

Women's Rights Ain't Enough: The Guarantee of Equal Rights of Men and Women and the State's Duty to Promote Effective Gender Equality under the German Basic Law

Art. 3 of the Basic Law for the Federal Republic of Germany²

- (1) All human beings are equal before the law.
- (2) Men and women have equal rights. The state shall promote the actual implementation of equal rights for women and men and work towards eliminating existing disadvantages.
- (3) No one may be disadvantaged or favoured because of his sex, parentage, race, language, homeland and origin, faith or religious or political views. No one may be disadvantaged because of his disability.

I Introduction

1. Equality as the second pillar of human rights

- *Freedom, equality and solidarity* form the three central pillars of human rights and fundamental rights (constitutional rights). This is best reflected in the famous slogan "Liberté, égalité, fraternité!" of the French Revolution of 1789. While freedom was historically the primary concern, equality is no less important. Equality is not about free development but *justice*. Equality too is an *element of human dignity*, the autonomous self-determination of *all* people, who are by nature *free and equal*. Therefore, any unequal treatment needs justification. This justification must be based on objective grounds; simply invoking tradition, culture or the established social order is not enough. Be aware that the very idea of human and fundamental rights is not to preserve the given tradition, culture or social order but to overcome their constraints!
- Nowadays, the postulate of equality seems natural and self-evident to us, but all human civilisations have initially developed hierarchical social orders, and almost everywhere women were subjected to male supremacy. Apart from a few indigenous societies, equality is historically only an *achievement of the Enlightenment and modern times*. Some societies may appear modern on the surface but are shaped even today by perceptions that are incompatible with the fundamental human value of equality, especially archaic ideas about gender roles.

2. Thousands of years of social inequality between men and women

- For thousands of years, in almost all cultures and societies, women had less autonomy, less rights, less options and were usually socially enprisoned in strict hierarchies that granted unjustified privileges to males.
- This was *not a natural phenomenon but a cultural construct* of human society that did not emerge from the beginning but only with the transition from the nomadic way of life to a settled society during the Neolithic Revolution (New Stone Age). Previously, during the Palaeolithic period (Old Stone Age), both men and women were hunters and gatherers and probably lived as equals.
- In recent centuries, gender inequality was perpetuated by the *unequal access of men and women to education*. Outstanding, dedicated women were able to obtain education and lead a relatively free, self-determined life, even professional life, but it demanded far more of them than of men.

3. The perspective today: women's rights, equal rights of men and women and gender equality

- With the exception of a few barbaric societies (e.g. Afghanistan), there is now global awareness of the need to improve the position of women in society. In the international human rights discourse, particularly in the Global South, this is usually addressed under the heading of "women's rights". Two geo-regional human rights treaties, the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women of 1994 and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa of 2003 technically establish specific women's rights that a man cannot have and does apparently not need.
- The idea of specific women's rights may seem appealing at first glance but raises theoretical concerns: Should women, who make up half of the population, be classified as a specific, vulnerable group in society that needs special protection? Like children, refugees or, as it is discussed, animals? Would this not imply a subtle recognition of some kind of natural male "superiority" and amount in itself to demeaning women?
- The *European approach*, taking into account the different social and cultural background, does not *focus* on special rights for women but generally *on equal rights of men and women and actual (effective) gender equality*. There is no European women's rights convention, nor are there specific women's rights enshrined in the European Convention on Human Rights or the Charter of Fundamental Rights of the European Union, with the *exception* of the traditional rights of *maternity protection* (art. 8 European Social Charter, 33(2) EU ChFR). There are, however, numerous human rights provisions at both, the pan-European and European Union level, that prohibit discrimination on the ground of sex and demand equal opportunities and treatment in various contexts, even in employment and within private law. The public debate also does not focus on "women's rights" but rather on "gender mainstreaming". The Council of Europe has a Gender Equality Commission, the European Union runs a European Institute for Gender Equality and a European Equality Law Network for this purpose.

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² Underlined text passages indicate links to relevant internet resources. Just click on the link in the pdf file!

