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**TRANSFORMING GENDER POLICY IN GERMANY?:
EUROPEAN GENDER DIRECTIVES AND CHALLENGES TO THE
MALE BREADWINNER POLICY PATH**

by

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A dissertation submitted to the Faculty of Graduate Studies and Research

in partial fulfilment of the requirements

for the degree of

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Abstract

European institutions have begun to elaborate a distinctive gender regime. Relying on a largely liberal understanding of equality, European measures are frequently at odds with established policies in a number of member states, especially those where a male breadwinner/female caregiver regime predominates. This thesis examines the way in which European initiatives, inspired by the liberal gender regime, have fed into policy debates and reforms in Germany, a notoriously resilient male breadwinner state and a “laggard” in European gender policy. Three case studies – on the regulation of equal pay, pornography and parental leave – are used to explore tensions between the nascent European gender regime and Germany’s. The findings suggest that Europeanization of the German gender regime has been uneven and incomplete. While European measures in labour policy have been widely drawn into the German policy frame, in other aspects of gender policy they have prompted a stubborn response to resist the spirit, if not the letter of the law. Thus the male breadwinner/female caregiver gender regime has not, as a whole, been displaced. Rather, German legal and political structures have responded to Europeanization by incorporating European gender policy largely alongside the broader set of German laws and norms. Although the German gender regime cannot thus be said to have been transformed, the changes that have been introduced are contributing to the emergence of a hybrid regime, incorporating aspects of both the male breadwinner and the dual earner model.

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List of Abbreviations

ASF	Arbeitsgemeinschaft Sozialdemokratischer Frauen (Working Group of Social Democratic Women)
BAG	Bundesarbeitsgericht (Federal Labour Court)
BDA	Bundesvereinigung der deutschen Arbeitgeberverbände (Confederation of German Employers' Associations)
BErzGG	Bundeserziehungsgeldgesetz (Federal Childcare Allowance Law)
BGB	Bürgerliches Gesetzbuch (Civil Code)
BMFSFJ	Bundesministerium für Familien, Senioren, Frauen und Jugend (Federal Ministry for Families, Seniors, Women and Youth)
CDA	Christdemokratischen Arbeitnehmerschaft (Christian Democratic Workers)
CDU	Christliche Demokratische Union (Christian Democratic Union)
COREPER	Comité des représentants permanents (Committee of Permanent Representatives)
CSU	Christliche Soziale Union (Christian Social Union)
DFR	Deutscher Frauenrat (German Women's Council)
DG	Directorate General
DGB	Deutscher Gewerkschaftsbund (German Labour Union League)
EC	European Community
ECJ	European Court of Justice
EESC	European Economic and Social Council
EPD	Equal Pay Directive
ETUC	European Trade Union Council
EU	European Union

EWL	European Women's Lobby
FB	Frauenbeauftragte (Women's Affairs Bureau)
FDP	Freie Demokratische Partei (Free Democratic Party)
ILO	International Labour Organization
MEP	Member of European Parliament
MLG	Multi-level governãnce
PDS	Partei des Demokratischen Sozialismus (Party of Democratic Socialism)
SPD	Sozialdemokratische Partei Deutschlands (Social Democratic Party of Germany)

TRANSFORMING GENDER POLICY IN GERMANY?: EUROPEAN GENDER DIRECTIVES AND CHALLENGES TO THE MALE BREADWINNER POLICY PATH

Introduction

The introduction of equal opportunities legislation on behalf of working women throughout the European Community (EC) during the 1970s was a direct consequence of EC level judicial and legislative activity... [T]he EC was a major catalyst in the generation and extension of national sex equality laws to protect the rights of working women (Mazey 1998).

Any attempt to regulate gender equality in Europe can ... be expected to clash with different norms and social practices by which gender 'equality' and 'differentiation' are institutionalized in member societies (Liebert 1999).

The possibilities and constraints to bring about improvements in women's equality through the institutions and policies of the European Union (EU)¹ remain controversial. As European Union policy capabilities have gradually expanded to include more aspects of social and gender policy, they have contributed to the (re-) construction of gender relations and gender institutions within and among the member states. Many feminist EU scholars agree that binding European directives have been important catalysts in the evolution of gender equality policy in various member states. For example, investigations into the extent to which European institutions may encourage a redefinition of public and private have attracted substantial interest (Young 2000; Rossilli 2000; Mazey 1995).

Whereas scholarly interest in the European Union once concentrated on the nature of the

European institutions and the power of individual member states to influence European decision-making, recent studies have focused their attention on “Europeanization” and the influence that “Europe” exerts on member states’ policy capabilities and institutional organization (for example, Caporaso, Cowles, Risse 2001; Knill 2001; Bulmer and Radaelli 2004; Knill and Lehmkuhl 1999; Börzel 2003). In this thesis, I combine insights from feminist EU studies with concepts from the Europeanization literature, now dominant in mainstream EU studies.

This thesis begins where these two traditions meet. It accordingly examines tensions between the emerging European gender regime and that of Germany, asking whether domestic actors have been able to make use of tensions between the different policy arenas to challenge the male breadwinner/female caregiver model with effect. It focuses on three examples: equal pay, parental leave and pornography. Bolstered by European directives, domestic actors have made some progress in displacing the male breadwinner/female caregiver regime. Nevertheless, this progress has been uneven. Though gender policy has been successfully disturbed in some areas, the old gender regime has yet to be replaced. This is a gradual and evolutionary process.

During the first two decades of European gender policy, the German government strongly resisted European initiatives to implement policy which supported a more equal gender regime. Only in the 1990s did the federal government begin to introduce innovative policy measures which more accurately reflected the values, norms and intentions of European gender policy. The timing of these shifts immediately brings two

potential factors to mind – increased European integration and the reunification of East and West Germany. As we shall see, while both involved the collision of distinct gender regimes, only Europeanization has thus far mounted a real challenge to the dominant male breadwinner regime.

Reunification brought two very different gender regimes into direct conflict with one another. One might therefore expect that East German women, supporting a more equal gender regime, contributed to the partial replacement of the dominant male breadwinner/female caregiver model. This was, however, not the case. Several possible explanations for the limited transfer of the East German gender regime in the issues examined in this thesis, may exist. Changes in social, economic and employment structures have weakened the East German gender regime in the post reunification period. Rather than the East German regime mounting a challenge to the West's regime, most evidence to date suggests the opposite – the East German gender regime is gradually being incorporated into the male breadwinner/female caregiver model of West Germany (see, for example Ferree 1993, Hörschelmann and van Hoven 2003; Kodré and Müller 2003; Ostner 1994). This clearly limits the explanatory value of reunification as a primary change initiator (see also Kodré and Müller 2003).

Moreover, a general lack of mobilization on the part of East German women has contributed to an apparent tacit acceptance of the West Germany regime. Although reunification brought two very different gender regimes into direct conflict with one another, women in the former East Germany have not actively mobilized to maintain the

more equal gender regime of the socialist era. Following a period of intense mobilization immediately before and after reunification (see Young 1999), by the mid 1990s many women's organization had fallen silent. Where they remained active, most organizations concentrated on issues such as opposing domestic violence and creating shelters for abused women and their children. Their apparent acceptance of the West German model in terms of the issues explored in this thesis has restricted the extent to which the dual earner regime of eastern Germany has challenged the dominant male breadwinner/female caregiver model².

Lastly, reunification is of limited explanatory value for the shifts explored in this thesis because many of the changes visible in German gender policy in the 1990s have evolved from events that occurred well before reunification. The implementation of equal pay and the regulation of pornography involved responses by the German state and interactions among German and European institutions which were set well before reunification. The differential gender regime in eastern Germany is therefore of limited consequence in these two cases. In contrast, the parental leave case did not generate substantial policy responses until the mid-1990s. Even in this case, however, the impact of the eastern German gender regime is limited. As chapter five discusses, where parental leave has been redefined in recent years the impetus has come, not from women in eastern Germany, but primarily through the mobilization of western German women around the EU initiative. I consequently focus on Europeanization as the key factor challenging the path of the German gender regime, introducing the differences between

eastern and western Germany as necessary only in the case of parental leave.

Central Questions

Regime theorists might well regard with scepticism my claim that the path of the German gender regime could be fundamentally altered by the actions of European and domestic groups. Regime theory relies heavily on the concept of path dependency to highlight institutional stability. Events early in an institution's historical trajectory are seeming determinate to its subsequent path (Pierson 2000). Thus, the “roots and routes” (Olsen 1995) of an institution grant stability and resistance to wide-scale change, even as the institution's surroundings evolve. This does not suggest that institutional change is impossible. Major upheavals, such as war or revolution, may create a “critical juncture” triggering one path to be chosen over another (Pierson 2000). In addition institutions may undergo gradual adaptational changes which do not deviate widely from the established path. Because they do not diverge from the original path, these gradual changes are considered incremental adaptations rather than path-shifting institutional changes. For most regime theorists, adaptive responses to European initiatives in gender or social policy might cause the German gender regime to adjust, but is unlikely to change the path itself.

Critics argue that this “code[s] all observed change as minor adaptive adjustment to altered circumstances (Streek and Thelen 2005). Path dependency thus lacks the analytical tools required to theorize gradual yet transformative changes presently

occurring in many advanced political economies. Rather than locating change in radical external upheavals, new historical institutionalist³ approaches suggest that we must consider endogenous factors as facilitating change (Crouch and Keune 2005; Deeg 2001, 2005). By altering the scale of reference from the exogenous to the endogenous, these theorists bring into view the heterogeneity of societies, a fact generally obscured by regime theoretical approaches. Crouch and Keune, for example highlight the conditions under which domestic sub-groups advance alternate regime formulations which can successfully displace the dominant institutions. Supporters of the women's movement have long encouraged an alternate gender regime to the dominant male breadwinner/female caregiver model. The incorporation of East Germany, with its dual earner gender regime, has the potential – as yet untapped – to reinforce this alternative. Thus far there has been little indication of East German mobilization to this end. In the post-reunification years, women's movements in the former East German became “increasingly quiet” (Kodré and Müller 2003, 119). Even among institutionalized feminist actors in eastern Germany, there is little evidence of their engagement with European policy or aims. Women, facing economic uncertainty and changing economic, social and political structures in the post-reunification period, have tended to turn their attention to more pressing issues. As a result, opportunities for innovative policy change and a more thorough challenge to the dominant male breadwinner/female caregiver model, such as those envisioned by Crouch and Keune, have not yet occurred.

While meaningful, institutionalism's focus on endogenous factors is generally

accompanied by a singular focus on the national level as the primary locus of political activity (see also Mahon, Andrew and Johnson 2004). Institutionalist approaches are therefore hard-pressed to explain how interactions with the European institutions may facilitate gradual changes domestically. For insight into changes through trans- or cross-national policy learning, I turn to the Europeanization literature.

Europeanization approaches draw on various aspects of institutionalism to investigate the circumstances under which European policy-making contributes to domestic changes (Caporaso, Cowles, Risse 2001; Featherstone and Radaelli 2003; Aspinwall and Schneider 2000). This approach suggests that domestic institutions are subject to adaptational pressures from the European level which may contribute to changes in domestic institutional structures. The potential for change is attributable to a process in which the European forum encourages policy sharing and the formulation of common approaches. Thus, the flow of ideas through the European institutions can disrupt the national policy path and lead to increased Europeanization (see also Bomberg and Peterson 2000). In contrast to new historical institutionalist approaches, Europeanization has the virtue of addressing the different levels of governance and, most importantly, the relationship between them. While Crouch and Keune see domestic actors as change-initiators advancing alternative paths, Caporaso et al. (2001) suggest that exogenous pressures can empower domestic actors to pursue a specific alternate path. Consequently, new historical institutionalism sees change as initiated through internal factors whereas the Europeanization literature suggests that “external” pressures can

create domestic-level opportunities. The levels of governance are consequently not nested in, but linked with, each other.

While insightful, there remains a central difficulty in the Europeanization literature. In general, this approach is constrained by a focus on institutions rather than social practice. In an otherwise comprehensive analysis, Bulmer and Burch (2001), for example, specify three institutional “domains” of Europeanization: policy, politics and polity⁴. Nowhere do they consider the Europeanization of social practice. Even discourse approaches to Europeanization (for example Kallestrup 2002; Hay and Rosamund 2002; Radaelli 1999) tend to focus on institutional discourse at the expense of a more thorough examination of the construction of norms, values and meaning at the social level. Indeed, this societal element is essential in understanding the evolution and possible Europeanization of the German gender regime. We know from a number of feminist studies, that legislation alone is insufficient in changing gender relations. Rather, policy initiatives must also be internalized by, and reflected in, social actions and practice. Moreover, we must remain open to the possibility that despite formal (i.e. institutional) Europeanization, the majority social group does not accordingly adopt new social practices and thus, “Europe’s” influence remains limited. I try to overcome this difficulty by including the transfer of policy norms and values as one aspect of Europeanization (see chapter two). The importance of ideas and norms in colouring European policy is developed through the multi-level governance literature.

Several key questions emerge from these discussions. I ask whether European

gender initiatives can help initiate a change in the structure of gender relations in Germany. If so, what is the role of domestic actors in this process? Beyond this empirical question, this thesis gives rise to the theoretical question of whether these internal and external forces are sufficient to challenge the path dependent evolution of the German gender regime. This requires me to address the relationship among different policy actors and policy levels to understand the influence of Europeanization on the domestic gender regime in Germany.

Investigating these questions with reference to the German state rather than other member states, offers several advantages. The German gender regime is, more than many of the other member states, fundamentally in conflict with the emerging European gender regime. Moreover, the resistance of the conservative welfare state and its corresponding male breadwinner gender regime to change make the German state a particularly fruitful study of the process of regime change (see, for example Esping-Andersen 1990; Seeleib-Kaiser 2004). The continuity of the German system is apparent in the state's response to European gender policy. The German variant of the male breadwinner/female caregiver model, one of the most "resilient" of its kind (Kodré and Müller 2003), has consistently avoided action to implement the European gender directives. A liberalization of gender relations would necessitate a shift in these two seemingly change-resistant regimes.

Caporaso et al., however, speculate that given a number of factors, Germany, may in fact be more susceptible to institutional change through Europeanization than other member states. For example a tradition of consensual decision making and a political system

encouraging cooperative federalism may facilitate change in the German institutions.

A notorious “laggard” (Liebert 1999) in terms of equality policy, the German government’s responses (or lack thereof) to the European gender policies has frequently sparked the Commission to take, or threaten to take, legal action. There has thus emerged an intense pattern of interaction among the German and European institutions, mediated by a variety of exogenous and endogenous actors. During the period from 1970 to 2000, approximately one quarter of the rulings taken by the European Court of Justice (ECJ) on gender equality involved issues which had been referred to the European body by the German Courts (Liebert 2003). This indicates on the one hand the conflict between the German and European policy initiatives, and on the other hand highlights the depth of interaction among the institutions and across policy arenas.

The Gender Regime and Choice of Case Studies

The choice of case studies in this analysis is guided by a particular understanding of gender relations and gender regimes. With the three cases I mean to convey that gender policy is not confined to a single issue area or feminist policy realm. Rather, drawing from categories articulated by other feminist authors, I present a selection of issue areas which, when combined, offer valuable insight into the (re-)construction and maintenance of the gender regime. It is widely acknowledged that numerous factors contribute to the articulation of gender relations (Connell 1987; Walby 1997; Shaver 2002). A comprehensive study of gender structures is thus best undertaken by addressing

diverse policy areas (see also Walby 2001; O'Connor, Orloff and Shaver, 1999). My three cases – equal pay, parental leave and the regulation of pornography – are based on three policy categories identified by O'Connor, Shaver and Orloff (1999) - the labour market, income maintenance and reproductive rights. In order to provide insight into the diversity of a gender regime, I choose one case from each of these categories while, at the same time, striving for diversity in terms of time frame and policy approach.

European and German approaches to gender equality differ dramatically. Whereas European legislation has generally focused on equality as sameness, the West German approach has tended to highlight gender differences by openly valuing “women’s work” in the home as equal to but different than, “men’s work” in the labour market. Two of the three cases presented here have been selected for their ability to draw out the implications of these differences and evaluate the degree to which the EU can subsequently influence the domestic gender regime. The first EU equality directive (117/74/EEC) addresses the regulation of equal pay for work of equal value in the member states. This case offers insight into the early years of both German and European gender policy. Spanning most of the 1970s, this issue drew support from a wide spectrum of women, some active in government, some in the official women’s movement, others working outside of these channels to correct what they perceived to be an injustice. This level of support is not surprising, given that a commitment to equal pay is an important aspect in increasing women’s financial independence and autonomy. Enforcing legislation on equal pay for men and women formally demonstrates the commitment by state and market institutions

to recognize financially the value of women's labour market participation.

Parental leave offers a marked contrast to the equal pay case. It is the most recent equality issue addressed in this thesis. It too offers insight into very specific aspects of the gender regime, notably the relationship between men and women and the division of unpaid labour in the household. In the early years of equality policies, the tendency was to direct policy at women, to formally allow them equal access to the masculine sphere of paid labour. This was, however, not combined with initiatives to reconcile these new options with family and home responsibilities. Thus, early equality policies, such as equal pay, which focus on women's lives rather than the relationship between the sexes, were generally unable to bring about a fundamental change in overall gender relations. Current policy is more adept at recognizing the necessity of "masculinizing" women's labour market participation and simultaneously "feminizing" men's life patterns to create a more balanced division of labour at home and in the labour market (see also Esping-Andersen et al. 2001). The policy shift from maternity leave to parental leave represents the first formal attempt to legislate the division of labour between partners and to alter behaviour patterns of both men and women. It marks the beginning of reconciliation policies in Europe and a potential new beginning in equality policy direction.

One of the primary strengths of O'Connor, Shaver and Orloff's study of social policy in liberal welfare states (1999) is their recognition that social policy goes beyond traditional concepts of the welfare state. They bring "body politics" into the analysis of social and welfare policy (see also Orloff 1993). This adds a new element to European

gender policy analysis by reaching beyond the basic initiatives generally considered to be “equality politics”. The EU has largely ignored issues of sexuality and reproduction, except as their commodification has entered the European discourse through the neo-liberal market focus. “Body politics” has been addressed through other policy areas, but seldom of its own accord. For example, the European Court of Justice (ECJ) was forced to address sensitive issues such as access to contraception and abortion in the member states as a result of the introduction of freedom of movement of goods, services and people⁵. More recently the European institutions have addressed “body politics” through issues such as trafficking in women, forced prostitution and sexual harassment in the workplace. That regulation and even commodification of the female body may be controlled through legislation that does not consciously address body politics but which, as a result of a gender blindness, can have strong implications for gender relations. These hidden policies are not a part of the formally recognized gender policy yet may influence the construction and maintenance of the gender regime. One such issue which has been actively pursued by the European Union for over twenty years is the regulation of the content of television broadcasts. The so-called Television Without Frontiers directive addresses, as a portion of the legislation, the regulation of pornographic imagery in television broadcasts yet ignores the implications that such broadcasts may have on the construction of social images of feminine and femininity. By including this directive as one of the three case studies, I am able to address numerous different aspects of gender regime construction, and go beyond an analysis of welfare policy to a much broader

focus on social policy. The three case studies presented here offer a very diverse look at both European and German equality policies. This form of comparison within the broad realm of gender policy, offers sufficient room for comparison across issues and time while still maintaining control over a number of other variables.

These three directives span the full time spectrum of European gender policy, touching upon three very different approaches to gender legislation. Teresa Rees (1998) refers to these three phases as tinkering, tailoring and transforming, describing a shift along a spectrum of gender awareness from equal treatment to gender mainstreaming. The three issues addressed in this thesis each reflect one of these stages and thus offer a broad overview of the evolution of European gender policy. Equal pay and parental leave, moreover function as “bookends” of European gender policy, with equal pay marking the origin of European women’s policy and parental leave representing one of the most recent gender directive to be passed by the Council of the European Union⁶. These cases lead me primarily to consider the timeframe between 1974 and 1996 and the relationship between European and German actors over this period.

Thesis and Hypotheses

The main argument advanced in this thesis suggests that domestic actors and European institutions are posing a challenge to the male breadwinner/female caregiver model which has long dominated German policy-making. European equality directives aim to regulate women’s position relative to men’s through a particular understanding of gender relations

which, at times, may clash with legislation and norms already entrenched in German society and politics. Domestic actors have sought to build on this alternate European policy frame and the openings created through European adaptational pressure to undermine the domestic dominance of the male breadwinner model. Together, the EU and domestic actors have begun to challenge a number of aspects of German gender policy and have chipped away at the primacy of the male breadwinner regime without, as yet, replacing it.

Several mediating factors came into play in this process. First, the strength of domestic actors and their level of empowerment influenced their ability to alter gender policy frames (see also Caporaso, Cowles, Risse 2001). In particular, the strength of domestic actors was affected by the level of consensus or by the prominence of key members. In the case of equal pay, women's movements were empowered through the support of prominent female politicians and unionists. Broad consensus among the domestic actors on policy alternatives strengthened feminists' voice in policy making, whereas internal disagreements hindered attempts to reframe policy options. In addition, the existence of well-organized opposition to a given policy sometimes forced them to reframe issues such as equal pay in a gender neutral manner, thus reinforcing the male breadwinner status quo.

According to Crouch and Keune's research (2005), different experiences and contexts, even the memory thereof, can play an important role in reshaping policy preferences and paths of domestic actors. A group of actors can, with the necessary

resources and practices, support an alternate set of values and norms thereby “crowding out” the previously dominant pattern. In the case of equal pay and the regulation of pornography, mobilization in support of an alternate gender regime came primarily from women's organizations in West Germany. Parental leave policy, determined shortly after the reunification of East and West Germany, may conceivably have benefited from the experiences and mobilization of East German women. As chapter five demonstrates, however, the mobilization of eastern German women was all but non-existent in support of a reframing of parental leave policy.

Finally, it is important to recall that policy making involves not only negotiation and transposition but also compliance and acceptance. Adaptational pressures and domestic political activity will only influence the expression of the gender regime if individuals and dominant groups in society accept the new frame. As the three cases explored here show that, legislation and social practice often progress at different speeds, leading to contradictory but co-existing understandings of gender relations.

Key Concepts and Terms

It is important to specify what I mean with specific terms or concepts before proceeding. Chapters one and two address important ideas and concepts within the theoretical framework of this study. There are, however, three set of terms which are central enough to warrant a brief discussion here.

“Gender policy” and “women’s policy”, though seemingly interchangeable, are

not synonymous. On the whole, “women’s policy” as I use it, refers to policy initiatives taken at the national or the European level which specifically target or concern women. These include for example, maternity leave, and special protection for pregnant and nursing mothers, as well as special training or education initiatives aimed at increasing women’s chances in the male dominated labour market. By designating these policies “women’s policies”, I do not mean to essentialize women’s political activities, but only to describe a politics that establishes and reinforces differences between men’s and women’s political needs (see also Hoskyns 1996). In contrast, “gender policy” attempts to address both men and women in its pursuit of equality. Gender mainstreaming and reconciliation policies are two examples of “gender policy”. Moreover, I occasionally make use of the term “equality policies” as a broader, generic term encompassing both women’s policies and gender policies.

Gender policies construct and perpetuate a specific understanding of gender relations. It is the collective understanding of gender relations, expressed by policy, policy instruments and social actors that I term the gender regime. By gender regime, I understand a set of norms, values, principles and policies that inform and influence gender relations in a given polity (see also Liebert 2003; Sainsbury 1999; Connell 1987; O’Connor, Shaver and Orloff 1999). The state and its policies influence and constrain the set of viable options available to an individual or family and thereby reinforce a specific set of gender relations. The relationship between the gender regime and policy construction is explored more thoroughly in chapter one.

Political, geographic and social changes that resulted from the reunification of East and West Germany are a source of complication of otherwise simple concepts. The boundaries of the German state, both physical and mental, changed significantly within the timeframe presented in this thesis. Until 1989, the European integration project involved only the West German state (the Federal Republic of Germany). Consequently, when I refer to “Germany” during the period from 1949 – 1989, I am referring to the Federal Republic of Germany. If, on occasion it is necessary to distinguish the Federal Republic of Germany (West Germany) from the German Democratic Republic (East Germany), I have taken care to insert the relevant prefixes⁷. For the time period between reunification and present day, I use “Germany” to refer to the single political entity. Reunification, however, has not erased the differences and divisions between the formerly separate countries. It is consequently necessary, on occasion, to highlight these distinctions using “eastern” and “western Germany” to describe the geographic areas that correspond to former political divisions. These terms are, by and large, in keeping with common German practice.

Finally, I wish to draw attention to the danger of assuming that policy which is good for a majority of women is good for “women” as a group. Policy-makers may oversimplify “women’s needs” with the resulting legislation generally addressing women in their role as either mothers or as workers, while ignoring distinctions in class, religion, ethnicity, personal history, family and marital status. Given the policy framework created by German and EU legislation, it is often difficult for researchers to go beyond this

constraint. This thesis, nonetheless tries to avoid these difficulties by addressing different sets of civil society actors in policy making. In this way, I address sectors of the feminist counter culture, differences among branches of the women's movements and divisions between western and eastern German women.

Method and Outline

This project has been researched primarily through an analysis of government documents, archival materials and draft legislation at both the national and European level. Printed matter and position papers offer a strong sense of the "formal positions" of organizations and institutions. Where possible, I have drawn on interviews to delve beyond the formal position and to verify information that appeared contradictory⁸.

This dissertation is organised into two main parts. Chapters one and two offer necessary background information and place Germany within a broader comparative framework. Chapter one examines the relationship between welfare and gender regimes and addresses the nature of these regimes in the current German state as well as the former East and West Germany. It also discusses the position of German women's movements and their relationship to the state. Chapter two examines the regulation of gender and women's policies through the European Union. It addresses the role of different European institutions and assesses the institutional culture surrounding gender policy in Europe by tracing European gender policies from their beginnings in Article 119 through to more recent measures.

The second part of this dissertation – chapters three, four and five – focuses on the three case studies. Chapters three and four trace the West German and European debates on equal pay and the regulation of pornography respectively, in order to demonstrate the different frames and actors at each level and the manner in which these interacted with one another. Chapter five addresses the responses of the unified German state to the European parental leave directive. This chapter is the only one to specifically address reunification and the potential impact of reunification on the hitherto dominant pattern of gender relations in “Germany”. Chapter six summarizes these findings and concludes that in certain circumstances, exogenous and endogenous pressures are altering aspects of the German gender regime. Although this has not yet resulted in a complete reformulation of the existing gender regime, the presence of a new or counter-regime has partially undermined the legitimacy of the male breadwinner system. The system may thus still be generally reflective of the male breadwinner regime, but as gradual policy shifts continue to compound, the German state may in fact be on the verge of a new understanding of gender and gender relations.

Notes to Introduction

¹ The Maastricht Treaty of 1992 brought the title European Union into common use. Prior to 1992, the member states were joined together in the European Community. I use both of these terms, depending on the time frame in question. For a general term, spanning the history of the institutions, I use European Union.

² East German women have, nonetheless demonstrated a certain frustration with the West German model and the constraints that this model places on their ability to carry out the

dual role of mother and labour market participant. This is perhaps most apparent in the “baby strike” of the immediate post-unification period where birth rates in eastern Germany plummeted by nearly 40% in a single year (from 180,000 births in 1990 to only 110,000 in 1991). Fertility rates dropped from approximately 1.7 in 1990 to only 0.8 in 1993. This drop cannot however be attributed only to a dissatisfaction with the West German system. A general sense of uncertainty among East German women contributed to decisions to postpone motherhood, bringing the East German life patterns more in line with those of West German women. See also Kreyenfeld 2000. This trend is also discussed in more detail in chapter five.

³ Here, new institutionalist approaches refers to a very recent strand of institutionalism that focus on gradual transformative changes. This is not to be confused with new institutionalism as a catch-all for historical, sociological and rational choice institutionalism.

⁴ Bulmer and Burch use “policy” to refer to specific issue areas; “politics” to political parties, interest groups, etc. and “polity” for national institutions including political and administrative structures.

⁵ For more on the so-called “X Case” see Smyth 1993; 1996.

⁶ Three directives have been passed since the parental leave directive. Two of these, however, amended earlier directives without opening fundamentally new policy territory. The third directive (on the reversal of the burden of proof) was incorporated into German legislation through the same law as the equal pay directive. In order to achieve more diversity of policy and policy responses, I have chosen parental leave rather than the burden of proof directive. For a complete list of European equality directives, refer to the appendix.

⁷ I consciously avoid the use of the abbreviations FRG and GDR or their German equivalents BRD and DDR. These abbreviations (in particular BRD) were politically loaded terms in recent German history and are generally avoided in common German use.

⁸ I carried out seven interviews with individuals active in the various German and European institutions, including the ETUC, EWL, BMFSFJ, the European Commission and Parliament. Most of the archival material was obtained through the German Parliamentary Archives, Bonn and through FFBIZ in Berlin. I received most of the internal European documents from the individual European institutions through the access to documents provisions of the European Union.

Chapter One

The State of Gender in Contemporary Germany

Most investigations of social policies in western industrialized countries focus on the relationship between market and state. Thus, welfare policies are generally understood as an integral part of the triad among state, market and individual, in which the state intervenes on behalf of the (masculine) citizen in the event of market failure. Feminist scholars, however, have demonstrated that this relationship must be understood within the broad context of the family and gender roles as constituted through state policies. Consequently, in feminist analyses, social policies are seen to contribute to a particular relationship between the sexes. Following this tradition, this dissertation begins from the state-market-family triad as it has taken shape in post-war Germany, then complicates this by reflecting on the impact of European Union policies on these relations, with particular emphasis on the mediating role played by German women's organisations. Gender policies of the European Union and the multiple layers of agents involved in the formation and execution of these policies is the subject of chapter two. In this chapter the focus is on developing an understanding of the German gender regime and the actors and institutions responsible for shaping this regime.

The chapter begins by sketching the outlines of the German welfare and gender regime, leading to a broad understanding of gender policy and gender regime. The concept of gender regime as the set of values, norms and policy that define the relations between the sexes is developed later in this section and largely informs the selection of

cases pursued in the following chapters. The three case studies I have selected represent a spectrum of social and welfare policies, which contribute to the construction and maintenance of the German gender regime. The second section of this chapter addresses institutionalist theories as a framework to place policy evolution within a broader institutional and historical context. While not without insight, institutionalism has difficulty accounting for changes in a social regime and has a limited understanding of the role of agents in constructing conditions for change. This weakness is addressed in the final portion of this chapter, which considers the specificities of German women's organizations as agents of change. Women's organizations can mobilize to challenge the construction of gender relations in Germany. They do so, however, within the confines set by their own historical legacies, institutional surroundings and political opportunities.

From Welfare Regime to Gender Regime

This dissertation is concerned with the construction and evolution of a system of gender relations in Germany. Mainstream theories on the welfare state provide evidence that policies articulated through the welfare state regime are “an active force in the ordering of social relations” (Esping-Andersen 1990). This claim offers a valuable starting point for my analysis and opens a number of possibilities for the study of state-society relations. I draw on the concept of constitutive forces of the welfare state regime from these mainstream theories to highlight the correlation between policy and social norms, but adapt these concepts through insights from a variety of feminist works. These two

traditions assist in drawing out the specificities of gender norms and values in German society.

One of the most influential scholars in the contemporary study of welfare states has been Gøsta Esping-Andersen. His work draws attention to the manner in which different welfare regimes reflect and reinforce class relations in any capitalist state. His early works in particular, were pivotal in spawning a mental shift away from a primarily functionalist notion of welfare states as products of the industrial revolution, towards an institutionalist understanding of the welfare state as one potential source of social stratification. Esping-Andersen's theories contain key insights into the nature of the state-market nexus, its influence on social structures and preliminary observations about the role of the family as a welfare provider. His ontology was, nonetheless, initially blind to gender issues and the relationship between gender and welfare. While Esping-Andersen later recognized the gender bias in his own work (see for example Esping-Andersen et al. 2001; 2002), early works such as *Three Worlds of Welfare Capitalism* are characterized by an exceptionally narrow description of social inequality as class inequality. In *Three Worlds* (1990) he reasons that by institutionalising a specific state-market relationship, modern welfare states actively shape and reshape existing social inequalities. Here, he focused only on class-based distinctions at the expense of other systems of social stratification, such as gender, race and ethnicity, resulting in an incomplete description of state-society and state-market relations. While I borrow his notion of an active and constitutive state, I broaden this to better introduce other mediating factors in social

stratification and to thus address the state's role in the construction of gender inequalities.

Esping-Andersen classifies Germany as a conservative welfare state in which underlying assumptions in the welfare system support and maintain existing status distinctions. The conservative welfare state offers social assistance for individuals in need but uses the notion of subsidiarity to define need. In a conservative welfare state, the family functions as the primary provider of welfare services so that "the state will only interfere when the family's capacity to service its members is lost" (Esping-Andersen 1990, 21). It is not surprising that the conservative welfare regime is consequently "strongly committed to the preservation of traditional familyhood. Social insurance typically excludes non-working wives, and family benefits encourage motherhood. Day care, and similar family services, are conspicuously underdeveloped..." (Esping-Andersen 1990, 27). Despite this key observation on the relationship between welfare and family, Esping-Andersen does not develop the implications for gender or the gendered division of labour as a source of social inequality. His *Three Worlds* leaves a series of questions unasked, and a variety of ideas undeveloped. In the following sections, I ask some of these questions and offer answers from both the wider feminist literature as well as my own observations from the German case. The complex and multifaceted dialogue among feminist scholars and around these "unasked questions" has led to gendered theories of the welfare state and an awareness that social policy can influence gender relations in multiple ways. It is not until his later work (1996; 2001; 2002) that Esping-Andersen returns to his preliminary observations about the role of the family and begins

to address the importance of gender as a source of social inequality⁹. In this way, Esping-Andersen belatedly enters a dialogue already long-underway in feminist circles.

When subject to a gender analysis, mainstream welfare state concepts and patterns exhibit two key weaknesses. First, mainstream concepts do not address the role of family and family responsibilities in shaping women's relationship to the labour market. Second, mainstream welfare state literature generally proceeds from a narrow definition of welfare state policies and class-based inequalities. Mainstream literature thus overlooks the influence of other factors on the state-market-family relationship. In the following discussion, I address the implications of these weaknesses and suggest how insights from gender perspectives can transcend class-based analyses and thus highlight different relationships and new insights.

The typical gender division of labour in the household assumes the woman is the primary caregiver and homemaker. This division of labour inevitably influences the conditions of a woman's labour market participation. In attempt to overcome the household-labour market difficulties, many women "choose"¹⁰ part-time employment or opt to leave the labour market altogether. A distribution graph of women's employment by age in Germany generally reveals a three-phase model, in which women enter the labour market after completing their schooling, exit with the birth of their first child and re-enter when the youngest child reaches school age. Re-entry to the labour market is frequently on a part-time basis (Garhammer 2000)¹¹. Part-time work has become a widespread solution for reconciling work and family responsibilities. In 2003, only one in

five mothers in the former West Germany worked fulltime (Statistisches Bundesamt 2003). Statistics show that women with young children are substantially less likely to be involved in paid employment (part-time or full-time) than non-mothers, evidence that ongoing family responsibilities can have a negative impact on women's labour market participation (Garhammer 2000; Esping-Andersen et al. 2001). Upon re-entry to the labour market, women may find that their past decisions weigh heavily on subsequent opportunities. Women's irregular (or non-masculine) pattern of employment can lead to fewer promotions, lower pay and less chance to take on positions of increased responsibility as their employer, arguably, cannot "rely" on women's commitment to the company or organization. The three phase model may moreover have serious repercussions for a women's life-time earnings and her financial independence. As a general rule, "a full-time working woman will forego 2 percentage points per annum in earnings if she interrupts her career during a five year interim... For women with long-term career commitment, full interruption implies a dramatic cumulative penalty and, hence, if the part-time option or affordable day-care is unavailable, the trade-off becomes zero-sum" (Esping-Andersen et al. 2001, 53-54). Generalizations about women's familial responsibilities may perpetuate women's disadvantages on the labour market as assumptions about women's family role constrain even women without children¹². The assumed norm thus carries implications for all working women, whether they choose to have children or not. I turn to a feminist reformulation of the welfare state in order to understand this relationship more fully.

In one feminist reformulation of Esping-Andersen's work, Ann Orloff (1993) suggests that by including additional criteria such as the ability of an individual to “form and maintain an autonomous household” to Esping-Andersen's original study, women's unique position to the market becomes visible. By “autonomy”, Orloff refers to financial autonomy or an individual's ability to support themselves and their children without relying on marriage or other family relationships (Orloff 1993; O'Connor, Orloff, Shaver 1999). One can, however, expand this concept of autonomy as a central indicator to refer to an individual's ability to make unencumbered choices in all aspects of her life, including family structure and sexuality. An increase in autonomy reduces a women's reliance on a male partner that may consequently undermine the male breadwinner state. Policy and policy assumptions can either support or constrain women's autonomy. Assumptions about family structure and women's “normal” role as caregiver and homemaker, rather than labour market participant, are reflected in different policies. Most modern European welfare states make, to varying degrees, the policy assumption that a family consists of a male breadwinner and female dependent (Lewis 1992; Ostner and Lewis, 1994). The German state also assumes a strong male breadwinner model, in which it links a woman's entitlements not only to her position as a mother, but also as a dependent wife (Schunter-Kleemann 1995).

Susanne Schunter-Kleemann (1995) maintains that differences in assumptions about the nature of women's dependence within male breadwinner states leads to different policy solutions which in turn facilitate a variety of state-market-family

relationships. According to her classification, the German state is a marriage-based patriarchy defined by its tendency to encourage women to enter into marriage and take on the role of primary caregiver. The German state supports this family form by offering dependent wives health care, social security and similar benefits through their wage-earning husband. A working wife, in contrast, must contribute a portion of her wages to social insurance, but does not gain any additional benefits. Similarly, tax benefits are offered to families with children, but no additional benefits to help off-set the cost of external child care exist for the dual income family. For a dual income family with pre-school aged children, expenses such as childcare or household help, contributions to social security and increased taxes can nearly equal the average female worker's wages. Moreover, lone parent families are frequently overlooked by policy makers, as single parents are, for example allocated a lower "family" base rate for taxation than a single earner, dual parent family¹³. These assumptions reinforce the private sphere as the woman's realm, while the labour market remains a largely masculine realm. In contrast, the French welfare state, defined as a "family-based patriarchy" by Schunter-Kleemann encourages motherhood or parenthood without compromising women's participation in the labour market (see also Ostner and Lewis 1994; Jenson 1986). High levels of publicly supported child care services and tax breaks for child care and household help facilitate women's participation in both spheres. The German system assumes women rely on traditional forms of family and encourages women's financial and social dependence on the male partner in these relationships, thereby compromising their personal autonomy.

By highlighting the manner in which family commitments (or assumptions about family commitments) constrain women's autonomy, feminist formulations of the welfare state offer new insights into the state-market-family relationship. They problematize the public-private boundary and demonstrate that the state's role in constructing this boundary is essential to an understanding of gender relations. "[I]t is the boundary between public and private- where it is drawn for men and for women, who draws it, and why it is drawn where it is in different societies – that is the central overarching issue" (Ostner and Lewis 1994, 5). This boundary is demarcated and influenced by a variety of policies which lie outside the traditional realm of welfare state analyses. As discussed below, expanding the mainstream analysis from welfare policy and class distinctions to social policy and gender divisions shifts the analytical focus from welfare regimes to gender regimes. Although there is a certain correlation between these two, they are not the same.

The very definition of the welfare state constrains the scope of mainstream approaches. Originally, most mainstream scholars viewed the welfare state as a state "committed to modifying the play of social or market forces in order to achieve greater equality" through social insurance and assistance programmes which provided a level of income protection in the event of unemployment, illness, accident, retirement or death of the family's primary wage earner (Orloff 1996, 52). In *Three Worlds*, Esping-Andersen rejects this narrow view, arguing that the state's role in managing and organizing the economy includes "... employment wages and overall macro-economic steering" (1990,

2). Esping-Andersen's "broad definition", however, remains too narrow for my purposes. It assumes the centrality of a full-time male earner and consequently remains blind to the special position of women in the labour market. Instead, I draw on an even wider definition as advocated by a number of feminist authors in which the welfare state is seen "as interventions by the state in civil society to alter social forces, including male dominance, but... [without] judg[ing] *a priori* that all interventions are aimed at, or actually produce greater equality among citizens" (Orloff 1996, 52). This opens the scope of welfare state policies to include health and medical care, day-care and education, eldercare, housing and other services provided for the dependent citizen. Consequently, rather than constrain their analysis through the framework of the welfare regime, many feminists go a step further and suggest that social policy as a whole, has implications for the gender regime (Orloff 1996; Sainsbury 1999).

Gender regime refers to a set of norms, values, principles and policies that inform and influence gender relations in a given polity (see also Liebert 2003; Sainsbury 1999; Connell 1987; O'Connor, Shaver and Orloff 1999). These gender norms are constructed and supported by a wide range of policy issues. Assessment of the full scope of relevant social policy, helps to draw out the various means by which the state steers gender relations. Accordingly, I have chosen cases to represent three key areas - work, family and body. Each contributes to the construction of the gender regime in a specific manner. Feminist scholars have often linked labour and family policy to welfare state analyses. Body politics, however, have figured much less prominently in the welfare state/gender

regime discussion. Body politics are, nonetheless, essential to the formation of the gender regime and to the regulation of gender relations. As O'Connor, Orloff and Shaver argue, "state regulation of biological reproduction narrowly conceived ... is influenced by some of the same factors that shape support for the reproduction of populations more broadly, including the cash transfers and services received by families" (1999, 29). Reproductive policies are central to the state's construction of women's roles, the relationship between men and women and between families and the state. In a recent case, the German Constitutional Court ruled that a legislative restriction on a woman's access to abortion required the state to also provide adequate publicly-funded child care (*Bundesverfassungsgericht* 1993). With this ruling, the Court – perhaps unknowingly – established an important link between body politics, social policy and the welfare state.

Body politics encompasses more than just reproductive policies. It refers to institutionalised control over women's bodies through women's health care policies, regulation of sexual harassment and rape and the construction of sex and sexuality. State and market control over the female body and its representation can contribute to a particular construction of the gender regime. For example, the representation of women as the primary caregivers and homemakers in most television series, advertisements and movies can reinforce this as the "correct" relationship between the sexes. Similarly, the portrayal of women as docile sex objects can have the effect of reproducing this image of femininity within society. In this thesis, I investigate the construction of femininity through state regulation of pornographic broadcasts. Deep internal divisions in the

feminist movements and greater society that have been sparked by this issue adds to the interest of the case. On the one hand, feminists have argued that the restriction of pornography reduces a woman's autonomy and her right to make independent decisions about her sexuality and the commodification of her body. On the other hand, some feminists stress that violence in pornography constructs a power hierarchy with women portrayed as weak, sexually available and subordinate to men. This too, may be seen as detrimental to women's autonomy. The issue of the regulation of pornography blurs the barrier between the public and private spheres, allowing the state and/or European institutions influence over sexuality, not as it relates to family or broader demographic trends, but as it has implications for the construction of femininity. It therefore goes beyond most analyses of the state-family-market triad and introduces the body as a separate policy area through which the state can regulate or ignore a particular construction of femininity.

Each aspect of gender relations – work, family and body – is governed by underlying assumptions. Comparing these three issues within a single country gives insight into the nature of German gender relations and the manner in which the conservative policy logic influences the state-market-family relationship. O'Connor, Orloff and Shaver determine in their study of liberal regimes that different and indeed sometimes illogical policy logic propelled different issues in the same state. Various policy areas are guided by different understandings of gender equality. Can the same be said of the conservative welfare state? Exploring this possibility allows the researcher to

imagine a state in which, for example, a liberal concept of “gender sameness” propels education policy or labour market policies, but a more conservative understanding of “equal but different” continues to guide family policy or income redistribution and social benefits. Moreover, if different policy aspects are guided by different concepts of gender relations, what does this mean for the gender regime? Do competing policy logics, or perhaps even policy regimes, undermine the dominance of the male breadwinner gender regime? To answer these questions, I turn to regime theory and, in particular recent formulations of institutionalist theories.

Path Dependency and Regime Change

Mainstream analyses of post-war social policy have, on the whole assumed that institutions tend to follow a set logic, perpetuating and reproducing themselves, even at the expense of efficiency. Institutions are therefore considered independent actors whose histories shape relations with external actors and subsequent policy choices. The emphasis on institutional persistence and the rejection of a purely functionalist explanation of institutional design makes regime theory a particularly interesting approach from which to examine the construction of the gender regime in a given state. Two weaknesses must, however, be overcome: first, because regime theory was initially intended to explain institutional stability, it lacks a theory of change; and, relatedly, its inability to conceptualize gradual yet transformative change undermines the role of agents in creating policy shifts. The following section addresses these weaknesses and

proposes that more recent configurations of institutionalism provide a more fertile environment for evaluating potential shifts in the welfare and gender regime in contemporary Germany. Supplementing these approaches with insights from feminist thought draws out the relationship between institutions and civil society actors.

