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Abstract

Gender Equality in German Constitutional Law*

by Michael Wrase

The fundamental right to gender equality has played an important role in Germany's more recent constitutional history. The rulings of the Federal Constitutional Court (FCC, Bundesverfassungsgericht) and other courts have developed doctrinal standards that are relevant to anti-discrimination legislation overall. This article provides a brief history of gender equality in the German Basic Law (Grundgesetz) and its concretization in key Constitutional Court decisions from 1949 until today. A special emphasis is on the legal doctrine of non-discrimination and on the influence of feminist legal scholars. The article concludes with a discussion of affirmative action measures from the perspective of constitutional law.

* A German version of this article will be published in Lena Foljanty and Ulrike Lembke (eds), *Feministische Rechtswissenschaft* (3rd edn, Nomos, forthcoming).

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1. History of equal rights in the Federal Republic of Germany

a) 'Men and women shall have equal rights.'—How gender equality became part of Germany's Basic Law

The provision that 'men and women shall have equal rights' only became part of Germany's Basic Law after some substantial struggles. The policy committee *(Grundsatzausschuss)* of the Parliamentary Council *(Parlamentarischer Rat)* initially preferred the wording, 'Men and women shall have the same rights and duties as citizens'. This essentially represented the existing legal norms according to the Weimar Constitution.[1] When representative Frieda Nadig (SPD) objected that equal rights for women should not be restricted to their rights and duties as citizens but should also be implemented in family law and all other legal domains, committee members voiced their concern that 'this would make the Civil Code unconstitutional'.[2] Based on the argument that this would create too much legal uncertainty, the broader motion of the SPD group was rejected in the main committee as well. It was only thanks to the energetic involvement of representative Elisabeth Selbert—one of the 'four mothers' of the Basic Law[3]—that the Parliamentary Council was forced to revise its decision. After the proposal calling for full equality was defeated, women's organisations across Germany started extra-parliamentary activities beginning in mid-December 1948 to fight for the SPD's straightforward formulation that 'men and women shall have equal rights'. A wave of petitions reached the Parliamentary Council.[4] Elisabeth Selbert herself spoke of a 'storm initiated outside in the realm of public opinion about the main committee's vote on this article at the first reading',[5] whereas FDP representative and soon-to-be federal president Theodor Heuss later tried to play down the protests, conde-

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1 The corresponding passage in Art. 109 of the Weimar Constitution read: 'Men and women have the same fundamental rights and duties as citizens.'

2 Comment by Representative Dehler, cf Ines Reich-Hilweg, *Männer und Frauen sind gleichberechtigt* (Europäische Verlagsanstalt, 1979) 19.

3 Of the 65 representatives in the Parliamentary Council, only four were women: Frieda Nadig (SPD), Elisabeth Selbert (SPD), Helene Weber (CDU), and Helene Wessel (Center). With the exception of Elisabeth Selbert, the female representatives were rather reserved when it came to supporting the goal of full gender equality, cf Barbara Böttcher, *Das Recht auf Gleichheit und Differenz* (Westfälisches Dampfboot, 1990) 169–170.

4 Documented in Ines Reich-Hilweg, Männer *und Frauen sind gleichberechtigt* (Europäische Verlagsanstalt, 1979) 21–22.

5 See the minutes of the second reading in the main committee on 18 Jan 1949, in Barbara Böttcher, *Das Recht auf Gleichheit und Differenz* (Westfälisches Dampfboot, 1990) 217.

scendingly calling them a 'puff of air, as it were'.[6] Whatever the case, the negative feedback had such an impact on the representatives in the Parliamentary Council that the equal rights article, as proposed by the SPD, was subsequently passed by a large majority. Symptomatically, one CDU representative conceded that their perspective on the issue had been 'too legalistic and not political enough'.[7] Women scored their first major victory towards gender equality in Germany.[8]

b) The legal doctrine of the equality provision

In legal doctrine, three steps are relevant when interpreting Article 3(2),(3) GG: The first is to define what 'equality' and 'equal rights' are supposed to mean (is it about formal or substantive equality, etc.). The next step is to evaluate on a case-by-case basis whether discrimination has in fact occurred. If the answer is yes, the third step is to consider possible justifications for this discrimination.

Despite the special emphasis on equal rights of men and women in Article 3(2) GG, the equal rights provisions in Article 3(2) GG and Article 3(2) GG were uniformly interpreted from the beginning to imply a prohibition of discrimination, that is, a right to formal equal treatment.[9] After the four-year transition period contained in Article 117(1) GG had expired, the Federal Constitutional Court, in a 1953 landmark ruling, held the equal rights provision to be directly binding law.[10] This means that all legislation evidently inconsistent with the equal rights provision became ineffective with the end of the transition period—in theory, at least. In practice, it took much longer until all direct unequal treatments disadvantaging women, especially in family law, were abolished.[11] Up until the late 1990s, FCC

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6 Barbara Böttcher, *Das Recht auf Gleichheit und Differenz* (Westfälisches Dampfboot, 1990) 222.

7 Comment by Representative Walter Strauss, cited in Barbara Böttcher, *Das Recht auf Gleichheit und Differenz* (Westfälisches Dampfboot, 1990) 215.

8 Elisabeth Selbert gave an impressive account of her feelings after her success in the Parliamentary Council: 'I had won, and I don't know if I can describe to you the feeling I had in that moment. I had held an ounce of power in my hand, and I made use of it, in all the depth, in all the breadth I could rhetorically command. It was the crowning moment of my life when this led to the adoption of equal rights for women.' Written down by Barbara Böttcher, *Das Recht auf Gleichheit und Differenz* (Westfälisches Dampfboot, 1990) 166.

9 Cf Theresia Degener, 'Der Streit um Gleichheit und Differenz in der Bundesrepublik Deutschland seit 1945' in Ute Gerhard (ed.*), Frauen in der Geschichte des Rechts* (CH Beck, 1997) 881.

10 BVerfGE 3, 225 (239f).

11 It was not until 1991, for example, that the rule according to which the husband's last name automatically became the marital name unless the two marriage partners had chosen one of their birth names to become the marital name, was declared unconstitutional, cf BVerfGE 84, 9.

rulings on Article 3(2),(3) GG can be roughly divided into three phases[12]; a fourth phase has emerged since 2000.

c) Early Constitutional Court rulings: 'Equal value but different natures and functions'

In the 1950s and 1960s, the court assumed the existence of natural differences between men and women that determined their social roles, with men constituting the norm. Equality, the court insisted, should not be confused with an arbitrary levelling of difference (*Gleichmacherei*); rather, equality was based on equal value that acknowledges difference.[13] To the court, differences between the sexes were evident in different family-related duties, but most importantly in motherhood, in which female nature was assumed to be most deeply rooted and best able to unfold.[14] Accordingly, exceptions to the rule of equal legal treatment based on 'objective biological and functional (division-of-labour-related) differences between men and women' were conceived broadly.[15] The equal rights clause, the court opined, was not designed to eliminate the 'natural' differences between men and women. Rather, the court believed its own role was to ensure that women did not experience any disadvantages because of their 'different nature'. As a consequence, the FCC also issued a number of decisions that were quite progressive at the time, bringing real improvements to the legal situation of women.[16] For example, the fathers' right to make the final decision in questions of childrearing and their exclusive right to legally represent the child were declared unconstitutional[17], as was intestate succession according to antiquated regulations pertaining to the administration of family farms (*Höfeordnung*), which gave priority to male heirs in estate matters.[18] Furthermore, the FCC demanded that the work of women 'as mothers, housewives, and helpers' be recognized in the social insur-

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12 Cf Ute Sacksofsky, 'Article 3(2),(3) sentence 1' in Dieter C. Umbach and Thomas Clemens (eds.), *GG–Kommentar* (CH Beck, 2002).

