

# Chapter 10

## Manager by Law: An Analytical Discourse

### Evaluation of the German Woman Quota

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#### Abstract

Two bills for the implementation of a legal women quota demand that all German market-listed companies should be required by law to have at least 40% women on their supervisory boards by 2020. In the German political discourse, the bills ground their justification in what I will articulate as the equality of opportunity argument, which primarily refers to the government's duty according to German constitutional law to promote the effective implementation of equal rights for women and men and take steps to eliminate disadvantages that now exist. As the Analytical Discourse Evaluation will show, the contested argument hinges on an interpretation of the implied conception of equality of opportunity and can only cogently argue for a redistribution of management positions when assuming that structural disadvantages in employment for women originate from their cultural coercion to raise families.

#### 1 Introduction

The proposition of bill 17\3296 for a women quota for supervisory boards of German major stock enterprises, first discussed in the Bundestag on 3<sup>rd</sup> December 2010,<sup>1</sup> marked the beginning of what would develop into a stormy political affair, vibrantly discussed throughout the German public sphere. The suggestion: German market-listed companies (i.e. DAX 30) should be required by law to have at least 40% women and men on their supervisory boards by 2020. Given that 2010 there were only 7,42% of women on supervisory boards of all DAX 30 companies taken together, the bill effectively suggests

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<sup>1</sup> Deutscher Bundestag, *Entwurf eines Gesetzes zur geschlechtergerechten Besetzung von Aufsichtsräten*, 17<sup>th</sup> Parliament, 17/3296, presented 13 October 2010.

that these companies should be legally obliged to literally bring more women aboard.<sup>2</sup> As Ursula von der Leyen, Germany's Federal Minister of Labor and Social Affairs, puts it: 'We no longer discuss whether we need to – but how we can achieve a higher percentage of women at the top of big companies.'<sup>3</sup>

The demand that management positions in the private sector should be redistributed on the basis of gender and in favor of women is justified by referring to inequalities of opportunity in women's careers that are due to the so-called double burden of combining family and career. According to this equality of opportunity argument, unlike their male colleagues, women are structurally disadvantaged in their employment, as it is ultimately seen as their responsibility to pause their jobs and careers to raise a family. With the help of Analytical Discourse Evaluation, I will show that this argument has to imply a substantive conception of equality of opportunity and can only cogently argue for a redistribution of management positions when assuming that structural disadvantages in employment for women originate from a cultural coercion to raise families.<sup>4</sup> Further, the analysis will show that the equality of opportunity argument, so often evoked in the political debate and the basis of the bills, mistakes equality of opportunity, as effective equal chances to be employed on management levels, with equality of outcome, the numerical equalization of women and men on executive and supervisory boards. Rather than costly developing daycare centers and other infrastructures that would provide opportunities for anyone who wishes to combine family and career, the German government passes on its responsibility to the private sector by attempting to legally require companies to ensure equality of outcome on their top management levels. After a short overview of the political discourse and the context of the political debate in Germany, I will reconstruct (2) and evaluate (3) the equality of opportunity argument.

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2 Carsten Wippermann, *Frauen in Führungspositionen: Barrieren und Brücken* (Heidelberg: Sinus Sociovision GmbH, 2010).

3 Kerstin Schwenn and Sven Astheimer, "Ursula von der Leyen im Interview," *Frankfurter Allgemeine Zeitung*, October 17, 2011, accessed June 5, 2012, <http://m.faz.net/RuboEgEEF84AC1E4A389A8DC6C23161FE44/Doc~Eg54FFoFE31C1449CA1FF719B2oCE8381~ATpl~Epartner~Ssevenval~Scontent.xml> ("Wir diskutieren nicht mehr über das Ob, sondern über das Wie eines höheren Anteils von Frauen an der Spitze großer Unternehmen").

4 Teun J. Dekker, *Paying Our High Public Officials; Evaluating the Political Justifications of Top Wages in the Public Sector* (New York: Routledge, 2013).

## Political Context of the German Woman Quota Law

The idea of a lawful quota that promotes more women on the top management levels of big enterprises was brought forward by Ursula von der Leyen (Christian Democratic Union, CDU), Federal Minister of Labor and Social Affairs, and Kristina Schröder (CDU), Federal Minister for Family Affairs, Senior Citizens, Women and Youth (BMFSFJ) already in 2010, long before the actual debate would arrive at its climax.<sup>5</sup> Pivotal for the debate was a report published by the BMFSFJ under Kristina Schröder (CDU) later that year that investigated the position of women in big enterprises.<sup>6</sup> The results: in the 30 companies listed in the German share index only 7,42% women could be found on supervisory boards and 2,16% on executive boards; in the 200 biggest companies in 2010 only 6,2% women were on supervisory boards and 2,4% on executive boards.<sup>7</sup> Disillusioned by these numbers and the “apparent failure” of the voluntary commitment by the German economy to promote more women into the management, in October 2010 Renate Künast et al. from the Alliance ‘90\The Greens drafted bill 17\3296 as a first attempt to transform the promotion of women into legislature. Following the initiative to introduce a legal quota for women, the Social Democratic Party (SPD) drafted bill 17\4683 to expand the lawful quota regulation to apply not only to supervisory but also to executive boards.<sup>8</sup>

The common denominator of the Claim of the debate is rather straightforward: the German DAX 30 companies should be required by law to have more women on all executive and supervisory boards. In general, I identified at least nine different arguments in the German political discourse that seek to justify this quota law. Here is a brief overview over the different Data in support of the main Claim in abbreviated syllogistic form:<sup>9</sup>

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- 5 Barbara Gillmann, “Frauenquote von 20 Prozent ist machbar,” *Handelsblatt*, June 14, 2010, accessed June 5, 2011, <http://www.handelsblatt.com/politik/deutschland/exklusiv-interview-frauenquote-von-20-prozent-ist-machbar/3461234.html>; AFP, “Schröder will Unternehmen zur Frauenförderung zwingen,” *Die Zeit*, June 14, 2010, accessed June 5, 2011, <http://www.zeit.de/politik/deutschland/2010-06/schroeder-frauen-quote>.
  - 6 Bundesministerium für Familie, Senioren, Frauen und Jugend, *Frauen und Jugend. Aktionärinnen fordern Gleichberechtigung: Erhöhung des Frauenanteils in Führungspositionen insbesondere Aufsichtsratspositionen deutscher Unternehmen* (Berlin, Deutscher Juristinnenbund e.V., 2010).
  - 7 Ibid.
  - 8 Deutscher Bundestag, *Quotenregelung für Aufsichtsräte und Vorstände gesetzlich festschreiben*, 17<sup>th</sup> Parliament, 17/4683, presented 9 February 2011.
  - 9 Warrant and Claim remain the same in all reconstructions.

