Rescaling Gender Relations: The Influence of European Directives on the German Gender Regime

Abstract

During the 1960s–1990s, a gradual yet definite shift in the organization of gender politics in the European Union (EU) and member states has become apparent. This shift began with the implementation of the early gender directives of the 1970s and has since evolved to include a partial “rescaling” of policy-making from national to transnational spaces and a gradual redefinition of gender regimes and policies at the national level. As a result, gender policy cannot be viewed as either predominantly transnational or national but arises through interaction of multiple and coexisting policy spaces. In this article, I use a multiscalar analysis to highlight this complex interaction. I draw on (West) Germany as a specific case study to offer a historical analysis of the implementation of the early European gender directives and the manner in which these developments have contributed to the redirection of the German gender regime and the emergence of a new “hybrid regime.”

A major shift in the organization of gender policy regulation has taken place in the European Union (EU) and its member states during the 1960s–1990s. Gender policy, arguably once firmly grounded in the politics of the nation-state, has been “rescaled” and partially relocated to an EU level. This has not, as some scholars...
from within the Europeanization school might argue, led to a convergence or replacement of national gender policies by a single set of European policies. Although the extent to which national gender regimes have been “Europeanized” varies across the member states, national historical and social circumstances remain central in framing and organizing gender relations (Liebert 1999; Mazey 1998). The German gender regime, in particular, is often cited as being exceptionally resistant to changes emerging from EU regulations (Kodré and Müller 2003; Liebert 1999). Yet even in this “strong male breadwinner” culture, gender policy is becoming increasingly infused with values that originated in the institutions of the EU. As a result, the analysis of gender policy cannot be limited either to the national or to the EU level but must be understood within the broader context of multilevel and multiscalar processes (Castree 2000) where overlapping influences have helped establish a set of gender rules and norms to challenge the exclusive dominance of national gender regimes.

This article considers the implications of the early European equality directives—specifically the equal pay directive (EPD) of 1974 (75/117/EEC) and the equal treatment directive (ETD) of 1976 (76/207/EEC) on German gender policy. It aims, first, to highlight how a multiscalar analysis can fine-tune the discussion of the evolution of the current German gender regime and the complex interconnectedness of the domestic German and transnational EU policy regimes. Although I draw on the principles of a multiscalar analysis, it is important to note that my approach is not fully multiscalar. A fully multiscalar analysis would consider global, transnational, national, subnational, local, household, and individual phenomena. It would, for example, take the role of reunification of East and West Germany as well as the role of the Länder into account. Given the limitations of space, I draw primarily on European, national, and individual actors in this article. In this way, I have attempted to bracket the state as a primary actor and consider the roles of key actors around the state and the manner in which they self-identify with one or more policy levels. This corresponds closely to the second aim of this article: that is, to draw attention to the manner in which a complex policy web has gradually contributed to a reformulation of the traditional male breadwinner model. The interaction of national and European norms and policies has challenged the German gender regime and contributed to the evolution of a hybrid regime, incorporating elements of both the German and the EU gender policy regimes.

The article is divided into three main sections. I begin the first section with a discussion of gender regimes in general and the post–World War II West German gender regime more specifically.
Although many gender regime analyses assume the national as the primary, or even singular level of analysis (Sainsbury 1999), I argue in favor of broadening this focus to highlight multiple actors and scales present in the construction of the German gender regime. The state, as well as its policy-making apparatus, is only one of several actors influencing and shaping the construction of gender policy. The second section of this article progresses from this observation to examine how insights into diverse traditions, including geographic scale, historical institutionalism, Europeanization, and feminist scholarship on the EU gender policy, may be merged to better incorporate the roles of extra-state actors and thereby offer a more nuanced understanding of gender regime change.

The EU is perhaps the most important “nonstate” actor involved in the formation of post-1970s gender policy. It is therefore not surprising that feminist scholars have recently turned their attention to the role of the EU in shaping gender policies and regimes at both the European and the national levels (Liebert 2003; Stratigaki 2004; von Wahl 2005; Walby 2001). Although some scholars have concerned themselves with the implementation of gender policies and the “Europeanization” of gender (Liebert 2003; Walby 2004), others continue to view the EU and the national levels as separate and distinct entities. Both these approaches tend to overlook the fluidity of policy scales and the constantly shifting structures of power relations governing their interaction. Adopting a multiscalar approach, informed by the feminist literature on Europeanization and gender regime formation yet aware of the fluidity of policy scales, can better explain the interaction of institutions, actors, policies, and laws.

The case study evidence presented in the third section of this article underlines how European initiatives can gradually contribute to the construction of an alternate gender regime, which in turn encourages a shift in the overarching path of the German gender regime and the emergence of a new “hybrid regime.” I conclude the article with a brief note on some of the more recent challenges and changes to the German gender policy regime and suggest that the interaction of various policy spaces and actors has contributed to gradual yet fundamental changes in the German gender regime.

The German Gender Regime

“Gender regime” refers to a set of norms, values, policies, principles, and laws that inform and influence gender relations in a given polity (Connell 1987; Liebert 2003; O’Connor, Orloff, and Shaver 1999; Sainsbury 1999). A gender regime is constructed and supported by a
wide range of policy issues and influenced by various structures and agents, each of whom is in turn influenced by its own historical context and path.

Several unique historical circumstances make Germany an especially interesting case for this analysis of Europeanization and gender regime change. Repeated processes of state-building, unification, abrupt changes, and new beginnings over the past 150 years have had a strong impact on the structures of the German political and social systems (Quataert 1996). The early German state, in particular, relied heavily on a gender ideology based on a soldiering/caregiving dualism, which clearly defined women as the caregivers of the nation. This structured women’s primary relationship to the state as mothers and wives—a special role that was subsequently used to define women’s uniqueness and engage for greater equality with men despite perceived “natural differences.” The “equal but different” ideology, though weakening, remains crucial to many aspects of the German gender policy regime.