13 BVerfGE 3, 225 (241). The court based its view on a statement Elisabeth Selbert had made in the main committee of the Parliamentary Council: 'It is a fundamental error to assume sameness when it comes to equal rights. Equality is based on equal value, which acknowledges difference.' cf Barbara Böttcher, *Das Recht auf Gleichheit und Differenz* (Westfälisches Dampfboot, 1990) 218.

14 BVerfGE 10, 59 (78).

15 Cf BVerfGE 5, 9 (12); 6, 389 (422ff), other references in Ute Sacksofsky, 'Article 3(2),(3) sentence 1' in Dieter C. Umbach and Thomas Clemens (eds.), *GG–Kommentar* (CH Beck, 2002) para 337.

16 Ute Sacksofsky, 'Article 3(2),(3) sentence 1' in Dieter C. Umbach and Thomas Clemens (eds.), *GG–Kommentar* (CH Beck, 2002) para 339.

17 BVerfGE 10, 59.

18 BVerfGE 15, 337.

ance system,[19] thereby acknowledging at least partially the economic value of these activities. Well into the 1960s, therefore, the court issued rulings that at least counteracted the restorationist tendencies in legal policy at the time.[20] This achievement must arguably be credited in no small part to Constitutional Court Justice Erna Scheffler, then the only female justice on the FCC[21] and a fierce champion of gender equality.[22]

d) The 1970s and 1980s: The elimination of unequal legal treatment

In the second phase, the 1970s and 1980s, the FCC put more and more emphasis on gender equality. This corresponded to the transformations brought on by the new women's movement. Outdated gender roles could no longer be justified by 'natural differences' or 'the different natures and functions' of men and women.[23] In its 1975 ruling on widow's pensions, the FCC stated that the earlier understanding of women's role in marriage and the family had changed. It was no longer assumed that 'a woman must first and foremost be a housewife. Rather, other possible roles are recognized'.[24] Accordingly, most laws and regulations directly discriminating women were eliminated until the mid-1980s. Seminal FCC decisions in that regard concerned disadvantages in terms of citizenship[25] and the requirement that all family members take the husband's family name.[26]

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19 BVerfGE 17, 1.

20 Sabine Berghahn, 'Der Ritt auf der Schnecke: Rechtliche Gleichstellung in der Bundesrepublik Deutschland' in Mechthild Koreuber and Ute Mager (eds.), *Recht und Geschlecht* (Nomos, 2004) 61.

21 Between 1951 and 1986, the Federal Constitutional Court only had one female justice at a time serving in the First Senate (in this order: Erna Scheffner, Wiltraud Rupp-von Brünneck, Gisela Niemeyer). Between 1986 and 1994, at least two of the court's sixteen justices were women; cf Renate Jaeger, 'Frauen verändern die Justiz - verändern Frauen die Justiz?' (1998) 1/98 Streit 3, 5. Between 1994 and 2006, the FCC consistently had at least four, at times even five female justices. When Evelyn Haas retired from the First Senate in 2006, only three of the sixteen were women. The appointment of Susanne Baer and Gabriele Britz in February 2011, following a proposal made by SPD and Greens, put the share of female justices back to four. At present, with the appointment of Susanne Ott in November 2016, the number of female justices at the FCC has even risen to seven, falling just one short of equal representation in both senates.

22 Cf Renate Jaeger, 'Frauen verändern die Justiz - verändern Frauen die Justiz?' (1998) 1/98 Streit 3, 6–7.

23 Ute Sacksofsky, 'Article 3(2),(3) sentence 1' in Dieter C. Umbach and Thomas Clemens (eds), *GG–Kommentar* (CH Beck, 2002) para 341.

24 BVerfGE 39, 169 (187).

25 BVerfGE 37, 217.

26 BVerfGE 48, 327; cf also the (late) decision BVerfGE 84, 9.

On the other side, male claimants now increasingly turned against the remaining 'patriarchal privileges' of women.[27] As a result of these successful constitutional complaints filed by men, the legal rule making a widower's pension, but not a widow's, dependent on whether the deceased spouse had mostly supported the family,[28] was declared unconstitutional, as was the provision that granted women working outside the house one paid 'housework' holiday a month but denied the same advantage to single men.[29] By contrast, the mother's exclusive custody for children born out of wedlock was found to comply with Art. 3 (2), (3) GG,[30] as was the rule allowing women to retire earlier (at 60) than men (at 65).[31] The ruling on the retirement age was the first in which the court held that an unequal treatment of men and women may also be permissible if it serves to compensate for disadvantages occurring in social reality.[32] However, this crucial aspect of protection against discrimination was only to gain traction in the rulings of the 1990s.

e) The night work decision and the promise of de facto equality

The Constitutional Court's night work decision of January 1992 became the turning point in favour of an active equal rights interpretation of Article 3(2),(3) GG.[33] Employment statutes at the time contained a prohibition on women working between 8 pm and 6 am on weekdays. The FCC refused to accept the reasoning given by legislators, namely that the ban served to 'protect' women from health hazards caused by night work, as a reason for differential treatment and declared the rule unconstitutional. Gender distinctions were only permissible, the court stated, 'if they are indispensably necessary for the solution of problems that by their nature can arise only for women or only for men.'[34] The court found no indication in occupational health research supporting the assumption that female workers, owing to their physical constitution, were more disadvantaged by working at night than

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27 Ute Sacksofsky, 'Article 3(2),(3) sentence 1' in Dieter C. Umbach and Thomas Clemens (eds), *GG–Kommentar* (CH Beck, 2002) para 341.

28 BVerfGE 39, 169.

29 BVerfGE 52, 370.

30 BVerfGE 56, 363.

31 BVerfGE 74, 163 (180). The 1989 Pension Reform Act mandated that the retirement age limit for women be gradually raised to that of men beginning in 2001; with the 1999 Pension Reform Act, the beginning of this alignment process was scheduled to begin one year earlier, in 2000.

32 In this decision, the court referred to a 'typifying compensation of disadvantages which in turn originate in biological causes', BVerfGE 74, 163 (180). This is despite the fact that the reference to biological differences had become quite loose, see Ute Sacksofsky, 'Article 3(2),(3) sentence 1' in Dieter C. Umbach and Thomas Clemens (eds.), *GG–Kommentar* (CH Beck, 2002) para 343.

