REACH AND SUBSTANCE OF THE PRINCIPLE OF EQUAL TREATMENT IN SOCIAL SECURITY LAW UNDER EUROPEAN COMMUNITY AND GERMAN CONSTITUTIONAL LAW

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I. INTRODUCTION

German constitutional law, as well as European Community ("EC") law, forbid discrimination on the basis of sex in statutory systems of social security. However, the extent to which the European Community's principle of equal treatment applies is limited in comparison to German constitutional law.

In EC law, the elimination of discrimination on the basis of sex is one of the general principles the European Court of Justice ("ECJ") has a duty to uphold.[1] In social security matters, the principle of equal treatment is also regulated by Directive 79/7.[2] In line with the EC's limited authority to regulate matters of social security, EC directive 79/7[3] is applicable only to those statutory social security schemes (or the social assistance regulations that supplement or substitute for them) that provide protection against the classical risks associated with paid employment, such as illness, invalidity, old age, accidents at work, occupational diseases and unemployment.[4]

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[1] ECJ Judgment of 15 June 1978, Case 149/77, Defrenne III, ECR 1978, 1365, at 26/29; ECJ Judgment of 20 Mar. 1984, Cases 75/82 and 117/82, Razzouk and Beydoun, ECR 1984, 1509, at 16.

[2] Council Directive of 19 Dec. 1978 on the Progressive Implementation of the Principle of Equal Treatment for Men and Women in Matters of Social Security, 79/7/EEC, O.J. 1979, L6/24. It is important to note that the European concept of "social security," as employed here and in this article, is broader than the social security system in the U.S. and encompasses a wider range of benefits and entitlements.

[3] A directive obligates the EC states to adapt their national law to the European standards set out in the directive within the period prescribed (Art. 189, EC Treaty). The way in which this is done is left to the member states. They may adapt their law within the framework of their traditional legal system. Wherever the provisions of a directive appear, as far as their subject matter is concerned, to be unconditional and sufficiently precise, those provisions may be relied upon by an individual against the state if the state fails to implement the directive in national law by the end of the period prescribed, or if it fails to implement the directive correctly.

[4] Directive 79/7, *supra* note 2, Art. 3 cl. 1 states:

This directive shall apply to:

In addition to a general equality principle, German constitutional law includes a special prohibition on discrimination that forbids disadvantageous or preferential treatment on the basis of sex as well as distinctions based on other criteria, such as race and religion. In addition, the Basic Law (the West German, now all-German, constitution) established the constitutional principle that men and women have equal rights—a principle added in 1949 after forceful intervention by women and women's organizations in the constitutional debate.[5] This principle of equal rights is not a non-binding phrase. Rather, it is a "true legal norm" that directly commits the legislature, judiciary and executive to implement equal rights, according to the leading 1953 German Constitutional Court decision on this principle.[6]

The principles of both general and specific equality apply directly to German social security law.[7] In Germany, social security law is based almost exclusively on legal norms. The legislature is directly bound by the catalogue of basic rights.[8] The prohibition on discrimination on the basis of sex in social security law is thus, unlike EC Directive 79/7, not limited to the working population. Constitutionally, for example—though not on the basis of the Community directive—family benefits paid to the entire population must conform to constitutional principles of equal rights. Because, however, the subject of this article is a comparison between EC and constitutional law, the following will concentrate, even in the discussion of national social security law, on protection of working people and not on protections encompassing the entire population.

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a) statutory schemes which provide protection against the following risks:
–illness,
–invalidity,
–old age,
–accidents at work and occupational diseases, and
–unemployment;
b) social assistance, in so far as it is intended to supplement or replace the schemes referred to in (a).

5 VERA SLUPIK, DIE ENTSCHEIDUNG DES GRUNDGESETZES FÜR PARITÄT IM GESCHLECHTERVERHÄLTNIS (1988).

6 Judgment of 18 Dec. 1953, 1 BvL 106/53, 3 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS (official collection of Constitutional Court decisions) [hereinafter BVERFGE] 225, 239 ff.

7 HANS-JÜRGEN PAPIER, *Der Einfluß des Verfassungsrechts auf das Sozialrecht in* SOCIALRECHTSHANDBUCH 114 ff. (von Maydell & Ruland eds., 1988).

8 *See* Art. 1 (3) of the Basic Law ("GG").

Art. 4 of Directive 79/7 expressly prohibits all direct or indirect discrimination on the basis of sex.[9] Art. 3 of the German Basic Law does not as explicitly mention indirect discrimination.[10]

Direct discrimination exists when one sex is directly preferred or disadvantaged. It is present, for example, if a widow, but not a widower, receives survivor's benefits at the death of the spouse. It is direct discrimination if married women receive lower unemployment benefits than married men or single men and women. The question, controversial even today, whether differences between the sexes can justify unequal treatment is answered in the negative by both EC and German constitutional law with the ban on direct discrimination. Sex is a forbidden criterion on which to base a decision, and the ban on direct discrimination requires "blindness" in regard to the criterion of sex.

The prohibition on indirect discrimination represents a contrary approach. Here it is all but required that sex differences be taken into account. Examples of indirect discrimination in social security law are minimum benefit levels from which only part-time workers are excluded. As the majority of part-time workers are women, they are the main ones affected by this apparently gender-neutral distinction, causing a problem of indirect discrimination. A further example is the payment of wages to employees in the event of illness, invalidity, old age and the like only if they are "principle breadwinners." Because that role in the family is traditionally held by the husband, who usually earns a higher income than the wife, limiting the benefit to so-called principle breadwinners excludes mainly women and may be indirect discrimination.

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[9] 1. The principle of equal treatment means that there shall be no discrimination whatsoever on grounds of sex either directly, or indirectly by reference in particular to marital or family status, in particular as concerns:

–the scope of the schemes and the conditions of access thereto;

–the obligation to contribute and the calculation of contributions;

–the calculation of benefits including increases due in respect of a spouse and for dependants; and

–the conditions governing the duration and retention of entitlement to benefits

2. The principle of equal treatment shall be without prejudice for the provision relating to the protection of women on the grounds of maternity.

[10] (1) All people are equal before the law.