### 1. The Equality of Opportunity Argument

[Data] Women & men are not equally represented on executive & supervisory boards of the German DAX 30 companies because of problems of equality of opportunity.

[Warrant] If D, then German DAX 30 companies should be required by law to have more women on executive and supervisory boards.

[Claim] German DAX 30 companies should be required by law to have more women on executive & supervisory boards.

### 2. The Corporate Governance Argument

[Data] More women employed on executive & supervisory boards increase a company's (financial) performance.<sup>10</sup>

### 3. The Profitability Argument

[Data] There is correlation between the amount of women employed on executive & supervisory boards and the profitability of a company.<sup>11</sup>

### 4. The Competitiveness Argument

[Data] If the amount of women on executive and supervisory boards is a criterion for the allocation of international mandates for a company, then more women on executive & supervisory boards increase a company's competitiveness.

### 5. The Lack of Managers Argument

[Data] In the light of the upcoming lack of skilled (male) managers, female managers are indispensable for the executive & supervisory boards of the German DAX 30 companies.

### 6. The Glass Ceiling Argument

[Data] Corporate models – historically designed by men – are not compatible with the combination of work and domestic responsibility of women.

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10 Georges Desvaux, Sandrine Devillard-Hoellinger and Pascal Baumgarten, *Women Matter: Gender Diversity, a Corporate Performance Driver* (McKinsey & Company, 2007).

11 Desvaux, Devillard-Hoellinger and Baumgarten, *Gender Diversity*.

### 7. The Critical Mass\Higher Social Utility Argument

[Data] Promoting more women on executive & supervisory boards of the German DAX 30 companies yields the critical mass in form of role models that is necessary to attract higher amounts of women to executive & supervisory boards in the future (trickle-down effect).<sup>12</sup>

### 8. The Failed Voluntary Commitment Argument

[Data] Voluntary commitments by the German DAX 30 companies to have more women on their executive & supervisory boards from 2001 & 2009 failed.<sup>13</sup>

### 9. The Norway Argument

[Data] A lawful regulation for more women on executive & supervisory boards of stock-listed companies is successful in Norway.

As can already be seen by these rather short reconstructions of the first argumentative level, some of the premises presented above remain rather questionable or can be reduced to other arguments. Except for the equality of opportunity argument, many arguments are mostly supporting only one of the two parts of the main Claim: (a) that there should be more women on executive and supervisory boards, or (b) that this should be achieved with the help of the government's intervention. To argue for (a) does not necessarily entail a justification for (b). For this and other reasons, which the scope of the present paper does now allow me to discuss in greater detail, I will limit the present Analytical Discourse Evaluation to the equality of opportunity argument, which re-appears most frequently throughout the political discourse, as it is embedded in the bill proposals 17\3296 and 17\4683, which are at the same time the most essential documents of the whole debate.

I reconstructed the equality of opportunity argument from records of parliamentary debates, bill proposals, official documents of German research institutions, newspaper articles and other media coverage. More specifically, I identified and selected those documents that are most relevant for the reconstruction of the argument and the debate more generally:

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12 Georges Desvaux, Sandrine Devillard and Sandra Sancier-Sultan, *Women Matter: Women at the Top of Corporations: Making it Happen* (McKinsey & Company, 2010), 8.

13 The DAX companies agreed in 2001 and 2009 to the so-called German Corporate Governance Code (CGC) (<http://www.corporate-governance-code.de/eng/kodex/1.html>) that introduced a voluntary commitment to promote more women onto the top management and supervisory levels.

- a. Bill 17\3296 by the Bündnis 90\Die Grünen.<sup>14</sup>
- b. Bill proposal 17\4683 by SPD.<sup>15</sup>
- c. Report by BMFSFJ.<sup>16</sup>
- d. McKinsey studies Women Matter (2007 & 2010).<sup>17</sup><sup>18</sup>
- e. Report by DIW.<sup>19</sup>
- f. Research report by WD (Scientific research service for the German Bundestag).<sup>20</sup>

These six documents are especially important for the reconstruction and evaluation of the equality of opportunity argument for at least three reasons: Firstly, bills 17\3296 and 17\4683 form the legal foundation. The whole debate takes place on basis of the proposed law amendments that stipulate that the German DAX 30 companies should be required by new articles to have more women on their executive and supervisory boards. Secondly, (a) and (b) are justified by reference to the other documents. Hence, the main line of argumentation for the bills rests upon the findings and factual statements from documents (c), (d), (e), and (f). This means that all debates and hearings taking place in the Bundestag refer to the content of these documents and are for instance indicated as ‘must read’ on the websites of the Bundestag in order to be able to participate in the debate. Lastly, other than being the basis and justification for the bill itself, documents (c) – (f) are also constantly referred to by the media.

It is therefore reasonable and representative of the current political debate to confine my argumentative analysis and reconstruction to the equality of opportunity argument, the above-mentioned documents and the Claim that the German DAX 30 companies should be required by law to have more women on executive and supervisory boards.

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14 Deutscher Bundestag, *Entwurf*.

