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Care Crisis: Racialised Women at the Crossroads of Migration, Labour Market and Family Policies

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Introduction

Besides job creations and responding to care needs, a central argument justifying the development of in-home care[1] has been that of gender equality. I argue that the stated policy objective of "freeing" the productive potential of the more highly-skilled women – as announced by the European Commission – widens the gender pay gap, instead of fostering gender equality in the workplace. Official reports on gender equality in Germany state that one of the main drivers of gender inequality in the labour market is the gender segregation of professions (BMFSFJ 2011). Studies of gender stratification have shown that the gender pay gap is due to three main interlocking factors:

- (1) the unequal division of household tasks between men and women, which leads to career interruptions for women due to child and elderly care;
- (2) the devaluation of feminised labour, which translates in the better remuneration of male-dominated compared to female-dominated professions with comparable qualifications[2] (e.g. firemen vs. nurses); and
- (3) the gender-segregation of professions, which creates structural gender inequalities across occupational sectors, characterised by lower pay for feminised sectors (see Lemière and Silvera 2008; Kilbourne et al. 1994).

[1] The term "care" used in this paper refers to all activities encompassed in reproductive work performed in private homes, including cleaning, cooking, and caring for other persons. We will see later that the differentiation between "domestic" and "care" work operated in public policies serves to establish or reinforce a hierarchisation between workers based on immigration status, ethnicity and race. For this reason, and because reproductive tasks usually straddle both categories and cannot be neatly differentiated, I will use the generic term "care" for both domestic and care work. Moreover, as the scope of this paper does not allow for a critical analysis of the category of "care", I will refrain from taking a clear position in the debates surrounding this debate 14/04/2014 14:45:00.

[2] Brunet, S. & Dumas, M., 2012. Bilan de l'application des dispositifs promouvant l'égalité professionnelle entre femmes et hommes. Les Editions des Journeaux Officiels, Conseil Economique, Social et Environnemental, March.

Policies supporting household and in-home care services contribute to the development of a highly feminised, precarious and low-skilled labour sector, in turn indirectly increasing the pay differentials between men and women – and *between* women. This paper seeks to analyse the combined effects of family, labour market, gender equality and migration policies on the position of racialised women in the care labour sector. What are the objectives of these various sets of policies, and most importantly, how are they articulated? How is the policy goal and constitutional duty to ensure the advancement of gender equality reconciled with the growth of a highly precarious gender-segregated labour sector marked by the overrepresentation of racialised women? Special attention will be drawn to the implications of gender- and colourblind laws and policies. In what specific ways do seemingly gender- and race-neutral laws impact women and/or racialised minorities? What processes create such (un)intended effects?

I conceptualise "intersectional gender inequality" as the process through which single-axis gender equality policies – which solely focus on inequalities between men and women – reinforce intra-group inequalities, especially inequalities within the group "women". Intersectionality can be defined as a Black feminist legal theory, methodology and conceptual tool used for the study of the interaction of multiple systems of oppression. First coined in 1989 by Kimberlé Crenshaw, the term intersectionality has since then been explored, revisited, adapted and criticised by many scholars – feminist and otherwise – in a number of disciplines (see Crenshaw, 1989; Collins, 1998; Davis, 2008; McCall, 2005; Yuval-Davis, 2006). By re-centring the analysis of gender inequalities on race[3], I seek to provide an alternative lens to capture the ways in which public policies which fail to address the intersection of gender, race and class shape the position of racialised women on the labour market.

[3] The category „race" refers to a socio-political and analytical concept. It is not conceived of as a biological category, but as a social and historical construct, which helps reflect social realities in Europe, including Germany. The use of "race" participates in the recognition of processes of racialisation based on religion, culture, skin colour, ethnicity and language in the European context. See Roig, E. & Barskanmaz C. 2013. La Republique against Race. Verfassungsblog: on Matters Constitutional. http://www.verfassungsblog.de/en/la-republique-against-race/#.Uo31XmSbjfI [Accessed 21.11.13]

The first section of this paper outlines migration policy measures linked to the labour market for care; the second analyses the gendered and race-related effects of the flexibilisation of the labour market on care workers; and the third explores the interplay between heteronormativity, structural gender inequality, and gender-blind laws and policies.

