

SPECIAL ISSUE

Guest Editor: Belinda Cooper, with
Susanne Baer and Ulrike Merger

INTRODUCTION

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When I first arrived in Berlin soon after completing law school in 1987, I was surprised at the apparent absence of feminist influences on law, which had been so important to me during law school. For a time, an anti-pornography campaign imported ideas current in the United States, but it felt out of place in a country without a first amendment tradition and with a very different approach to sexual issues. Its influence also appeared to be more political and social than legal. There seemed to be no home-grown movement to question the fundamental concepts of German law through the influence of women's experience and feminist ideas.

Things were, however, beginning to change. While Germany has long had practicing lawyers who consider themselves feminists and devote themselves to issues affecting women, feminist concepts of jurisprudence have now also begun to enter legal academia. Starting in the 1980s, scattered courses in feminist jurisprudence began to appear in university sociology, political science and law departments throughout Germany, usually organized by students with the loose sponsorship of a faculty member. In 1991, a chair in the law of gender relations was established at the University of Bremen, considered Germany's most liberal university. And in 1993, six years after my arrival in Germany, while teaching law at eastern Berlin's Humboldt University, I was privileged to witness the genesis of the first-ever institutionalization of a coherent curriculum in feminist jurisprudence at a German university.¹ What be-

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¹ In 1992, Professor Frances Olsen of UCLA gave a talk on feminist jurisprudence to my class in U.S. legal concepts. Her description of the central role of students in establishing women and law courses in the United States encouraged Christine Bauer, one of the students, to organize a group of law students interested in feminist issues. The group then

gan as a single seminar soon grew to two, and eventually developed into a professorship. Out of that process came the collaboration between myself and the first two instructors in feminist jurisprudence at Humboldt University, Ulrike Merger and Susanne Baer, that led to this volume of the *Cardozo Women's Law Journal*.

The following is a collection of writings on German women in law by women directly involved in the field. It includes some of the latest scholarship by younger academics, as well as contributions from experienced lawyers. Their articles provide a look at the issues moving German women in law at a particularly interesting moment, as feminism makes gradual inroads into legal thinking and two German cultures try to come to terms with one another. These trends might not be unrelated—Humboldt University was, after all, an East German university. The changes that have taken place since unification, the rethinking and shaking up of long held assumptions, have made room and opportunity for much that might have been unattainable before.

The subjects of the articles were chosen and the authors approached mainly by the same group of law students who demanded and then attended the pioneering seminars at Humboldt University. Several of them also contributed an essay, "Between Legal Studies and Feminism," on their experiences as women studying law in Germany. The topics of the remaining articles range widely. Ninon Colneric, chief judge of the labor court in the state of Schleswig-Holstein, provides a basic overview of anti-discrimination law in Germany. Judge Colneric, like Ursula Rust in her article on social welfare law, also traces the influences of European Community law on German law. Both make clear the extent to which the European Community has become a supranational body, exercising concrete influence on its member states in more than merely the economic arena. Feminist legal scholar Susanne Baer, who has translated some of the works of Catharine MacKinnon into German, describes efforts to introduce feminist legal theory in an institutional and scholarly environment that is not particularly welcoming to such new currents. Sibylla Flügge, an expert on German legal history, discusses concepts of child custody, particularly for out-of-wedlock children, in a system that has traditionally separated the duty of care from the right of legal authority over a child. Professor Dagmar Schiek takes up the theme of German and Euro-

approached the dean of the law department at the time, Professor Bernhard Schlink, and requested courses on law and feminism. See Mareike Coppi et al., *Between Legal Studies and Feminism*, 3 CARDOZO WOMEN'S L.J. 451 (1996).

pean prohibitions on night work and their significance for women in the context of labor law; Margarete von Galen, a practicing German lawyer, traces the history and current status of legalized prostitution in Germany, exploring the prevailing legal view that treats it as immoral and thus different from other professions. Alexandra Goy, also a practicing attorney, describes the institution of the *Nebenklägerin*, or "victim-plaintiff," which provides an opportunity for women who are victims of violence to become directly involved in the trials of their abusers.

These contributors, with the exception of the Humboldt University student authors, are all from the former West Germany. There has been little time, as yet, for a younger generation of eastern German women to complete their legal training in post-unification universities and bring their often quite different perspectives into the feminist legal discourse. Our two other East German contributors represent older generations of legal scholars, educated and trained in East Germany, though often critical of the old system. Anita Grandke, a recently retired professor at Humboldt University, writes on the development of equal rights for women in East Germany and the possibility of combining family and career in East and West Germany before and since unification. Rosemarie Will, also a professor at Humboldt and one of the few East German professors of law to retain her position following the reorganization of the East German university system accompanying unification, describes the evolution of German abortion law, particularly the attempt to harmonize the radically differing East and West German legal approaches to the issue.

It is, of course, not possible fully to translate the experiences of another legal and social culture, particularly not in a single law journal volume. Germany's legal system is a continental one, with inquisitorial courtroom procedures and a code system emphasizing doctrinal systems worked out from above rather than case law built upon precedent and experience from below. German law and legal teaching are based on a positivist belief that law is, and should be, separate from politics and other disciplines. Germany had no significant civil rights movement that might have influenced equality law, as in the United States; and social change has not, traditionally, come by way of the judicial system, but by way of politics. Thus German feminists in law face barriers quite different from those with which we in America are familiar.