15 Deutscher Bundestag, *Quotenregelung*.

16 Carsten Wippermann, *Frauen in Führungspositionen*.

17 Desvaux, Devillard-Hoellinger and Baumgarten, *Gender Diversity*.

18 Georges Desvaux, Sandrine Devillard and Sandra Sancier-Sultan, *Women at Top*.

19 Elke Holst and Anita Wiemer, *Zur Unterrepräsentanz von Frauen in Spitzengremien der Wirtschaft Ursachen und Handlungsansätze* (Berlin, German Institute for Economic Research (DIW), 2010).

20 Wissenschaftliche Dienste Deutscher Bundestag, *Aktueller Begriff: Frauen in Führungspositionen in der Wirtschaft*, no. 69/10 (Berlin, Deutscher Bundestag, 2010).

## 2 Reconstructing the Equality of Opportunity Argument<sup>21</sup>

Throughout the debate in question the Claim – as mentioned in Bill 17\3296 (a) and Bill proposal 17\4683 (b) – remains the same: the German DAX 30 companies should be required by law to have more women on executive and supervisory boards. In justifying the Claim, both documents (a) and (b) refer to German constitutional law article 3, clause 2, which states that the German government has the duty to enact equality of opportunity in occupation between the genders. The clause appears in Bill 17\3296 as:

According to article 3, clause 2, of the German constitution the German state shall promote equality (of opportunity) and abolish any societal disadvantages of women that now exist.<sup>22</sup>

With the beauty of the German language comes its semantic ambiguity. No one would question that the German state has the duty to abolish societal discrimination of women. However, whether this clause can be applied in this debate remains to be seen and will depend on the content of other premises in the argument. For in order to not only make logical sense, but also ‘semantic’ sense, the meanings of the concepts in use have to be further specified and applied coherently. Compare the following reconstruction of the first argumentative level:

[Data]            Women and men are not equally represented on executive and supervisory boards of the German DAX 30 companies because of problems of equality of opportunity.<sup>23</sup>

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21 The full reconstruction of the argument can be found at the end of this section. Throughout the analysis I will refer to excerpts and sub arguments, which will be visualized in the respective section. Premises that are taken from documents will be tagged with a footnote, referring to the respective empirical document where they appear.

22 Deutscher Bundestag. *Entwurf*, 6 (“der Staat hat verfassungsrechtlich den Handlungsauftrag für die Förderung der Gleichberechtigung zu sorgen. Artikel 3 Absatz 2 des Grundgesetzes verlangt vom Staat auf den Abbau gesellschaftlicher Benachteiligung der Frauen hinzuwirken.”).

23 Deutscher Bundestag. *Entwurf*.

[Warrant] If women and men are not equally represented on executive and supervisory boards of the German DAX 30 companies because of problems of equality of opportunity, then German DAX 30 companies should be required by law to have more women on all executive and supervisory boards.<sup>24</sup>

[Claim] The German DAX 30 companies should be required by law to have more women on executive and supervisory boards.<sup>25</sup>

If women do not have the same opportunities as men to be employed on the executive and supervisory boards of the German DAX 30 companies, then there is inequality of opportunity (in occupation) between the genders, which under constitutional law the German government has to resolve. The concept of equality of opportunity appears in the Data and the Warrant, which already indicates that the same conception has to be implied coherently in order for the argument to be deductively valid. However, before going into detail about the ambiguities of the German language and the concept of equality of opportunity, I will first consider the normative principle – the Warrant.

### **Warrant and Backing**

The normative principle of the Warrant links the findings of the report by BMFSFJ with the final Claim.<sup>26</sup> Whenever there are problems with equality of opportunity in the allocation of top managements jobs in the German economy, the government should resolve these by lawfully requiring the companies to promote more women onto their executive and supervisory boards. Underlying this Warrant is the belief that an affirmative action intervention by the government that stipulates the amount of women on executive and supervisory boards can resolve equality of opportunity problems that currently manifest themselves in unequal numerical representation on executive and supervisory boards. It further assumes that there are equality of opportunity deficiencies. Why the government should release a lawful requirement, is justified by reference to the German constitutional law:

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24 Ibid.

25 Ibid.

26 Carsten Wippermann, *Frauen in Führungspositionen*.



- [Warrant\Data] Under German constitutional law (article 3, clause 2) the government has the duty to enact equality of opportunity in occupation between the genders.<sup>27 28</sup>
- [Warrant\Warrant] If under German constitutional law the government has the duty to enact equality of opportunity in occupation between the genders, then, if women and men are not equally represented on executive and supervisory boards of the German DAX 30 companies because of problems of equality of opportunity, German DAX 30 companies should be required by law to have more women on all executive and supervisory boards.
- [Warrant\Claim] If women and men are not equally represented on executive and supervisory boards of the German DAX 30 companies because of problems of equality of opportunity, then German DAX 30 companies should be required by law to have more women on all executive and supervisory boards.

This suggests that the government is justified in intervening in the employment of the top management levels of the DAX 30 companies according to the constitutional law, if there is a persisting inequality of opportunity that hinders women from reaching positions on supervisory and executive boards. According to the debate an inequality of outcome – numerical differences of men and women on executive and supervisory boards – testifies to and is equated with an underlying problem of inequality of opportunity (Warrant\Claim). The debate is guided by the belief that inequality of opportunity can be resolved by redistributing the positions in question. So lacking equality of opportunity is taken as criterion to justify the redistribution of jobs on executive and supervisory boards of big enterprises. Regardless of whether the criterion holds or not – something which has to be established by the Data and will be analyzed shortly – the normative principle suggested here is commonly referred to as affirmative action or reverse discrimination: “positive steps taken to increase the representation of women and minorities in areas of employment, education and business from which they have been historically excluded.”<sup>29</sup>

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27 Deutscher Bundestag, *Entwurf*.

28 Deutscher Bundestag, *Basic Law*, accessed April 28, 2011, <http://www.bundestag.de/dokumente/rechtsgrundlagen/grundgesetz/index.htm>.

29 Robert Fullinwider, “Affirmative Action,” in *The Stanford Encyclopaedia of Philosophy*, ed. Edward N. Zalta (Winter 2010 Edition), accessed June 5, 2011, <http://plato.stanford.edu/entries/affirmative-action/>.