1. The crisis of care: outsourcing reproductive work to migrant and racialised women[4]

The employment of and need for care workers in Germany has been a problematic issue for the past decades. This issue has been broached several times in the process of the drafting of the immigration law ZuwandG (Bundesrat 2002, 134), and it was not until January 2002 that a policy specifically regulated migrant "domestic" work[5]. A public debate was ignited by a situation involving a prominent journalist, Frank Lehmann, who started an action to regularise the employment of migrant care workers from CEE countries[6] after the police discovered that he was illegally hiring a Slovakian care worker for his father-in-law[7] (see Kontos and Shinozaki 2007). It took no longer than a couple of months for a new piece of legislation opening regular access to labour migration in the care sector for eastern European workers to be adopted, despite the continued demands that had been formulated by undocumented care workers themselves (see for example, Respect Network). The German government modified the Regulations for Exceptions from the Recruitment Stop *(Anwerbestoppausnahmeverordnung ASAV)* and the Employment Ordinance *(Arbeitsaufenthaltsverordnung AAV)* on January 30th, and on February 4th, 2002 respectively[8]. The new regulations

[4] I prefer the term "racialised" people to the term "migrant", as the latter term tends to be used as a proxy for "non-white" in the German public discourse. The term "racialised" underlines the fact that racialisation occurs through a process. Race is not an objective category, but a social and historical construct that underlies social relations of power. When the term "migrant" is used in this paper, it refers to people who themselves migrated.

[5] The following regulations establish a differentiation between "care" *(Pflege)* and "domestic" work.

[6] Central and Eastern Europe, abbreviated CEE, as is a generic term for countries in Central Europe, Southeast Europe and Eastern Europe, usually meaning former communist states in Europe. It is in use after the collapse of the Iron Curtain in 1989–90.

[7] See Frankfurter Rundschau, 26.10.2001, p. 38, and 29.12.2001, p. 4.

[8] Article 21 of the decree on the authorization of newly arrived foreigners to engage in gainful employment (Beschäftigungsverordnung - BeschV) vom 22.11.2004

provide a legal basis for recruiting full-time "domestic helpers" *(Haushaltshilfen)* from several CEE countries[9] under the care insurance provision for a maximum of three years[10]. As Kontos and Shinozaki pointedly note, the sudden change in legislation marked a noteworthy shift in language from Pflegekräfte (care workers) during the campaign to Haushaltshilfe (domestic helps) during the law drafting process (2007, p.16). This change of designation, far from being merely incidental, has far-reaching implications for the situation and status of migrant care workers. Due to their general fear of labour replacement, trade unions were concerned that the introduction of migrant competition would cause unemployment rates among registered professional caregivers to increase, despite the fact that most German households could not afford full-time employment at the current rates. A compromise had thus to be reached between the German government, who could no longer afford to ignore the convenient practice of irregular hiring of migrant workers from Eastern Europe, and trade unions, who wished to protect incumbent workers. In order to establish a clear differentiation – and hierarchy – between national workers and migrant workers, the drafters of the law opted for the term "domestic helps", denoting a lack of professionalism and formal qualifications, thus signaling that these migrant workers did not represent a serious threat for national care workers, since they were merely "helpers". However, this legislative change has not achieved the expected surge in legal employment of migrant care workers, as only 1,102 households made use of this legal measure in 2002 (Böhmer 2010, 137). For most households in need of care services, the undeclared employment of migrant women thus remains the only financially viable alternative (Griep 2005). Several experts maintain that these official numbers mask a much more widespread practice of irregular hiring of migrant care workers (DGB 2009, 7; Gather, Geissler, and Rerrich 2002; Kontos and Shinozaki 2007; Lutz 2007).

The German long-term care insurance *(Soziale Pflegeversicherung)* introduced in 1995[11] covers basic elderly care expenses and provides the choice between cash

[9] These are Poland, Slovakia, Slovenia, the Czech Republic and Hungary.

[10] § 4 Abs. 9a of the ASAV and the § 4 Abs. 4a AAV

[11] The social care insurance (PV) became mandatory in Germany on January 1st 1995 with the adoption of the eleventh social code (SGB XI).

transfers, in-kind services, or a combination of both. In all cases, since state allowances do not cover the full cost of care, private households either have to cover all additional costs, provide the care services themselves, or employ a migrant care worker in the cheaper informal market for care. Due to the low level of cash payments in a system that favours cash transfers instead of collective care structures, German care policies create incentives for family care through female relatives and for the irregular employment of migrant care workers (Keck and Saraceno 2009, 7; see also Ostner 1998).