The path dependency thesis tends to overemphasize stability and, as a result, may overlook certain forms of institutional change. For Pierson (2000), institutions are self-perpetuating as “increased returns” generate incentives for actors to continue to work within the existing institutions. Although institutional change is possible, the costs are generally too high for this to be a viable or rational option. Accordingly, Pierson theorizes that institutions remain largely stable even as the external environment shifts.

To emphasize the nature of path dependency, Pierson quotes Levi’s definition:

Path dependence has to mean, if it is to mean anything, that once a country or region has started down a path, the costs of reversal are very high. There will be other choice points, but the entrenchment of certain institutional arrangements obstructs easy reversal of the initial choice. Perhaps the better metaphor is a tree, rather than a path. From the same trunk, there are many different branches and many smaller branches. Although it is possible to turn around or to clamber from one to the other – and essential if the chosen branch dies – the branch on which the climber begins is the one she tends to follow (Levi, 1997 quoted in Pierson 2000, 252).

Rather than creating a new path or branch, small, incremental shifts in policy, are viewed as branches and twigs connected to and growing out of the original branch. Yet when policy proceeds along a new branch, path dependency is unable to recognise its “newness”. It therefore downplays the cumulative effect of change. Nonetheless gradual changes in the organization of German society, evidenced in changing family structures,

women's increased labour market participation and shifts in attitudes towards gender roles, appear to be accumulating. EU directives are contributing to this. Although they have yet to result in a full-scale regime-shift, we need to be open to the potential cumulative effect of apparently incremental adaptations.

In path dependency, institutions only embark on fundamentally new paths when external crises such as war, revolution and decolonization render existing institutions unable to respond by adjustment. New paths are the result of external crisis, not internal mobilization. This disempowers internal actors and overlooks their ability to mobilize for fundamental changes in society and policy – a particularly troubling situation from a gender perspective. If historical contingency dictates, or at the very least influences, contemporary policy making, there is little possibility for women's activism to alter patriarchal structures established over the course of time.

Recent studies on institutional change offer a more fruitful interpretation of policy change and actor empowerment (for example, Deeg 2005; Crouch and Keune 2005; Thelen and Streek 2005). These authors begin with a broad understanding of institutions as regimes, or collective sets of rules stipulating “expected, licensed behaviour”. This includes social interactions and values and, in particular, socially constructed norms as key social institutions and consequently translates institutional interactions into interactions between identifiable social actors¹⁴. These new approaches have a much broader understanding of institutions, and institutional change, than path dependency theories, and are better-suited to addressing the shifts in the social norms and interactions

which constitute the gender regime. They emphasize institutions' "fluidity and their being continuously created and recreated by a great number of actors with divergent interests, varying normative commitments, different power, and limited cognition" (Thelen and Streek 2005). Hence, institutions remain important collective actors in the policy process but they alone do not determine the uses to which they may be put. Adopting aspects of this approach opens the frame of analysis to multiple actors, multiple interests and continuous change.

In contrast to path dependency approaches, these newer forms of institutionalism address a variety of potential sources of institutional and policy change, many of which are internal to the very institutions which path dependency sees as constraining. Crouch and Keune (2005), for example argue that change results from a shift in dominant practice. Domestic actors favouring a different set of policy preferences than those currently in place may cultivate a new path through their own incongruent behaviour and thereby displace dominant practices. Actors may make use of a number of different policy spaces or rely on existing, yet subordinate paths to challenge dominant institutions. Working from a feminist perspective, Pfau-Effinger (1999) makes a similar observation regarding gender regimes. She suggests that a time lag may exist between socially accepted norms of gender relations and those expressed in state policy. Changing demands emanating from one group of society may require time to transfer between groups. There may consequently come to be a time in which one part of society defines new norms and values while another continues to hold to the older norms. It is

conceivable that some groups within society will embrace a new gender regime, while others may not until long after state policies have shifted to better accommodate the new demands.

Pfau-Effinger is concerned primarily with the gender culture present in the dominant group, although differences among groups may be important in explaining changes in gender relations. There is thus, only ever a single “institutional” gender regime present, although different social gender regimes may be apparent. In contrast, Crouch and Keune claim that different institutions supporting fundamentally contradictory images or “logics” may exist within a single social structure. One institution may even support behaviour that is basically at odds, even incompatible with, behaviour sought by another institution. Domestic actors can make use of this tension to facilitate a change in dominant regimes. Thus, domestic actors use internal opportunities created by conflicting policy logics to further their own preferences. In theory, the concept of competing policy logics opens excellent possibilities for the study of the German gender regime. Using this framework, I suggest that the European and German institutions advance competing, even contradictory policy logics on gender relations. This suggestion goes beyond Crouch and Keune’s theorizing. Their focus remains primarily on domestic or endogenous factors as responsible for shifting practices. Although they do suggest that external factors may offer alternate paths, most of their energy is focused on endogenous factors. This downplays the importance of the European level in the contemporary policy-making process.

In contrast, Deeg (2001; 2005) leaves more room for flexibility in his understanding of regimes and regime change. He suggests that different regimes may not only exist in a state of competition, but may in fact, co-exist over an extended period of time. In such cases, the presence of an alternate regime may undermine the supremacy of the dominant regime, even if it does not replace it. This perspective combines elements of the previous theories, including the idea of a time lag as well as active sub-groups. It furthermore offers insight into how co-existing levels of governance can produce competing but not dominating regimes. The European institutions may require certain changes to the German gender regime, however these changes need not “replace” the existing regime, nor need they result in a simple adaptation of the existing regime. Rather, Deeg’s argument conceives of co-existing regimes and the creation of a “hybrid” which is fundamentally different from the old regime, but accommodates, or even retains, parts of its logic. Drawing on these observations, I anticipate that the German gender regime and a European gender regime may continue to co-exist. Neither dominates the other but the resulting hybrid is fundamentally different from either the male breadwinner model or the dual earner model supported by the EU. Is it accurate, however, to picture the European institutions as simply a sub-group or competing institution? To do so appears to suggest that the European institutions are simply functional entities rather than self-interested bodies subjected to pressures from internal and external circumstances. The nature of the European polity, in particular its multi-level tendencies is discussed in detail in chapter two.

Crouch and Keune, Deeg and Pfau-Effinger all refer to groups internal to the state, who act as key agents in constructing an alternate regime. Agency, in particular women's agency is vital to the construction, maintenance and change in gender relations. Several possible groups may be involved in reshaping the German gender regime. Certainly women's organizations and movements are key in propagating a different set of gender relations than those currently dominant. In addition, it is possible that, in some policy areas, remnants of the old East German gender regime may mount a challenge to the dominant West German set of gender relations. During, and immediately after reunification, the East German socialist values, including widespread employment for women, were largely swallowed by the conservative West German state (Ostner 1994; see also Dölling 1994; Rosenfeld, Trappe and Gornick 2004). Either, or both of these counter regimes may displace, replace or co-exist with the dominant male breadwinner model. We must, however, also consider the role of actors outside the German state. The institutions, norms, values and networks of the European Union may also challenge the dominant gender regime. Chapter two addresses theories of Europeanization in order to gain a better understanding of the European institutions and their relationship to across policy spaces.

The ability to act on the political stage is influenced by the structures of the system, the nature of systemic openings, and the internal organization and strategies of groups. Women's organisations mobilize to construct and reconstruct the set of gender relations in the state. They do this, however within the framework of a particular set of

institutions which constrain and assist their actions. The nature of these structures is the focus of the following section.

Historical Legacies and German Gender Relations

Structures, agents and the historical constitution of each of these can influence political opportunities and contribute to the formation of gender relations. Institutionalism and regime theory suggest that history matters. I reject the strict interpretation of path dependency and its dismissal of agents in redefining institutional and policy paths, yet understand that these agents are themselves partially the products of their own histories. History can shape and reshape actors, influencing their awareness of strategic tools for interacting with the state institutions. In this section, I address the way projects of unification and division have shaped German society and, in particular, influenced the structure of gender and welfare regimes and the organization of women's political activity.

The past 150 years of German history can be characterised as a series of abrupt changes and new beginnings. This period has had a fundamental impact on the structures of the German political and social system, the formation of women's organisations and the shape of their collective consciousness. It is, by and large, beyond the scope of this dissertation to address the intricacies of German history and the role of nation and state-building on the German feminist project. Nonetheless, the shape of post-war and contemporary feminism has been influenced by these events. It is therefore helpful

briefly to reflect on this period of early nation-building and the role that nationalism played in shaping the gender regime.

In the latter part of the 19th century the German state saw massive industrialization, immense militarization and active nation-building. These have all contributed to the shape of contemporary German feminism and structures of the gender regime. German nation-building was a particularly militaristic endeavour. It relied heavily on a masculinization of the state and placed militancy and soldiering at its centre. This campaign peaked during and immediately after the wars of unification (1864-1871) constructing a fundamental link between masculinity, citizenship and soldiering. There resulted a clearly gendered discourse, built around the notion of soldier-citizens and thereby formally excluding women from political life. Through their privileged position in the home, however, women played a central role in the nationalist projects of both the 19th and 20th centuries. Women sacrificed their husbands and sons for the state, and were invaluable to the state in keeping the memory and culture of war alive, and injecting the militarization of Germany into an emerging nationalist construction (Eley 2000).

The militaristic construction of identity created a particular space for gender roles. Jean Quataert refers to the 'gender war ideology' generated through both state and civil society as central to nation building. She argues "[i]n the last third of the nineteenth century, this ideology functioned by evoking a dual conception of the state as a war-making machine but also as a caring institution – caring for its soldiers at war, its veterans and disabled and its needy in general" (Quataert 1996, 64). The dual conception

war-making/care-giving reinforced a gendered ideology of nationhood, encouraging women to embrace citizenship through their role as caregivers of the nation and defining their relationship to the state as mothers and wives. The early women's movement encouraged this special role for women and used it to pursue women's equality, despite "natural" gender differences.

The post-World War II division of Germany was also crucial to the construction of German social structures. The separation of the German state into socialist East and capitalist West contributed to the entrenchment of two distinct and mutually exclusive gender regimes. This, in turn fostered two different understandings of feminism and women's roles in public life. Initially, women in the West found themselves caught in the caregiver/homemaker role still entrenched in the German nation-building project. The importance of the homemaker role was politically and socially reinforced by a need, in the early post-war years, to return to "normalcy". Women had carried an extremely difficult burden during the war and immediate post-war years, and many felt that they had earned the right to stay at home and return to their role as housewife (Ostner 1994). The family came to represent the central unit in the post-war reconstruction of the state. In the eyes of the West German state, the traditional family model was the foundation and stabilizer of the contemporary social order (Ostner 1994)¹⁵.

As Cold War tension rose, the West German state used the East German "other" as a means of defining and justifying its own family policies (see also Moeller 1993; Ostner 1993). From the official West German perspective, East German women were

“forced” to take on a double burden of motherhood and paid employment, in a manner that was clearly detrimental to the family and family values. In fact, most East German women did not view this double burden with disdain, but enjoyed an independence and personal autonomy that alluded their Western counterparts (see also Teschner 2000). Aware of the increased autonomy and formal equality of the East German women, many West German feminists idealized and envied the equality of their “sisters” from the East. At least on the surface, an ideological commitment to equality of the sexes in East Germany was underlined by full employment, publicly funded childcare and formal legal equality in all aspects of life. While “Father state” left little room for women to construct a common, gender-based identity, socialist thought entrenched a sense of “sameness” in the population and thus encouraged women’s autonomy from a male breadwinner (Young 1999). The East German state supported women’s roles as mothers and homemakers, granting women a one year maternity leave and special leave each month to take care of household chores. Thus, equality for the East German state involved bringing women into the public sphere, without encouraging men to enter the private sphere of child care or housework. The double burden was not discussed, nor does it appear to have hindered East German women’s sense of equality, leading some observers to classify this form of gender relations “equality without emancipation” (Böhm 1992).

Although their experiences were, on the whole very different, East and West German women were not fully isolated from one another. There was some limited contact between East and West feminists during the period of division. Reunification

nevertheless brought a sudden awareness of each others' reality, and highlighted the fundamental differences between Eastern and Western feminisms. It became clear that the very understanding of women and their relationship to the state was based on two fundamentally different sets of experiences and was manifested in two distinct sets of values.

The most fundamental contrast between the women of East and West has arisen from their diametrically opposed experiences and perceptions of the division between the public and private sphere. While women in the Federal Republic aimed to break down what they perceived as an artificial division which served to galvanize the patriarchal state (and demonstrated significant successes in this respect), East German society has been characterized as a 'niche society', in which the population sought respite from the hegemonic socialist state in their private lives (Teschner 2000, 207).

This vitally different orientation towards the public-private divide contributed to differences between Eastern and Western feminists in the period immediately after reunification (see also Hörschelmann and van Hoven 2003).

A difference in attitudes, priorities and approaches to equality alienated West German women from their East German "sisters" and contributed to misunderstandings and barriers between the two groups¹⁶. West German feminists were stereotyped as "arrogant, know-it-alls, [who] hate men and children, are dogmatic and intolerant. East German women are conformist, conventional Mommies, fixated on men and not at all radical." (Helwerth 1992). The euphoria of reunification had barely passed when these differences began to dominate the East-West relations between the women's movements. As has been the case for much of the story of reunification, attempts by West German feminists to "educate" the East German women whose "feminist consciousness lagged

behind by some thirty years”, was viewed by many as a “colonialism” (see for example, Nave-Herz 1997). More recently, distance between the two feminisms has began to close. Nonetheless, different priorities and experiences continue to colour the values underpinning the social expectations and norms. This is particularly evident in social expectations towards motherhood and employment. In western Germany, 80% of the population believe that young children suffer when their mother works. In contrast, only 67% of the eastern German population agrees with this sentiment. Although this is still a fairly high percentage, it is hardly more than the European average of 65%. At the same time, only 39% of the western German but 66% of the eastern German population feels that a working mother can offer her child the same “loving care” [*Geborgenheit*] as a non-working mother. Again, the eastern German mentality reflects the European average (61%) much more closely than the western German (Niedermann 2000). The existence of these two fundamentally different gender regimes within the now unified German state could, in years to come, have implications for the possibilities of change to the dominant gender regime. In particular, the continued existence of a more equal gender regime in the former East Germany may operate as a counter-regime in the form described by Crouch and Keune.

The West German/East German divide distinguishes differences in approaches and priorities in contemporary German society. It is, however, not the only social division of importance. Women's movements as a whole, in both West and East Germany have contributed to the construction of a series of feminisms and feminist counter-cultures.

The structures, strategies and networks of this movement are explored below.

German Women's Organizations and their Institutionalization

Numerous branches of the German women's movement are interwoven into a complex layering of movement and institutionalised feminism¹⁷. The resulting policy networks are fluid and ever-changing. Given this heterogeneity, it is often difficult to identify who speaks for "German women" and through which medium. One can, however, identify several types of actors – individuals, women's groups and women working within other organisations – as central to the framing of the German women's position. The presence of multiple actors on the policy stage leads me to go beyond the concept of state feminism to embrace the idea of government feminists – that is, women working through and with different structures of governance in a fluid and ever-changing network of alliances. The next section looks at these in more detail.

Categorising women's movements is seldom an easy task, as it invariably leads to oversimplification and a blurring of potentially important distinctions. There are a number of possible axes along which we can divide different forms of women's political mobilization. The chosen axis subsequently determines which characteristics and divisions are emphasized. Karen Beckwith (2000) makes the important distinction between women's movements (and organizations) and feminist movements (and organizations) where feminist organizations refer to those groups who mount an active challenge against patriarchal structures and institutions. In contrast, women's movements

and organizations includes a broader spectrum of feminist, anti-feminist and “traditional” women’s activity. Beckwith makes a distinction on the basis of priorities and ideology, and therefore differentiates between the aims of women’s political activity. It is unable, however, capture the complexity German women’s activity.

Mósesdóttir (1999) identifies two strands in the modern German women’s movement, where one group advocates increased recognition of women’s unpaid contribution to society and the other encourages entrance to the patriarchal and “male-dominated” labour market. This resembles the more common liberal/radical classification of feminism. The group seeking social and/or financial recognition for women’s unpaid labour encompasses, to use Beckwith’s distinctions, both feminist and women’s movements. Through a classification drawn from their end goals, Mósesdóttir collapses two unique movements into one. In so doing she risks blurring important strategic divisions. Women in each of these two strands work through different channels, use different strategies and different beliefs to achieve differently defined goals of equality. This is lost with Mósesdóttir’s categories. In contrast, Gisela Kaplan (1992) classifies the movement in former West Germany according to strategy rather than priority of issues. She refers to a liberal and an autonomous socialist faction where the autonomous strand favours a decentralised, non-hierarchical, female-only “cultural feminism” and the liberal feminists seek increased female participation in public life. Although this closely resembles Mósesdóttir’s categories, Kaplan makes an important link between the organizational strategy and a movement’s goals. Although this is still a somewhat

unsatisfactory distinction, it is widespread in German usage.

In common usage, the term “autonomous feminism” refers to a specific form of radical feminism which rejects co-operation with both men and the patriarchal state as a whole. This branch of the feminist movement was born out of the student and left-wing protests of 1968. Frustrated with hearing that their concerns as women were “private concerns” and dissatisfied with their secondary positions within the movements, a number of women reorganized along new lines (Nienhaus interview). The resulting autonomous movement¹⁸ is organized in non-hierarchical, loosely formed alliances. It rejects cooperation with men as a whole as well as the institutions of the state and the church, choosing instead to work through consciousness-raising and other “cultural feminist” techniques. This organizational strategy prioritizes the male-female dichotomy as a primary identifying characteristic. Although autonomous was a valuable category in the early years of the modern women's movement, in recent years these women have increasingly moved towards interaction with, and through, the institutions of the state, thus blurring the divisions between autonomous and liberal.

It is misleading to suggest that feminist political activity takes place within isolated units or organizations. Far more frequently, political activity draws on a variety of different organizations and movements, with each contributing in its own way. To characterize this co-operation, some feminist scholars have relied on the concept of a “triangle of empowerment”. This represents the network of interaction among women's movements, femocrats and female politicians in the policy-making process (Nijeholt,

Vargas and Wieringa 1998). The fluidity and flexibility of this approach is promising. Differently placed women contribute to an overarching project with each using her place in the broader whole to create a loose and potentially fluctuating network of women. The networks conceivably change depending on the issue or approach, rendering a distinction based on strategy or final aim unnecessary and improbable. This idea opens up the field of possible actors to include women working both from within and outside the traditional state mechanisms and acknowledges the co-operation which can take place across the liberal-autonomous, labour-housework or traditional-modern lines. In practice, however, the triangle of empowerment requires the researcher to clearly distinguish between three distinct sites of women's political mobilisation. In reality, the division between civil society and state-based political activity in Germany is not always clear. In a number of continental European states, women frequently mobilise through existing social movements, political parties and labour unions to achieve "feminist" goals. In these cases the organization of women is less important than the manner in which women use their position in pre-existing organizations to mobilize. To understand the German movement, we must allow the lines between these elements to blur. Rather than understand these units as three distinct entities interacting on a given issue, I stress the overlap and interrelatedness of central actors. As women move between structures of the state and civil society organizations the divisions between civil society and institutional feminism becomes even more blurry.

In the 1970s, the Green Party and "Alternative Lists" contributed to a merging of

civil society and institutional political activity and, at the same time, boosted the possibilities of women's formal political participation. As anti-party parties, the Alternative Lists and, in particular the Greens offered women a chance to enter the traditional organizations on "non-traditional" terms. The non-hierarchical, loose organization of the early Green Party resonated closely with the ideals of the autonomous women's movement, attracting a number of feminists into its folds. Since its official party beginnings in 1979, the Greens have had a quota for 50% female participation in place. All offices are filled alternately by men and women (Die Grünen 2004). The Green party was clearly successful in attracting the young, female voter, and sparked a response from the other political parties to better tailor their platforms to this group. In 1988, the SPD implemented a similar, albeit lower, quota for female participation in party politics. The CDU has been significantly slower in adopting such a platform, although "women's politics" began to gain increased presence on the agenda by the mid 1980s¹⁹. While political parties attempted to woo the women's vote by drawing more women into their organizations, feminist activists encouraged women in the political parties to join the ranks of the "autonomous movement" ("Schwankenden Stadthexen" 1981). A number of women moved quickly and easily between the formal state mechanisms and the movement.

A distinction between those women working internal or external to the state is thus no longer valid, as a number of activists take advantage of both channels. Ursula Nienhaus, an activist long-involved in the women's movement, stresses the

inappropriateness of the division. She explains that "... feminists decidedly went into the traditional institutions in order to change them" constituting an important part of the evolution of the feminist movement (interview). Yet for Nienhaus, this institutionalization has also contributed to the demise of the movement itself. She argues that "[t]here is no feminist movement in Germany at the moment. There is not even a women's movement. A movement is something different than the institutionalized channels of policy making" (interview). Although she suggests that the division between those feminists working inside the state and those working outside the state is not a valid one, she herself distinguishes between a movement (i.e. outside the state channels) and the institutionalization of that movement.

The distinction between civil society-based and state-based organizations has been further challenged through the evolution and proliferation of Women's Bureaux [*Frauenbeauftragten*] in the *Länder* and sub-state institutions of government. These offices are officially given the responsibility of overseeing women's policy in the various levels of government. Women were frequently recruited from the ranks of the autonomous movement to fill these newly created positions (Ferree 1995). The women filling these positions brought together their colleagues from the movements with those in the formal political institutions to further feminist goals. Lacking a strong national women's policy machinery, these offices are generally considered to be the site of "state feminism" in Germany (see Ferree 1995).

The concept of state feminism can offer some insight into this process of

institutionalising feminist principles. Stetson and Mazur show that

[t]he most striking consequence of over 25 years of women's movement activism has been the array of institutional arrangements inside democratic states devoted to women's policy questions. Such a widespread change in institutions has the potential of turning the state into an activist of behalf of feminist goals, embedding gender issues in national policy agendas and giving advocates for the advancement of women permanent access to arenas of power (Stetson and Mazur, 1995).

Although these official state channels are important in formulating and implementing women's policy, I argue that focussing only on these institutions and "state feminism" pursued therein overlooks other forms of institutionalized feminist activity. State feminism limits the scope of analysis to machinery consciously charged with women's policy issues. This bypasses women's activity in political parties, unions and other movements – sites of substantial political activity in Germany and other continental European states. At the same time, state feminism tends to focus largely on issues which are commonly considered "women's issues", and may remain blind to the impact of other forms of policy on women's lives. Finally, state feminism implies, at least in name, that this policy machinery is at the domestic level. As this thesis examines, feminist policies need not stem from state feminist machinery: they may also evolve from non-feminist and non-state policy machinery.

In her study of the Spanish women's movements and feminist politics, Monika Threlfall (1998) takes issue with the term "state feminism". She argues that the term is vague and imprecise, tending even to contradictory elements. These difficulties lead Threlfall to distinguish between state feminism and government feminism. Through government feminism, Threlfall opens the door to examine the role of women in political

parties and the role of a party's commitment to gender equality in the overall process of policy-making. This is a much more valuable concept for understanding the German "institutional feminism". It is this broad understanding of institutional or government feminism that largely informs my understanding of feminist activity in Germany. Thus, in subsequent chapters, I draw on the activities of government feminists, including those in unions and political parties, as well as women who enter the policy sphere from outside the institutionalized mechanisms in order to pursue a particular stance at a particular time²⁰. This "temporary" engagement with the state is embodied through the various women's movements. It is valuable to address these different actors in turn.

The German Women's Movement(s)

Feminists who engage with the state can either mobilize outside the formal structures and then use openings in the state institutions to make themselves heard or they may use their positions within the existing structures, such as parties, ministries and women's bureaux, to advance feminist politics. These two strategies are not mutually exclusive or alienated from one another but complementary strategies which can be – and are – used simultaneously to increase pressure on the patriarchy. In its attempt to redefine politics, the modern German women's movement has consciously sought to alter the relationship between individual, society and state. It has, however, embraced a wide varieties of strategies and organisational forms to accomplish this.

The formal juncture between civil society and institutionalised feminism is

embodied in the German Women's Council [*Deutscher Frauenrat* (DFR)]. The *Frauenrat* has existed in various forms since 1949 (Nave-Herz 1997) and has operated as an umbrella organisation under the name *Frauenrat* since 1969. Since its founding, the membership of the DFR has comprised both "newly-founded" women's organizations and "re-formed" organizations from the early, pre-WWII women's movement. Thus, its very beginning reflects a merger, albeit not always seamless, of old and new women's movements with conservative and liberal traditions. The *Frauenrat* currently claims a membership of 57 women's organizations and networks representing approximately 11 million women. Its diversity is at once its strength and its weakness as member organizations from labour and union groups, professional women's groups, church-based women's groups and women's caucuses of the political parties seldom share preferences.

The DFR works with, but not from within, official government channels. Its primary role is as a national lobby organization to comment on draft legislation, and advise ministers and policy makers of potential gender implications of proposed legislation. The *Frauenrat* develops its official positions at annual general meetings attended by the delegates from the member organizations. These positions are arrived at by consensus, although they are seldom consensual (Nienhaus interview). Given the diversity of the membership, the official positions are frequently the result of compromise and middle positions and are seldom "radical". This is not surprising in light of the DFR's composition: some 24 of the 57 organizations represented are linked with a *Hausfrauenbund* [homemakers organization] or have religious or Christian democratic

roots. The strong representation of the more traditional or conservative organizations has led some activists to criticise the *Frauenrat* as the last stronghold of the “old” women’s movement. For these women, the *Frauenrat* is often depicted as simply an appendage of the conservative state apparatus.

The DFR's efficiency as spokes-organization of the feminist counter-culture may be questioned on three fronts. First, the vast majority of its funding is granted through the government (European Database 2004). Its dependence on government funding may compromise the *Frauenrat's* ability to take radical positions or pursue certain projects. Moreover, the *Frauenrat's* secretariat is simply unable to comment on all legislation and proposals discussed in the Bundestag. As subsequent chapters discuss, the DFR has frequently failed to comment on legislation or has adopted a very weak stance on behalf of German women. Finally, many women remain sceptical of the *Frauenrat* and its claim to represent, as a single body, German women. Although it is the “official voice of women”, the DFR's official positions frequently represent a compromise among diverse positions with which no one is happy. Especially at the European level, it is not uncommon for the *Frauenrat* to adopt the German government position as its own (i.e. take a conservative stance) in discussions with other women’s organizations. This is discussed in more detail in the subsequent chapters.

For a number of women, the *Frauenrat* is not an adequate means through which to pursue feminist policy. An alternate strategy may be to work through the institutions themselves, although this option is poorly developed in the German case. Institutions

directly charged with women's policy-making remain weak at the federal level. The *Bundesministerium für Familien, Senioren, Frauen und Jugend* [Federal Ministry for Families, Senior, Women and Youth]²¹ is officially responsible for overseeing women's policy matters. The multiple mandate of this Ministry can lead to conflicts of interest within the office itself. Women's rights are often "held hostage to the constitutional mandate to protect the family" (Ferree 1995, 99). Moreover, the Ministry is clearly bound to broader government platforms and cannot operate on the behalf of women in a non-partisan manner.

At the sub-national level, a complex web of women's bureaux has arisen, drawing portions of the autonomous women's movement into its folds. *Frauenbeauftragten* (FB) are a mandatory part of state and local governance in cities with a population greater than 10,000. Though the ability of these officers to influence the policy process depends on a number of factors, their existence has successfully shifted a degree of responsibility and funding for women's projects to the sub-national levels (Ferree 1995). On the whole, the FBs have a fair amount of freedom to prioritise women's issues as they see fit. They are closely involved in determining the distribution of local funding for different women's projects, a position which has led many of the local "autonomous" organizations to work more closely with the formal structures of governance.

My focus on government feminism, rather than state policy machinery, allows me to go beyond these formal mechanisms to look at women's political activity through political parties and the labour unions as an important platform for women's issues. In the

early post-war years, trade unions were seldom receptive to feminist politics. Women's labour market participation, in particular the right to equal pay for work of equal value, compromised the very foundations of the male family wage which the unions had long used as a bargaining tool. By the mid-1970s, a strong women's presence was established in both the central trade union federation [*Deutscher Gewerkschafts Bund* or DGB] and in its close political ally, the Social Democratic Party (Hoskyns 1988). As women gained ground within these organizations, they found access through the organizations to the broader political system. Unions and political parties both enjoyed a privileged position in German politics. This is discussed in more detail below.

Agents cannot be separated from the structures with which they interact. New institutionalist analyses show that agents, though constrained by the structures within which they operate, are able to adapt and change in order to increase their efficiency. Thus, an understanding of the German gender regime and the actors therein is not complete without a brief discussion of the structures that constrain and empower these agents.

The German Political Opportunity Structure

Agents will, to a degree adapt their strategies to the structures with which they interact. Every political system has its own internal and external entry points through which different actors may gain access to the policy making process. The organization of a political system can influence the strategies and success of collective action (for example,

Kriesi et al. 1995; Rucht 1996; McAdam, Tarrow and Tilly 1997). In subsequent chapters I identify a number of specific occasions and circumstances which influenced the ability of the organizations to participate in the decision-making process. Here, I address the nature of German federalism, the role of the judiciary, the nature of party politics and corporatism as broad institutional features of the German state that may influence women's political mobilization.

The actual impact of federalism on the mobilization of feminist interests is rather controversial. A number of theorists, beginning with Truman (1951) have hypothesized that groups in a unitary structure will be more effective than those in federal structures because a unitary structure allows them to clearly focus on a single level of government. In contrast, federal systems tend to fragment groups and render them less effective. Mósesdóttir follows a similar argument for feminist mobilization in Germany. She too sees the federal system as disadvantageous to women's mobilization as it "forces women to divide their efforts in a way that has weakened women's struggle" (Mósesdóttir 1999). This opinion is, however, not universally shared. Hans-Peter Kriesi et al. (1995) for example, convincingly argue that a federalist system may open a number of different channels for mobilization. Thus, if groups confront a dead-end at one level, they may transfer their political activity to another, potentially more receptive level of governance. In her analysis of women's movements in several political systems, Sylvia Bashevkin (1998) makes a similar observation. She finds that centralized state structures do not necessarily translate into advantageous conditions for women's groups. Rather, the

multiple access points offered through the federalist system work in favour of women's mobilization.

In Germany, the domestic federal structure is accompanied by a set of quasi-federalist structures at the European level. There are, consequently three policy arenas through which women may mobilize their interests: the sub-national or *Länder*, the national and the European. If each institution has its own "identity" or way of framing issues, then each of these three levels may offer new possibilities for framing the gender issue, thus opening numerous avenues for mobilization. There is strong analytical evidence that the European level offers substantial new openings for women's mobilization. My findings imply, as Kriesi and Bashevkin argue, that the different levels of mobilization are advantageous to the implementation of women's policy.

Different institutions offer different access points. The Courts may be particularly important given that they are theoretically open to all members of society. The independent judiciary in which the Constitutional Court has a fairly broad right to judicial review has also been subject of mix reviews for feminist mobilisation. On the one hand, the German Constitutional Court has twice imposed a conservative interpretation of the Basic Law and its protection of the family to strike down more liberalized abortion legislation. On the other hand, the Constitutional Court has been instrumental in advancing formal, legal equality between men and women (for example, Limbach 1993). On the whole, the German Courts have been influential in shaping women's rights and gender policies. There appears to be a conscious use of the judicial system by a particular

grouping of German feminists in an attempt to cement formal equality between men and women into the German system. According to Sabine Tesoka, “[w]ithout a doubt, there is an active advocacy coalition that has also used the constitutional arena as a battleground for the promotion of equality between men and women in Germany.” (Tesoka 1999). An informal network of scholars and lawyers are furthermore exploiting the opportunities of European law in order to “circumvent certain German norms and courts.” (Tesoka 1999) The use of the European and national courts by these networks is selective and strategic, indicating a clear knowledge of the system and an awareness of the openings in the political opportunity structure.

As the previous section implied, in the German system women may mobilize through formal structures, as well as a number of other institutions including political parties and labour unions. Most analysts suggest that the strength of German political parties works against outside interests and organizations. The power of political parties serves to maintain a relatively steady cast of political players and ensures that these dominant players exercise a near monopoly over the decision-making process. The presence of a women's caucus in all political parties may, however, counter this effect. The women's caucus ensures that women's ideas and issues are given a forum at party meetings. Issues important to the women's caucus may be adopted into the broader party platform and therefore gain increased presence in the legislative process. Nonetheless, as the case studies discuss in more detail, issues are frequently watered down during this process, often resulting in policy which barely resembles the original proposals of the

women's caucus.

Women may similarly find links to the broader political system through participation in labour unions. With labour and management holding a special position in the German neo-corporatist policy making system, the women's caucus of the unions can gain access to the system in a way that other organisations cannot. In general, corporatist systems tend to support a strong set of established policy-making networks (iron triangles) which effectively exclude new interests from participating in decision-making. Studies from the Netherlands demonstrate a bias towards economic interests in the corporatist system which may, through the very definition of political and economic issues, filter out women's interests (Outshoorn and Swiebel 1998). In the German case, there also appears to be some indication that women's organizations have faced great difficulties in bringing a feminist perspective to "economic" issues (see also Mósesdóttir 1999). This may be partially overcome through women's participation in the labour unions themselves. The women's caucuses of the labour unions give women access to a key political unit, much in the same way as women's participation in party caucuses increases their access. As women gain ground in unions, the corporatist system may in fact work to their advantage. While this forum continues to represent only a specific group of women (i.e. those active in the formal labour market), it nonetheless has the potential to be used as a valuable forum for women's rights.

There are numerous potential openings for women's organizations in the German state. These are, however, tempered by the dominant frame of women's policy in the

structures. The traditional role of the family in German society and the special status of women as wives and mothers presents mental barriers to changes in gender relations. Women's organizations must change the frame within which a problem is understood before they can achieve a woman friendly policy formulation. Women may be assisted in this endeavour by an additional set of openings in the political opportunity structure of the European Union.

The European level is becoming increasingly important in the shaping of gender policy, Tarrow and Imig (2001) suggest that national organizations can bypass their state level if this is proving to be closed to their cause. Instead, they may directly lobby at the European level. Once legislation is implemented at the European level, there is a legal basis from which to pursue further action at the national level. A whole new set of political opportunity structures may consequently exist at the European level (for example Keck and Sikkink 1998). Moreover, actor's conceptualization of the European political system, and their construction of the policy arena as a series of interconnected policy "scales" can influence their ability to operate on a variety of different policy sites. Actors may "jump scale" (Smith 1992) from the local or the national to the European by constructing issues as a matter of European concern. Actors, though defined within a single policy arena are not confined to that political scale but may move between and within political scales. It is therefore necessary to understand the national and European structures as well as the actors originating within each of these systems. In the following chapter, I address the possibilities for women's organisation at the European level and

discuss whether these actors have influenced the German gender regime either by supporting the alternate regime advanced by German women's organisation or by putting forth yet another possible alternative regime. Chapter three then applies this theoretical framework, informed by both mainstream and gender approaches to the first of three case studies.

Notes to Chapter One

⁹ Although Esping-Andersen's later work recognizes the role of gender, he has a tendency to incorporate this as "just another" source of inequality without recognizing that these inequalities permeate all aspects of social relations. He consequently continues to overlook a number of sources of gender inequality, including, for example power relations within the family.

¹⁰ I use the term "choose" with certain caveats. A woman's choice to stay in or leave the labour market is fundamentally constrained by the availability of childcare services, either public or family-based; financial need; her relationship to another breadwinner. Thus, the "choice" is largely influenced by individual and structural circumstances.

¹¹ The three-phase model is particularly strong among married women in western Germany. See Rudolph 1992.

¹² In informal conversations with several managers and business owners, I learned that a number of them are reluctant to hire young women because of the implications that maternity and parental leave policies can have on a business. No one expressed this concern about men.

¹³ A further quirk of the German system is the concept of *Unterhaltspflicht* -- literally the obligation to support financially. According to this principle, married couples are responsible for each other's financial well-being, even after divorce. This principle extends beyond the married couple to all immediate family members. Thus, parents are required to support children in post-secondary education and adult children are required to support their elderly parents. This takes Esping-Andersen's concept of subsidiarity to the extreme, but does so within the context of other policies which assume a single family income.

¹⁴ Thelen and Streek do suggest that an institution must be a formalized norm, that is one which can be enforced by a third party. Thus “as long as the breach of a rule or the violation of an expectation, formal or informal, leads to no more than a strategic response by the actors directly affected, we are dealing, not with an institution, but with a more or less voluntarily agreed social convention.” Particularly with reference to gender relations, it is difficult to determine what is a formalized norm and what is a voluntarily agreed social convention. As such, my discussion of institutions as regimes will also include such conventions so long as they are reinforced through social pressure on state policy.

¹⁵ It is interesting that the German post-war state privileged the “traditional” family, even though war had rendered this an increasingly uncommon family form (for more, see Moeller 1993).

¹⁶ It is important to note that not all West German and East German feminists reacted in this way. In particular, feminists in East and West Berlin maintained fairly close contact, even before reunification.

¹⁷ For an overview of West German feminism see Schenk 1992.

¹⁸ It is interesting to note that this term is usually used in the singular, although here too there are a variety of strands and different organizations.

¹⁹ For more on the position of women in German political parties, see Maleck-Lewy and Penrose 1995.

²⁰ It should be stressed here that there remains a portion of the autonomous movement which continues to operate on a women-only, non-state basis. Given the fact that they consciously reject working through the state, it is not possible to examine their activities within the framework of policy influence as it is discussed in this dissertation.

²¹ The fact that women are included as a “special segment” of the population along with seniors and youth does not go unnoticed in a gender analysis.

Chapter Two

The Regulation of Gender at the European Level

The historical institutionalist approaches are valuable in understanding the role of endogenous actors in creating domestic change. These approaches do not, however, adequately address exogenous factors and their potential to influence domestic actors and institutions. This deficiency stems primarily from historical institutionalism's assumption that internal domestic politics and external or international politics can be independently addressed. In contemporary European politics, however, it is no longer possible to separate these two: the German political system is interwoven with the European political institutions and actors use both policy arenas to pursue their interests. It is therefore necessary to understand further domestic regime change from within the context of a multi-level European polity and the potential influences of Europeanization.

This chapter accordingly shifts focus from the domestic to the European policy arena. It draws on multi-level governance (MLG) to expose the layers of actors and institutions operating in the European polity and to offer insight into the construction of a gender project at the European level. MLG suggests that the interplay among actors and formal European institutions contributes to the establishment of a set of institutional norms that subsequently frame and guide European gender policy. Through the process of Europeanization, these norms and values can be transferred from the European to the national policy arena where they may be incorporated into domestic legislation. The extent to which this can bring about changes in the domestic institutions partially

depends, according to one Europeanization approach, on the existing “fit” between the European and domestic institutions (see, for example Caporaso, Cowles and Risse 2001; Risse and Börzel 2003). If European policies and values are at odds with the existing regime, the European level will exert adaptational pressure on the domestic institutions. Domestic and external actors may then use this tension to challenge the dominant regime.

The chapter begins by addressing the nature of the European political system and the process of policy transfer within a multi-level polity. The subsequent section traces the evolution of gender policy and its corresponding institutional culture from the 1970s until present day. This shows that the European institutions have gradually embraced a liberal understanding of gender equality which is largely at odds with the conservative German regime. In recent years, Europe's gender focus has begun to reach beyond labour market policies to incorporate a wider set of policy areas. Building on this discussion, the third section of this chapter then addressed the central actors in European gender policy. Here, it becomes clear that some of the European institutions embraced equality between women and men as a core value much earlier and to a much greater degree than others. Gender mainstreaming, as well as recent shifts in the institutional power relations in the Union is working to entrench gender equality as a fundamental norm in all the European institutions. The chapter concludes with a brief discussion of the possible implications of the European dual earner model for the German male breadwinner/female caregiver regime. The politics of policy transfer between these policy arenas is examined in detail in the case studies that follow in the next chapters.

Europeanization and Policy Transfer in a Multi-level System

Early academic analysis of the European Union and its institutions revolved largely around questions of power and the distribution of power between the member states and the European institutions. Two theoretical approaches, neo-functionalism and intergovernmentalism, dominated the early debates, pitting supranational institutions and policy against national governments and bodies. The tendency, however of both these approaches to dichotomize national and supranational rendered them largely unable to explain the interplay and interaction among policy levels. Their inability to describe and explain the realities of contemporary integration in Europe opened the theoretical field for a variety of new approaches, characterized by an analysis of the diverse political actors and networks, multiple levels of governance, and policy arenas.

For these newer approaches, the European Union constitutes a “massive transfer platform” for norms, ideas and policies (Radaelli 2000) between national and European institutions with the European institutions acting as policy entrepreneurs. Through their frequent consultations with interest groups, independent experts, corporations and similar external actors, the European institutions engage in a two-directional exchange of ideas with other actors to prepare European policy solutions. In the first step of this exchange, national and sub-national organizations may shift from their primary policy arena to the European channel contribute to policy construction. The European institutions, in particular the Commission, may then import ideas and policy solutions from these groups

into European legislation. The form of legislation chosen by the Commission will determine the steps necessary to then transfer European policies and their corresponding norms and values into domestic legislation.

Directives and other forms of hard law generally require the approval of the Council of Ministers, and the member state governments – in order to be binding on the member states. Ideally, the policy transfer from European to national is accompanied by a transfer of ideas and values from the European to the domestic stage. In contrast, “soft law” initiatives though not directly binding on the member states serve primarily to outline a common understanding of a particular policy issue. These soft laws, including recommendations, statements of best practice and Action Programmes contribute to the evolution of European values and norms and may involve the partial transfer of these values among member states and between the member states and the European institutions. European solutions may be “implanted”, through hard or soft law, into the political systems of the member states (Mazey 2002). The exchange of ideas between policy levels and among policy actors serves to reinforce and legitimize the actors and policy paths through which these ideas were generated. This process, generally referred to as Europeanization, has become an important focus of European Studies in recent years (Featherstone 2003).

Nevertheless, there is no common definition or approach to Europeanization (for more see Radaelli 2004). Featherstone distinguishes at least four types of “Europeanization” in contemporary political science. The term may be used in reference

to "... a historical process; as a matter of cultural diffusion; as a process of institutional adaptation; and as the adaptation of policy and policy processes" (2003, 5). It is most commonly used as a means of identifying member state responses to European Union policies. It thus, involves an emphasis on domestic change, drawing attention to European structures as important sources of external pressure, facilitating institutional or policy change at the domestic level.

In adopting Europeanization as a central concept, there is a risk of hiding behind a top-down logic that simply looks for the domestic effect of European initiatives. In this case, it simply becomes a synonym for "absorbing" EU policy (Radaelli 2003). In this work, I draw on Radaelli's approach to Europeanization. He argues for an approach in which the researcher follows events in domestic policy and traces individual and institutional choices around these events. "It is in the context of domestic choices made 'at the hub of the problem' that one can see if and when processes...play a role in the logic of ...policy making – or even change this logic" (2003, 51). To this end, I examine the policy process at both the European and the German level to find the degree to which European gender policies have played a role in the logic of German gender policy.

In Radaelli's definition of Europeanization, he claims that:

Europeanization consists of a process of a) construction, b) diffusion and c) institutionalisation of formal and informal rules, procedures, policy paradigms, styles, 'ways of doing things' and shared beliefs and norms which are first defined and consolidated in the EU policy process and then incorporated in the logic of domestic (national and subnational) discourse, political structures and public policies. (Radaelli 2003; 2004).

Europeanization thus, involves the transfer of hard and soft law, institutions and norms.

Radaelli highlights a contextual transfer of paradigms, beliefs and norms that may be pivotal to domestic change. Given that a domestic gender regime is, at one level, reinforced by social practice, it is essential to address how norms may be reconfigured through European policy and institutions. Radaelli highlights three distinct phases in Europeanization: construction; diffusion and institutionalization, thereby dividing the process of norm and policy construction from that of institutionalization. Radaelli consequently recognizes that actors and ideas flow both from domestic to European (in policy and norm construction) and from European to domestic institutions (during policy institutionalization). This two-way process differs from a number of earlier Europeanization approaches, in which the process tended to be viewed as simply a top-down transfer of policy rather than a complex series of interactions (for example Knill and Lehmkuhl, 1999). Finally, in his characterization of Europeanization, Radaelli stresses the “logic of domestic discourse”. This, as I discuss below, meshes well with the institutionalist approach adopted by Crouch and Keune (2005) to explain domestic regime change. Recall that they argue that different institutions can advance competing policy logics in a single social structure. The resulting tension creates possibilities which may be exploited by domestic actors. Drawing these approaches together, I imagine that the extent to which the domestic and European policy logics can be merged will influence the extent of Europeanization.