(2) Men and women have equal rights. *The state promotes the actual achievement of equality of women and men and works to eliminate existing disadvantages.

(3) No one may be disadvantaged or preferred on the basis of sex, background, race, language, homeland and origin, beliefs, religious or political views. *No one may be disadvantaged on the basis of handicaps.

* Asterisks indicate portions added by law on 29 Oct. 1994.

The subject of this article is the extent and substance of the ban on direct and indirect discrimination on the basis of sex under European and German constitutional law. Part II discusses the principles of EC law and their effect on national social security law, along with the basic principles of Germany's statutory social security system for the protection of working people, which together provide the framework for social security in Germany. The reach of the EC principle of equal treatment is limited by the areas to which the Community directive applies, and is determined by the legal consequences of discriminatory behavior to the member states and their laws, as described in Part III below. Part IV will analyze the substance and practical effects of the ban on direct and indirect discrimination based on judgments of the ECJ and the German Constitutional Court, in order to draw a more precise picture of the interplay between German and European law in this area. This has become particularly relevant to German social security law due to recent ECJ jurisprudence. In Part V it will become apparent that, in contrast to the situation in labor law, in social security law German law still seems to promise greater freedom to discriminate than European norms.

II. THE OVERALL FRAMEWORK

A. *Basic Principles of EC Social Security Law*[11]

The EC is primarily an economic community, and has no comprehensive authority to regulate social policy.[12] It remains the responsibility of the member states to regulate social security; they may retain their countries' existing structures of social security law, including, for example, provision of a uniform basic level of state support for invalidity and old age, statutory pension insurance financed through contributions, or even private pension insurance.

At the same time, the EC does have express authority over certain areas of social policy.[13] The EC Treaty mentions both social security for workers as part of the guarantee of freedom of movement[14] and the principle of equal pay.[15] The equal pay guarantee, Art. 119, is among the social welfare provisions included in the

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11 On the following, *see* Karl-Jürgen Bieback, *EG-Sozialrecht: Grundlagen und Geltung sowie Wirkungen des EG-Gleichbehandlungsrechts auf das nationale Sozialrecht*, DEUTSCHE RENTENVERSICHERUNG 20 ff. (1994).

12 The concept of the "social system" includes labor laws and social security law.

13 On the current discussion, *see* COMMISSION OF THE EUROPEAN COMMUNITIES & DEPARTMENT OF INTERNATIONAL LAW OF THE CATHOLIC UNIVERSITY OF LOUVAIN, THE FUTURE OF SOCIAL POLICY—OPTIONS FOR THE UNION (1994).

14 Art. 51 of the EC Treaty.

15 Art. 119 of the EC Treaty.

Treaty. The principle of equal treatment in pay was introduced in 1957 at the founding of the European Economic Union, in response to France's fear that it would suffer a competitive disadvantage because of its more comprehensive social welfare benefits and policies to assist women and especially families.[16]

Though the equal pay guarantee in Art. 119 may have been based on economic considerations, it has developed—with the help of ECJ jurisprudence since the 1970s—into the EC's only social policy principle with direct effect.[17] Also in the 1970s, Art. 119 was supplemented by three equal treatment directives: the equal pay directive,[18] the directive on other working conditions,[19] and the directive on statutory social security systems.[20] The two labor-law equal treatment directives could also be based on the EC's "hard" authority under Art. 100 of the EC Treaty, because they directly affected the functioning of the common market. The situation was different for the social security directive, Directive 79/7; its basis was primarily Art. 235 of the EC Treaty, which granted authority over "unexpected cases."

B. Effect on National Social Welfare Law

EC social welfare law, including equal treatment law, differs from the international social welfare law regulated by bilateral social security treaties or international agreements and conventions in that it is part of an independent, supranational legal community. This legal system has its own controlling legal principles, as well as its own institutions for making and implementing law. The dynamism and special significance of EC equal treatment law for German social security law lies in its binding effect on national law.

In line with its authority under Art. 164 of the EC Treaty, the ECJ—deviating from the usual interpretory rules for international treaties, and predicated on the doctrine of the precedence of EC law and its uniform, immediate applicability to member states—

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16 Jean Boudard, *Community Law and National Laws of the Member States Relating to the Principle of Equal Pay Between Male and Female Workers*, 1 EQUALITY IN LAW BETWEEN MEN AND WOMEN IN THE EUROPEAN COMMUNITY 61, 62 (Michel Verwilghen ed., 1986).

17 Simone Rozès, *Discrimination on Grounds of Sex—Rights and Facts*, *id.* at 27, 28.

18 Council Directive of 10 Feb. 1975 on the Approximation of the Laws of the Member States Relating to the Application of the Principle of Equal Pay for Men and Women (75/117/EEC), O.J. 1975, L45/19.

19 Council Directive of 9 Feb. 1976 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, 76/207/EEC, O.J. 1976, L39/40 E.C.R.

20 Directive 79/7, *supra* note 2.

decided early on that the basic precepts of the EC Treaty had direct legal effect on the citizens of member states.[21]

C. *Basic Principles of German Social Security Law for the Protection of the Working Population*

In Germany, statutory social security is the traditional means of ensuring against the risks associated with dependent labor. Social security schemes began more than a hundred years ago in the German Reich, with statutory health insurance in 1883,[22] statutory accident insurance in 1884,[23] and statutory invalidity and old age insurance in 1891.[24] Unemployment insurance began in 1927 in the Weimar Republic.[25] The fifth branch of social security law, called "home and nursing care insurance," was not anchored in law until 1994.[26]

Statutory social security in Germany is organized as obligatory insurance; that is, the insurees are required by law to be members of the various insurance schemes:

–Under the statutory health insurance scheme, the insurees include workers, their children and spouses who are capable of work but are not working, and retirees. Ninety percent of the population is insured by statutory health insurance in this way. The remainder are privately insured or covered by other systems. Less than 0.5% of the population is uninsured.

–Under the accident insurance scheme, every employed person is insured at the expense of his or her employer, making it possible to pay civil-law damage claims for work-related accidents by way of no-fault payments from public accident insurance funds.

–Under the mandatory pension and unemployment insurance schemes, every employed person must be insured. For pension insurance—though not unemployment insurance—it is also possible to be voluntarily insured—that is, at one's own wish.

