010; Habermehl 1989.

- The influence of the mentioned structures gives the impression that the only goal of equality is for women to reach the level of society enjoyed by men. This assumes that it is a sign of discrimination in itself that many women decided to remain where they originally were. This impression might lead to two negative developments: 1) that traditional female activities become worthless, “no-go” areas for either of the sexes; and 2) that men do not find their place in society, as they would feel, eventually or immediately, unwanted everywhere. There is a great potential for discomfort - and for inequality - in these consequences, as these developments may paradoxically limit individual freedom and choice and lead to inefficiency due to the loss of individual capabilities.
- Possible discriminations are detected (see above), but generally, it is not clear who would be discriminator and who the victim, or what would be the discriminatory acts. In any case, the value of the free decisions of women and determined of men seem to be underestimated.

2.3 Summary and consequences

This chapter highlights that charismatic leadership followed by a corresponding bureaucratic structure were absolutely necessary in order to implement the equality of rights between women and men. It has been an outstanding success story: in comparatively little time, they achieved and consolidated that gender equality such that it should not really be a question anymore at present in Germany.

Once this goal was achieved, it was difficult to justify the existence of this structure, at least as it used to be, without pretending that these changes had not been fully realized. It is not only a question of resource efficiency - after their mission was accomplished, we could assume that there would be other, more pressing objectives in society - but rather one of consistency or of consequence. For this structure is precisely the most important obstacle nowadays that hinders us from closing the circle of gender equality through its narrow view of things and of solving problems and through overlooking that societal issues are deeply interconnected. With such a unilateral and selective way to realize the goal of equality - equal rights and duties for men and women, rather than, as would be preferable, equal opportunities for anyone according to his or her own preferences - cannot be completely achieved.

Therefore, the present gender bureaucratic structure should be changed so that it can react against discriminations and in favour of equality irrespective of the gender of the person concerned. It can thereby contribute actively and concretely to obtain its own aim. Otherwise, this structure should disappear as a consequence of its own success. If it does not, neither society nor individual men or women will benefit from its existence with regards to gender equality, but rather only the structure itself will benefit: by hindering exactly the goal it is theoretically pursuing, it is guaranteeing precisely its own continued existence.

It can be supposed that the impulse towards any change will not come from the structure itself. Politics will have to perform it⁵¹ in the name of equality and of social balance.

3 Female Entrepreneurship and German Family Law

3.1 Family and female Entrepreneurship

It is a fact that about 30% of entrepreneurs in Germany are women, that is, less than one third of the total⁵². In principle it would not be easy to identify any direct discrimination as a plausible explanation, as the decision of self-employment does not depend on anyone but the concerned persons. There could be many other reasons for this phenomenon, e.g.:

- Entrepreneurship is not easily compatible with having a - let us say non-superficial - family life, unless the family, especially the other parent or other agents, support the entrepreneur partner⁵³.
- In general, entrepreneurship is one of the most time-intensive and least time-flexible ways to earn a living. It does not allow much room - in any case, not reliably - not only for family, but also for free time, friends, etc. It seems not to be the best solution when a work/private life balance is a goal⁵⁴.
- Habits, models or just the way businesses are driven is identified with masculine behaviour patterns⁵⁵.
- A biological component may play an important role: women tend to be risk-averse and socially oriented, yet these two characteristics are less than fully compatible with the way business is performed, at least traditionally speaking⁵⁶.

⁵¹ It was not the German health insurance funds (*Krankenkassen*) that pleaded for giving up the so-called "*Praxisgebühren*" (obligatory tax for patients for visiting medical practices going towards those funds), but rather the political agenda that once created it in 2003 (DPA 2012), in which was determined as early as in 2009 that they violated constitutional patient rights (BSG 25.6.2009, Az. B 3 KR 3/08).