The post–World War II division of Germany into West and East was also central to the construction of German social structures. In the East, the state supported a particular form of women’s equality and “sameness” (Guenther forthcoming). East German women, both with and without children, were expected to be active in the labor market. But in the West, the family, and in particular the stabilizing role of the “stay-at-home” mother/wife, was honored as the key to the postwar reconstruction of the state. The traditional family, with women’s special role of caregivers and nurturers, was viewed as the ideal. Supporting women in the three Ks—Kinder, Kirche, and Küche (children, church, and kitchen)—the West German state emphasized the importance of the traditional family and thereby encouraged women’s dependence on a male breadwinner.

A change in government, from Christian to Social Democrat in the latter part of the 1960s, brought an increased awareness of women’s rights and equality. Although the new government worked to establish policy changes, the broader population continued to embrace the equal but different notion of gender roles. Gender regimes, deeply embedded in the consciousness and activities of the wider population and supported by long-standing government policies, are largely resistant to changes in day-to-day governing coalitions.

In the early 1990s, Ostner and Lewis (1994) accurately characterized the (now-unified) German state as a “strong male breadwinner regime.” They highlighted how the German welfare state presumes a woman’s financial and social dependence on a male partner and links her social entitlements to this role as mother and/or wife. For example, a married woman who does not work outside the home receives
health care, a degree of social security, and similar benefits by virtue of her husband’s employment and her dependence on the male breadwinner. In contrast, a working woman contributes a percentage of her wages for these services without gaining any additional benefits. Thus, a woman’s financial incentive to work outside the home is dramatically reduced, reinforcing the labor market as a masculine and the home as a feminine domain. Similar trends are visible in the education system, in the availability of early childcare, and in broader family policy (Garhammer 2000; Kreyenfeld and Hank 2000; Ostner and Lewis 1994; Rudolph 1992).

It is this “strong male breadwinner regime” and the social importance of women’s roles as mothers and wives that place the German gender regime, more than many of the other EU member states, fundamentally in conflict with European gender policies. Kodré and Müller (2003) have suggested that the German form of the male breadwinner/female caregiver regime is one of the most “resilient” of its kind. The German state has consistently avoided action to implement the European measures where these European norms might have initiated a liberalization of traditional gender roles. A notorious “laggard” (Liebert 1999) in terms of equality policy, the German state’s reluctance to implement gender policy has led to frequent conflict between the domestic and European institutions. During the thirty-year period, 1970–2000, approximately 25 percent of the European Court of Justice (ECJ) rulings on gender policy were referred to the European body by the German courts (Liebert 2003). This highlights the basic conflict between the German and the European norms and laws, and the political opposition to a liberalization of the male breadwinner model.

There is some indication that these trends may be shifting. More women are active in the formal labor market (although many continue to work only part-time) than ever before, and birth rates are low as women choose a career over family. To counteract these trends and alleviate the inevitable strain that falling birth rates place on the social security system, the state has looked to policies supporting the reconciliation of family and career including a quick return to the labor market after the birth of a child. These steps are supported by new gender equality measures and antidiscrimination legislation. Increasing women’s labor market participation as well as men’s responsibilities for childcare are gradually altering notions of gender roles and are contributing to a redefinition of the gender regime such that the “strong male breadwinner” tag no longer accurately describes the German state. To understand this changing gender regime necessitates an analysis of the historical evolution of women’s policies, as well as a broader discussion of social policies
In the past, feminist scholars have drawn on studies in comparative welfare regime analysis to conceptualize the gender regime. Gender regimes are understood to support and influence state policies and social practices in much the same way as a welfare regime reinforces preexisting social inequalities and social policies (Connell 1987; Esping-Andersen 1990, 1996; Esping-Andersen et al. 2001; Liebert 2003; O’Connor, Orloff, and Shaver 1999; Sainsbury 1999). The focus on the gender regime to describe how policies “create” gender is, by definition, state centered. In the European policy sphere, however, several policy spheres interact and share responsibility for policy-making. Moreover, the gender regime/welfare regime literature generally limits its scope to social policy and the relationship among states, families, and markets at the expense of other policy areas. Yet, social policy is not the only policy area that can contribute to the shaping of gender relations (O’Connor, Orloff, and Shaver 1999; Walby 2001). Rather, legislation in various policy areas can influence and constrain the options available to an individual or family and thus reinforce a particular notion of male and female social roles. An accurate analysis of the institutional influence on gender policy and gender relations in the EU must move both beyond the focus on social policies and beyond the state-centric approach. This can be partially accomplished by incorporating insights from a scalar analysis to the study of the Europeanization of gender regimes.

Adding Scale to Europeanization Approaches

Geographic scale is a familiar concept for political geographers (Delaney and Leitner 1997, 93), yet the concept has been slow to penetrate other areas of political analysis, including the study of the EU and Europeanization. Adding scale to the analysis of the EU and Europeanization of gender policies encourages the researcher to consider the interaction of multiple and fluid regimes and to acknowledge the role of actors, events, laws, and policies that fall outside of the traditional boundaries of the state.

The use of scale as a tool of analysis is certainly not without difficulty, as different scholars have tended to conceptualize the term in different ways. Some early studies regarded geographic scale as a “nested hierarchy of bounded spaces of differing size, such as the local, regional, national and global . . . ” (Delaney and Leitner 1997, 93). In these visions, geographic scales are treated as different levels of analysis. Scale is therefore “unproblematic, pre-given and fixed hierarchy of bounded spaces in which processes and phenomena
occur and are to be examined” (Leitner 1997, 124). Although a valuable starting point, this spatial fixity presumes the existence of mutually exclusive and hierarchically organized spaces and offers an image largely akin to the conceptualization of the EU that is advocated by many Europeanization theorists (Börzel and Risse 2003; Cowles, Caporaso, and Risse 2001) to explain the transfer of policy between the national and European institutions. Unlike policy levels, scales are not fixed. Actors may move freely between policy scales thus changing the composition and nature of a particular scale. Our use of the concept must therefore recognize these scales as socially constructed, fluid, and periodically transformed.