1.1 A labour market for care stratified by immigration status, race and ethnicity

Institutions providing ambulant care in Germany are subject to formal conditions and requirements regulated through laws, guidelines and agreements. Parallel to this highly regulated system, the informal care sector determines the unofficial conditions of care provision. If social and labour rights were to be respected (i.e. sickleave, holidays, etc.), 3.5 persons would be required to perform the work entailed by 24-hour care and the cost would amount to around 10.000 Euro per month (ver.di 2011, 4). Such prohibitive costs lead to the emergence of a "grey", semi-regulated, semi-formal, and most importantly, tolerated market segment. Under such conditions, the so-called "24-hour-care" through one care worker is politically accepted and creates a labour segment halfway between the formal and irregular labour market (Diakonie e.V. 2008). The legal framework regulating care is complex and messy to deal with, as various employment arrangements depend on different legal provisions. Care workers from CEE-EU countries can

- (1) be employed temporarily by a German employer[12] (principle of freedom of movement);

[12] Work permit from May 1st 2011 (workers' freedom of movement). In this case, the person in need of care herself/himself or a relative is the employer. The placement can occur through the federal labour agency or through any other job searching possibilities. A work permit is no

- (2) be sent to Germany by a foreign intermediary employer through a service contract binding the foreign placement agency and the care worker (principle of freedom of establishment and services);
- (3) exercise their care activity in Germany as self-employed workers in the framework of the European freedom of services within the EU.

According to the Labour Office, the Central Foreign Exchange of the German Federal Labour Market Authority issued 1.633 work permits for work in private households in 2010. But a large share of employment relations with care workers from CEE-EU countries is not counted in official statistics. Estimates indicate that approx. 115.000 CEE-EU care workers are employed in German households legally and illegally (Neuhaus, Isfort, and Weidner 2009).

Illegal work arrangements involving workers excluded from the European legal labour protection framework are also widespread in Germany. Such workers, mostly from extra-European countries have a precarious immigration status and therefore entre asymmetric employment relations with their employer. The analysis of official documents pertaining to care work, including parliamentary reports, policy analysis papers, and laws reveals the near complete absence of this category of care workers, which shows that their situation is not addressed, let alone recognised. The discourse pertaining to the care labour market and to semi-legal work arrangements exclusively revolves around Eastern European care workers, even though a significant number of undocumented care workers from Asia, Latin American and Africa are providing these services to German households. The labour market for care is thus stratified as follows:

- formal care mostly provided by German qualified workers;
- semi-legal care provided by eastern European workers; and

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longer needed, with the exception of Bulgaria and Romania, for which restricted freedom of movement still applies until 31.12.2013.

- informal care performed by undocumented[13] workers from Asia, Latin America and Africa

The lack of affordable formal care services creates the structural demand for cheaper irregular employment. Moreover, active labour market policies targeting low-skilled and long-term unemployed workers also provide the much-needed racialised and feminized workforce to the care labour sector. By promoting a labour sector largely dominated by women, active labour market policies which (re)direct women to care professions contribute to gender imbalances on the labour market, and to higher pay differentials between women and men. Both migration and labour market policies directly or indirectly assign migrant and racialised women to a sector marked by low pay, low status and poor working conditions. This labour migration system, by almost exclusively resorting to women – even if their gender is not specified in the law – has far-reaching implications on broader gender inequality on the German labour market. The new regulations opening semi-legal access to the German care labour market for CEE-EU workers also epitomise the process through which structural racial/ethnic and gender inequalities are produced and perpetuated.

2. The flexibilisation of the labour market: reactivation of racialised women

The fall of the Berlin Wall marked the beginning of a large social policy and labour market reform in Germany, characterised by the flexibilisation of the labour market, the reduction of the non-wage labour costs and of unemployment costs, and the increased scrutiny of labour sectors affected by informal work (Kontos et al. 2006). The underlying aim of the flexibilisation of the labour market is the absorption of unemployment through the liberalisation of the legal framework for fixed-term contracts, agency work, dismissal protection, minor employment and collective labour agreements. This reform specifically targets the low-wage segments of the labour market and the long-term

[13] Care workers who provide informal care are not necessarily undocumented.

unemployed. It is in this context that domestic services were targeted as a potential pool of large-scale employment for these groups of workers. The care sector exhibits two characteristics which perfectly match the expectations of the government in terms of rapid job creations at a very low cost: an increasing demand for such services which is met to a large part by informal work, and that these tasks require little to no additional training.

As part of this reform, labour market and fiscal policies offered incentives for the regularisation and/or employment of care workers. One example was the exemption of social contributions for so-called "minor employment" *(geringfügige Beschäftigung)* until 1999, i.e. employment for a few hours a week and up to a certain salary[14]. This highly gendered employment regime is premised on the male breadwinner model, whereby wives who left employment to raise their children and were insured through the fully employed husband are given the opportunity to re-enter the labour market on a part-time basis while remaining on their husband's insurance plan (Klammer, Ochs, and Trautwein-Kalms 1998; Ochs 1999). This policy increased the number of people engaged in minor employment through the 1990s, with 5.6 million registered workers in 1997, two-third of which were women (Ochs 1999). Moreover, women make up the vast majority of workers taking on minor employment as a main occupation (and not as a side job) with 66.3 percent of native German women, and 65.3 percent of foreign women[15].