⁵² 29% in 2010, according to the EU Agency for Gender Equality of the ESF - European Social Funds ([http://www.esf-gleichstellung.de/96.html?&cHash=bc1d152061&tx_ttnews\[cat\]=95](http://www.esf-gleichstellung.de/96.html?&cHash=bc1d152061&tx_ttnews[cat]=95) - 31.1.2013). S. OECD 2012, 129ff.; BMWA 2003, 9ff.

⁵³ S. COM(2010) 491 (21.9.): Strategy for equality between women and men 2010-2015, 4: "The impact of parenthood on labour market participation is still very different for women and men in the EU today because women continue to shoulder a disproportionate part of the responsibilities involved in running a family. Many women feel that they still have to choose between a career and their children"; Rajani/Sarada 2008, 107-12; Deakins/Freel 2005, 61ff.; Aldricha/Cliff 2003.

⁵⁴ COM (2010) 491, 5. Perhaps as a result of the multi-factor orientation, or of the value for them of a social network mentioned, this wanting to "have it all" seems to be a rather female characteristic (see Slaughter 2012).

⁵⁵ Gupta et al. 2009.

⁵⁶ See Brindley 2005; Huntington 2012. This pattern is to be refined, as women that are active in the free market economy must belong to the ones that deal with the risk scheme in this area. A selection must have taken place before. For instance, women are increasingly present in the most stable of all jobs: public employment (Altis/Koufen 2011, 1116). Finally, the number of female entrepreneurs is higher among women when there are antecedents in the woman's family or in case of a family business - where the perceived risk is lower, as the business has already been started and it apparently works (see Gupta et al. 2009, 408-9).

This chapter focuses on the role that families play in explaining the figure above. If there is a family (let us say here in the traditional sense, the most common case we are dealing with: parents and a young child or children), and one or both adults want to be an active part of it, then they will probably spend one third of their time with it. Provided that we have to sleep about another one third of the time, there remains about eight hours a day to work (not considering time for friends and hobbies). This is the point that makes entrepreneurship a difficult task in the case that a family is to be taken care of. Without support, the family will probably not allow enough time, and in the case that it does, this remaining time will not be structured or predictable - children may be ill, have problems at school, etc. In fact, the schedules of entrepreneurs are less predictable than those of employees working at normal companies - e.g., clients, customers, providers and authorities may need the attention of self-employed people outside of regular hours, and the entrepreneur will have to react to this.

3.2 Re-Designing families: the role of family law in Germany

The last gender discriminatory norms and legal practices in Germany are related to family law, and they all attach women to their children and detach men from theirs⁵⁷.

3.2.1 § 1591 vs. § 1592 BGB

Section 1591 Civil Code (BGB): Maternity - "*The mother of a child is the woman who gave birth to it*".

Section 1592 Civil Code (BGB): Paternity - "*The father of a child is the man 1. who is married to the mother of the child at the date of the birth, 2. who has acknowledged paternity or 3. whose paternity has been judicially established under section 1600d or section 182 (1) of the Act on the Procedure in Family Matters and in Matters of Non-contentious Jurisdiction*".

The mother-child relationship is hence natural (surrogate motherhood is forbidden in Germany), whereas the rapport between father and child becomes artificial or conditioned (as a surprising contradiction of Art. 6 II GG). German Law links motherhood entirely to biology, whereas fatherhood is completely independent from it - unless biology is the only possibility to make fathers responsible for financially supporting a child (see

⁵⁷ The list of legal discriminations (only against men) per written norm is, apart from those exposed below, not very long: e.g., §§ 56 and 57 SVB VI as well as § 2 III 9 SGB VIII. They are the results of compensatory privileges for women that were once necessary, but that nowadays would not correspond to the present German reality anymore.

1592 III BGB). For example, if a married woman becomes pregnant by another man, the husband is the *only* father before the law – thus, he will be obliged to sustain the child, and there will be no way for him to prove the contrary (i.e., that he is not the biological father according to a paternity test) against the will of the mother⁵⁸. The biological father in this case was until very recently just ignored by law⁵⁹. As a result, the protection of the mother-child link is much stronger than that of father-child, as if the father role were less important for the children, or as if it were interchangeable. It is true that mothers should enjoy a special constitutional protection according to Art. 6 IV GG, but this should not allow such dissimilar treatment as a rule⁶⁰.