33 BVerfGE 85, 191.

34 BVerfGE 85, 191 (207).

their male counterparts. Insofar as studies did show that women are more seriously harmed by night work, this conclusion was generally traced to the fact that they were also burdened with housework and child-rearing during the day. This, however, the court held, was an effect of social roles and not a sex-specific characteristic. Rather, the prohibition to work at night substantially disadvantaged women in their search for employment and restricted them in their free command over their working hours.[35]

The FCC ruling had far-reaching consequences not only because it called, for the first time, for a strict interpretation of the equal treatment provision—giving up the formula of 'functional differences' (as regards the division of work) between men and women. Incidentally, as it were, the court also stated that the regulatory content of Article 3(2) GG went beyond that of Article 3(3) GG by demanding that the constitutional mandate to promote equal rights be extended to social reality. The provision that 'men and women shall have equal rights', the court went on, was designed not only to abolish legal norms that link advantages or disadvantages to gender-specific characteristics but to enforce equal rights for men and women in the future.[36] In this way, the court created the possibility to use Article 3(2) GG to legitimate affirmative action policies designed to compensate for gender-specific discrimination in society.[37] Furthermore, Constitutional Court justices also opened their judicial doctrine towards a substantive understanding of equality targeting the elimination of real disadvantages.

2. Equality and legal doctrine on fundamental rights: On the interpretation of Article 3 Section 2, sentence 1 and Section 3, sentence 1 GG

a) Article 3 (2),(3) GG as a strict prohibition of discrimination

Today, there is universal agreement that Article 3(3) GG contains a strict prohibition of the unequal legal treatment of men and women. This prohibition of discrimination prohibits all government measures that discriminate directly by gender. According to the night work formula of the FCC, rules involving gender-based distinctions are only compatible with Article 3(3) GG if they are *indispensably* nec-

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35 BVerfGE 85, 191 (208ff). In the same year, by contrast, the Austrian Constitutional Court declared the prohibition of night work for women constitutional (VfSlg 13038/1992). For critical comments on this decision, see Elisabeth Holzleithner, *Recht Macht Geschlecht* (Facultas, 2002) 54ff.

36 BVerfGE 85, 191 (207).

37 Also stated in explicit terms in the later decision on the firefighter fee, BVerfGE 92, 91 (109).

essary because of biological differences between men and women, that is, if they are inevitable in practice. Beyond rules directly related to pregnancy, birth, and lactation, it is thus hard to imagine any legitimate kind of unequal treatment based on this criterion.[38] Conflicting constitutional law may be another reason to justify unequal treatment. In this context, the equal rights mandate in Article 3(2) GG is most relevant, entitling lawmakers and public administrators to compensate for de facto disadvantages, which typically affect women, by preferential treatment and to promote the equal treatment of women.[39]

The prohibition of discrimination primarily applies to government authorities. Indirectly, however, via the so-called 'radiating' effects of fundamental rights[40], it also becomes increasingly ingrained in private law by influencing its interpretation and application.[41] In such cases, however, it is always important to balance the goal of equal treatment on the one hand against the freedom to pursue a trade or profession (Article 12(1) GG) and the private autonomy (Article 2(1) GG) of service providers on the other hand.[42]

b) The group-related perspective

In the late 1980s and 1990s, new approaches to interpreting Article 3(2),(3) GG emerged in the legal literature that called for a stronger group-related perspective. This was triggered not least by the constitutional debates about gender equality policies and positive action in favour of women, especially the 'fight over quotas'. What the new approaches had in common was a group-related, asymmetrical perspective, which understood Article 3(2) GG as actively promoting the rights of women rather than only prohibiting unequal treatment. The goal was to counter the societal dominance of men in the various areas of life by means of a

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38 Marion Eckertz-Höfer, 'Art. 3(2),(3)' in Erhard Denninger and others (eds.), *Alternativkommentar zum GG* (CH Beck, 2001) para 56; Ute Sacksofsky, 'Article 3(2),(3) sentence 1' in Dieter C. Umbach and Thomas Clemens (eds.), *GG–Kommentar* (CH Beck, 2002) para 348.

39 BVerfGE 92, 91 (109)

40 For a general discussion, see Horst Dreier, 'Introduction' in Horst Dreier (ed.), *GG–Kommentar* (vol 1, 3rd edn, 2013) 96ff.

41 Cf Dieter Grimm, 'The role of fundamental rights after sixty-five years of constitutional jurisprudence in Germany' (2015) 13 I-CON 9, 21-23.

42 Cf Michael Wrase, 'Verfassungsrechtliche Ansatzpunkte für einen Diskriminierungsschutz beim öffentlichen Angebot von Gütern und Dienstleistungen' Zesar 2005, 229, 236f; in practice, this problem arises in the gender-based premiums of private health insurance providers, for example, cf Michael Wrase/Susanne Baer, 'Unterschiedliche Tarife für Männer und Frauen in der privaten Krankenversicherung – ein Verstoß gegen den Gleichheitssatz des Grundgesetzes?' (2004) 23 NJW 1623; now also see Case C-236/09 *Association belge des Consommateurs Test–Achats ASBL and Others v Conseil des ministers* [2011] ECR I-00773.

material or substantive[43] prohibition of discrimination, that is, by creating real equality of opportunity between men and women. It was not least feminist legal scholars who contributed with their work to advance the legal doctrine on equality[44] and thereby influenced the jurisdiction of the FCC as well.

Authors such as Vera Slupik or Sibylle Raasch interpret Article 3(2) GG as an imperative to collectively promote women.[45] From their point of view, the collective dimension of the issue rests in the fact that 'gender', as 'race' or 'origin', is a group-related category, that is, an (ascribed) characteristic that makes the individual a member of the respective group.[46] Traditional gender roles are so deeply engrained in this, the authors argue, that all women are affected. Vera Slupik talks about the 'social fate of women' in this context.[47] The goal of the constitutional mandate to create gender equality, according to Slupik, is the social ideal of gender parity, realized in a 'potential role reversal': 'Potential role reversal means creating a situation in which the discriminated gender, that is, women, makes use of the de facto advantages of the dominant gender.'[48] In this way, it becomes possible to justify quotas in decision-making, for example, because they reverse the advantage that men typically enjoy in the hiring process.

c) Article 3(2) GG as a prohibition of dominance and hierarchization

In opposition to the interpretation of Article 3(2) GG as a prohibition of discrimination, but also opposed to those who view it as a collective right, Ute Sacksofsky, and later Susanne Baer, drawing on the US debate, propose an understanding of discrimination that does not focus on social groups (men/women, blacks/whites, people with/without disabilities) but rather on the power structure that exists between them. When it comes to characteristics such as gender, race, religion, or

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43 Dagmar Schiek's terminology, in Dagmar Schiek and others (eds.), *Frauengleichstellungsgesetze des Bundes und der Länder* (2nd edn, Bund, 2002) para 257.

44 Especially Vera Slupik, Die Entscheidung des Grundgesetzes für Parität im Geschlechterverhältnis (Duncker & Humblot, 1988); Sibylle Raasch, Frauenquoten und Männerrechte (Nomos, 1991); Ute Sacksofsky, Das Grundrecht auf Gleichberechtigung (2nd edn, Nomos, 1996); Susanne Baer, Würde oder Gleichheit? (Nomos, 1995); Christine Fuchsloch, Das Verbot der mittelbaren Geschlechtsdiskriminierung (Nomos, 1995).

45 Vera Slupik, Die Entscheidung des Grundgesetzes für Parität im Geschlechterverhältnis (Duncker & Humblot, 1988); Sibylle Raasch, Frauenquoten und Männerrechte (Nomos, 1991) 79; Sibylle Raasch, Frauenquoten und Männerrechte (Nomos, 1991) 148ff.