It is important to note that Europeanization does not imply policy convergence at the member state level (see also Héritier and Knill 2001; Montpetit 2000). I make no

claims that gender policy is converging around a single European ideal. Rather, domestic reactions to European policies will vary based on a number of factors including policy logics, cultural differences and the differential preferences of national policy makers (Liebert 1999). Caporaso, Cowles and Risse (2001) suggest that the degree of domestic institutional change in each state will be dependent on the level of convergence or “goodness of fit” between institutions at the two levels²². They claim that differences between domestic and European policies and institutions may exert adaptational pressures on the domestic institutions, which can contribute to shifts in institutional structure and organization. Where domestic institutions conform to the norms of the European project, there will be no adaptational pressure and thus little, if any, domestic change. Conversely, a high degree of misfit between the domestic and the European institutions is likely to generate adaptational pressure and domestic change. Following this logic, if the European gender regime encourages an arrangement of gender relations that differs widely from the male breadwinner model, the German domestic regime will face strong adaptational pressures, especially when domestic actors seize the opportunity presented by European legislation to press their claims.

Thus the “transfer” of gender policy and its corresponding norms is mediated by both the European and domestic levels. Risse and Börzel (2003) highlight the importance of domestic facilitating factors in the institutionalization phase. The policy or institutional misfit described by Caporaso, Cowles and Risse must, therefore be understood as a necessary but not a sufficient condition for domestic change. Risse and Börzel (2003)

draw on two different strands of institutionalist thought to support their argument that, under certain conditions, Europeanization will facilitate change by altering the distribution of resources and power at the domestic level. Intervening factors including veto points in the domestic structures and the presence of supporting formal institutions help determine the nature of political opportunities and the degree to which actors can exploit these. This approach is useful, on the one hand, because it draws attention to the role of domestic structures. On the other hand, it leaves little room for agency. Domestic actors cannot create opportunities of their own initiative but are fully constrained by systemic realities.

In an attempt to address this difficulty, Risse and Börzel also draw on agent-centred institutionalism. This aspect of their explanation suggests that socialization and learning processes through which actors redefine interests and identities and institutionalize new norms and values are also central to the process of Europeanization (see also Finnemore and Sikkink 1998). “The more European norms, ideas, structures of meaning, or practices resonate (fit) with those at the domestic level, the more likely it is that they will be incorporated into existing domestic institutions” (Risse and Börzel 2003, 67). Thus, where European and German norms and values coincide, there will be little resistance to Europeanization. Where values are not shared, adaptational pressure may place the domestic institutions under pressure to conform to the European values. If, however, there are high cognitive misfit levels, domestic actors will likely resist the European norms, thereby reducing the impact of Europeanization. Norm entrepreneurs at

the domestic level may mediate between the levels, facilitating potential policy or institutional change. In terms of the German gender regime, I argue that a domestic counter culture which partially shares the European values and norms may gain in legitimacy through its cognitive fit with the European project. Domestic and European ideas and actors may converge around an alternate policy frame and exert distinct but compatible adaptational pressures on the domestic institutions.

Domestic and European institutions and organizations interact on a complex and multi-layered policy stage. In my understanding of European policy making, the domestic and the European level are connected, such that these policy arenas cannot be considered independently of one another. This marks a break with much of the policy transfer literature which suggests a hierarchical transfer from one level to the other. Even those authors who recognize the possibility of horizontal as well as vertical policy transfer (for example Dolowitz and Marsh, 2000) tend to continue to assume a series of defined spaces that correspond to the different levels of government (see also Mahon, et al. 2004). This implicitly restricts agents to act only within their respective policy space. MLG approaches have drawn attention to the fact that the European Union can offer space for domestic actors to participate in the European policy process, while European actors are also involved in shaping domestic policy. The levels are therefore not self-contained but porous, allowing actors, ideas, policies and norms to move between them. This is one of the central tenets of multi-level governance approaches.

MLG is primarily concerned with the distribution of policy-making capabilities in

a system of negotiation between the national, sub-national and supranational sites of governance, NGOs and private actors. This approach considers committees and networks as nodal points for communication and policy formulation. Because the European environment does not widely support the expression of ideological differences through party or opposition politics, the culture of consultation and dialogue among diverse actors legitimizes the policy formation process (Jachtenfuchs and Kohler-Koch 2003). This demonstrates the fluidity of policy levels and the possibilities for a direct transfer of ideas and norms among the European, national and subnational institutions and actors.

The recent work of Gary Marks and Liesbet Hooghe has been quite influential in shaping scholars' understanding of the EU as a multi-level policy. As Marks and Hooghe (2001) show, in a system of multi-level governance, policy ideas are created through the contestation among and within groups of actors. As actors group around specific idea networks, policy coalitions are generated, and a single policy frame eventually dominates in a given issue area. European integration is propelled, in their view, by contestation around different collective understandings about the nature of European Union and the European polity. Political coalitions, according to Marks and Hooghe are "formed among groups sharing particular views". The authors address territorial, political and nationalist cleavages as important factors in creating these shared views. While not without merit, this runs the risk of over-simplifying the nature of actor identity and designating the geopolitical as the most important form of self-identification. In contrast, feminist studies (for example Liebert 1999) have indicated that gender is a key characteristic dividing and

identifying individuals and their relationship to the European project and should, as such be included in this analysis.

Two key problems with MLG stand out from a gender perspective – the prioritization of political and economic projects and the lack of understanding of power relations among and between actors. Marks and Hooghe describe the EU as an “interplay among a limited number of overarching political designs or ‘projects’ rather than a flow of discrete decisions. These projects are coherent, comprehensive packages of institutional reforms around which broad coalitions of political actors at European, national, and subnational level have formed” (2001, 123). The two projects that they highlight address the relationship between the market, state and supra-state without any recognition of the gendered assumptions behind this relationship. In fact, several other inter-related projects, including a “gender project” produces contestation and an exchange of ideas which propel the nature of European integration.

Moreover, Marks and Hooghe overlook the power relations that exist among and between actors. Although I support the way multi-level governance removes hierarchy between the national, subnational and European policy arenas, it remains important, particularly from a gender perspective, to recognize that not all actors will have equal access to the policy arena. Social network analyses have examined the gender component of decision making networks and found that “people tend to form network ties with socially similar individuals” which leads to a general preference for single-sex social networks (Kronsell 2004 quoting Hedin, 2001). In other words, although men may not

“consciously or overtly exclude women, they may have a tendency to favor connections with other men in work, research and leisure time, hence reproducing in these networks the homo-social environment of which they are a part ... making it difficult for women to engage in it.” (Kronsell 2004). Multi-level governance overlooks the set of conscious and unconscious power relations within and among organizations, and thus obscures the disadvantage women may face in influencing policy making, even in informal settings. Issues of gender and power need to be adequately incorporated into the multi-level governance approach.

By introducing the fluid policy levels described in MLG into the discussion of policy and norm transfer in Europeanization theory, I contend that the construction of a European gender project and its transfer to the domestic policy agendas can increase the mutual dependence of the various actors. Their interaction contributes to the creation of specific dominant policy projects whose centrality is reinforced by formal and informal networks converging around them. Thus, institutional and non-institutional actors in gender policy and other European policy areas rely on one another for legitimacy and broader influence (see also Jachtenfuchs and Kohler-Koch 2003).

Over the past several decades, an EU “gender project” has begun to emerge out of the interaction among policy players. Three main ideas underpin this European gender project. First, it is built on an understanding of equality as sameness that has entrenched a commitment to a dual earner model. Second, in the past decade, European gender policy has started to acknowledge the relationship between the public and the private spheres

and has thus moved to institutionalize a broad understanding of women's policy and women's equality. Third, new policy approaches including gender mainstreaming have addressed the importance of altering men's as well as women's behaviour thus partially recasting the system of gender relations along new lines. This set of institutional values, albeit embraced to different degrees by the various institutions, persists despite the fluidity of inter-institutional relations in the European setting (Mazey and Richardson 1997).

In the following section, I outline the historical evolution of the European gender project. This offers some insight into the institutional cultures and overarching ideas which have, at different times, guided this gender project. Drawing on MLG approaches, I then address the role of national and European actors and institutions that have contributed to the construction of these norms and the progression of integration in the gender field. Interaction among these bodies and the domestic groups discussed in chapter one, has influenced the formation of an emergent gender project, propelled by a given set of ideas and values.

The Evolution of Gender Policy and Ideas

At the European level, equality between men and women was first addressed in the 1957 Treaty of Rome. Article 119 of the Treaty states that “[e]ach Member State shall during the first stage ensure and subsequently maintain the application of the principle that men and women should receive equal pay for equal work”²³. Over the subsequent decades, a

coalition of actors including women's organizations and various formal institutional actors have helped shape a common institutional culture around gender equality and entrench a progressive European project of equality for women and men. Three different policy approaches are ascertainable. First, in the 1970s and early 1980s, equality policy was driven by a commitment to equal treatment and a belief that women's equality could be achieved by removing the barriers to women's labour market participation. The second policy era, from the mid-1980s through to the mid-1990s corresponds to a shift in approach from legislation to "soft law" and voluntary action. Here, women's labour market participation remained central but the institutions, in particular the Commission and Parliament, began to incorporate a broader understanding of women's equality based on the recognition that the public and private spheres must be considered together. Finally, beginning in the mid-1990s, the European institutions largely embraced a broad understanding of gender equality underlined by a transformative project of gender mainstreaming. These steps have contributed to the institutionalization of a dual earner model of gender equality in the EU institutions.

Equality between men and women was seldom addressed in the national or European setting until the late 1960s, despite the inclusion of Article 119. In accordance with its responsibility to oversee treaty compliance, the Commission drafted several memos to the member states between 1957 and 1969, reminding them of their treaty commitment to equal pay. These were isolated statements supported by little political will. In the late 1960s two key events triggered a policy shift by the European and

national governments. First, a rise in women's political activism throughout Europe increased the prominence of women's issues. Governments began to recognize and respond to women's demands for greater equality. Against a backdrop of growing awareness of women's inequality throughout Europe, the European Court of Justice heard the ground-breaking Defrenne cases²⁴. This officially brought the issue of equality to the European level. On the whole, the Court took a liberal and progressive stance towards certain aspects of women's equality, expanding the definition of pay and ruling Article 119 directly applicable. This established a political and legal basis for equality provisions in the European Union and set a new political project in motion. Over the next five years, the institutions passed four Directives on women's equality.

European equality legislation during the first two policy phases was “incremental, rather discontinuous and frequently suspended” (Liebert 1999; see also Mazey 1995). While the early Directives established an institutional commitment to equality, they also highlighted immense differences in commitment between, and within the institutions. The political momentum that drove gender policy in the 1970s came to an abrupt halt in the early 1980s as the Thatcher government clearly dismissed European involvement in social policy. The Euro-sceptic Conservative government made frequent use of its veto power in the Council of Ministers to thwart any European initiative in this policy field. This atmosphere helped to entrench a culture of sovereignty in the Council which kept social policy largely outside the European sphere. At the same time, the certainty of the U.K. veto allowed the remaining Council members to engage in “big talk” on social

policy with little fear that they would be required to take any concrete steps.

To overcome the stalemate in the Council, government feminists in the Commission changed tactics and pursued a series of soft, non-binding legislative initiatives. Several Community Action Programmes outlining best practices, recommending and supporting national and trans-national initiatives, formed the bases of equality policy in the 1980s. These Action Programmes directly targeted organizations from European civil society and supported grassroots initiatives to advance women's rights in the member states. For the first time concrete actions aimed to advance women's needs, build networks and encourage solidarity among women were financed by the European institutions (Haller-Block 1995). These schemes helped to recreate political momentum and encouraged mobilization by women's organisations towards the European institutions (Mazey 1995). At the centre of these community initiatives, were the Medium Term Community Action Programmes which established clear policy guidelines and outlined the details of the Community commitment to equality. The First Community Action Programme (1982-1985) retained a basic commitment to legal instruments in achieving equality. It put forth several proposals for new Directives – including a proposal on parental leave – that clearly attempted to shift the Community focus “from narrow workplace concerns to issues that began to address the childcare and family responsibilities of women (and men)” (Hoskyns 2000).

Nonetheless, progress was often not smooth. Thus for instance, wariness on the part of the member state governments and the culture of sovereignty prompted

Commission officials to downgrade a proposed Directive on positive action to a non-binding Recommendation. The first Action Programme was, at best, a mixed success. In contrast, the Second Action Programme on Equal Opportunities for Women (1986-1990) put less emphasis on legal instruments and prioritized non-binding activity in the areas of child care, reconciliation of work and family responsibilities and encouraged a broad concept of equality. In this way, the Commission used the Action Programmes to overcome the Council's reluctance and begin to cultivate a Community discourse which rejected the strict division between public and private and encouraged action in policy areas related to but not directly part of, the labour market. This pattern has persisted over several decades as the European institutions have continued to support women's labour market equality and "dance around" equality in areas not related to the labour market.

New attempts to prioritize positive action over equal treatment were reinforced by two pivotal events in the 1990s – the Kalanke case (C-450/93) on affirmative action heard before the ECJ, and the introduction of the Maastricht Treaty. These encouraged a shift in policy focus. In Kalanke, the ECJ ruled that national measures allowing "positive discrimination" were contrary to the 1976 Equal Treatment Directive. This was a surprising turn-around from the ECJ's otherwise liberal interpretation of equality and its usual support for women's labour market participation. The European Parliament, Commission, women's organizations and several member states expressed their disappointment in the ruling, resulting in a lively multi-level debate on the role of positive action in supporting equality. When the Marschall case (C-409/95) brought

similar questions back to the ECJ two years later, in 1997, the Court ruled differently. Here, the Court supported the idea that equal qualification did not always mean equal treatment and that preferential treatment of the underrepresented sex was therefore justifiable. This formally recognized positive action to encourage women and men to enter non-traditional fields as an important part of the Union's institutional commitment to labour market equality.

Coming into effect in 1993, the Maastricht Treaty offered several new openings for women's activism. Two changes to the institutional organization of the European institutions were especially important in broadening the scope of equality legislation. First, the Maastricht Treaty increased the powers and legislative role of the European Parliament. The Parliament already demonstrated its commitment to a broad understanding of equality through its formal statements and position papers. In the pre-Maastricht era, these did not carry much weight. Parliament's increased role might change that. The Maastricht Treaty furthermore granted Parliament the right to vote on the nomination of the incoming Commission. Parliament immediately used this power to scrutinize the individual Commissioners appointed to the 1995 Santer Commission. The Women's Rights Committee in particular was quite aggressive in its criticism of Economic and Social Affairs Commissioner Pdraig Flynn and his previous poor record in promoting gender equality. Using its new powers, the Committee successfully shamed incoming Commission President Santer into promising increased action on equal opportunities – a promise which Santer kept. This renewed commitment by the

Commission, combined with Parliament's increased role in legislation has worked to boost the importance of gender equality policy in the EU (Pollack and Hafner-Burton 2000).

The Maastricht Treaty also established new areas of co-operation for the member states, some of which opened room for new themes in women's rights. For example, the Justice and Home Affairs pillar created a new political space for activism in areas such as trafficking in women and violence against women (Pollack and Hafner-Burton 2000). These new policy openings further expanded the boundaries of European equality policy beyond the narrow concept of equal treatment to a wider and more pro-active policy stance.

In the latter part of the 1990s, the negotiation and implementation of the Amsterdam Treaty further entrenched gender equality as a key value of the EU. This institutionalization of the concept was further promoted through the introduction of gender mainstreaming as a vehicle to challenge the inherent patriarchy of the European political system and the dominant frame for equal opportunities in the European Union (Mazey 1998).

Gender mainstreaming involves not restricting efforts to promote equality to the implementation of specific measures to help women, but mobilising all general policies and measures specifically for the purpose of achieving equality by actively and openly taking into account at the planning stage their possible effects on the respective situation of men and women (gender perspective). This means systematically examining measures and policies and taking into account such possible effects when defining and implementing them (Commission 1996).

This shift to gender mainstreaming, in conjunction with a variety of related measures, has

helped to elevate equality between women and men to a fundamental component of the European integration project.

Gender mainstreaming marks a transformation in European gender policy. Rather than measures directed at women and women's behaviour, the European institutions formally recognize that equality must involve a shift in the behaviour and attitudes of both men and women. Reconciliation policies such as parental leave and increased access to child care have been at the core of this new approach. Despite a shift in focus, however, gender mainstreaming broadens but does not alter the base commitment to women's work that drives the European framing of gender policy. In practice, the institutions' approach continues to focus primarily on women's labour market participation, only skirting into other fields if these can be shown to be related to women's access to the labour market. In the EU, gender mainstreaming embraces a dual breadwinner model of gender relations in which both partners are considered as financially independent individuals.

Equality between men and women has been a central component of the European project since the early 1970s. It has, over several decades embraced several different approaches to equality: equal treatment, positive action and gender mainstreaming. The assumptions underlying these initiatives, however, have changed only slightly. The European institutions, albeit to different degrees, have embraced the women's labour market participation and supported women's role as workers since the early days of Community policies. The discussion above highlights some of the Community initiatives

and offers evidence of the wide range of policy actors that come together through the European forum to potentially influence policy-making at the national and European level. The following section addresses these different actors, policy arenas and access points in more detail.

The Europeanization of Gender Policy Actors

A frame for European gender policy is created and perpetuated through the multi-levelled interaction among various policy agents. The national, European and subnational policy arenas are interrelated and porous, allowing actors to cross between the different policy levels. At the same time, the ability of external actors to influence policy is partially limited by the structures and institutions of European politics and by their interaction with other actors. An examination of the primary actors and institutions and their principle roles in gender policy formation sheds light on how the interaction among institutional and non-institutional actors has shaped the framework for policy formation in Europe and the member states.

The Commission has been referred to as a veritable haven for “practically minded feminists” (Ross 2001). It is true that much of the progressive gender policy currently in place in the member states was initiated by the Equal Opportunities Unit of the Commission's Directorate General Economic and Social Affairs²⁵. The Commission's role in policy making is two-fold. First, as the initiator of legislation, the Commission plays an key role in setting the agenda and the frame for gender policy. Second, the

Commission operates as an important focal point through which actors from civil society, member state governments and European institutions interact. The Commission's right to initiate legislation gives this body control over the initial framing of gender policy. On the whole, the Commission has used this capacity to engage a feminist position in legislation and policy making.

During the 1970s and 1980s the Commission relied primarily on a core group of government feminists to direct policy and draft equality legislation. These women worked to mobilize wide-spread support from representatives in national governments, professional organizations and academia in order to ensure that the drafts they produced would enjoy wide-spread support from the remaining institutions. (Stratigaki 2000; Hoskyns 1996). Although they routinely faced opposition from their own institutional colleagues and sceptics in the other institutions, the women were frequently successful in advancing a loosely feminist perspective on policy initiatives. The 1974 Social Action Plan, for example included an early reference to the principle of reconciliation of work and family responsibilities. The Commission has, of late, shifted its approach from a reliance on internal government feminists to a broader input base. To this end, the Commission earnestly seeks input from civil society organizations and actively supports the establishment of policy networks around gender issues (Martin and Ross 2001; Bretherton and Sperling 1996). Some of these networks, such as the European Women's Lobby are well established within the European institutions. Others operate on a temporary basis as part of one of the many initiatives sponsored by the Commission.

Established in 1990, the European Women's Lobby (EWL) came into existence through Commission-sponsored national level initiatives. It functions as an autonomous lobby organization and, as such, maintains close ties to both the Commission and the European Parliament. The EWL draws its membership from women's organizations around Europe. It maintains a central organizing office in Brussels responsible for co-ordinating and uniting the policy activities of nearly 2,700 women's organizations from across Europe (EWL homepage). The primary aim of the EWL is "... to inform, link and raise awareness of women's organizations about European issues, and to ensure that women's needs and perspectives become an equal and integral part of European policies." (Stratigaki 2000). The Lobby actively pursues contact between the national and European levels to increase the flow of information and to co-ordinate European-level policy statements and position papers. The recent shift to a commitment to gender mainstreaming within the European institutions has further ingrained the central role of the European Women's Lobby in policy making (Mazey 2002) and reinforces its position as bridge between the national and European policy levels.

Most European gender networks are not as institutionalized as the EWL. The majority are temporary single issue networks that have formed in order to take advantage of funding opportunities offered through the Commission sponsored programmes such as DAPHNE, ISIS and the Community Framework Strategy on Gender Equality. In general, the Commission stipulates the groups must demonstrate transnational representation in order to receive funding under these programmes. It uses this requirement as a means to

encourage co-operation, sharing of ideas and best practices at a grassroots level. Commission support may furthermore be contingent upon co-financing from national or regional governments. In this way, the Commission fosters not only network formation but further facilitates the multi-level structure of governance within the Union.

Formalized networks directly incorporated into the Commission structure such as the Experts Networks and the Advisory Committee on Equal Opportunities also play an important role in institutionalizing feminist perspectives into Commission work. These sub-groups are comprised of national experts responsible for the collection, comparison and dissemination of data on gender policy and practices in the various member states. Like the European Women's Lobby, they act as a hub around which national women's movements, experts and interest groups organize. Their position papers and policy statements are taken seriously by the Commission, yet the influence which they, and other actors within the Commission are able to exert over the policy making process, remains limited by the reality of the Commission's role. The Commission bodies are frequently restrained in their capacity by the need to mediate between the often contradictory positions and preferences of the European Parliament and the Council of the European Union.

Many observers focus on the Commission as the central site of European gender policy formation. While the Commission plays a key role in shaping policy and facilitating co-operation among the various actors, it is important not to underestimate the role of the European Parliament as a women's rights activist. Until recently, the

distribution of power among the European institutions left the Parliament with very little formal influence over policy making, yet even under these conditions, parliamentarians actively worked towards a more equal understanding of gender equality.

Women's activism in the Parliament goes back to the early days of the European institutions. In 1979 the Parliament convened the first Ad Hoc Committee for Women's Rights with the mandate to report on the reality of women's equality in the member states²⁶. The resulting Maij-Weggen Report (1981) was generated with extensive research and consultations with civil society organizations, and covered topics as diverse as child care and education, access to abortion and women's financial independence. Among its many observations, the Report drew attention to the narrow focus of European women's policy and stressed the importance of a broader understanding of equality. The Ad Hoc Committee took exception to the tendency in European politics to focus on legal equality, equality as sameness and equality in the labour market. It was essential, Maij-Weggen argued, to break down the distinction between the public and the private. Only by removing this arbitrary divide, would it be possible to improve the status of women in Europe (European Parliament 1981). The Committee therefore urged the Commission to act on a wide set of topics, many of which were clearly outside the formal scope of European competences. The Parliament has largely maintained this broad understanding of women's equality and has generated official positions on areas outside labour policy including representation of women in the media, trafficking in women and children, violence against women and the recognition of pornography as discrimination against

women. Some of these issues have risen to become key policy areas for the European institutions as a whole. Although Parliament itself cannot initiate legislation, the Commission has frequently built on Parliament's observations and reports in formulating new gender initiatives. In this manner, the European Parliament can play an important agenda setting role.

The possibilities of women's activism through Parliamentary channels has increased with the expansion of co-decision as the primary policy-making procedure in the Union. Given its new position in the legislative process, Parliament can act as an important access point for women's organizations and plays an unique role in broadening the scope and frame of European gender discourse. Women's ability to influence policy through the Commission and Parliament however, remains limited. Whereas the Commission has little influence in policy making beyond the initiation stage, Parliament remains constrained by party politics and national cultural differences which reinforce "differing concepts of equality, contrasting gender identities and roles will supposedly be reflected in parliamentary deliberations" (Liebert 1999). Even if lobby groups mobilize support in the European Parliament and Commission, the ability of these bodies to influence policy remains limited compared to the powers of the Council.

The Council of the European Union²⁷ can pose a seemingly insurmountable obstacle for gender policy. This body represents member state interests and national preferences in the European policy process. The member states use this forum to upload their own policy preferences to the European level. A member state's success in

uploading national policy preferences ensures a close fit between the national and European legislation and may reduce the adaptational pressures exerted upon the national institutions. It is perhaps not surprising that, in this environment, directives are frequently reduced to the lowest common denominator with key feminist policy preferences often removed from policy drafts.

Lack of transparency and the lack of a clear membership also make the Council rather inaccessible. There is no specific Council configuration to address equality issues. Thus, gender policy is frequently managed through extra-sessional Council meetings or, through the Social Affairs Council. These meetings are held in closed session, and minutes and draft documents are not readily available. It is consequently difficult for women's organizations to evaluate the political climate around policy drafts thereby complicating attempts to form effective and coherent lobby strategies. Moreover, Council meetings usually address only the most pressing or most "visible" issues. The vast majority of matters are discussed in preparatory COREPER meetings. Membership herein is also difficult to determine, again undermining the opportunity for direct lobbying (Kohler-Koch 1997).

Shifts away from unanimity to qualified majority voting and the accession of the Nordic countries have made the Council, in recent years, more amenable to equality legislation. Sweden and Finland, in particular, have contributed to the shift in policy focus from women's rights to equality between men and women. These governments have been exceptionally aware of the need to counter wide-spread Euro-scepticism in

their population (Mazey 2000). The Nordic countries show a particularly wide gender gap in support for integration, with women's Euro-scepticism closely linked to their concerns that EU membership will lead to a levelling down of social rights (Liebert 1999). This has further encouraged the Nordic states to actively fight for social, and in particular gender rights, at the European level.

The distribution of powers in the EU is shifting. The Maastricht Treaty granted a direct legislative role to the European representatives of labour and management and thereby opened policy channels for increased participation by sub-national and interest groups. Already in 1996 the Commission challenged the Social Partners to negotiate a framework agreement on parental leave under the new provisions in the Maastricht Treaty. The Partners were successful where the traditional institutions had failed. Again, the representatives from the Nordic states brought a strong concern for gender issues to the table (Paschier interview). Their support for a more equal distribution of family responsibilities between partners complemented the gender mainstreaming approach which was just gaining support in some of the European institutions. Most commentators are cautious not to exaggerate the role that women's organizations may play through the Social Partners. They stress that women were largely excluded from the negotiations of the Parental Leave Directive and suggest that circumventing the formal policy making arenas can be detrimental to women's rights. There is, for example, no need for the Social Partners to consult with Parliament or any outside bodies in forming Framework agreements. In practice the women's council of the ETUC does play a role in shaping the

common position which the ETUC then brings to the bargaining table (Stratigaki 2000; Paschier interview). The Women's Council is furthermore directly involved in the process of monitoring the implementation of the parental leave agreement giving the organization some post-agreement powers.

Legislation alone does not create women's equality. The transition of European law into national legislation, and the implementation of this new legislation at the domestic level is crucial to women's ability to exercise the rights granted through the European Union. The European Court of Justice plays a key role in this interpretation and monitoring of gender policy. Through the Court, civil society actors have been able to create their own "windows of opportunities" to influence policy making. Most authors view the ECJ as a progressive player in European gender policy (see, for example Cichowski 2001; Mazey and Richardson 1996). Through its rulings, the ECJ has played an important role in broadening the interpretation of women's rights within the European context. This has contributed to the construction of a "supranational space" where women can challenge the member states to realize their European rights. The Court has therefore contributed to the construction and interpretation of a set of European rules which governs gender policy.

As multi-level governance approaches maintain, there are a variety of different actors involved in the formation of European gender policy. These actors come from the national, sub-national and European policy arenas and interact with both the national and European institutions. Each of the actors brings a particular set of preferences on gender

policy to the European stage. Through interactions, negotiations, bargaining and occasionally conflict, a single institutional culture may prevail.

The European Gender Regime

As the discussion above has shown, European gender directives primarily have focused on women in the labour market. Nonetheless, concerted action by the Commission and Parliament occasionally has resulted in a broadening of the scope of European equality policy. Soft laws have been particularly important in this regard. Action programmes and similar initiatives have sought to combat violence against women, encouraged the increase in publicly funded childcare and addressed the image of women and men in advertising and the media. Many of these non-binding recommendations and resolutions go beyond labour market equality to address women's position in the so-called "private sphere". Gender mainstreaming and reconciliation policies, including parental leave have attempted to overcome the artificial divide between public and private spheres. Most recently, European gender initiatives have undergone a shift from women's policy to gender policy in which they have altered their target from women to both women and men. This marks a fundamentally new and potentially transformative step in the regulation of gender relations in which the Union seeks to encourage both women's labour market participation and men's caregiving.

There is no European gender regime which, like a domestic regime reflects and reinforces state policies and social norms nor is there a common understanding of gender

relations across the member states. There is, however, an emergent “institutional gender regime”, or an institutional culture that constructs and reinforces a particular set of norms through policy initiatives. The institutional culture in the European Union has traditionally embraced women's labour market participation and, more recently men's caregiving. Understood in the terminology of a domestic regime, this implies a commitment, at the very least, to a dual earner model with tendencies as a result of gender mainstreaming and initiatives targeted at men, towards a dual breadwinner/dual caregiver or equality model (see, for example Pfau-Effinger 1999). Certainly, the reality of European gender policy is constrained by a number of factors as institutionalized norms are frequently ahead of the institutional practice (Shaw 2002). Nonetheless, the underlying premises of the European gender policies are, on the whole, progressive and try to encourage equality between partners in both labour market and household.

In contrast, the (West) German gender policies have consciously focused on a strategy of equal but different in which the woman's position in the household was elevated to a position equal to that of the man's labour market participation. This has contributed to a prioritization of women's special rights based on their position as dependent wives and mothers. More recent initiatives have indicated a shift in discourse towards increased gender equality and even men's participation in caregiving. Many of these shifts have been partially encouraged through European initiatives.

Clearly there is not a “good fit” between the German and the European gender policies and institutions. Risse and Börzel's observations on policy transfer between

levels of governance suggest that in the absence of policy fit, the European Union is likely to exert adaptational pressures on the German domestic institutions. At the same time however, the strong cognitive misfit between domestic and European actors may result in stubborn efforts to resist the spirit, if not the letter, of the law.

Notes to Chapter Two

²² Although Caporaso, Risse and Cowles (2001) claim to focus on institutional change, the volume largely addresses policy change, perhaps indicating the difficulties in separating these two.

²³ This article is numbered 141 under the 1997 Amsterdam Treaty. At this time, the article was also altered to better include the principle of work of equal value. Article 141 reads: "Each Member State shall ensure that the principle of equal pay for male and female works for equal work and work of equal value is applied." In addition, the Treaty of Amsterdam addresses equal opportunities and equality of the sexes in Articles 2, 3, 13 and 137.

²⁴ The Defrenne cases involved a female employee of Sabena airlines, Gabrielle Defrenne and her challenges to the Belgian government and Sabena Airlines to give her remuneration equal to her male colleagues. These cases are discussed in greater detail in chapter three.

²⁵ Formerly referred to as DG V.

²⁶ In 1982 this Committee became the European Parliament Standing Committee of Women's Rights. It is interesting to note that not all of the female Parliamentarians were in favour of the creation of such a committee. Many felt that the creation of a permanent committee would institutionalise women's rights and deter from the urgency of women's rights issues. Many of these women felt that an Ad Hoc Committee would be more flexible and better able to project the importance of women's rights.

²⁷ Formerly called the Council of Ministers of the European Communities.

Chapter Three

Equal Pay and the Gendered Pay Gap

Equal pay was the first equality issue to be addressed by the European institutions and has been entrenched in European legislation, in one form or another since the 1950s. In principle at least, governments, trade unions and employers have accepted that female employees are entitled to the same pay as their male counterparts. Reaching this awareness and turning the principle into a reality has been a difficult struggle involving a wide variety of players at domestic and European policy levels. European equal pay initiatives have evolved over three decades from a narrow and largely ineffective treaty commitment to equal pay for equal work, to a more encompassing, yet relatively weak, directive addressing the concept of work of equal value. More recently, the European Union has begun to turn its attention to addressing the remaining pay gap through mainstreaming techniques. In general, the European initiatives reaffirm the commitment of the European institutions to achieve women's equality through labour market participation and financial autonomy – an approach that stands in marked contrast to that of the German state. Although, in principle, the German government expressed a commitment towards equal pay for equal work in the 1950s, it has used the contradiction between equal pay and an individual's constitutional right to free contractual negotiations as a means of avoiding concrete action. As late as the 1980s, women routinely and legally received lower remuneration than men carrying out the same job. The state's lack of commitment to equal pay has reinforced women's primary role as caregiver rather than

labour market participant.

In the absence of a common German-European approach to equal pay, Europeanization theory would expect the German system and structures of gender relations to undergo adaptational changes as a result of pressure exerted by the more liberal European institutions. Domestic actors, hurt by national provisions, would be bolstered by the European frame and thereby empowered to further challenge the assumptions of the state and pursue their own policy preferences. As this chapter shows, this process has evolved slowly and incompletely.

This chapter traces equal pay legislation in Europe and Germany in order to highlight the degree to which endogenous and exogenous actors have begun to challenge the male breadwinner regime. It pays particular attention to the interaction among the proponents of the different frames at both the European and German levels. Following a brief discussion of the history of the principle of equal pay and its importance as a feminist issue, I outline the European negotiations and policy around this principle. Although early European initiatives barely reflected a feminist agenda, some of these early steps do show evidence of the emergence of a European commitment to a liberal frame of equality which seeks to encourage women's labour market participation. I then juxtapose this liberal European framework against the domestic debates in Germany. As we shall see, European legislation and domestic activity have gradually begun to alter the policy discourse around equal pay in Germany. Although the pay gap remains, gradual changes in policy discourse and increasing social acceptance of women's labour market

participation are evidence of a slow, gradual move away from the strong male breadwinner model.

Feminism and Equal Pay Policies

Equal pay legislation does not necessarily indicate state support for a feminist agenda. Since equal pay was first publicly addressed in Germany in the mid 1800s, a wide variety of organizations with diverse policy aims have advocated legislation to implement the principle. During the industrial revolution, the issue was taken on board by socialist feminists and the political left, establishing equal pay not only as a part of the feminist struggle but also as part of the class struggle (Hermann 1999; see also Hanna 1926). At the same time, other sectors of society supported equal pay as a mechanism for pushing women out of the labour market and protecting men's jobs from the challenge of a lower-paid female workforce (Gerhard 1990). Although contemporary political society tends to see equal pay as an essential part of the women's rights agenda, the framing of the issue can influence the extent to which this is realized. The importance of equal pay to women's equality, as well as the specificities of the German situation are addressed below.

The (under)valuation of women's labour market contribution is directly linked to a number of broader feminist issues, including autonomy and independence. A woman's independence describes her ability to exercise her own choices about employment, family and other aspects of daily life. Choices are, however, constrained by a number of factors,

including her access to personal financial resources. If the average female wage is insufficient to support a woman and her children, then it becomes increasingly difficult for her to exercise decisions which remove her from the norm of the male breadwinner family. This, of course, has implications for family structures and women's role within those structures. Low pay can have especially harsh implications for single and divorced women. Trapped in low-paid positions and reliant on a single income, these women and their families are especially vulnerable to the cycle of poverty. In order for her to break this cycle, a woman must receive wages that are sufficient for her to maintain an autonomous household (see also Orloff 1993).

The financial acknowledgement that women's work is equal to men's work also has strong symbolic implications. A commitment to the principle of equal pay can have the discursive power of constructing women's labour market participation as "normal". This, in turn has repercussions for state assumptions about the organization of the family, the division of labour in the household and the structure of welfare and social policies.

A number of policy initiatives have contributed to the revaluation of women's work in recent years. The gap between male and female wages in Germany has decreased over the past several decades, although it remains the largest in the EU-15 (Di Pasquale 2002). According to one source, women working in the industrial sector in 1964 earned 67% of the average male wage. By 1974, this had risen to 70% (Hörburger and Rath-Hörburger n.d.). The most recent statistics (2003) from the *Statistisches Bundesamt* suggest that women currently earn, on average, 74% of the male wage²⁸. In eastern

Germany the gender pay gap has traditionally been much less extreme. According to one government report, women in eastern Germany earned up to 94% of the average male wage in 1997 (Di Pasquale 2002)²⁹. The stronger foundations for equal pay laid in eastern Germany during the Socialist era have continued to exist in the post-reunification era. Under Socialism, the East German government encouraged women's equality as sameness and entrenched the necessary principles in the constitution at the founding of the East German state. Thus, European legislation to combat the financial discrimination against women in the labour market, has had little impact on eastern German women. Nonetheless, the eastern German labour market remains highly segregated. The segregation of the labour market, as I address below, contributes to an overall lower paid female workforce.

The gender wage gap is commonly used to describe the relative position of men and women in the labour market. It is, however only a crude measure of gender pay equality (Rubery, Smith and Fagan 1999). Other statistics, such as the percentage of women in low-paid positions can offer more insight into the reality of women's remuneration. According to one study on the low wage sector in western Germany, 70% of employees receiving "poverty wages"³⁰ in 1997 were women (Dribbusch 2004). Rubery et al. (1999) suggest that in 1998, the lowest wage category comprised three times as many women as men. Like the wage gap, the concentration of women in low paid jobs has definite implications for financial independence and autonomy. A number of other factors such as the amount of part-time work carried out by women; the gender

segregation of the labour market; and the share of men and women in temporary jobs must also be taken into consideration in understanding the wage gap between men and women.

According to recent studies commissioned by the European Parliament, approximately 13% of the wage differential can be “explained away” through various structural differences including such factors as average age, training, occupation and part-time or full-time status (European Parliament 2001). The remaining gap cannot, however be explained through structural differences but must be understood as indirect discrimination based on gender. Taken individually, issues such as women's part-time labour and the segregation of the labour market are largely outside the scope of this thesis. They are, however, addressed indirectly through an analysis of the underlying policy strategies and premises underpinning equal pay initiatives. The framing of both problem and policy solution, including the extent to which indirect discrimination is addressed, is essential in understanding the degree to which equal pay policies are related to broader feminist goals (for more see Bacchi 1999).

At the European level, three different policy frames – equal pay for equal work; equal pay for work of equal value; and affirmative action aimed at addressing the pay gap – have been invoked to address gender pay differentials. The initial policy of equal pay for equal work suffered from several practical limitations that restrict its ability to promote women's equality in the workplace (for example, Lewis 1988). Equal pay for equal work provided for equal pay only in those cases where men and women work the

same jobs side-by-side. It relied on the concept of the “male comparator” against which woman's work was measured. This had the effect of reinforcing the masculine standard as the norm and measuring woman against this norm. It moreover suffered from the practical limitation that men and women rarely execute the exact same job, thus limiting its applicability to very few situations. As a result of horizontal and vertical segregation of the labour market, women are typically concentrated in lower paid clerical and service sector jobs, while men dominate in higher paid manufacturing sectors. These inequalities cannot be adequately addressed through the regulation of equal pay for equal work.

The second policy approach, equal pay for work of equal value, addresses the different situations of men and women on the labour market. This approach to pay equity removes the need for a male comparator in order to assess women's right to equal pay by valuing the skills and demands required for a particular job, rather than the job itself. Thus, the skills and training required for a hairdresser (typically female) may be favourably compared to those required by a car mechanic (typically male). In practice job evaluation schemes have led to an overvaluation of “masculine” skills and an undervaluation of “feminine” skills (see for example von Prondzynski 1987). This was particularly pronounced in 1950s and 1960s in Germany where employers circumvented the existing equal pay legislation by consolidating female dominated positions into “*Leichtlohngruppen*”³¹. Categorizing “women's work” into lower job categories reinforced horizontal job segregation and perpetuated the myth that women's salaries were only a “top-up” to the wages of the primary male breadwinner. Thus this form of

equal pay legislation actually partially reinforced the male breadwinner model (see also Mazey 1988).

It has only been recently that the European Union and its member states have begun to address the underlying causes of the gender pay gap. In particular, soft legislation such as action programmes and non-binding recommendations have addressed for example, disadvantages resulting from age, education, career breaks, segregation of the labour market, and the influence of family factors on women's choices. Recent efforts to implement equal pay have approached the issue by constructing non-gendered pay scales, using positive action initiatives to reduce the segregation of the labour market and increase women's education qualifications. In addition, mainstreaming approaches to address underlying issues such as women's prevalence in part-time or flexible employment have become far more common. As the subsequent section illustrates, each of these three models – equal pay for equal work, equal pay for work of equal value and mainstreaming techniques – have, to different degrees, played a role in the German and European regulation of equal pay. It is only through a gender aware approach that the feminist goals of equality, independence and autonomy can be realized.

European Debates, Negotiations and Legislation – From 119 to the Equal Pay Directive

Article 119 of the Treaty of Rome (1957) states that “[e]ach member state shall during the first stage ensure and subsequently maintain the application of the principle that men and women should receive equal pay for equal work.” This was a minimalist position

developed as a compromise among member states with very diverse social agendas. Limited to equal pay for equal work, Article 119 was hardly new or radically worded, yet it eventually provided the groundwork for the future development of sex equality policy at the European level (for example Gardiner 1999; Hoskyns 1996; Haller-Block 1996).

It is important to understand Article 119 within the broad context of the post WWII international system and the budding project of European integration (see also Hoskyns 1996). By 1957, the provision of equal pay for men and women had already been recognized as an important international issue, having been accepted as one of a wide span of rights incorporated into the UN Declaration of Universal Human Rights. Equal pay for equal work was furthermore entrenched in the Constitution of the International Labour Organization (ILO) and later expanded to address work of equal value through ILO Convention 100. This move from equal work to work of equal value involved a conscious shift in policy approach to address what had since been identified as structural inequalities contributing to women's wage discrimination (Bacchi 1999). This recognition makes Convention 100 a more progressive form of legislation than the European provisions adopted six years later.

Four of the (future) member states had ratified Convention 100 prior to the negotiations establishing the Treaty of Rome³². Of these four, only France had implemented concrete measures on equal pay at the national level. This, according to most analysts explains France's desire to see equal pay regulated by the new European Community. The French government acted out of economic self-interest and a fear that

different levels of social regulation could distort competition in the Community (Gardiner 1999; Quintin 1988). Any potential market distortion needed to be regulated through treaty provisions harmonizing various aspects of social regulations. A lower paid female workforce in some countries would amount to a competitive advantage over countries that required employers to pay women and men equal wages. While there is certainly a good deal of truth to this economic explanation, it prioritizes economic factors at the expense of social and political explanations. A unique set of domestic political factors and a framing of women's role in society as both workers and mothers was also central to France's commitment to social policy harmonization and equal pay regulation.

The French government responded to women's increased labour market activity during industrialization differently from many other European states. Unlike the U.K. or Germany, the French government and labour unions had not historically discouraged women's labour market participation. Already in the early 1900s, the government largely accepted women's employment "as a fact of life and selected policy from a range of alternatives delineated by that given" (Jenson 1986, 19). Post-war policies consequently addressed the importance of women's labour market contribution and sought to encourage motherhood in conjunction with paid employment. Several acts were implemented in the 1940s and early 1950s which, in theory, granted women widespread equality with men. Although the principle of equality did not, in reality, go much beyond regulating a common minimum wage and single pay scale for all workers, these provisions were likely sufficient to cause alarm among the employers and encourage the state to table

Article 119 as a condition of integration (Hoskyns 1996).

In contrast, the German state supported women's "special role" as nurturers and carers of the nation and encouraged women to stay at home with their families rather than enter the paid workforce. Labour unions used the concept of the "family wage" during collective bargaining in order to secure better conditions for their (male) members, and thereby reinforced the labour market and the private home as separate masculine and feminine spheres. The male breadwinner norm was furthermore reinforced by policy choices that consciously distanced the West German state from both Nazi Germany and socialist East Germany. Equal pay had a long history as a central component of the platform of the political left, and was incorporated into the constitution of the socialist East German state following the post WWII partition. These "socialist" principles could, to the West German state, lead only to the demise of the family and the end of the social fabric of the state. West German policy therefore consciously supported women's role as homemakers rather than labour market participants and remained wary of any policy which might "normalize" women's labour market participation.

With such different domestic situations, treaty provisions on equal pay could only take a middle ground between two sets of national preferences. Following extensive negotiations, Article 119 was reached as a "compromise solution". The compromise involved downgrading the original proposal for equal pay for work of equal value to simply equal pay for equal work³³. At the same time, it removed equal pay from the competition section of the treaty and inserted it into the social section. This helped to

satisfy the French preference for a strong social policy. With the reorganization of the provision, the strong wording that would have been usual in a competition provision, remained (see also ECJ 1971). Women later used the strengths of this provision to broaden its scope beyond what the framers could have ever imagined (McKeen 1999).