–The entire population is insured under mandatory home and nursing care insurance, at it is for health insurance.

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21 ECJ Judgment of 5 Feb. 1963, Case 26/62, Van Gend en Loos, ECR 1963, at 1.

22 Since 1989, this has been part V of the Social Security Code (Statutory Health Insurance).

23 Since 1912, this has been the Reich Insurance System (Accident Insurance) and later Part VII of the Social Security Code (Statutory Accident Insurance).

24 Since 1992, this has been Part VI of the Social Security Code (Statutory Pension Insurance).

25 Since 1969, this has been codified in the Labor Promotion Act (*Arbeitsförderungsgesetz*), which is considered a special part of the social security code.

26 Social Security Code, part XI—Home and Nursing Care Insurance Law (*Pflege-Versicherungsgesetz*) of 26 May 1994, BGBl. 1994, at 1014.

With the exception of accident insurance, social insurance is independent of the cause of the legally-defined need for benefits. In contrast to private insurance, individual risks play no role, as they do not affect the amount of the contribution. Thus an essential characteristic of statutory social insurance is its leveling function—in German, it is called a "solidarity balance"—between the sick and the well, those in need of home and nursing care and those who will never need it, early invalids and those who can work, and unemployed and employed persons.

The benefits under statutory accident and pension insurance, as well as unemployment insurance, are primarily wage replacement benefits. These are based on amount of income and the corresponding size of contributions. In health and in home and nursing care insurance, the connection between income and benefits is different; here, wage replacement benefits play a lesser role. Most important are material benefits and services during illness or in case of need for care.

While EC law includes risk-specific social welfare benefits in Directive 79/7, German social policy traditionally makes a clear distinction between social insurance financed by contributions and social security financed by taxes. Half of social insurance is financed through contributions from the insured and (generally) his or her employer. This is different in the case of tax-financed social security, the purpose of which is to ensure the constitutionally-guaranteed right to a minimum living standard for every person.

III. Reach of the Equal Treatment Principle Under EC Law

Social security law may not include any discrimination on the basis of sex. In 1971, in its first decision on equal treatment of the sexes, the ECJ held that employer contributions to a statutory system of social security did not count as income within the meaning of the equal pay requirement, Art. 119 of the EC Treaty, so that the principle of equal treatment in Art. 119 of the Treaty did not apply to statutory social security without a further legal basis.[27] However, this was followed by adoption of Directive 79/7. Since then, for member states the EC principle of equal treatment also applies to social security law. The deadline for harmonizing national law with the principles of the Directive was 23 December 1984. The ECJ's first judgment on Directive 79/7 came in 1986. Since then, there have been over 30 ECJ judgments on the compatibility of national

[27] ECJ Judgment of 25 May 1971, Case 80/70, Defrenne I, ECR 1971, at 445.

social welfare law with Directive 79/7. The majority of decisions so far have involved the question whether the principle of equal treatment in the Directive applies at all.

A. Scope of Directive 79/7 Ratione Personae and Rationae Materiae

Under Art. 2 of the Directive, the persons to which it applies are the "working population." The concept is broadly defined to include:

–the working population, that is, dependent employees and the self-employed;
–persons seeking employment;
–persons whose activity is interrupted by illness, accident or involuntary unemployment;
–workers unable to work; and
–working people now retired.

The working population includes every worker who offers labor in exchange for payment, regardless of the length of time worked and the amount of income. This was the ECJ's express decision in two 1995 cases on Directive 79/7.[28] Thus Directive 79/7 has no minimum threshold for time worked or income upon which its applicability to persons could depend.[29]

The Directive's applicability to persons is defined exclusively in Art. 2. Thus no one may make a claim under Directive 79/7 solely because he or she is a member of a social security system that falls under the Directive's substantive area of applicability as defined in Art. 3 (1) of the Directive.[30]

Interruptions of paid work have no impact if they occur due to one of the risks listed in Art. 3 (1) of the Directive.[31] Conversely, if a woman gives up employment to raise children, for example, she loses the protection of the Directive.[32]

The protections of the Directive apply not only to persons who are themselves sick, invalid or unemployed, but also to persons who give up employment because the protected risks are suffered

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28 ECJ Judgment of 5 Dec. 1995, Case C-317/93, Nolte, and Case C-444/93, Megner and Scheffel, NzA 1996, at 129 and 131.

29 A time threshold of one weekly work period of eight hours was provided for in a guideline by the Commission of 1990 on Regulation of Part Time Work; *see* BERTELSMANN, COLNERIC, PFARR & RUST, HANDBUCH ZUR FRAUENERWERBSTÄTIGKEIT [hereinafter HzF], G II 4.1.7.

30 *See supra* note 4; ECJ judgment of 11 July 1991, Case C-87/90, C-88/90 and C-89/90, Verholen, ECR 1991, I-3757, at 20 f.

31 ECJ Judgment of 11 July 1991, Case C-31/90, Johnson, ECR 1991, I-3723, at 22 ff.

32 ECJ Judgment of 27 June 1989, Case 48/88, Achterberg-te Riele, ECR 1989, 1963, at 11-13.

by third parties for whom they care. Thus caregivers may also be protected by the Directive.[33]

The Directive's substantive area of applicability, defined under Art. 3 (1), includes statutory systems offering protection from classic risks such as illness and the like. Thus the risks against which it protects do not include general educational or work-promotion benefits.[34]

B. General Exclusion of Survivor and Family Benefits

Art. 3 (2) of Directive 79/7[35] excludes two benefit systems that would have had to change in many member states if the principle of equal treatment of the sexes were applied: survivors' and family benefits. However, Art. 3 (2) includes the important caveat that family bonuses added to the benefits in the systems listed in Art. 3 (1) are not exempt from the Directive's area of applicability. The general exclusion of family benefits is especially relevant in Germany in connection with per-child bonuses and child-raising payments.

C. Exclusion of Benefits as an Option for Member States

Aside from the general exceptions in Art. 3 (2), member states have the opportunity to exempt numerous areas from the Directive's applicability under Art. 7 (1).[36] These exceptions mainly involve special rules for women; such rules were adopted in many European countries at the end of the previous century to ensure protection for non-working wives, thereby also entrenching traditional sex roles. Social security was traditionally mediated through the husband and father. Such patriarchal elements may be partially retained by member states under Art. 7 (2)'s option. The

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33 ECJ Judgment of 24 June 1986, Case 150/85, Drake, ECR 1986, 1995, at 22 ff.