46 Vera Slupik, Die Entscheidung des Grundgesetzes für Parität im Geschlechterverhältnis (Duncker & Humblot, 1988) 80.

47 Ibid 81.

48 Ibid 86.

disability, individuals are not discriminated against on the basis of their individual characteristics but on the basis of their ascribed affiliation to a group defined by that characteristic. Prejudices and derogatory views existing towards such a group are projected on individuals.[49] Whether or not a given policy is unlawful, therefore, is not determined by whether a protected characteristic such as gender or skin colour is used as a point of reference but rather by the effects a policy has on the specially protected group.[50] Accordingly, Ute Sacksofsky sees Article 3(2) GG as a prohibition of dominance (*Dominierungsverbot*). Based on that reading, the group that enjoys economic and political power in a community is legally prohibited from disadvantaging, or 'dominating', underprivileged groups. Public authorities, Sacksofsky argues, are legally barred from both (1) defining women in terms of their traditional role or perpetuating that role, and from (2) adding unjustified disadvantages to the adoption of traditional roles.[51] However, unlike Vera Slupik, for example, Ute Sacksofsky does not propagate a group *law* for women but only a group *reference*. Protection is granted only to individuals; it is only the concept of discrimination that is defined from the perspective of gender groups and their power structure in society.

Susanne Baer is even more rigorous in her rejection of any understanding of equality as a formal prohibition of discrimination. Any asymmetrical interpretation of the right to equality, she argues, may only be interested in the difference between two individuals if that difference represents a societal hierarchization. In this manner, the perspective of the person concerned is set against the dominant perspective.[52] The prohibition of discrimination is violated, according to Baer, whenever hierarchies manifest in society are stabilized or promoted. From that point of view, legal regulations pertaining to abortion, for example, which have a special impact on women as a social group, would have to be reviewed according to aspects of equality.[53] Susanne Baer's argument is not only about the fact that adopting certain social roles is connected to disadvantages. Rather, her concern is with overcoming a division of roles that involves disadvantages as such.

Drawing on the empirical studies and theoretical work of US legal scholar and feminist Catharine MacKinnon, Susanne Baer shows that the right against sexual harassment at the workplace is inseparably linked to sexualized constructions of

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49 Ute Sacksofsky, *Das Grundrecht auf Gleichberechtigung* (2nd edn, Nomos, 1996) 312.

50 Ibid 314.

51 Ibid 325–326.

52 Susanne Baer, *Würde oder Gleichheit?* (Nomos, 1995) 237.

53 Ibid 240.

'women' and 'men'. According to Baer, it manifests an understanding of social gender that defines women as subdued and men as aggressively superior. An adequately understood right against sexual discrimination must begin with an effort to overcome such constructions of social roles.

Today, European anti-discrimination directives, as the well as the German General Equal Treatment Act (AGG), explicitly frame forms of harassment, including sexual harassment at the workplace, as a problem of discrimination (among other things)[54]—a conclusion that German legal doctrine of fundamental rights theory has yet to adopt.

d) Elimination of the gender-binary understanding of equality

An important step towards overcoming the obsolete gender-binary interpretation of Article 3(2), sentence 1,(3) GG was made by authors such as Laura Adamietz, wo interprets the prohibition of gender-based discrimination as a 'prohibition of expectations'.[55] Drawing on FCC decisions and social-constructivist approaches in gender studies, she develops a theoretical approach that also includes instances of discrimination against LGBTI*. The prohibition of discrimination, Adamietz argues, must not build on preconceived categories such as man and woman, with their strong biological connotations; rather, it must respond to the (social) expectations of role- and gender-compliant behaviour. People who discriminate on the basis of gender do so because they expect a person to behave in a certain way according to the gender assigned to that person. Or they will sanction any kind of behaviour that does not meet the expectations regarding the behaviour of persons with that kind of gender.[56]

In a landmark decision of October 2017 regarding the entry of a third gender category (besides male and female) into the birth register pursuant to § 22 of the Civil Status Act, the FCC extended the protection of Article 3(3) GG to sexual identities beyond the obsolete binary concept of gender. The provision of gender equality, the Court argued, does not only protect men against discrimination based on their male sex and women against discrimination based on their female sex but also persons who permanently identify with neither of these two categories against discrimination based on this neither exclusively male nor exclusively fe-

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54 Cf Article 2(3) Directive 2000/78/EC, Article 2(3) Directive 2000/43/EC; Article 1a Directive 76/207/EEC; the legal definitions of harassment or sexual harassment as a subcase of discrimination are found in Article 3(3),(4) AGG.

55 Laura Adamietz, *Geschlecht als Erwartung* (Nomos, 2011).

56 Laura Adamietz, 'Geschlecht als Erwartung' (2013) 4/13 Streit 156, 165.

male gender.[57] This applies irrespective of the fact that, historically, the members of the Parliamentary Council, when writing the German constitution, naturally assumed a binary concept of sex. And while it is true that Article 3(2) GG refers to 'men' and 'women', the Court explained, that does not mean that the German term 'Geschlecht', which can be translated as both 'sex' and 'gender', today can only mean men and women. After all, the purpose of this provision was mainly to eliminate gender-based discrimination against women.[58] Rather, 'given today's knowledge of other gender identities', these identities must be included in the protection against discrimination in line with the purpose of Article 3(3) GG, which is 'to protect persons from being disfavoured that belong to groups structurally prone to being discriminated against'.[59] In its decision, the FCC also made explicit reference to the European Court of Justice (ECJ), which also defined protection against gender discrimination broadly by including discriminations linked to a person's gender reassignment.[60]

e) The new jurisdiction of the Federal Constitutional Court

Beginning with the night work decision, substantive approaches to interpreting Article 3(2), (3) GG have increasingly found their way into FCC jurisdiction. Especially in recent years, the court has reviewed laws also with respect to their de facto discriminatory effects on women in social reality.[61] Insofar, it is possible to speak of a new (fourth) phase of jurisdiction.

For the first time in an *orbiter dictum*, the FCC in 1993 stated with reference to the decisions of the ECJ that a link to gender pursuant to Article 3(3) GG may also apply if 'a provision worded in a gender-neutral way predominantly concerns women and if this may be traced to natural or social differences between the sexes'.[62] In its ruling on double family names of January 2002, the court explicitly reviewed the question of whether the legal exclusion of a double name for a child

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57 BVerfGE 147, 1 (28) para 58.

58 Ibid para 59.

59 Ibid para 61.

60 BVerfGE 147, 1 (28) para 58; Case C-13/94 *P v S and Cornwall County Council* [1996] ECR I-2143, para 20.

61 Cf BVerfGE 89, 276. According to the FCC, the rule of Article 611a BGB, old version (protection against gender-based discrimination at the workplace, especially in hiring situations; now integrated into AGG, cf Article 7 compared to Article 6(1) and Article 1 AGG) specifies the protective purpose of Article 3(2) GG. This must be considered by courts when interpreting and applying this rule. Accordingly, any interpretation running counter to the protective purpose, for instance by requiring excessive evidence, is unlawful.

62 BVerfGE 97, 35 (43).

represents a de facto discrimination of women, because women tend to be more willing to give up their family name if parents disagree about their child's family name. The court found that women were not discriminated against by this possibility, given the 'at best slight impact on the implementation of Article 3(2) GG'.[63] Nevertheless, these decisions paved the way for the judicial review of de facto discrimination under German constitutional law.