II. The systematics of equality rights under the German Basic Law

- The German constitution also does not grant specific women's rights, except the mother's right to *maternity protection* (art. 6(4) BL). As regards equality, art. 3 BL sets out three equality rights. Their wording is sparse, but their meaning and substance has been developed in decades of constitutional jurisprudence and doctrine.
1. The general principle of equality (art. 3(1) BL)
 - Despite its narrow wording ("before the law"), art. 3(1) is understood in a wide sense as a general principle of equality that applies to any measure of public authority in any context. It demands equal treatment in the making as in the application of the law. It requires to treat substantially equal cases equally and substantially unequal cases unequally. It is violated if there is no *objective justifying reason* and, thus, the unequal treatment manifests arbitrary (so-called prohibition of arbitrariness). Where different groups of persons are treated unequally, the justifying reason must also be of *sufficient weight*, i.e. the differences between these groups must be of such kind and importance that this can justify the different treatment.
 - Art. 3(1) does not apply if a man and a woman are treated differently on the ground of their sex, because in these cases it is superseded by art. 3(2 and 3) BL as *lex specialis*. It applies, however, if they are treated differently for other reasons and these reasons do not fall under art. 3(3).
 2. The prohibitions to differentiate according to certain personal characteristics (art. 3(3) BL)
 - Art. 3(3) BL is a special concretisation of the principle of equality that goes further. It generally precludes unequal treatment on the basis of certain *personal characteristics* that are mostly closely connected to human dignity. In principle, these characteristics, including sex, can neither justify disadvantageous treatment (discrimination) nor preferential treatment (privilege). This prohibition is not absolute, but the excluded criteria may only be used exceptionally, if they are necessary for solving problems which, by their very nature, can only exist for persons of the concerned group, that means if the criterion forms the constituent element of the circumstances of social life that shall be regulated. Such constellations are rare. In addition, it is said that collisions with other constitutional values may justify exceptions, but caution is required since this idea may be easily abused. In any case, any *exception must be imperative*.
 3. Equal rights of men and women (art. 3(2) BL)
 - Art. 3(2) phrase 1 BL too is a special concretisation of the principle of equality. It serves not only a legal but also an important political and moral function. It solemnly declares that in this country the many centuries of gender inequality in law are over and there will be no more male privileges. Moreover, the German term "gleichberechtigt" aimed from the beginning to achieve not only equal rights but also equal standing in society and actual equality in life.
 - The state's mission under art. 3(2) phrase 2 BL to promote effective (actual) gender equality has been added in 1994 and since then been at the centre of the debate.

III. Equal rights of men and women and the prohibition to differentiate on the ground of sex (art. 3(2) phrase 1, art. 3(3) phrase 1 BL)

- 75 years after the Basic Law entered into force, equal rights for men and women are still a particularly sensitive and controversial issue in Germany. The Basic Law has forced significant progress, but there is still some catching up to do, not only in the opinion of feminists. On the other side of society, there are efforts to roll back the developments of the last decades (criticism of alleged "gender mania"). The debate, like the one about the alleged "refugee crisis", reflects today's brokenness of the German society.
1. The rights and their standards
 - The relation between the two fundamental rights is unclear. Some scholars present both as a block. The Federal Constitutional Court prefers to work with art. 3(3), which actually provides the most important protection of women against discrimination. In this respect, art. 3(2) phrase 1 BL does not set any special or more advanced standards.
 - *Art. 3(3) prohibits not only direct differentiation but also indirect differentiation by regulations which, although formulated gender-neutral, predominantly affect one of the sexes* due to natural differences or social conditions (example: physical requirements for applicants to the civil service that are not justified by the demands of the service).
 - The prohibition to differentiate by sex is not absolute but allows *differentiations only if they are imperative* (absolutely necessary) *for the solution of problems which by their nature may arise only for men or for women*. This is usually only the case if there are biological reasons (example: special health and safety regulations to protect women during pregnancy or men against prostatic cancer at work). Apart from these rare exceptions, unequal treatment can only be legitimized by the way of thorough balancing with colliding other constitutional values.
 2. The impact of the rights
 - The prohibition to differentiate by sex has had a great impact on German society. *Numerous traditional rules* in civil law, in particular family law, inheritance law and labour law, which perpetuated traditional gender roles within the families or society, *needed to be given up*. Anything that restricted the autonomy of the woman or gave the man any pre-eminence, even with regard to the family name, needed to be changed. This process took decades, since it required numerous legislative steps and awareness first needed to grow. Many discriminatory regulations were abolished not by the legislature, but by the Federal Constitutional Court. An important step was the Law on the Equality of Men and Women in the Area of Civil Law (Equal Rights Act) of 1957.
 - Today, the law ensures comprehensive (albeit not yet absolute) legal equality. The restrictions of the past on women's self-determination, legal capacity or inheritance rights are from today's perspective almost impossible to comprehend. Family law no longer grants male privileges. Each spouse continues to manage their own property independently (sect. 1364 BGB [German Civil Code]). They manage the household by mutual agreement (sect. 1356(1) BGB) and share parental responsibility for their children (sect. 1626 BGB). Both are entitled to pursue gainful employment, but must be considerate to the interests of the other and of the family (sect. 1356(2) BGB). In families with young children, nowadays not only mothers but sometimes also fathers take a break from work for a while to care for the children.

