EMPLOYMENT, THE FAMILY, AND THE LAW: CURRENT PROBLEMS IN GERMANY

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I. INTRODUCTION

A. The Current Discussion on Compatibility of Occupational and Family Life

Today, the discussion about the (in)compatibility of occupational and family life, which began more than twenty years ago, is more topical than ever. Until a few years ago, reconciliation of family and professional life was primarily a demand of equal opportunities policies,[1] aiming at equal chances for women to learn and perform a job in order to avoid financial dependencies from a male breadwinner on the one hand, and at a chance for women's self-realization in professional life on the other. During the last few years, however, the objective has changed from equal opportunities to a sustainable family policy.[2]

Although the relevant demographic figures have been well-known for quite a while, politics and the public have only recently discovered that within the next few decades the drastic birth decline[3]

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1. *Cf.* Spiros Simitis, *Welche Maßnahmen empfehlen sich, um die Vereinbarkeit von Berufstätigkeit und Familie zu verbessern?*, 60 DEUTSCHER JURISTENTAG (DJT) 9 (1994).

2. Christiane Lindecke, *Von der Gleichstellungspolitik der Geschlechter zur nachhaltigen Familienpolitik*, WSI-MITTEILUNGEN 473 (2005); Gerhard Engelbrech, *Transferzahlungen an Familien - demographische Entwicklung und Chancengleichheit*, WSI-MITTEILUNGEN 139 (2002). As regards suggestions for a new family policy cf. Siebter Familienbericht, *Familie zwischen Flexibilität und Verlässlichkeit—Perspektiven für eine lebenslaufbezogene Familienpolitik*, BT-Drs. 16/1360, 260 ff.

3. In 2004, the average number of children per women was at an all-time low of 1.36. Since the number of births has been at a similar low level for the last three decades, every generation of children is a third smaller than their parents. For quite a while, immigration from abroad was able to balance the fact that the number of deaths exceeded the number of births. Since 2003 this is over and the population of Germany is shrinking. *Cf.* STEFFEN KRÖHNERT, FRANZISKA MEDICUS & REINER KLINGHOLZ, DIE DEMOGRAPHISCHE LAGE DER NATION,

will show grave consequences for the German economy, the statutory systems of social security, and, as a consequence, for our wealth.[4] It did not take long before the culprits for this development were identified: female academics.[5] Instead of giving birth and educating future contribution payers for the statutory pension system, many of them study, find a job, and have a career. Of course, most of them plan to have a family sometime in the future.[6] The formation of a family is further and further postponed—often until it is, due to biological reasons, too late.[7]

The individual motives for postponing motherhood are often complex and cannot simply be explained by the fact that it is still rather difficult to have a career and children at the same time. Today, many men of all age groups hesitate or even refuse to have children,[8] not necessarily only but particularly if they know or assume that their partner would expect them to take over their share in child care. If this resistance is not formulated openly but simply executed by putting the partner off to "later," women often realize too late that they do not have any or the wrong partner for the adventure of parenthood. But even if both partners are willing to contribute their share, the requirements of modern professional life—flexibility with regard to time, flexibility with regard to place of work (worldwide), steady increase in fixed-term contracts, and, even worse, the increase of unpaid internships particularly for beginners[9]—complicate reconciliation of family and working life, particularly if both partners have a demanding job.

Under the pressure of the demographic development, allegedly requiring not only an increase of birth rates but at the same time an

WIE ZUKUNFTSFÄHIG SIND DEUTSCHLANDS REGIONEN? (2006). A shorter version of this study is published *at* http://www.berlin-institut.org/berlin-institut_studie_2006.pdf.

4. *Cf.* FRANK-XAVER KAUFMANN, SCHRUMPFENDE GESELLSCHAFT (2005).

5. *Cf.* FRANK SCHIRRMACHER, MINIMUM, VOM VERGEHEN UND NEUENTSTEHEN UNSERER GEMEINSCHAFT (2006).

6. Seventy-five per cent of those beginning to study wish for a life with children; only 6% do not want any children. *Cf.* Wunschkind.de, FAZ of 25.2.2005. For more details, see CHARLOTTE HÖHN ET AL., KINDERWÜNSCHE IN DEUTSCHLAND, KONSEQUENZEN FÜR EINE NACHHALTIGE FAMILIENPOLITIK, STUDIE DES BUNDESINSTITUTS FÜR BEVÖLKERUNGSFORSCHUNG (2006).

7. Whereas West German women in the year 1980 were on an average 25.2 years of age at the birth of the first child of their marriage, this has risen to 29 years old by the year 2000.