34 ECJ Judgment of 16 July 1992, Case C-63 and Case C-64/91, Jackson and Creswell, ECR 1992, I-4737; *see also* ECJ Judgment of 4 Feb. 1992, Case C-243/90, Smithson, ECR 1992, I-467.

35 "The directive shall not apply to the provisions concerning survivors' benefits nor those concerning family benefits, except in the case of family benefits granted by way of increases of benefits due in respect of the risks referred to in paragraph 1 (a)."

36 This Directive shall be without prejudice to the right of Member States to exclude from its scope:
(a) the determination of pensionable age for the purpose of granting old-age and retirement pension and the possible consequences thereof for other benefits;
(b) advantages in respect of old-age pension schemes granted to persons who have brought up children; the acquisition of benefit entitlements following periods of interruption of employment due to bringing up children;
(c) the granting of old-age or invalidity benefit entitlements by virtue of the derived entitlements of a wife;
(d) the granting of increases of long-term invalidity, old age, accidents at work and occupational disease benefits for a dependent wife.

article merely requires them to regularly review the grounds for such exceptions.[37]

The most important exception is the lower retirement age for women. The ECJ has had to consider when different age limits can permit additional sex-specific distinctions in pension law. It has held that exceptions are only possible in regard to such benefits if the differences are necessarily and objectively linked to the different retirement ages. Thus shorter vesting periods for women are justified as the effect of the earlier retirement age for women,[38] as are shorter contribution periods for women, which are necessary to achieve the same pensions as men,[39] and higher invalidity pensions for women, which are still possible even after they have reached retirement age.[40]

However, if an EC country fails to take advantage of the exception under Art. 7 (1)(a) of Directive 79/7, the strict principle of equal treatment takes effect and no longer allows exceptions, even transitionally. In Belgium, the result was that men could take advantage of the shorter insurance periods applying to women, once the age limit was made uniform.[41] The bases of the new arrangement had been calculated on the assumption that women would continue to have shorter insurance periods than men. This was nullified by the ECJ decision.

D. Direct Applicability of the EC Principle of Equal Treatment on the Basis of Sex

In cases where binding or possible exceptions do not apply and the prerequisites for personal and substantive applicability are fulfilled, Art. 4 (1) goes into effect. Under the ECJ's consistent jurisprudence, Art. 4 (1) has direct effect, as it is sufficiently precise and defined to be utilized by domestic courts. This is true for cases of both direct[42] and indirect[43] discrimination.

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37 "Member states shall periodically examine matters excluded under paragraph 1 in order to ascertain, in the light of social developments in the matters concerned, whether there is justification for maintaining the exclusions concerned."

38 ECJ Judgment of 30 Mar. 1993, Case C-328/91 (Thomas), E.C.R. 1993, I-1247, at 20.

39 ECJ Judgment of 7 July 1992, Case C-9/91, EOC, ECR 1992, I-4297, at 14 ff.

40 ECJ Judgment of 11 Aug. 1995, Case C-92/94, Graham, at 19.

41 ECJ Judgment of 1 July 1993, Case C-154/92, Van Cant, ECR 1993, I-381, at 43.

42 ECJ Judgment of 4 Dec. 1986, Case 71/85, FNV, ECR 1986, 3855, at 18; ECJ Judgment of 24 Mar. 1987, Case 286/85, McDermott and Cotter, ECR 1987, 1453, at 16; ECJ Judgment of 24 June 1987, Case 384/85, Clarke, ECR 1987, 2865, at 9; ECJ Judgment of 8 Mar. 1988, Case 80/87, Dik, ECR 1988, 1601, at 8; ECJ Judgment of 21 Nov. 1990, Case C-373/89, Integrity, ECR 1990, I-4243, at 12; ECJ Judgment of 13 Mar. 1991, Case C-377/89, Cotter and McDermott, ECR 1991, I-1155, at 25.

43 ECJ Judgment of 13 Dec. 1989, Case C-102/88, Ruzius-Wilbrink, ECR 1989, 4311, at 19; ECJ Judgment of 24 Feb. 1994, Case C-343/92, Roks, ECR 1994, I-571, at 20.

E. Legal Consequences of Discriminatory Behavior

Under ECJ jurisprudence, violations of the prohibition on discrimination on the basis of sex indicate that the discriminatory measure or law is incompatible with Community law. Under Art. 5 of Directive 79/7, member states are required to abolish unequal treatment.

However, so long as no new, non-discriminatory rules have been adopted, the Directive is the only valid reference for equal treatment. Therefore, members of the disadvantaged sex not only may rely directly on the equal treatment principle of Community directives;[44] they also have a right to the same treatment, and to application of the same rules, as members of the previously advantaged sex. The principle is that the discriminatory provision immediately be applied in non-discriminatory fashion, and only at the same level at which it applied to the previously advantaged sex. Until new measures are promulgated, this remains the "only valid referential system."

Such jurisprudence surrounding the legal consequences of violations of the ban on discrimination is necessary to ensure that the ECJ's general Community interpretations apply in the same fashion in every member state, rather than depending on the country and legal system in which this incompatibility with EC law becomes an issue.

The situation is different under German constitutional law. There, only the Constitutional Court has the authority to discard a norm of law. Generally, once it determines a violation of the constitution has occurred, the Court leaves it to the legislature to change the violative norm.

The different jurisprudence of the ECJ ensures the effectiveness of Community law and, unlike German constitutional law, has a significant influence on the actual promulgation of new measures.[45]

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[44] The Directive also guarantees all persons the right to pursue before the courts claims based on the individual right to non-discriminatory treatment, possibly after recourse to other competent authorities (Art. 6 of Directive 79/7). Statutes of limitations can limit the ability to bring retroactive suits. *See, e.g.*, ECJ Judgment of 25 July 1991, Case C-208, Emmott, ECR 1991, I-4269. However, the ability to pursue such claims may not be excessively restricted. *See, e.g.*, ECJ Judgment of 27 Oct. 1993, Case C-338/91, Steenhorst/Neerings, ECR 1993, I-5475.