Any affirmative action principle that seeks to grant every individual equal opportunities poses distributive problems and problems of justice. A distributive problem because preferentially promoting women effectively redistributes the available positions on executive and supervisory boards of the DAX 30. Positions that would have been held by e.g. male individuals are provided in favor of women. These jobs then are not only allotted according to professional skills and qualification but also according to gender. The redistribution poses problems of justice, for preferring one particular group to another is discrimination. Hence, an affirmative action seeks to lift disadvantage or structural discrimination of one group to inevitably impose it onto another, so discrimination is not abolished but shifted from women to men. Consequently, there must be an additional principle that justifies discriminating against one group rather than another on grounds of lacking opportunities.

Neither an existing inequality of opportunity, nor article 3, clause 2 of the German constitutional law by themselves, justifies the redistribution of work placements. In the debate justifications for preferring women over their male competitors for jobs on executive and supervisory boards, have to do with distributive justice and social utility. While not explicitly specified in the debate, other than in the short excerpt cited above (cf. quote from Bill 17\3296), there are two possible principles that could back up the Warrant of the Warrant for justifying that an affirmative action and redistribution of work placements re-establishes equality of opportunity: redistribution as (a) compensation<sup>30</sup> and (b) as social utility<sup>31</sup>:

#### Version A: Redistribution as Compensation

[Warrant\Warrant\Data] By law preferring women to men in redistributing jobs of DAX 30 executive and supervisory boards compensates for any persisting inequality of opportunity in occupation between the genders.

[Warrant\Warrant\Warrant] If by law preferring women to men in redistributing jobs of DAX 30 executive and supervisory boards compensates for any persisting inequality of opportunity in occupation between the genders, then requiring the German DAX 30 companies by law to have more women on all executive and supervisory boards resolves problems of equality of opportunity.

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30 Judith Jarvis Thomson, "Preferential Hiring," *Philosophy & Public Affairs*, 2 (1973): 364-384.

31 Desvaux, Devillard-Hoellinger and Baumgarten, *Gender Diversity*, 8.

[Warrant\Warrant\Claim] If under German constitutional law the government has the duty to enact equality of opportunity in occupation between the genders, then, if women and men are not equally represented on executive and supervisory boards of the German DAX 30 companies because of problems of equality of opportunity, German DAX 30 companies should be required by law to have more women on all executive and supervisory boards.

#### Version B: Redistribution as Social Utility

[Warrant\Warrant\Data] A higher percentage of female employees on executive and supervisory boards inspire more young women to become members of executive and supervisory boards (role models).

[Warrant\Warrant\Warrant] If [W\W\D, (b)], then requiring the German DAX 30 companies by law to have more women on all executive and supervisory boards will prevent future problems of equality of opportunity (higher social utility).<sup>32</sup>

[Warrant\Warrant\Claim] If under German constitutional law the government has the duty to enact equality of opportunity in occupation between the genders, then, if women and men are not equally represented on executive and supervisory boards of the German DAX 30 companies because of problems of equality of opportunity, German DAX 30 companies should be required by law to have more women on all executive and supervisory boards.

If jobs are to be redistributed on grounds of (a), then it would have to be defined what exactly compensation means. Compensation can be of many kinds: compensation for (past) exclusion as suggested by the numbers found in the report by Kristina Schröder,<sup>33</sup> or compensation for the so called double burden of women (the obligation to combine

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32 Desvaux, Devillard-Hoellinger and Baumgarten, *Gender Diversity*, 8 (“64% of women see the absence of female role models as a barrier to their development.”).

33 Carsten Wippermann, *Frauen in Führungspositionen: Barrieren und Brücken*, (Heidelberg: Sinus Sociovision GmbH, 2010).

career and family), which will be discussed in the Data analysis. The idea is that promoting a female rather than a male employee on the top management level compensates for the female person having suffered from career opportunities because of the double burden. Preferring female over male applicants then arguably compensates their disadvantages of being allegedly excluded from management positions by having lesser job opportunities e.g. due to an obligation to care for the family (time consuming).

However, it should be noted that gender defines a whole class of individuals. Any affirmative action policy that promotes women on executive and supervisory boards of the DAX 30 companies seeks to compensate for a structural inequality by privileging all individuals of one class qua being female over another (males). However, the group that actually suffered career opportunities because they decided to raise a family (mothers) within the class of females is much smaller. Further, it remains highly contestable whether such an action removes the sources of the structural inequality in the first place because it only changes the outcome distribution of e.g. top management jobs. In fact, an affirmative action as envisaged in German politics seeks to structurally change an outcome distribution on the ontological basis of gender, by positively discriminating male economists, for a structural problem, which arguably is not even caused by them. Re-establishing equality of opportunity through compensation therefore depends on the conception of equality of opportunity one embraces, which I will elaborate later. Other ways of “re-establishing” equality of opportunity, e.g. through providing better infrastructures such as daycare centers are marginalized in the public debate and are not discussed in the bill proposals.

Suggestions to redistribute the jobs on grounds of (b), argue that by employing preferentially women on top management levels, new and so far missing role models will precipitate that will yield higher overall social utility, by inspiring young women to become members of executive and supervisory boards. (b) is motivated by findings of the McKinsey study 2007 that states: ‘64% of women see the absence of female role models as a barrier to their development.’<sup>34</sup> The idea is that once more women are brought on the management boards, more women in general would aspire to follow the same occupation, so that in the future there will be ‘naturally’ equal amounts of men and women working on supervisory and executive boards, which in turn would proof – according to certain politicians – that both genders would enjoy equal opportunities.

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34 Desvaux, Devillard-Hoellinger and Baumgarten, *Gender Diversity*, 9.

Again equality of outcome is equated with having equal opportunities to get there. Creating lacking role models for young women has to do with the idea of emancipation – or equalizing their representation in terms of public perception. Holding equal opportunities then seems to be based on the idea of being equally emancipated (management positions being no longer solely associated with men), which is proven by being equally represented in terms of role models.