8. The fact that still significantly more males than females are and stay childless, is still often ignored. In the age group of 35–40 years 17.4% of women but 33.6% of men do not have children. Nevertheless the childlessness of men is a taboo topic. See further MEIKE DINKLAGE, ZEUGUNGSSTREIK, WARUM DIE KINDERFRAGE MÄNNERSACHE IST (2005); Susanne Gaschke, *Lasst die Männer nicht in Ruh*, DIE ZEIT, 15.12.2005; Johanna Adorján, *Was ist nur mit den Frauen los?*, FRANKFURTER ALLGEMEINE SONNTAGSZEITUNG, Mar. 19, 2006, at 25.

9. *Cf. Generation Praktikum - Jung, gut ausgebildet, fleißig - und ein fester Job in weiter Ferne*, DER SPIEGEL Feb. 3, 2006, cover story.

increase in female employment,[10] the new coalition government has decided to promote compatibility of family life and occupational life further, *inter alia* by introducing a rather expensive benefit called "parental benefit" (*Elterngeld*).[11] In times of high public deficits, the new Federal Minister of Family Affairs, Senior Citizens, Women and Youth, herself having seven children and holding a masters degree in political economics and a Ph.D. in medicine, has committed herself intensively in order to find the necessary majority among her colleagues.[12]

Whether or not the introduction of the new benefit will change anything for the better, however, remains to be seen.[13] Although the legal framework for working parents has been improved step by step, in the end considerably during the last twenty years (parental leave was introduced and prolonged,[14] a right to part-time work was introduced,[15] reconciliation of family and professional life became a task of the works council[16]), reconciliation of family and professional life is still highly problematic in today's Germany. There is one major obstacle that can hardly be overcome by law: In Germany, even today (full-time) employment of mothers is not socially accepted without reservation. A good mother simply has to be with her children.[17] Mothers of (smaller) children who nevertheless have to or, even worse, want to work are regarded as bad mothers. For these, the

10. The European Union Integrated Guidelines for Jobs and Growth (2005–2008), Brussels 2005, aim at an average employment rate of at least 60% for women by 2010. In Germany, the share of women in gainful employment has steadily increased during the last years. In 2004, 59.2% of all women between 15 and 64 were gainfully employed, while the respective share of men in gainful employment was 70.8%. However, at the same time the total volume of women's working hours in gainful employment has decreased, due to a growth in part-time work. Twenty-three percent of females in gainful employment are part-time workers. *Cf.* 2 BILANZ CHANCENGLEICHHEIT, FRAUEN IN FÜHRUNGSPOSITIONEN 26 (Federal Government et al. ed., 2006).

11. *Cf.* GERMAN GOVERNMENT, NATIONAL REFORM PROGRAMME FOR GERMANY "INNOVATIONEN FORCIEREN - SICHERHEIT IM WANDEL FÖRDERN - DEUTSCHE EINHEIT VOLLENDEN" 50 (Berlin 2005).

12. *Cf. Ich bin Deutschland, Der Kreuzzug der Ursula von der Leyen für Kinder, Kirche und Karriere*, DER SPIEGEL, June 1, 2006, at 22–34.

13. A look at the situation in the Nordic countries of Norway, Sweden, Finland, and Denmark, which served as a model for the parental benefit in Germany, shows that the introduction of parental benefit alone may not suffice. *Cf.* Gerda Neyer, *Elterngeld nur ein Teil in einem großen Puzzle, Sozialpolitik und ihr Effekt auf die Geburtenentwicklung in den nordischen Ländern*, 3 DEMOGRAPHISCHE FORSCHUNG (2/2006).

14. *See infra* III.A.

15. *See infra* III.C.

16. *See infra* VI.A.

17. From this angle, the extinction of the Germans is of course a consequence of feminism. See the recent article of the prominent anchor woman Eva Herman, *Die Emanzipation - ein Irrtum? Plädoyer für die weibliche Entfaltung in der Familie*, 5 CICERO 114 (5/2006).

metaphor *Rabenmutter* (literally: a raven's mother, meaning a cruel and uncaring mother) has been coined.[18]

A cynical person might suspect that the rejection of working mothers is nothing more than a convenient argument, ostensibly aiming at the child's best interests only, but in fact preventing women from becoming too ambitious or, equally bad, boosting unemployment statistics on the one hand, and a self-exculpation of those who are happy being able to quit their demanding jobs in order to stay with their children at home (and can afford to do so), on the other. But it is nevertheless wide-spread and very effective. As a consequence, many women who love their job rather selflessly forgo their wish to have a family than to risk becoming a selfish *Rabenmutter*. If they nevertheless decide to have children, they risk being thrown back into the role models of family life in the 1950s.[19] Of course, things are even more complicated due to the fact that child care facilities are still a catastrophe in (West) Germany.[20] But this again has to do with the ideal of a good mother, taking care of her children herself.