3.2.2 § 1626a BGB

Section 1626a Civil Code (BGB): "Parental custody of parents who are not married to each other; declarations of parental custody - (1) *Where the parents, at the date of the birth of the child, are not married to each other, they have joint parental custody if they 1. declare that they wish to take on parental custody jointly (declarations of parental custody), or 2. marry each other. (2) Apart from this, the mother has the parental custody*".

Accordingly, if both parents are not married to each other – as opposed to when they are and share joint custody – only the mother has the parental custody, unless she decides to share it with the father. Until 2010⁶¹ – again only after an admonition by the ECtHR⁶² – the mother did not need to give reasons for not willing to share it⁶³. In the aftermath, and according to a new government bill⁶⁴, the father whose common custody of his child was rejected by the mother may now invoke the court to prove whether her negation is well-grounded – i.e., concerns the best interest of the child – and obtain custody, if necessary against the mother's will, at least in theory (see 4.2.3).

⁵⁸ In theory there would be a way – a judge could acquiesce instead of the mother (§ 1598a II BGB), but only if this information does not damage the best interest of the child (§ 1598a III BGB). According to the court praxis, it is (seemingly) always the case.

⁵⁹ Until *Anayo v. Germany* 21.12.2010 (20578/07) ECtHR. Now these fathers may start to have contact to their children, according to the bill of the German Government, under certain circumstances – Ds. 17/11048 (17.10.2012).

⁶⁰ Guerra 2012, 17-8.

⁶¹ Decision of the Constitutional Court (BVerfG) 21.7.2010 (1 BvR 420/09).

⁶² *Zaunegger v. Germany* 3.12.2009 (22028/04).

⁶³ Until 1998, the mother had nothing to decide, as she held alone the parental custody by law.

⁶⁴ Ds. 17/11048 (17.10.2012).

In any case, the (fundamental!) right of this father to his child, be it "granted" by the mother (or by court) or not⁶⁵, would thus not be connatural, whereas his duty to support this child at least financially *would be* indeed inherent, irrespective of whether or not his rights with regards to the child have been granted.

3.2.3 Children after divorce/separation

In this situation, it is not a written norm, but the *usus* in German family courts that strongly attaches women to their children - provided that they plead for it. In the case that the father and the mother let the court decide on who will take care of the common children completely or most of the time - e.g., after a divorce – the court will decide in favour of the mother in 80-95% of cases⁶⁶.

If we assume that half of the marriages in Germany end in divorce, and that half of them have children under 18 years of age⁶⁷, we can then suppose that the proportions are similar (or probably even higher) concerning parents who are not married to each other - this means that, for about 22% of women, it is much more difficult to undertake or continue entrepreneurship⁶⁸.

3.2.4 The German Basic Law

From the legal point of view, such different treatment of fathers and mothers should be unacceptable⁶⁹. The GG (*Grundgesetz*: Basic/Fundamental Law), the German Constitution, the supreme norm to which all other norms in Germany must conform, makes no difference between father and mother (Art. 6 II GG) and prohibits that differences between men and woman be made (Art. 3 GG).

Moreover, the care and upbringing duty of both parents (Art. 6 II GG) have correspondingly active subjects, their children, who would be entitled to demand that duty. As a result, *they*, too, would have a natural, fundamental right to both their equally positioned parents, which would directly derive from Art. 1 I GG (human dignity) and Art. 2 I GG (free development of one's personality), and which should not be externally granted by anyone, but rather inherent to their human dignity.

⁶⁵ From the legal point of view, this is an inexplicable absurdum. Fundamental rights are *recognized*, never granted by the state. That a private person (or now, a court of justice) may grant a fundamental right is just inconceivable.