The Court's 18 November 2003 decision[64] on the constitutionality of the Maternity Leave Act (Mutterschutzgesetz, MuSchG) and the 5 April 2005 decision[65] on child-raising periods in the pension fund for lawyers may be considered landmark rulings in FCC case law on gender-based discrimination. The decision on the Maternity Leave Act originally concerned the question of whether requiring employers to make maternity leave payments while mothers are legally prohibited from working (six weeks before and eight weeks after childbirth) represents a violation of employers' right to occupational freedom under Article 12 GG. Occasioned by a constitutional complaint lodged by several German companies, the Court debated whether the provision of Sec. 14(1) MuSchG violated 'the equal rights provision in Article 3(2) GG, which is to be considered in systematic interpretations of the constitution'.[66] The Court found that the state has a wide margin of appreciation as to how to promote the implementation of equal rights for women and men in practice. However, legislators must address the danger that protective measures taken by the state may have discriminatory effects in the real world of work and compensate for such effects as much as possible.[67] Against this background, the court declared the contested provision in the MuSchG to be unconstitutional. Because employing women exposes employers to the risk of having to pay cash benefits to supplement public maternity leave payments in the case of motherhood (with the employer's contribution representing the higher amount), the provision in the MuSchG may de facto restrict the employment opportunities of women. For that reason, the Court ruled, legislators were required to compensate employers for this financial burden, for instance by installing a redistribution scheme that distributes the additional costs across all employers, regardless of the proportion of women in their workforce. Yet such a redistributive scheme only existed for small enterprises with up to 20 employees. To compensate larger enterprises, the FCC

63 BVerfGE 104, 373 (395).

64 BVerfGE 109, 64.

65 BVerfGE 113, 1.

66 BVerfGE 109, 64 (89).

67 BVerfGE 109, 64 (90).

required that the regulation had to be revised. Since 2006, the redistributive scheme has been in place for all enterprises.[68]

The ruling on the pension funds for lawyers was based on a constitutional complaint lodged by a female lawyer who sought to be exempt from paying membership fees in the pension funds for lawyers in Baden-Württemberg during the time of her parental leave. In order to be exempt from having to make the high monthly payments while on parental leave, she was required to resign her entitlement to practice as a lawyer during that period, which entailed a number of disadvantages.[69] The Court argued that in social reality, it is still women who are predominantly responsible for childcare and who fully or partially interrupt their employment for that purpose, at least temporarily. As a consequence, requiring members to pay fees even while on parental leave, or otherwise resign entirely from their occupation, was a regulation that predominantly affected women. This indirect discrimination would then have to be based on reasonable grounds. The court found that this was not the case, as the financial stability of the pension fund would not be affected by exempting parents from membership fees during the parental leave period.[70]

f) Indirect discrimination

The idea that indirect (or de facto) discrimination on the basis of gender violates the equal rights provision as well is now also explicitly accepted by the FCC. A more detailed jurisdiction on that matter initially emerged at the European level,[71] but the principles identified there may in principle be applied to Article 3(2),(3) GG as well.[72] Indirect discrimination means (1) rules and practices that appear gender-neutral but (2) in practice lead to disadvantages primarily suffered by persons of one gender and (3) cannot be justified by such reasons that would satisfy a proportionality test.[73] The proportionality test, in other words, is trig-

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68 Act on Employer Compensation and on the Amendment of Other Acts of 22 December 2005, BGBl I 2005, 3686.

69 In particular, the complainant lost pension claims in the case of occupational disability, cf BVerfGE 113, 1 (16ff).

70 BVerfGE 113, 1 (19ff).

71 Cf Sebastian Krebber 'Article 157' in Christian Calliess/Matthias Ruffert (eds), *EUV/AEUV–Kommentar* (5th edn, CH Beck, 2016) paras 39ff.; cf also Christine Fuchsloch, Das Verbot der mittelbaren Geschlechtsdiskriminierung (Nomos, 1995) 34ff.

72 Cf also BVerfG EuGRZ 2010, 336 (343).

73 Cf Sebastian Krebber 'Article 157' in Christian Calliess/Matthias Ruffert (eds), *EUV/AEUV–Kommentar* (5th edn, CH Beck, 2016) para 40 and the legal definition in the EU framework directive: Article 2 b) Directive 2000/78/EC.

gered by empirically supported differences in the degree to which men and women are affected by a regulation or practice. Cases of indirect discrimination occur in part-time employment, for example. The FCC found indirect discrimination to be at work in the case of cleaning staff employed by state hospitals in Hamburg who were spun out into a separate company when the hospitals were privatized. The right to continued employment was then only applied to those employed by the state hospitals, not to those employed by the subsidiary company. As the proportion of women in the cleaning staff was 93.5 per cent and hence even exceeded the high proportion of women of nearly 70 per cent working at the hospital, the court found this unequal treatment to be a case of de facto discrimination of women.[74]

g) Intersectional discrimination

The legal literature continues to be divided on whether a review of indirect discrimination is supported by Article 3(2) GG alone[75] and hence limited to the characteristic of 'gender' or whether it encompasses all of grounds of discrimination mentioned in Article 3(3) GG, that is, parentage, race, language, homeland and origin, faith, religious or political opinions and disability.[76] The jurisdiction of the FCC tends visibly towards the latter direction.[77] As Article 3(3) GG is intended to address the historical discrimination situation of social 'groups', it is not justified to reduce the review of indirect discrimination to gender-based discrimination. This is especially evident in cases of intersectional discrimination, that is, when persons are affected in a specific manner on grounds of gender in combination with other characteristics.[78] For example, in its 2015 decision on the prohibition of the expression of religious beliefs for teachers, the FCC found that, at present, provisions in that regard 'de facto quite predominantly affect Muslim women who

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74 BVerfG EuGRZ 2010, 336 (343); however, the FCC's review of unequal treatment was primarily guided by the standard of Article 3(1) GG.

75 e.g. Marion Eckertz-Höfer, 'Art. 3(2),(3)' in Erhard Denninger and others (eds.), *Alternativkommentar zum GG* (CH Beck, 2001) para 59; Ute Sacksofsky, *Das Grundrecht auf Gleichberechtigung* (2nd edn, Nomos, 1996) 348–349; cf also BVerfGE 104, 373 (393); 113, 1 (15); *BVerfG*, EuGRZ 2010, 336 (343).

76 Christine Fuchsloch, Das Verbot der mittelbaren Geschlechtsdiskriminierung (Nomos, 1995) 141f; Angelika Nußberger 'Art. 3' in Michael Sachs (ed.), *GG–Kommentar* (8th edn, CH Beck, 2018) paras 255–257.