B. The Constitutional Framework

The German constitution does not explicitly aim at reconciling family and occupational life. However, according to Article 6(1) GG, marriage and the family shall enjoy the state's special protection. According to the Federal Constitutional Court (*Bundesverfassungsgericht*—BVerfG) and the prevailing opinion among scholars of constitutional law, the fundamental right granted in Article 6(1) GG encompasses the spouses' freedom to organize the marriage and particularly the division of tasks.[21] Although the BVerfGE has furthermore stated that the state's duty to protect the

18. *Cf.* ANKE DÜRR & CLAUDIA VOIGT, DIE UNMÖGLICHEN - MÜTTER DIE KARRIERE MACHEN (2006), where eleven examples of working mothers who even made a career are portrayed. It is illuminating that the book, published in 2006, is advertised with the hint that it contains "provocative" examples.

19. *Cf. Die Frauen-Falle*, 17 DER SPIEGEL 34–45 (2006); *Frankfurter Allgemeine Sonntagszeitung*, DIE LASTEN IM LEBENSBUND, Apr. 2, 2006, at 74; Florian Schulz & Hans-Peter Blossfeld, *Wie verändert sich die häusliche Arbeitsteilung im Eheverlauf? Eine Längsschnittstudie der ersten 14 Ehejahre in Westdeutschland*, 1 KÖLNER ZEITSCHRIFT FÜR SOZIOLOGIE UND SOZIALPSYCHOLOGIE (2006) (after fourteen years, in 85% of couples the work was distributed in accordance with traditional role models).

20. *See infra* IV.A.

21. BVerfG, dec. of 14.11.1984, BVerfGE 68, 256 (268); dec. of 18.4.1989, BVerfGE 80, 81 (92); dec. of 17.11.1992, BVerfGE 87, 234 (259); Arnulf Schmitt-Kammler, *in* GG, KOMMENTAR art. 6, ¶ (Michael Sachs ed., 3rd ed. 2003); Gerhard Robbers, *in* VON MANGOLDT ET AL., I GG, KOMMENTAR art. 6, ¶ 15 (5th ed. 2005).

family resulting from Article 6(1) GG also entails the state to encourage compatibility of family and professional life,[22] the abolishment of incentives for the traditional housewife marriage is still often regarded as an interference with Article6(1) GG and hence as unconstitutional.[23]

C. International Law

Reconciliation of family and professional life is also an object of international law. A proper discussion of the relevant instruments of international law, however, would exceed the scope of this article.[24] Only the Unification Treaty of August 31, 1990,[25] between the Federal Republic of Germany and the German Democratic Republic shall be mentioned here. Since the percentage of mothers participating in gainful employment was traditionally high in the former GDR,[26] Article 31(2) of the Unification Treaty obliges the German legislature to organize the legal framework taking into consideration the compatibility of family and occupational life in view of differing legal and institutional points of departure regarding gainful employment of mothers and fathers.

D. Families in Germany—Some Facts and Figures

Before discussing the current problems with regard to employment, the family, and the law, it seems necessary to explain first what constitutes a family in Germany today.

First of all, German families are rather small. Since the 1950s, the average household size has fallen by one quarter. In West Germany in 1955, there were still 3.0 persons per household, in 1972, 2.7, and in the year 2000 only 2.2 persons per household. In East Germany, the

22. BVerfGE, dec. of 28.5.1993, BVerfGE 88, 203 (260); Bodo Pieroth, *in* HANS D. JARASS & BODO PIEROTH, GG, KOMMENTAR art. 6, ¶ 10 (8th ed. 2006).

23. *Cf.* Bernhard Klose, *Neugestaltung des Ehegattensplittings contra Freiheit der Familiengestaltung?*, ZRP 128 (2003).

24. *Cf.* Rolf Birk, *Welche Maßnahmen empfehlen sich, um die Vereinbarkeit von Berufstätigkeit und Familie zu verbessern?* Gutachten E zum 60, DJT E 22–24 (1994).

25. BGBl. II, 889.

26. In the former GDR, the percentage of mothers participating in gainful employment was traditionally high. Before the (re-)unification of the two Germanies, nine out of ten mothers were gainfully employed. Due to structural changes and rationalizations at the East German labor market, the share of women (with and without children) in gainful employment decreased drastically in the first half of the 1990s. The percentage of actively employed mothers has stabilized at about 75% and has slightly declined since. GENDER DATENREPORT, KOMMENTIERTER DATENREPORT ZUR GLEICHSTELLUNG VON MÄNNERN UND FRAUEN IN DER BUNDESREPUBLIK DEUTSCHLAND 277 (Waltraud Cornelißen ed., 2005).

size of households has declined from 2.3 to 2.2 persons per household since 1991.