More recently, scalar theorists have taken the notion of nonfixed spaces a step further to emphasize the manner in which changing sociospatial processes and power relations contribute to “tangled hierarchies and disperse interscalar networks” (Brenner 2001, 605). A focus on the multiple, tangled spatialities of scale (Brenner 2001; Jessop 2002) highlights, on the one hand, the interconnectedness of scales and, on the other hand, the fluidity of these spaces and the actors involved in their construction. This adds an important element to the clearly defined spaces of Europeanization theories. In theory, many Europeanization approaches also encourage the researcher to go beyond a single state-centric analysis; in practice, most analyses remain constrained by traditional understandings of the political level and continue to view the EU and the national levels as distinct and separate policy spheres. Although recognizing the existence of a multilevel polity, Europeanization approaches assume a hierarchical relationship in which policy passes down from the supranational to the national and then to the subnational level. Even those who recognize the possibility of horizontal as well as vertical policy transfer and thus a less-distinct hierarchical arrangement (Dolowitz and March 2000; Radaelli 2000, 2003) tend to assume a series of clearly defined spaces that correspond to the different levels of government (Mahon, Andrew, and Johnson 2004). This binds agents to act only within their respective—and singular—policy space. Yet the EU offers space for domestic actors in the policy process (Tarrow and Imig 2001), and European actors are involved in shaping domestic policy. Transfer is thus not one-way but ongoing and multidirectional. Actors may, moreover, redefine themselves as European in order to increase their policy influence (Helferrich and Kolb 2001).

A multiscalar analysis views the European and domestic spaces as overlapping arenas of policy, norms, values, power relations, and social interactions, where actors are not confined to a single scale, nor is one scale prioritized as necessarily superior to or more powerful than the other. Different scales stand in shifting and changing
relation to one another. Networks of actors are constructed with and through these scales to seek changes in policy direction. As actors “jump scale” (Smith 1992) or move between the levels, “… political claims and power established at one geographic scale are expanded to another” (Smith 2000, 726). Using the concept of scale in an analysis of European gender politics thus involves considering changing relations of space and power and the “conceptions and ideologies of space and power that social actors bring to practical efforts to change the world and, of course, resist change” (Delaney and Leitner 1997, 96). Nonetheless, as Europeanization scholars have highlighted, the institutions of the EU can constitute a “massive transfer platform” for norms, ideas, and policies (Börzel and Risse 2003; Cowles, Caporaso, and Risse 2001; Radaelli 2000). Domestic and European ideas and actors can converge around an alternate policy frame and exert distinct but compatible adaptational pressures on the domestic institutions.

The success of the EU as a transfer platform for gender policy and norms continues to vary greatly across the member states. Several scholars have highlighted how national cultural and social traditions continue to result in national variation of gender directives (Liebert 1999; Mazey 1998; Ostner and Lewis 1994). Mazey, for example, suggested that “[n]ational political traditions and ideology have been influential ‘filters’ in the sense that they have determined the manner in which national governments have complied with EC legislation and, by implication, its impact. . . . In short, EU initiatives in this area [gender policy] have been mediated via often strong national ‘policy styles’ and the ‘policy hinterland’ created and shaped by particular policy traditions and ideas” (133). In other words, national gender regimes will influence the implementation of the European gender policies but will themselves remain largely intact. Recent evidence from the German case, however, highlights that incremental changes in domestic policy regimes can lead to fundamental changes in the regime itself and can contribute to the evolution of a new “hybrid” gender regime as policy and norms are transferred between spaces (Deeg 2001).

If policy and ideas move freely across scales, how can we conceptualize a particular set of values existing within a particular scale? Given the fluidity and changing nature of policy scales, it is not hard to see that multiple regimes can occupy or overlap in a given policy space. Contemporary historical institutionalists have recently suggested that the path dependency of an institution can shift as endogenous and exogenous actors engage with various policy levels (Streeck and Thelen 2005). The resulting presence of competing policy logics within a single space can generate friction that may then be further
exploited by domestic actors (Crouch and Keune 2005). Supporting a new policy logic over the old, domestic actors can begin to carve a new policy path. Thus, as European norms supporting gender equality as “sameness” transfer to the domestic policy scale, a new policy logic and policy opportunities are created. As the domestic frame disadvantages specific actors, they may “jump scale” to align themselves with the European path and thereby challenge the domestic regime. This alternate regime does not need to be accepted by the society as a whole (Pfau-Effinger 1999), or even by the domestic institutions, as Europeanization theorists might assume (Börzel and Risse 2003). Rather, different institutions supporting fundamentally contradictory images or “logics” may exist within a single social structure (Crouch and Keune 2005; Deeg 2005). As domestic actors use the tension between the systems to advance their preferences, a new policy space with distinct characteristics is gradually constituted.

Although the EU has actively pursued several policies regulating equality of the sexes, few scholars would define the thirty years of European gender policy as constituting a European gender regime. There is, in fact, no single dominant gender regime in the EU which is reflected in and by policy, nor is there a common understanding of “ideal” gender roles across the various member states. I maintain, however, that there is an “institutional gender regime” or an institutional culture that embraces a particular understanding of gender relations and perpetuates this in its policy-making. This forms the basis of a nascent EU gender regime. As an EU-particular understanding of gender roles is reiterated through policy, it becomes entrenched as one “accepted” approach to gender policy both at the European and at the domestic levels.

In the subsequent section, I examine the negotiation, implementation, and transfer of two early European gender initiatives to show how a European gender regime, grounded in a notion of equality as sameness, evolved at the EU level and how the (West) German responses consciously avoided redefining gender relations. Only as actors jumped scale and blended European and German initiatives were gender relations partially reframed. As domestic actors both consciously and unconsciously embraced the European understanding of gender relations, an alternate policy regime has become entrenched within German law.

The EU and Gender Policy Initiatives

European gender policy has historically prioritized women’s labor market participation as the key to overall equality. Particularly in the 1960s and 1970s, the European institutions worked toward creating
a “level playing field” in the labor market by implementing measures to increase women’s access to employment, training, and education. The institutions passed several directives to restrict structural barriers to women’s labor market participation and prohibiting direct and indirect discrimination based on sex. This employment focus is underlined by a liberal concept of sameness that has placed it at odds with the male breadwinner model dominant in many of the member states. In recent years, the EU institutions have broadened their approach to equality although the underlying commitment to neoliberal employment policies and gender sameness has remained largely untouched (Stratigaki 2004). More recent European policy initiatives include measures prohibiting sexual harassment in the workplace and increasing access to daycare and childcare, as well as a new focus on family policies and opportunities for fathers to take a more active role in parenting. These new measures bring the EU policies more closely in-line with a dual-earner/dual-carer model than with the traditional male breadwinner model of gender relations.