77 Cf BVerfGE 97, 35 (43f); 121, 241 (254f).

78 Cf Dagmar Schieck 'Article 4' in Dagmar Schieck (ed), *AGG Kommentar aus europäischer Perspektive* (CH Beck, 2007) para 2ff. On the intersectional nature of the grounds of discrimination cf ibid 'Article 2' para 53ff, 'Article 5' para 28f, 'Article 6' para 25.

wear a headscarf for religious reasons'.[79] Consequentially, the court reviewed the North Rhine-Westphalian education act in question under aspects of gender-based discrimination as well.

h) Equal rights and the protection of marriage and the family, Article 6(1) GG

For a long time, the protection of marriage and the family, enshrined in Article 6(1) GG as a fundamental right was repeatedly used to justify disadvantages experienced by women in marriage and the family or by persons in same-sex relationships. However, a clarification or turn in constitutional jurisdiction has been taking place in this regard as well: In its 2002 decision on the equivalence of family work and gainful employment in the assessment of post-marital maintenance, the FCC explicitly stated that Article 6(1) GG in conjunction with Article 3(2) GG protects marriage as a life community of equal partners.[80] This means that the application of Article 3(2) GG is not restricted by Article 6(1) GG; rather, it must be extended to the fundamental right of marriage. Hence the freedom of shaping one's life in marriage cannot be used to justify the direct or indirect discrimination of women. On the contrary, real self-determination within the meaning of Article 6(1) GG can only exist if the state ensures the independence of both spouses and eliminates gender-based discrimination related to marriage. However, provisions such as splitting income taxation for spouses (*Ehegattensplitting*), which indirectly reinforce the male breadwinner model, still stand in the way of reaching that goal.

Following the lead of the European Court of Human Rights (ECtHR)[81], the FCC has increasingly strengthened the equal rights principle in family law as well. For example, the provision of Sec. 1626a BGB (old version), which gave the mother sole parental custody for children born out of wedlock, whereas joint parental custody could only be effected with the consent of the mother, was declared unconstitutional because it infringes upon the father's parental rights. This case,

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79 BVerfGE 138, 296 (354), see Susanne Baer/Michael Wrase, 'Zwischen Integration und „westlicher" Emanzipation: Verfassungsrechtliche Perspektiven zum Kopftuch(-verbot) und der Gleichberechtigung' (2006) KritV 375.

80 BVerfGE 105, 1 (10f).

81 *Zaunegger v Germany* (2009) ECHR 22028/0.

therefore, is an example of the elimination of the (indirect) discrimination of men based on traditional gender roles.[82]

Moreover, in a landmark ruling on the unequal treatment of marriage and (same-sex) registered civil partnerships of July 2009, the FCC emphasized the fact that the special protection of marriage enshrined in Article 6(1) GG does not entitle legislators to disadvantage other ways of life comparable to marriage—such as the former registered civil partnerships of same-sex couples. The authority to give favourable treatment to marriage over other ways of life does not give rise to a requirement contained in Article 6(1) GG to disadvantage other kinds of partnership in comparison to marriage.[83] As a consequence of this new jurisdiction, the FCC declared unconstitutional the discrimination of registered civil partnerships with regard to inheritance and gift tax law (2010)[84], the family allowance under civil service law (2012)[85], successive adoption (2013)[86], and income splitting tariffs for spouses (2013)[87], thereby gradually opening the door, in terms of constitutional law, towards same-sex marriage ('marriage for all').[88]

3. The mandate to promote equal rights pursuant to Article 3(2), sentence 2 GG

a) The constitutional mandate to promote equal rights in Article 3(2) GG

As part of the 1994 review of the constitution, necessitated by German reunification, the so-called mandate to promote gender equality (*Förderauftrag*) was inserted into Article 3(2) GG. In the Joint Constitutional Committee *(Gemeinsame Verfassungskommission, GVK)*, the Social Democrats (SPD) preferred the more broadly

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82 In an earlier decision, the FCC argued (albeit already with some doubts) that legislators legitimately assumed that mothers would only refuse the father's wish to obtain joint custody in order to safeguard the child's welfare. In that scenario, mothers would not abuse their possibility to refuse a joint custody declaration to exercise power over the father, cf BVerfGE 107, 150 (177). Empirical evidence has shown this assumption to be false. The available data suggest that mothers often refuse joint custody simply because they do not want to 'share their inherent custody with the child's father', BVerfGE 127, 132 (159).

83 BVerfGE 124, 199 (226).

84 BVerfGE 126, 400.

85 BVerfGE 131, 239.

86 BVerfGE 133, 59.

87 BVerfGE 133, 377.

88 Act to Introduce the Right to Marry for Persons of the Same Sex of 20 July 2017, BGBl 2017 I 2787.

worded provision that 'the state shall guarantee equal rights for women in all areas of society' and called for the inclusion of an explicit provision regarding the legitimacy of measures specifically designed to advance women (the so-called compensatory clause), but the conservative camp for a long time resisted any amendments to Article 3(2) GG.[89] Eventually, the parties agreed on a formulaic compromise: 'The state shall promote the actual implementation of equal rights for women and men and take steps to eliminate disadvantages that now exist.' That wording satisfied everybody. CDU/CSU and FDP representatives were happy because neither the term *Gleichstellung* (implying equal treatment of men and women in practice) nor the compensatory clause appeared in the new provision. The compromise was viewed as a guarantee that compensatory measures such as quotas were now 'off the table'.[90] The SPD, in contrast, was happy that the constitution now pointed out that there was a gap between the legal entitlement to equal rights and reality, and that the state had an explicit mandate to change this situation. Moreover, Social Democrats believed that to fulfil this constitutional mandate, compensatory measures such as quotas 'should be permissible, after all'.[91]

The disagreements in the Constitutional Committee are hard to understand. As early as in its 1992 night work decision, the FCC had ruled that the provision that 'men and women shall have equal rights' in the first sentence of Article 3(2) GG not only constitutes a prohibition of unequal treatment but also seeks to promote gender equality in social reality in the future. As a consequence, laws designed to compensate for disadvantages in practice that typically affect women are deemed constitutional.[92] That is why, in a ruling issued after the constitution was amended, the Court merely stated that this interpretation by the FCC 'has in the meantime been clarified explicitly by adding sentence 2 to Article 3(2) GG.'[93]

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89 Cf Kerstin Schweizer, Der Gleichberechtigungssatz – neue Form, alter Inhalt? (Duncker & Humblot, 1998) 72ff.

90 Kerstin Schweizer, Der Gleichberechtigungssatz – neue Form, alter Inhalt? (Duncker & Humblot, 1998) 82.

91 As in the words of delegate Hans-Jochen Vogel, GVK stenographic minutes, 23rd session, 19. For an overview and assessment of the discussion, see Jutta Limbach and Marion Eckertz-Höfer (eds.), *Frauenrechte im Grundgesetz des geeinten Deutschland* (Nomos, 1993).