Culturally, the state in Germany—traditionally strong, assertive and highly paternalistic—occupies a very different role than in the United States and engenders different responses on the part of

citizens generally and feminists in particular. Also, Germany's tradition of individual rights is less absolute than ours; rights tend to be balanced more consciously against the needs of the community. And ultimately, acting as the backdrop to all these considerations, there is the ever-present historical memory of Nazism, including the role played by law in permitting persecution and extermination.²

Because of these and other factors, the articles presented here frequently contain underlying, often unconscious assumptions that conflict with our own. Though the authors and editors have tried to flag and to some extent explain such assumptions wherever possible, a truly comprehensive translation of cultures would go far beyond the scope of this collection.³ Thus readers may find some statements and ideas unfamiliar, some causalities difficult to understand, and certain responses hard to fathom. We hope this will not discourage, but will rather whet appetites for further exploration of feminism through dialogue with feminist scholars and legal practitioners outside the United States

That, in fact, is one of the main reasons for such a comparative project. Experience is never entirely transferrable across cultures and national borders. But the world, as we are constantly reminded, is becoming ever more interdependent; knowledge of other cultures and ways of operating and the exchange of ideas across borders are increasingly necessary, as well as increasingly possible. New communications technologies make it easier for less powerful groups to connect, engage in dialogue and ultimately, perhaps, strengthen one another. The mere knowledge that other systems have developed differing approaches to familiar problems can be a catalyst for change in our own society, just as the concepts of American feminist jurisprudence are influencing German women in law to work for change within their legal system. Surely, at a time when we are being told that capitalism "won" the Cold War

² For one discussion of the role of the judicial system under Nazism, see INGO MÜLLER, *HITLER'S JUSTICE: THE COURTS OF THE THIRD REICH* (Deborah Lucas Schneider trans., 1991).

³ For those interested in delving further into this area, some works in English include MIRJAN DAMASKA, *THE FACES OF JUSTICE AND STATE AUTHORITY: A COMPARATIVE APPROACH TO THE LEGAL PROCESS* (1986); MARY ANN GLENDON, *ABORTION AND DIVORCE IN WESTERN LAW* (1987); MARY ANN GLENDON, *THE TRANSFORMATION OF FAMILY LAW: STATE, LAW AND FAMILY IN THE UNITED STATES AND WESTERN EUROPE* (1989); DONALD P. KOMMERS, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* (1989); MARY ANN GLENDON ET AL., *COMPARING LEGAL TRADITIONS* (2d ed. 1994); JOHN H. MERRYMAN, *THE CIVIL LAW TRADITION* (2d ed. 1985). On the eastern German legal system and the changes after unification, see INGA MARKOVITS, *IMPERFECT JUSTICE: AN EAST-WEST GERMAN DIARY* (1995), in which women (particularly East Germany's many female judges) play a prominent role.

and the European welfare state is collapsing, it is important to remind ourselves that a capitalist democracy in the heart of Europe continues to consider care of its weakest citizens a fundamental principle. Surely, as the idea of "family" becomes a political buzzword, even as programs to help families are eliminated, we can learn something from a society that provides concrete ways for families to survive and thrive. When low-income single mothers are vilified in the United States, it is useful to gain greater familiarity with a system that sees children as a value in themselves and helps all parents, single or married, wealthy or poor, to raise them. Although many of the authors in this collection are critical of their system, undoubtedly with reason, their articles also illustrate, consciously or unconsciously, many positive achievements. Of course we will not be able to incorporate all these positive facets into our society, just as they cannot copy all our strengths. But an ongoing dialogue, such as we hope will be stimulated by this compilation, can leave both sides changed for the better.

A project as broad in scope as this one, dealing with two languages and at least two cultures and spanning an ocean, has inevitably required a degree of compromise. Source citing in German was simply not a realistic option; therefore, each author is responsible for the accuracy of her own citations. Some of the citation forms are unusual, as we were working almost entirely with foreign sources not often referenced in U.S. law journals. German legal scholars typically cite legal "paragraphs"—sections of laws—the way we cite cases; paragraph numbers become shorthand for concepts. Such cites do not usually refer to a specific compilation in which that law is found, as there may be many different compilations of, say, the family law or civil law codes, but merely to the paragraph number, and sometimes to the version of the law in which a no-longer applicable paragraph was found. Citation may also be to the Federal Legal Bulletin, in which new laws are published upon passage. Although we have sought to provide explanations or footnotes where necessary to avoid confusion and tedium, we have retained enough of the original form to provide a flavor of the different style of legal discussion in Germany.⁴

This project would not have been possible without the help of the following students, all of them participants in the first seminar on feminist jurisprudence at Berlin's Humboldt University: Antje

⁴ In the following, the articles by Dagmar Schiek, Ninon Colneric, and Susanne Baer were written originally in English. The responsibility for translating the remaining articles from the German was mine; I am also, of course, solely responsible for any errors in the translations.

Berger, Mareike Coppi, Anne Eggert, Bettina Joos, Julianne Putzker, Ina Steidl and Marion Westphal. Their spirit of curiosity, inquiry and criticism bodes well for the future of feminist legal scholarship in Germany.