3. The ongoing gender discrimination in relation to military service

- Discrimination in relation to military service has long persisted and even continues to this day:
 - Due to a special clause in art. 12a BL, women were denied access to the *armed* military service in the German Armed Forces [Bundeswehr]. This deviation from art. 3(3) BL was constitutional, since the constitution itself ordered it. It was only changed in 2000, after the European Court of Justice had ruled that a European Directive on the implementation of the principle of equal treatment for men and women as regards access to employment did not allow to generally exclude women from the armed military service. Germany needed to amend its constitution in order to comply with European Union law.
 - Under art. 12a(1) BL and the Compulsory Military Service Act [Wehrpflichtgesetz], even today *compulsory military service is limited to men*, although there is no objective justifying reason for that. Women serve in the armed forces in all functions in numerous countries all over the world. In Germany, at present 13 % of the soldiers are female. There is no reason why women should not be subject to military service, especially for administrative and logistical work or to control drones.
 - Compulsory military service is presently suspended but may be reactivated if the current geopolitical tensions increase. In April 2026, a recent amendment of sect. 3(2) of the Compulsory Military Service Act has caused a stir. The new text clearly requires men aged between 17 and 45 to obtain permission from the Armed Forces if they wish to leave Germany for more than three months, while women are free to leave. Even if this is only a bureaucratic step, covered by art. 12a(1) BL, and the Minister of Defence has already announced not to apply the provision at present, it discriminates men seriously and evidently, "justified" only by an outdated clause in the constitution.