92 BVerfGE 85, 191 (207).

93 BVerfGE 92, 91 (109); see also BVerfGE 104, 373 (393); 109, 64 (89), BVerfG NJW 2005, 2443.

b) Measures to promote equal treatment, especially quotas

To this day, one crucial point of disagreement regarding Article 3(2) GG is the extent to which state measures to advance women are constitutionally permissible.[94] Although such regulations constitute formal unequal treatment to the disadvantage of men in the meaning of Article 3(3) GG, they can be justified on the grounds of Article 3(2) GG as conflicting constitutional rights[95] as long as they meet the principle of proportionality.[96]

aa) Public incentive schemes

In any case, the state has considerable freedom when granting public benefits to women with the goal of reducing their underrepresentation in specific areas of society. One example to illustrate this point is the 2002 decision of the Federal Administrative Court (Bundesverwaltungsgericht, BVerwG) on the start-up bonus for master craftspeople *(Meistergründungsprämie)*.[97] The state of North Rhine-Westphalia wanted to pay such a bonus (worth DM 20,000) to young master craftsmen if they started their own business no later than two years after earning their master craftsman's certificate. For young master craftswomen, that deadline was extended to five years. The complaint filed against this policy by a male motorcar mechanic with reference to the principle of equal treatment was deemed unfounded by the BVerwG in the last instance of appeal.[98] The unequal treatment of men and women, the court argued, was justified by the mandate to promote equal rights in Article 3(2) GG, noting that favouring women in the start-up bonus rule was intended to reduce their massive underrepresentation in the crafts sector. This underrepresentation was an expression of diverse objective and subjective obstacles, including a higher involvement in family work, lower financial means due to inferior employment opportunities, and almost ineradicable prejudices. The obstacles for women also include psychological barriers resulting from the absence of female role models, the reluctance of men to transfer their business to a woman, or a certain risk averseness. Granting a subsidy, the court ar-

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94 For a discussion of a potential constitutional dimension of the equal treatment mandate from the point of view of a feminist constitutional law scholar, see Beate Rudolf, 'Feministische Staatsrechtslehre?' in Beate Rudolf (ed), *Geschlecht im Recht* (Wallstein 2009) 74ff.

95 For a different opinion, see e.g. Ute Sacksofsky, *Das Grundrecht auf Gleichberechtigung* (2nd edn, Nomos, 1996) 372ff; Marion Eckertz-Höfer, 'Art. 3(2),(3)' in Erhard Denninger and others (eds.), *Alternativkommentar zum GG* (CH Beck, 2001) para 64f., who both view Article 3(2) GG as lex specialis. In the end, however, this hardly makes a difference, because these authors also call for a (more moderate) proportionality test.

96 see BVerfGE 85, 191 (207); 92, 91 (109).

97 BVerwG NVwZ 2003, 92.

98 Different opinions of earlier instances: OVG Münster NWVBl 2002; VG Aachen ArbuR 1999, 494.

gued, was a common method for governments to encourage a desirable kind of behaviour. This method was especially suitable for overcoming such psychological barriers but also for eliminating economic obstacles. If the state wanted to encourage more women to start their own business in the crafts sector, extending the period in which the incentive is granted was a legitimate policy.[99] Unlike granting privileges to women working in the public service sector, which always come at the expense of male competitors, providing financial incentives such as the start-up bonus is a measure that does not hurt anybody (the government might also choose to scrap the subsidy altogether). Hence, the court insisted, no legal regulation is required for such a measure. The mandate of Article 3(2) GG applies to all state authorities, including the administration when issuing funding guidelines as administrative regulations.[100]

bb) Quotas

Unlike public incentives, the use of quotas to achieve gender balance in hiring and promotion decisions in the public service sector has been fiercely controversial in political and legal terms from the outset. In her commentary on equal opportunity legislation, Dagmar Schiek, for example, points out that the so-called *Frauenquote* (women´s quota) is known to trigger 'strong aggressive potential, reflected in numerous court disputes and an intensive debate about its legitimacy in terms of constitutional and EU law'.[101]

Most preferential treatment rules contained in federal and state equal opportunity legislation are not quotas in the true sense of the Latin source word *quota* (share). This would mean reserving a fixed share of positions or promotion opportunities for women.[102] But instead of setting such gender-specific quotas, these laws contain decision-making rules to be applied on a case-by-case basis. This is meant by the term 'decision-based quota' (*Entscheidungsquote*). Two groups of regulations can be distinguished in that respect: true decision-based quotas and the so-called soft preferential treatment policies. Most of current equal opportunity legislation contains a true decision-based quota with a saving clause. Accordingly, in career fields where women are underrepresented, preference is to be given to

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[99] This approach has obviously proven to be successful: Since the deadline for establishing a business was extended, the share of women among grant recipients has increased quite a bit from 15 per cent to 19 per cent.

[100] BVerwG NVwZ 2003, 92 (94).

[101] Dagmar Schiek and others (eds.), *Frauengleichstellungsgesetze des Bundes und der Länder* (2nd edn, Bund, 2002) para 252.

[102] Ibid para 239.

women 'if their qualification, aptitude and professional performance are equal' and 'provided that no reasons prevail in the person of a competitor'.[103] These regulations are legally binding and constitute individual entitlements to compliance with the preferential treatment provision; that is, a rejected female candidate can invoke the provision before the courts and have her claims enforced, if necessary. Equal opportunity legislation in the states of Bavaria, Baden-Württemberg, Saxony and Thuringia, by contrast, is limited to soft preferential treatment provisions that do not contain such an enforceable entitlement. Public authorities are merely instructed to raise the proportion of women in areas where they are underrepresented. How this goal is achieved is up to the recruitment authority to decide.[104]

The 'quota' could have become a test case for Article 3(2) GG in its new version and for the new jurisdiction of the FCC. However, the dispute was eventually brought before the ECJ with reference to equal treatment directive 76/207/EWG[105] (now directive 2006/54/EC). The European judgements also brought clarity to the national arena[106] and may be applied to the doctrine of Article 3 GG. Each case concerns an encroachment on the right to equal treatment, which may be justified via the corresponding mandates to promote equal rights (Article 141(4) EGV old version, now Article 157 IV AEUV and Article 3(2), sentence 2 GG, respectively). The problematic issue in this context is proportionality, that is, whether or not the 'quota' is suitable, necessary and appropriate.

In its 1995 *Kalanke* decision—a case on the Bremen law on equal treatment for men and women in the public service—the ECJ had initially ruled rather apodictically that quota rules guaranteeing women 'absolute and unconditional priority for appointment or promotion' go beyond promoting equal opportunities and are therefore incompatible with Community law.[107] Some believed this ruling sealed the fate of quotas.[108] Two years later, however, in its *Marschall* decision[109], the ECJ

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103 Such a decision-based quota is found in the equal opportunity legislation of North Rhine-Westphalia, Berlin, Bremen, Hamburg, Mecklenburg-Western Pomerania, Saarland, Saxony-Anhalt, Schleswig-Holstein, and Rhineland-Palatinate; cf ibid para 223.

104 Dagmar Schiek and others (eds.), *Frauengleichstellungsgesetze des Bundes und der Länder* (2nd edn, Bund, 2002) para 244.

105 Extensively amended through Directive 2002/73/EG.

106 Cf Sabine Berghahn, 'Der Ritt auf der Schnecke: Rechtliche Gleichstellung in der Bundesrepublik Deutschland' in Mechthild Koreuber and Ute Mager (eds), *Recht und Geschlecht* (Nomos, 2004) 64.

107 Case C-450/93 *Kalanke v Freie Hansestadt Bremen* [1995] ECR I-3051.

108 For detailed references, see Dagmar Schiek and others (eds.), *Frauengleichstellungsgesetze des Bundes und der Länder* (2nd edn, Bund, 2002) para 269.