Second, households where two generations are living together are a minority in Germany today. In 2000, only one in three households was a multi-generation household. Moreover, multi-generation households are made up almost exclusively of two-generation households, that is of families with parents and children. Only 0.3 million households, i.e., 0.8 % of all households, house three or more generations. Grandparents, parents, and children living under one roof are thus a dwindling minority of all households.[27] Three quarters of all two- and multi-generation households consist of married couples with children, 6% of single parents, and 1% of non-married couples with children.[28]

Third, although the proportion of children living in a married couple environment has declined over the period 1972 to 2000 by some 10 percentage points, the "normal family" is still the predominant family environment for growing children. In 2000, 84% of all children under 18 lived together with married parents (East Germany: only 69 %).[29]

Fourth, families have become quite fragile entities. Today, one marriage in four ends in divorce before fifteen years of marriage have elapsed. The divorce rate is also increasing in the case of couples who have been married longer. On the basis of the divorce rate according to the duration of marriage for 2000, it can be expected that 37% of marriages will end with divorce.[30]

Fifth, family does not only take place in the form of marriages. The number of non-married partnerships has risen steeply over the past few decades. Today 8% of all families consist of unmarried couples cohabiting.[31] In the year 2000 in Germany there were some 2.1 million unmarried couples living together, of these 30% with children. Living together without a marriage license is especially widespread among young, mainly childless couples. Few couples today wait until after they have married before starting a common household. The vast majority of couples have a phase of cohabitation.[32]

27. *Cf.* HERIBERT ENGSTLER & SONJA MENNING, FAMILIES IN GERMANY—FACTS AND FIGURES 5 (Federal Ministry for Family Affairs, Senior Citizens, Women and Youth ed., 2004), *available at* http://www.bmfsfj.de.

28. *Id.* at 5.

29. *Id.* at 7.

30. *Id.* at 21.

31. *Id.* at 7.

32. *Id.* at 10.

Sixth, family can also mean that partners of the same sex are living together. In the year 2000 in Germany there were at least 47,000 partners of the same sex living together. Of these, 59% are male couples and 41% are female. There are children in one of eight same sex partnerships, in one in three at least one partner had formerly been married.[33]

Last but not least, in many families today there is only one adult person, for single parenthood has become a widespread living arrangement in Germany over the past few decades. Seventeen per cent of families with children are single parent families.[34] In 2000, there were 1.77 million one parent families in the narrower sense (i.e., single parents with children under 27 and without any further persons in the household). Of these 86% were single mothers and 14% single fathers.[35] The great majority of single parents (63%) are divorced, about one quarter (23%) of all single parents is unmarried. One parent families are generally one child families.[36]

II. PROTECTION OF (EXPECTANT) MOTHERS

Since pregnancy and birth entail grave physical strains and often mental burdens for the (expectant) mother, protection of expectant mothers and of those who have recently given birth is a matter of course in modern societies. At the EU level, maternity protection is guaranteed by EC-Directive 92/85/EEC.[37]

At the national level, Article 6(4) GG grants every mother the protection and care of the community. As a consequence, the legislature is obliged to provide effective dismissal protection for expectant mothers and mothers who have recently given birth, even if public budgets are extremely debited and if fundamental restructuring after the re-unification had to take place.[38] The present law of maternity protection, i.e., the MuSchG (*Mutterschutzgesetz*—Act

33. *Id.* at 12.
34. *Id.* 7.
35. *Id.* at 8.
36. *Id.* at 9.
37. Council Directive 92/85/EEC of Oct. 19, 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC), OJ EC 1992, L 348/1. *Cf.* MARLENE SCHMIDT, II DAS ARBEITSRECHT DER EUROPÄISCHEN GEMEINSCHAFT ¶¶ 49–62 (2001).
38. BVerfG, dec. of 24.4.1991, BVerfGE 84, 133 (156); BVerfG, dec. of 19.12.1991, BVerfGE 85, 167 (175); BVerfG, of 10.3.1992, BVerfGE 85, 360 (372); BAG, dec. of 10.10.1996, AP Einigungsvertrag Art. 38 Nr. 6.

Protecting Expectant Mothers and Mothers) of 1952,[39] however, accommodates the obligation resulting from Article 6(4) GG.[40] The MuSchG mainly prohibits work performance (Section A), prescribes continued remuneration (Section B), and, quite important, contains a strict ban on dismissals (Section C).[41] The protection granted by the MuSchG is supplemented by the employee's right to lie if being enquired by the employer about a possible pregnancy, developed by case law (Section D).