On April 1st 2003, several changes affected the minor employment scheme: the maximum salary was increased from 325 to 400 euro, the upper limit for working hours was removed, and the employer's contribution to the social insurance scheme was raised.[16] A new employment category, the "mini-job", as well as an in-between zone for

[14] For the legal framework of "minor employment", see the Law for the Promotion of Employment *(Arbeitsförderungsgesetz)*, and later the Employment Law *(Beschäftigungsgesetz)*, and since January 1st, 2001, the Part-Time and Fixed-Term Employment Law *(Teilzeit- und Befristungsgesetz)*

[15] See Böhmer 2012, p. 318

[16] § 8 Social Code IV

employment relations with wages from 400 to 800 euro and a progression of social insurance contributions were established.[17] In parallel to these changes, economic incentives for the formalisation of care work in private households were introduced through the lower social insurance contributions imposed on private households in comparison to employers in other sectors. In an attempt to absorb undeclared work in the private care sector, a tax deduction scheme for households employing a care worker was introduced in the Law for Income Taxation *(Einkommenssteuergesetz)* in 1990. This regulation was abolished in 2002 following widespread criticism on its apparent revival of class-based privileges, as only the wealthiest households could benefit from tax cuts. The government upheld the tax deduction system but changed it so that people employing domestic helps in the minor employment framework may declare a tax deduction for the maximum of 10 percent of their income[18] (Kontos et al. 2006). Pursuing the aim of job creations and reintegration of the unemployed on the labour market, some communal administrations adopted a policy of support for Domestic Service Agencies, which employ care workers on a full-time basis and allocate their working hours to several households. The number of these agencies reached 120 in 2005, and their output in terms of job creations remained rather low in comparison to the estimated need for domestic services (Kontos et al. 2006).

2.1 Racialised women at the intersection of labour market policies and immigration regulations

Starting in 2003, the well-known Hartz-Reform introduced a series of laws aiming to foster labour market flexibility by reducing the costs of unemployment and the costs of labour. The Hartz reforms comprised the reduction of social benefits, and the introduction of new activation rules meant to pressure the unemployed into responding to the demands of the labour market, the motto of the reform being “Support and Challenge”[19]. The payment of unemployment benefits – or rather social benefits – is

[17] § 20 para. 2 SGB IV

[18] § 35a Tax deduction for expenditures for employing for domestic work and for the use of domestic services.

[19] Section 1 of the Social Code II *(Sozialgesetzbuch II)*

conditioned on the acceptation of the jobs offered to them by the Labour Office, and the obligations of the unemployed are reinforced under the new plan. This neoliberal model inherited from North America directly participates in the gradual retrenchment of the state from public welfare and in the resulting emergence of an institutionalised female precariat, to borrow from Jean Gadrey (2009), as women make up the majority of workers in sectors providing social services on the one hand, and make up a disproportional share of the unemployed or/and marginally employed on the other. The reluctance to recruit and accept more low-skilled migrants partially lies in the high unemployment rate among so-called first, second, and third-generation migrants and repatriated Germans[20], who represent an unexploited labour force potential, especially due to their relatively young age.[21] In 2011, the unemployment rate among foreigners was more than twice as high as among Germans with respectively 16.9 and 7.2 percent (Böhmer 2012, 113). German women "with a migration background"[22] who were born in Germany have the lowest employment rate among women, with only 40.3 percent, compared to 48.6 percent for foreign women in 2008 (Böhmer 2012, 305).

[20] In 2000, the unemployment rate among foreigners (16.5 percent) was almost twice as high as among Germans (8.8 percent). Many older employees stemming from the guest workers' generation became unemployed after the structural change. The generation of their children does not acquire the qualifications demanded on the labour market, or even remain without qualifications. The employment situation of the repatriated Germans (Spätaussiedler_innen) has dramatically worsened in the past years. Their unemployment rate is still higher than that of foreigners with almost 20 percent.

[21] More than half of foreigners are children, adolescents or young adults below 30.

[22] According to the German statistical office, the population group with a migration background consists of all persons who have immigrated into the territory of today's Federal Republic of Germany after 1949, and of all foreigners born in Germany and all persons born in Germany who have at least one parent who immigrated into the country or was born as a foreigner in Germany. The term "migration background" can be problematic as it participates in processes of racialisation. "With a migration background" is not uniformly used across migrant groups in the media and in the public discourse. It tends to be primarily meant for visible minorities and becomes a proxy for non-white (see note 3). For this reason, I use inverted commas ("").