The foundation of European gender policy can be found in the 1957 Treaty of Rome. According to article 119 of the social provisions of the Treaty of Rome, “[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” (Treaty of Rome, 1957, Article 119). Equal pay was consciously addressed as both an economic and a social goal of the community, a dualism that has remained central to the European approach to gender equality. On the one hand, framing equality as an economic necessity confined the European gender initiatives to a narrow labor market focus based on a liberal understanding of equality as sameness. On the other hand, by grounding equality in social policy, the community institutions have justified a shift in policy focus from equal pay to numerous other policy areas including the provision of childcare, parental leave benefits, and sexual harassment in the workplace.

In the 1950s and 1960s, very little action was taken to facilitate women’s equality as the member states largely ignored their article 119 commitment to equality. Although the Commission, in accordance with its responsibility to oversee treaty compliance, drafted several memos to the member states between 1957 and 1969 to remind them of their responsibilities, the member states took few concrete steps to implement the principle. This lack of action was soon challenged by two sets of nonstate actors, who deliberately entered the European policy space seeking to alter the Belgian state’s regulation of women’s pay and overall working conditions.

In 1966, women at a munitions factory in Herstal, Belgium, took their demands for equal pay to the EU level. Approximately 3,000
women walked off the job in protest of the undervaluation of their work in relation to their male colleagues (Chicowski 2000; Hoskyns 1996). The strike lasted nearly three months during which time the women carried placards calling for the application of article 119 and challenging the Belgian government to honor its European commitment. Their invocation of the transnational to facilitate change at the national was primarily symbolic. The women’s actions, however, contributed to initial stages of the rescaling of gender politics, as they used international commitments as leverage against a national government (Castree 2000; Keck and Sikkink 1998; Sifft 2004).

Perhaps inspired by the invocation of the EU level to alter national laws, two Belgian lawyers set out two years later to further challenge the lack of implementation of article 119. Whereas the Herstal equal pay strike involved bringing the European institutions into the domestic arena, the Defrenne case involved domestic actors engaging directly with the European institutions in order to change domestic legislation. In both instances, the boundaries between the European and the domestic were blurred, as actors moved between policy scales. The legal supremacy of the European over the national law further conflates the two policy spheres. Member states are bound by European law and are obliged to transfer European decisions into domestic law, furthering the transfer of the European norms and values and opening new avenues for domestic actors to challenge the dominant domestic values.

The Defrenne case was, in fact, a series of cases against Sabena Airlines and the Belgian government to challenge the government to implement article 119 and correct the pay differentials formalized in Belgian collective agreements. Three cases (ECJ Case 80/70; ECJ Case 43/75; ECJ Case 149/77) crisscrossed through the Belgian and European court systems throughout the 1970s, highlighting the inequality in Sabena’s employment policies and drawing attention to the lack of support offered by the Belgian government. Although from a legal perspective the challenges were only partially successful, from a political perspective they were extremely successful. This established a political and legal basis for equality provisions in the EU and set a new political project in motion.

Although civil society forces raised awareness for issues of women’s equality across the member states, institutional forces, in particular institutional competition, further contributed to the momentum which now propelled the Commission to continue to pursue women’s equality as an important aspect of social and economic integration. The Commission, concerned about maintaining its dominant role as the initiator of integration, responded to ECJ policy activism in the Defrenne cases with a series of new equality
rescaling initiatives (Hoskyns 1996, 74). Women within the Commission and other European institutions used this opportunity to pursue their own feminist agenda. Perhaps not surprisingly, these proposals initially met resistance and even hostility from the member states. The German government was particularly vocal in its opposition and used the subsequent period of negotiation to try and weaken the Directive as much as possible. In so doing, the government consciously shielded the strong male breadwinner model dominant in West Germany from changes that might have destabilized this regime.

In the early 1970s, policy action to further women’s equality took place almost exclusively at the national level where women and feminist organizations fought for changes through the established state and social channels. However, the Herstal equal pay strike and the Defrenne cases introduced new actors to the scene. The Commission’s involvement in equality legislation changed the policy landscape within the member states. No longer confined to the traditional boundaries of the state, domestic nonstate actors could use the EU level to influence national policy-making. Social policy and the events involved in its formation “. . . are not simply being moved around [from the national to the European], they are undergoing a process of qualitative transformation through rescaling. And in the process, new rules or patterns of inter-scalar relations are emerging . . .” (Peck 2002, 332). As the following discussion shows, this rescaling has contributed to gradual yet important changes in the expression of gender relations in Germany.

The following section draws attention to several aspects of the negotiations on the equal pay and ETDs. In particular, these negotiations highlight the degree to which the German government resisted measures that might have contributed to a potential redefinition of men’s and women’s roles. Nonetheless, both formal and informal aspects of the legislation were eventually incorporated into the accepted set of gender roles in Germany as, throughout the latter part of the 1970s and the early 1980s, various actors including government actors, individuals, and even institutions jumped policy scales and facilitated the transfer of the European norms and values.

Negotiating the EPD

A Community Directive is a form of binding legislation initiated by the European Commission and further negotiated and refined by member state representatives in the Council of Ministers. The Council is guided by a commitment to unanimity such that each member state holds a de facto veto right. This requirement has often made negotiations long and trying. The Council is obliged to hear the opinion of
other actors, including the European Economic and Social Committee (EESC) and the European Parliament; in theory, these nonstate actors can influence the wording and even the focus of the legislation. In practice, their influence is limited. Nonetheless, even where the directives remained limited in their scope, when the new legislation shifts back to the national level, domestic actors are again able to use the “radical potential” (McKeen 1999) in the Directives to pressure for further change in policy and social practice.

The earliest drafts of the EPD were neither feminist nor ambitious in their intentions. These drafts simply reiterated the principle of equal pay for equal work expressed in article 119. These proposals were quickly coopted and reworked by institutional feminists, particularly in the Commission and the EESC, and were resubmitted to the Council for consideration. In this later version, the directive had evolved from a simple statement on equal pay for equal work to a statement on the value of women’s work (Commission of the European Communities 1973; Council of Ministers 1974a).