A. Ban on Work Performance

The general ban on work performance as granted by Directive 92/85/EEC[42] is guaranteed by sections 3(2) and 6(1) MuSchG. Accordingly, expectant mothers may not be employed during the last six weeks before the expected date of confinement and before eight weeks after confinement has expired. In case of premature delivery and if the women delivers twins or even more children, the period during which the mother may not be employed after confinement extends to twelve weeks. In the event of premature delivery (as well as any other confinement earlier than expected), the period of non-employment after confinement is prolonged by the span of time during which the period of non-employment before confinement was shorter than six weeks. While the ban on work performance after confinement does not allow for any exceptions, the ban on work performance before confinement can be waived. It only applies if the expectant mother has not explicitly declared that she wishes to work. The declaration, however, may be withdrawn at any time.

Furthermore, the MuSchG prohibits employment of expectant mothers and those who have recently given birth with work possibly endangering the child:[43] According to section 4(1) MuSchG, expectant mothers may neither be employed with heavy physical work nor be exposed to damaging effects of health endangering materials or

39. BGBl. I, 69. For the history of origins of protection of expectant mothers in Germany *cf.* KATJA NEBE, BETRIEBLICHER MUTTERSCHUTZ OHNE DISKRIMINIERUNG, DIE RICHTLINIE 92/85/EG UND IHRE KONSEQUENZEN FÜR DAS DEUTSCHE MUTTERSCHUTZRECHT 28 (2006).

40. BVerfG, dec. of 13.11.1979, BVErfGE 52, 357 (365).

41. For a change of paradigm from bans of employment to assessment, information, and prevention of specific dangers for expectant mothers pleads, see NEBE, *supra* note 39.

42. Accordingly, Member States shall take the necessary measures to ensure that workers are entitled to a continuous period of maternity leave of a least fourteen weeks allocated before and/or after confinement in accordance with national legislation and/or practice. The maternity leave must include compulsory maternity leave of at least two weeks allocated before and/or after confinement in accordance with national legislation and/or practice.

43. *Cf.* Articles 6 and 7 of Directive 92/85/EEC.

rays; of dust; of gases or steams; of heat, coldness, or wetness; of vibrations or noise. A long list of examples is given in section 4(2) nos. 1–8 MuSchG. Section 8 MuSchG provides that expectant mothers and those who have recently given birth shall neither work overtime nor at night between 8 p.m. and 6 a.m. nor on Sundays and holidays. Moreover, expectant mothers may not perform work if, according to medical reference, the mother's or the child's life or health would otherwise be endangered, section 3(1) MuSchG.

B. Remuneration During Bans on Work Performance

In order to prevent the employee from economic pressure to work, Directive 92/85/EEC provides for financial support during bans on work performance. Under German law, continued payment of the usual net remuneration is provided.

If any of the specific bans on work performance in terms of sections 3(1), 4, 6(2)–(3), or section 8 MuSchG applies, the employer is obliged to pay continued remuneration in accordance with section 11 MuSchG.[44]

For the duration of the general ban on work performance during the last six weeks before and the first eight weeks after confinement as granted by sections 3(1) and 6(1) MuSchG, the employee is entitled to maternity benefits (*Mutterschaftsgeld*). Maternity benefits are paid by the statutory health insurance; it amounts to 13€ per day; the difference between maternity benefits and the employee's usual net income is, according to section 14 MuSchG, to be covered by the employer. In 1965, when section 14 MuSchG was introduced, a woman's net income was usually lower than 13€ (25 DM at that time). As a consequence, hardly any employer had to contribute. Today, however, employers do not only "contribute" to maternity benefits but *de facto* pay continued remuneration. In 2000, the financial burdens for employers in Germany resulting from section 14 MuSchG amounted altogether to 2.89 billion DM.[45]

In order to prevent that the financial burden resulting from section 14 MuSchG works as a deterrent to employing women, the legislature introduced a procedure to balance the financial burdens resulting from section 14 MuSchG for small and medium-sized

44. The remuneration to be paid amounts to the average remuneration of the last thirteen weeks or the last three months preceding the month when the pregnancy occurred.

45. Sozialbudget 2001, Teil B des Sozialberichts 2001, BT-Drs. 14/8700, 261.

enterprises. Employers employing not more than thirty employees[46] are obliged to pay a certain percentage of the sum of all wages to the statutory health insurance. If one or more of their employees becomes pregnant, the employers' payments in accordance with section 14, 11 MuSchG are fully reimbursed by the statutory health insurance.