Even with equal pay entrenched in the Treaty of Rome, member states rarely lived up to this commitment during the first stage of economic integration. Full treaty compliance was necessary before the Community could proceed to the next level of integration, yet Commission attempts to address the member states' responsibility to implement Article 119 were frequently frustrated. In 1961, shortly before the scheduled begin of the second stage of integration, the Commission established an observation group, the "Article 119 Group" to evaluate the member states' commitment to equal pay and report on its findings. The 119 Group, comprising Commission officials and delegates from the member states with a the support of a network of experts to provide legal and statistical information, noted that none of the member states had fully implemented the principle of equal pay (Collins 1975; Hoskyns 1996).

The other European institutions were seemingly also concerned by the lackadaisical attitude with which the member states approached their commitment to equal pay. Following their own reports on the implementation of Article 119 in the mid 1960s, both the European Parliament and the European Economic and Social Council (EESC) pressed the member states to act on treaty commitments. Three women in particular actively fought for equal pay through the European institutions. Maria Weber

of the German Trade Union Council, Evelyne Sullerot a French sociologist, and Emilienne Brunfut, a Belgian trade unionist, used their positions in national and European institutions to encourage increased action towards the implementation of Article 119. Although there is evidence that the women's position was taken seriously by some of the Commissioners (see, for example interview references in Hoskyns 1996), very little concrete action was taken until the social and political environment shifted in the late 1960s.

In the 1960s, women's activism was on the rise throughout Europe with "second wave" feminism bringing about immense changes to the social context of women's equality. Two key events, the Herstal equal pay strike and the Defrenne court challenges, mark the first instances in which women directly used the European level to secure their rights nationally. The changes in the political environment helped to spawn a new framing and new understanding of the principle of equal pay in the European institutions.

The first of these events, the Herstal Equal Pay strike in 1966, involved approximately 3000 women employed at a Belgian munitions factory (Cichowski 2000). The women walked off the job to protest the undervaluation of their work in relation to their male colleagues. During their strike, the women carried placards calling for the application of Convention 100 and Article 119. They thereby directly challenged the Belgian government to honour its international commitments. The strike lasted nearly three months, ending only when the women's demand for equal pay had been met. National legislation, however, remained unchanged.

The Herstal women used international law as leverage against their own domestic government, thereby partially shifting the locus of political activity from the domestic to the international. Keck and Sikkink refer to this shifting of policy levels as the boomerang pattern (Keck and Sikkink 1998; see also Sift 2004). They suggest that when domestic channels of access are blocked, actors can bypass the national level and seek redress through international channels (see also Tarrow and Imig 2001). In this case, the Herstal women made only symbolic and indirect use of the European channels. The primary locus of activity remained the national, with women bringing international responsibilities into the national discourse. The second example of European-national interaction on gender issues, the case of Gabrielle Defrenne, relied much more heavily on a direct interaction between national and European policy levels. Here, the boomerang pattern is much more pronounced as actors directly engaged with the European institutions in order to change domestic legislation.

In the *Defrenne* cases, two Belgian lawyers challenged formalized pay differentials in Belgian collective agreements. Frustrated with the lack of political and legal action on Article 119, a Belgian lawyer, Elaine Vogel-Polsky, consciously set out to find a test case in which she could establish the applicability of Article 119 to Belgian law (Vogel-Polsky in Hoskyns 1996). Not surprisingly, the larger Unions showed no interest in invoking European legislation to override the collective agreements they had negotiated. Eventually Vogel-Polsky found her test case in the service sector, among the airline hostesses of Sabena Airlines. Although she did not wish to be directly involved in

the Court challenge, one employee, Gabrielle Defrenne, agreed to allow her name and case to be used. Over the next decade, three different *Defrenne* cases criss-crossed through the Belgian and European court systems, challenging several aspects of the airline's employment policies (ECJ Case 80/70; ECJ Case 43/75; ECJ Case 149/77).

The *Defrenne* lawyers argued that Sabena was in violation of Article 119 on several counts. First, a discriminatory pay scale, in place until 1966, paid women less than their male colleagues in the same position. Furthermore, female air hostesses were required to retire at the age of 40, some 15 years earlier than the male air stewards, a form of discrimination which in turn led to a disadvantage in severance payments and pension payments for women. After an initial hearing in the Belgian court, the case was referred to the European Court of Justice in 1971 to rule on the interpretation of pay and the scope of Article 119. While the first decision at the ECJ defined pay rather narrowly, there was seemingly an uneasy feeling about the decision among the European judges. When this “unfinished business” came before the Court again in 1976, the judges made a particularly forceful ruling that “[t]he principle that men and women should receive equal pay, ... laid down by Article 119, is one of the foundations of the Community” (ECJ Case 43/75). The Court thereby established the importance of Article 119 as a sound foundation for future European equality policy.

Timing was important in both *Herstal* and *Defrenne*. Women's political mobilization occurred at a time when political interest in equal pay had been waning in the member states. Although the Commission had lost interest in pursuing compliance

with the equal pay legislation, women's actions returned the project to the agenda and pushed the Commission to take steps to increase its legitimacy. In her extensive study on the implementation of Article 119, Hoskyns argues "The case [ECJ 80/70] provided a jolt for the Commission, which appeared to be in danger of being outflanked in both legal reasoning and policy development by autonomous and 'unpredictable' women's initiatives. Paradoxically, this opened the way for women within the Commission's own bureaucracy to push for a stronger policy" (1996, 74). This is the first indication of an evolving "gender consciousness" within the Commission.

At the same time, international circumstances also helped to re-spark the Commission's interest in equal pay. The U.N had declared 1975 International Women's Year and urged members to submit reports on efforts to combat discrimination in their countries. The European Community was anxious to demonstrate its commitment to women's rights at the international level (Geyer 2000). In November of 1973, the Commission launched a draft directive "on the approximation of the laws of the Member States concerning the application of the principle of equal pay for men and women" (Commission 1973). The legislative wheels were in motion.

The Equal Pay Directive (EPD) was devised to clarify and strengthen Article 119 by reiterating the original measures in a new legal act (Commission 1973). In a meeting with the Parliamentary Committee on Social Affairs and Employment, one Commission official clearly outlined the underlying reasoning in presenting the draft. He argued that "...proposing a directive of this kind... was intended exclusively for the solution of one

aspect of the problem, namely the question of wage differentials, and was not designed to tackle the more general situation of employed women” (European Parliament 1974). He indicated that the Commission proposed to address these indirect structural barriers through a Social Action Programme to be submitted later in 1974. This attempt to compartmentalize various issues into single and self-contained units was quickly abandoned as various actors outside the Commission demonstrated the interrelatedness of these problems. The Commission thus initiated an approach to equality which, while addressing specific problems, began to link these to other indirect forms of discrimination. Although, taken alone, the directive is a relatively weak document, when considered as a part of a greater project, the equal pay directive signals the emergence of a broader liberal feminist agenda in the Commission.

The original Commission proposal of November 1973 was followed by a revised proposal in July 1974. This new draft contained several changes drawn largely from recommendations made by the Parliament and the EESC. Even in the revised draft, the Commission refrained from direct references to “equal pay for work of equal value”. The concept was only implied: “[t]he principle of equal pay involves equal treatment for men and women with regard to all aspects and conditions of remuneration, *including assessment criteria* without discrimination on the grounds of sex” (Council 1974, italics mine). The reference to assessment criteria is particularly important. It demonstrates an awareness of the undervaluation of women's skills as a source of discrimination and links low pay to biased wage scales and the segregation of the labour market.

The expression “equal pay for work of equal value” was proposed for inclusion in the directive shortly after the revised draft was presented to Council's Working Party on Equal Pay (Council 1974a). During this meeting, the Commission's legal representative stressed that “equal work” should be interpreted in the wide sense understood by Convention 100 and that, to ensure this understanding, the principle of “equal pay for work of equal value” ought to be inserted directly into the text (see also Council 1974b). Although the Commission still argued that the aim of the directive was only to implement Article 119, it was beginning to do so within a frame that would allow for much broader interpretation of the principle. The secrecy of Council meetings and minutes makes it difficult to ascertain the precise origins of this policy shift. Nevertheless, there is substantial evidence that the impetus was generated through contact with other European institutions, external groups and individuals.

The Commission had invited the Parliament and the European Economic and Social Committee (EESC) to submit non-binding opinions on the initial draft. Although the Commission was in no way bound by these opinions, many of the provisions included in the revised directive can be traced back to these two bodies. The EESC, at the time involved in a wider debate on women in the labour market, showed particular concern for the implementation of equal pay through changes in the valuation of work. Insights from the broader debate appear to have directly influenced the EESC position on the equal pay directive. The EESC's report on the application of Article 119, written by Maria Weber of the German Trade Union Association, was exceptionally strongly worded and clearly

indicates a feminist understanding of the interrelatedness of the issues and the influence of the family on women's labour market participation and remuneration. Several of its core ideas were included in the EESC's formal opinion, and the report appears to have influenced the nature of subsequent European equality directives (see also Hoskyns 1996). Most importantly, the EESC stressed that the principle of equal pay would have no practical applicability if it remained limited to identical work. The EESC accordingly suggested a broader and more open definition of equal pay that was largely adopted by the Commission in its revised proposal (EESC 1974).

Women's discrimination in employment was also an important topic of the day among the Members of European Parliament (MEPs). The Parliamentary Committee charged with reviewing the directive was especially concerned about the prevalence of wage scales that disadvantaged women through an undervaluation of their work. Accordingly, the Committee's recommendations focused on the abolition of gender specific wage categories, a recommendation that was incorporated into Parliament's final text. This was, however, the only really progressive change included in the Parliament's opinion. While the debates show that some of the female MEPs were anxious to address wider sources of structural inequalities such as family responsibilities and child care, the Parliament as a whole was not willing to work this into its final report. There was also no attempt to broaden the formal scope of the directive from equal pay for equal work to equal pay for work of equal value. Like the later Commission draft, Parliament's position on work of equal value was only implied through the references to gendered wage scales.

Overall, Parliament demonstrated an awareness of many of the broader issues but was unwilling to incorporate these progressive concepts in its final opinion (European Parliament 1974a).

The debates in the Council of Ministers did not mirror the progressive discussions in the EESC or even the Parliament. When the Commission submitted its revised proposal to the Council in July 1974, several member states immediately expressed reservations about equal pay for work of equal value. Denmark, the United Kingdom and Germany registered strong concerns about the implications of this wording on national legislation and, in particular the individual's right to negotiate contracts without interference from the state. Reaching a compromise position was a difficult process as these three member states rejected a number of possible amendments over the subsequent months (Council 1974a).

For the German delegation, two issues were especially troubling: the reference to work of equal value; and the possible infringement of contractual freedom for individuals and the social partners. Of these, the issue of equal value appears to have been the most important. The Federal Republic rejected numerous proposals that attempted to circumvent the terminology “equal value” while maintaining the principle. Now unwilling to return to the limited principle of equal pay for equal work, the Commission favoured the wording it presented in the revised draft in which equal pay was defined to “includ[e] assessment criteria”. This, the Commission argued, required no more commitment than the member states had already made under the ILO Convention 100.

The German delegation, however, was only willing to accept the general formulation defining equal pay if the reference to assessment criteria was removed (Council 1974c). The primary difference between these two versions is both political and legal. Because the Commission's proposal explicitly includes indirect discrimination resulting from wage scale criteria, it would leave the member states little room to circumvent the legislation once passed. The German proposal does not exclude wage scales from the equal pay provisions, yet consciously avoids their inclusion. This would leave the member states more room for individual interpretation in which responsibility for the creation of wage scales could be left to the social partners. It would not fully exclude assessment criteria as a potential source of indirect discrimination but would likely require a court challenge by the labour unions or women's organizations to decide whether wage scales were, in fact, part of "all aspects and conditions of remuneration"³⁴.

In a similar vein, the wording "[m]ember states shall apply the principle of equal pay to men and women who under comparable working conditions occupy posts or functions requiring an equivalent level of qualifications, effort, aptitude or responsibility" (Council 1974a) was put forth. This too was unacceptable to the German delegation. The representatives in the working group stressed that, in their opinion, this type of provision would in fact, slow down the implementation of equal pay as, "[t]he criterion of equivalent level of qualification [in determining equal value] could in fact be contrary to the objective pursued, because the number of employed women who hold qualifications is quite small" (Council 1974a). The German government suggests that, because women

are less qualified than men, a pay scale that prioritises formal qualification, may in fact serve to hold women at the lowest end of the pay scales. However, if the market is allowed to determine value, the pay will naturally adjust to fit the various different jobs and qualifications. By this logic, the reason that the pay discrepancies exist lies with women and their lack of qualification. It is, however, the patriarchal system that has placed a higher value on “learned” skills rather than “natural” abilities. The German delegate's arguments, though couched in a concern for women's labour market position, in fact reinforces masculine stereotypes in which “women's work” is by definition unskilled.

The second major concern of the delegation was related to this notion of evaluating qualifications and jobs. The West German government strongly opposed measures that might compromise the autonomy of the social partners. This included, among others, the provision elaborated under Article 6 of the draft directive calling for the supervision of the principle of equal pay (Council 1974a; Council 1974b). Germany argued that any formalized supervision by the government and/or Commission would infringe on the rights of the social partners. Its position remained unchanged even when the Commission demonstrated that existing German legislation already allowed the government to delegate supervisory capacities in terms of workplace regulation to Employees Councils. The German government was similarly unmoved by the Commission's reference to an earlier Community Recommendation in which the Commission expressly invited each member state to “organize the supervision of the

measures which they take in implementing Article 119 of the Treaty” (Council 1974b).

The delegation contested the Commission’s principle that “a right was only a right when it was supported by supervision and sanctions”. The German government suggested that this role was best carried out by the social partners and therefore need not be included in the directive. They argued:

... the trade unions themselves ensured that the labour laws were applied and they strongly opposed any interference by the public authorities in this field. The German delegation was not opposed to this supervision being carried out by undertakings but it was firmly opposed to the fact that the Commission intended to reach this objective by means of a power conferred on the governments. (Council 1974a see also, Council 1974d and 1974e)

The government thus used the trade unions as a means of avoiding concrete action. In so doing, the state continued to frame equal pay as labour market inequality rather than as a social or political issue. As a labour market problem, the government could justify leaving the issue of regulation to the unions and the market. As Bacchi has observed, “legislation that refuses to problematize ‘market rates’ assumes that these are either fair or unavoidable” (1999). This commitment to the market value of labour in fact reinforces the male breadwinner system by failing to problematize the differential relationships between the market and different individuals.

These two issues remained problematic throughout the summer and fall (Council 1974d; Council 1974e) with the German position becoming more and more entrenched during subsequent working group meetings. In early December, however, the German government surprisingly accepted compromise positions in all these areas, including references to work of equal value. The summaries of Council meetings available to the

public make no record of whence this policy shift came. According to Hoskyns' research, it was secured by a female member of the German delegation, representing the *Bundesministerium für Jugend, Familie und Gesundheit* (Federal Ministry for Youth, Family, and Health). She recalled the difficulty in convincing officials from the *Arbeitsministerium* (Ministry of Labour) about the importance of accepting the term equal value rather than simply equal work. "In the end the officials gave in: 'they were surprised', she says, 'by a young thing feeling so strongly'" (quoted in Hoskyns 1996).

The final version of the European legislation is the result of the interaction of various actors, from domestic and European policy arenas, converging on the European level. Labour unions, Council negotiations and the Commission all offered openings for women to shape the legislation in a manner which would better address the underlying sources of women's structural inequalities. Given the relative strength of the Council over the other European institutions at that time, it is rather remarkable that the final legislation was relatively progressive. It is especially remarkable since the legislation necessitated changes to the national laws in every member state (Commission 1979; see also *Deutscher Frauenrat* 1979). Of course, many of the member states, including Germany continued to deny that the national legislation required any change at all. This led to serious problems in terms of both "fit" and implementation.

Domestic Debates, Negotiation and Legislation

In West Germany, the presence of European legislation was a necessary, but not a sufficient condition to revise the laws regulating male and female remuneration. The

German government required six years to pass domestic legislation incorporating the European standards of equal pay. Even these late-coming provisions were unsatisfactory to sectors of the women's movement, many government feminists and some labour union activists. While the West German government maintained that domestic law already conformed to the new European regulations and consequently did not require revision or clarification, as the following section illustrates, German legal provisions were not at all sufficient to protect women from systematic wage discrimination. The debate generated domestically – a direct result of the passage of the EPD and the responses of the German state to this directive – facilitated women's political mobilization, brought wage discrimination onto the political agenda and increased domestic and European pressure for change. In 1980 the German government passed legislation to incorporate most of the requirements of the European directive which, to the dismay of feminists in a number of sectors, did not share the European institutions' increasing support for a broad approach to women's equality. A general lack of political will and wide-spread disagreement on the best course of action prevented the adoption of a feminist framing of equal pay.

The basis of the West German government's argument against further legislation rested in the "equality provisions" of Article 3 of the *Basic Law* (1949). This section of the Basic Law reads:

- 1) All people are equal in the eyes of the law.
- 2) Men and women have the same rights.
- 3) No one may be discriminated against or receive special treatment based on his³⁵ sex, his homeland or place of origin, his beliefs, his religion or political affiliations.

The government of the day, a Social Democrat-Liberal (SPD-FDP) coalition,³⁶ maintained that this provision prohibited all forms of discrimination, including wage discrimination. The legal basis of this claim however is contentious given the lack of legal clarity that has surrounded the equality provision since the beginning of the modern German federation.

The Parliamentary Council (*Parlamentarische Rat*) charged with drafting a Constitution for the new West German Federation in 1949 was divided on the meaning and scope of the equality provision. During the third reading of the draft Constitution, the Chair of the Human Rights Committee introduced amendments that would have fundamentally altered the meaning of Article 3, Paragraph 2. These amendments reformulated the paragraph more loosely to read: “the law must treat that which is equal, equally; that which is different may be treated according to its nature; human rights must not be violated” (quoted in Selbert 1981). Although these amendments were eventually rejected³⁷, the attempt to further qualify and limit the equality between men and women is telling. Article 3, 2 is a reflection of a broader conflict between those who viewed equality as sameness and those who sought equality within the scope of “natural” difference. This conflict coloured debates among various different groups and organizations over the subsequent decades.

In 1955 the Federal Labour Court (BAG –*Bundesarbeitsgericht*) ruled that the equality provisions of the *Basic Law* were binding on signatories to collective agreements, thus setting an important legal precedent and defining Article 3, 2 in a broad

sense. The BAG ruled that, “a) the principle of equality and the ban on discrimination [in the *Basic Law*] also includes the principle of equal pay for men and women in equal work. b) The principle of equal pay, as a human right, is binding not only on the powers of the state, but also on the parties to collective agreements” (Bundesarbeitsgericht 1955). This liberal interpretation of the equality provisions corresponds with the original intentions of Elisabeth Selbert, one of the Parliamentarians initially responsible for the inclusion of Article 3, 2 (Selbert 1981). The BAG reasoned that employment relations reflect power differentials similar to those found in the state-citizen relationships. Consequently, certain provisions of the *Basic Law* must be extended to include the relationship between employer and employee. This opinion was, however held by only a minority of legal scholars³⁸. Others, frustrated that “[t]he Federal Labour Court just doesn’t learn!” feared that this interpretation would lead down a dangerous and slippery slope (Maunz and Dürig 1973).

Those who opposed the extension of the *Basic Law* to employment contracts supported a more traditional reading of the Constitution. These legal scholars argued that, like any constitution, the German *Basic Law* is intended to limit the powers of the state and to protect the citizen from potential abuses of its power. Thus, the equality of men and women outlined in Article 3 can only apply to contracts between the state and the citizen. It does not apply to contracts between individuals. Consequently, only individuals employed by the state could legally premise their right to equal pay on Article 3, 2.

Not surprisingly, women's organizations were keen to see Article 3 applied in the

manner advocated by Elisabeth Selbert and her female colleagues in the Parliamentary Council and reinforced by the BAG. In the early 1970s, German women, particularly those in the labour unions and the *Frauenrat*, mobilized around the provisions of the *Basic Law* to fight wage discrimination. The DFR hosted a conference on wage differentials in November 1971 giving the issue of equal pay a more prominent role on the organization's agenda. Maria Weber, then a member of the national executive of the DGB, used this platform to illustrate that the light-wage groups common in collective agreements undervalued women's paid labour. She based the right to equal remuneration on Article 3, 2 (Weber 1972). Although the conference generated increased awareness of the issue of equal pay³⁹, it did not remain high on the priority list of the DFR for long. Equal pay as an issue was quickly overshadowed by other fights, most notably the campaign to decriminalize abortion. The wider women's movement as well as the unions and the *Frauenrat* fell surprisingly silent on the issue of equal pay until the latter half of the 1970s.

Throughout the 1970s, the SPD-FDP coalition maintained that the *Basic Law* guaranteed equal pay for men and women. The coalition stressed that the government could not pass further legislation to regulate wages or place guidelines on the content of collective agreements because this would compromise the rights of the unions and individuals to negotiate contracts without state interference. The government, caught between these two basic rights, choose the path that required the least political activity, and thereby passed responsibility for equal pay to the labour unions.

The German government had advanced similar arguments during the European negotiation of the EPD in order to limit the scope of directive. It reiterated this position in a report on the implementation of the EPD submitted to the European Commission in 1978 (Commission 1979). The government absolved itself of responsibility for equality by placing the onus for implementation and regulation with the social partners. It furthermore refused to examine indirect structural disadvantages, including child care and women's reliance on part-time work, as possible contributors to overall pay differentials. Given this reluctance, the task facing women has been to replace the narrow understanding of equal pay and the government's explanatory frame with one which addressed the undervaluation of women's work. In other words, it required a shift, on the part of the state from equal pay for equal work to equal pay for work of equal value.

The liberal interpretation of Article 3, 2 opened an important window of opportunity for women in their fight to realize equal pay. These opportunities were however, restricted by women's economic and social realities. Most could not risk their job by bringing a court challenge against their employer. Even women supported by a labour union were not protected from dismissal, making a court challenge, regardless of the outcome, a financial risk. Nonetheless, several women did use the national Courts and other structures of the German state to challenge the lack of regulation on equal pay. This contributed to the broader European activities on equal pay and women's rights.

Annemarie Renger (SPD), President of the Lower House (*Bundestagspräsidentin*) in the Schmidt government recognized the difficulties that women faced in bringing a law

suit against their employer as a primary barrier to realizing equal pay (see also Renger 1993). Renger, a long-time government feminist, took up the cause of equal pay as central to the women's rights discourse. She used her position as President of the Lower House to pursue a line more feminist than the official SPD platform. In this manner, she acted as an important catalyst to prompt actors in government, parties, labour unions and civil society to act on the principle of equal pay. Renger believed that women's equality could be achieved through institutional, legal and legislative channels and challenged women to use these channels to fight for their rights. Once a test case passed through the courts, the institutional channels would, according to Renger become more accessible for women and clear the way for subsequent challenges. She offered the financial, legal and moral support essential to a successful court challenge, hoping thereby to overcome some of the barriers that discouraged women from pursuing their right to equal pay.

In the first few months following her appeal, Annemarie Renger received over 200 responses; yet, despite the promise of financial support, not one woman was willing to formally bring a case against her employer (Jahn 1976). Most of the women were afraid of the social and financial repercussions of a court challenge. As one woman wrote, “[n]o one will take you up on your request... Who wants to risk being let go – they would certainly find a reason.” Another lamented, “[i]f you, Madame President, really do have the chance to bring about equal pay for me, what sort of working climate will result?” (Jahn 1976).

One explanation of women's unwillingness to come forward, despite government

and in many cases union support, is that they had internalized the male breadwinner system in Germany. Thus, a newspaper article, written several years later, reflected on the deeply ingrained stereotypes that continued to influence women's lack of action.

The distressing thing is that women have, until now, accepted discrimination with very little objection. This may be because they fear the consequences of their protests, or it may be because women too, are caught up in the century-old perception of men's and women's roles and have not yet learned to free themselves from these. Even women have internalized the prejudices that suggest they miss more work days due to illness than their male colleagues; that they are more likely to be a burden on the business because of pregnancy; that they cannot handle stress as well as their male colleagues. Women are moreover lacking necessary emotional and moral support (Brandes 1982).

Women were caught in the patriarchy of the social and legal structures. Those who did challenge the existing system found that the institutions themselves frequently worked against women's equality.

The value of men's work had been reinforced by early court cases that defined equal pay for equal work along very narrow lines or accepted the practice of paying men special bonuses that were not available to women. By accepting that "men do men's work and women do women's work" as a valid legal argument, the German courts reinforced preconceived notions about the value of women's paid labour (see also Christ 1978).

Women were confronted with a social devaluation of their paid labour and, at the same time, a high social valuation of their unpaid contribution to society. While many continued to view a woman's income as "supplementary" and therefore less important, the "special value" of a woman's contribution to the family and home was often reiterated. As late as 1981, one Christian Democrat publication reaffirmed that "[a]

woman's contribution to the family is worth much more than her paid labour could ever be" (CDA 1981).

For their part, men had little reason to support women's equality in the labour market. Although, when questioned, most men were unable to explain why their labour was more valuable than women's, most accepted this fact as central to the "proper" ordering of society – "we men have to earn more. Women always earn less" (Andersen 1980). Even when the labour unions and *Betriebsrat* (Employee's Council) encouraged solidarity with women in their struggle for equality, men were generally quite slow to endorse equal pay legislation. One example from a printing factory in 1972 demonstrates the social and discursive importance of men's status as "primary earners". With the support of the *Betriebsrat*, wage categories at the printing factory were redesigned through more gender neutral evaluation schemes. "The women were, of course, satisfied", recalled one of the directors of the employee's council. 'But the men, who had in no way been placed in lower wage categories, broke out into massive protests. That was the end of the story. Bonuses, set outside the collective agreements were used to re-establish a wage differential' " (quoted in Rimmel 1974).

Women consequently faced a series of barriers which reinforced the male breadwinner system and the corresponding undervaluation of women's labour market participation. Yet, despite financial, social and political pressures, not all women succumbed to these stereotypes. The period between the mid 1970s and early 1980s shows dramatic shifts in women's attitudes towards female labour market participation

and, more importantly the value of that participation. The *Frauenrat* and unions had only fleetingly addressed the question of women's pay in the early 1970s. By 1977, in the wake of Renger's challenge to women to use the institutional channels, the discussion was taken up with renewed interest.

Changes in social attitudes, particularly among women, were quite apparent during second wave feminism. According to one study, in 1961, 57% of the women surveyed (housewives aged between 16 and 65) were content in their role as "just a housewife". By 1973, this number had dropped dramatically to 29%. In contrast, the number of women who were, or would prefer to be formally employed had risen from 22% in 1961 to over 50% in 1973 (*Deutscher Frauenrat* 1975) These changes in attitude and preferences, were however not reflected in dramatic changes in women's labour market participation. In fact, as a percentage of the female population aged 15-64, women's participation rates barely changed from 49% in 1960 to 50% in 1973 (Pott-Buter 1993). Nonetheless, an increasing number of women claimed to be dissatisfied with the circumstances of the male breadwinner/female homemaker system. The (partial) rejection of the assumptions of the dominant gender regime helped to lay the foundations of "counter" regime which gradually gained support from a wider population. Three pivotal events, bringing together government and civil society feminists, the European Commission and the domestic German policy structures, were key in shaping an environment conducive to increased legislation of women's equality.

In 1978, over two years after initiating the challenge to women to fight for pay

equity through the Courts, Annemarie Renger had a suitable test-case⁴⁰. It was, however, never heard before the Courts as the employer agreed to a last minute out of court settlement⁴¹. While this may have been a victory for one individual, the important precedent setting case remained elusive. Nonetheless, the highly public Einemann case bolstered women's confidence that they could fight for equal pay and win. A sudden increase in discrimination cases was brought before the courts.

Towards the late 1970s, the labour unions also adopted a more aggressive stance opposing wage discrimination. Until then, unions had been somewhat Janus-faced in their support of equal pay for men and women. On the one hand, the DGB has formally supported the principle of equal pay as a fundamental premise since 1959 (Hochgeschurz 1997). The DGB and its representatives had furthermore been openly critical of female-only light wage groups and similar forms of discrimination through pay scales. On the other hand, the labour unions were, at least partially, responsible for the negotiation of these same collective agreements. The union position changed in the late 1970s, with labour unions increasingly supporting equal pay claims, publicly speaking out in favour of equal pay and encouraging a re-organization of wage groups in collective agreements.

In 1979, 29 women from the Heinze Foto Labor⁴² (Heinze Film Development) brought the issue back into the media, drawing unprecedented levels of public support in their case for equal pay for equal work. At the Heinze development labs, female and male employees received the same base pay of DM 6.00 per hour – the lowest level on the pay scale. Women, however, were ineligible for bonus payments ranging from DM1.50 to

DM 2.00 per hour, received by the men on the night shift. Women, who staffed the day and evening shifts, received an average bonus of only DM 0.24 per hour⁴³. The legal council for the women, provided by their union local⁴⁴, argued that the difference in the wages was clearly sex-based since almost exclusively women received the lower bonus payments. The legal council for Heinze, in contrast, argued that each worker had exercised the right to freely negotiate contracts and had agreed to a particular bonus payment on an individual basis. That men received higher bonuses reflected their higher market value (Tageszeitung 1979). The Heinze case thus brought together the two primary frames of the equal pay discussion prevalent in Germany at the time. The outcome contributed to the future definition of the domestic policy frame. The varied priorities expressed in each of three levels of labour court thus take on increased importance as the policy structures themselves become reflective of the clash between a socially accepted and internalized male breadwinner system and increased demands from sectors of society rejecting the limitations of that system.

The “Heinze-Frauen”, as much of the German media dubbed the women, won their case before the labour court in Gelsenkirchen. The *Landesarbeitsgericht* (Industrial Court of Appeal), however rejected the reasoning of the labour court. Instead, the judge interpreted the concept of equal pay and sex-based pay discrimination very narrowly ruling that the pay differences were not based on sex as three men received similarly low bonuses (Frankfurter Rundschau 1979). Moreover, the judge argued that the principle of equal pay for equal work was only applicable in identical situations. Thus workers on the

nightshift could legally receive higher pay than those on the day shifts. Neither the Labour Court nor the Appeals Court made any reference to the European Directive on equal pay, even though this had been in place for several years. Although judges are required to apply European law when a contradiction between domestic and supranational law is apparent, a general lack of awareness of European law prevents most judges from drawing on these provisions until legislation is formally transposed into domestic law (for more see Rabe 1993). The final ruling by the Federal Labour Court in September 1981 reinforced the position that the right to freely negotiate contracts must not interfere with provisions for equality between the sexes⁴⁵. By this time, however, the government had already passed legislation clarifying the equality between men and women in the work place. The Federal Court clearly stated in its ruling that it had not reviewed the applicability of Article 119 to this case, as domestic legislation was sufficient (Bundesarbeitsgericht 1981).

Equal pay had been on the agenda of both German and European policy makers for several years. Although progress had been made in both policy spheres, the two policy paths remained largely separate. While events such as the Defrenne cases and the Herstal equal pay strike brought an early cross-over between Belgian legislation and the European principles, no similar pattern was evident in Germany. The European Commission had attempted to raise awareness of the applicability of European legislation and the opportunities available through the European institutions, yet these policy channels were largely ignored by domestic actors.

With the first direct elections to the European Parliament scheduled for 1979, the European Commission was anxious to boost Europe's image and legitimacy among the broader public. Part of its campaign to improve the links between domestic interest groups and social movements and the European institutions focused on a series of Commission-sponsored women's conferences in the member states (Seeland 1977). These aimed at increasing women's awareness of the European Community and its activities and spawning a shift in focus of civil society activities towards the European level. The Commission followed the national level projects with a European-wide women's conference linking the various national movements through a European hub. In the end, the German conference did little to establish a direct link between German women and the European institutions. The importance, however, of bringing together women from the different branches of the domestic movement should not be overlooked. The Berlin conference in 1977, for the first time, brought together women from the various branches of the women's movement as well as women represented in political parties, labour unions and other sectors of civil society such as the environmental movement and peace movement.

The conference was organized around a series of working groups and formal plenary and round table sessions. Most of the working groups only addressed the role of the European institutions in passing. When Europe was addressed it was usually to express the opinion that the European institutions could, at best, offer financial support for the women's rights cause. In the formal discussions, the women addressed the EC in a

little more depth, although a generally negative attitude coloured these discussion as well. The distrust was especially noticeable among the autonomous women's organisation who made their opinion of the European "*Männerbund*" (Men's Alliance) clear from the beginning (Seeland 1977).

It became clear that women who were not directly involved in the formal institutions tended to be sceptical of the value that government institutions had in the fight for women's equality. Frau Krämmeler, from the Berliner Frauenzentrum (Berlin Women's Centre) remarked:

But again I wish to repeat the question within the framework of the discussion concerning the viability of achieving women's rights through institutions and parliaments. Whatever can we expect from the machinery of a European Parliament, when, even at a national level the existing possibilities to abolish low wage groups ... are neither fully nor swiftly applied? (Erster Berliner Frauenkonferenz 1977, 84)

In contrast, women in the political parties naturally viewed the institutions and legislation as central to women's equality. Frau Matthäus (FDP) put forth a bold suggestion that German women ought to pursue a broad anti-discrimination law modelled after the British *Sex Discrimination Act* (1975). This idea, though largely overlooked at the conference in 1977, sparked the beginning of a new initiative to pass an anti-discrimination law which would not only address equal pay for work of equal value, but would also place women's equality within a broader social and political context.

During the next 18 months, the idea of creating an anti-discrimination law simmered in the women's caucuses of the political parties. The women in the FDP and SPD picked up the idea with substantial interest yet faced a long struggle in moving from

the idea to actual legislation (Hörburger and Rath-Hörburger n.d.). The first barrier facing women was in convincing their own political parties of the value of a broad-based anti-discrimination law. The FDP women faced a particularly difficult task here, as their party had voted against the EPD in order to appease its important allies in industry and corporations (Hörburger and Rath-Hörburger n.d.). The pressure that women were able to assert from inside the party structures was augmented by the actions of the *Humanistische Union*, a human rights organization that drafted and circulated a legislative proposal for a broad anti-discrimination law. The issue found its way into the wider feminist community (von Münch 1978; Blank, Schoske and Stolte 1981; Klein 1981).

The idea of creating equality through anti-discrimination legislation was controversial within the women's movements. The debate surrounding the law drew attention to the variations in strategies preferred by the different movement sectors. In general, women in the autonomous movement rejected the introduction of new legislation, preferring instead to base women's equality on the *Basic Law* – a far more radical piece of legislation than anything new the government might pass – and on consciousness raising in order to alter social attitudes. Most remained sceptical of the effectiveness of institutional channels, as this allowed the government to appear concerned but seldom brought concrete action. As one woman commented, “I cannot shake the feeling that our politicians are now beginning to bureaucratize [*verwalten*] discrimination rather than fight it” (von Münch 1978). In contrast government feminists,

particularly in the FDP and SPD, expressed widespread support for the legislation and viewed it as a chance to entrench women's rights into the broader social and political context. This could, they hoped, establish the essential links between women's labour market equality and family responsibilities, the availability of child care and leave arrangements or part-time work options (Blank, Schoske, Stolte 1981). The debates within the wider women's movement formed an important component of civil society mobilization which, combined with women's judicial challenges and pressure from inside the political parties highlighted the need to implement provisions to ensure women's workplace equality.

This domestic pressure was further augmented by follow-up pressure from the European institutions. In mid-1978, the governments of the member states were required to submit a report to the European Commission outlining the steps taken to implement the EPD. In order to generate a realistic image of the situation, the Commission advised member states to invite women's organizations and other sectors of civil society to contribute to the report. Though most member states included opinions from civil society, the German government appears to have compiled the report without any outside assistance (Commission 1979). The government reiterated its now-familiar arguments: wage discrimination was illegal under Article 3, Paragraph 2 of the *Basic Law*; and separate pay groups for men and women were illegal except where specific duties were, by definition, gender specific. The report cites "night porter and page" as specifically male jobs, while "maids, buffet servers and coffee cooks" are identified as women's

jobs⁴⁶ (Commission 1979). The report demonstrates the extent to which the government continued to frame women's workplace equality and equal pay in particular through a lens which viewed "natural differences" and different qualifications as leading to different jobs and abilities.

Since the EPD had been passed, the European Community continued to take steps to address women's equality. In addition to the Action Programmes, encouraging specific projects to address women's discrimination, in 1976, the Council of Ministers passed directive 76/207/EEC "on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion of working conditions". Council Directive 79/7/EEC "on the progressive implementation of the principle of equal treatment for men and women in matters of social security" was under negotiation. These initiatives reaffirmed the Commission's commitment to equality between the sexes and demonstrated the importance of widening equality provisions to address both direct and indirect discrimination. The European level, unlike the German state, had begun to address the structural inequalities that contribute to women's disadvantages in the labour market.

Against this backdrop, the Commission called on the German government to implement the EPD or face a non-compliance procedure at the European Court. The importance of this Commission statement should not be underestimated. In fact, some authors credit the Commission, not domestic actors, with being the primary impetus pushing the government to consider adopting anti-discrimination legislation in earnest.

(Hörburger and Rath-Hörburger, n.d). Certainly in conjunction with pressure from civil society organizations discussed above, the government could no longer avoid taking action.

Rather than the broad-based anti-discrimination legislation advocated by the women's caucuses, the governing coalition opted to incorporate minimalist provisions for women's equality into a broader "European Conformity Law". In so doing, the government demonstrated its penchant for "bureaucratic neatness" rather than a deep commitment to women's equality. The new passages inserted into existing sections of the *Civil Code* [BGB or *Bürgerliches Gesetzbuch*] do not specifically target women's labour market discrimination. At least from a legislative perspective, women's equality remained a (positive) side effect rather than specific aim. The legislation itself made reference to two European Directives, the 1976 Equal Treatment Directive, and a 1977 Directive "on the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses" (77/187/EC). Ironically, although the Commission's response to Germany's report on the implementation of the EPD was clearly an important factor in prompting the government to take action, there is no direct mention of the equal pay directive, despite the legislation's reference to equal pay for work of equal value. In the end, the legislation fell short of both the proposed anti-discrimination law, and the provisions of the equal pay directive.

Nevertheless, for many of the institutional feminists seeking to improve women's working conditions, the initial draft of the legislation showed potential. The preliminary

version (*Referentenentwurf*), drafted by the Federal Employment Ministry and presented to the governing coalition, addressed several aspects of women's workplace discrimination, including the difficulty that women faced in utilizing the courts to fight discrimination. Within this, the draft made the progressive proposal to reverse the burden of proof in discrimination cases, requiring the employer to demonstrate that the decision not to hire or promote a woman was based on factors other than the sex of the applicant. This has the practical advantage of making court challenges more accessible to women who had suffered from discrimination. It can be exceptionally difficult for an applicant, who has been turned down on the grounds of sex to prove this discrimination, particularly since the applicant is unlikely to have access to information about the other candidates for the position. Placing the onus of proof on the employer partially overcomes these difficulties. At the same time, the reversal of the burden of proof proposes a substantial change in discourse by setting new collective norms of behaviour (see also Chalmers 2000). Women's employment becomes socially acceptable and preferential treatment of men based on sex is rendered unacceptable. Importantly, the draft proposal anticipated strong financial penalties for employers found to be in breach of the provisions. As discussed below, neither of these provisions were included in the final version of the Conformity law. This substantially reduced the positive impact that the legislation may have had on women's autonomy and independence and reinforced the existing approach to women's workplace equality.

The FDP-SPD coalition rejected the proposal presented by the Minister of

Employment. The primary opponent within the governing parties was the right-wing faction of the FDP, which insisted on legislation that was more favourable to industry and big business. The legislation draft presented to parliament reflected the coalition compromise. Much of the burden of proof provision was removed as were the provisions for damages. The resulting legislation did not satisfy any of the major legislative actors, either in government or civil society. It was however, accepted that this was a necessary first step in achieving women's equality.

As discussed above, the legislation was intended to transfer two European directives. The directive on equal pay was clearly not a priority. It was addressed in a single sub-section in Article 612a without any reference in the legislation or preamble to the EPD. The Article reads:

In an employment agreement, a lower wage may not be agreed upon for equal or equal value work performed for an employee of one sex than for an employee of the opposite sex. The agreement of a lower wage is not justified by the fact that, as a result of the employee's sex, special protective measures are in effect. §611a Par. 1. Sent. 3 is to be applied accordingly.

The legislation addressed three main points, albeit through a minimalist stance: the prohibition of wage discrimination; the reversal of the burden of proof; and protection from dismissal. The legislation allowed for financial retribution in cases of discrimination but no punitive damages. In practice there was no financial penalty for discriminatory hiring practices⁴⁷. Lacking concrete punishment for employers found to be in breach of the law, many of the other provisions were of little value in challenging the realities of the male breadwinner system.

The prevalence of the male breadwinner norm was particularly evident in the Upper House where the proposal met with widespread criticism. In the meeting of the Legal Committee of the Upper House (*Bundesrat*) several members outlined their concern that the proposal was both unnecessary and too far-reaching. In particular the CDU members of the Legal Committee criticised that the proposal for a reversal of the burden of proof, though already watered down in comparison with the original proposal, did not fit into the German legal system. The most outspoken criticism came from the former Justice Minister of Rheinland-Palatine, who accused the governing coalition of “wildly turn[ing] a blind eye to the social, sociological, psychological and other manifestations of the naturally given differences between the sexes.” (quoted in Deutscher Bundestag 1979a). The recommendation and amendments proposed by the *Bundesrat* were aimed to maintain the *status quo* and to restrict the impact that the legislation would have on women's labour market participation. These recommendations were largely rejected by the government.

There was little room for women's input in the *Bundesrat* debates as few, if any, women were representatives in the *Bundesrat* at the time⁴⁸. The Parliamentary channels, in particular the public hearings held in Spring 1980, offered much more fruitful opportunities for women to make their opinions known. The DGB and several of its constituent unions, the *Frauenrat* and a few independent women's organizations submitted written opinions on the proposed legislation text (Deutscher Bundestag 1980a). In general, women expressed disappointment in the legislation, arguing that it was

insufficient to bring about equality in the workplace. The *Frauenrat*, criticised the proposal as lacking any real substance but, ironically relied itself on the stereotypes of the male breadwinner system in order to justify this position. This was particularly evident in the DFR's concern that the proposed legislation did not address indirect discrimination. They drew particular attention to the fact that marriage and family makes women less "ready for action" (*einsatzfähig*) than men. Ironically, these stereotypes were the very ones which other feminist organizations were trying to overcome. Their formulation of this concept indicates that the DFR was, itself blinded by the stereotypes that drove the male breadwinner system. Women, constrained by their (primary) responsibilities to home and family could not offer employers the same level of commitment as a male employee. Though the *Frauenrat* suggests the need to overcome the discrimination linked with this assumption, there is no attempt to debunk the belief as myth.

A primary concern for most of the unions and women's organizations concerned the lack of retribution available to women who had been treated in a discriminatory manner. The unions, DFR and other women's organizations all stressed that without imposing substantial fines on the employer found in breach of the law, the new legislation would be useless in practice (Deutscher Bundestag 1980a) Perhaps not surprisingly, the employer's organizations (BDA) criticised this same proposal as going "too far" and sacrificing the employers' freedom of choice and contract negotiations to the principle of equality. The employers' organizations expressed concern that the right to sue the employer would lead to an increase in such cases where any women not hired

would have the right to seek retribution from the employer (see also Hörburger and Rath-Hörburger n.d.).

Finally, several of the organizations and legal experts called to give an opinion, stressed that the proposed legislation “did not contain the positive character of the EC-Directive, because it failed to entrench the state's commitment to actively advance women's position in the labour market” (Bundestag 1979). Similar references to the dangers of indirect discrimination and the state's responsibility to overcome the structural inequalities of women's labour market participation show that some women's organizations and legal experts shared the European institutions' understanding of women's discrimination. The frame which the German government advanced through this legislation tried to separate employment equity and non-discrimination in employment from other market and social forces and thereby overlooked indirect forms of discrimination. As a result, women's rights were not adequately addressed. The final assessment of the proposal offered by women's organizations and the labour unions was that the law was a “paper tiger without teeth” (see also Deutscher Bundestag 1980).

Similar dissatisfaction was expressed during parliamentary debates. The German Parliament discussed the legislation twice, in its various forms: once in November 1979 and again following committee meetings and public hearings in June 1980. It is notable that very few were satisfied with the draft. “One thing is clear: the draft before us is under fire from two sides. For one side it doesn't do enough; for the other it already goes too far.” (Deutscher Bundestag 1980: Verhulsdonk CDU). It is difficult to identify clear lines

of support in the Parliamentary debates. There was no clear party or gender demarcation of support. On the whole, it can be said that the women were in favour of the legislation in principle, but argued that it was insufficient in creating equality for working women. As one would expect, the opposition CDU/CSU expressed a critical view of the legislation as being a misdirected attempt to achieve the right goals. In committee the CDU members supported the legislation, although one member stressed that this was because of the goals of the proposal rather than the means which it outlined.