These changes came about largely through the incorporation of the EESC’s opinion into a revised proposal. The EESC was, at the time of the negotiation of the EPD, involved in a larger debate about factors influencing women’s labor market participation that appears to have contributed to a wider awareness of women’s issues among the members and thus colored the focus of the EESC’s opinion report. The report, written by Maria Weber of the German Trade Union Association, was exceptionally strongly worded and clearly indicated a feminist understanding of the relationship between family, labor market participation, and levels of pay (Hoskyns 1996). In particular, the opinion report stressed that the principle of equal pay would have no practical applicability if it remained limited to identical work. The body supported a broader definition of equal pay, incorporating the concept of equally valued work. The Commission adopted this position and proposed a directive based on this principle.

Several member states were immediately skeptical of the revised Commission proposal. When the draft was submitted to the Council in July 1974 for consideration, Germany, Denmark, and the United Kingdom hurried to voice their concerns that the focus on equal pay for work of equal value could have strong implications for national law. These member states argued that, in their national traditions, the state did not have the right to place restrictions on contract negotiations that were undertaken freely between an individual and the employer.

The primary concerns of the West German delegation were twofold. First, the West German tradition of collective bargaining makes wage negotiation the responsibility of the social partners rather than
the state. Therefore, the state is legally not in a position to restrict negotiations through legislation (Council of Ministers 1974b). The West German delegation argued that several of the central provisions of the proposed directive, including the assignment of value to employment positions and the state’s responsibility to oversee implementation and the regulation of classification schemes, required the state to play an active role in collective bargaining. Consequently, the draft directive was unacceptable to the German delegation. In fact, as the Commission pointed out, this was a very weak argument. The proposed regulations went no further than several provisions already in place in other areas of collective bargaining and were largely compatible with the West German system.

The German delegates’ second objection was based on a concern that the directive could, in practice, restrict women’s equality rather than foster it. Although the delegation uses rhetoric that referred to women’s “equality” and “rights,” it was clear that underlying this stance was a general opposition to women’s full-time labor market participation. For example, the German delegation argued that “[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 of Ministers 1974a). This implied that because women are “less qualified” than men, a pay scale that prioritizes formal qualification may in fact serve to hold women at the lowest end of the pay scales. If the market is allowed to determine the value, pay will naturally adjust to fit the different jobs and qualifications. According to this logic, wage differentials exist because women lack qualifications. In fact, the patriarchal system that placed a higher value on “learned” skills rather than what were seen as “natural” abilities, as well as structural barriers to women’s education and employment, contributed to the pay discrepancy. The German delegation thus reinforced masculine stereotypes in which “women’s work” is, by definition, unskilled and in which women and men have inherently different qualifications. This also represented a clear attempt to protect the German gender regime from measures that might undermine or challenge the existing set of social relations and the value placed on the traditional family.

These two issues continued to hamper Council negotiations throughout the summer and fall (Council of Ministers 1974c, 1974d) with the German position becoming more and more entrenched during subsequent working group meetings. In early December, however, the West German Social Democrat government suddenly accepted compromise positions in all these areas, including references to work of equal value. The summaries of Council meetings make no record
of when this policy shift came. According to Hoskyns (1996), the acceptance of “equal value” 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). In an interview, this bureaucrat recounted the barriers she faced in convincing officials from the Arbeitsministerium (Ministry of Labour) of the importance of the terminology “work of equal value.” Few of the male delegates, particularly those in the Ministry of Labour, could understand her conviction. “In the end the officials gave in: ‘they were surprised’, she says, ‘by a young thing feeling so strongly’ ” (87). Thus, the final version of the European directive reflects a compromise position obtained through the interaction of various formal and informal actors from both domestic and European policy spheres.

The mere existence of the European directive could not alone challenge the primacy of the male breadwinner system in West Germany. Although this directive marked a new beginning in European action on gender equality and established specific principles as norms and values central to the European gender project, several more years passed before these principles even began to challenge the expression of gender roles at the national level.

In the meantime, at the EU level, the inertia generated from the EPD encouraged women’s advocates to continue to work toward more extensive regulations to facilitate equality between men and women. The next step—the ETD built on the framework established through article 119 and the EPD adding several key concepts, including the idea of indirect discrimination, which had not been satisfactorily worked into the EPD.

At the core of the ETD is the regulation of indirect and direct discrimination. In addition to the prohibition of both types of discrimination, the ETD requires that the member states ensure equal access for men and women to occupations, promotions, and vocational training. It stipulates that working conditions and rules of dismissal must be the same for men and women and that all jobs must be open to women, unless sex is a direct and determining factor in carrying out the occupation. Importantly, the ETD permits exceptions to the principle of equality, to encourage measures to further promote equal opportunities for women, or to address special circumstances such as pregnancy. In this way, the ETD encourages equality and sameness in the labor market despite the biological differences between men and women. There is a further policy shift visible in the directive. Whereas the EPD attempts to accommodate the needs of women already in the labor market, the ETD focuses on measures required to attract women into the labor market. It thus makes a clear statement on women’s role in society.
The ETD was, in some ways, even more controversial than the EPD, perhaps because its focus shifted slightly away from “pure” labor market issues. The West German government again appeared particularly anxious to keep the directive’s scope to a minimum and avoid substantial changes to the structure and regulation of the domestic labor market. In so far as it was able to keep the directive vague—leaving several key definitions for member states to define on an individual basis—the government was successful in its endeavor. Moreover, although the directive is quite broad in its recognition of both direct and indirect discrimination, other sections restrict this by allowing “provisions concerning the protection of women, particularly as regards pregnancy and maternity” (Council of the European Communities 1976). Ironically, these measures themselves may serve as structural barriers and indirect forms of discrimination.13

In general, the directive takes a firm stance on discrimination including a paragraph to allow special consideration to be taken when women are pregnant or breastfeeding. This was a particularly important issue for feminists working inside the Commission. They argued that it was essential to regulate these issues needed in order to overcome the structural barriers to women’s labor market participation that are associated with reproduction. This stance maintained the European provisions to facilitate labor market participation and encouraged the establishment of a dual-earner model. However, some member states, including Germany, used the provision to justify a high level of “protection” for women who encouraged women to “choose” motherhood over active labor market participation. This was especially apparent in the national debates that raged over the implementation and incorporation of the European directives in the subsequent years.