For those employers involved in the cost splitting procedure, an employee's pregnancy only entails organizational but no extra financial costs. For all other employers, however, employment of women in their childbearing years still bears additional financial risks compared to the employment of men of the same age.

C. Dismissal Protection

Directive 92/85/EEC prohibits the dismissal of pregnant employees. The right to protection from dismissal for a reason connected with maternity and the right to paid maternity leave furthermore belongs to the fundamental rights granted by Article II-93(2) of the not yet enacted Treaty establishing a Constitution for Europe.

Under German law, section 9 MuSchG interdicts the dismissal of a woman during the period from the beginning of her pregnancy until four months after she has given birth to a child. Only in very exceptional cases, in which the continuation of the employment relationship would be absolutely unacceptable for the employer, a pregnant woman or a woman who has recently given birth to a child can be dismissed—provided that the *Land* Office for Labor Inspection gives its consent.[47] Since the prerequisites for such an exception are extremely high, for a long time these cases did not play a role in

46. Until December 2005, only employers with not more than twenty employees were covered by the cost splitting procedure; furthermore, they were reimbursed only 80% of their cost. In a decision of November 18, 2005 (BVerfGE 109, 64), the Federal Constitutional Court (*Bundesverfassungsgericht* - BVerfG) found that section 14(1), s. 1 MuSchG was contravening the ban of indirect sex discrimination and asked the legislator to amend the MuSchG by December 31, 2005.

47. The admission of dismissals in exceptional cases is not only compatible (BVerfG, dec. of 13.11.1979, BVerfGE 52, 357, 365 ff.; BVerwG, dec. of 29.10.1958, BVerwGE 7, 294, 295 f.) but even required by constitutional law. Otherwise, the employer's right to perform his occupation granted in Article 12 of the German Constitution (*Grundgesetz* - GG) would be violated; BVerwG, dec. of 2. 7. 1981, AP MuSchG 1968 § 9a No. 1. As a consequence, Germany is prevented from implementing the strict ban of dismissal as granted in Article 4 of ILO Convention Nr. 3. EBENSO ASCHEID ET AL., KÜNDIGUNGSRECHT § 9 MuSchG ¶¶ 66–68 (2d ed. 2004).

practice.[48] During the last few years, however, the number of applications for the authority's consent has doubled.[49]

Generally, the legislature regards the pregnant woman's interest as overriding the employer's interests. An "exceptional case" in terms of section 9 MuSchG is therefore only deemed to be given, if extraordinary circumstances command that the woman's interests abdicate behind the employer's interests.[50] In any case, the conflicting interests have to be balanced, taking into account the specific purpose of section 9 MuSchG, i.e., to preserve the employee's material means of existence and to avoid the particular mental strains resulting from a dismissal during her pregnancy.[51] Examples of exceptional cases include:[52] loss of the employee's qualification for her job due to grave private lapses; grave financial burdens for the employer endangering the employer's economic existence; grave or repeated violations of central duties resulting from the employment contract; or no further possibilities to employ the employee further.

D. The Applicant's Right to Lie About Her State of Pregnancy

Due to the financial and organizational burdens resulting from an employee's pregnancy for her employer, most employers would probably prefer to avoid hiring women who are already pregnant at the time of hiring. One way to find out whether or not an applicant is pregnant is to ask her directly before hiring her. While the employer's interest in knowing of the applicant's possible pregnancy is protected by his right to choose and carry on an occupation as guaranteed in Article 12 GG, the disclosure of facts relating to the circumstances of the applicant's private life falls under the applicant's general rights of personality resulting from Article 2(1) and Article 1(3) GG. Since this conflict of interests is not regulated by the legislature, it was up to the labor courts to develop a framework of rules bringing the interests of both sides to their best advantage. In 1957, the Federal Labour Court (*Bundesarbeitsgericht*—BAG) found the following solution, still applicable today:[53]

48. ASCHEID ET AL., *supra* note 47, at § 9 MuSchG ¶ 66.

49. *Mütter unerwünscht?*, BRIGITTE, 23/2005 of Oct. 25, 2005. Up-to-date official figures are not available.

50. BVerwG, dec. of 29.10.1958, BVerwGE 7, 294 (296 f.); of 21.10.1970, BVerwGE 36, 160 (161); of 18.8.1977, BVerwGE 54, 276 (280 f.).

51. ASCHEID ET AL., *supra* note 47, at § 9 MuSchG, ¶ 74, with further proofs.

52. *Cf. id.* at ¶ 75–77, with further proofs.