Concerning professional qualifications, foreign women who migrated to Germany are the largest category without a formal degree, and possess the lowest levels of vocational training. With only 8.3 percent of foreign men and 8.6 percent of foreign women who were born in Germany with a high school degree, foreigners born in Germany have the lowest chances of graduating from high school (Böhmer 2012, 311). The situation of foreign workers is also largely influenced by the system of recognition of foreign qualifications. The European statistical office Eurostat reports that a high share of migrants are employed below their qualifications level (Eurostat 2011). In 2008, 31 percent of foreign workers born abroad were overqualified, reaching even 33 percent for women. This share is lower among foreign workers born in Germany, with an overqualification rate of 20 percent, and 17 percent for women (Böhmer 2012, 108).

2.2 The racialisation of low-skilled segments of the labour market

The overrepresentation of migrants in low-skilled segments of the labour market is thus not only the result of their real lack of qualifications, but also due to institutional and structural factors such as the inadequate recognition of their qualifications (Englmann and Müller 2007; see also Deutscher Verein 2010, 30) and systemic discrimination based on ethnicity, nationality, origin and gender. The lack of recognition of foreign credentials and qualifications and the resulting lack of opportunities for non-European migrants is a case of indirect discrimination according to the criteria set by the EU-Directive 2000/43/EC of the Council on the implementation of the principle of equal treatment without distinction of race or ethnic origin (see Frings 2006, 494). Regulations pertaining to the recognition of foreign diplomas represent another instance of the adverse effects of colourblind laws on structural racism. While such laws do not explicitly seek to exclude racialised workers from the labour market, they indirectly result in their overrepresentation in low-skilled sectors due to deskilling. The restrictive conditions attached to the recognition of foreign credentials thus indirectly function as a means to assign workers to specific sectors. The combined effects of immigration laws, labour market policies (esp. Hartz IV), and protectionist regulations pertaining to the recognition of qualifications create the conditions of the overrepresentation of racialised women in minor employment. The intersectional gendered and racialised representation of the low-skilled female migrant is thus promoted by policies (BMFSFJ 2011, 73–75).

Considering their situation on the labour market, migrant and racialised women are the primary targets of active labour market policies. In fact, they are at the same time widely affected by unemployment, and overrepresented in sectors meant to absorb unemployed and undeclared work, e.g. the care sector. According to national employment statistics, 81 percent of migrant women are employed in the service sector (Böhmer 2010, 108) and the share of foreigners employed in private households steadily increases, going from 9.9 percent in 2003 to 17.8 percent in 2010 (Böhmer 2010, 382, 2012, 304). Women also remain overrepresented in minor employment, making up two thirds of all minor employees. However, if the global share of women (national and foreign) in minor employment is slowly declining, with a decrease of 4 percent between 2000 and 2008, the share of foreign women is slightly increasing (Böhmer 2010, 388).

Scientific studies show that the general improvement of the German economy is not correlated with an increase of wages and that social inequalities are not decreasing (Institut für Demoskopie Allenbach 2011; Statistisches Bundesamt 2011). A study conducted by the Institute for work, skills and training (IAQ) of Duisburg-Essen University reports that the number of employees working for an hourly wage of less than 9.15 euro has increased by 2.33 million since 1995 (Kalina and Weinkof 2012). The income situation of workers “with a migration background” is still more precarious than that of native Germans. The poverty rate of the working population “with a migration background” was almost twice as high as that of native Germans, with respectively 13.8 percent and 6.2 percent. Among the employed workers “with a migration background” who primarily earn their living through wage labour, the poverty rate was more than twice as high as that of native Germans in the same category, with 11,9 percent compared to 4,9 percent (Statistisches Bundesamt 2010, 245). In addition to the structural factors responsible for the high unemployment rate among the population “with a migration background”, institutional factors also contribute to their marginal situation. For instance, migration laws restrict migrants’ access to the labour

market, which artificially maintains idle capacities[23]. The German Association for public and private Welfare *(Deutscher Verein für öffentliche und private Fürsorge e.V.)* accuses the numerous legal restrictions to labour market access for people "with a migration background" of preventing their successful integration in Germany and calls for a removal of restrictive provisions (Deutscher Verein 2010, 26). The association points to the lack of coordination between immigration and social policies, as the two areas often pursue contradictory objectives. It complains that their application is rendered difficult for implementing agencies and calls for a harmonisation of regulations at all levels. Such demands are indicative of the high presence of workers affected by immigration law employed in welfare services.

We have seen that women, and women "with a migration background" in particular, are disproportionately affected by the flexibilisation of the labour market induced by the Hartz reforms. By means of indirect job placement through active labour market policies, they are allocated to the low-skilled and precarious care sector. The combined effects of labour market policies and the structural disadvantages affecting women and racialised people create their intersectional discrimination. Moreover, racialised women are assigned to the most precarious and gender-segregated segments of the labour market because of the – partly institutional – racist stereotypisation of migrant women, which creates gendered and racial assumptions about their skills and aspirations. The pervasive image of the traditional, nurturing mother of foreign origin participates in their representation as particularly fit for caring activities (Frings 2006, 497). The demand for feminine migrant labour in "caring" occupations is thus also socially constructed by racial and gendered stereotypes.