[45] Karl-Jürgen Bieback, *Diskriminierungs- und Behinderungsverbote im europäischen Arbeits- und Sozialrecht*, 9 SCHRIFTENREIHE DER EUROPÄISCHEN RECHTSAKADEMIE TRIER 103, 127 f. (1995).

IV. Substance of the Principle of Equal Treatment Under Community and German Constitutional Law

In Art. 4 (1) of the Directive, EC law specifies four areas in which discrimination may occur: the scope of the schemes and the conditions of access; the obligation to contribute and calculation of contributions; calculation of benefits, including increases for spouses and dependents; and conditions governing the duration and retention of entitlement to benefits.

In German social welfare law, the right to non-discriminatory access and the assessment of periods in which employment is interrupted are particularly relevant.

A. Constitutional Court and ECJ Jurisprudence on Direct Discrimination in Social Security Law

There has been only one ECJ judgment, as yet, involving national social security law in Germany. Most of the problems of direct discrimination in Germany had already been decided on the basis of German constitutional law by the mid-1980s, when Directive 79/7 became applicable to Germany. A comparison of selected Constitutional Court decisions with the requirements of Directive 79/7 for three selected areas shows that the German outcomes are still, in some areas, farther-reaching than European law.

1. Constitutional Court Decisions

Since the founding of the Federal Republic of Germany, Constitutional Court decisions have moved in the direction of a strict interpretation of the prohibition on discrimination, though constitutional norms have remained unchanged. In 1953, the Court ruled that Art. 3 (2) of the Basic Law was not a non-binding statement of intent, but a "true legal norm" directly binding the legislature, judiciary and executive branch. It developed the principle that distinguishing between women and men could be permissible if—and only if—objective biological or functional (division of labor) differences were present.[46]

However, the Court's acceptance of such objective biological or functional differences has changed significantly.[47] It may be assumed that functional differences can no longer justify differential treatment of the sexes. Thus the result of nearly fifty years of constitutional jurisprudence in Germany surrounding equal rights has

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[46] 3 BVerfGE 225, 242.

[47] Ulrike Sacksofsky, Das Grundrecht auf Gleichberechtigung 23 ff. (1991).

been that, today, only objective biological differences can justify differing treatment of the sexes.[48]

a. Widowers' Pensions

On the issue of widowers' pensions, Constitutional Court decisions have clearly changed in outcome, though the rationale behind them has undergone only minor changes.

Until the mid-1980s, every wife received a widow's pension from the statutory pension insurance fund at the death of her husband. Widowers received such pensions only if their wives had paid most of their living costs; thus a widower's pension was only a conditional entitlement and, because of women's lower earnings, was rarely granted in practice.

In 1963, in a case now known as the "First Widower's Pension Decision," the conditional widower's pension was upheld; according to the prevailing view at the time, it was compatible with Art. 3 (2) of the Basic Law.[49] In this judgment, the Court used the division of roles—promoted under family law and also common in reality—as a justification for direct unequal treatment of widows and widowers. The traditional division of labor thus became the standard for constitutional evaluation. In its decision, the Court considered only the disadvantage to widowers; there was no acknowledgment whatsoever of the discriminatory situation for working women who, unlike insured men, had no way of making provision for their husbands after their death—despite contributions to pension insurance that were calculated in the same way for men as for women.

The "Second Widower's Pension Decision" of 1975 was based on an interpretation under which functional differences between the sexes justified direct discrimination. Still, the Court ordered the legislature to reform widow's and widower's pension laws, as social conditions were clearly changing as a result of increasing employment of women.[50]

This legislative mandate was fulfilled in 1985. Since that time, a claim to a widow's or widower's pension arises at the death of either insured spouse. Whether this is actually paid out or not depends on the current income of the surviving spouse; the practical

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[48] Most recently in Constitutional Court decision of 24 Jan. 1995, 1 BvL 18/93 (the duty to serve as a firefighter and the accompanying duty of contributions violates Art. 3 (2) of the Basic Law), DVBL 613 (1995).

[49] Constitutional Court decision of 24 July 1963, 1 BvL 30/57, 11/61, 17 BVerfGE 1, 23 ff.

[50] Constitutional Court decision of 12 Mar. 1975, 1 BvL 15, 19/71, 39 BVerfGE 169, 185 ff.

result is that, in general, a widower continues to receive no survivor's pension.

Even after equalization of the prerequisites for widows' and widowers' pensions, social security continues generally to be mediated through the husband.[51] The opportunity to create a completely different form of security for survivors that would give women independent claims to old-age insurance was not utilized. In addition, non-marital relationships continue to be excluded from pension law.

The question of widowers' pensions could not be settled under Community law, as Art. 3 (2) of Directive 79/7 exempts survivors' benefits from Directive 79/7's scope of applicability.[52]

b. Lower Table Values for Women

An example of a fundamental change in jurisprudence on the substance of the constitutional principle of equal rights can be found in another area of pension insurance, that of sex-specific insurance tables. For certain periods of employment, table values rather than actual contributions are taken as a basis in calculating pensions. These are based on the average income of all the insured. Because these values were, and are, different for women and men, and specifically lower for women, women in the past also had lower table values.

This unequal treatment came before the Court for the first time in 1977, in the case of a teacher who had emigrated from East to West Germany. Because of the lower earnings ascribed to women, she received a lower pension, through the laws governing so-called "foreigners' pensions," than comparable men. This was especially distressing since she had earned the same income in East Germany as her male colleagues.

This fact was considered irrelevant by the Court; under the "foreign pension" law, West Germany took on East German insurance obligations, and was therefore allowed to apply West German standards, including sex-specific table values.[53] The standard of review was expressly stated to be Art. 3 (2) of the Basic Law. Surprisingly, the Court then undertook a proportionality test usually reserved for Art. 3 (1).[54]

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51 Renate Jaeger, *Welche Maßnahmen empfehlen sich, um die Vereinbarkeit von Berufstätigkeit und Familie zu verbessern?* 2 VERHANDLUNGEN DES 60. DEUTSCHEN JURISTENTAGES 27 ff. (1994) (presentation O).