This line of argumentation assumes that every woman and men intrinsically and perhaps yet unconsciously wants to work in top management positions. Therefore new role models have to be created that attract also the young aspiring female economists. One has to believe that young women are disadvantaged compared to their male competitors because there are no female role models yet. Could a women quota change this? Is it the right approach to promote women on management boards not for their professional qualities but for their being female? Lacking role models are rather weak in justifying a redistribution of work placements, for it would still remain uncertain if a changed outcome distribution would have the desired trickle-down effect.

Summarizing the Warrant side of the equality of opportunity argument, it can be noted that the normative principle of an affirmative action intervention by the government involves a conception of equality of opportunity and justice. Whoever argues in favor of an affirmative action, has to believe that (a) there is persisting inequality of opportunity, and (b) that redistributing jobs will resolve this inequality of opportunity. If no one is morally responsible for her socio-cultural background or other circumstances that lie beyond her control, it can be consequently identified as morally arbitrary to be female or male. This is a stance developed for instance in John Rawls' theory of justice as fairness. In the context of affirmative action, social redress is supposed to make equality of opportunity fair by ensuring that those disadvantaged by personal, social and economic disadvantages have the same prospects for self-determination and pursuing their life plan as other better situated.<sup>35</sup> Accordingly, redistributing jobs on management levels of big companies is fair, iff being female causes some individuals to suffer from disadvantages and lack of access.<sup>36</sup> As will become clear in the following reconstruction of the Data side of the argument, participants of the debate have to agree with Rawls' stance and additionally justify why being female is a disadvantage in the job market of the German economy.

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35 Dennis Mithaug, *Equal Opportunity Theory* (Thousand Oaks: Sage, 1996).

36 Fair because it could become a principle arrived at in the original position and behind the veil of ignorance.

## Data and Verifiers

The report by the BMFSFJ under Kristina Schröder investigated the employment of women in the German DAX 30 and found that in 2010 women were scarce on supervisory and executive boards: only 7,42% of all members on supervisory boards, and 2,16% of all members of executive boards in these companies were female.<sup>37</sup> For Kristina Schröder and other politicians it seemed more than obvious that the numerical underrepresentation on these top management levels was due to the fact that German women simply do not have the same opportunities as German men to reach positions on these boards. This sub-argument can be reconstructed as in the following syllogisms:

[Data\Data]	Percentage of women on supervisory boards of the DAX 30 companies in 2010: 7,42% & percentage of women on executive boards of the DAX 30 companies in 2010: 2,16%. <sup>38</sup>
[Data\Warrant]	If there are 7,42% of women on supervisory boards & 2,16% of women on executive boards of the DAX 30 companies, then women and men are not equally represented on executive and supervisory boards because of problems of equality of opportunity. <sup>39</sup>
[Data\Claim]	Women and men are not equally represented on supervisory and executive boards of the German DAX 30 companies because of problems of equality of opportunity.

The factual Verifiers 1&2 of the Data are true. In 2010 there were fewer women than men employed on executive and supervisory boards of the German DAX 30 companies. However that an inequality of outcome of the distribution of jobs on the management level testifies to a persisting inequality of opportunity between men and women, does not automatically follow. To see why one has to have a closer look at how this Warrant is justified.

## Denying the Antecedent?

Unequal representation of men and women on executive and supervisory boards is blamed on inequality of opportunity, because (a) in Germany men and women enjoy the same educational system and (b) according to German law it is illegal to deny individuals access to a job on grounds of their sex. Thus, formally every woman and man that wants to can

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37 Carsten Wippermann, *Frauen in Führungspositionen*.

38 Ibid.

39 Ibid.

acquire the same professional abilities to accomplish jobs on executive and supervisory boards.<sup>40</sup> On grounds of (a) and (b) it is commonly agreed that women and men are equally well educated and that they formally enjoy the same opportunities to be employed on executive and supervisory boards. Some politicians then conclude that there must be an apparently existing, but previously unnoticed, deficiency in equality of opportunity between the genders that accounts for the unequal distribution on management levels. If this is true, and women are disadvantaged, then the normative principle of the Warrant is applicable and the state would be justified in intervening in the employment policies of the DAX 30 companies. However, compare the following hypothetical backup of the Warrant that seeks to verify the Data:

[Data\Warrant\Data]	Women and men are not equally represented on executive boards of the German DAX 30 & there are equally well-qualified women and men for jobs on executive and supervisory boards of the German DAX 30 because they have access to the same educational system in Germany.
[Data\Warrant\Warrant]	If [D\W\D], then, if there are no problems of equality of opportunity between the genders, women and men should be equally represented on executive and supervisory boards of the German DAX 30.
[Data\Warrant\Claim]	Women and men are not equally represented on supervisory and executive boards of the German DAX 30 companies because of problems of equality of opportunity.

Taken alone, all premises are very well acceptable. However, the conclusion drawn in this case denies the antecedent. The Warrants of the Data [Data\Warrant (1&2)] are therefore not sufficient to link the factual statements from the BMFSJ report to the Data, an unequal distribution of outcome does not warrant inequalities of opportunity. Serendipitously, the numbers revealed by the report are not the only support for the Data of the argument. Nonetheless, they are the most cited numbers (!) in the public discourse to justify the women quota.

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<sup>40</sup> Neglecting, for a moment, socialization and other factors that determine an individual's choice.