The Parliamentary Legal Committee neglected to draft a formal position on the legislation, even though it involved relatively major changes to the *Civil Code*. The legislation was on the agenda of the committee four times, yet the committee apparently did not have the opportunity to properly discuss the draft (Deutscher Bundestag 1980a). Several women in parliament criticised the legal committee's lack of commitment to the legislation and expressed their own frustration at being denied the opportunity to debate the issue in the committee setting.

In the end, the legislation was passed as a necessary response to the European directives. It was, however, clearly a compromise solution on a number of different levels. First, it tried to balance the demands of the women's caucuses in the FDP and the SPD with the broader party platforms and other party concerns. Many of the women accepted that the conformity law was only the first step of many more to come and consequently hoped for anti-discrimination legislation in the future (see also Deutscher Bundestag 1980). The law furthermore took the middle ground between the two coalition

partners, again balancing the more industry oriented FDP with the historically union-friendly SPD policies. Several SPD-introduced legislative amendments that would have shifted the legislation in favour of the worker rather than employer, were rejected by the FDP and thereby withdrawn. The differential visions of how to achieve equality between men and women forced the partners into a compromise with which no one was fully satisfied.

The legislation was, perhaps most importantly, a compromise between the European and German policy levels. In April 1980, shortly before the legislation was passed, the Commission informally notified the German Minister of Work and Social Affairs, Dr. Ehrenberg, that the Commission office did not consider the draft legislative to adequately transfer the European gender directives (Deutscher Bundestag 1980)⁴⁹. If the government proceeded with the draft as presented, the Commission would begin non-compliance proceedings. The German government did not respond with the changes deemed necessary, prompting the Commission to launch its non-compliance proceeding in 1982 (ECJ case 248/83). The Commission charged that the German legislation did not adequately apply the equal treatment and equal pay directives, particularly with respect to employees in the public service. When the case was finally heard in 1985, the Court found in favour of Germany on four out of five charges, including the only charge relating to equal pay. The one change which was upheld, led to some small changes in the legislation. On the whole, however, the legislation was eventually deemed to fulfil the requirements of the European law.

The Conformity Law was the end result of several decades of negotiation over the principle of equal pay for work of equal value. The legislation, in the end, met the minimum requirements of the European directives but failed to incorporate the feminist awareness that was budding in the Commission. European initiatives hesitantly embraced a liberal understanding of women's rights and encouraged financial and social equality through labour market participation. The directive, nonetheless suffered from a general weakness in its failure to clearly define terms and guidelines for measuring wage scales. It is, however, the nature of a European directive to set only the perimeters for European standards and allow the individual member states to adopt the measures necessary in order to incorporate these into the national systems. The German government failed to do so, avoiding legislating guidelines for valuing different work in a way which might overcome the gender biases of the existing wage scales. This contributed to the sense that the government continued to view women's workplace participation as the exception rather than the norm or desired norm. German policy provisions addressed only direct wage discrimination. Indirect forms of discrimination including gender pay scales were not addressed through the Conformity Law. Thus, Europeanization occurred in so far as German legislation was adapted to reflect the content of European law. It did not, however, involve a transfer of cognitive frame or social institution.

The Conformity Law was nonetheless an important step in the institutionalization of women's equality. For the first time, the Courts had a specific law on which to base their decisions. Moreover, the preamble of the legislation included reference to the 1976

equal treatment directive, thus creating a direct legal link between the German laws and the European provisions. This contributed to an increase in references from the German Courts to the ECJ and eventually brought about a widening of the legislative scope. In fact, it was the European Court that gave the German law “teeth” by ruling that financial compensation was insufficient to deter discriminatory practices and imposing six months pay as the normal penalty for discriminatory practices (ECJ Case 14/83). This new provision has gone a long way in turning disappointing legislation into a more woman-friendly law.

Assessment and Conclusion

In the previous chapter, I suggested that the dual forces of Europeanization and domestic mobilization can challenge the male breadwinner regime in Germany. European initiatives can spark shifts in German laws and social attitudes which may contribute to the gradual and incremental transition towards a new direction in the German gender regime. Equal pay, the topic of the first European gender directive offers a good starting case study and valuable insights into early challenges to, and responses from, the German male breadwinner regime.

The discussion above has shown that the European institutions exerted pressure on the German state to bring about legislative compliance in the realm of equal pay. The pressure was both direct, for example the non-compliance proceedings, and more indirect in the form of financial support for the 1977 Berlin women's conference and the higher

prioritization of equality issues at the European level. Despite legislative adaptation bringing the German laws into line with the European standards, the cognitive frame of the European institutions was not incorporated into the German legal or social institutions. Small shifts in policy and attitude have continued to evolve around the regulation of equal pay in the years since the passage of the Conformity Law. While the early equal pay initiatives may have done little to counter the German male breadwinner system, the continued evolution of this policy area may indicate the beginning of a gradual shift in the framing of women's labour market equality and wage discrimination in Germany.

Europeanization approaches help explain how adaptational pressures from the European level can lead to domestic institutional change. Radaelli defines Europeanization as the transition of not only legislation but also the informal values, norms and accepted practices (Radaelli 2003). Thus, Europeanization can initiate changes in both the German laws and the framing thereof. On a legal level, pressures from the European institutions did bring about general conformity between German laws and the EPD with the basic provisions transferred through the Conformity Law. Several specific issues, including the definition of gender neutral wage scales which the Commission urged (but did not require) the member states to define, were however, not addressed by the German state. The state has, even in the years after the Conformity Law, placed much of the responsibility for the application of the principle of equal pay on the social partners. Shifting the burden of implementation to the social partners has, in many ways,

reinforced an understanding that equality between men and women is a labour market issue rather than a political or social matter. This separation of state and market removes equal pay from the wider social and political context, making it more difficult for its campaigners to address the underlying social and structural causes of discrimination.

The EPD was the first instrument to define a European gender policy. At the time, this policy was firmly entrenched in both labour market and social policies, thus establishing a link between market participation and social equality. Moreover, the European institutions collectively embraced an understanding of equality as linked to women's financial independence, social "sameness" and labour market participation. This has since become the basis for future question of gender equality. Feminists have thus been able to build on an existing liberal understanding of equality in framing certain issues. In contrast, in order to influence the framing of gender equality in German politics and society, feminists must first overcome the pre-existing and dominant male breadwinner framework. European laws grafted on the German system, generally fit into this dominant concept. It thus becomes exceptionally difficult for women to use the political structures to advance an alternate gender regime. The strength of the existing male breadwinner regime acted as a difficult barrier for women, seeking labour market equality and equal pay, to overcome.

The combined challenges from the European institutions and the mobilization of domestic actors were insufficient to fully displace the dominant German understanding of women's labour market participation. In chapter two, I speculated that where endogenous

and exogenous actors share a frame of understanding of a particular issue, they may be able to (partially) displace the dominant frame. In the case of equal pay, endogenous actors were weakened through internal divisions and a rejection of the European institutions. Internal divisions evident in most of the formal women's organizations including political parties, women's movements and the governing coalition detracted from women's collective voice. In the absence of a unified group to challenge the dominant regime, alternate understanding of women's labour market participation and the value of women's work could not take hold.

The link between domestic actors and the European level was also quite weak. Save a few occasions where one level drew directly from the discourse of the other, these two policy levels remained largely separate. The general distrust expressed by autonomous feminists towards institutionalization of women's policy as a whole contributed to the discontinuity between the German and European levels which weakened women's opportunities to challenge the existing domestic regime.

Nonetheless, women's activism did spawn two minor but important changes to the framing of equal pay. First, women's activism through domestic legislative, judicial and civil society channels successfully introduced the concept of equal value into the German legislation. A focus on the discriminatory nature of the *Leichtlohngruppen* helped women to highlight the importance of gender neutral pay scales. Moreover, although the conformity law does not adopt the liberal frame of the European legislation, it does make a direct link between German and European equality legislation. Although these are only

minor shifts in the framing, and hardly sufficient to term a challenge to the dominant regime, they left important openings for women's future activism.

In recent years, the German unions have taken some steps to address the structural inequalities that contribute to the wage gap. Several unions have launched a joint campaign to increase the value of "women's jobs". These unions have taken concrete steps to increase awareness of women's pay discrimination in the various industry sectors. They have moreover consciously sought above average increases in the wages of those in the lowest pay categories. Although this does not change the relative value of the positions in the lowest category, it can help to break the poverty cycle which links women to the male breadwinner.

The current red-green coalition government has also initiated several steps in the past years which begin to challenge the hold of the male breadwinner system on women's remuneration. Two key legislative changes have contributed to a realignment of the foundations of German gender policy. In 1994 the parliament approved changes to the Article 3, 2 of the *Basic Law* to clarify the responsibility of the state to the principle of equality between men and women. According to the new formulation, the state is required to actively promote the achievement of equality between men and women. This new provision has sparked a series of state initiatives to increase women's labour market and educational opportunities and to overcome women's labour market discrimination through a new division of labour between men and women.

At the same time, the government passed a *Frauenförderungsgesetz* (law to

advance the position of women) which placed women's labour market participation and social equality into a broader context. The legislation links women's discrimination to questions of educational and vocational opportunities and other social and structural factors. Both of these laws and the corresponding government programmes have helped to shift the government's understanding of women's labour market participation. However, although the legislation has altered the valuation and perception of women's labour the government has not yet adequately addressed related policy areas such as child care, training and flexible working time in order to overcome the differences between men's and women's wages. As a result, many women remain unable to take advantage of the initiatives in place⁵⁰. In this sense, the issue remains grounded in the male breadwinner framework.

There are fundamental changes taking place in Germany's approach to women's labour market equality. These are, however not yet sufficient in the area of equal pay to speak of a substantial change in the path of the German gender regime. The German approach to equality defined through the principle of "*Gleichstellung*" means literally "making equal". As long as women continue to be "made equal" there will be little chance to go beyond a framework which prioritizes the masculine biography and attempts to fit women into these structures. In contrast, women's organizations stress the need to change attitudes and ideas and to make both men and women equal. Women's organizations are continuing to push this new framework. Their success in two other cases is addressed in the next chapters.

Notes to Chapter Three

²⁸ Statistics for full-time employment only.

²⁹ There are numerous difficulties with the statistical comparison of wages. Whether one compares only full-time or full and part-time workers; weekly or hourly pay; pay alone, or pay plus bonuses, can have an impact of the statistics. The pay gap in eastern Germany ranges from roughly 77% to about 94%, depending on sector, method of calculation and source.

³⁰ So-called poverty wages are defined as earnings amounting to less than 50% of the average earnings.

³¹ “*Leichtlohngruppe*” translates directly as light wage groups. “Light” in this sense refers both to the physical strain of the work and to the level of pay received.

³² Belgium was one of the first states to ratify the Treaty, doing so in 1952. France ratified it in 1953 and Italy and Germany in 1956. Netherlands and Luxembourg did not ratify the Convention until 1971 and 1976 respectively.

³³ In contrast to the ILO Convention 100, the Treaty of Rome is binding on the member states. This higher level of commitment may also explain states' reluctance to agree to strong provisions.

³⁴ German legal convention may have also played a role in the preferences of the German delegation. It can be argued, under German contractual law, that text removed from an original draft with the consent of the contracting members, is implicitly excluded from the scope of the agreement. In other words, wage scales and assessment criteria, if consensually struck from the agreement, would likely not be covered under the general provisions of “all aspects and conditions of remuneration”.

³⁵ The German here specifically uses the masculine pronoun. This is, as in English, common usage when referring to individuals of both sexes.

³⁶ The SPD-FDP coalition was in power from 1969-1974 under the leadership of Chancellor Brandt. Following his resignation, the coalition continued to govern under Helmut Schmidt until 1982. In 1982, CDU Chancellor Kohl took power.

³⁷ The inclusion of the more simple and direct “[m]en and women have the same rights” was facilitated by the active mobilization of women's organizations. For more see Selbert 1981.

³⁸ See, for example Zuleeg, 1996 and Feldhoff, 1998. The conflict between these two basic rights was legally resolved in 1994 through an amendment to the *Basic Law* that stipulates that the government must act within its capacity to ensure an environment in which equality between men and women can be realised.

³⁹ Unlike most of the English-language debates, German women seldom distinguished between equal pay for equal work and equal pay for work of equal value. Most continued to refer to equal pay for equal work, although the corresponding focus on the abolishment of light-wage groups and a fair valuation of women's work clearly refers to equal pay for work of equal value.

⁴⁰ The case centred around Irene Einemann (in some sources given as Eilemann) who worked in an industrial bakery, doing the same job as her male colleagues. She lifted 20kg loaves of bread from the oven, 56 times an hour. For this, she was paid DM 6.86/hour plus a DM 100 bonus per month. Her male colleagues were paid DM 8.24/hour plus a bonus of DM 0.70/hour. This worked out to roughly DM 200/month difference. Although Frau Einemann complained to her employer about this situation, she was told that that was the way it was, and if she didn't like it she could find a less strenuous job (Voigt 1978).

⁴¹ The settlement gave the defendant approximately DM 7000 in back pay and established her wages as equal to her male colleagues.

⁴² German newspapers were very inconsistent with the spelling of the name of the photo laboratory. Spellings included Hinze, Heintze and Heinze. I have used the latter as it was the most common.

⁴³ It is important to note, that protective legislation prohibiting women from working night shifts was still in place in Germany. When the company introduced a night shift, the women trained their male counterparts. They were still considered to be "less qualified" than the men whom they had trained. For more on the implications of the ban on night work for women's wage equality, see Feldhoff 1998.

⁴⁴ In general, the union will provide legal council for its members and will carry the costs of the court cases.

⁴⁵ Though the Heinze-Frauen won their case, they did not receive any financial compensation as the Foto Labor had declared bankruptcy before the back wages were paid.

⁴⁶ German original "Zimmermädchen, Kaltmamsell, Kaffeeköchin".

⁴⁷ In a case eventually settled by the European Court of Justice, the German Court had ruled that the individuals discriminated against had the right to financial reimbursement in the amount of the cost of the application. This amounted to only a few Deutsch Mark for the cost of photocopying and postage. The idea of punitive damages beyond the actual cost incurred by the applicant were decided by the ECJ in subsequent cases. See ECJ Case 14/83.

⁴⁸ The Upper House or Bundesrat is made up of representatives from the *Länder* governments. The actual representatives are chosen by the *Länder* depending on the issues on the table.

⁴⁹ The letter refers to a “draft legislation on the implementation of Directive 76/207/EC on equal pay for men and women”. The precise meaning here is a little unclear, as Directive 76/207 is on equal treatment, not equal pay. The equal pay directive was numbered 75/117/EC.

⁵⁰ More on the relationship between childcare and inequality in chapter 5.

Chapter Four

Broadcasting and Regulating Pornography

Reactions from the modern German state to issues of sexuality and, in particular, deviations from a declared sexual norm have ranged from criminalization to a disinterest in that which happens behind closed doors, thus outside the realm of state control. Sexuality as pornography, however, is not an exclusively private matter but occupies a position between the public and private spheres. Through the representation of a specific type of sexuality in words and/or images, pornography can remove sexuality from the private home and bring it into the public realm. The subsequent commodification of these representations, which in effect presents the (female) body for consumption by a wider public, embeds pornography firmly in the public sphere. As the artificial division between public and private has come under increasing scrutiny from feminists, the regulation of pornography has gradually found its way onto political agendas. State and European institutions' ability to regulate pornography is however, hampered by a lack of consensus among and within political parties, women's movements and broader society. With pornography simultaneously framed as a question of morality and dignity, personal choice and freedom from censorship, public and private concern, there are no simple guidelines for policy development. As a result, the state and the European institutions have framed some aspects of pornography as a violation of common morality, while other aspects are ignored. Pornography "...is recognized as harmful and a violation of dignity when it constitutes part of sexual harassment in employment. At the same time, it is untouched as long as it is used in private" (Baer 1996). This chapter addresses the

different positions that actors have taken in relation to pornography and its regulation at the European and German level, paying particular attention to the manner in which the issue has shifted from a private to a public sphere and the insights that the regulation of broadcasting and pornography can offer on the Europeanization of the broader gender project.

The case of the regulation of pornography stands in marked contrast to that of equal pay, presented in chapter three. The equal pay study showed that the European initiatives have slowly had an influence on domestic policy formulation as debates begun at the European level were partially imported into the German political discourse. In contrast, the regulation of pornography has entered the European political dialogue through the member states and through the expansion of European political activity into an ever-broader sphere of social policy. Policy actors, having exhausted the opportunities at the national level once, have subsequently addressed the issue at the European level and may return the debate to the domestic policy sphere through emergent European measures. This process highlights Europeanization as a two-way street and the fluidity of actors and policy arenas in the European polity.

The question of regulating pornography has found supporters in a number of different social camps. Neither the member states, the different institutions, nor feminists themselves, can agree on the nature of pornography. The task of defining and framing pornography in a “women friendly” manner has been complicated by the lack of agreement within the women’s movement and among women on the value of institutional

regulation. This chapter begins by addressing these different stances and their positions relative to the regulation of pornography. I argue that this lack of consensus has been central to the (in)ability of institutions to manage the pornography question. Within the discussion of these various stances, I align myself with “anti-pornography” feminists and maintain that certain aspects of pornography can discriminate against women and perpetuate an image of women as sex objects subordinate to men. A broader realization of sex equality may be harmed by this hierarchical dichotomization of the sexes. Tracking the evolution of pornography legislation, the chapter moves from a discussion of pornography at the domestic level through to its important role in contemporary European policy making. Although the primary focus is on the broadcast directive and its role in regulating pornography at the European level, I also refer to several soft law initiatives that have recently evolved at the European level.

Feminism and Pornography

Whereas equal pay and women's position in the labour market sparked controversy among different branches of German feminists regarding which path could best accomplish their goals, the actors generally shared a recognition of equal pay as advantageous for women's equality. The differences in position have been much greater in the case of pornography and its implication on the status of women. Several different views on pornography were expressed within the women's movement alone, with similar discord evident among political parties, other social movements and numerous political

actors. The issue spurred a variety of actors into the political area, creating unique alliances among and between groups. Despite support for similar outcomes, the different frames, beliefs and strategies underpinning the actions of various groups made for tentative and uneasy alliances. This section briefly outlines these differences as expressed by several groups within German society, developing, in particular the arguments presented by anti-pornography feminists.

In general, women from the traditional left, as well as the “radical” feminist movement and Lesbian movements strongly opposed government regulation of pornography. For them, pornography should be seen as part of a broader artistic or erotica movement and as governed only by individuals' freedom of choice. The state had no right to censor freedom of expression or regulate the private sexual lives of individuals. In contrast, a group of conservative women and their allies supported a complete ban on pornography, arguing that sexuality had the potential to undermine traditional family values and social mores. From this standpoint, the state had a role to play in regulating pornography for the “good of society”. Yet another perspective, which I term the “anti-pornography” feminist stance, distinguishes itself from both extremes. These women (and men) supported limited regulation of pornography by the state. Their concern was not for social sexual morals, but that pornography represented the commodified expression of aggression against women and a glorification and legitimation of violence against women. They challenged the state to develop a clear definition of pornography which would distinguish violence against women from erotica. In this way, these feminists

sought to remove the question of pornography and its regulation from the narrow discussion of sex and morality and bring it into a wider discourse of violence, discrimination and the commodification of women's bodies and dignity⁵¹.

It is helpful to begin this discussion with a definition of pornography, although as the chapter proceeds it will become clear that it is precisely the lack of agreement on a definition that lies at the heart of the issue of its regulation. For the purpose of this chapter, pornography is understood as the representation of the (female) body in a sexually explicit manner with the effect of reducing women to sexual objects. Pornography may be overtly violent, or it may imply violence through its portrayal of women and their subordination to men⁵². Overt violence, along with the sexism and racism that pornography often represents and perpetuates, has been at the core of the anti-pornography feminist critique in Germany and elsewhere (Dines et al. 1998). Violence in pornography can take a variety of forms. One of the most common themes involves men forcing sex on a woman. Pornographic videos frequently show women refusing sex, yet subsequently enjoying what can, according to the anti-pornography feminists, only be termed rape. Violence, where sex (often oral sex or forced sexual activities) is used to "punish" women for not immediately submitting to a man's wishes, is a central component of many pornographic storylines (Dines et al. 1998; Traudisch 1990). The level of violence may range from implied to overt, with the most extreme cases showing women in various levels of "sexual torture", including painful restraint, physical abuse, penetration with objects, and even mutilation.

Anti-pornography feminists oppose these representations on a number of levels. On a very basic level, they argue that the women involved in the production of pornography are frequently physically and mentally abused, threatened and held against their will⁵³. There is substantial evidence that women have been killed or murdered during a video shoot (Baer 1996; Itzin 1996; Schwarzer 1994a). The harm however, may go beyond the physical. Pornography generally uses sex to show women as weaker than and sexually subordinate to men. It subsequently links this weaker or “lower” position of women with a legitimization of violence against women and a glorification of sexual violence. Rape and sexual abuse of women is consequently condoned as “normal” sexual behaviour and is even glorified and elevated to an essential component of sexual fantasies. If fantasies are acted upon, pornography may again involve the actual physical harm of individual women.

There are indications that pornography can be both directly and indirectly linked to actual acts of violence against women in society as a whole (for example, SWAP 2004). Though “scientific evidence” linking pornography to sexual violence, rape, and abuse is inconclusive, there are many personal accounts and women’s narratives that demonstrate a relationship between the two. In a study carried out in 1980 by Diane Russell, 10 percent of women reported that they had experienced a situation in which they were “upset” by someone trying to get them to act out something seen in pornographic pictures, movies or books (see Dines et al. 1998; Steinem 1993). Another study of 200 street prostitutes found that 73 percent reported having been raped; of these,

24 percent reported that the rapists had made reference to pornography. This is particularly significant given that the study did not directly address pornography, so this information emerged unsolicited (Dines et al. 1998, 109).

Personal accounts also reveal a link between violent pornography and racism. The portrayal of non-white women in pornography generally builds on sexual and racist stereotypes of exoticism; consequently, women of colour are doubly objectified and degraded through pornography. Anti-pornography feminists argue that regardless of race, age, ethnicity, and nationality, women everywhere are objectified and harmed by pornography. Though women may experience this harm in different ways, the central characteristic is the objectification and degradation of women. As one German feminist argued,

Pornography as discrimination on the basis of sex violates women everywhere. Marketed throughout the world, pornography is not limited to the countries of its production, nor is the abuse of women through it limited to such locations. In some places, women are raped and tortured and killed for pictures; everywhere, women are silenced. (Baer 1996, 52)

For the anti-pornography feminists, it is not only the individual women used in the production of pornography who are harmed; rather, these women become symbols of “Everywoman”. They argue that pornographic depictions reduce a woman to her sexuality, depersonalizing and objectifying her. The dehumanization and reduction of women to sexual objects may take the form of acclaimed “art”⁵⁴, literature, glossy magazines, “peep shows” in the red light district, or videos. It is also present, albeit in a less overt and arguably “milder form” in the sexist advertising that permeates everyday society.

Sexist advertising which, on the one hand, does not involve physical harm of women during its production, can for some anti-pornography feminists contribute to the overall objectification of women in society. In a recent example, poster-sized advertising for the German public interest magazine, *Bild*, was given prominent display in public bus shelters throughout Germany. The posters depicted a 20-year-old woman wearing only a G-string and headed with the caption, "My record is 8 hours" (*EMMA* On-line 2002)⁵⁵. The text below the photo promised more such stories in the magazine. The sexual implications and reduction of the individual depicted to a sexual object were indisputable. Women are thereby commodified to sell a particular product. A difficulty arises, however, in that these images are neither overtly violent, nor generally recognized as pornographic. This blurs the distinction between acceptable and unacceptable, pornography and art even further.

For policy makers, the central issue surrounding the legislation of pornography, has been to capture and define the socially-acknowledged parameters of acceptable and unacceptable in order to regulate pornographic and sexual representations. Policy makers must therefore distinguish between erotica or art – acceptable to all (or most) social sectors – and unacceptable pornography. To be of value, political and legal definitions must be clear and concise. This has not yet been accomplished at either the German or the European levels as lawmakers have consciously avoided clearly defining pornography. Under German law, pornography as a whole is not defined. The legislation does, however, make a distinction between so-called *harte Pornographie* (hard

pornography) depicting violence, the sexual abuse of children, or sexual acts between people and animals and other forms of pornography, usually referred to as soft or simple pornography⁵⁶. Simple pornography is not defined. The lack of official clarity has prompted a number of formal legal commentaries on the question which, drawing from existing case laws, provide a non-binding framework from within which further decisions can be made. In general, the commentaries suggest that one must use moral criteria to define the parameters of pornography. These criteria are however, recognized to be inaccurate and ill-defined. They are difficult to interpret and subject to different interpretations at different times and by different individuals⁵⁷.

In contrast to the existing subjective definitions, feminist legal scholars in Germany and elsewhere have offered a precise definition of pornography that includes measures to allow for a (nearly) universal understanding of the term⁵⁸. Rather than setting the parameters of pornography at that which society currently deems “acceptable,” feminist legal scholars use concrete measures to clearly discern the pornographic from the erotic and to draw attention to the fact that “classic pornography” is in fact, a graphic representation of the subjugation and degradation of women. This feminist definition clearly establishes “pornography [as] sexual violence perpetrated against women through realistic and clearly sexually degrading representations, in print media or photos, which contain one or more of the following elements...” (Baer and Slupik 1988, 172). These elements are then detailed more specifically. Thus, the feminist definition of pornography requires that an image be (a) violent (explicitly or implicitly) and (b) realistic and (c)

degrading and (d) contain one or more of six subsequent elements. Specifically, these include the representation of women as sex objects who enjoy painful or humiliating experiences; the representation of women as enjoying rape or sexual assault; women represented in degrading scenes or scenes that depict bodily harm, torture, or humiliation or in which women are shown as dirty, to be of less value than men, bleeding, or mutilated in a context that makes this appear sexual (Baer and Slupik 1988, 172). By focusing on the precise form of pornographic depiction, this definition leaves little room for subjective interpretation. It is from within this framework, that German anti-pornography feminists have fought for increased regulation at national and European levels.

Domestic Debates and (De-)Regulation – Morality vs. Censorship

Until the latter part of the 1980s, regulation of pornographic broadcasts was regulated only by national governments. With the implementation of the “Television Without Frontiers” Directive (89/552/EC) in 1989, a degree of control passed to the European institutions. Nonetheless, national institutions retained the primary role in defining and regulating pornography. In West Germany, the regulation of pornography was initially caught between competing values of freedom of expression and the protection of the family. While anti-pornography feminists were partially successful in re-framing pornography as a form of discrimination against women, they were unable to make this the basis for legislation or to get it incorporated into broader social values.

Under contemporary German law, the production, possession, distribution, and

sale of pornography is regulated by Section 184 of the *Strafgesetzbuch* (Penal Code)⁵⁹. Pornography as a term on its own, is not defined. Paragraphs 1 and 2 of Section 184 make it an offence to sell or otherwise make pornographic materials available to minors under the age of 18. Individuals over 18 may possess and sell pornography, except as limited by Section 3. Restrictions herein make it illegal for anyone to possess, produce, or otherwise handle pornographic images that contain violence, depict the sexual abuse of children, or show sexual acts between humans and animals. These restricted forms of pornography are collectively referred to as *harte Pornographie* [hard pornography]. A legal ban on hard pornography does not mean however, that this form of pornography is unavailable. It is generally possible for an adult to get violent or otherwise banned pornography in any of the sex shops and most of the video stores in the country (Baer 1996, 2003). Anton-Andreas Guha, political editor of the *Frankfurter Rundschau*, one of Germany's major newspapers, notes in his analysis of the social implications of pornography that "[the law] is fairly lax and barely plays a role in legal reality. Nobody seems to take it seriously" (1988, 100).

The ease with which one can obtain even illegal pornography is demonstrative of several contradictions in the German legislation. The regulation of pornography is hampered by poorly defined terms and inconsistent interpretation as well as a more general lack of implementation and execution of the legislation. The legislation is embedded in the Penal Code, rather than the Civil Code (public rather than private law), making the possession or production of hard pornography a crime against the state, rather

than against a specific individual or group. Consequently, only the state can prosecute violators. This has both practical and symbolic implications for women. First, it creates the very real practical difficulty of leaving an already over-burdened legal system with the task of prosecuting. At the same time, it denies women independent agency and limits their ability to empower themselves. This underscores the state's assumptions that pornography is harmful to society as a whole, rather than individuals. It therefore reinforces a frame based on moral rights rather than discrimination.

Moreover, while the state is, in theory responsible for prosecuting the illegal distribution or production of pornography, in practice the government must balance this role against its responsibility to protect the freedom of the press and maintain freedom of expression. German society, is on the whole, weary of censorship and limits on the private lives of individual citizens. The era of National Socialism, and the conviction that the government must never again have the power to execute such control over individuals, reproduction and sexuality has accorded personal and cultural freedoms, in particular freedom of expression, freedom of choice and freedom of the press the highest protection within German legal tradition. These are basic human rights guaranteed in the first section of the *Grundgesetz*. Legal tradition has given the fundamental human rights outlined in the *Basic Law* higher legal status than other forms of legislation. As a result, the German state has been reluctant to regulate individual sexuality through means which might be viewed as censorship. This tension between censorship, morality and privacy has coloured several aspects of the German regulation of pornography.

Current German legislation is the end product of a long process of reforms to the Penal Code undertaken in the early 1970s. These reforms were intended to bring the legal situation more in line with common social morality which had come under challenge by sexual liberalization and the student and women's movements of the late 1960s. The complete ban on pornography, in place until the early 1970s, was one of a number of laws under review in light of changing social values. As social values are not homogenous, a number of different positions came to light during the debates. Each position reflected a particular framing of the issue and prioritized a particular set of rights and responsibilities for the state. One group opposed any changes to the existing legislation and was in favour of retaining the full ban on pornography. The second supported a full deregulation of pornography, arguing that limits on the media were tantamount to censorship and therefore to be avoided at all costs. Finally, the third position maintained a middle-of-the road stance in which a ban on "harmful pornography" and for those under 18 would combine concern for the morality of youth without seriously hampering freedom of expression. The parliamentary debates on amendments to the penal code highlighted these differences.

A Parliamentary Committee was charged with reviewing the existing legislation and making recommendations for changes. The participating political parties embraced a wide spectrum of positions on regulating pornographic broadcasts. In both this committee and the Upper House's Legal Committee, the Centre-Right Christian Democrats were the primary advocates of retaining the full ban on pornography with their arguments

reflecting the strong family values and traditional gender roles embraced by the party. Though the party recognized that social attitudes toward sexuality were changing, they worried about the effect this liberalization could have on the morality of young people. Although the CDU/CSU representatives recognized that pornography was not scientifically proven to be harmful to an individual's moral judgment, they noted that it was also not disproved. Given this uncertainty, one could not exclude the possibility that pornography was damaging to the development of minors and one must therefore take action to protect the country's youth. Children would certainly find a way to access this material if it was available in society. Hence, according to the logic of the CDU/CSU, a full ban on pornography was required to prevent youth from accessing harmful pornographic images. In the Legal Committee of the *Bundesrat* the CDU/CSU representatives acknowledged that it was likely only hard pornography that was harmful to minors. Nonetheless, they argued, that the transition between soft/simple and hard pornography was fluid and poorly defined. It was therefore exceptionally difficult to determine where to draw the distinction and by which criteria one should measure the differences between hard and soft porn. For the most part, the CDU/CSU relied on testimony of recent experiences in Sweden and Denmark that demonstrated the difficulty in maintaining this artificial divide (*Deutscher Bundesrat* 1973). Given these difficulties, the CDU/CSU in both the *Bundestag* and *Bundesrat* favoured a full ban on pornography for the well-being of Germany's youth.

The CDU/CSU advanced, but did not pursue, a further argument in the

Parliamentary *Jugend, Familie und Gesundheit Ausschuss* (Committee for Youth, Family and Health). Here, representatives addressed the fact that pornography compromises human dignity, in particular the dignity of women. This seems to be one of the only references during the debates to pornography as harmful human dignity⁶⁰. The CDU member's qualification of this remark, however, reveals an ironic twist to the concept of dignity. The member was concerned about the harm to woman's dignity not as a crime in and of itself but because this degradation could have "negative implications on the socialization of young people" (Deutscher Bundestag 1971, 2). Rather than protect women's dignity for women's sake, the CDU/CSU was concerned that harming women's dignity would, by compromising the morals of women, be harmful to the family. Ironically, this understanding of pornography continues to objectify women. Women and their dignity, become simply tools to facilitate the protection of the family and social values. By focusing on the possibly damaging effect of pornography on youth, the aspect of pornography that dominates the discussion is the "fact" that sex and sexuality are immoral in any form. It is sex, and in particular extra marital, non-procreative sex, that is considered to be harmful. Pornography hurts the moral values of the community, families and marriages could be jeopardized, and society itself may thereby come under attack. This "moral framework" was embraced in particular by the CDU/CSU but also separately by representatives from the Churches and traditional women's organizations.

This perspective is, in many ways, very much in line with the conservative values described by Esping-Andersen in which the welfare state is largely influenced by the

church and traditional values. Ostner and Lewis similarly note that the strong male breadwinner regime visible in German society includes a reliance on a strong role for marriage and traditional family, including an authority-bearing father/husband figure (1994). In their study, they found that German family policy “emphasized the importance of a male breadwinner in the market, and the primacy of the *pater familias* in both the private domestic world and the political sphere” (Ostner and Lewis 1994). It is again clear that, women are tools for the family and state, rather than individuals, in need of protection in their own right. There is consequently a direct link between the prioritization of the family and moral values and the male breadwinner regime. The CDU position in support of the traditional family and the morality of society directly corresponds to the male breadwinner regime. Given the strength of the male breadwinner regime in the early 1970s, it is surprising that a more liberal perspective was taken into consideration at all.

A final aspect of the CDU/CSU position further highlights the position of women in the male breadwinner society. Some individuals advocated legislation which would protect adults (in particular women) from “unwanted confrontations” with pornography. This position was supported by a number, though not all, of the CDU/CSU representatives in the *Bundesrat* and was used to make a claim to demand at least a ban on advertising and presenting pornographic films in public movie theatres or other public places (Deutscher Bundesrat 1973). This is consistent with the male breadwinner state's traditional assumptions that women need to be protected. The proposal, however, does

not protect all women equally. It considers that some women might be shocked or offended by unwanted confrontations with pornography and consequently attempts to protect them from this offence. At the same time, this form of “protective legislation” makes no attempt to protect the women abused, degraded or otherwise harmed in the production of pornography. Thus, CDU/CSU assumptions about the role of women in society, “correct” moral values, and the protection of “acceptable” women, were reflected in the party's support of a full ban on pornographic materials.

In contrast, a handful of individual members from the then-ruling SPD and FDP factions expressed concerns that regulating pornography could amount to censorship. They argued against the proposal to protect individuals from unwanted confrontations with pornography as, under German law, adults generally do not need the protection of the state⁶¹ (Deutscher Bundestag 1973). This position, in fact, makes many of the same assumptions about women's role in the production of pornography as the CDU had made. It assumes that women are willing actors and thus they are able to protect themselves. The SPD representatives furthermore argued that, lacking scientific proof that pornography is undeniably harmful to either the individual or to society, the freedom of adults to choose must take priority over the protection of minors, assuming that this freedom does not infringe on or injure others (Deutscher Bundestag 1973a). This adopts a different frame from the morality-position advanced by the CDU/CSU. For the SPD, the state must determine how to best balance two fundamental freedoms, and its primary responsibility must be to freedom of expression and freedom of choice.

The legislation adopted in 1975 takes a position midway between these two extremes. It rejects censorship of pornographic materials for the adult population (except for hard pornography) in favour of freedom of choice. There is no mention of the harm that might come to those involved in filming pornographic movies or photos. There is no discussion of the need to protect the women in these films. Although there was serious concern about the realist nature of these films having a detrimental effect on minors, there is no recognition that the individuals in these films are real people who may be subjected to real abuse during filming. The German legislation is intended to “protect” society. However, it protects only certain portions of society at the expense of others.

The anti-pornography feminist perspective was represented neither in the debates, nor in the subsequent legislation. It would appear that the reform of criminal law was not considered to be a “women's issue” as there were very few women involved in the special committees in the *Bundestag* and *Bundesrat*. Only one female parliamentarian appears to have actively contributed to the committee debates (Deutscher Bundestag 1973).

There was, at this time, little support for the regulation of pornography from within the women's movements. The women's movement of the early 1970s, in particular the autonomous and “radical” movements, had evolved out of the 1968 left-wing protests. In general, these women valued individual rights and freedom of choice, little state interference in private matters, and sexual liberation. There was thus little support among these women for restricting access to pornography. The women's movement of the early 1970s, moreover, did not see the state as an important avenue for pursuing women's

equality. Their disengagement from the state, and broadly speaking, support for sexual liberation, prevented the large sections of the women's movement from seeing that pornography might constitute discrimination against women. It was only when the newly liberalized approach to pornography resulted in a dramatic increase in pornographic images, that women began to question the reproduction of state patriarchy and the construction of women's subordination through the depiction of women's sexuality.

Perhaps not surprisingly, a dramatic increase in pornography and sexual images was evident in the years immediately after the liberalization of the penal code. Sexual images were widely used in advertising. As long as the advertisement did not depict violence or sexual acts with children or animals, it was legally acceptable. Women's sexuality was used to sell everything from cars to tape recorders (Bremme 1990). Within the formal pornography industry, taboos were also being broken. Producers often admitted to pushing the limits of the acceptable (Uhse 1990). The fine line between legal and illegal was frequently crossed, especially in the depiction of children in sexually explicit poses. According to one report on the child sex industry in the early 1980s, children as young as eight years old were being used in the making of pornographic images (Schwarzer 1994a). It was clear that the laws were not being enforced. As they began to see themselves objectified and reduced to their sexuality, some women began to react. The Courts were again their first battleground.

The use of litigation to “reframe” the pornography debate was spearheaded by a specific branch of the women’s movement led by Alice Schwarzer, editor of the feminist

magazine *EMMA*. Their critique of the “pornographication of society” began with an open campaign against the depiction of women in sexist advertising and pornographic “art.” Supported by Schwarzer, ten women launched a lawsuit against the popular *Stern* magazine on the grounds that sexist representation of women on the magazine covers was an affront to women’s dignity. This was the first public attempt to reframe the question of pornography to address its impact on women everywhere. The case sought to bring pornography into the public sphere and to label it discrimination against women. The women, through the courts and using *EMMA* as their forum, argued that the objectification of any woman and the subsequent commodification of this woman as a sex object, was degrading to all women.

Although they lost the battle in Court, the women did celebrate two small victories. While the law required the judge to dismiss their case, he stated that he found the women to be in the “moral right,” (Schwarzer 1994). Moreover, the judge expressed his hope that a court might, in 20 years, be able to rule otherwise. Bolstered by this moral victory and the success of bringing pornography as discrimination into public debate, Alice Schwarzer launched the “PorNO” campaign, moving the battle out of the Courts and into civil and political society. The public awareness campaign culminated in 1987 with a legislation proposal that declared pornography a form of violence and discrimination against women. Most important, following the example of the Dworkin and MacKinnon civil ordinance in the United States, the legislation sought to move pornography from the criminal to the civil branch of law. If successful, this would give

women a direct means of retribution if they were personally harmed by pornography. The proposed legislation reignited the debate on pornography begun in the parliament in 1970. The issue was, to differing degrees, picked up by all the political parties. Several parties promised to carry out public hearings to discuss the relationship between the representation sexual violence and discrimination against women in society.

Two legislative proposals were at the core of the public hearings. The first proposal, mentioned above, was advanced by Alice Schwarzer and *EMMA* magazine; the second was an independent proposal by two feminist lawyers, Vera Slupik and Susanne Baer⁶². All political parties showed some degree of support for the legislation and the linking of women's objectification and discrimination and most legal experts, both within the parties and independent, received the proposals positively (in particular the more legally sound Baer/Slupik proposal) although with some reservations. Many women in the political parties openly welcomed the proposal. Rita Süßmuth, for example, then Minister responsible for the Youth, Women, Family and Health portfolio under the ruling CDU party, proclaimed the need for public debate on the role of pornography in German society. She announced a hearing of the ruling coalition (CDU/CSU/FDP) and a separate hearing within the CDU/CSU women's caucus on the topic of pornography. Neither took place (Bremme 1990). The liberal FDP Party responded similarly with "big talk" but no action. Though the Liberals supported the proposal in principle, the party avoided formal statements on the anti-pornography debate as, the party had not yet "found the time" to really investigate the matter (Bremme 1990). The two main left-leaning political parties,

the SPD and the Greens, did hold public hearings on the matter.

The Green Party hearings were held on 8 September, 1988. The debates highlighted deep internal division in the party over the issue. On the one hand, the Green Party values were clearly committed to women's rights and equality of individuals; on the other hand, these same party principles stressed the importance of a high degree of personal choice and freedom from censorship. Given this inherent contradiction in the party platform, it was difficult for the party to develop a stance on pornography as discrimination against women. One Green Party member, Waltraud Schoppe summarized the sentiments of a number of other Party members when she declared that she could not support the legislation because she "wanted to continue to be able to buy pornos in the supermarket" (Bremme 1990, 131). As Susanne Baer later commented, "I thought to myself, 'she has no idea what she is actually talking about'" (Baer interview). In fact, Schoppe was not alone in this opinion. Her position was shared by a number of more conservative men as well as radical feminists. The differences in opinion among and between women, as well as the unusual alliances that formed between conservative men and radical feminists contributed to difficulties in reframing the issue.

The SPD hearings, held on 13 and 14 September 1988, were somewhat more fruitful than the Green hearings (Dane and Schmidt 1990). Many of the issues that had been addressed during the penal code reforms in the first half of the 1970s resurfaced. Importantly, however, these issues were now considered within a broader framework that recognized the implications of pornography for women. In the SPD hearings,

representatives from the pornography industry, both producers and actresses, sat alongside lawyers, politicians, and feminists. With the obvious exception of the pornography producers (and to a lesser degree the actresses), most of the participants supported new legislation, though some of the lawyers questioned grounding this in civil law and opposed granting recognized women's organizations a collective right to bring charges on a woman's behalf. These aspects of the proposal were in their opinion, too radical for the German legal system. In fact, neither proposal was unknown to the German legal tradition⁶³. The Baer and Slupik proposal clarified the definition of pornography and reframed the issue as one of violence against women, yet it accomplished this without changing the legality of pornography as a whole. Violent pornography was already forbidden under paragraph 3 of Section 184. The proposal primarily sought to give women the agency to fight this form of discrimination themselves rather than rely on the inadequate protection of the state. In this sense, the Baer and Slupik proposal tried to work within an existing set of legal parameters. Although the framing of pornography as discrimination was radical and new, it remained within the confines of broader pre-existing legal concepts⁶⁴.

Despite the centrality of one particular strand of the women's movement (represented by *EMMA*) in these debates, there was by no means consensus within the women's movement on the regulation of pornography. In addition to *EMMA*, two other prominent women's organizations, the *Schwarze Witwe* [Black Widow] and the feminist publication *Schamlos* [Shameless⁶⁵] put out by the *Munsteraner Frauenring* [Munster

Women's Circle] did engage in some campaigning against pornography in the early 1980s. However, by the time the issue really took hold some five years later, these two organizations were no longer openly active. Interestingly, the *Deutsche Frauenrat*, the official branch of the women's movement, does not seem to have taken an open stance on either proposal.

Several sectors of the movement criticized the proposed legislation, though often on very different grounds. At least one sector of the more radical of the German feminist movement criticized the proposals as not being radical enough and for being too *Staatfixiert* (fixated on the state). Others suggested that pornography was a vital part of sexuality and eroticism and as such was important to women's self-expression and indeed emancipation (Gehrke n.d.). Some, in particular women working as and with prostitutes, opposed the legislation on pragmatic grounds, fearing that it might actually worsen the position of women working in the sex industry. These women feared that a law opposing pornography would force the sex business underground and as a result make regulation even more difficult. Finally, it is important to note that these debates took place against the backdrop of a comparatively vocal S&M movement, whose supporters clearly opposed any further restrictions on pornography. The divisions in the German feminist movement were, to a degree, mirrored in the divisions in the political parties, especially the Greens⁶⁶.