Responses from Domestic German Actors

The German government’s actions during the negotiations and implementation of the EPD demonstrated its commitment to the male breadwinner model. Its arguments, though not always consistent, generally supported the male breadwinner status quo. During the EU-level negotiations of the EPD, the government had repeatedly stressed the incompatibility of the proposed directive with German industrial relations and legal practice. Nonetheless, once the EPD was passed, the German government expressed a different stance during the domestic debates and officially declared that the new equality provisions did not require any changes to existing laws. According to the government, the provisions laid out in article 3(2), of the Basic Law, declaring men and women equal before the law were sufficient to guarantee equality between men and women in
matters of remuneration and employment conditions. In fact, this was a rather controversial position. By arguing that article 3(2) was sufficient to guarantee equality, the state claimed an indirect applicability of the fundamental right to equality and implied that the Basic Law governed relations between private actors as well as between the state and its citizens. Yet despite this claim, the government was unwilling to enact legislation that would allow this right to be carried out. It was only through pressure from European and domestic actors that the government slowly worked to amend national legislation in accordance with the European provisions. In the subsequent years, domestic actors used the European space to challenge the government’s position, and the European actors used the domestic space to force compliance with the European values set out in the directive.

Beginning in the late 1970s, the European Commission took steps to increase the legitimacy of the European institutions among specific civil society groups. In light of the upcoming parliamentary elections, the Commission was anxious to increase its legitimacy and to establish new lines of communication between the European institutions and sectors of civil society (Seeland 1977). To this end, the European Commission sponsored a women’s conference in 1977 to address the opportunities that the EC opened for women. Interestingly, as a collectivity, German feminists showed little interest in using the European institutions to increase women’s equality. Although, by this time, both the EPD and ETD had been passed but not implemented, the broad consensus among German feminists was that the European provisions did not offer any increased protection or opportunities. For some, this reflected a basic distrust in the overall appropriateness of using legislative channels to alter social practice. Several other groups, in particular women already active in the policy-making apparatus, favored using domestic legislative channels rather than shifting focus to the, as yet, unproven and unknown European scale. These women sought to develop a broad antidiscrimination law that would go beyond the European initiatives and address numerous aspects of women’s discrimination. In this way, ironically, the main contribution of the European Commission was to encourage increased domestic policy activity. In its role as facilitator, the European Commission was central in bringing the women from different organizations together in an environment where they could discuss and strategize the best approaches to women’s equality.

The European Commission’s second major foray into the domestic channels was in reaction to the German government’s 1978 report on the implementation of the EPD. The Commission clearly stated that article 3 of the Basic Law was not an adequate substitute for the active implementation of the European provisions. Therefore, the
German government had not fulfilled its obligations and could expect soon to face noncompliance proceedings. This threat appears to have helped push the domestic policy makers into action as, shortly thereafter, the German Minister of Employment submitted a preliminary proposal for new legislation to bring German law into compliance with the European Labour Directives (Hörburger and Rath-Hörburger n.d.). Although the Commission was certainly a primary catalyst, it is important not to downplay the pressure that women exerted through social movements, political parties, and labor unions.

As had been discussed at the 1977 women’s conference, women from many organizations, including the women’s branches of political parties and labor unions, had increased pressure for a broad antidiscrimination legislation that would respond to and, in some ways, go beyond the provisions of the European directive. Although these proposals gained a small following within the mainstream policy institutions, the proposals were unable to garner sufficient support to be pursued in a formal way. Instead, the Social Democratic Party (SPD)/Liberal coalition government formulated a compromise legislation that failed to satisfy either the conservative or the liberal factions in government.

The antidiscrimination legislation proposed by women’s organizations was, to a large extent, premised on equality as sameness rather than difference. Despite obvious similarities with the European stance, the SPD and Free Democratic Party (FDP) women rarely drew on the European debates to legitimize their position. Their failure to jump scales and link policy levels contributed to the persistence of the German gender regime (Liebert 2003). Without policy or norm entrepreneurs to facilitate the transfer of the European frame between scales, Europeanization was limited to a legal implementation of the provisions. Although the new legislation establishes some new rights for women in the labor market, the values and norms inherent in the European directives are not addressed in domestic legislation.

The final compromise legislation fell far short of the broad-based antidiscrimination legislation that feminists in the SPD and the Liberal Party (FDP) had hoped for. The so-called Compliance Law\textsuperscript{15} passed in 1980 was framed as an official response to two European directives: the ETD and Directive 77/187/EC.\textsuperscript{16} Although the legislation also addressed the right to equal pay for work of equal value, the EPD was not explicitly mentioned in either the preamble or the formal explanatory text of the legislation. The legislation addressed three additional points relevant to women’s equality: it prohibited the use of gender-specific selection criteria in hiring and promotion; it established a limited reversal of the burden of proof in discrimination...
cases; and it protected individuals pursuing legal retribution from dismissal. The legislation did not challenge the fundamental premises of the male breadwinner model or the basic assumption of “natural differences” between men and women.

In many ways, the omissions in the Compliance Law are more instructive than the content of the legislation itself. For example, although the European directive specifically allowed (even passively encouraged) positive action measures to facilitate women’s labor market participation, the German legislation made no such allowances. The law largely overlooked the fact that discriminatory selection and evaluation criteria and limited access to training and education restricted women’s access to the male-dominated labor market. Although the European directive specifically sought to overcome these structural barriers, the German legislation included no provisions to encourage women to take on “nontraditional” roles and thus did not challenge the male breadwinner model. Whereas the ETD encouraged states to recognize that structural barriers, in particular family responsibilities, placed women at a distinct disadvantage in the labor market, the German government framed these “structural issues” as natural differences between men and women, limiting the potential scope of the European legislation.