109 Case C-409/95 *Marschall v Land Nordrhein–Westfalen* [1997] NJW 1997, 3429.

changed its course. In that case, the court explicitly noted that even when qualifications are equal, employers tend to promote men rather than women.[110] A preferential treatment rule as it is found in the equal opportunity laws, the court argued, might counteract the real inequality of opportunity between men and women and thus reduce actual instances of inequality which exist in the reality of social life. Such a national rule was permissible, therefore, provided that it contained a 'saving clause' to ensure that priority is not given to female candidates if special criteria in favour of the male candidate outweigh the priority rule. However, the ECJ added the important qualification that any criteria that may be considered in favour of the male candidate must not be such as to discriminate against female candidates.[111] This means that many of the 'auxiliary criteria' used prior to the introduction of gender quotas aside from a candidate's professional qualification—including seniority, number of relatives entitled to maintenance payments, military service performed, and the like, which de facto gave priority to men—must no longer be considered. As a consequence, however, the only cases in which the saving clause can become relevant in practice are those in which other factors of social discrimination, such as race or disability, come into play in the person of the male candidate, which make preferential treatment in his favour, by way of exception, appear justified.[112] Another legitimate criterion is if a male applicant will perform typically 'female' tasks, for instance as a caretaker of children.

In the 2000 *Badeck* decision, the ECJ reconfirmed the guidelines regarding the legitimacy of decision-based quotas it had established in the *Marschall* decision.[113] In its *Abrahamsson* decision, however, the court also clarified that giving preferential treatment to female candidates is only permissible if their qualifications are *equal* to those of male candidates. It thereby declared a Swedish rule in the higher education sector to be disproportionate, according to which preferential treatment was given to the underrepresented gender even if a female candidate only had sufficient but inferior qualifications for a position than the male competi-

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110 Cf Case C-409/95 *Marschall v Land Nordrhein-Westfalen* [1997] NJW 1997, 3429 (3430): '[M]ale candidates tend to be promoted in preference to female candidates particularly because of prejudices and stereotypes concerning the role and capacities of women in working life and the fear, for example, that women will interrupt their careers more frequently, that owing to household and family duties they will be less flexible in their working hours, or that they will be absent from work more frequently because of pregnancy, childbirth and breastfeeding.'

111 Cf Case C-409/95 *Marschall v Land Nordrhein-Westfalen* [1997] NJW 1997, 3429 (3430).

112 See also Dagmar Schiek and others (eds), *Frauengleichstellungsgesetze des Bundes und der Länder* (2nd edn, Bund, 2002) para 284ff.

113 Case C-158/97 *Georg Badeck and others* [2000] ECR I-1875.

tor.[114] This case illustrates a key problem concerning the decision-based quota: At a time when the old assessment system with its tendency towards uniform grades becomes increasingly less relevant and is replaced by individual assessments, the instrumental effectiveness of quotas to support women is very doubtful.[115] As Sabine Berghahn concludes: 'In practice, the quota remains a crutch that is hardly useful for enforcing results; if anything, it helps to raise awareness.'[116]

The enforcement of an actual quota, for instance by reserving a specific number of senior positions for female candidates (the so-called reservation quota or fixed outcome quota), is incompatible with both national law (see also Article 33(2) GG) and European law owing to the requirement of equal qualifications. The situation is different with regard to training positions (such as apprenticeships) because these positions are designed to create such qualifications in the first place rather than requiring them[117], and with regard to committees such as administrative and supervisory boards, in which membership is by election (or according to the principle of an equal representation of men and women).[118] The fixed gender quota of at least 30 per cent for new mandates in the supervisory boards of companies that are either listed or co-determined, introduced by the law of March 2015[119] and effective as of 2016, can be assumed to be compatible not only with German constitutional law, given the explicit mandate to promote de facto equal rights pursuant to Article 3(2) GG, but also with European law.[120]

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114 Case C-407/98 Katarina Abrahamsson and Leif Anderson v Elisabet Fogelqvist [2000] ECR I-5539.

115 Cf Dagmar Schiek and others (eds.), *Frauengleichstellungsgesetze des Bundes und der Länder* (2nd edn, Bund, 2002) para 250f.

116 Sabine Berghahn, 'Der Ritt auf der Schnecke: Rechtliche Gleichstellung in der Bundesrepublik Deutschland' in Mechthild Koreuber and Ute Mager (eds.), *Recht und Geschlecht* (Nomos, 2004) 65.

117 For a detailed discussion, see Dagmar Schiek and others (eds.), *Frauengleichstellungsgesetze des Bundes und der Länder* (2nd edition, Bund, 2002) paras 246, 289ff.

118 Cf Case C-158/97 *Georg Badeck and others* [2000] ECR I-1875 para 65f.

119 Act for the Equal Participation of Women and Men in Leadership Positions in the Private Sector and the Public Sector of 24 April 2015 (BGBl. I 642), last amended by the act of 11 April 2017 (BGBl. I 802).

120 Cf Joachim Wieland, 'Ist eine Quotenregelung zur Erhöhung des Anteils der Frauen in Aufsichtsräten mit dem Grundgesetz und Europarecht vereinbar?' (2010) 33 NJW 2408, 2410; a representative example of the opposing position in Mathias Habersack/Jens Kersten, 'Chancengleiche Teilhabe an Führungspositionen in der Privatwirtschaft - Gesellschaftsrechtliche Dimensionen und verfassungsrechtliche Anforderungen' (2014) Betriebs-Berater 2819, 2827: exception clause required.

4. Conclusion and outlook

In recent years, the Federal Constitutional Court's interpretation of gender equality in Article 3(2) and (3) GG has been increasingly characterized by a substantive understanding. Important steps in that direction included the extension of jurisdiction on indirect discrimination and the inclusion of gender identity in the non-discrimination clause of Article 3(3) GG. The key question, which has not yet been fully clarified, is whether the FCC will also apply the principles of substantive equality developed on gender to the other grounds of discrimination listed in Article 3(3) GG, that is, parentage, race, language, homeland and origin, faith, religious or political opinions, or disability. The systematic concept of Article 3(3) GG, which is based on a non-hierarchical understanding of the grounds of discrimination mentioned therein, suggests that this is inevitable.[121] The fact that Article 3(2) GG makes special mention of the equal treatment of men and women is irrelevant in this respect, as the Court has emphasized in recent decisions, because this mandate is aimed at positive measures to promote equal rights (affirmative action). Moreover, giving priority to gender over other grounds of discrimination such as race, faith, origin, or disability, would cause German constitutional law to fall significantly behind the status quo of European jurisdiction.[122] This should not be in the interest of the FCC. Yet whether the Court is willing to give the rights of equality a similarly strong effect in the sense of *effet utile* as it has traditionally done for the rights of freedom beginning with the 1958 Lüth decision[123] is something that remains to be seen. Whatever the case may be, the large number of pending cases and lawsuits to be expected will give the Court plenty of opportunities to refine and develop standards as regards the principle of non-discrimination in the future.

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121 Cf Anne Peters and Doris König, 'Chapter 21: Das Diskriminierungsverbot' in Oliver Dörr and others (eds.), *EMRK/GG Konkordanzkommentar zum europäischen und deutschen Grundrechtsschutz* (vol 2, 2nd edn, Mohr Siebeck, 2013) paras 135ff.

122 Cf Sandra Fredman, 'Emerging from the Shadows: Substantive Equality and Article 14 of the European Convention on Human Rights' (2016) 2 Human Rights Law Review 273.

123 BVerfGE 7, 198 (204ff); see also the earlier BVerfGE 6, 55 (72), which called for giving preference to an interpretation of fundamental rights 'that gives the strongest legal effect to the rule in question'; cf Dieter Grimm, 'The role of fundamental rights after sixty-five years of constitutional jurisprudence in Germany' (2015) 13 I-CON 9, 28-29.

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