IV. The obligation of the state to promote *effective* gender equality (art. 3(3) phrase 2 BL)

1. Gender mainstreaming

- Art. 3(2) phrase 2 was introduced in 1994. It goes beyond art. 3(3) BL in so far as it does not only prohibit something but establishes a positive obligation and extends it to the social realities. It commands the state to *proactively promote the actual implementation of equal rights* and work towards the elimination of the still existing disadvantages. This is not only a political proclamation but a legally binding *state policy objective* [Staatsziel], which must substantially guide all policies and activities of all public institutions in the state. It entitles the legislator to compensate for actually existing disadvantages, which typically affect women, by favouring regulations. This happens in three different ways:
 - *through procedural rules* which require political decisions to take particular account of the life circumstances and interests of women and men
 - through *institutional arrangements* that establish specialised advisory institutions for this purpose and
 - through *substantive regulation* of specific issues.
 - Gender mainstreaming is an important topic in Germany, in politics, legislation, public administration and society, but also in German development cooperation and as a research topic at German universities.
- a) Gender mainstreaming laws for the civil service
- The Federation and all Länder have adopted gender mainstreaming laws for their civil service sectors, including the universities. These laws are usually called Gender-Equity Act [Gleichstellungsgesetz], Equal Rights Act [Gleichberechtigungsgesetz], Equal Opportunities Act [Chancengleichheitsgesetz] or Promotion of Women Act [Frauenförderungsgesetz]. They require all public authorities and institutions to install *Equal Opportunity Officers* [Gleichstellungsbeauftragte] (formerly called women's representatives), with an advisory function, which are independent in the exercise of their office and must be consulted on all matters relating to gender equality issues (that means, in practice, in almost every matter), in particular before any personnel decision. They serve as *institutional gateway* to ensure that gender aspects are not overlooked. If you are applying for a position in the public sector, you will meet the equal opportunities officer as a member of the selection panel in the job interview.
- b) Gender mainstreaming in the field of private law
- Like all fundamental rights, equality rights are directly binding only on public authorities, but as objective constitutional values they also have an indirect effect on relations between citizens (*indirect horizontal effect*): They must be taken into account by the legislator when making private law and the courts when interpreting and applying it, especially when interpreting indefinite legal terms, such as good faith, bona mores or common decency. Thus, the state's mission to promote effective gender equality has had a significant impact on German private law, in particular labour law. Ambitious EU directives, which required EU member states to ensure equal pay, opportunities and treatment of men and women in matters of employment, occupation, self-employment, social security and supply of goods and services, facilitated this development.
 - The Transparency in Wage Structures Act [Entgelttransparenzgesetz] of 2017 prohibits direct and indirect gender-based discrimination in remuneration for equal or equally valuable work (sect. 3) and grants employees an individual entitlement to disclosure so as to verify compliance (sect. 10).
 - The General Equal Treatment Act [Allgemeines Gleichbehandlungsgesetz] of 2006 prohibits direct and indirect discrimination not only on the ground of sex but also of race, ethnic origin, religion or belief, disability, age or sexual orientation (sect. 1). It also prohibits harassment, sexual harassment and instructions to discriminate (cf. sect. 3). The law focuses on the protection of employees in the workplace (sect. 6 et seq.). Employers must take all necessary measures, also preventive measures, to prevent discrimination (sect. 12). Otherwise, in case of harassment or sexual harassment, affected employees have the right to refuse performance without loss of pay if this is necessary for their protection (sect. 14). The law also prohibits discrimination in the creation, performance or termination of mass transactions, where the identity of the customer is usually irrelevant, and in insurance contracts (sect. 19). This can even apply to the rental of apartments if the landlord lets more than 50 apartments in total. Moreover, the law has established a Federal Anti-Discrimination Agency [Antidiskriminierungsstelle des Bundes] with an Independent Anti-Discrimination Commissioner (cf. sect. 25 et seq.)

2. The problem of deliberate discrimination against men

- It is disputed whether and to what extent art. 3(2) phrase 2 BL, as colliding constitutional law, can justify to disadvantage men deliberately in order to compensate for the general social disadvantage of women. This problem arises especially in professional life when it comes to filling senior positions in the public service. In this context, art. 33(2) BL, which governs the selection process for public office, does not determine the sex but aptitude, qualifications and professional achievements as decisive criteria. It is questionable whether mandatory quotas for women in the public service or "reversed discriminations" that require to disadvantage better-qualified male applicants and to favour lower-qualified female applicants, would comply with this norm. The Federal Constitutional Court has not yet commented on this but would probably consider permissible qualification-orientated quota arrangements where, until the achievement of a certain quota of women, female candidates must be favoured if they are not less qualified. A tendency, though not strict, to favour female applicants over equally qualified male applicants is already common practice in the public service. In those professions with a large surplus of women (e.g. elementary school teachers or kindergarten teachers) the situation is reverse. In practice, the selection committees avoid the problem by finding arguments, even when the applicants are equally qualified, to present the favoured candidate as better.
- To break the persistent male dominance in the German business world, the ***Act on the Equal Participation of Women and Men in Leadership Positions in the Private Sector and the Civil Service*** of 2015 introduced moderate mandatory *gender quotas for the supervisory boards* and later also the *management boards* of certain listed stock corporations (sect. 96(2) and 76(3a) Stock Corporation Act [Aktiengesetz]). As these rules proved not so effective in practice, they were sharpened in 2021.
- The discussion about quotas for women and "reversed discrimination" distracts from the real reasons for the continuing disadvantages for women in professional life in Germany: the *lack of family-friendly infrastructure* and the lack of consideration in society for the needs of young families. Insufficient capacities and too short opening times of day care centers and kindergartens, the closure of company kindergartens, the late introduction of all-day schools and the unwillingness of clubs, organisations and institutions to offer their activities for younger children in the after-work hours often force families to withdraw one parent from working life in an age which is important for her/his professional career. This inevitably leads to career setbacks - in families where the parents alternate in childcare and professional life even for both parents. Moreover, in Germany exorbitant expectations in society on the role of the mother put a strain on the women and their families. Finally, excessive demands of employers, partners and clients concerning the availability and flexibility in professional life limit the opportunities for women with families to engage in senior positions. To overcome these problems, a constitutional clause on gender equality is nice but not enough.