⁶⁶ Statistisches Bundesamt Fachserie 10, Reihe 2.2, 2009 Tabelle 2.8; Fachserie 10, Reihe 2.2, 2008 Tabelle 2.8; Fachserie 10, Reihe 2.2, 2007 Tabelle 2.8

⁶⁷ Rudolf 2012.

⁶⁸ Brockmann 2013. C.f. Spiegel 2011a.

⁶⁹ Guerra 2012, 21ff.

3.3 Family Law as burden for female entrepreneurship: reasons and consequences

The whole German society is insistently pleading for gender equality. More and more fathers are ready and willing to assume a family life⁷⁰. But if they do, they are hindered from the beginning - they are not allowed the same position as mothers, unless they are married to them - or after divorce/separation, irrespective of whether both parents are married or not. It is astonishing that, of all things, family law in Germany is remaining an island in this society; that it returns men and women to the traditional roles that started to disappear three or four generations ago.

The core reason for this difference is likely prejudices⁷¹. According to these prejudices, fathers must be seen as a potential risk to their children, at least indirectly, or as incapable of coping with them - but capable of economically sustaining their children and their children's mother. Women are, by way of these prejudices, seen as a natural benefit for their children, gifted to handle them - and perhaps not capable enough to economically sustain their children and their children's fathers. Certainly, there is no plausible reason for such prejudices⁷². But it seems that the core of arguments and decisions regarding the subjects concerned (family lawyers; *Jugendamt*, or "Youth Welfare Service"; *Verfahrensbeistände*, or "Youth Attorneys"; and, mainly, judges), are biased, as the results show.

The paradoxical consequence is that gender inequality is *de facto* in these cases: here, there are men who would want to and would be able to assume the responsibility of caring for their families, but yet are at the mercy of women, who they have the right to decide if and how they will share their rights and duties to their children with these men.

So, if we want to implement gender equality in the family field, then in society we must avoid prejudices in order to start to build equality from an equal basis. Hence, we have to understand where those prejudices come from:

- *Tradition*: we can count probably many centuries back (or even longer) during which the roles of men and women in the family were shared and assumed in this way.
- *The particular context of postwar Germany*: many war widows (*Trummerfrauen*, or "debris women") had to raise their children alone in the postwar years of scarcity. They enjoy and have enjoyed a very good reputation for their courage and strength⁷³, contrary to that of the surviving men, who were seen as defeated, barbaric and physically and psychologically broken.

⁷⁰ Zerle/Krok 2008.

⁷¹ Guerra 2012, 47ff.

⁷² Guerra 2012, 55ff.

⁷³ Cf. Keller 2012.

- *The fight for women's rights*: not the original charismatic leadership, but rather the supporting bureaucracy that followed transmits to society a polarized profile of men and women (respectively seen as offender and victim), which is now deep established.

Another paradox has to be pointed out. The movement for the equal rights of women became so strong that it removed, in proportionally very little time, practically any traditional, societal, political, economic or legal factors that hindered women from acting freely and equally in German society. Only one, the family law system, still pushes individuals back to tradition.

The most plausible answer has to do with the aforementioned argument that this movement generally did not understand equality as a goal for the whole society, but rather as one only for women wanting to climb in those fields where men were in a supposedly more advantageous position (such as economics or politics). And, as illogical and contradictory to the general political and economic discourse it may sound, family law also concerns women - mothers - who pursue their own rights as well.

In this sense, it is interesting to ascertain that it is rather "male" organisations that are for gender equality in family law, i.e., for men to assume the same rights and duties as women in the family field⁷⁴ - whereas it is rather "female" organisations that are against it⁷⁵. Note that the voices and institutions in politics that insistently plead in Germany against discrimination against women are the same ones that maintain that men should not receive the same rights as women in context of family law⁷⁶ - and vehemently opposes to those that plead for a more consequent and balanced way to pursue gender equality⁷⁷. At the same time, they encourage (or intensely demand that) men engage more with their families - but, as it was seen, without guaranteeing them an equal legal position to that of women, somehow until the following proposition is expressed: it is good that more and more fathers want to take care of their families, but it must be the right of mothers to decide if, how and how long⁷⁸ they are allowed to do so. The result reminds us of the argument

⁷⁴ Väteraufbruch, Väter ohne Rechte, Bundesforum Männer, Agens, etc.