52 *See supra* section III B.

53 Constitutional Court decision of 26 Jan. 1977, 1 BvL17/73, 43 BVerfGE 213, 225 ff.

54 Renate Jaeger, *Probleme der Gleichbehandlung im Sozialrecht—Zur Situation nach EG-Recht und bundesdeutschem Recht*, NzA 1, 6f. (1990).

In a second decision on lower table values for women in 1981, the Constitutional Court abandoned this line of interpretation and began to interpret the equal treatment principle strictly. This decision was based on evaluation of the first five years of employment for pension calculations. In this period, actual earnings are typically lower than the average income of all insured workers, and also lower than one's own later income. Therefore, pension law for the early years of employment attempts to correct for social reality through table values. The Court determined that sex-specific table values were incompatible with Art. 3 (2) of the Basic Law. It held that, because the table values were supposed to correct for social reality, they had to do so for both males and females, and had to continue aiming to implement equal rights for the future. Further, it found the actual income differences between men and women to be neither biologically nor functionally determined.[55]

Under EC law, the problem of sex-specific tabular values would have counted as direct discrimination in calculating benefits. European law would also have prohibited this unequal treatment.

c. Special Pension Age for Women

With its 1987 decision on old-age pensions for women, the Constitutional Court took a very new tack.[56] For the first time, the Court found a case of direct discrimination against men to be justified because it compensated for professional disadvantages experienced by women.[57]

The age threshold for statutory pension insurance was, then as now, age 65 for all insured. Between ages 60 and 65, an insured worker could only receive a pension under certain conditions. This was possible at 60 for women, and only for women. After age 60, in addition, the long-term unemployed could receive pensions, and at 63, longtime insurees had the right to a pension.

Since the pension law reform of 1992, this system of incremental opportunities for early retirement has continued unchanged, except for the significant difference that retiring before age 65 has a negative effect on the amount of the pension, with considerable

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55 Constitutional Court decision of 16 June 1981, 1 BvL 129/78, 57 BVerfGE 335, 342 f.

56 Constitutional Court decision of 28 Feb. 1987, 1 BvR 455/82, 74 BVerfGE 163, 178 ff.

57 On positive action in favor of women, *see* Van Gerven et al., *Current Issues of Community Law Concerning Equality of Treatment Between Women and Men in Social Security*, *in* 7 EQUALITY OF TREATMENT BETWEEN MEN AND WOMEN IN SOCIAL SECURITY 42 f. (Christopher McCrudden ed., 1994).

deductions. In addition, the minimum age for pensions for women, the unemployed, and longtime insurees was set at 62 (following a lengthy transition period); that is, it was raised for everyone except the longtime insured, for whom it was lowered from 63 to 62.

In 1987, the Constitutional Court took up the issue of women's early old-age pensions, which at the time were not yet lower. The Court came to the conclusion that women's old-age pensions were compatible with the constitutional principle of equal rights because they compensated for the typical disadvantages suffered by working women, particularly in conjunction with child-rearing.

The logic behind the decision is not convincing. The conditions for women's pensions are that a woman must have worked and been insured between the ages of 40 and 60; but this does not fall within the period of life typically burdened with child-rearing and employment. Thus the norm did not coincide with the Court's concept of compensation.

Further, in making exceptions to the strict principle of non-discrimination, the Court must be sure that it is not simply using traditional sex roles to justify renewed inequality. Thus the ECJ has held that exceptions to the principle of non-discrimination are to be interpreted restrictively—even though it failed to follow its own advice by broadly interpreting the possibility of exceptions for age limits under Art. 7 (1)(a) of Directive 79/7.[58] Thus it would be relevant to know whether Germany could take advantage of the options under Art. 7 (1) (a) of the Directive. Because the express goal of the 1992 pension law reform was to equalize the age limits for men and women, it would be difficult to justify reserving the possibility of collecting a pension after 10 years of insurance payments—even at the cost of benefit reductions—only for women. Pension law thus continues to provide for direct unequal treatment on the basis of sex where age of access to pensions is concerned.

Nevertheless, overall one point of view does support the Constitutional Court decision. The unaltered difference in minimum ages for men and women regarding when they may take advantage of early old-age pensions is a typical example of the way in which direct discrimination against men in favor of women can be transformed into indirect discrimination against women unless the entire system of early retirement is changed. To enter the category of the longtime insured, insurees must show they have had insurance for 35 years. On the average, men achieve this; women do not.

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58 *See* Case C-9/91, EOC, *supra* note 39; Bieback, *supra* note 45, at 112 f.

From this perspective, abolishing the women's old-age pension would mean replacing a scheme of pension access that directly discriminated against men with one that indirectly discriminates against women.

2. ECJ Jurisprudence

German constitutional jurisprudence today has achieved a standard of strict application of the equal treatment principle to social security law that is also applied by the ECJ in interpreting Directive 79/7. The ECJ has not yet taken a position on whether direct discrimination can, in exceptional cases, be objectively justified. This view has been advocated by parties to labor law litigation; however, the ECJ has always been able to leave the question open in its decisions.

B. Jurisprudence on Indirect Discrimination in Social Security Law

1. ECJ Jurisprudence

Unlike German constitutional law, EC law expressly prohibits indirect discrimination. In contrast to its decisions on direct discrimination, however, the ECJ has had few opportunities to give an opinion on indirect discrimination in social security law. In its decisions on social security law, it follows well-established jurisprudence on indirect discrimination in labor law, utilizing the standards of review developed in that context. These establish that indirect discrimination exists regardless of whether the legislature purposely intended to disadvantage one sex when adopting the discriminatory law. Indirect discrimination is the actual effect of a law, regardless of whether this was consciously intended. According to the decisions, three test questions are involved in indirect discrimination:

1. Is the law sex neutral? That is, a law must be formulated with no direct link to sex, so that its requirements can be fulfilled by both women and men.
2. Is one sex affected more heavily than the other? In other words, is the percentage of members of one sex that is or could be negatively affected by the requirements of the law considerably greater than that of members of the other sex?
3. Is the law objectively justified, suitable and necessary? If the form taken by the law's requirements is not objectively justified, indirect discrimination is present. A provision is justified if the member state can show that the means chosen by the law actually serve to promote its social policy.