Though no new legislation came of these debates, the issue of pornography as discrimination was put on the table. The feminist framing was, in the end unsuccessful

(i.e., there is no German legislation that empowers women to seek judicial retribution if they have been harmed by pornographic images, nor is there a widely accepted understanding of pornography as discrimination and hence as one structural barrier to women's equality), but the temporary prominence of the debate was largely the result of the feminist reframing attempts. Putting the pornography debate on the table was facilitated through public support and partially propagated through the widely circulated *EMMA*. It was also assisted by an increase in the number of women in the decision-making process, which gave feminists access to the political arena. The male breadwinner regime, with its focus on the family, and traditional morality, was challenged by the alternative framing of the regulation of pornography. Support for this anti-pornography feminist stance, was however, insufficient to establish this frame as a real alternative to the dominant male breadwinner regime. The failure of the alternate regime in broader society, may be attributed to several factors.

The level of disagreement among the various branches of the women's movement likely hindered the success of the legislative proposals and thereby limited the effect of the alternate frame. It was a relatively small coalition of women that adhered to and promoted the counter-regime. Moreover, this anti-pornography feminist approach was further checked by a number of other potential frames which also sought to challenge the existing legislative frame. These deflected attention away from the anti-pornography feminist campaign and lessened the impact of the challenge. The existing legislation represented a compromise for the tension between the protection of the family and

freedom of expression inherent in the German legal tradition. Both of these issues enjoyed very prominent positions in the collective German consciousness. The attempt to reframe pornography as discriminatory and violence against women could not compete with these existing frames.

Not only were there strong internal divisions in the women's movement, the anti-pornography feminists could not rely on support from the official political channels. Although some of the female politicians supported the legislation, they too faced strong opposition from within the parties. Because neither Baer and Slupik, nor *EMMA* were operating from within the party structures, their access to the political arena was still limited. The little headway that they made was lost as the issue fell from the table in 1989 as Germany was suddenly thrown into upheaval by the fall of communism and the reunification of East and West. Pornography and women's dignity took a back seat to more pressing issues. In Europe however, the debate was only just beginning.

European Debates and Regulations – Commodity vs. Discrimination

The German government restrictions on “hard” pornography were framed around public morality and protecting youth from potentially dangerous material. It thus follows that violations of this legislation be managed under the criminal code. In contrast, at the European level, pornography is regulated only insofar as it is a commercial good to be traded and sold. In the eyes of the European institutions, its regulation can act as a potential barrier to the execution of a free market. Pornography must therefore be subject

to the same conditions of trade within the Community as other goods and services. The European Union has, however, broadened its mandate in recent years beyond the simple regulation of market and trade. In particular, the institutions have developed new competencies in the area of social policy, immigration and discrimination against individuals and groups. Individuals have been actively working at the European level to alter the understanding of the sexual representation of women as part of the broader structural inequalities facing women. The extent to which this new frame may support an alternate understanding of gender relations at the German level remains to be seen.

This section makes two main observations with regard to European (non-) regulation of pornography. First, I note that pornography was initially addressed by the European institutions as a commodity. At the same time, the regulation supported the perception of some of the member states that pornography as harmful to the development of minors. Given the prominence of these two frames, the Television Without Frontiers Directive did little to reframe the debate along an anti-pornography feminist perspective. Second, shifts in the prominence of the gender project have contributed to changes in addressing the structural barriers to women's equality. Increased gender awareness in a number of related policy areas, as well as the introduction of gender mainstreaming, have opened new opportunities for addressing pornography as discrimination against women.

The proliferation of (televised) pornographic materials in the European Union is regulated through the Broadcasting Directive (Council 1989), also referred to as the Television without Frontiers Directive. This legislation aims to strengthen competition in

broadcasting among the member states and to remove barriers to broadcasts between them. It places responsibility for screening the appropriateness of a broadcast with the member state in which the broadcast originates. If a transmission is deemed suitable in one member state, and it conforms to the regulations on content, advertising, etc., then the member state receiving these transmissions may not subject them to further review. In other words, what one member state deems appropriate is considered appropriate in all member states. Although specific provisions allow member states with stricter national regulation of media transmissions to maintain these standards, such measures cannot be effective without a uniform understanding of pornographic and acceptable. In the absence of such definitions, the European legislation suffers from many of the same problems as the German legislation.

According to Article 22 of the Television Without Frontiers directive, member states may subject transmissions that “seriously impair the physical, mental or moral development of minors” to additional review and/or barriers. The directive specifically suggests that this measure may be invoked against programs that “involve pornography or gratuitous violence”. The directive, however, fails to define pornography. Without a common understanding of what constitutes pornography or common guidelines to determine what might “seriously impair” the development of a child, Article 22 is open to a great deal of interpretation. Indeed, terms such as *gratuitous* and *moral* are as difficult to define as pornography itself. As such, the directive alone does little to reframe the discussion of pornography in Germany. In fact, European law, which assumes the

transmitting states to be responsible for regulation, may even result in more relaxed controls (Weigend 1994) as member states accept transmissions without further control.

Council documents demonstrate that pornography was not an important issue for the member states during the initial negotiations of the Television Without Frontiers directive. In fact, Article 22⁶⁷, garnered relatively little attention during the negotiations in the 1980s. In those instances where the member states turned their attention to this portion of the Directive, they primarily discussed the balance between the protection of children and youth and the dismantling of trade barriers. Thus, from the outset, the member states proceeded from an assumption that the regulation of the commodity “pornography” was necessary in order to protect the morality and development of young people.

The German and the Portuguese delegations were particularly anxious to see community-wide norms implemented to protect minors (Council 1986). In the German delegation’s view, the protection of minors must remain a “fundamental point... [which] may not in any case be affected by the freedom of the circulation of programming”. The delegation introduced an amendment to this end, which was neither well-received nor incorporated into the final draft (Council 1987). The majority of the other delegates argued that this sensitive area involved subjective elements which rendered community norms difficult to achieve. The documents show a clear preference for maintaining member state control in this difficult area as it must be recognized “... that different value judgements might apply to determining what is capable of harming children’s

development or what constitutes pornography or gratuitous violence” (Council n.d.). Recognizing that the different member states favoured a wide variety of measures to protect minors from “harmful programming”, the Irish delegation proposed a compromise which intended to shift the bulk of regulatory responsibility to parents and guardians rather than the state. The proposal maintained very vague language and left most details open for member states to determine within the context of national political and social culture. This was also deemed too detailed by other member states. The final version is quite vague and leaves the member states to determine how and by whom broadcasts ought to be regulated.

This Irish proposal also contains what appears to be the first direct reference to pornography or pornographic content during the negotiations. The focus of this discussion was clearly on the harm that might come to minors and, by extension, to society as a whole, if young people were exposed to pornography, gratuitous violence or incitement to hatred on the ground of race. This was to be accomplished through restrictions on the time of broadcasting, or through audio or visual warnings to be aired at the beginning of the programme (Council 1987a). Pornography was, consequently acceptable in principle, but access was to be restricted to adults. Thus, the European frame corresponded very closely to the framework expressed in the revised section 184 of the German Penal Code. As I discuss in the final section, the fit between the dominant frame of the European legislation and existing German laws, helped to isolate the debates at the different policy levels from one another. Even though German women were

actively seeking to change the framing of the legislation at the national level at roughly the same time as the European institutions were negotiating the Television Without Frontiers directive, these two policy spheres remained separate.

In the previous chapter, I discuss the role of the ECJ in linking domestic and European policy spheres together, thereby partially shifting the frame under which the German government considered the principle of equal pay. In the case of pornography and broadcasting, the European Courts did not contribute to a blurring of policy levels. The European Courts consistently reinforced pornography as a good or commodity open for trade throughout the market (ECJ case 34/79; ECJ case 121/85). In the first case, in 1979 the Court permitted member states to limit the importation of pornographic materials, in the process formally defining pornography as a commodity. It is thus subject to the same regulatory framework as any other community good. In a later ruling, the Court found that the member states could not restrict the importation of sex toys (which, if interpreted broadly, could also include videos) given that the trade in these objects was not illegal on the domestic market. The Court has therefore supported the commodification of women through pornographic images and, moreover, expanded the proliferation of such images from the national to the European market.

The Television without Frontiers Directive was amended and expanded in 1997 (97/36/EC), in response to rapidly changing broadcast technologies (Council 1997). These amendments included some minor changes to the regulation of pornographic imagery, but nothing that represented a change in the perception of regulation of

pornography as simply a barrier to the free exchange of commodities. Article 22(2) was added to clarify the distinction between programmes that might *seriously impair* the development of minors (as regulated by the original Article 22) from those that *impair* their well-being and development. These amendments bore a great deal of similarity with the Irish compromise suggested some years previously. Under the new provisions, broadcasts deemed to only impair the development of youth could be broadcast throughout the Union with certain restrictions. For example, the broadcast must be transmitted late at night when children are unlikely to be watching television or else they must be sent in scrambled form. If the program is broadcast in unscrambled form, an audio warning must precede the broadcast or a visual warning must appear on screen throughout the program. The distinction between “serious impairment” and only “impairment” is certainly a normative question. Given the different national legislation of the various member states (Weigend 1994), regulation is quite complicated. If a member state finds a broadcast to be unacceptable, it may initiate a complicated process in order to ban the station from future transmissions (case T-69/99). This does not, however, undermine the nature of pornography.

Both the 1989 and the 1997 directive are intended to safeguard broadcasters and ensure reasonable competition in the European broadcasting system with little reference to or regard for the gendered implications of the broadcast material. The European provisions therefore maintain a dual aim of protection of minors and freedom of the market. This prevents the institutions from seeing the effects of pornographic

transmissions on women and also contributes to the commodification of the human body and the objectification of women. The European gender regime was seemingly unable to compete with the firmly entrenched neo-liberal economic regime that guides much of the European initiatives.

The period between the initial implementation of the Broadcast Directive, and its first revisions in 1997, corresponds to a period of major change in the overall regulation of European gender policy. The European Commission and Parliament in particular, sought a balance between the neo-liberal economic framework of the Community and the emerging institutional gender regime. The European commitment to gender equality elevated gender policy to a fundamental principle of the Union, broadened the scope of gender policy and in the mid 1990s incorporated gender mainstreaming as a means of ensuring a gendered perspective on all aspects of community legislation. The 1990s and early 2000s have shifted the gender focus to examine the role of structural inequalities in women's discrimination. As discussed below, aspects of European policy strongly challenge the existing frame on pornography and support the feminist anti-pornography stance that frames pornography as discrimination against women.

Parliament, in particular has demonstrated a growing awareness of the multiple sources of discrimination against women, and has addressed the commodification of the female body as a form of discrimination through a number of different initiatives. The most direct step towards a Community policy against pornography came in 1993 when the Parliament issued a resolution on pornography as a response to several MEP's

motions (European Parliament 1993). Beginning in 1990, at least once a year, the MEPs reiterated the need for a common stance on pornography. With its 1993 Resolution, the Parliament became the first of the European institutions to take a formal step towards a common understanding of pornography and a recognition of pornography as discrimination against women. The document recognizes pornography as “an affront to human dignity... [stimulating] certain symptoms of undesirable social behaviours, particularly against women,” and as “a systematic practice of exploitation and subordination based on sex that disproportionately harms women and contributes to inequality between the sexes, existing power imbalances in society, female subordination and male domination.” Perhaps even more importantly, Parliament used the document to argue for European competency in this realm based on the Union's responsibilities under Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, guaranteeing protection from torture, inhuman, or degrading treatment and punishment. The legislative body furthermore pushed for the “protection of the victims of the manufacture of offensive products (actual victims).” It is important to note that the issue was brought to the European level through individual parliamentarians, influenced by discussions in their own member states. Here, Europeanization involves the transfer of policy discussions from the national to the European level. Once incorporated into the collective institutional consciousness, the policy may return to the domestic policy levels.

The statements and recommendations laid out in the Parliamentary Resolution

were largely ignored by the other legislative bodies. Though Parliament called for specific action from the other European bodies, neither the Commission nor the Council made any direct response to the parliamentary resolution. While it is generally customary for European documents to refer back to earlier communications or documents on the same topic, there is no recognition of this communication from Parliament by the Commission or Council, even in later legislation (Commission 2000; Council 2002). The lack of impact of what was in fact a groundbreaking document is perhaps reflective of the relative lack of power exercised by the European Parliament at that time (Maurer 2003). The body, despite its good intentions, was not in a position to define what constituted European jurisdiction. Nonetheless Parliament, at least, moved beyond the framework of pornography as immoral or damaging to youth to view pornography as discrimination or even torture. Taken in conjunction with other elements of the European gender policy, this was a significant step.

The European Parliament continues to address pornographic and sexist representation of women in a campaign against sexist advertising and discriminatory or stereotypical representations of women in the media (European Parliament 1997). Key players in this debate including Swedish MEP Marianne Eriksson and German MEPs Lissy Gröner and Marlene Lenz (Lenz 2003) have played a crucial role in developing the Parliament's programme to help combat sexist advertising in the member states. In 1997, Parliament adopted a resolution on the treatment of women in advertising, stressing the need for a zero-tolerance campaign against violence against women and adopted a

resolution on trafficking in women for the purpose of sexual exploitation. These measures have broadened the scope of the Community gender policy and drawn important links between structural inequalities, violence against women and discrimination. In this manner, the Parliament's approach resembles that pursued by anti-pornography feminists in Germany.

More recent initiatives to combat trafficking in women have also noted the link between sexual exploitation of women in the pornography industry and organized trafficking in women. These have helped strengthen the power of Parliament's alternate framework and slowly move away from an acceptance of pornographic material as commodities. Through the simplification of the co-decision procedure in the Amsterdam Treaty, the European Parliament has acquired a greater influence in decisions in an increased number of issues. It is possible that Parliament's "feminist" framework may make some inroads into the other institutions.

The Commission, for example, has acted to combat violence against women and discrimination in advertising by funding two programmes – Daphne and Stop – both of which have been accompanied by a series of reviews and legislative initiatives⁶⁸. Moreover, in 2001 the Commission supported Council's Framework Decision⁶⁹ on combating trafficking in human beings and on the sexual exploitation of children and child pornography. Though the Framework Decision does not take the same radical stance as the 1993 parliamentary resolution, there is some indication of a gradual acceptance of a more feminist framing. The Framework Decision, for example, targets

“offences concerning trafficking in human beings for the purpose of sexual exploitation ...[and] labour exploitation” (Commission 2000). This clearly brings pornography into the picture, if only in a limited fashion. It is possible that the Framework Decision will open new opportunities that anti-pornography women’s organizations can use to eventually force a change in perception (see also Hilson 2002). In general, however, the Community continues to look at sexual exploitation as link to trafficking in women from outside the Community. This focus creates the impression that the Community believes its own nationals working in the pornography industry are less in need of protection than those who have been brought in from outside (usually Eastern Europe and Southeast Asia). From the perspective of anti-pornography feminists, the ideal legislation would target all forms of sexual exploitation of all women, rather than focusing only on a specific group.

Finally, the current Framework Strategy on Equal Opportunities (2001–2005), a document outlining the central aims of the Community policies on gender equality, has targeted gender stereotyping as its main priority. This clearly demonstrates that the Community has recognized the need to deal with images that by presenting men and women in particular roles reinforce traditional gender roles. The representation of women as sex objects, always ready to please a man, could come under attack through programs developed under this Framework Strategy. Again, note that this does not open the debate immediately to defining pornography as discrimination, but it does open some possible new channels. Moreover, this new action to recognize media stereotypes as one possible

structural barrier to women's equality also has implications for a broader understanding of discrimination, one that leaves room for the discussion of pornography from an anti-pornography feminist point of view.

In contrast to the progressive approach visible in the Parliament and to a lesser extent the Commission, the Council, still partially suffers from an institutional inertia in which the existing (patriarchal) framework has been perpetuated in a series of acts and decisions. This too is being challenged from within and from outside the Council channels. The Council has taken important steps toward addressing problems of the proliferation of child pornography on the Internet and trafficking in women and children. These issues, are however, generally viewed as aspects of Community security, rather than women's rights. Consequently, although the Council has gradually begun to address broader structural inequalities and violence against women, the dominant perspective does not adopt anything akin to the framework advanced by anti-pornography feminists.

Several other developments indicate that the institutional gender regime, by embracing an ever-broader understanding of gender relations, may yet bring the question of pornography into the Broadcast Directive. In particular, the establishment of the European Women's Lobby, and the implementation of gender mainstreaming may create substantial changes to the institutional landscape so as to alter the perception of the regulating pornography as an aspect of discrimination against women. The European Women's Lobby could offer a channel through which to bring a feminist perspective to the Broadcast Directive. However, the EWL neither commented on nor contributed to the

1997 reform debates (EWL 2003). There are, however, some indications, that the Lobby has encouraged the Commission to address the representation of men and women in the media more thoroughly in the revised directive. These shifts in policy focus and actors open new possibilities for future developments.

Mainstreaming may also alter the institutional focus and help to justify a more feminist approach to policy areas which seem to be completely detached from “women's rights”. In theory, mainstreaming ought to have already been in place during the reforms of the Television without Frontiers Directive. This did not occur. As Pollack and Hafner-Burton (2000) demonstrate, mainstreaming has been quite slow to permeate some directorate generals (DGs), particularly those deeply steeped in the neo-liberal tradition and with few women in the upper ranks. Had mainstreaming played a more substantial role in policy making during the second Television Without Frontiers directive, it may have offered valuable opportunities for anti-pornography feminists in the Community to push the alternate frame. The directive is currently under review again. Now that gender mainstreaming is firmly entrenched in the procedures of the European institutions, the issue of pornography may be more thoroughly addressed during this round of negotiations.

The influence of several of the measures discussed above are apparent in the early drafts of the most recent revisions of the Television Without Frontiers Directive. Most importantly, the narrow approach to pornography and its regulation premised on the need to protect minors, has been widened. Public consultations taking place as part of the

upcoming review build on a framework which incorporates notions of protecting human dignity and restricting “affronts to human dignity” as first addressed in a Council Recommendation (98/560/EC) passed in 1998. The Recommendation which seeks to develop “the competitiveness of the European audiovisual and information services industry by promoting national frameworks aimed at achieving a comparable and effective level of protection of minors and human dignity” (Commission 2000) indicates an awareness of the relationship between broadcasting and social values. Public consultations to address the required amendments to the Television Without Frontiers directive continued to use this approach. Nonetheless, while the wording has changed, there does not appear to be a substantial shift of focus on the harm that pornography causes to minors to the harm that is caused to women through pornographic materials. The extent to which a discursive shift will be followed by an actual change in focus remains unclear.

There is evidence that the upcoming revisions to the Television Without Frontiers directive will make specific reference to the portrayal of women in the media and that this might include an acknowledgement of pornography as an affront to the dignity of women. Alternately, the issue may be incorporated into the proposed directive on the equality of men and women in fields outside of employment (see for example Black 2003). In either cases, the pressure to include sexist media representation as a form of discrimination against women seems to be generated from within the European institutions. Neither the EWL nor national based women's organizations have, as yet,

openly pressured the Commission to include these measures. Nonetheless, several organizations are examining the possibility of using European channels to address the issue of pornography. If sexual discrimination in the media is entrenched into either of these directives, the European Court would have the right to determine which programming and advertising is sexist or harmful to human dignity. Although it is aimed primarily at the representation of women in the media rather than at “organized” pornography, it does not seem to be a stretch to imagine that such legislation could be used to counter pornography as a whole.

The European institutional approach to body politics, as evidenced in the regulation of pornography, trafficking in women and the sexual exploitation of women in advertising, is currently undergoing a shift in policy frame. So far, only the Parliament has consciously described pornography as discrimination against women. However, as the institutions address issues such as violence against women, the representation of women in the media and trafficking in human beings, there are possibilities for reframing the issue. A reframed approach would go beyond restricting the trade in the “commodity” of pornography because of a desire to protect minors, to recognizing pornography as discrimination against women. Although it has become more common to address the protection of minors and human dignity, this has yet to be backed by a concrete set of initiatives and clear definitions of pornography, “harmful” broadcasts and similarly vague terms.

Assessment and Conclusion

The regulation of pornography is, for several reasons a far more complex case study than that of equal pay. On the one hand, the EU has paid very little attention to the issue. On the other hand, its connection to a variety of more prominent gender issues such as trafficking in women, violence against women and the representation of women in the media has led the EU to frequently reflect on the matter without actually taking action. Its position in a broader feminist struggle, and a wider gender project is thus somewhat unclear. As a result, few organizations in civil society have actively sought to alter society's understanding of the matter. Finally, it is exceptionally difficult to define the role of state or European institutions in what is frequently deemed a private matter. Thus, the interplay among state, civil society and European actors is much weaker, more informal and more difficult to trace than for issues which clearly fall within the jurisdiction of the state.

In this final section, I address the ways in which these difficulties have influenced the process of Europeanization and the construction of alternate norms and values within the European and German policy spheres. I conclude with the recognition that, in this case, Europeanization has been extremely “fuzzy” and is difficult to clearly define the process or its results. Nevertheless, pornography appears to be undergoing a reframing at the European level. With the further articulation of “feminist” norms at the European level, the pressure to conform at the domestic level may increase. The process of Europeanizing body politics, is potentially just beginning.

Pornography makes up only a small aspect of one European directive. The EU has, consequently not played a substantial role in its regulation. At the same time, one could argue that the EU has played a role in the *deregulation* of pornography. By defining pornographic material as a tradable commodity, the European institutions indirectly supported a liberalization of pornographic materials. Under the broadcast directive, each member state is required to determine the suitability of programming transmitted from the domestic market. The receiving state may apply restrictions if the material contravenes more protective domestic legislation. This is, however, a complex and seldom used process. Theoretically, the nature of pornography is defined by the state with the most liberal regulations reinforcing its status as a “commodity”.

At the same time the European legislation also recognizes the validity of the “morality argument”. The directive allows the member states to restrict broadcasts which might harm or seriously harm the moral development of minors. This reinforces the dominant domestic frame in Germany, and has seriously limited the adaptational pressure exerted by the European institutions on the German institutions and norms. The neo-liberal economic frame and the morality frame are, by and large, compatible with one another.

Both of these frames, moreover, demonstrate a relatively good fit and resonate with the norms, values and institutions dominant at the German level. According to the thesis put forth by Caporaso, Cowles and Risse (2001), it is consequently unlikely that adaptational pressures will be exerted on the domestic level and domestic institutions will

consequently remain largely unchanged. To the neo-liberal and moral framing, however, we must add a third, competing frame – a feminist frame – that is currently evolving at the European level and which may in the future exert pressure on the member states.

The regulation of pornography is not typically viewed as a feminist issue. As a result, the initial European legislation passed without much consideration of gendered impact or implications for women. Its regulation existed outside of the reach of the gender regime that has been emerging within the European institutions. This, however, is beginning to change. There is evidence of strong support in all the European institutions to increase European activity in two policy areas, closely related to pornography: the fight against violence against women and trafficking in women for the purpose of sexual exploitation; and the need to combat discriminatory portrayals of women in the media. Support for these issues has been strong in the Parliament, the Commission and, to a lesser degree, the Council. Though not explicitly mentioned, there is room within this frame to pick up on the issue of pornography. Moreover, the additional focus on sexist advertising also allows some room to discuss pornography as a structural barrier to women's equality.

The presence of a competing, yet non-dominant frame at the European level complicates the process of Europeanization. Crouch and Keune (2005) assert that a single social structure can support contradictory logics. In their study, they find that the contradictory logics may in fact encourage forms of behaviour that are essentially at odds with one another. In this case, the European structures simultaneously claim that

pornography is a commodity while women and, more specifically female sexuality are not. Crouch and Keune speculate that endogenous actors can use the tension between these competing logics to facilitate a shift in the dominant regime. Thus, we could expect to see European women's organisations, using the emerging frame to introduce a "feminist" frame on the regulation of pornography. In fact, women's mobilization at the European level has remained limited.

It is difficult to confidently assess the extent to which women's organizations have been active at the European level in pursuing a feminist frame on body politics as a whole. On one hand, the Daphne and Stop programs, as well as initiatives against trafficking in women, have been supported extensively by the EWL and some domestic groups. The EWL has been particularly successful in defining violence against women as a European issue, and has actively pursued the establishment of EU-level initiatives and policy (Collins interview). On the other hand, the EWL has slow to establish links between violence against women and the regulation of pornography. The lobby group did not comment on either the 1989 or the 1997 Television Without Frontiers directive, initially seeing no potential for feminist politics in this legislation. EWL activity is furthermore hampered by the multiple voices which the lobby must attempt to incorporate. In the past, this has led to difficulties in establishing consensus in areas of body politics such as abortion (Helferrich interview). It would be a difficult struggle to pursue an anti-pornography feminist stance with a high degree of conviction from all the women's organizations involved.

The links between the domestic and European policy spheres have been exceptionally weak. The negotiation of the first broadcast directive took place in 1986 and 1987, at approximately the same time as the anti-pornography feminists in Germany were seeking to change the domestic laws. There is, nonetheless, no reference to the European level in the German debates. German women's organizations avoided using the Community level to pursue goals at the national. Baer, commenting on the role of the European level on regulating pornography, remarked, "We didn't give it any thought ... at that time [1987]; the European Directives were such that the 1975 Directive on equal pay was central and the European Community focused on employment life. We consciously did not want to make this [the draft legislation] an issue of working life" (Baer interview). Baer does suggest that it would have been possible to do so by making the issue one of discrimination at work, looking at it from the perspective of the actresses, and bringing the whole legislation through the prostitution track. But she argues the political climate in Germany, which viewed prostitution as immoral and illegal work, would have made this an extremely problematic route to pursue. Consequently, given the nature of the European institutions and their focus on employment, there appears to have been a conscious rejection of this level as a possible means of reframing the problem.

Domestic German women's movements been quite closed to the possibilities of the European level as an avenue to pursue feminist body politics. No German civil society organization proposed a project on the portrayal of women to be funded through the gender Framework Strategy (2001-2005). Moreover, only one German

nongovernmental organization (NGO) received direct funding under the DAPHNE programme to work on prostitution and the sexual exploitation of women. There is no indication that any branch of the German women's movement is presently pursuing any action against pornography through the European channels, nor that the issue is of concern within the major German women's organizations. Several, however, focus on violence against women and the proliferation of sexist advertising, and they are currently pursuing initiatives, though somewhat belatedly, at both the national and the European levels.

Perhaps these organizations have learned from the successes at the European level and adopted a frame that prioritizes opposition to violence against women. By modifying their stance to better coincide with one that is more likely to be accepted by the broader public, the organizations have increased their chances of successfully influencing the understanding of the nature of violence against women. Indeed as the actions of both the Commission and the Parliament indicate, this reframing is already under way. But the frame these organizations have chosen precludes attention to pornography by placing sexual exploitation at the centre of a debate to protect women from violence and trafficking.

The weak policy and civil society links between the German and the European policy levels, in conjunction with what is a generally good fit between the two frames, has resulted in very little adaptational pressure. It is possible, however, that a gradual spread of a feminist frame on body politics more broadly defined, might facilitate the

reframing of the broadcast directive and subsequent measures to control the proliferation of pornography from the European level. The question, however, is whether the German policy actors will, at that time be receptive to an anti-pornography feminist perspective.

In the 1980s, German women mobilized through a vast number of channels including the political parties, EMMA, other civil society organizations and the legal system, in an attempt to reframe the question of pornography as discrimination against women. The lack of consensus, however, about the need for anti-pornography legislation diminished the impact of those working to crack the dominant regime. These groups, particularly those with access to the political parties acted as veto points and blocked the reforms from proceeding beyond the hearing stage. Secondly, the conscious desire to frame the legislation as a question of discrimination and a social structural barrier to women's equality without passing through the employment channel necessitated that women focus only on the national level. It is only recently that the option to pursue non-labour market related policies through the European institutions has become possible. Where it has, the German women appear to have moved on to other issues. As such, the challenges exerted by the European level on the domestic remain weak. In terms of body politics, morality and the representation of sexuality, there is little indication as of yet of successful challenges to the male breadwinner regime.

Notes to Chapter Four

⁵¹ The issue of child pornography is not examined in this chapter.

⁵² This chapter deals with pornographic representations in film and photo. For reasons discussed below, it does not consider pornography in the form of “erotic literature”. Nor does it address the widespread proliferation of pornography on the Internet.

⁵³ Women of colour and migrant women are more frequently the targets of sexual exploitation. Moreover, the vulnerable status of many non-EU (illegal) migrants in the European Union makes it more difficult for them to escape abusive situations. For more on this, see Elman (2001).

⁵⁴ The question of where to draw the line between pornography and art is a particularly complex one. German feminists have been especially vocal against the work of “artist” Helmut Newton. For more on this campaign and Newton’s photos see Schwarzer (1993, 1994a).

⁵⁵ This poster campaign sparked public outrage when one man wrote to *EMMA* and other institutions describing an incident he had witnessed. The man apparently approached a bus shelter late one evening where two drunk men and a lone women were waiting. The men glanced at the poster and then at the women and jeered, “Hey doll, what’s your record? We could test it right here to see!” (*EMMA* On-line 2002).

⁵⁶ The term *simple (einfach)* seems to be the preferred one in the German literature, where a further distinction between soft and simple pornography is occasionally made. Here, “soft pornography” refers to images in which the sexual act itself is more implied than shown. Furthermore, soft pornography does not generally include close-up photos of the female genitalia or of the erect penis. In contrast, simple pornography does show the sex act but without violence or other elements that would characterize it as hard (see Traudisch 1990; Dane and Schmidt 1990). It is important for the English-speaking audience to note the distinction between this understanding and the common English usage, in which *hard-core* refers to the degree of penetration shown.

⁵⁷ For a more complete discussion on defining pornography in the German context, see Gehrke n.d., Ostendorf 2001, Tröndle and Fischer 1999, and Weigend 1994.

⁵⁸ To my knowledge, the first to put forth such a definition were American feminists Andrea Dworkin and Catherine MacKinnon in 1983. The subsequent definitions and laws proposed by German feminists drew extensively on Dworkin and MacKinnon’s work but adapted them to the German legal system (Baer 2003; Dworkin and MacKinnon 1988).

Although there has been a particularly active network of feminists and academics working on this issue in the United States, this chapter relies almost exclusively on the German literature. This is a conscious decision on my part. The portrayal of pornography is dependent on society's acceptance and collective understanding of the body and sexuality. Differences in the German and American context in this respect are quite great, with German society on the whole much more open to sexuality. To avoid assumptions about sexuality within the respective societies, I focus primarily on the German academic literature and debates. Though this at times comes at the expense of a very rich American literature on the subject, I consider this to be more appropriate.

⁵⁹ It is, to a lesser degree, also regulated by Section 131 of the Penal Code, which restricts media productions that glorify violence, as well as Section 6 of the *Jugendschutzgesetz* (Youth Protection Act). Given the interconnectedness of these sections, this chapter focuses on Section 184.

⁶⁰ The inviolability of human dignity (*Menschenwürde*) is enshrined in Article 1 of the *Basic Law*. By *Menschenwürde* an inalienable value or worth of the individual is assumed. It is thus an attribute of life and humanity itself and can be neither granted nor revoked by the state. A definition of pornography as discriminatory or harmful to the image of women might make use of this concept in its reasoning.

⁶¹ On the whole, the German state perceives its role as protecting only those who cannot protect themselves. This is generally defined as children. However, as the women's movement established shelters for abused women in the late 1970s and early 1980s, it became clear that structural inequalities can lead to situations where even adults are not in the position to protect themselves.

⁶² Baer and Slupik originally cooperated with *EMMA*. However, they disagreed with Schwarzer on a number of points of law and the manner in which the American proposal might be modified to fit German law and subsequently published their own proposal.

⁶³ Although on the whole, German litigation does not support class action suits, there are some allowances for it in the legal code. For example, environmental organizations have the right to bring a collective action on behalf of someone (or something) else.

⁶⁴ In contrast, the *EMMA* proposal did not conform entirely to existing German legal tradition. Hence, although it received more publicity, it was a less legally sound proposal than the Baer/Slupik draft.

⁶⁵ *Schamlos* has several meanings. It most commonly translates as shameless. It can, however also mean indecent or brazen. On yet another level, *Scham* can be used to refer

to the female genitalia

⁶⁶ For more on the reasons why women defend pornography see Leidholdt 1990.

⁶⁷ The article, eventually numbered 22 was, for a long time during the negotiations numbered Article 15.

⁶⁸ These programs were initiated by the European Union to support civil society projects aimed at combating some aspects of structural inequalities against women. Daphne targets violence against children, young people, and women. The Stop program, originally run from 1997–2000 and later as Stop II from 2001–2002, was intended to help prevent and combat trade in human beings and all forms of sexual exploitation. Both programs encourage transnational cooperation among civil society organizations. STOP has since been merged into the AGIS programme.

⁶⁹ With the entry into force of the Treaty of Amsterdam (1997), framework decisions and decisions came to replace joint actions. Framework decisions are used to align the laws of the different member states. They are binding on the Member States in terms of the result to be achieved, but like a directive, leave the choice of form and method to the domestic policy machinery. Unlike directives, framework decisions are taken on the initiative of either the Commission or a member state and must be adopted unanimously. This tool is used for policy areas which are not clearly under the jurisdiction of the Union.

Chapter Five

Parental Leave and the Shift to “Gender Policy”

Like equal pay, parental leave policy has emerged at the juncture of Community economic, social and gender projects. The policy has been one of the core elements in a broader set of European reconciliation policies which aim to facilitate the better combination of work and family responsibilities for men and women. On the whole, these policies encourage a two-fold restructuring of gender relations by supporting the labour market participation of mothers, and increased family responsibilities for fathers. Thus, the policy is at least nominally driven by a dual earner/dual carer model of gender relations. It is not surprising that this policy frame is at odds with the domestic framing of parental leave in (West) Germany. The fundamental differences in objectives, context and policy priorities between the West German and the European measures have reinforced two different sets of gender relations in contemporary German society. What is surprising, however, is the lack of mobilization of eastern German women on this issue during the post-unification era. Neither government feminists nor women's organizations have actively pursued a parental leave policy frame which defends the worker-mother status previously entrenched in the norms of the East German state. As a result, shifts in discourse and policy now becoming apparent in German policy are better attributed to the transfer of norms and values from the European level, than the conscious mobilization of an alternate gender regime by eastern German women. While the male breadwinner model continues to dominate German society and politics, gradual and limited influence

from the European debates and legislation has become visible in recent years in the domestic discourse around the reconciliation of work and family and the division of labour in the household.

Parental leave policies in the two German states were grounded in two very different understandings of women's position in society and the state's responsibility towards women and families. In East Germany, women were encouraged to return to work soon after the birth of a child, and were supported in this endeavour through near-universal child care facilities and special provisions to accommodate working mothers. This policy had the dual purpose of maintaining full employment of men and women, while at the same time encouraging relatively high fertility rates among women. Moreover, the state sponsored daycare programmes helped to ensure the "proper" education of children into the socialist state system. Leave plans were primarily aimed at achieving state goals, but in the process encouraged women's employment and financial independence from the male breadwinner. Nonetheless, aimed almost exclusively at mothers, East German policy supported female employment without seeking changes in men's behaviour. It consequently left women's caregiver role unchallenged, contributing to the double burden. Thus even though it broke with the male breadwinner model, entrenched in West Germany, the East German model did not promote the emergent European dual earner/dual carer ideal.

In West Germany, parental leave policy evolved gradually out of maternity protection laws premised on the need to protect mothers and new-born infants by

discouraging mothers from active participation in the labour market. It encouraged maternal care, in particular during the first three years of a child's life. The West German ideal thus supported the male breadwinner earning a family wage, with women full-time homemakers and caregivers or, at best, part-time earners once the children were of school-age. As the regulation of parental leave gained a prominent position in domestic discourse during the mid 1990s, the collision of the fundamentally different eastern and western German gender regimes complicated the debates already underway at the European and domestic levels.

Parental leave thus sits at the nexus of the state, market, family triad and offers a valuable case study on the evolution of the European gender regime and the corresponding norms and values. It is important to remember that parental leave policy is not a “stand alone policy” but must, as Sheila Kamerman stresses,

...be viewed as an integral part of early childhood care and education policies. Moreover they [parental leave policies] must be assessed as well in relation to several other policy domains, including the historical link between maternity protection and health policies, labor market policies (both to create incentives for young women to enter the workforce and, sometimes, for unskilled women to withdraw from the labor force), gender equality policies including policies to facilitate mothers' employment, to promote fatherhood, and to help reconcile work and family life (Kamerman 1999, x).

The relationship between parental leave and these related policy areas can influence the extent to which policies have an impact on the gender regime and the gendered division of labour. The first section of this chapter outlines in general terms, how parental leave can support this broader feminist agenda. The presence of parental leave policy does not, however, automatically result in “feminist” policy or in changes in the dominant gender

regime. It is therefore important to address the underlying premises and objectives of the leave through an analysis of policy debates and formation.

Parental leave has twice been actively debated at the European level. Each period of European discussions has been followed by domestic-level debates. This chapter traces both sets of debates, beginning each discussion with an analysis of the European measures and then shifting to the German debates. Through this discussion it becomes clear that the current German parental leave legislation has been influenced by the European discourse. In particular, the contemporary German discourse on the reconciliation of work and family and increased parenting roles for fathers is indicative of changes emerging from the European directive. Although current state discourse indicates a gradual shift toward a more equal gender regime, a continued lack of action in related policy areas has ensured that social practice in western Germany has generally continue to follow a male breadwinner/female caregiver model. In eastern Germany, women's life and employment patterns differed, yet there is little indication that this alternate understanding of gender roles has challenged the dominance of the German system. Nonetheless with the introduction of new values and policy priorities through the Europeanization of parental leave, gradual changes are becoming visible in contemporary German society.

Feminism and Parental Leave Policies

The European Commission, borrowing from ILO Recommendation 165 defines parental leave as:

the leave granted to fathers and mothers during a period after the termination of maternity leave to enable parents in employment to look after their newborn child for a certain time, whilst giving them some degree of security in respect of employment, social security and remuneration... parental leave is also granted to adoptive parents (Commission 1983).

Parental leave policy is therefore directly linked to labour market participation and employment policy. It is a gender neutral, job protected, child care leave. This is categorically different from maternity leave which is a form of protective legislation based on the special healthcare needs of the convalescent mother and newborn child. For the European institutions, parental and maternity leave are based on fundamentally different premises with maternity leave reinforcing at least temporarily, maternal care, and parental leave encouraging dual parent caregiving. Ideally, parental leave challenges the premises of the male breadwinner regime by "...requir[ing] a fundamental change in attitudes about gender, parenting and work in industrialized societies, whereby both mothers and fathers are assumed to be responsible for the care of young children, and government and employers are held responsible for assisting parents in this extremely important task" (Haas 2002). The implementation of parental and maternity leave policies frequently blurs the different policy aims and as a result parental leave may fall short of its radical and socially transformative potential.

Granted specifically to "parents in employment", the nature of parental leave policy plays an important role in the state, market and family triad. The structure of leave policy can encourage or discourage female labour market participation; shape decisions about the division of unpaid labour between partners; and influence choices about family

size and structure. It therefore has an impact on women's independence and autonomy as linked to family and labour market decisions. According to a liberal feminist perspective, in order for men and women to participate equally in the formal labour market, they must engage in an equal sharing of unpaid responsibilities. So-called reconciliation policies consequently aim to achieve a masculinization of women's labour market participation and a feminization of men's family responsibilities to establish a more equal participation of both sexes in their relationships to their family and the labour market. These policies support an equality-based gender regime.

Policies structured to achieve greater gender equality in this way can be at odds with leave schemes that offer long periods of unpaid or low-paid leave. Longer term and low-paid leaves are taken almost exclusively by women and thereby reinforce the gendered division of paid and unpaid labour. This contradiction, evident in many West European states, reveals "...not only contradictory policy objectives but, underlying them, deep seated conflicts or, at least ambivalences about gender roles and relationships and about masculinity/ies and femininity/ies that still exist throughout Europe" (Moss and Deven 1999). These assumptions about gender roles and the gender regime may be influenced by at least four general factors. The length of leave, level of pay, the degree to which a connection to the labour market is encouraged, and the availability of affordable and accessible childcare facilities, must all be taken into consideration in evaluating the manner in which leave can reinforce or undermine the male breadwinner model. The specific articulation of these policies will be influenced by the dominant set of social and

political norms and values.

Morgan and Zippel (2003) distinguish between different aims of parental leave schemes partially based on the length of leave. They argue that extended leaves (i.e. beyond 12 months) are better termed “care leave” than “parental leave” as the underlying aims of these policies are generally to replace costly childcare facilities and encourage female caregiving.

Parental leave was developed as a way to solidify the connection between mothers and the labour force and have been part of the strategies to promote women’s labour force participation. Care leave represents a different strategy, one of promoting “temporary homemaking” for women rather than encouraging their speedy return to the workforce. (Morgan and Zippel 2003).

It is noteworthy, that those European countries with long, poorly paid parental leave policies including (West) Germany, Austria and Spain are also those countries with the lowest levels of childcare facilities⁷⁰. Although I do not wish to suggest a direct correlation between “care leaves” and a general lack care facilities without further study, a relationship between long care leaves and lack of child care facilities for the very young is evident. Ondrich, Spiess and Yang (2002) have researched this relationship in the German case. They conclude that:

Federal parental leave policy in [West] Germany has focused on providing protection to new mothers for longer periods of time. The longer periods of potential leave mean that, initially... the new mother is insulated from the general scarcity of affordable day care in Germany... The empirical work in this study suggests that a working woman who has no option but to take full parental leave should she have a child, must make a difficult decision concerning career versus family.

In the absence of publicly funded and accessible child care facilities, many women may

have little choice but to use the full period of parental leave open to them.

Mahon (2002) suggests that state policies to make “temporary homemaking” more attractive for some women, is characteristic of a trend towards neo-familialism. Although the state may adopt a formally gender neutral stance by aiming these policy provisions at “parents”, long care leaves, especially in conjunction with childcare allowances, have in several instances reinforced a gendered division of labour. According to Mahon, a wide variety of western European states, including some which formerly embraced a more egalitarian model, demonstrate tendencies towards this form of childcare policy. There is certainly evidence of the neo-familial policy model in Germany. However, unlike Finland and France, which have moved away from a more egalitarian model to a neo-familial model, the German reliance on parental (i.e. maternal) care has much deeper roots. Rather than a potentially path-breaking policy shift, the German state's initial endorsement of parental leave is merely a gender neutral expression of the male breadwinner/female caregiver model and the traditional division of labour that developed in post-War West German society. Under this system, women are frequently required to choose between parenting or labour market participation and parents are additionally required to choose who will adopt each of these roles, thereby reinforcing the division of labour in the household. There is little incentive for both parents to share both roles.

It is not only the length of the leave that influences decisions on career and family. The level of pay, type of pay scheme and the personal income circumstances of

family members will also contribute to the decision. In Europe, a wide variety of pay schemes exist for parental leave policies. Among flat rate schemes, the level of pay may be income-tested as in Germany, based on number of children as in France, or dependent on family structure as in Austria's additional payments for single parent families. Leave may also be income-related, although again here the level of income replacement varies throughout Europe. In Italy, for example, the leave period is paid at only 30% of former pay; in Denmark parents on leave receive 60% of their salary; in Sweden parental leave is compensated with 80% of an individual's salary.

Low or unpaid parental leave will influence individuals' choices about the division of paid and unpaid labour among partners. Where women generally earn less than men, it is mothers who most frequently take the parental leave. In contrast, where leave is offered as a percentage of salary, it is possible for either partner to temporarily leave his or her job without serious financial repercussions. One study on fathers and parental leave in the unified Germany, found that level of pay was one of the primary reasons that men did not take up parental leave. Nearly 75% of the men in both eastern and western Germany highlighted that pay during parental leave was insufficient to compensate for their loss of income (Rost 1999). Not surprisingly, in 78% of the families studied, the fathers earned more than the mothers. Thus, in most circumstances the family risked losing the primary income if the father were to take leave. This restricts choices about which parent should, or can, take leave. The level and nature of pay during parental leave can consequently function to reinforce traditional gendered divisions of labour

rather than challenge the male breadwinner model⁷¹.

The second most common factor cited by men in this same study, was work related. Nearly 1/3 of the respondents admitted a fear of “losing touch” with the workplace during their absence. Roughly the same number were concerned about missing professional opportunities or felt that in their position, parental leave was simply not an option (Rost 1999). These issues were of more concern for men in the western German *Länder* than those in the former East. However, men in the former East were more likely to worry about losing their job altogether (30%). Possibilities to maintain contact with one's employer during the leave period – through part-time work, reduced hours or other forms of regular contact – are therefore important in encouraging men to take up parental leave.

The ability to maintain a connection to the workplace during parental leave is also important for women's return to the labour market. Several studies have highlighted that a woman's opportunities in the labour market decreases proportionate to the length of time that she exits the labour market to have and care for children (Esping-Andersen et al 2001; Keyenfeld and Hank 2000). Her overall salary, opportunities for promotion and special training are similarly influenced. To challenge both the male breadwinner and the female caregiver aspects of the dominant gender regime, leave policies must encourage parents to be connected to both family and employment throughout the leave.