⁷⁵ Deutscher Frauenrat, Terre des Femmes, Deutsche Juristinnenbund, Verbandes alleinerziehender Mütter und Väter e.V. (VAMV), etc.

⁷⁶ Lambrecht, Christine (MdB, AG Rechtspolitik), an die SPD-Bundestagsfraktion, 24.01.2011; Grüne Bundestagsfraktion 2010 (08.10.), Bär, Dorothee; Voßhoff, Andrea 2011 (07.01.), Kein Automatismus im neuen Sorgerecht, CDU-CSU. In the end the new § 1626a BGB, as it was shown, even after its reform and the reprimand of the ECtHR, do not treat still equally fathers and mothers.

⁷⁷ Bundesfamilienministerin und Buchautorin (Danke, emanzipiert sind wir selber: Abschied vom Diktat der Rollenbilder 2012) Kristina Schröder, Ehemalige Gleichstellungsbeauftragte und Buchautorin (Die Gleichberechtigungsfalle: Ich habe mich als Gleichstellungsbeauftragte für Männer eingesetzt und wurde gefeuert 2012).

⁷⁸ That mothers used decision power not in the best interest of the child, but in their own one could be 2010 ascertained by the Constitutional Court - BVerfG 21.07.2010 (1 BvR 420/09). However: only when the ECtHR (European Court of Human Rights) had condemned Germany in 2009 - Zaunegger v. Germany 3.12.2009 (22028/04). Before had the BVerfG considered that § 1626a BGB is not per se anticonstitutional - BVerfG 29.1.2003 (1 BvL 20/99, 1 BvR 933/01). S. Barnardos (2012, Are we nearly there yet, Dad? Supporting young dads' journeys through fatherhood, Family Strategic Partnership, Department for Education) describes how young fathers are treated differently to mothers and thus prevented to take care of their own children.

detailed above regarding the recent rule for German compulsory military service: there was no duty for women to join the army, only for men; but if women wanted to join it, they were entitled to.

This contradiction has an interesting consequence: if the detaching of women from their children (e.g., in order to facilitate female entrepreneurship) and an attaching of women to children (e.g., in family affairs) are pursued at the same time and with the same strength, it is sure that it will never be possible to obtain either one of the goals – and certainly never gender equality. The gender equality movement will be required until this contradiction is solved.

There is no objective reason to believe that women are better parents than men or *vice versa*. Both are necessary for the children - precisely because they are different and therefore contribute better to the children's personality enrichment⁷⁹. How long they want to (or can) be with them should be decided by both parents under equal conditions. As soon as this change is effectuated, there will be no more constitutive obstacles in modern Germany in the other areas of society for anybody, whatever his or her gender.

3.4 Summary

One's own family is central for every human being. We tend to or just need to spend a lot of time with our relatives. Entrepreneurial activities are time-intensive. These two areas are hardly compatible without support.

Whereas gender equality has been achieved, this equality has not reached the family field. Women are there still attached to their children - at least in that they are entitled to decide. For them, it means that the road to entrepreneurship, for example, would be (much) more complicated than for men or for childless women.

If gender equality is to be taken seriously, it must concern all areas of society, or else there will be no gender equality at all: all areas of society are interconnected. An equal balance in the family field is a precondition for both parents freely finding their own work/family balance.

4 Conclusion and commentary

I was invited to give a talk as guest at the Leuphana University of Lüneburg in Germany on "Family Law and Female Entrepreneurship in Germany"⁸⁰. I met remarkably open-minded students, young men and women. It was a refreshing experience. They reacted rather surprised to some of the facts and the thesis detailed

⁷⁹ Otto 2012; Hasel 2012. And it may even go wrong. On the consequences of children being raised without affection, Cf. Brinck 2012. Cf. Franz 2004; Fthenakis/Minsel 2002, 28: "Both parents had the same proportion to their children's life satisfaction"; Napp-Peters 1995; Myers 2011.