## Defining inequality of opportunity: Deutsch and its semantic ambiguities

There are sources that verify why women have fewer opportunities to become member of Germany's top managements. Compare the following reconstruction of another verifying strand for the Data:

[Data\Data]	Women do not have equal opportunities as men to reach positions on executive and supervisory boards in big companies such as the German DAX 30. <sup>41</sup>
[Data\Warrant]	If men and women do not have equal opportunities to reach positions on executive and supervisory boards in big enterprises (DAX 30), then they are not equally represented on those executive and supervisory boards due to problems of equality of opportunity.
[Data\Claim]	Women and men are not equally represented on executive and supervisory boards of the German DAX 30 companies because of problems of equality of opportunity. <sup>42</sup>

The Data of the Data suggest that there are differences in women's careers, which are not warrantable with formal or minimal conceptions of equality of opportunity, i.e. by pointing out that women and men enjoy the same educational chances and employment laws (cf. a & b above). The underlying belief is that people's life should not depend on morally arbitrary circumstances, such as social background or gender, but on ability, effort, and effective choice. As we will see, the implication of this substantive conception of equality of opportunity is that especially being female is believed to forestall career opportunities for women.<sup>43 44</sup>

Interestingly, different conceptions of equality of opportunity are reflected in the different meanings of the German term *Gleichstellung*, which obfuscates the whole debate. Throughout the debate and especially in the draft of the bill the term, *Gleichstellung* and the respective verb *gleichstellen* are used to refer to at least four different meanings:

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41 Carsten Wippermann, *Frauen in Führungspositionen*.

42 Deutscher Bundestag, *Entwurf*.

43 Adam Swift, *Political Philosophy* (Cambridge: Polity Press, 2006).

44 Richard Arneson, "Equality of Opportunity," in *The Stanford Encyclopaedia of Philosophy*, ed. Edward N. Zalta (Winter 2010 Edition), accessed June 5, 2011, <http://plato.stanford.edu/entries/equal-opportunity/>.



1. emancipation: the term is used to mean that women and men should be equipollent for the decision making in big companies.
2. equalization: means to numerically align the amount of men and women e.g. on executive and supervisory boards.
3. Gleichstellung to grant men and women equal opportunities.
4. Gleichstellung can also refer to gender-mainstreaming – “ensuring that gender perspectives and attention to the goal of gender equality are central to all activities and government policies.”<sup>45 46</sup>

The difficulty with these semantic ambiguities is that the same concept is used at different points in the debate to refer to different meanings. So when speaking of ensuring Gleichstellung of men and women according to the constitutional law, it is referred to meaning 3, however when speaking of Gleichstellung on executive and supervisory boards people, refer to meaning 2 and possibly also 3 and 4. To apply the normative Claim that the government has the duty to enact equality (of opportunity) between the genders to mean that men and women should be gleichgestellt according to meaning 1 and 2, would render the argument faulty, since equality of opportunity as referred to in the Warrant does not necessarily permit an equality of outcome. Gleichstellung is however not a weasel word. It can mean several things at the same time and always leaves interpretative space for the recipient, which makes it a magnificent tool for politicians. In order to avoid the semantic ambiguities, I reconstructed the premises with the term ‘problems of equality of opportunity’ taken from document (a).

### Do vs. Have To

So how does being female impair women from reaching positions on executive and supervisory boards when they are enjoying the same educational system and formal equality of opportunity? Compare the following reconstruction of the verifying strand for the Data of the Data\Data:

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45 “Gender Mainstreaming,” UN Women, accessed June 5, 2011, <http://www.un.org/womenwatch/osagi/gendermainstreaming.htm>.

46 Bundesministerium für Familie, Senioren, Frauen und Jugend, *Strategie “Gender Mainstreaming”* (Berlin: BMFSFJ, 2012), accessed July, 2013, <http://www.gender-mainstreaming.net/>.

- [Data\Data\Data] Due to family and children women do pause their occupation more often and longer than compared to men.<sup>47</sup>
- [Data\Data\Warrant] If women do pause their occupation more often and longer than compared to men, then they will not have equal opportunities in the job compared to men.<sup>48</sup>
- [Data\Data\Claim] Women do not have equal opportunities as men to reach positions on executive and supervisory boards in big companies such as the German DAX 30.<sup>49</sup>

Underlying the explanation for the lacking equality of opportunity for women on top management levels, is the belief that women care for family and children and are therefore disadvantaged. The findings of the Data of the Data\Data, appear in the McKinsey study Women Matter 2007 (document b), which again relies on a Harvard Business Review from 2005. Amongst other things, the review found that “career breaks for women are mainly motivated by the need to spend more time with the family,” with 37% of the surveyed female US college graduates voluntarily stopping working.<sup>50</sup> <sup>51</sup> It seems plausible that pausing a job on management levels leads to fewer opportunities for advancement in the job. Compare the following Backing:

- [Data\D\W\Data] If women are not always available and mobile, then they will have fewer opportunities in the job compared to men.<sup>52</sup>
- [Data\D\W\Warrant] If women do pause their occupation they are not always available and mobile.
- [Data\D\W\Claim] If women do pause their occupation more often and longer than compared to men, then they will not have equal opportunities in the job compared to men.<sup>53</sup>

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47 Desvaux, Devillard-Hoellinger and Baumgarten, *Women at top*.

48 Desvaux, Devillard-Hoellinger and Baumgarten, *Gender diversity*.

49 Carsten Wippermann, *Frauen in Führungspositionen*.

50 Sylvia Ann Hewlett and Caroly Buck Luce and Peggy Schiller, “The Hidden Brain Drain – Off Ramps and On Ramps in Women’s Career,” *Harvard Business Review* 83 (2005): 31-57.

51 Ibid.

52 Desvaux, Devillard-Hoellinger and Baumgarten, *Gender Diversity*.

53 Ibid.

According to the review, availability and mobility are key for career opportunities. That is why women (and more generally all individuals) who pause their occupation and spend less time in their job, have fewer opportunities than their male competitors, to work their way up. The underlying assumption is that the work environment of big companies requires their management personal to be available and flexible at all times. Accordingly career opportunities can only develop, if these prerequisites are met. Whether a women quota also changes these structural problems remains however doubtful.

More importantly, the conclusion that generally women do not have equal opportunities as men to reach top management positions does not support the substantive conception of equality of opportunity needed to validly apply the normative principle of the Warrant. If women do pause their occupation – that is voluntarily chose to do so – they are not structurally disadvantaged and would have no lack in equality of opportunity. Accordingly, the different choices made by men and women would determine their unequal distribution on top management positions. Women do not suffer from structural inequality of opportunity by the simple fact of being female. For the unequal distribution on management levels would not be due to unequal chances to reach those positions, but would rather reflect different choices. Consequently, the government would not have the right to intervene on equality of opportunity grounds, as argued for in the Warrant.