If the discrimination can be objectively justified, indirect discrimination is not present only if:

a. the discriminatory measure is suited to the achievement of this goal, and

b. the discriminatory measure is necessary to achieve this goal.

These three test questions have found broad acceptance, especially in the literature on labor law and in jurisprudence.[59] The prohibition on discrimination on the basis of sex, developed from US law on racial and sex discrimination,[60] thus influenced European anti-discrimination law and was developed further in an EC legal context sensitive to discriminatory processes.

In social security law, the first issue—sex-neutral measures—can be easily answered; however, this assumes the presence of some awareness that sex-neutrally worded measures can have indirectly discriminatory effects. In social security law, specific "neutral" characteristics are typically distributed unequally according to sex, and their presence thus justifies a suspicion of discrimination. These are, in particular:

–characteristics such as household or family status, main breadwinner, etc.;
–benefits for dependents;
–inclusion of spouse's benefits and income; and
–discrimination against part-time[61] and discontinuous work.

These are all characteristics connected to sex-specific divisions of labor in which the male sphere is almost exclusively that of gainful employment and the female sphere is basically that of family and housework, which may or must be supplemented by employment. Thus women's working biographies, unlike those of men, are marked by interrupted or reduced working periods and incomes that are frequently insufficient to ensure an independent livelihood.

The second issue in indirect discrimination, that of the greater effect on one sex, has not yet caused any particular problems for ECJ jurisprudence. Thus the ECJ speaks of "substantially more . . . men than . . . women"[62] and "a substantially smaller percentage of men than women."[63]

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59 Bieback, *supra* note 11, at 31.

60 SACKSOFSKY, *supra* note 47, at 207 ff.

61 Two ECJ judgments on part-time work are Case C-102/88, Ruzius-Wilbrink, and Case C-343/92, Roks, *supra* note 43. The ECJ ruled in both cases in favor of the part-time workers.

62 ECJ Judgment of 11 June 1987, Case 30/85, Teuling, ECR 1987, 2497.

63 Case C-102-88, Ruzius-Wilbrink, *supra* note 43.

The third issue is quite a different story. The way in which the principle of proportionality is restrictively and broadly applied is the decisive element in the substantive impact that the EC prohibition on indirect discrimination can have on national social welfare law. ECJ decisions on indirect discrimination have been significantly different from those on direct discrimination. Although the intensity of intervention of indirect discrimination is equal to that of direct discrimination, the ECJ allows national legislatures, to a considerable degree, to justify indirectly discriminatory measures. The Court has accepted as "objectively justified grounds" the argument that a social security system sought to ensure a minimum subsistence income for all workers.[64]

The ECJ has expressly rejected the argument that the legislature's social welfare policy cannot be made responsible for general societal developments, including typical discrimination against women. The court argues that every government policy, along with traditional patterns and existing discriminatory structures, contributes to continuing this disadvantage and is thus a stabilizing factor in inequality that must be justified.[65] However, the court in general has given national legislatures considerable latitude in setting the goals of social welfare policy and the concrete details of its implementation. This latitude is the basis of the ECJ decision on the first two cases from Germany on social security policy.[66]

2. Constitutional Court and Federal Social Welfare Court Jurisprudence

There is little German federal court jurisprudence on indirect discrimination in social security law. The Constitutional Court has only taken a position on questions of indirect discrimination in a chamber decision, but never with the "authority" of the full Court.[67] The Federal Social Welfare Court, the final appeals court on social security matters, ruled in 1991 in a case involving the problem of indirect discrimination in social security law.[68] It used the concept of indirect discrimination differently from the ECJ and accepted justifying grounds that did not conform to European

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64 *See, e.g.*, Case 30/85, Teuling, *supra* note 62; ECJ Judgment of 7 May 1991, Case C-229/89, Commission v. Belgium, ECR 1991, I-2205; ECJ Judgment of 19 Nov. 1992, Case C-226/61, Molenbroek, ECR 1992, I-5943, at 14H.

65 Case C-229/89, Commission v. Belgium, *supra* note 64, at 17 f.

66 *See infra*, Part V.

67 Constitutional Court decision of 28 Sept. 1992, 1BvR 496/87, HzF Respr., at 30 no. 22.

68 BSG (*Bundessozialgericht*, Federal Social Welfare Court), decision of 27 June 1991, 4 RA 48/90, EzFamR GG Art. 3, no. 1.

standards. However, there has been no ruling by the ECJ, as the Social Welfare Court did not refer the matter to it for decision. The Court thus violated its duties as a final appeals court under Art. 177 (2) of the European Community treaty, which requires it to call upon the ECJ in questions involving interpretations of European law.

V. Exclusion of Minor Employment as Indirect Discrimination Under EC and German Constitutional Law?

On 5 December 1995, the ECJ announced two decisions on minor employment (*geringfügige Beschäftigung*) that involved cases from German social welfare courts.[69] It held that the exclusion, under German social insurance law, of so-called minor employment is not discrimination within the meaning of Art. 4 (1) of Directive 79/7, even if it affects significantly more women than men, "because the national legislature may reasonably assume that the questionable legal provisions were necessary to achieve a socio-political goal having nothing to do with discrimination on the basis of sex."

A. EC Law

These were the only cases from German courts on Directive 79/7 on which the ECJ had to decide within the scope of the preliminary rulings proceeding under Art. 177 of the EC Treaty. The cases were triggered by a provision of German social insurance law under which minor employment was excluded from the social insurance scheme, with the exception of accident insurance. Minor employment is employment for less than 15 hours a week, with less than 1/7 of the average income of all insurees.[70] A further condition is that the minor employment not accompany other, financially more lucrative work. Thus those whose main income comes from such employment are insurance-free. It is primarily women who earn so little.[71]

The ECJ has had to decide whether the limit for lowest earners was compatible with Art. 4 (1) of Directive 79/7 in two different constellations. In one case,[72] two janitors who had been employed in minor employment wanted to be included in health, pension

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69 Case C-317/93, Nolte, and Case C-444/93, Megner and Scheffel, *supra* note 28.