The legislation suggested that jobs that were “by nature” gender specific could remain closed to members of the other sex. These gender-specific jobs and the criteria that define them as such were not defined. There is evidence that the German state considered socially defined norms and natural differences between men and women as definitive factors. In its 1978 report to the Commission, the government had stressed that separate wage scales for men and women were illegal in Germany unless specific duties were, by definition, gender specific. As examples of gender-specific duties, the report cites “night porter and page” as men’s jobs and “maids, buffet servers and coffee cooks” as women’s jobs (Commission of the European Communities 1979). This clearly highlights the extent to which the government continued to frame women’s workplace equality as limited by “natural differences.” The European norms could make little difference in this political and social environment.

The legal supremacy of the European over national law, however, meant that the German state was bound by the full set of European provisions, even though these were not officially incorporated into domestic legislation. This again highlights the fluidity and interconnected nature of the two policy spheres, as European provisions were essentially included in but separate from the existing body of German law. As actors moved between the two spheres, gender policy and socially accepted gender roles began to incorporate more of the
European perspective. The male breadwinner model, long dominant in West Germany, began to come under challenge.

Over the course of the next several years, actors converged, both consciously and less consciously, around the European legislation to alter the scope of the German Compliance Law and gradually bring European values into the domestic legislation. Women’s increased use of the European institutions, especially the Courts, contributed to a reinterpretation of German legislation and finessed the Compliance Law to partially incorporate some of the European values and norms. As a result, a new awareness of European legislation developed among legal practitioners and facilitated elite socialization and the perpetuation of the European norms. Two ECJ cases illustrate particularly well how German gender policy was reoriented around the notion of equality as sameness and the challenge that this exerted on the overarching gender policy regime.

In the first case (Case 14/83) the ECJ established that the German implementation of the ETD through the Compliance law was inadequate. Two women—Sabine von Colson and Elisabeth Kamann—had applied for positions as social workers at a male prison. They were turned down in favor of two lesser-qualified men with the reasoning that women needed to be protected from the risks that were “naturally” associated with work in a male prison. The German Court was essentially being asked to rule upon the legitimacy of the “equal but different” premise that underlined the German gender regime. The Court ruled in favor of the women, finding their treatment discriminatory. Under German law, however, the Court was only able to award financial compensation equal to the actual costs the women had incurred through their application—the cost of travel to the interview. Thus, the Court declared discrimination premised on the need to protect women as illegal but found that this illegal action was not financially reproachable. The Court thereby tacitly supported the equal but different argument and helped sustain the dominant male breadwinner model.

The ECJ was asked to review the decision. In its judgment, the European Court ruled that article 6 of the ETD explicitly required states to establish a penalty for discrimination which was substantial enough to discourage discriminatory practices. With this decision, the ECJ fundamentally changed the scope of the German legislation several years after it had been passed. In the absence of adequate domestic legislation, the ECJ ruling became the new standard by which German Courts made subsequent rulings. Thus, German judges were gradually socialized to the European norms framing discrimination against women, even on the grounds of protection, as unacceptable. The transfer of European norms was facilitated
through the acceptance of these norms by the domestic legal elite (Börzel and Risse 2003). This subsequently contributed to a gradual socialization and internalization of the principle as more and more women used the Courts to seek retribution for discriminatory practices.

The European Court played a similar role in defining the scope of positive action measures to increase women’s representation in specific areas. Heated debates on the issue of quotas, women’s representation, and positive action measures had repeatedly made their way to the domestic policy agenda during the 1980s and early 1990s. Although the same issue had been discussed at the EU level and was regulated by the ETD, there is little evidence of the European norms being called upon by domestic actors during the policy discussions. Even those actors who supported positive action and thus the European stance neglected to draw on the European scale for legitimacy (Kodré and Müller 2003). In response to heated debates on the effectiveness and fairness of quotas and positive action measures to increase women’s representation in the labor market, the city-state of Bremen passed a (state) law on equal treatment that required the automatic selection of a woman over an equally qualified man in areas of the public sector where women were underrepresented. This law was challenged when a man, Eckhard Kalanke, was passed over for promotion in favor of a woman. The ECJ was asked to rule (Case C-450/93). Surprisingly, the ECJ ruled against the city-state of Bremen finding the automatic preference of women to be in violation of the ETD.

This controversial ruling sparked immediate responses from the European institutions and women’s movements alike, again bringing domestic and European policy arenas together. Ironically, the first time that domestic actors drew directly on the actions and decisions of a European institution was in a negative light. Only a short time later, the controversial Kalanke ruling was qualified and essentially overturned by a further ECJ decision. In the Marschall case (Case C-409/95) the ECJ ruled that a “saving clause” by which a man could still be hired over an equally qualified woman if he demonstrated other relevant characteristics was sufficient to prevent the legislation from contravening the ETD. Thus, changes to the regulation of women’s labor market participation evolved through the actions of domestic and European actors and the direct imposition of EU gender norms and values on domestic German gender policies.

The Marschall decision contributed to a fundamental shift in the understanding of male and female qualifications. Although the decision did not fully undermine the basic conception that men and women are, by nature, different, it successfully placed this perceived
difference within a new context wherein difference was no longer considered to constitute a justifiable limit to women’s labor market employment. This altered understanding of equality as neither sameness nor difference brings together premises of both the German male breadwinner model and the European dual-earner model of gender relations.

Further Thoughts and Developments

The discussion of the negotiation and implementation of the equal pay and ETDs has highlighted the ways in which European initiatives have gradually facilitated shifts in domestic German policy. These have been accompanied by changes in overall attitudes toward women’s labor market participation and the value of women’s work. On the whole, women now enjoy occupational freedom and access to training, education, and promotion. Even the military—one of the last bastions of masculinity—was opened to women in 2000, following a ruling from the European Court. Several legislative initiatives to better regulate women’s equality were undertaken in the late 1990s and early 2000s. However, the fact that the perception of women’s social roles has altered somewhat should not lead us to overlook the fact that the government has consistently been slow to implement these measures and attempted to support the male breadwinner model as long as possible. In fact, even while women’s labor market equality becomes more of an accepted norm, in other ways, the German government continues to resist equality legislation emanating from the EU institutions.18

In 2002, the Council of Ministers passed amendments to the ETD, clarifying several definitions and broadening the scope of discrimination to include, for example, sexual harassment in the workplace. The deadline for implementation was set for 2005. Not surprisingly, this legislation has yet to be adequately transferred into German law. Following the trends of the past, we may, however, expect domestic and/or European actors to jump scale and force the implementation and adaptation of the European norms.