So in order to render the whole argument logically valid, advocates have to belief that women are forced to care for family and children, and are therefore enjoying fewer opportunities to reach top management positions. The findings of the McKinsey study and the Harvard Business Review, as factual, empirical findings, by themselves do not support this Claim. In fact, it rather seems an interpretation of these factual findings in the public debate that tends towards the belief that women are actually forced to care for family and children. The verification of the Verifier has therefore to be rephrased:

- [Data\Data\Data] Due to family and children women have to pause their occupation more often and longer than compared to men.
- [Data\Data\Warrant] If women have to pause their occupation more often and longer than compared to men, then they will not have equal opportunities in the job compared to men.
- [Data\Data\Claim] Women do not have equal opportunities as men to reach positions on executive and supervisory boards in big companies such as the German DAX 30.

When rephrased this way the Data of the Data\Data would need to be backed up. In the debate it seems to be treated as common knowledge that the traditional picture of women stands in association to family and household. In order to emphasize the problem compare the following – slightly exaggerated – possibility for the verification of the Data of the Data\Data\Data:

- [Data\D\D\Data] Women are culturally forced to care for children and family.
- [Data\D\D\Warrant] If women are culturally forced to care for children and family, then they have to pause their occupation more often and longer.
- [Data\D\D\Claim] Due to family and children women have to pause their occupation more often and longer than compared to men.

It has to be agreed to the underlying premise that it is culturally seen as women's responsibility to raise families. This problem of being double burdened, means that any choice to raise a family renders the possibility of a career untenable. It is society's conservative picture of the role of women, and the belief that women (qua being female so understood) are double burdened, which decreases their opportunities to work their way up to executive and supervisory boards. A structural problem that – if it applied to being female – would allow the intervention by the state.

Figure 10.1 The Equality of Opportunity Argument: Redistribution as Compensation (Version A)

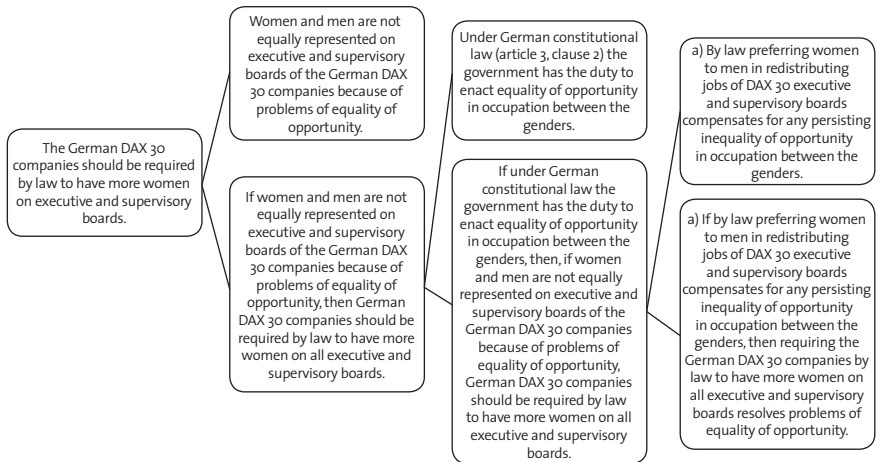


Figure 10.2 The Equality of Opportunity Argument- Redistribution as Social Utility (Version B)

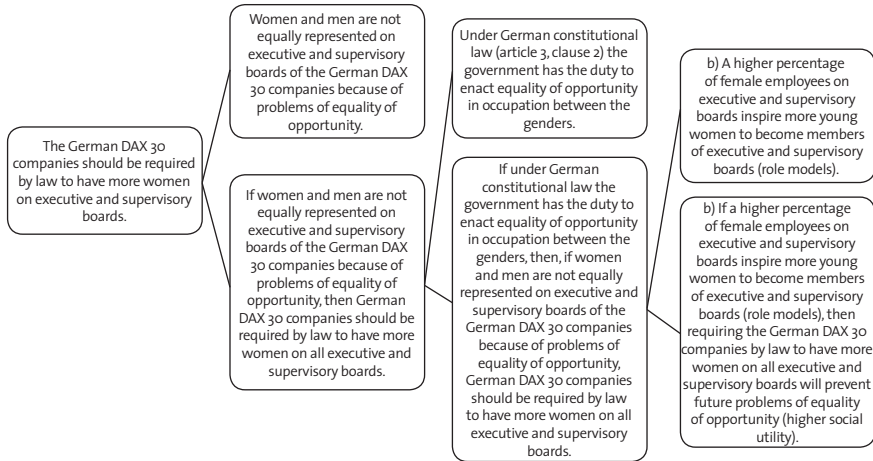


Figure 10.3 The Equality of Opportunity Argument – Data (Version A)