Ultimately, however, attitudes towards mothers' labour market participation and fathers' relationship to the family are responsible for the extent to which a family relates

to the male breadwinner model (see also Werneck 1998, Rosenkrantz et al 1996). In western Germany, a negative association is attached to the working mother who has her children cared for by someone other than a family member (see for example Ostner and Lewis 1994). The “*Rabenmutter*” stigma is not alleviated if a woman returns to work only upon a child's entry into school. Mothers are expected to be at home for their children in the afternoon, in order to oversee homework and similar activities (Eulers 2003). This social stigmatization of the working mother, especially prevalent in Catholic Bavaria, is all but non-existent among eastern Germans (Bisky 2005). The openness towards working mothers in East Germany carried over into a tolerance of a variety of different family forms, and a comparatively high level of single mothers⁷². The policies of the old socialist state had contributed to the cultivation of a gender regime in which motherhood and childrearing were easily combined with formal employment, the legacy of which is visible in individuals' attitudes towards the employment of mothers (Jaumotte 2003). For example, in a 1994 survey, only 33.7% of the East Germans agreed with the statement that “[a] child is likely to suffer if his or her mother works”⁷³. In contrast, 71.1% of West Germans agreed. Nearly 15 years after reunification, eastern German women with young children are still much more likely to be employed than western German mothers (Engelbrech and Jungkunst 2001). Social values in eastern and western Germany thus encourage different roles for women and lead to different norms and choices in terms of parental leave and the reconciliation of work and family.

Cross-national studies on parental leave in Europe (for example Moss and Deven

1999; Falkner et al, 2002; Haas, 2002; Bruning and Plantenga, 2002; Gauthier 2000; Lohkamp-Himmighofen and Dienel 2000) have indicated that parental leave policies have not generally brought about the promised shift in attitudes and responsibilities. Although all of the EU member states make parental leave available to either parent, the extent to which men take advantage (or are encouraged to take advantage) of this possibility varies greatly. On the whole, men's take-up rate remains substantially lower than women's (only 2% in Germany compared to over 95% for women), implying very little change in the actual division of labour. Consequently, parental leave emerges as a Catch 22: "if parental leave was equally taken by women and men, it might promote or consolidate gender equality. But to be equally taken requires gender equality to have been achieved already, or to be further advanced than at present. If gender equality is not already advanced, then parental leave may retard or even reverse progress towards its achievement" (Moss and Deven 1999).

Attitude change requires specific incentives to encourage behavioural changes. The Nordic countries have been most successful in encouraging a dual-carer/dual earner scenario. Both Sweden and Norway encourage fathers to become involved in the care for their young children through a "daddy leave" (Leira 1999). This special leave is granted in addition to maternity/parental leave and is directed only at fathers. The leave is paid at full, or nearly full salary, making it exceptionally attractive for men. In Norway, one month of non-transferable leave is reserved for fathers to be taken immediately after the birth of their child. If fathers opt not to take the leave, it is lost entirely. Compared to

earlier legislation granting fathers the opportunity to take leave on a voluntary basis, the “daddy leave” has been very successful. Under the voluntary scheme, take up by fathers was similar to that in other European countries, around 2-3%. The introduction of the daddy quota has raised the percentage of fathers taking the leave to over 70% (Leira 1999). A similar “daddy month” exists in Sweden. Again, if the father does not make use of his entitlement, it is lost to the family. In Sweden, take-up rates of the Daddy month are approximately 90%, with roughly 1/3 of fathers taking further leave during the first several years of the child’s life (Haas and Hwang 1999). This acts as a specific incentive to encourage fathers to participate in family life and take on a portion of household chores during the leave.

Other forms of incentive involve a time account system in which parents can trade off earnings against the length of leave (for example Norway) or an additional period of paid leave if the primary leave is shared between both the mother and father (as in Austria). In contrast to these states, Germany has been slow to move beyond a discourse supporting fathers' caregiving to actively encourage men's parenting and women's return to the labour market. Current discourse and debates show a gradual move in this direction

Contemporary German policy is carried over from the former West German policy, revolves around the centrality of the family and thus supports traditional divisions of labour and family forms. According to the existing parental leave legislation, both parents are entitled to up to three years of parental leave during which they may each pursue paid employment of not more than 30 hours per week. With the consent of their

employer, one year of the parental leave may be postponed and taken sometime between the child's third and eighth birthday. The leave is relatively flexible, allowing parents to alternate leave between them, although this plan must be presented to the employer in writing at the beginning of the leave period. Leave is paid at a relatively low rate. Parents receive a childcare allowance of 300 Euros per child per month for the first two years of leave. The third is entirely unpaid. If parents opt for the new and shorter "budget version" of childcare allowance, they receive 450 Euros per child, per month for only one year. The right to child care allowance is income tested with a comparatively low cut-off of only 30 000 Euro/year family income⁷⁴. After the first six months, the eligibility criteria become even more restricting, with families earning more than 16 500 Euros eligible for only a reduced child care allowance⁷⁵. If parents work part-time during the leave period, their childcare allowances are adjusted accordingly.

The current German parental leave policies have been strongly influenced by early maternity leave policies, and an attempt to address neo-natal and post-natal health for mother and child through legislation limiting the mother's labour market participation. In Germany, maternity protection policies began as early as 1878 when Bismark introduced radical new legislation imposing three weeks of mandatory leave, immediately after the birth of a child, for all working women. The protective measures were expanded gradually over the next several decades to offer longer paid leave. This put Germany at the leading edge of the western industrial world in terms of legislation protecting the reproductive role of working women. Bismark, of course, was not

concerned with women's equality. His government was moved to act based on a comparatively high infant mortality rate in the German state.

In the years after World War Two the West German state exploited the image of the happy family with a homemaker mother. A woman's greatest contribution to society was in creating a stable and happy home for her husband and children (Münchenberg 2002). In 1961, cross national statistics again demonstrated that German mothers and infants suffered from a comparatively high mortality rate. In response, the government institutionalised further maternity leave and set the payment of these at a flat rate equal to sick pay (Fix 1998). Maternity protection policies were thus grounded in a concern for the health and well-being of newborns and the mothers themselves. There were certainly no measures taken to facilitate women's labour market participation such as the expansion of child care facilities or introduction of more flexible positions⁷⁶.

Changing attitudes, in particular after 1968, brought competing demands from the women's movement, with some branches seeking an improvement in women's condition through paid housework, while others sought emancipation through employment. Although the newly elected SPD-FDP coalition expressed its support of women's employment and women's equality, the government did not take any concrete action on parental or maternity leave until 1978. At this time, the government passed legislation to increase the existing protection period for working mothers, arguing that women who have recently given birth were "in need of special care" (*schonungsbedürftig*). The state used this argument in favour of "special care" for new mothers to justify restricting the

leave to mothers, and simultaneously addressing a widespread social concern that the mother's paid employment was detrimental to the development of her child. The conscious decision to exclude fathers from child care leave raised criticism from a number of different corners of society (Deutscher Bundestag 1979). Even the *Bundesrat*, frequently the more conservative of the legislative bodies, was opposed to exclusion of fathers, arguing that if the aim is to alleviate a new mother's double burden of work and family, then fathers ought to be permitted to assist in the caregiving (Deutscher Bundestag 1979). This was not legally the case until 1985.

Even in the young East German state, women were expected to contribute to society as both mothers and workers. Where West German policies encouraged women to be dependent upon a male breadwinner, East German policies shifted the locus of dependence from the male partner to the state. As Ostner et al. note, the "socialist providential state took command of essential family functions, assuming a parental role and to some extent that of the breadwinner-husband." (Ostner, et al. 2004). Especially in the 1970s and 1980s, this involved a set of policies and social entitlements granted to mothers in order to serve the needs of the state. Gender equality in the sense of granting fathers special entitlements was not central to the East German regime. Thus, while the working mother model was the norm in East Germany, the carer father was not. The gender regime dominant in East Germany was thus best defined as a dual earner/female-state caregiver regime. Following the birth of a child, the mother was granted 20 weeks of maternity leave during which she received a social insurance payment equal to her

average monthly wages. Until the child reached the age of one, mothers were granted parental leave paid at up to 90% salary. In special circumstances a spouse or grandparent might be eligible for parental leave.

After the first year of maternal care, a large percentage of East German children were cared for through extensive state day care centres. As of 1990, over 50% of the children between one and three the former East German children and 100% of the three to six year olds were in day care facilities. In contrast, only 2% of the West German children under three and approximately 78% of those between three and six were in day care (Randall 2000). Policy in the two German states were clearly driven by fundamentally different notions of gender roles.

Until the early 1980s, both parental leave and childcare policy remained a national issue⁷⁷. While it remained state policy in East Germany, in the West, the European Community began to address the need to harmonize social policy, including parental leave in the early 1980s. With the German debates to open leave to fathers on the table in the early 1980s, the policy was concurrently addressed at both levels. There is, however, little indication that German policy actors openly drew from the European debates to influence the domestic discussions. This was particularly true for the first round of debates in the early and mid 1980s. Once legislation was agreed at the European level in 1996, the process of Europeanization and policy and norm adaptation was more explicit. The following sections trace these negotiations and legislation at both policy levels.

European Debate and Negotiation – Talk Without Action

Most of the member states officially supported a shift from maternity leave to parental leave in the early to mid-1980s (see also Gauthier 2000). Although the domestic and European policies developed more or less simultaneously, the framing of the issue was fundamentally different with the European Commission and Parliament embracing a multi-dimensional frame at odds with the positions within the member states. The European proposal for a directive on parental leave is primarily grounded in a feminist politics, but is supported by economic and social reasoning. In order to downplay the feminist objectives that dominated the frame as initially presented by the Parliamentary Women's Committee, the Commission presented the proposal to the member states as part of labour, economic and social policy. In contrast, most of the member states addressed the issue domestically as an aspect of family policy. The different approaches manifested themselves in a stalemate in the Council of Ministers and the draft directive was eventually put on ice for several years. This section addresses these debates tracing the European initiatives from 1981 until 1986.

The initial impetus for Community legislation on parental leave came about in response to the Parliamentary Report on the Situation of Women in Europe (1981). The Committee had addressed the situation of women across a broad range of issues including equality in the workplace and remuneration, access to abortion and the division of labour in the family. The feminist tone of the report is not at all surprising, given that a number of Parliamentarians on the Ad Hoc Committee were also active in women's movements in

their respective countries. These government feminists, representing both the movement and the European Parliament pursued a number of radical positions through the report. The report was peppered with references to the relationship between the public and private spheres, to the connection between women's paid and unpaid labour and proposed several tactics, including the introduction of European parental leave policies to facilitate changes to the gendered division of labour. It is somewhat surprising that, despite the clear feminist agenda and a strongly emancipatory tone, the European Parliament, adopted with a clear majority, a resolution addressing the primary points of the report on the Status of Women in the Community⁷⁸. The Resolution subsequently formed the basis for the first Community Action Programme on the Promotion of Equal Opportunities for Women (1982-1985) and played a central role in establishing the basis for a liberal feminist policy frame in the Parliament and Commission.

In the early 1980s, the political atmosphere in the Commission was generally receptive to pursuing social and gender policy through the European channels. The Action Programme provided an important legal basis for this activity. Ivor Richards, former Commissioner for Education, Employment and Social Affairs has since acknowledged that "...it was due to the Action Programme and pressure from the European Parliament that he introduced a draft directive on parental leave... without the action Programme to use as a lever on the Council, the Commission would have had to justify every step it tried to take in this field" (CREW Report, January 1985, V. 1 quoted in Rutherford 1989; see also Council 1983).

By this time, the Commission had already demonstrated its commitment to equality policies by establishing a number of sub-committees and para-Commission bodies to gather information and develop equality policy. The Equal Opportunities Unit of DG V (Employment and Social Affairs) had gained in importance through the 1970s equality directives. Increases in staffing and budgets and a proliferation of publications, especially in the area of childcare and family policy, raised the prominence of the Unit within the Commission (Ross 2003). One new policy approach, beginning in 1982, sponsored the creation of policy networks to research specific sub-fields of gender policy. Several Expert Networks, including one on the application of the equality directive and another on the position of women in the labour market, were inaugurated in 1982. Several more networks have followed in later years including a Childcare Network in 1986. One effect of these networks and para-Commission bodies was to attract policy activists situated at the “cutting edge of new conceptualization and politics” (Ross 2003, 184). This contributed to the emergence of a new and at times radical discourse within the Commission. Positive action and reconciliation policies developed and supported by the Networks demonstrate clear support for women’s labour market participation and a more equal sharing of household tasks between partners.

As outlined in the Community Action Programme on the Promotion of Equal Opportunities for Women (1982-1985), the Commission was charged with the responsibility to “draft a Community legal instrument to promote parental leave and leave

for family reasons while maintaining and extending existing public childcare facilities and services” (Commission 1983). Following consultations with the Advisory Committee on Equal Opportunities for women and men and with the Social Partners on the nature and content of the legislation, the Commission tabled its proposal for a Council Directive on parental leave and leave for family reasons in November 1983⁷⁹.

Formally, the Commission reasoned that a directive on parental leave was necessary on the grounds of economic and social policy as well as equality between men and women. At the same time, it consciously retained many of the feminist premises that dominated the framing of the issue by the Parliamentary Women's Committee and the Equal Opportunities Unit of the Commission. Thus, although the Commission had adapted the reasoning to better appeal to the member states, the content of the draft remained radical and thus prompted many of the member states to proceed with caution.

The Commission cites economic and equality issues as the primary impetus for the directive, with social issues more implicitly than explicitly addressed. The aim of the directive, according to this multi-faceted approach:

... is to establish common statutory provisions throughout the Community governing these specific aspects of working conditions. By establishing a clear Community approach to parental leave, moreover, this proposal will also serve a useful purpose in the context of the implementation of the Community's policy on equal treatment between men and women (Commission 1983).

Ever-aware of the financial considerations that constrained many of the member states at the time, the Commission clearly demonstrated that the proposal would not impose unbearably high costs on the member states as the expected take-up rate would likely be

far below the eligibility rate. In fact, it was suggested that parental leave would help alleviate some aspects of unemployment and economic stress by creating positions for young workers. By filling the positions left by those on leave with unemployed workers, these individuals would gain valuable experience that would benefit the economy as a whole.

The Commission also referred to equal opportunities and the relationship between the public and private spheres as fundamental aims of the proposal. From this, the Commission addresses childcare as a central policy area related to parental leave. Given the growing importance that childcare policy played in the Commission at the time, it is conceivable that parental leave was used as a means of discreetly bringing it onto the European agenda (see also Rutherford 1989). The Commission, again couched this in rhetoric which it assumed would be accepted more readily by the member states, arguing that childcare and parental leave were particularly important policy areas for member states concerned with demographic trends.

Many member states were concerned about emerging demographic trends, in particular falling fertility rates, a growing number of pensioners and a decreasing number of contributors during a period of economic uncertainty. Few of the member states openly addressed a link between family policy and demographics, yet many have used reconciliation policies to indirectly address demographic and socio-economic trends. Although not contradictory to the feminist frame, the link between demographic trends and parental leave policies is difficult. As Rutherford suggests, "... governments should

not be encouraged to subordinate, so blatantly, child and family welfare to the fluctuations of the labour market” (Rutherford 1989, 305). The multiple aims presented in the Commission's draft to the Council of Ministers thus downplays the gender goals of the legislations.

Within this altered reasoning, much of the language in the proposal mirrors the feminist discourse of the Commission and Parliament. It links, for example, women's labour market participation to private responsibilities by identifying that “the sharing of family responsibilities between parents is an essential part in particular of strategies designed to increase equality in the labour market” and stressing that parental leave should not be used as a “discreet way of encouraging the permanent withdrawal from the labour market of working mothers” (Commission 1983). The feminist frame is most apparent in the content of the proposal. A truly radical initiative for its time, the draft used parental leave to encourage women and men to each take a short period of paid leave before returning to the labour market. The directive called for a minimum leave of three months for all working parents to be taken before the child's second birthday. It suggested that, with the agreement of the employer, the leave be able to be taken part-time and extended accordingly. Finally, the leave was to be paid, at an undetermined level, from public funds or social security systems. The proposal thus tries to “normalize” care and labour market participation for both parents.

The draft was discussed in Parliament and the EESC in the early months of 1984. Three Parliamentary bodies – the Committee on Social Affairs and Employment, the

Committee on Economic and Monetary Affairs and the Committee of Inquiry into the Situation of Women in Europe – addressed the draft (European Parliament 1984). It is interesting to note that, while the Committee on Social Affairs and Employment and the Women's Committee adopted opinions with little internal controversy, the vote in the Economic and Monetary Affairs Committee expressed a higher degree of concern. In the former Committees, the documents were adopted with 75% and 100% agreement respectively. The ten member Economic committee (9 men and 1 woman) adopted the draft opinion by 4 votes to 1, with 5 abstentions. On the whole, however support for the proposal was strong among the wider group of MEPs and spanned a wide political spectrum. The majority of amendments were to expand or clarify the directive, and remained very much in line with the overall liberal feminist frame.

Support in the European Economic and Social Council was also divided. The EESC passed its official opinion with 87 votes in favour and 53 opposed, with 8 abstentions. The primary objections stemmed from the employers, who had previously expressed their concerns with the directive to the Commission. In essence, the Employers' Committee argued that the issue of parental leave was a matter for the social partners, not the member states or the European Community. The EESC Employers' Committee did concede that differential standards for parental leave could place some employers at a competitive disadvantage. In particular, they could see that employers with a high percentage of female workers would be particularly disadvantaged as women would likely still be the ones to take up parental leave. The Employers' Committee,

however, argued that this issue was a question of living conditions rather than working conditions and therefore not subject to European jurisdiction (Council 1983). The Employers' Committee thus denied a fundamental link between public and private spheres – a stance which would again be apparent in the second set of European negotiations.

The division of power in the Community was such that support from the EESC, the European Parliament and the Commission was insufficient to ensure the passage of the directive. Strong opposition in the Council, in particular from the UK, Ireland, Germany and Denmark, prevented the legislation from passing. Rutherford (1989) suggests both domestic and European factors played a role in the failure of the directive. At the European level, she cites the institutional power struggle as well as factors related to the internal organization of the Commission. Thus, while the proposal enjoyed a high degree of support from the Parliament and the Commission and, in particular from the Commissioner in charge, the structure of power between the institutions prevented the Commission from substantially influencing the proposal beyond the initial draft. Inside the Council, domestic factors dominated the discourse. The unanimity requirement offered each member state a de facto veto power, thus crippling the discussions.

Domestic factors, including the recent proliferation of domestic legislation on parental leave, complicated the passage of the directive. At the end 1982, four of the ten member states had some form of parental leave in place, although none of these conformed to provisions set out in the draft directive. By 1985, at the height of the

European negotiations, all member states (except the U.K.) had implemented some form of legislation to allow parents to care for young children (EIRR 1985). A number of member states were unwilling to revise newly adopted legislation and, as a result, each member state pushed for legislation that required as little adaptation to the national legislation as possible. A plethora of visions and frameworks was thus brought to the European table.

It was evident from the outset that the directive would be difficult to pass. Not only were many of the member states opposed to the provisions, the nature of their concerns varied widely. Delegates from Germany and Denmark questioned such fundamentals as the formal legal basis of the proposal (Council 1984; 1984a). The Belgian and Irish delegations were concerned with costs; the French with the difficulties which small and medium sized enterprises might face under such legislation; the Italian delegation argued that the proposal was too detailed. Every article met with reservations of one kind or another⁸⁰.

In addition to basic concerns regarding the legality of the treaty basis for parental leave, the German delegation expressed two major reservations that are of particular concern to the framing of gender roles and the reinforcement of a particular set of gender relations. First, the government actively campaigned against the Commission's intended non-transferability of leave. Second, the government was anxious to receive reassurance that member states could exceed the provisions outlined in the draft directive (see, for example Council 1985; 1985a; 1985b; 1985c). Both of these issues were of importance to

the maintenance of the male breadwinner/female homemaker ideology that underpinned the existing domestic legislation.

The German government opposed the non-transferability of the legislation and the implications that this may have for the special status of mothers as primary care givers. Moreover, the German request to permit standards above those outlined in the directive would allow the state to continue to support a longer, unpaid period of childcare, something which we know to encourage women to leave employment for a longer period of time and make re-entry much more difficult. If women were primarily responsible for the care of their children during the first three years, the state would be alleviated of responsibility to provide public day care facilities. Both of these sticking points for the German delegation demonstrate that the government was not yet willing to entertain a gender-neutral framework, which might have not only brought about more equality for women in the family and the labour market but, in so doing may have destabilized the centrality of the family in society.

One further sticking point arose with reference to the relationship between a European-organized parental leave legislation and the guaranteed autonomy of the social partners. Interestingly, this issue was primarily expressed by the Belgian delegation. The German and Dutch governments, though concerned about the effects of equal pay legislation on collective bargaining did not take up the issue with vigour during the parental leave negotiations.

Several compromise positions were advanced by the various Presidencies and by

the Commission in attempt to reach an agreement. Most of these watered the proposal down to such an extent that it was hardly discernable as a mechanism to promote equality between men and women. The longer and more difficult the negotiations became, the less “feminist” content is evident in the overall structure of the proposal. In the face of strong opposition in the Council, the Commission was unable to pursue the framework originally supported by the Parliamentary Committee and the Commission’s Women’s Bureau. Gradually, the purpose of parental leave as a means of achieving equality for women was lost. Agreeing to a directive on parental leave became more important than the content of that directive. Still, the member states could not reach a consensus. The directive was no longer actively negotiated after 1986. The primary policy level shifted back to the domestic.

The period from 1982 – 1986 marked an important period of change in the European institutions. On the one hand, the European Parliament and the European Commission, each driven by their respective women's policy units, collectively embraced a liberal concept of equality based on labour market participation. These institutions, moreover, used a broad understanding of structural inequality to justify a broader base for European social policy, increased social integration and a European gender policy. On the other hand, the member states, represented through the Council of Ministers were generally reluctant to increase social policy integration, fearing that this would open Pandora's Box. Although the Council of Ministers was generally receptive to a liberal gender policy in employment matters, this basic consensus did not carry over into policy

areas not immediately associated with employment and labour market regulations.

The European Court of Justice was a further unknown in this nascent gender regime. Although the Court had taken several liberal and generally women-friendly decisions in the early 1980s, it too was reluctant to formally expand women's policy to gender policy. What McGlynn (2001, 2001a) terms the “dominant ideology of motherhood” framed the ECJ's understanding of the existing legislation and temporarily excluded an ideological shift from women's policy to gender policy from taking place through judicial channels. McGlynn argues that “... the ideological foundations of the European Court's sex equality legislation ... is limiting the potential of the equality laws to bring about real improvements in the lives of many women. In this way, far from alleviating discrimination against women and men, the European Court is reinforcing traditional assumptions about appropriate family roles” (2001, 327). The Court's role in the perpetuation of a gendered division of labour in Germany, and to a lesser extent in European legislation, is particularly evident in the 1984 case of *Hofmann vs. Barmer Ersatzkasse* (ECJ Case 184/83)⁸¹.

In this case, the German government defended its mothers-only leave legislation based on the argument that the leave was intended to protect the health of the mother and her new-born child and to relieve her of the double burden of caring for a newborn and working outside the home⁸². This argument was very much consistent with earlier reasoning based on comparatively high infant mortality rates in Germany. Hofmann's

lawyers, however argued that the leave was a technique to convince women to leave employment for a long period of time after the birth of a child. They based this argument on several observations. According to the legislation, mothers who adopted a child were also granted the optional six month leave. Moreover, the leave period was automatically terminated if the infant died during this timeframe. If the mother's health was the true concern then the leave, then the status of the child ought to be immaterial. The government responded to these arguments by claiming that the health of the mother was brought into question only as a result of the double burden, hence the death of the child would relieve a portion of this "burden". Transferring the leave period to the father, as Hofmann intended, was not recognized by the state as similarly relieving one aspect of the burden.

In a much-cited ruling the ECJ decided that the equal treatment directive (76/207/EEC), and by extension the European equality provisions were "... not designed to settle questions concerning the organization of the family, or to alter the division of responsibility between parents" (ECJ 184/83). The Court ruled against Mr. Hofmann, arguing that the "special bond" between mother and child warranted the protection of the mother's role. The ECJ thereby reinforced a conservative ideology of gender and motherhood and perpetuated the "dominant ideology of motherhood". Had the decision been in favour of Mr. Hofmann, the Court may have added increased pressure to adopt the "radical" parental leave proposal that was still being debated in the Council of Ministers.

The contradictory framing of parental leave within the various European institutions was a major factor inhibiting the adoption of European legislation. While the Commission and Parliament supported measures to bring about a more equal sharing of family and labour market responsibilities, the member states generally resisted such measures. The European debates and court rulings as well as the studies carried out by the various networks and Commission-teams influenced the domestic debates in subsequent years. Although the directive itself failed to pass, a degree of Europeanization is evident in the German attempts to alter domestic legislation.

Domestic Debates, Negotiations and Legislation – Circumventing Europe

Opening the existing maternity leave to fathers was brought onto the German political agenda in 1985. It is likely that this policy debate was at least partially driven by the intensified debate at the European level and by the tensions created in the Hofmann decision. Yet the official domestic debates are void of references to either of these European events. Several policy actors, however, embraced the new language of reconciliation and sharing paid and unpaid labour that had dominated the European discussions.

Two separate proposals to alter existing German legislation on maternity/parental care were brought to the German legislative bodies in September 1985. The first, put to the *Bundestag* on September 7, by the CDU simply proposed changing aspects of maternity leave to parental leave (Deutscher Bundestag 1985). The second, put to the

Bundestag three days later, contained a counterproposal penned by the SPD faction (Deutscher Bundestag 1985a). Together the two proposals offer an excellent summary of the two competing frames that were at work in German social and political arenas. Whereas the CDU proposal allowed men a more active role in caregiving, it did little to undermine women's primary responsibilities to the family, or to encourage women's labour market participation. In contrast, the SPD proposal consciously encouraged a shift in the gendered division of labour by offering longer paid leave for families in which each partner took at least four months of parental leave. The SPD proposal responded to demands within the women's movement for the reconciliation of career and family and incorporated much of the "cutting-edge" discourse from the European debates.

Although the male breadwinner family remained the most common form of family organization, a growing awareness of gender issues indicated that, at least a portion of society favoured a social organization that allowed women greater equality in the labour market. Demands for increased equality had elevated women's rights, women's roles and family policy⁸³ to a central component of the platforms of all major political parties. During the 1980s, the SPD's women's caucus (ASF), made substantial gains in influence and status in the party. The position of the ASF at the time was best described as liberal feminist and they encouraged the increased representation of women in political life, and higher rates of participation for women in all aspects of public life. To this end, the ASF passed resolutions to implement gender quotas to all aspects of party politics and

made it clear that the ASF had an essential role to play as the voice of SPD women. The organization reminded the male party elite that “the interests and needs of women are not automatically and in all circumstances parallel to those of the party.” (quoted in Weis 1995). The prominence of this feminist branch in the party is evident in the SPD proposal and in their support for women's labour market participation and men's caregiving.

For its part, the CDU was forced to respond to the feminist politics of the SPD and its own decline in appeal among young female voters, by re-formulating its traditional stance on family politics. In its 1985 Conclusions from the Essen Party Congress the CDU declared itself committed to women's full participation in all aspects and levels of society. This statement wasn't, however, backed by policy that encouraged women to take on non-traditional roles and enable their full participation in social and political life. In general, CDU policy continued to support women's responsibilities in the home and to the family. The “new” CDU policy simply buried these beliefs in a rhetoric of “more equal” and “more woman-aware”. The contradiction between the rhetoric and policy was evident in the CDU's new parental leave proposal.

The two proposals clearly corresponded to the respective political ideologies of the SPD and CDU and corresponded to the parties' dominant image of the relationship between the sexes. Two primary differences in the proposals must be highlighted. The proposals differed in their understanding of the link between childcare allowances/parental leave and labour market participation and in the degree to which they

offered incentives to actively encourage changes in gendered roles and behaviour.

The CDU legislation detached childcare allowances from the labour market in order to avoid discriminating against stay-at-home mothers. “For us [the CDU], career is not just employment outside the home. Responsibilities in the home and for the children is equally valued. It must be recognized again.” (Deutscher Bundestag 1985b). This contributed to an overall framework which prioritized motherhood as active employment. Although the proposal stressed that it offered choices to families, on the whole, it addressed only the needs of mothers. In justifying his party's stance on the legislation, CDU Minister for Youth, Family and Health, Heiner Geißler, referred to fathers and their needs only once yet openly declared the inclusion of fathers to be a major accomplishment of the legislation. At times, Geißler's address to legislature bordered on paternalistic. He declared, for example that “... 50% of those women who take parental leave do not, although they originally intended to, go back to work, but stay with their child – which incidentally is quite understandable.” (Deutscher Bundestag 1985b). Rather than encourage women's return to the labour market, the CDU chose to offer financial support for their exit from the labour market. This is in keeping with the “new” CDU family and women's policy which promulgated a “new period of partnership” but continued to be based on old stereotypes. Though this policy would open the way for men to take parental leave, it did nothing to encourage this shift in consciousness.

The SPD proposal, in contrast is framed as providing compensation for lost

income by financially supporting families in which both parents were active participants in the labour market. This established a clear link between family policy and employment policy, which corresponds closely to the frame advanced at the European level. This perspective was actively supported by the members of the Green party (Deutscher Bundestag 1985b), who viewed the link between labour market and family, public and private spheres to be the single most important aspect of parental leave policy.

The SPD proposal also attempted to overcome the fact that 50% of the women on maternity leave do not return to work. By offering incentives to families in which both partners took a portion of the leave, the SPD hoped to not only encourage father's parenting but, by extension supported mothers re-entering the labour market. The attitude changes which the policy sought to bring about were based on ideas very similar to those advanced during the European debates. There is, nonetheless no reference to the on-going European discussion in the parliamentary debates although the ideas and terminology that peppered the European discussions were frequently repeated by the SPD and Green members.

One final aspect of the CDU proposal is worth highlighting. The proposal was to be taken in consideration at the same time as a further proposal to establish a foundation which would provide financial support for pregnant women considering abortion. The foundation, called "Mother and Child – protection of the unborn life" was intended to encourage mothers to "choose the child". The proposal however made no attempt to also expand childcare facilities or day care possibilities so that these single mothers could

return to the labour market.

The balance of power in the Bundestag all but guaranteed that the CDU legislation would pass, despite the SPD's counter-proposal. Several factions of the women's movement campaigned actively against the CDU legislation. EMMA, for example accused the government of "buying" women out of the labour market. By expanding paid child care allowances to all mothers, regardless of their status to the labour market, the government created a financial incentive to leave the labour market. Even women from the more "traditional" movements undermined the CDU proposal, criticising it for not offering long enough job protection and forcing women to choose to return to work after a very short period of time (Deutscher Bundestag 1985b; 1985c). None of these actors referred to the European proposals as possible alternatives to the German approach.

These two legislative proposals opened two possible responses to changing economic and social conditions for the government. The CDU proposal supported the male breadwinner/female caregiver model; the SPD began to challenge some of its premises. The government was faced with the decision to implement measures to support women as working mothers, through policies to maintain full-time uninterrupted labour market participation with minimal leave, and high levels of public childcare and eldercare on demand, or to encourage women to use paid parental leave measures and part-time work to encourage women to leave the labour force and care for their children (see also Hantrais 2000). Following relatively little debate and few amendments, the Bundestag

voted in favour of CDU proposal, thus reinforcing traditional concepts of gender roles. The legislation used financial incentives and a rhetoric about the “discrimination of the non-working mother” to encourage women's homemaking rather than labour market participation. The legislation was, thus clearly in line with what the German delegation had sought to gain in the European proposal.

The new legislation fell short of the Commission's proposal for non-transferable right to leave. Nonetheless, there are some aspects of the European debate that found their way onto the German political table. The inclusion of men in parental leave schemes was certainly partially a response to the Hofmann decision and a trend in other member states towards equality between women and men. Much of the discourse on reconciliation, the connection between public and private spheres and changing gender roles that had found support in the Commission and Parliament was also evident in the SPD and Green party positions. In this way we can see a minimal Europeanization of discourse and values.

Interestingly, however, the debates themselves remained almost entirely national. There was no direct reference to the European level in either of the proposals, nor were the European negotiations mentioned during the parliamentary debates. Given that the European institutions failed to pass legislation that would allow the institutions to exert adaptational pressure on the German government, it is perhaps not surprising that little formal Europeanization of policy was evident. The second round of negotiations, however, built on these same changes in discourse to eventually open the German gender

regime to greater challenges from the European and domestic levels.

European Debates, Negotiations and Legislation

In the late 1980s, parental leave was not actively discussed in the Council of Ministers, yet the issue remained on the European agenda. It was often addressed in relation to discussions of childcare, unemployment and women's labour market participation. As such, parental leave continued to be set in a liberal feminist framework, even while the issue was removed from the official agenda. This section traces the second round of European negotiations, beginning with a brief discussion of the events in the Council of Ministers before turning to the negotiations by the Social Partners.

Changes in power relations among the European institutions, a revival of interest in “social Europe” including a commitment to joint responses to unemployment and social issues, as well as changes in women's representation altered the legislative landscape in Europe. The convergence of these institutional and market factors in the early 1990s saw the legislation reintroduced in the Council of Ministers, where it rapidly became clear that the member states were again unable to reach consensus. Rather than allowing the legislation to lag in the Council, the Commission opted to open its proposal to the Social Partners to test the provisions of a new European level collective bargaining. This power shift from member state to social partner control invoked an entirely different set of actors and power relations in the negotiations. The fundamental framing of parental leave was partially altered to better reflect the principles of the social partners.

Nonetheless, some of the values and norms initially expressed by the Parliament and Commission remained visible in the final Framework Agreement and the corresponding Directive⁸⁴.

Even though the process of negotiation was quite different from the other directives discussed in this thesis, the pattern of Europeanization during which policy, institutions, norms and values were partially passed on to the member states, remained quite similar. The German government once again denied the need to adapt the existing legislation, only doing so when pressure from the European and domestic institutions left little choice. The European legislation has been entrenched into the German legal system, yet its effectiveness remains constrained by the social and institutional norms of the male breadwinner/female caregiver model. As the other two cases suggested, however, there are indications of value shifts stemming from the institutionalization of the European provisions, which have the potential to challenge the male breadwinner model.

The shift to a more “socially-minded Europe” was precipitated by the election of Jacques Delors to the Commission Presidency in 1985. The Delors Commission was committed to a new level of integration which was not only receptive to social policy issues but actively lobbied the other institutions for support. One of his primary tools by which to pressure the Council and member states for increased social action was the 1986 Action Programme. This programme included, among other commitments, the “swift passage of a directive on parental leave and leave for family reasons”. To this end, proposals were frequently submitted to the Council members for discussion (see for

example Council 1988; 1990; 1992; 1993a). None of these, however, led to a serious reconsideration of the directive, as member state positions had remained largely unchanged since the closing of discussions in 1986.

The Delors Commission's commitment to "social Europe" was seconded by the Belgian Presidency's declaration in 1993 to "give social Europe back its wings" (quoted in *Europe* 1993). Further supported by the social focus of the new Maastricht Treaty these factors combined to create an environment conducive to the revival of several stalled directives. In July 1993, the issue was formally on the agenda of the COREPER working groups. Although several delegations welcomed the resumption of work on the parental leave dossier (see, for example Council 1993) an agreement remained elusive. Many of the issues of contention had remained unchanged during the past decade. In an attempt to simply reach an agreement, the underlying premise that parental leave can facilitate changes in the gendered division of labour in the household, as well as alter the masculine norm of uninterrupted labour market participation, were substantially diluted. One proposal, for example, suggested the leave be available to mothers and/or fathers (Council 1993b). Another offered a long transition period during which parental leave would be transferable between the mother and the father (Council 1994). Yet another reformulated the very purpose of the directive to emphasize familial child care rather than continued labour market participation or equality between men and women (Council 1994b). Finally, one proposal completely abandoned the idea of shared parental leave and proposed that member states offering a minimum of six months paid or unpaid maternity

leave were exempt from the remainder of the article (Council 1994c). In this case, the net result of a parental leave directive would have been the institutionalization of a six month maternity leave. This clearly no longer supported the feminist frame that had initially driven the legislation.

The delegation from the now-unified Germany approached the negotiations with substantially fewer reservations than in the previous round of negotiations. One possible explanation for this change of position and increased amiability is that the government may have chosen to believe that the new national legislation, implemented in 1985 in response to the first round of European negotiations, was sufficient to conform to any legislation that might evolve out of this round of European discussions. As was apparent in the negotiations of the equal pay directive, the German government was known to argue that national legislation conformed even where it did not. A Commission official summarized this tendency in the observation that the Germans tended to agree to only those measures which, in the eyes of the government, already existed at the domestic level. In an interview, one national official of the *Bundesministerium für Familien, Frauen, Senior und Jugend*, highlighting the interconnectedness of German and European policy-making instruments, argued that European policy making is based on national policy making. "We would never ask for anything at the European level that we did not already have, or want, at the national level" (BMFSFJ interview). Given this tendency, it seems rather likely that changes in domestic legislation to partially address the European legislation would provide sufficient impetus to alter the general stance of the German

delegation towards the European directive.

By September 1994, eleven of the delegations had agreed to a draft directive (Council 1994a). The United Kingdom, however, maintained its general reservation on the draft. Because social policy matters remained subject to the principle of unanimity, the U.K. reservation was sufficient to block the proposal. In the final relevant Council discussion of the matter on September 22, 1994, the President concluded that the proposal was deadlocked. Commissioner Flynn (Employment and Social Affairs) accordingly stated that the Commission would begin the procedure provided for in the Social Policy Agreement under which the Social Partners were empowered to take an active role in the formation of community legislation.

The conditions were right for the application of the Maastricht Social Agreement. Most importantly, the Agreement took the United Kingdom out of the active negotiations, thus offering the possibility to circumvent its veto power. Moreover, having failed to produce an agreement on works councils during an earlier opportunity to implement the Social Agreement, the Social Partners were now anxious to demonstrate their contribution to the European legislative process. The pressure to reach an agreement was consequently quite high, and may have led the social partners to make concessions which may have otherwise not been taken into consideration. Finally, the nature of the issue itself was conducive to social partner legislation. Compared to controversial issues such as works councils, gender issues (excepting equal pay) tend to be among the easier issues for the social partners.

It's interesting... it seems to be easier to discuss women's labour market participation – equality kind of issues – with employers [than]... more hard-core issues like Works Councils or touchy issues where employers are very anxious not to move in any direction which obliges them to anything. [But with women's issues] employers are interested ... they are interested in labour market shortages, highly educated women... you can try to do something... (Paschier interview).

For the social partners then, the desire to reach a deal was at the forefront and encouraged the different actors to accept positions that they may not have otherwise considered.

The Commission carried out preparatory and consultation work. During a six week period, 17 interest groups offered their position on the draft proposal. The responses indicate wide-spread support for the promotion of equal opportunities and a commitment to the European policy arena as the appropriate forum for these measures (Commission 1996a; see also Falkner et al. 2002). The European Women's Lobby was among those to respond during the consultation period. The EWL position encouraged paid leave as a measure to facilitate a more equal sharing of household responsibilities among partners. It moreover encouraged the implementation of measures to reintegrate women back to the formal labour market following leave. Thus, the EWL in general supported a position which corresponded closely to the position expressed by the Women's Committee in Parliament and the Commission through its first draft of the parental leave directive in 1983.

The position of the EWL, though taken as the formal position of European women's organizations, is itself a compromise and majority position among a wide array of organizations. It is particularly relevant that the German women's organizations, represented through the conservative *Frauenrat* did not support the EWL's official

statement. The organization instead supported longer periods of job protected leave so that women could care for their children at home during the first several years. It is not clear whether this position reflects the *Frauenrat's* close relationship with the more traditional and conservative women's organizations, or whether the organization's reliance on government funding encouraged it to support the government solution. Controversy between the *Frauenrat* and the EWL was indeed not unusual. The former President of the EWL suggests that the *Frauenrat's* tendency to support the national position was especially apparent in issues that may have been perceived as undermining the special status granted to women through the motherhood role. A similar difference of opinion was expressed during the negotiation of the maternity protection directive passed in 1994. The disagreement does not usually influence the final position of the EWL as the more conservative stance of the *Frauenrat* can generally be overcome by the majority position of the other members. Nonetheless, in such instances, the *Frauenrat* contributes to the perpetuation of the German male breadwinner model.

Formal consultations among the Social Partners began in early July 1995.

Although the nationally defined issues were not simply overcome by the Social Partners, the diverse and multi-national composition of each delegation forced common positions to be found first at the organizational level before proceeding to the negotiation table. The Deputy General Secretary of the ETUC stressed the importance of the composition of the delegations for the success of the negotiations. He remarked that the "[t]he choice of delegation was... extremely important to ensure that our organisations were properly

represented and that the delegates were qualified in the subject. It should be stressed that the mixed composition of our delegation was an indisputable factor in the success of the negotiations” (Lapeyre 1996).

Each delegation was comprised of individuals representing different organizations and interests. The ETUC delegation, for example comprised individuals representing the various national unions and chosen by their respective organizations. The result was a well-balanced delegation made up of both men and women, some with direct connections to the women’s movement, others with expert knowledge on the European process (Paschier interview). In all, about a third of the delegates were women (though not necessarily feminist). A preference for measures to encourage the equal distribution of paid and unpaid labour was also represented by the Nordic states. The role of the new member states⁸⁵, in particular Sweden and Finland with a tradition of gender-balanced approaches to social policies was not to be overlooked. These countries played a key role in pushing for men’s involvement in child care and parental leave (Paschier interview).

The Social Partners understood the issue as one of equality between men and women. The ETUC was particularly concerned that the agreement “[pave] the way for promoting an individual right for men and women.” The organization moreover “set [itself] the clear goal of non-transferability as a major factor in developing society towards a better distribution of family responsibilities between men and women” (Lapeyre 1996). The trade unions, however, were aware throughout the negotiations that the employers had the upper hand. Management’s positions had been well articulated by

the member states in the Council meetings. The ETUC position was constrained by the knowledge that the employers enjoyed a “fallback position” that had already been discussed in Council (Paschier interview). This was one of the major stumbling blocks in the negotiations. The employers knew exactly how far they needed to go and knew that the Unions would have to be satisfied with any agreement that went beyond what the Council had been able to negotiate.

That the Unions had little leverage is fairly clear in the final Framework Agreement. It was a compromise rather than a radical new piece of legislation whose value lay primarily in its existence rather than content (Falkner 1998). Under the Framework Agreement, leave is non-transferable, and though no concrete measures are addressed in the text, it encourages states to undertake measures to increase father’s participation in leave. Each parent has a right to three months leave to be taken before the child’s eighth birthday. No agreement was reached on the level of pay of the leave period, nor was it outlined whether small businesses would also be subjected to this legislation. Both issues remained for the member states to determine according to their own situations. Thus, the text of the directive primarily sets out a potentially though not necessarily liberal feminist framework from within which the member states make the legislation.

The agreement is not “feminist”, although it leaves room for women-friendly policies to be initiated by the member states. Some authors criticise the agreement on this ground and argue that a more “woman-friendly” directive might have been agreed had

women's organisations been more involved. This is unlikely. Women's voices were heard through a variety of channels, including the new member states, the union women's caucuses and the EWL. The final agreement, however, needed to be negotiated with managers.

The fact that women's organisations were not involved does not mean that women's issues were not taken onboard...it's not fair and it is not right [to say] that women's issues or women's interests were not taken on board... You can be unhappy about the results. I'm not so sure the results would have been any different had women's organisations been on board... you still have to negotiate with employers (Paschier interview).

The agreement negotiated was, according to many of those involved, the best that the ETUC – or working women – could hope for in the circumstances.

Following agreement by the Social Partners, the Commission was challenged with the task of incorporating the agreement into community law in a way which would prevent the member states from re-opening negotiations. In the Directive forwarded to the Council, the member states were only permitted to comment on or amend the preamble of the text. The agreement itself was included as an annex, and was hence not subject to the scrutiny of the Council.

The member states, in particular the German delegation, still attempted to alter the preamble in such a manner as to change the meaning of the agreement itself (Council 1996). In March 1996, the German delegation campaigned to change Recital 9a of the preamble reading in part

...referring back to the Member States and/or social partners to lay down the conditions under which parental leave would be implemented, in order to take account of the situation existing in each Member State, particularly as regards the conditions for granting parental leave and exercise of this

right to parental leave.

The German government petitioned the other member states to add: “and in particular with regard to the transferability of that right, the simultaneous exercise or otherwise of that right and the professional activity of the two parents”. This suggestion would, however, have made a mockery of the entire agreement by allowing any of the fundamental provisions of the Agreement to be changed at the discretion of the member states. 12 of the other 13 member states were opposed to the addition.