⁸⁰ My thanks go to my colleague, Dr. Silke Tegtmeier, for that opportunity.

above. They became curious and critical. The feedback I received was encouraging: there were hardly any worrisome biased opinions on gender topics, as far as I could judge it.

This paper is, in part, the result of their questions and my own reflections to understand and to explain the whole context of my conference. In the end, my paper happened to have a stronger focus on gender equality and on the obstacles to it than I had intended at the beginning. I am afraid that this is necessary in order to comprehend the societal interconnections better - e.g., with regard to female entrepreneurship - in order to facilitate appropriate modifications. So this is my contribution to change reality. Here, unconditional gender equality in our society.

Germany is a curious phenomenon regarding gender equality. Whereas it is not clearly possible to say whether or not women are discriminated against or disadvantaged, you can definitely say that men are, most clearly in the family legal field. Nevertheless, they appear to be the discriminators - at least in an indirect way (through social patriarchal structures or the glass ceiling). For this reason - or as a result - they are confronted with negative prejudices, whereas women are seen in light of positive prejudices. A whole structure sustains this profound contradiction.

Yet everything in society is interrelated. You cannot construct a building - at least a level one, anyway - on a new balance of equal opportunities for everyone, depending only on their freedom of choice and capabilities, when that balance is still based on an old foundation, or the building will be constructed askew.

We can assume that the family is the basis of the German society. If there is no gender equality in the family field, there will be no gender equality in the whole society, for example, the economic or the political fields. Gender inequality will persist or new types will emerge: men, for example, will not be permitted to assume responsibility for their children; they will be reluctantly accepted to be able to take care of them after divorce; or to work in kindergartens or elsewhere with little children - which would not hinder women from working at higher positions, to be hired instead of men (employers will know that they would rather take care of little children or obtain them after separation/divorce), or to assume entrepreneurial activities. And female self-employment is one of the most difficult areas for women to enter if there is no support at home - provided that they do not want to give up family life or that additional support is not at their disposal.

But it is more than that. Inequality is based on and cultivates prejudices. These prejudices prevent men and women from regarding themselves as partners in the search for solutions. Thus problems cannot really be solved. Energy will be wasted unproductively, used not for constructive aims (e.g., equality or justice) but rather against people (e.g., men or feminists).

Equality does not necessarily mean equalizing every group of human beings - to achieve a kind of 50-50 gender "optimum" in every societal field - otherwise, we would all face discrimination. Equality means that



any man or woman should have the same opportunities and barriers, whatever he or she wants to do with his or her life. It means that his or her belonging to any sex or gender brings no advantage or disadvantage. Only in this case will we be in a position to really implement gender equality. Statistical differences can thus be possible and, concerning freedom of choice, perhaps unavoidable or just desirable, as they would reflect individual freedom.

Lastly, I would like to propose a final topic. I assume that the goal of every human being is the pursuit of happiness and that no way to this can come from economic growth in itself, whatever its form, as economics just brings "security", and security is a necessary but not a sufficient condition for happiness. The unwanted proposal of gender equality, as it is broadly understood, could imply the optimization of resources in order for both parents to be able to work, i.e., to be productive, while children are elsewhere being taken care of in appropriate premises with adequate staff that has to be remunerated. This approach would be satisfactory for economic growth - apart from its known sustainability effects - as the GDP (Gross Domestic Product) would effectively rise.

Anyway, letting birds fly free does not make any GDP grow - but it is a sustainable attitude, as it supports our environment and, I would say, makes people feel better. Maybe family life should also not have the goal of raising the GDP. In fact, (little) children would not care a lot about the GDP, and would just want to spend as much time as possible with their parents - and I guess most parents would want the same. It is as natural as that.

Both GDP-neutral approaches could remind us that the roads that really lead us closer to ourselves, to others and perhaps to happiness are the only ones that are worth being pursued - ideally together.

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