Despite the principle of equal treatment of men and women in the implementation of the law enunciated in article 1 § 3 of the Social Code II, the gender specific disadvantages entailed by the Hartz reform are not addressed, let alone mentioned. The task of implementing gender equality was even handed over to the labour administration,

[23] According to the Ministry of Labour, approx. 47 percent of foreigners living in Germany in 2000 had a restricted access to the labour market or were still in the one-year waiting period (Süssmuth 2001, 225).

which has to involve the local Commissioners for Women's issues in the process (Frings 2005). Such a shortcoming is mainly due to the lack of consideration of structural factors which produce and reinforce social inequalities at the macro level.

3. Structural gender inequality: Heteronormativity, gender-blindness and privilege

Structural gender inequality occurs through the (un)intended effects of gender-blind laws and policies. Since individuals and institutions such as the labour market are still rooted in hierarchical gender structures, laws tend to reproduce inequalities, even though they are formulated in gender-neutral terms and do not *intend* to disadvantage a specific gender. Policymakers who do not critically question the gendered implications of regulations will likely reproduce the structures in place. For example, the long-term care insurance scheme (PV) impacts negatively on women even if it does not *intend* to. Since the heteronormative division of labour still operates as a system, laws which rely on family networks for social care – even without specifying "female family members" – will inevitably disadvantage women. This is but one example of how structural discrimination occurs through gender-/colour-/ethnicity-/race-blind laws. By their very nature, and according to the principle of universality, laws should be applicable to a large variety of cases. However, social expectations pertaining to gender roles are shaped by the explicit or implicit norms on which lawmakers rely in their work – intentionally or not. The dissolution of heteronormative roles thus requires lawmakers to critically reflect on the pervasive influence that existing norms have on their perceptions, and ultimately on the laws they produce. The consolidation of heteronormative roles also occurs through the classification of ideal types, which is characteristic of fiscal law. Such methods are primarily meant to reduce the complexity of real world situations. However, these typologies (ideal typical groupings) nevertheless reproduce heteronormative patterns as they are based on the social norms which are reflected in the real world – in other words, the very norms that gender equality policies seek to dismantle. These processes of norm (re)production occur explicitly or implicitly, and can be intentional or unintentional. Gender equality policies thus cannot afford to fall back into these patterns and should avoid stereotyping. However, well-designed gender equality policies are often hindered by other policies, such as labour market,

family, migration and fiscal policies. Different sets of policies frequently pursue conflicting objectives and result in tensions in their implementation. So called “colour-blind” laws also produce structural racial inequalities and contribute to the perpetuation of structural disadvantage and inequality for racial/ethnic minorities. The intersecting effects of these two or more types of discrimination lead to the multilayered disadvantage of racialised women (see Browne and Misra 2003; Crenshaw 1989; Duffy 2005, 2007).

3.1 Heteronormative gender roles and the law

Until the 1970s, gender roles were explicitly inscribed in German law, as in most European countries. Art 1354 § 1 of the Civil Code (BGB) entrusted “the man […] with decisions pertaining to all matters concerning the common marital life”. The 1957 gender equality law[24] partially overrode these patriarchal regulations, but held on to clearly ascribed traditional gender roles and to the housewife/breadwinner model. Even though the male breadwinner model was erased from the civil code through the 1977 reform of marriage law, lawmakers still continue to adhere to these gender roles, as numerous analyses reveal. For example, a decision of the Federal Constitutional Court of April 14th 2010 validated claims of indirect gender discrimination by recognising that gender-neutral laws and processes can be discriminatory towards women, thus establishing the missing link between social realities and seemingly neutral legislation. The verdict states that:

Art 3 § 2 of the [German] Constitution provides protection against factual discrimination […]. The addition of phrase 2 in art 3 § 2 of the Constitution makes it clear that the duty of gender equality extends to social reality […]. In this respect, the enforcement of gender equality is also impeded by regulations which may be gender-neutrally formulated, but in the outcome predominantly affect women because of natural differences or of social conditions […]. Therefore, it is not decisive whether an unequal treatment is directly and explicitly tied to gender. (BVerfG 2010, para. 64–65, transl. ER)

[24] Law on the equal treatment of men and women in civil law (GleichberG) of 18th June 1957, (BGBl. I S. 609)