70 For unemployment insurance, the time threshold is now 18 hours per week.

71 Ninon Colneric, *Der Ausschluß geringfügig Beschäftigter aus der Sozialversicherung als Verstoß gegen die Richtlinie 79/7/EWG*, ArbuR 393, 398 (1994).

72 Case C-444/93, Megner and Scheffel, *supra* note 28.

and unemployment insurance schemes. In a second,[73] the petitioner had lost the ability to work after having worked for the last few years in minor employment. She was affected by the tightening of claim requirements that the Federal Social Welfare Court had determined not to be indirectly discriminatory.[74]

The ECJ first decided that no minimum threshold existed for applicability to persons under Art. 2 of Directive 79/7.[75] Following on its previous decisions, the ECJ assumed that mainly women worked in this form of part-time employment, and that excluding lowest earners represented indirect discrimination.

On the third criterion of objective justification, the ECJ in both decisions granted national legislatures as-yet unknown latitude to refer to the goals of social policy in their proceedings. The German government claimed:[76]

–exemption of lowest earners was a structural principle of the German social insurance system;

–there is social demand for minor employment; and

–a loss of employment for lowest earners would not lead to regular employment, but to illegal work and sham self-employment.

The ECJ accepted these as social and employment policy goals that, objectively, had nothing to do with discrimination on the basis of sex. In contrast to previous cases,[77] the ECJ based its judgment on the information provided by the national government, without any further examination. Thus, for example, it is incorrect that the threshold for lowest earners is a structural principle of German social insurance law. Because the ECJ recognized only the goals claimed by the German government, it limited its latitude in determining the validity of those goals.

In the same way, both judgments deviate from previous jurisprudence in that the court itself answered the question whether the measure held to be objectively justified is also suitable and necessary, rather than leaving this determination to the national court. The ECJ determined that the German legislature could reasonably have decided that a threshold for lowest earners was necessary to achieve its goals.

In previous cases, the ECJ had left it to national courts to review the question of necessity under national law, taking adequate

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73 Case C-317/93, Nolte, *supra* note 28.
74 *See supra* note 68.
75 *See supra* Part III A.
76 Case C-444/93, Megner and Scheffel, *supra* note 28, at 25, 27, 28.
77 *See, e.g.*, Case C-226/91, Molenbroek, *supra* note 64, at 14.

account of the division of responsibilities between national courts and the ECJ within the context of the preliminary rulings proceeding under Art. 177 of the EC Treaty. In the case of Thomas, for example, the court said:

> Although it is for the national court, in preliminary-rulings proceedings, to establish whether such a necessity exists in the specific case before it, the Court of Justice, which is called upon to provide the national court with worthwhile answers, has jurisdiction to give guidance based on the documents before national court and the written and oral observations which have been submitted to it, in order to enable the national court to give judgment.[78]

Yet not a hint of the cooperation between national courts and the ECJ described here can be recognized in the two decisions.

B. German Constitutional Law

Directive 79/7 excludes many areas important to the achievement of equal treatment of the sexes in social welfare law, leaving member states the right to determine the substance of the principle of equal treatment. Like all directives, the Directive also establishes only minimum norms in its area of applicability, and does not stand in the way of national principles of equal treatment so long as they do not contravene the goals of the Directive. Thus it remains to be clarified whether the threshold for lowest earners is compatible with Art. 3 (3) and (2) of the German Basic Law. The fact that the ECJ, within the framework of its limited authority to regulate national social welfare law, gives national legislatures almost unlimited latitude with regard to prohibition of indirect discrimination on the basis of sex does not free the national legislature from measuring its legal provisions against the equality principles in the Basic Law that conform to the goals of EC law. Thus the question whether it is compatible with the constitution to exclude lowest earners from social insurance protections may be the first opportunity for the Constitutional Court to clarify the substance of the prohibition on indirect discrimination on the basis of sex under German constitutional law.

In current German constitutional jurisprudence, unlike EC law, the formal legal prohibitions on discrimination under Art. 3 (3) of the Basic Law are to be strictly applied, and in conjunction with Art. 3 (2) of the Basic Law, they provide latitude for a material

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78 Case C-328/91, Thomas, *supra* note 38, at 13.

equality requirement. This is one, if not the most apparent, difference between the principles of equal treatment under German constitutional law and EC law.

VI. Conclusion

The EC principle on equal treatment of the sexes in statutory systems of social security applies directly to national social welfare law and may take immediate effect when courts find violations. The scope of this effective regulatory mechanism is, however, limited by the fact that the applicability of Directive 79/7 contains numerous exceptions.

Because of the possible exceptions, EC law does not break with the tradition of social security law that grants women social protection only if this protection is dependent on and derived from the husband. While member states are free to structure their social security systems with the goal of ensuring independent social security to women, they are not obliged to do so under EC law.

The prohibition on direct discrimination is now held, not only under EC law but also under German constitutional law, to prohibit justification of direct discrimination with the tradition of family roles or concepts of female difference. It is still unclear what legal latitude actually exists to achieve equal social protection for women. In this, German constitutional law—unlike EC law—provides substantive guidelines.

The substance of the prohibition on indirect discrimination on the basis of sex remains unclear under German constitutional law. Yet today a decisive question in Germany involves which discrimination-prone characteristics, such as part time work, are to be acknowledged under social security law. The same is true of legal changes if they limit entitlements to social benefits primarily for women. EC law has so far provided only limited assistance. The meaning of the EC prohibition on indirect discrimination for social welfare law is largely clear. The ECJ has allowed the social policy of member states an unreviewed latitude that greatly limits the force of the prohibition on indirect discrimination. It also fails to take sufficient account of the anchoring of the equal treatment obligation in the catalogue of basic rights, in EC law as well as in German constitutional law.

Under German constitutional law, stricter standards of application will have to be introduced. Indirect discrimination on the basis of sex is the typical form taken by discrimination against women. The intensity of the violation of the basic right not to be

discriminated against on the basis of sex does not distinguish according to whether the social welfare measure concerned involves direct or indirect discrimination. Constitutional evaluation should take account of this.

Thus German law on social security law has been less limited in its applicability and less accepting of exceptions than European law, and thus, for the future, seems to offer greater opportunity for implementation of equality than does European law.