3. Some current issues

- Some issues can only be touched upon briefly in the limited scope of this guest lecture:
 - a) The struggle to promote gender parity in parliamentary representation
 - So far, this struggle has not been successful in Germany. After the 2021 election, the female quota in the *Deutsche Bundestag* (the federal parliament) was 35 %. With the 2025 election it has dropped again to 32%. In seven Land parliaments it is even lower.
 - Several constitutional standards limit the spectrum of measures to promote gender parity: the principle of freedom of political parties (art. 21(1) phrases 1,2 BL), the principles of free and equal elections (art. 38(1) phrase 1 BL), the principle of equal opportunities for political parties (art. 21(1) read together with art. 38(1) phrase 1 BL) and, last but not least, the prohibition of differentiation by gender (art. 3(3) BL). The most effective but controversial instrument, *mandatory gender quotas for electoral lists*, would require a *specific constitutional basis*. In 2020, the Thuringian Constitutional Court and the Constitutional Court of the Land Brandenburg declared provisions in the electoral laws of these Länder void, which had introduced mandatory gender-balanced electoral lists without such constitutional basis. The milder alternative, making public funding of political parties contingent on gender parity in elections, also meets concerns, since the principle of equal opportunities requires equal treatment of the parties in case of public funding, without any "steering practice". Another alternative, voluntary self-commitment of the political parties to gender parity, has little effect if it does not involve all parties represented in the parliament. The "golden solution" is still missing. At least, some flanking measures to encourage women's participation in politics, such as campaigns to mobilise women, more consideration for the needs of members of parliament with children etc. might be helpful.
 - b) Misogynous attacks against active women in the digital media, aimed at silencing them in public life
 - The past ten years have seen a rise of misogynous attacks in the digital media against women who are active in public life. Such attacks can hit anyone but are particularly common against young politically involved women. Misogynous hate posts, cyberstalking, doxxing, trolling, cyberbullying and -intimidation that can amount to concrete threats, and even the dissemination of deepfake porn videos, have become common means to intimidate women and make them withdraw from the public. The responses to this threat, both from the social media and the European Union and its member states, have so far been inadequate. The EU's Digital Services Act is insufficiently enforced. Without rigorous prevention and criminal prosecution of these offences, complemented by the introduction of strict liability of digital platforms under civil law for the offences of their users and other specific measures, the idea of equal participation of women in public life will remain an illusion.
 - c) The ideological battle over the use of gender-sensitive language ["gendern"]
 - Feminists push to use gender-sensitive language as an important element of gender mainstreaming. A special artificial writing style shall express more clearly that there are not only males but also females in a group (e.g. "Dozentinnen und Dozenten" or "DozentInnen", "Dozent*innen" or "Dozent:innen" instead of "Dozenten"). This shall raise awareness for gender issues and, thus, help to change society, but it also makes the language more complicated and deviates in some variations from the official spelling rules.
 - Some legislators have passed laws in gender-sensitive language. Many authorities use it in their communications. Some universities have tried to force it on their students. This has triggered an *ideological backlash* from some parts of society that ended in a *culture war*. The intellectual and political world is divided. Some Land governments favour, while others prohibit the use of gender-sensitive language by the Land authorities. From the legal perspective, this battle is rather

uninteresting, since the *individual is free to chose* the language style he/she prefers. However, it stands as a symbol for the deeper struggle in society about the constitutional mission not only to recognise gender equality in theory but to ensure that it is actually implemented.

Further Reading

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