53. BAG dec. of 5.12.1957, BAGE 5, 159.

> The applicant is obliged to answer truthfully any questions asked by the employer, provided that the answers to these questions are in the employer's rightful and approvable interest, and deserve to be answered because of the employment relationship to be established. The employer's interest must actually be so strong that the employee's interest in the protection of his personal rights and the inviolability of his privacy are to be considered less important. Conversely, the employer is not entitled to question the applicant about private matters which may indeed be of minor importance for employment, but when it comes to balancing of interests, in particular with regard to the applicant's right to personality. The merely financial interest of the employer has to take second place. The applicant is not obliged to answer inadmissible questions. To prevent the employer from concluding from the employee's mere refusal to answer that there is something worth hiding, the applicant is allowed to answer inadmissible questions with a lie.

According to the today well established case law of the Federal Labour Court,[54] only a false answer to a rightfully asked question can be a lawful reason for dismissal or a fraudulent misrepresentation with the legal consequence that the employer may contest the contract of employment.

Today, it is crystal clear that the employer is not entitled to ask female applicants if they are pregnant with the consequence, that the woman is not obliged to answer any such questions truthfully. However, this finding is the result of a long and rather intense dialogue between the Federal Labour Court and the European Court of Justice. For a long time, the Federal Labour Court held the view that the employer had a considerable legal and financial interest to find out if an applicant was pregnant. According to the Court's view, the MuSchG intended to safeguard an employment relationship already established and to provide the women with financial safety, but it was not intended to guarantee her that she would be able to enter into a new employment relationship.[55]

It was not until 1988 when it became clear that this position could not possibly be upheld, for in the meantime, section 611a BGB (*Bürgerliches Gesetzbuch*—Civil Code) had been passed, implementing EC-Directive 76/2007/EEC.[56] Section 611a BGB,

54. BAG dec. of 16.12.2004, AP No. 124, section 123 BGB; BAG of 18.10.2000, BAGE 96, 123; of 11.11.1993, BAGE 75, 77; BAG of 5.10.1995, BAGE 81, 120, all with further proofs.

55. BAG dec. of 22.9.1961, BAGE 11, 270.

56. Council Directive 76/207/EEC of February 9, 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, OJ 1976 L 39; amended by Directive

recently replaced by sections 7, 1 AGG (*Allgemeines Gleichbehandlungsgesetz*—General Act on Equal Treatment),[57] prohibits the employer from discriminating against an employee on grounds of sex *inter alia* in the course of the establishment of an employment relationship. Exceptions apply to those cases where being one sex or the other is an essential prerequisite for a particular job. Whether or not the employer's question as to an existing pregnancy violated section 611a BGB was highly controversial, the crucial question being: Is a discrimination against pregnant women a discrimination on the grounds of sex? In 1988, the Federal Labour Court answered that question in a very unconvincing manner. It held the view that the question as to an existing pregnancy was to be regarded as a discrimination on grounds of sex only if there were male and female applicants competing. If only women had applied for the job, every applicant could be concerned and therefore discrimination was not at issue. This decision was heavily criticized—not least due to the fact that the employer's right to question was easy to circumvent: A pregnant female applicant only had to provide for application of a male person. As soon as there was a male competitor, the question as to an existing pregnancy was inadmissible and, as a consequence, the female applicant was not obliged to disclose a pregnancy.

Eventually, the Federal Labour Court's decision of 1988 was superseded by a decision of the European Court of Justice. In a case referred to it by a Dutch court,[58] the ECJ found that if an employer refuses to conclude an employment contract with a female applicant only because he is afraid of the disadvantages (possible or actual) arising from the employment of a pregnant woman as a result of the applicable statutory provisions, this was a violation of the ban on sex discrimination as prohibited by Directive 76/207/HEC. Due to the supremacy of Community law, national law has to be interpreted in a way compatible with Community law. In 1992, the Federal Labour Court hence renounced its former view and concurred with the legal opinion of the European Court of Justice. It concluded that the

2002/73/EC of September 23, 2002, OJ 2002, L 269/15; recently replaced by Directive 2006/54/EC of July 5, 2006, OJ 2006, L 204/23.