The consideration of indirect discrimination in gender equality cases also corresponds to relatively recent legal developments in European law. Lawmakers have the obligation to avoid regulations which interfere in the free decision of the spouses to decide upon the division of tasks in their marriage, or to induce the return of women in the home. However, family policies which heavily rely on the family (see long-term care insurance, PflegeVG) de facto discriminate against women and violate the legal principles cited above, including the prevention of indirect gender discrimination. Instead, social policy initiatives which seek to externalise care outside the home in collective structures, and regulations which promote paternal leave contribute to the gradual eradication of traditional gender roles. In a decision dating back to 1977, the German Federal Constitutional Court rejected the possibility to deduce the costs of childcare through third persons with the justification that the non-working mother could feel disadvantaged by the situation. Constitutional Judge Simon expressed his – progressive at the time – dissenting position to this judgement and justified the constitutional relevance of the "factual reality". He argued that

> *"in the social reality, the employment conditions for married women […] are more disadvantageous than for men, so that mothers are specifically considered responsible for childrearing and that complications pertaining to external childcare is de facto always detrimental to them. (BVerfG 47, 1, 34 ff., esp. 45 f. 1977, transl. ER)*

As Simon sharply comments, regulations which favour family care or which hamper the implementation of collective care structures or external care indirectly discriminate against women. Tensions between the social reality and public policies are thus still apparent in Germany. The care insurance law (PflegeVG), by introducing an insurance scheme for care, explicitly gives preference to home care (art 3 of the Social Code XI) and consequently defines care as the primary responsibility of families. Since reproductive work is still considered a feminine task, such a law will very likely produce asymmetrical gendered effects. Approximately 27 percent of family members in charge of home elderly care – the overwhelming majority of whom are women – had to quit their jobs, and 24 percent had to reduce their working hours (BMFSFJ 2011, 68). The trade unions ver.di, in their paper on the grey labour market for care, recognised the negative implications that a German law on "care time" (Pflegezeitgesetz, 1.7.2008) has on

women. This law promotes care though family members and implemented legal arrangements to allow employees to take time out of their employment to care for elderly relatives (ver.di 2011, 19). Such seemingly gender-neutral regulations lead to the disproportional involvement of women in care tasks, in turn increasing structural gender inequality on the labour market.

3.2 Gender-blindness and the perpetuation of male privilege

In order to counter the negative effects that child rearing and care work have on women, the better conciliation of work and family duties gained political relevance in the German and European public discourses. However, policy measures aimed at the better conciliation of work and family obligations can be highly problematic if they exclusively target women. Because of the different legal and factual position of men and women, work-life balance policies require a differentiated approach for each gender, including varying incentives and recommendations. If men are not included in the process, such policies will merely imply a transfer of reproductive tasks from privileged women on the formal labour market to marginalised women employed on the semi-formal and informal care sectors. This division of labour within the category "woman" occurs through class and ethnic/racial lines, which by no means challenges the heteronormative division of labour. Instead of improving gender equality through the decreased responsibility of mothers regarding reproductive tasks, it reinforces patriarchal structures by fostering inequality between women and leaving male privilege unchallenged. The fiscal advantages tied to minor employment (Minijobs) according to social and fiscal law are based on the male breadwinner model. Scholar Kirsten Scheiwe refers to the social protection provided by the law in case of minor employment as a "second-class coverage", especially in the case of household services (Art 8a Social Code VI), as the workers depend on the social coverage of their partners (Scheiwe 2007, 54). Since the tax and financial incentives induced by the law entice women to stay in this kind of employment if their husbands are fully-employed, the combination of social protection and fiscal regimes reinforce the gender segregation of the labour market (BMFSFJ 2011; Koch and Bäcker 2003). As demonstrated by policy scholars, the gender segregation of the labour market is one of the main drivers of the gender pay gap (Lemière and Silvera 2008). Minor employment promoted by the

Hartz reform is yet another example of how gender-blind policies reinforce the structural disadvantage of women.

Judge Simon's dissenting vote cited earlier shows that male privileges can be overridden if legal decisionmakers critically reflect upon gendered models. It also shows that traditional gender roles which were inscribed in the law are still pervasive in the minds of those who have a mandate to ensure the advancement of gender equality. The above-cited jurisprudence and legislation provide a protective framework against structural gender inequality. However, as the line of argumentation followed in this paper shows, a significant amount of laws and policies – and their combined effects – continue to disproportionately affect women.