The German delegation, seemingly suddenly aware of the implications of the directive, entered an official statement to declare formally that German law was in accordance with the Directive:

It is clear from Recital No 10 [formerly 9a] and the Commission’s explanations, which the Council has noted, that the Member States have great flexibility as regards the conditions for granting parental leave and exercise of the right of parental leave. Germany may thus stipulate that:

- the right of one parent is not affected by the other parent’s failure to exercise the right,
- both parents cannot exercise the right to parental leave simultaneously,
- parental leave will not be granted where the other parent is already caring for the child (e.g. where not gainfully employed, or during maternity leave).

An amendment to German law is therefore neither needed nor envisaged.
(Council 1996a)

As the following section discusses, this statement was insufficient to protect the German legislation from the pressures of Europeanization. Though the CDU government in power in 1996 refused to alter the existing legislation, as soon as a new governing coalition took power in 1998, the legislation was again on the table.

Domestic Debates and Legislation – (Non-) implementation of the Directive

The European legislation is sufficiently vague to enforce the premises of neither a male breadwinner/female caregiver nor a dual earner/dual carer gender regime. While the directive doesn't implement provisions to fundamentally challenge the male breadwinner model, it does lend tacit support to state measures facilitating increased participation in family responsibilities for men. The onus to realize this aim, and the corresponding opportunities for women in the labour market, rests almost exclusively with the member states and the national social partners. The German government responded to the directive by insisting that the existing legislation sufficiently incorporated the principles and laws of the European directive. Only when a change in government bringing about a shift in the domestic balance of power occurred, did the German government open the way to establish a place for the European norms in German legislation and society.

When the directive was passed in 1996, German legislation offered working parents job-protected parental leave of up to three years⁸⁶. The entitlement to leave was lost, however, if the spouse of the individual wishing to claim leave was not also in paid employment. German parental leave entitlements were therefore not individual entitlements as stipulated by the European legislation but were connected to the employment status of the other parent. The leave could be taken by only one parent at a time and could be broken into several shorter periods and shared between the parents. The parent on parental leave had the right to work up to 19 hours per week. The leave was paid on an income-related basis. The limits for receiving pay had however not been

increased since 1986, so that fewer and fewer families were entitled to paid leave by 1995 (Zagelmeyer 1998).

The long, low or unpaid leave generally reinforced maternal care giving. The option of shifting primary caregivers partway through the leave, a provision which was designed to encourage increased participation of fathers, was largely ineffective. One study done in 1995 found that almost all mothers who were eligible for the leave took leave. In contrast, only 1% of men who were eligible made use of parental leave (Hall 1998). In 1991, fewer than 50% of those taking parental leave returned to work upon completing the leave. Of those who did return to work, 75% had made full use of the leave period (Zagelmeyer 1998). In the nearly ten years that parental leave benefits were in place, the net result had been to encourage long absences from the labour market for women and very little change in either men's or women's traditional roles. In eastern Germany, parental leave has, in theory, offered job protection for mothers in an unstable economic situation. As women make use of these provisions, taking longer periods of leave than previously, eastern German gender relations have begun to represent the West German model rather than vice versa. As in western Germany, men remain reluctant to take leave. Consequently the policies have not only brought about some changes in women's employment patterns, they have not successfully changed men's.

Following reunification, East German legislation was brought into line with the West German model, imposing the West German concept of gender roles onto former East Germany. The West German parental leave regulation, combined with high

unemployment among eastern German women, has had serious repercussions for many eastern German women and for the childcare infra-structure in eastern Germany. With rising unemployment, many women could neither longer afford, nor needed, to keep their children in public day care facilities. Between 1990 and 2004, the number of childcare places in the former East was reduced by approximately 50%, although the level of provision remains much higher than in the former West (Maier 2004; Keyenfeld and Hank 2002). Parental leave regulation has re-established a model which had largely disappeared from East Germany – extended withdrawal of mothers from the labour market (Maier 2004). On average, eastern German women now take 24 months (compared to the western German average of 33 months) of parental leave.

Despite indications that the East German model is moving closer to the West German male breadwinner/female caregiver model, many eastern German women continue to demonstrate a preference for combining family responsibilities with full-time employment. 36% of eastern German women with children in kindergarten work full time, compared with only 10% of western German women. Moreover, in one survey carried out by the Ministry of Employment found that nearly one quarter of the eastern German with children in kindergarten preferred a situation in which both partners worked full-time. This contrasts strongly with the preferences of western German women, where only 5% saw both partners working full-time as the ideal model (Engelbrech and Jungkunst 2001). Thus, despite policies encouraging women to leave the labour market, a substantial portion of eastern German women continue to hold onto the dual earner model

that had been prevalent in East Germany. It is thus all the more surprising that these women have been largely inactive in encouraging a shift in the dominant gender regime.

Government documents indicate that the German government was aware that existing legislation did not comply with the European Directive (Deutscher Bundestag 1996b). Even before the Social Partners finalized the provisions of the Framework Agreement, several bodies within the German legislature had drawn attention to the fact that existing German provisions were insufficient to address the European provisions. The *Bundestag* Committee for Employment and Social Affairs noted that “[t]he federal government’s view that the rules existing in the *BErzGG*⁸⁷ and the *BGB* are sufficient to fulfil these requirements in Germany, is incorrect” (Deutscher Bundestag 1996b).

It was, however, almost exclusively the opposition parties that drew attention to the incompatibility of the existing legislation. The DGB, the *Frauenrat* and the BDA remained largely silent. In a review of the implementation of the directive, the European Industrial Relations Observatory notes that the DBG “did not comment of the conformity of the German law with the Directive” (Zagelmeyer 1998). The federal Ministry for Family, Seniors, Women and Youth similarly avoided comment on the question of conformity. Moreover, the report suggests that the Directive is, in general not a contentious issue as “the provisions of the agreement/Directive are less generous than the provisions of the German law and [the Directive] define[s] only European minimum-standards”. The employers’ organization, BDA, was aware of the conformity problem but

did not raise the issue further. Only the SPD and Greens actively pressured the government to adopt legislation to bring the German parental leave legislation into line with the European standards.

Unlike in 1985, the opposition parties made extensive use of the European legislation and discourse in trying to bring about domestic level change. The SPD and Green parties used the European criteria as a reference point for critiquing the existing “pro-family” policy. The issue of non-transferability was particularly contentious (for example, Deutscher Bundestag 1996). The SPD argued that the existing provisions did not encourage men to take up parental leave, and that a non-transferable right to leave was essential in creating an attitude shift towards more “partnership” in childrearing. The party also drew attention to the fact that long exits from a career resulted in de-qualification of women’s skills and that this made it more difficult for women to re-enter the labour market after a childrearing break. The existing legislation, according to the SPD did not encourage equality and partnership but reinforced traditional stereotypes of men and women’s roles.

The SPD used the non-conformity of the German legislation to bring parental leave back onto the political agenda. The party tabled a proposal in late 1996 that granted parents the right to take leave simultaneously, to each work up to 30 hours per week during parental leave, and loosened the eligibility criteria for the child care allowance. An essential part of the proposal, was the notion of a more flexible rate of payment of the child care allowance where parents choosing to stay on leave for only one year would

receive more per month than those taking the full two years of paid allowance.

The SPD did not augment this proposal with any recommendations to increase the publicly funded day care available for young children. Thus, parents options for shorter periods of child care employment breaks remained limited⁸⁸.

The CDU in contrast, continued to view parental leave as a form of family policy and thus supported measures which reinforced the party's view of family values. The party argued, for example, that to protect the child's well-being, a primary caregiver should not work more than 19 hours per week. A young child needed, according to the CDU a constant and consistent relationship to the primary caregiver. The CDU attacked the European Directive upon which the SPD has based its legislation as "... chang[ing] the aim of child care allowances and parental leave..." (Deutscher Bundestag 1997). It was not the aim of the CDU proposal to offer financial support to two fully employed parents. The child care allowance is intended to financially recognize the value of childrearing. "It must remain the aim of the Federal Child Allowance legislation to support parents taking on the task of raising and caring for their children themselves during the first three years. This must remain as it is." (Deutscher Bundestag 1997).

The Greens also used the opening presented by the EU legislation to advance their own proposal at approximately the same time. Where the SPD focused primarily on "partnership", the Greens pursued the notion of flexibility in the reconciliation of work and family. Their proposal was modelled after the Scandinavian countries (in particular Norway) and was based on parental leave as a time account where parents could reduce

working time to varying degrees and for various lengths of time (Deutscher Bundestag 1996a). In effect, the more one worked in a week, the longer one could be officially on parental leave.

It is interesting to note that East German politicians from all parties were largely quiet on the issue of parental leave. The primary exception was the PDS, the successor party to the former East German political party. The PDS criticised the inflexibility of the existing parental leave provisions which hindered the shared responsibility for childcare and reinforced the traditional division of labour between partners (Deutscher Bundestag 1997). Of the political parties represented, only the PDS drew clear links between parental leave and wider issues such as childcare, demographic shifts in eastern Germany and differential family structures. The PDS, like many of the eastern German women's movements, argued in favour of a more equal distribution of family responsibilities among partners and for policies to change the balance of unpaid labour in the household. Their preferences thus involved a shift away from the former dual earner/female-state carer model of the socialist period, to a more equal dual earner/dual carer model such as that envisioned by the European institutions. In arguing their case, however, eastern German women's movements and government feminists did not invoke the European channels to legitimize their position.

Both proposals found substantial support among a variety of organizations in broader society. In September 1997, the parliament held public hearings on the changes to the childcare allowance and parental leave laws. Representatives from the churches,

unions and management as well as relevant interest groups including the *Deutscher Familien Verband* (Association of German Families), *Deutsche Liga für das Kind in Familie und Gesellschaft* (German League for the Child in Family and Society) and the *Verband alleinerziehender Mütter und Väter* (Association of Single-parent Mothers and Fathers) commented on the proposal⁸⁹. East German movements were again conspicuously silent on the parental leave measures. The *Frauenrat* did not participate in the formal hearings but did submit a position paper (*Deutscher Frauenrat* 1997). In its position paper the DFR expressed broad support for the measures outlined in the SPD and Green proposals. The organization found the Green Party's intention to structure parental leave as a time account particularly attractive. This was largely because of the DFR's support for long-term parental leave. While the *Frauenrat* supported the measures to encourage the father's participation in parenting, the organization made little mention of attempts to encourage women to return to the labour market quickly, or the need for increased childcare measures as important aspects of reconciliation policy.

Despite support within broader society, neither proposal passed Parliament. The German legislation was thus unchanged. Only a short time thereafter, the Commission sent a formal letter of notice of non-compliance with Directive 96/34/EC to Germany (Bulletin 7/8, 1998)⁹⁰. The Commission, however, dropped proceedings against Germany when the election of the SPD-Green coalition in October 1998 showed promise of new legislation and a new framing of parental leave and reconciliation policies. The election of the new government coalition brought about several changes in the structure and

framing of the German parental leave provisions. Two major changes, one symbolic and one substantive are of particular importance here. First the name of the leave was altered from “child care holiday” (*Erziehungsurlaub*) to “parental holiday” (*Elternurlaub*). This name change had an important symbolic purpose as it was intended as a means of recognizing that both parents were actively involved in childcare – an aim the SPD had been pursuing for some years (see Deutscher Bundestag 1996). The name was later changed to “parent’s time” (*Elternzeit*) to overcome the misrepresentation of the leave period as a “holiday”.

The substantive changes involved the implementation of legislation resembling the SPD suggestions from 1996 – 1998. The legislation directly reflected the demands of the European legislation and implemented a framework similar to the earlier SPD preferences of special provisions to encourage women to return to work. The new legislation (in place since 2001) gives parents each an individual right to parental leave. Each parent has a non-transferable right to up to three years of parental leave time. The leave may be taken by both parents simultaneously, but should the parents decide to take leave individually, the length of the leave does not increase beyond three years. Parents may, moreover, work up to 30 hours per week during the leave period. This is intended to encourage a continued connection to the labour market and the allow for increased flexibility of work time.

Parental leave and the childcare allowance are officially separate entitlements, according to the SPD law, although there are similarities in the eligibility criteria. Parents

who, in order to care for their child do not work, or work less than 30 hours per week, have a right to the childcare allowance if their combined family income does not exceed the income limit⁹¹. Parents may choose between one of two models, depending on the length of time which they anticipate they will not be in full time employment. Parents who choose to return to full-time work after the first year, may opt for the “budget” model through which families receive higher monthly payments but for 12 rather than 24 months. Though controversial in the legislature, the SPD-Greens argued that monthly payments for the first two years at the same rate, punished those families who took less than the full time of leave. This, the government argued, was not fair, nor was it conducive to encouraging individuals to stay in touch with their employment.

The framing of the issue by the SPD-Greens shifted from the early proposals put forth in the 1980s to the present circumstances. Earlier discussions in the SPD supported the child raising allowance only for families in which one of the parents left paid employment in order to care for his or her child. The right to financial support was contingent upon earlier labour market participation. This was intended as a measure to support employed mothers and to encourage their return to the labour market. This tie to the labour market is less apparent in the current legislation. Recall also that proposals from the 1980s supported special measures to encourage fathers to take part in the leave. Incentives, including longer paid leave for families in which each parent took at least four months of the leave were anticipated as ways to encourage fathers to become more active in raising their children. This too does not exist in the current legislation. The SPD has

thus been somewhat constrained in their own vision of parental leave by the measures that were brought into place during the CDU era. The two images of childcare and the reconciliation of work and family are not fully compatible with one another. It is not possible to financially support at-home mothers, and encourage women to return to the labour market, with the same legislation. The two different frames, one driven by the former CDU policy, and the other by the more feminist European legislation, thus exist alongside each other. Although the male breadwinner model has not been replaced, a new more equal model is slowly rising alongside the dominant gender regime.

Assessment and Conclusion

Over the past two decades, parental leave has undergone a number of different frames at both the domestic and the European levels. At the European level, parental leave began as a measure to encourage increased gender equality through attitude shifts and increased sharing of household and family tasks. In its origins in the European Parliamentary Women's Committee and the Equality Unit of the Commission, this proposal was closely related to liberal feminist demands. In its journey through the European institutions, the proposal was incrementally diluted, until the final legislation encouraged but barely supported the dual carer/dual earner model that had first been so central.

Parental leave in West Germany, in contrast, evolved out of protective legislation – first maternity protection then maternity leave. It has therefore been closely linked with notions about the health and welfare of the child and the mother as well as with forging

the “natural” bond between mother and child in the first years of life. Though the concept of equality eventually worked its way into the legislation so that maternity leave became parental leave, until recently German legislators have treated parental leave as a component of family policy rather than employment policy. It was not until the SPD-Green coalition came to power in 1998 that a paradigm shift evolved in which parental leave legislation became the basis for more equality in the labour market and the support for reconciliation of family and labour for both men and women. Though unable, for political reasons, to implement all the measures they had once supported, the SPD has tried to revamp the parental leave system to encourage more fathers to take leave and to allow especially mothers to maintain contact to the workforce during the leave period.

Pressure for parental leave measures from West German women's organizations has supported two very different frames in Germany. Many of the women's organizations, including the *Frauenrat*, have encouraged a long period of job protection for parents in order to allow women to care for their children themselves. In the absence of child care facilities, this has frequently been the only real option for women seeking to combine work and family. A smaller group of organizations has supported measures to facilitate woman's return to the labour market. As several studies have indicated, childcare is essential to women's choice in reconciling work and family responsibilities. The continuation of state supported public childcare facilities was of more importance for eastern German women than the implementation of more generous parental leave schemes. Indeed, in the trade unions' report on the implementation of the directive, the

unions specifically identify the unique situation in which eastern German women find themselves in terms of parental leave (Clauwaert and Harger 2000). High levels of dismissal for women taking, or having just returned from, parental leave had become widespread in eastern Germany. The unions suggest that this is a result of the massive job cuts of the previous years.

It is too early to determine whether the new measures will bring about changes in men's behaviour and women's options. A real change in discourse and policy direction is, however evident. The Ministry for Family, Seniors, Women and Youth has adopted a number of measures to encourage men to take family leave. Recent publications show the government addressing reconciliation from the perspective of changing the behaviour and employment patterns of both men and women. They moreover demonstrate a recognition on the government's part of a variety of policies that encourage women to leave the labour market. Many of these, including the provision of full-day schooling, increase of day care facilities, tax reforms and a wide variety of related issues are on the current political agenda. The new political rhetoric corresponds much more closely with the frame advanced by the European institutions, and may encourage some attitude changes. Informal studies indicate that number of fathers taking parental leave is slowly on the rise since the new measures have been in place. Support for public childcare, the alternative to long parental leave policies, remains uneven. In western Germany a strong stigma surrounding public childcare remains, exerting social pressure on women to take the full period of parental leave. In eastern Germany, this pressure is much less, thus allowing

families much more freedom of choice.

In their choices, eastern German women continue to support a different gender regime than many western German women. Eastern German women are far more likely to have a child out of wedlock than western German women. They are also much more likely to work full-time despite having young children. Both of these trends, however, require access to childcare facilities. The ability of women to exercise these options may in the future well be linked to the continuation of public child care facilities.

The alternate gender regime pursued by eastern German families remains limited and localized. The collision of values from the former East and the West has to date had very little impact on the overall execution of gender policy. It is beyond the scope of this discussion to speculate why eastern German women showed a strong political apathy during the mid 1990s, and why they chose not to actively campaign for better reconciliation policies. One possible explanation lies with the fact that the parental leave policy envisioned by the SPD did not obviously hurt eastern German women. Indeed, a very high percentage (97% in 1995) of families in the former East took advantage of parental leave provisions. As such, it offered a major support measure for families in the East (Clairwaert and Harger 2000).

In this case, then, reunification did not fundamentally challenge the underlying premises of the dominant male breadwinner/female caregiver regime. Women continue to find solutions that work in their own unique situations, and in so doing pursue an alternate gender regime without actively challenging the existing regime. This passive

resistance, evident in the declining birth rate and changing demographics of eastern Germany has not as yet challenged the dominant male breadwinner model carried over from the West German state.

In contrast, a degree of policy Europeanization is evident. The transfer of norms and values from the European to the German level is evident in a growing number of government initiatives. Rather than replace the dominant gender regime, however, these new insights from the European Union have come to co-exist alongside the male breadwinner regime. More importantly, the current government policies actually support both these regimes. While parental leave policy, for example, encourages a more equal sharing of responsibilities between partners, child care policy continues to support the male breadwinner/female caregiver model of gender relations. This again appears to support Crouch and Keune's (2005) observations that competing frames may exist within a single social structure.

Relations between organizations on the national and the European level facilitate transfer of ideas and policy between the arenas and encourage overlap of policy spaces. In the case of parental leave, civil society has been slow to exploit the permeable membrane between these spheres. Even when the option was clearly presented to them, the DFR made very little use of the resources at the European level. Individual women were more likely to work through Unions and political parties than civil society organizations. Formal political actors, including the SPD have, however made much more substantial use of the different channels, adopting the discourse of the European

experts to better address parental leave at the domestic level. As a result, pressure to adopt an alternate gender regime has, in the case of parental leave, been driven more by elite organizations adopting the European rhetoric. Whether pressure from civil society, in particular for increased child care facilities will eventually contribute to the replacement of the old gender regime with the new, remains to be seen.

The three cases addressed here have facilitated the Europeanization of the gender regime to different degrees and in different ways. Several similarities, in particular evidence of multiple gender regimes, are however observable. These are discussed in more detail in the final chapter.

Notes to Chapter Five

⁷⁰ In the late 1990s, only 4% of Austria's children under age three were in non-familial care. In former West Germany, only 2% and in Spain, only 5% of the children under three were cared for in day-care facilities. In Belgium and Ireland, in contrast, parental leave periods are comparatively shorter and non-familial care substantially more common with over 30% of children between 0-3 in childcare facilities (Hendersen and White 2003). The legacy of socialism has maintained a comparatively high level of early childhood care and education in eastern Germany. The number of childcare places has, however dropped radically since reunification.

⁷¹ Rost (1999) furthermore notes that the differences in spousal incomes increased after the birth of the first child. Women re-entering the labour market usually did so part time and therefore earned less than before the birth of their child. The man's role as primary breadwinner becomes more pronounced as a result of decisions on childcare.

⁷² Non-marital birth rates steadily increased in East Germany, reaching roughly 33% by 1989. This is generally attributed to the East German policies which may have not only supported single mothers but actually discouraged marriage (see for example Kreyenfeld and Konietzka 2001). Surprisingly, the level of non-married births did not drop off sharply following unification. Rather, it rose to over 50% by 2000. In the West,

approximately 10% of all births in 1990 and less than 20% in 2000 were to single mothers.

⁷³ Only Hungary and Austria showed support for the female caregiver model that was similar to that in Western Germany (Hungary 73.7% and Austria 73.3%). Only two countries showed less support for the model than East Germany (Canada with only 31.3% and Sweden with 28.5%). For more data, see Jaumotte 2003.

⁷⁴ Determined based on the family income in the year prior to the birth of the child.

⁷⁵ These are the limits for two-parent families with one child. Limits are slightly higher for subsequent children and single parents see (Rancke 2001).

⁷⁶ It is however interesting to note that the employer was willing to help working mothers when it was in his own interest. In 1973, the publication *Der Arbeitgeber* (the Employer) encouraged employers to hire women rather than Turkish Guest workers to fill the labour shortage. The publication offered advice to employers on how to best accommodate women with children in the workplace. For example firms ought to:

demonstrate clearly to the many women who mistakenly believed that they had to choose between family and work that such a choice was unnecessary. In addition it advised firms to keep in touch with former female employees at home with their families by providing regular information on company changes, events and developments. Such networks would maintain the bond with the firm and encourage women to think about returning to work as soon as possible (Vogelheim 1988).

In contrast by 1979, with hard economic times throughout Europe, *Der Arbeitgeber* suggested that the high female unemployment rates were a result of women's "unwillingness to work full-time" clearly making them unfit for "regular employment".

⁷⁷ Here I use national as opposed to supra-national. The *Länder* have limited involvement in childcare allowances.

⁷⁸ Several of the more controversial issues, including access to abortion were left out of Parliament's Resolution.

⁷⁹ The directive is hereafter referred to as the parental leave directive. Moreover, although the directive always included provisions for exceptional leave for family reasons, my focus here is on the parental leave aspect.

⁸⁰ Reservations to proposals are certainly not uncommon in European policy-making.

Nonetheless, the fact that the reservations expressed towards the parental leave directive were extensive and of a fundamental nature may help to explain the failure of the draft.

⁸¹ In this case, Mr. Hofmann, father of a child born to his non-marital partner, obtained the permission of his employer to take leave from his employment in order to care for his child. Mr Hofmann's leave began immediately following the mandatory maternity period taken by his partner. At this time, German law allowed women an optional six months of job protected leave following the mandatory maternity leave. The leave was paid at a flat rate of 25 DM/day. Mr. Hofmann applied to the *Barmer Ersatzkasse*, his health insurance company in order to receive the childcare payments, but was denied. The insurance company argued that the optional six month leave was only available to mothers. Mr Hofmann, arguing that this was in violation of the 1976 Equal treatment directive, had his case referred to the ECJ.

⁸² In at least one argument, the government suggested that employed women faced a triple burden – care for the newborn, formal employment and housework.

⁸³ Gender policy was only just entering the political agenda, particularly through the Green Party.

⁸⁴ Under the provisions of the Maastricht Treaty, the Social Partners were granted the powers to negotiate a Framework Agreement. The precise manner through which this ought to then be entrenched into Community law was, however, somewhat unclear. In the case of parental leave, the Commission opted to introduce a directive under which the member states would agree to adopt the Framework Agreement. The text of the agreement was included only as an annex which the member states could not change or renegotiate.

⁸⁵ Sweden, Austria and Finland gained membership to the EU in Jan. 1995. Although the Swedish and Finnish welfare states took a different approach to childcare and gender equality (see Mahon 2002), the delegates shared a general recognition of the importance of men's caregiving and women's labour market participation.

⁸⁶ Provisions were not restricted to biological parents but are granted to the individual who is primarily responsible for the upbringing and care of the child including grandparents and step-parents.

⁸⁷ BErzGG refers to the *Bundeserziehungsgeldgesetz*, or the legislation under which parental leave is regulated.

⁸⁸ The only parliamentarians to make reference to public child care during the debate on this proposed legislation were from the PDS. Heidemarie Lüth of the PDS supported the

SPD proposal in principle and called in addition for increased child care facilities “not only for children over three, but then when the parents need it, and even after the child turns six”. Her contribution however did meet with definite support not only her colleagues in the PDS but also the SPD and the Greens.

⁸⁹ For a full list of participating organizations and individuals see Bundestag 1998.

⁹⁰ Several other countries were also informed of the Commission's intent to implement non-compliance proceedings including, Greece, Ireland, Italy, Luxembourg and Portugal

⁹¹ The income limit for the first six months is set at 51,130 Euros. For the seventh through 24th months, the limit is 16,470 Euros. Families over this limit receive accordingly lower payments to a minimum of 10 Euros per month.

Chapter Six

Conclusions: a dual gender regime?

This study has highlighted four important aspects of the interplay among the different policy actors in constructing and altering the German gender regime. First, it has shown that Europeanization of the gender regime has been incomplete and uneven. Because the European Union has had direct influence over only some aspects of gender relations, the gender regime as a whole has not been displaced. German political and legal structures have incorporated the European gender measures by establishing a set of policy and legislation which remain separate from the broader set of German laws, norms and values. It is thus useful to think of these regimes as two distinct – yet interconnected – pillars with each encouraging a different set of gender relations. Third, to a large extent, the European policy level has remained a secondary arena for German domestic actors. Some domestic actors have brought the European discourse into the national-level debates and policy realm. In so doing they have established links between the European and the German gender regimes, thus beginning to entrench certain norms and values from the European regime into the domestic discourse. Fourth, the challenges posed by the European and domestic actors are seldom immediate. Rather, as we have seen, the gradual incorporation of the European discourse and (slow) acceptance of an alternate set of gender relations may lead to policy shifts several years or even decades after the initial directive was passed. This gradual evolution may be particularly evident where continued activity in related areas opens new opportunities in policy areas that have long since been removed from the primary political agenda.

In the following pages, I address each of these points in turn, thus developing my conclusion that the male breadwinner model in Germany has only begun to shift in response to interrelated, yet distinct, endogenous and exogenous forces. The old regime has not been replaced. Rather I argue that the male breadwinner/female caregiver and a dual earner model coexist uneasily in contemporary German society. If the pattern of relationships continues to follow the present trend, the male breadwinner model and the European dual earner models may gradually converge into what Deeg refers to as a “hybrid” model that displays characteristics of both, thereby maintaining some of the policy logic from the old regime even while Germany is re-organizing along a fundamentally new path.

The Uneven Challenge of Europeanization

Europeanization involves the construction, diffusion and institutionalisation of formal and informal rules, policy and norms (Radaelli 2003) so that a “European dimension becomes an embedded feature which frames politics and policy within the European states” (Wallace 2000, 370). The three cases presented here indeed involved the adaptation of domestic legislation to conform with European provisions and standards yet the actual political and social impact of this legal transfer varied widely. In this sense, my findings coincide with several other Europeanization studies (Caporaso, Cowles, Risse 2001; Featherstone and Radaelli 2003; Liebert 2003) which have found that Europeanization proceeds at different paces, and with different results, in the various

member states. In the cases presented here, the male breadwinner/female caregiver regime has been undermined in some aspects but it has remained largely intact in others. Thus the transfer of policy, norms and values from the European to the domestic policy arena has been stronger in labour market issues than in family policy or body politics. The uneven erosion of the regime has thus contributed to a reshaping rather than replacement of the gender regime.

The three case studies highlighted that, on the whole, the European initiatives in the area of labour market participation and workplace equality have ultimately been accepted by both the government and German society. The fact that the German regulation of women's labour market equality eventually shifted as a result of European pressure should not lead us to overlook the fact that the government was quite slow to respond to these pressures, attempting to support a gendered division of labour and maintain the premise of the male breadwinner as long as possible. Nevertheless, once undertaken, the provisions of the Conformity Law (1980) have had a substantial impact on the social and political valuation of women's work and the symbolic acceptance of women's labour market equality. In contrast, European measures to encourage changes in the division of labour in the household have been much less widely accepted, with only 2% of German fathers taking advantage of parental leave opportunities, despite attempts from both the national and European institutions to shift this trend. Thus, while the male breadwinner regime may be gradually upended by some form of dual earner model, the female caregiver norm has remained largely intact. This trend is apparent in both western

and eastern Germany. In terms of body politics, the influence of the European Union has been even less pronounced. There is little evidence that the framing of pornography as discrimination, as evidenced in the European Parliament's treatment of the issue and in recent measures to combat stereotypical representations of women in the media, have influenced the debate at the German level.

It is not surprising that European labour market provisions have had more of an impact on the German gender regimes than those (few) initiatives that have gone beyond this focus. This was the first area where gender equality entered European discourse. A number of feminists have pointed to the focus on labour market issues as one of the primary limitations of European gender policy. (see Hoskyns 1988; Rossilli 2000; Stratigaki 2004). The core of European gender policy and the central principles supported by the institutions, are grounded in a liberal notion of equality through labour market participation and women's financial autonomy. On the whole, member states have gradually come to accept European initiatives to regulate labour markets, while still showing little interest in developing common measures in areas that delve further into national sovereignty, including social rights and family policy (see also Berghahn 2003). Gender policy relating to women's labour market participation and equality in the workplace, well-secured in the European mandate, is therefore likely to be directed by a European "institutional gender regime" or a common frame of understanding which directs policy and encourages domestic level adaptation.

In the absence of an established alternate regime, there is little chance for

European initiatives to be internalized by a sector of German society and thus makes it more difficult for a counter-culture to establish itself within broader society. Equality as sameness in terms of labour market participation and remuneration already existed at the German level before the European legislation was incorporated into German law. Women's organizations, the *Deutscher Frauenrat*, labour union feminists and government feminists had actively pursued the principle of equal pay for work of equal value for many years before the European measures were adopted. As a result, there was little internal opposition to the principle from domestic actors. The European measures thus coincided with a pre-existing alternate framing. In contrast, measures to reframe pornography as discrimination against women faced strong internal divisions within the women's movement and lacked concrete support from government feminists. There was thus no existing domestic counter regime, with a strong base of support, which could be drawn into the European institutional frame. Because this issue delved into new territory, sought to draw new lines between public and private spheres and attempted to expose new forms of discrimination, this form of reframing posed a much greater threat to the dominant regime than either equal pay or parental leave.

Finally, and perhaps most importantly, labour market policies are more open to both legislative and social Europeanization than family or body politics because changes in employment policies require changes in market behaviour rather than individual's behaviour. Once concrete measures exist to force the market to change, individuals are able to take advantage of these changes. In contrast, measures to encourage fathers to

take up parental leave require fundamental changes in the behaviour of individuals. Certainly, as chapter three suggested, social attitudes, particularly men's attitudes towards women's work, also needed to change. Nevertheless, social acceptance was not essential to the success of the policy. Women were quick to internalize the alternate frame and use it to their advantage, thus strengthening this alternate frame and undermining the dominant male breadwinner model.

Chapter five highlighted the differences in employment trends for western and eastern German women. In the past, a socialist East German state supported a dual earner model which encouraged women to maintain full-time employment even with young children. Many young women have continued to find their own solutions in reconciling work and family responsibilities even after reunification. In this sense, EU initiatives that attempted to bring about higher labour market participation of mothers fit existing practice in East Germany and thus did not generate adaptational pressures in eastern Germany. European policy therefore has not encountered a homogenous gender regime. Regional differences, in particular between former East and West Germany, affect the potential for EU directives to induce path-shifting responses.

Co-existing Regimes

In those aspects of gender policy where European legislation has been incorporated into the German regime, the norms and values of these new legislative provisions have frequently remained at odds with the broader system. Insofar as these support a dual

breadwinner or a dual caregiver system, European gender provisions exist adjacent to the established male breadwinner regime. The two regimes are not necessarily in competition with one another, but co-exist in the manner described by Deeg (2001; 2005), offering two different paths for both government and social actors to follow.

The co-existence of gender regimes is perhaps most apparent in the case of parental leave. In the early 1980s, West German legislation consciously encouraged women with young children to stay at home. Long, low paid, job protected leaves encouraged women (rather than men) to exit the workforce while their children were young in order to be full-time caregivers. When, in response to the proposed directive (1985), the SPD recommended encouraging dual caregiving and a quick return to the labour market through financial incentives and tax breaks for childcare, the CDU instead implemented a system of child allowances which, in their view, was necessary to avoid discriminating against stay-at-home mothers. For more than a decade, this system was in place, reinforcing the male breadwinner model, and offering financial incentives detached from labour market participation.

When the government was required to implement the European provisions in the latter part of the 1990s, the newly elected SPD-Green coalition was faced with a difficult decision. On the one hand, the coalition partners preferred provisions which encouraged women to return to the labour market quickly. On the other hand, discontinuing the across the board financial support entrenched in the system would have been a politically costly move – particularly since a large majority of German women indeed did exit the

labour market for the full three years. In incorporating the European provisions, the government changed the parental leave provisions to accommodate the dual earner/dual caregiver European frame, without removing the existing system of incentives that encouraged mothers to stay at home. As a result, two separate paths have been created. Families may choose to follow either the traditional male breadwinner model, or a more liberal European model. This choice is, of course, tempered by the availability and affordability of high quality childcare⁹². Where in eastern Germany childcare facilities have continued to exist, women may be less likely to follow the male breadwinner model than their western counterparts. In East Germany, different family structures, and different experiences in reconciling employment and family have encouraged the development of different policy preferences, including the perseverance of the working mother norm. Nonetheless, the slow encroachment of the West German model and the collapse of employment opportunities in eastern Germany has led to a co-existence of regimes even in the areas of the former East.

The co-existence of two regimes supports Deeg's observations in which he sees an alternate financial regime evolving in Germany. Deeg suggests that while an alternate path has evolved "this new path does not represent a radical break from the past, yet neither is it simply a rapid evolution or innovation within the old path. Rather it is a new path characterized by a hybridization process (not convergence) in which many of the institutions of the old path continue as before, some old institutions are transformed for new purposes, and new institutions are introduced." (2001, 7). The co-existence of paths

changes the policy logics, and alters actors' incentives thereby changing actors' preferences. The challenge to the German gender regime by a more equal European one does not involve the complete replacement of the old, but a gradual yet nonetheless transformative process.

Nonetheless, the alternate path may remain less attractive for most families, because of the separation of the European path from the wider German system. Although, in theory, provisions to encourage a dual breadwinner model are in place, these provisions are not supported by similar policy logics in related areas. Thus, the ability to follow the new policy path may be constrained by a lack of publicly supported child care facilities for children under three, or by taxation and social security systems that continue to penalize dual breadwinner families. Actors can, however, exert pressure domestically and at the European level to pull related policy issues into the path of the alternate gender regime.

Multiple Policy Arenas and the Mobilization of Policy Actors

One of the central aspects of this thesis has been to analyse the relationship between the various policy actors and the roles that these actors play in policy making and regime construction. The three cases drew attention to a wide number of policy actors, operating at both the domestic and the European levels. It is not possible to single out an institution, committee or other actor as the most important in forming feminist policy. Government feminists (both European and German), labour union representatives, political parties and

various branches of the women's movement have all been important to the formation and propagation of feminist policy. The interplay among actors during the European negotiations appears to determine the degree to which policy initiatives will reflect a feminist agenda. Whether this frame was transposed into domestic law depended largely, although not solely, on domestic actors.

While Europeanization can be understood as a two-way street in which domestic actors influence the construction of European norms and values, and these values are then passed back through the member states, the three cases in this dissertation have primarily highlighted the impact of European norms on German policy. In other policy areas such as economic policy and environmental policy, the pattern may be different (see, for example Börzel 2003). In social/gender policy areas, however, German domestic actors remained largely unaware of the potential of the European institutions, until the mid 1990s.

It is difficult to ascertain a clear pattern of interaction among the various policy actors in any one given issue area. If, however, we look at the various issues over time, some patterns emerge. It is, for example clear that the relationship between domestic and European actors and the awareness of the potential of the European policy level among domestic actors has increased over time. In the earliest cases of gender policy, there was very little interaction among the domestic and European actors. Although the actors within the two spheres employed similar discourse, arguments and terminology, the two policy spheres remained largely separate. The division between spheres was so ingrained

in the 1970s, that there was very little mention of the European directive during German parliamentary debates on equal pay and women's equality in the workplace. Attempts by the European Commission to create women's networks and to encourage women's organizations to turn to the European level for policy innovations were largely unsuccessful. Susanne Baer and Vera Slupik consciously avoided using the European institutions to pursue a feminist reformulation of pornography legislation, fearing that this might channel the legislation into labour market policy or otherwise compromise their position.

By the mid 1990s, a number of networks linking national and European actors had been established by the Commission. The EWL, the ETUC and the Childcare Network of Experts, for example, contributed to an increased flow of information between domestic and European policy spheres. By the mid 1990s, it appears to have become more common for domestic actors in the former West Germany to make direct references to the European level in order to strengthen their own position. Thus, while the SPD and Greens had not grounded their early arguments for paternal involvement in childcare in the European discourse, by the 1990s, the parties were making conscious use of European data, studies, discourse and policy suggestions to lend credence to their own position. In contrast, eastern German politicians and members of the women's movement seldom referred to the European debates in pursuing their own policy preferences. Consequently, although eastern German values correspond to the European gender regime, eastern German women have, by and large, not mobilized to secure the dual earner model or

encourage a transfer of gender norms through the EÜ.

The use of the European discourse by (West) German domestic actors is also visible in the case of equal pay and issues related to the commodification of women's sexuality. It is becoming increasingly common in both these policy areas to refer to European level debates and discourse at the domestic level. There is a clear trend towards increased overlap of the policy spheres through the actions of both endogenous and exogenous actors.

Risse and Börzel highlight that Europeanization can be facilitated by the presence of norm entrepreneurs at the domestic level. Political parties and labour unions have been key sites for feminist activity at the domestic level. Thus, for example, Renger was able to use her position within the government and the CDU to pursue equal pay legislation. In contrast, lacking strong support from a political party, Baer and Slupik were unable to re-frame the definition of pornography as discrimination against women. Norm entrepreneurs alone, cannot explain the success or failure of the European frame at the domestic level.

Other factors, including for example elite learning to entrench the European frame at the domestic level are also important. The use of the Courts, both domestic and European have contributed to elite learning and to a horizontal policy transfer between the separate gender regimes. Over the past several decades, a growing awareness of European legislation among legal practitioners has facilitated elite socialization and the internalization of the European norms. Where German and European law contradict each

other, judges may refer to the European Court of Justice for an interpretation of the legislation. The interpretation is incorporated into the German legal thinking, even if the state does not change the corresponding legislation to formally reflect the decision. Because gender relations are so clearly dependent on social norms and values for their continuation, the gradual incorporation of the European norms into German policy making has the potential to undermine underlying social and political values. A ruling at the ECJ can alter the scope of German legislation several years after it was passed. Even without legal transfer, the ruling of the ECJ becomes the new standard by which the German Courts make subsequent rulings. Thus, German judges have been socialized to the European norms. This has contributed to a gradual socialization and internalization of the European principles as more and more women have used the Courts to seek retribution against discriminatory practices.

In order for legal and social Europeanization to occur in the area of gender policy, domestic and European actors can jump scale, taking advantage of opportunities or frames available at the other policy level. In this way, links between two distinct policy regimes are created, and a gradual shift in norms and values may follow.

Europeanization and Gradual Policy Shifts

In all three of the case studies, it was apparent that new norms and policy initiatives require time to filter through the different social and policy arenas. Most obviously, we see a long time passing between the negotiation of the directives at the European level

and their implementation at the domestic level. Germany, frequently called a “laggard” (for example Liebert 1999) in European gender policy, tends to avoid implementation of policy measures as long as possible. Once policy is in place, however, a further time lag has often been evident before the new legislation can begin fundamentally to challenge the dominance of the male breadwinner system.

Birgit Pfau-Effinger argues that an alternate gender regime may be adopted by particular groups in society, while others cling to the traditional and dominant gender regime. Thus, while a small portion of fathers may be using the opportunities to take parental leave, this has not been established as the norm. If, however, policy actors (domestic actors, institutions or European actors) continue to exert pressure in related areas, changes in norms and values may follow several years after the implementation of policy.

This is particularly well highlighted by the pornography case. The European directives had little or no effect on the German legislation (as, indeed the German debates had little effect on the European legislation). Over the past several decades, however a number of related issues including trafficking in women, the proliferation of child pornography on the internet, violence against women and the representation of women in the media have gained increased prominence on the European agenda. Through these issues, new links to the regulation of pornography and the identification of pornography as discrimination against women, have opened up. If domestic and/or European policy actors work to increase awareness of this link, then we may see repercussions for the

German gender legislation several years after the fact.

Sabine Berghahn (2003) has described the implementation of European policy initiatives at the national level as a “ping-pong” game between the two policy arenas. In fact, the process is even more complicated than this. The back-and-forth of the policy process can, as these cases have shown, be discontinued at any time, only to be brought back onto the policy agenda at a later date and with new policy actors and frames. The interaction is neither direct nor linear. The European institutions may, for example take several steps in a given area before the German government makes even one. The issue may, such as the equal pay or the regulation of pornography, be on both policy agendas at the same time without actually connecting. Only when the conditions are right – when there is support from a domestic subgroup, particularly grouped around a single alternate frame which enjoys support from both European and domestic actors – will the connection between the two policy arenas develop.

Final Observations

The emergent gender regime within the EU has thus contributed to policy change in Germany, if not the outright transformation of the Germany regime. As the scope of European gender policy broadens to include sexual harassment, trafficking in women, reproductive rights, child care and family policy, more and more policy areas are being addressed (see for example Zippel 2004; Millns 2001). Each new policy area incorporated into the European set of gender policies opens new opportunities. This

process of Europeanization does not involve taking power from the state. The European rule regime has not, nor is it likely to, replace the national. As the cases here have indicated, the member states continue to play a key role in framing the European legislation. At the same time, as policy areas are addressed by both the national and the European levels, the potential exists for European values and norms to mingle with the national, producing hybrid regimes.

Currently, “the lines between public and private and especially those between state, market and family, are being traced out anew. The gender contract, which to a large extent tells about the redrawing of the lines between different institutions, is thus also changing” (Kovalainen 1999, 152). The male breadwinner/female caregiver German model is thus coming under attack from interrelated, yet frequently separate, endogenous and exogenous forces. Rather than replace the old gender regime, I conclude that the male breadwinner/female caregiver and the dual earner model are both present in contemporary German society. If this continues, it will produce what Deeg refers to as a “hybrid” model displaying characteristics of both. While some of the policy logic from the old regime may persist, the Germany gender regime will be re-organized along a fundamentally new path. Thus Europeanization can challenge the male breadwinner/female caregiver regime. The challenge, however, must spread to several interrelated policy areas in order to transform Germany’s gender regime.

Notes to Chapter Six

⁹² Parents pay for kindergarten (3-6 year-olds) on a means tested basis. Thus, income in theory should not influence a child's ability to attend. If however, parents turn to private solutions (because there are no places available or the kindergarten is far from their place of work or home), the cost can be prohibitive. Care for younger children in a state facility is also means tested. Here places are even more rare, and parents are even more likely to turn to more costly private solutions.

Appendix

European Directives on Gender Equality

Directive	Title	Date	Implementation Deadline
75/117/EEC	On the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women	10 Feb. 1975	12 Feb. 1976
76/207/EEC	On the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions	9 Feb. 1976	12 Aug. 1978
79/7/EEC	On the progressive implementation of the principle of equal treatment for men and women in matters of social security	19 Dec. 1978	13 Dec. 1984
86/378/EEC	On the implementation of the principle of equal treatment for men and women in occupational social security schemes	24 July 1986	31 July 1989
86/613/EEC	On the application of the principle of equal treatment between men and women engaged in an activity, including agriculture, in a self-employed capacity, and on the protection of self-employed women during pregnancy and motherhood	11 Dec. 1986	30 June 1989
92/85/EEC	On the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding	19 Oct. 1992	19 October 1994
93/104/EC	Concerning aspects of the organization of working time	23 Nov. 1993	23 Nov. 1996
96/34/EC	On the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC	3 June 1996	3 June 1998
96/97/EC	Amending Directive 86/378/EEC on the implementation of the principle of equal treatment for men and women in occupational social security	20 Dec. 1996	1 July 1997

97/80/EC	On the burden of proof in cases of discrimination based on sex	15 Dec. 1997	1 Jan. 2001
2002/73/EC	Amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions	23 Sept. 2002	5 Oct. 2005

Source: http://europa.eu.int/comm/employment_social/equ_opp/rights_en.html

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