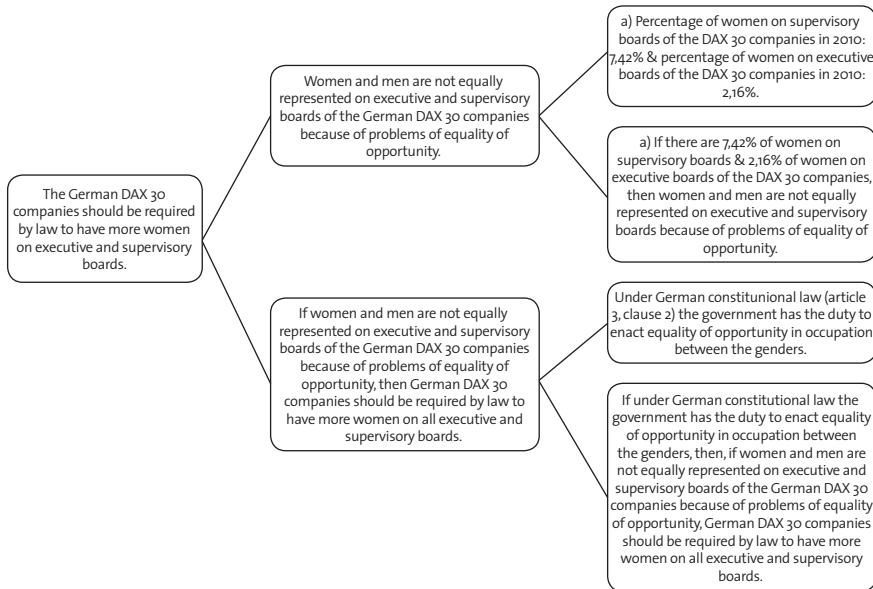
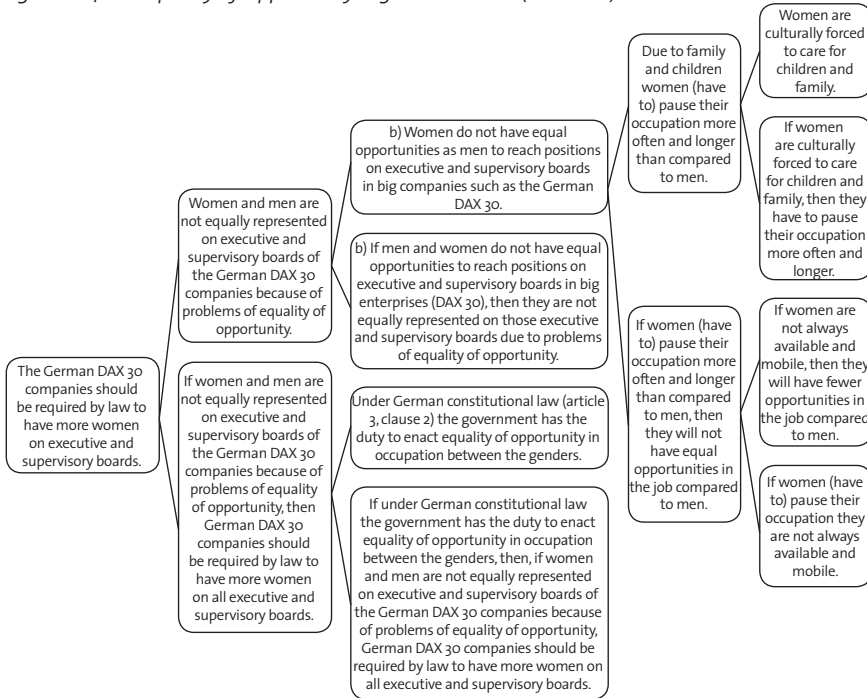


Figure 10.4 The Equality of Opportunity Argument – Data (Version B)



### 3 Evaluating the Equality of Opportunity Argument: Can Structural Problems be Solved by Redistribution?

The equality of opportunity argument hinges on the belief that in the German society women are structurally disadvantaged. Only then can one validly claim that there is an inequality of opportunity to reach top management jobs and only then could the constitutional law justify an affirmative action program. If one does not believe that it is intrinsically or traditionally women’s responsibility to raise and care for the family – which probably might be a quite controversial postulation – then the inequality of outcome, the unequal numerical amounts of women and men employed on top management levels of the DAX 30 companies, cannot be argued to originate from unequal (career) opportunities. Rather, different individual choices amount to a different distribution on executive and supervisory boards.

Assuming that Germany's cultural setting actually puts social pressure on women to raise a family, they would effectively enjoy fewer chances to succeed in their profession, given the current structure of the DAX 30 companies. Does an affirmative action program that redistributes positions on executive and supervisory boards of the DAX 30 remedy the causes of the structural disadvantages of women? Would redistribution compensate for the inequalities of opportunity? It does not seem that promoting women on top management levels abolishes the dilemma they face, when they have to make the alleged decision between family and career. What are the benefits for women that are promoted onto the executive boards? Do the suspected inequalities for having to care for the family disappear?

In fact the problem is that an affirmative action program can only constitute one half of a solution to the problem, if the logic of the inequality of opportunity argument is correct. It seems that rather the structure of companies and the infrastructure such as daycare centers, kindergartens etc. has to be improved or changed, in order to guarantee that both, young mothers and fathers, have an opportunity to pursue a career and start a family at the same time. The discussion about the lack in daycare centers roared through the German public in 2012 and 2013, and posed a very expensive and difficult task. Compared to that, it seems that the women quota is just a cheap way to shift the responsibility from Berlin to the executive and supervisory boards of the DAX 30.

The realization of the envisaged affirmative action program has at least two unfavorable consequences. As mentioned earlier, in the short run, the institutionalization of the women quota would discriminate against male applicants for executive and supervisory boards. Secondly, a redistribution of the top management workplaces does not solve the underlying structural problems that – according to the argument itself – cause the inequality of opportunity.

## 4 Conclusion

Unsettled by the fact that only very few women can be spotted on the landscape of Germany's top management levels and pressurized by Europe-wide ambitions to tighten the corporate governance regulations to include more women in top management decision-making, in 2011 Berlin paced to take action. What is presented as a remedy to alleged inequalities of opportunity between men and women in the German society is in fact a redistributive policy that does not change the actual causes it declares to resolve. Two drafts of a bill that have been discussed several times in the Bundestag in 2011, 2012 and 2013 propose that the German government has the duty to ensure equality of

opportunity between the genders, by affirmatively promoting women onto executive and supervisory boards of the stock listed big companies by means of a legal women quota.

The problem begins with assumptions about the nature of the alleged inequality of opportunity between the genders. In order to validly claim that women are structurally disadvantaged in the German society it has to be presupposed that they are culturally forced into the role of the housewife and mother. By appealing to traditionalist deadlocked ideals about the alleged obligation of women, Von der Leyen, Schröder and Künast et al. try to convince the German public that woman are categorically handicapped in their career aspirations to work on executive and supervisory boards of the German top companies. It remains highly questionable whether an affirmative action policy really is the best principle to abolish the alleged structural disadvantages for women.