The heteronormative division of labour, as a powerful organising principle and systemic feature of capitalist societies, represents the main obstacle to achieving gender equality. As theorised by materialist feminists, the reproduction of the workforce at no direct cost plays a tremendous role in the endless capital accumulation process (see Delphy 1984). However, the realisation that the reduction of the gender-segregation of professions represents a key site for change is slowly gaining influence in policymaking, as several initiatives indicate. The promotion of so-called "gender-atypical professions" is one example of the efforts undertaken by the government to counter the gender-segregation of labour sectors and the negative implications it has on gender equality. As part of this larger initiative, the German government put in place a series of projects in 2011, including "Mehr Männer in Kitas"[25], an initiative meant to specifically encourage men to take on work in the care sector. The first governmental report on gender equality identifies active men's policies as a crucial element of progressive gender equality policy (BMFSFJ 2011, 10). Such approaches contribute to the disruption of heteronormative norms and hierarchisation of masculine and feminine realms. The measures cited above tackle the structures in which inequalities are embedded instead of tackling individual behaviour. However, despite the introduction of these progressive measures, the intersectional discrimination of racialised women, and the

[25] Translation: "More men in childcare."

role that their massive employment in the care sector plays for the preservation of patriarchal structures still remains largely unaddressed.

4. Colourblindness and the heteronormative division of labour as the drivers of the intersectional discrimination of racialised women

Gender-neutral laws can have adverse effects on women because they are based on a normative order that still pervades today's social realities, even if it is no longer *named*. The same mechanisms cause so-called "colourblind" laws to indirectly disadvantage racialised minorities. The combination of both mechanisms leads to the institutional and structural discrimination of racialised women on the labour market through public policies and laws.

Women make up a significant share of the people who migrate for work. They represent almost a third of highly qualified migrants who come to Germany with a settlement permit and of self-employed migrants with a residency permit (Schuler-Harms 2009, 113 ff.). A third of all migrants who obtained a work permit according to art 18 of the Residency Act were women. When it comes to family and spousal reunification, women make up the majority of all migrants with 52.7 percent in 2006 (Schuler-Harms 2009, 105). Their integration in the labour market is rendered difficult by the interplay of restrictive regulations pertaining to labour protection and social security. As we have seen earlier, migrant women are disproportionately engaged in employment which does not provide social protection through unemployment and pensions benefits (Frings 2007, 216 ff.). In fact, institutional factors account for this overrepresentation, as people "with a migration background" are specifically and explicitly targeted by the Federal Employment Agency for One-Euro-Jobs (Bundesanstalt für Arbeit 2009, 20). Migrants who came through family reunification – mostly women – are usually not eligible for reintegration allowances either because they did not pay contributions to the

social security fund (SGB III – *Mangels Beitragszahlung*) or because they cannot provide evidence of a lack of financial means (SGB II – *Mangels Mittellosigkeit*) since they continue to receive a partial allowance from the state[26]. Moreover, migrant women placed in low-remunerated and precarious employment are neither registered as women nor as migrants in the professional integration records under art 54 of the Social Code II in conjunction with art 11 § 2 Nr 4 and 9 of the Social Code III (BMFSFJ 2011, 74). The statistical "disappearance" of migrant women and the juridical void attached to their employment and social situation are particularly symptomatic of the intersectional invisibilisation of racialised women in Germany.

The first report on gender equality recognises the paradoxical implications of the higher labour force participation of German women and the perpetuation of the male bread-winner model. They remarkably describe the processes of intersectional gender inequality though the interplay of a progressive – albeit selective – gender equality discourse and policies which still rely on traditional gender roles.

In many cases, cleaning and care activities in private households are performed by migrant women from third countries. This tendency to a "modified housewife model" represents the flip side of the growing employment of German women with the continued full employment of men through their roles as breadwinners. Care work is thus transferred from well-off women to low-skilled, often migrant women. (BMFSFJ 2011, 74, transl. ER)

This replacement process from professional German women employed in the formal sector to other racialised women with precarious residency, social and labour rights functions to safeguard the privileged position of men on the labour market and to the

[26] Taking up this kind of employment means on one hand that the person will no longer be registered as unemployed in statistics despite the obvious factual situation, and on the other, they are still entitled to welfare payments according to the Social Code II (SGB II) and therefore do not qualify for residence permits on the grounds of lack of own means of subsistence (§ 5 Abs. 1 Nr. 1 AufenthG).

perpetuation of the heteronormative order. Despite the institutional and structural discrimination surrounding their precarisation, migrant women aspire to be economically and professionally independent. Women who possessed good education credentials in their countries of origin report being faced with a “re-traditionalisation” of their role in the family through migration (BMFSFJ 2010, 9). This indicates that gender equality policies do not equally apply to *all* women. While gender equality policies foster work-life balance and provide alternative care options for some women, others are mobilised to ensure that these policies can be implemented. In other words, gender equality advances for *some* women, at the cost of *others.* The heteronormative division of labour is thus kept intact, and even fostered by the sets of policies analysed above.

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