Moreover, the European policy initiatives, once transferred to the German system, tend to remain separate from other aspects of gender policy. For example, legislation regulating equal pay may be of limited value if the overall system continues to urge women to exit the labor market for a long period of time in order to care for their children at home. As the European provisions challenge only some aspects of the male breadwinner model, two coexisting, but at times contradictory and separate, policy regimes are visible.

In those areas of gender policy where European legislation has been incorporated into the German political and social system, the
norms and values of the new legislation have often been at odds with the broader system. For example, through European initiatives, women have equal access to the labor market, but the state has yet to establish a system of high-quality childcare which would make women’s participation a reality. The state continues to prioritize family care over public daycare facilities. The two regimes coexist in the manner described by Deeg (2001)—neither policy logic is likely to dislodge the other in the short term. In the long term, a new “hybrid regime” may develop, incorporating elements of both the European and the German gender regimes and “... 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” (7). The challenge to the German gender regime then is gradual rather than immediate. It is nonetheless a transformative and self-perpetuating process, as changes in one area may open new opportunities for mobilization in other areas.

The above discussion has highlighted only a few of the actors involved in the formation and implementation of the policy. Even in this abridged discussion, it is clear that the number of actors working through the domestic and/or European policy scales is not set. Actors can redefine themselves as either German or European to take advantage of opportunities presented through the multiple policy scales. In this way, gender policy has been partially rescaled as European, and domestic actors merge in a new socially constructed space for policy negotiation. It is within this new scale that we can see the emergence of a gender regime incorporating elements of both the German and the European gender regime. This hybrid regime may contain the potential to gradually redirect the male breadwinner policies of the German state and redefine a gender regime comprising elements of both the domestic and the European.

NOTES

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1. The Europeanization school is very diverse. For more on Europeanization and the convergence of policy, see Mény, Müller, and Quermonne (1996), Featherstone and Radaelli (2003), and Olsen (2002). On the convergence of gender policy, see Walby (2004), von Wahl (2005), and Randall (2000).

2. As only West Germany was a member of the European Community, this article looks primarily at the West German gender regime. The distinction between the West and East German regimes becomes somewhat problematic.
post-1990 when it becomes difficult to refer to a single “German” gender regime. At the institutional level, however, the East German policies and social practices were largely subverted by West German traditions. Thus, I refer to the male breadwinner model as the dominant model even during the postunification period, yet I recognize that these values were not equally held by women in eastern and western Germany.

3. Sainsbury (1999) used gender regime and gender policy regime interchangeably. Although I too tend to use these interchangeably, it is important to recognize that policy change may come well before or lag well behind changes in social practice.

4. Perhaps the strongest evidence for this new policy focus is the proposed reform to the structure of the child-rearing allowance (Eltern geld). This new policy encourages the active participation of both partners in childcare and, in combination with increased childcare facilities and financial support of a shorter duration, encourages women to return to the workforce within a year of the birth of a child. For more, see http://www.bmfsfj.de.

5. Radaelli draws attention to the two-directional nature of policy transfer in the EU. His analysis, however, still focuses primarily on the influence of the EU on the domestic.

6. Walby (2004) and von Wahl (2005) are two notable exceptions to this.

7. The women eventually won equal pay from their employers. The Belgian law, however, remained unchanged.

8. The shift between the national and EU levels in this case closely resembles the “boomerang pattern” described by Keck and Sikkink (1998).

9. The Defrenne lawyers argued that Sabena was in violation of article 119 in 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, leading to a disadvantage in severance payments and pension payments for women. After an initial hearing in the Belgian court, the ECJ was asked in 1971 to rule on the interpretation of pay and the scope of article 119. Although 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, which laid down by Article 119, is one of the foundations of the Community” (ECJ Case 43/75), thus establishing the importance of article 119 as a sound foundation for future European equality policy.

10. Until 1987, the role of the European Parliament in policy-making was limited to a consultative role. Council was only required to ask Parliament to give an opinion on Commission proposals, but there was no need for Council to incorporate this into its own position. However, Parliament could pressure the Commission to alter and resubmit a proposal before the Council had taken a fine decision—a tactic that it frequently employed. Since 1987, Parliament’s powers have gradually expanded and its active
consent is now generally required before the Council may pass a Directive. For more on the policy-making process, see Bomberg and Stubb (2003), Cini (2004), and Scully (2004).

11. The EESC comprises representatives from economic and social interest groups in Europe, in particular labor and management organizations, as well as a number of other interests including farmers and small business owners.

12. Agreement on this position was by no means unanimous. Several representatives, in particular those from business interests, voted against the report and the concept of work of equal value.

13. In 2002, the ETD was revised. Among other changes, this new ETD clearly defined direct and indirect discrimination and set clear guidelines defining discriminatory behavior in employment, political, and social life.

14. Most mainstream legal interpretations held that the Basic Law governed only the relationship between the individual and the state and therefore did not cover discrimination between employer and employee (Maunz and Dürig 1973). Women’s organizations and the women’s branches of political parties and labor unions, in contrast, argued that article 3 implicitly placed the onus on the state to ensure that equality between the sexes was a reality in all aspects of society (Weber 1972; Selbert 1981).

15. The German title of the legislation is the Arbeitsrechtliche EG-Anpassungsgesetz [Legislation to Bring German Labour Law into conformity with European Community Law].

16. Directive on the approximation of the laws of the member states relating to the safeguarding of employees’ rights in the event of transfer of undertakings, businesses, or parts of businesses.

17. German original “Zimmermädchen, Kaltmamsell, Kaffeeköchin.”

18. This resistance is also evident in the difficulties that the government faced in passing broad nondiscrimination legislation to be binding in both the public and the private sector. Faced with strong opposition, the government was eventually forced to pass the law only for the public sector. This again highlights the lack of universality in the application of gender equality.

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