57. Act of 14 August 2006, in force since August 18, 2006, BGBl. I, 1897.

58. Dec. of 8.11.1990, Case C-177/88 (Dekker), ECR 1990, I-3941 (¶ 12); critically Nielsen, CMLR 1992, 160; Simon Honeyball, *Pregnancy and Sex Discrimination*, 29 INDUS. L.J. 43 (2000). *Cf.* further ECJ, dec. of 5. 5. 1994, C-421/92 (Habermann-Beltermann), ECR 1994, I-1657; of 14.7.1994, C-92/93 (Webb), ECR 1994, I-3567; dec. 3.2.2000, C-207/98 (Mahlburg), ECR 2000, I-549; of 4.10.2001, C-438/99 (Jiménez Melgar), ECR 2001, I-6915.

question as to a pregnancy during recruitment negotiations was, as a rule, generally inadmissible as an infringement of section 611a BGB.[59]

III. CARE FOR YOUNG CHILDREN

In addition to the period of maternity protection (six weeks prior and eight weeks after confinement), a so-called "mother's leave" was introduced in 1979. In 1985, mother's leave was replaced by "parental leave," applying to both mothers and fathers, as guaranteed under the BErzGG (*Bundeserziehungsgeldgesetz*—Act on Benefits and Leave for Care for Children),[60] amended several times since. By passing the BErzGG, the legislature intended to approve the educational work of mothers and fathers by granting parental leave and a child care benefit. Parents were to be given or to be facilitated the possibility to care for and educate a child during his first phase of life. In addition, the legislature aimed at achieving more flexibility for mothers and fathers to choose between or combine occupational and family life.[61] At the same time, constitutional doubts as regards the compatibility of the right to maternity leave with the ban on discrimination on grounds of sex as guaranteed in Article 3(2) GG were cleared out. However, it surely was no pure coincidence that parental leave was introduced at a time when unemployment figures seriously began to rise.[62]

Initially, the right to parental leave was limited to one person at a time and to the period until the child was eighteen months old. A few years later,[63] parental leave was extended until the child's third birthday. Since the fundamental revision of the BErzGG in 2000,[64] when Directive 96/34/EC on Parental Leave[65] was implemented into national law, both parents can take parental leave at the same time.

59. Established case law since BAG, dec. of 15.10.1992, BAGE 71, 252; more recently dec. of 6.2.2003, BAGE 104, 304.

60. Act of 6.12.1985, BGBL. I, 2154.

61. BR-Drs. 350/85; BT-Drs. 10/3792, 13 ff. Contrary to mother's leave, primarily aiming at the health protection, parental leave and child care benefit hence pursue aims of family policy.

62. It is the standard practice of German and European statistics to include people who have formal employment status in the number of those gainfully employed, although they are on leave on the reference date, meaning they are not actually then in active employment. For this reason, all mothers and fathers are included in the working population even when they are on parental leave and are currently not employed. ENGSTLER & MENING, *supra* note 29, at 33.

63. Act of 6.12.1991, BGBl. I, 2142.

64. Act of 23.10.2000, BGBl. I, 1426.

65. Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC, OJ 1996, L 145/4. As regards this directive cf. Marlene Schmidt, *The EU-Directive on Parental Leave*, *in* 32 LABOUR LAW AND INDUSTRIAL RELATIONS IN THE EUROPEAN UNION, BULLETIN OF COMPARATIVE LABOUR RELATIONS (BCLLR) 181–92 (Roger Blanpain ed., 1998); MARLENE SCHMIDT, III DAS ARBEITSRECHT DER EUROPÄISCHEN GEMEINSCHAFT ¶¶ 349–63 (2001).

A. Parental Leave

1. The Right to Parental Leave

Today, any employee residing in Germany, living together with a child and having the custody of that child, looking after and educating that child, is entitled to take parental leave (*Elternzeit*) until the child has turned three years old, section 15 BErzGG. Since parental leave can be taken for every child, section 15(2)s.1 BErzGG, parental leave may add up to 6—9 years or even longer, depending on the number of children. If parental leave is supposed to begin immediately after confinement or directly after the period of maternity protection, the employee has to apply for parental leave with the employer in writing, at least six weeks in advance. In all other cases the application has to be filed eight weeks in advance. In any case, the application has to specify for which periods within two years' parental leave is requested, section 16(1)s.1 BErzGG.

The right to parental leave is very flexible: parental leave can be taken fully or in parts, i.e., for a few months, by either mother or father and even by both parents at the same time, section 15(3) BErzGG. With the employer's approval, up to twelve months of parental leave can even be postponed to a later point of time before the child's eighth birthday, section 15(2)s.4 BErzGG. Both parents can divide his or her entitlement to parental leave into two periods and, with the employer's consent, into even more periods, section 16(1)s.5 BErzGG. Unfortunately, there are no figures available detailing how much (and for how long) parental leave is usually taken.

2. Implications of Parental Leave for an Existing Employment Relationship

For parents having been gainfully employed before taking parental leave, the mutual main obligations resulting from an employment relationship are suspended. In other words: an employee taking parental leave is not obliged to work but does not receive any remuneration either.

At the same time, the continuation of the employment relationship is specifically safeguarded: from the moment a parent has informed the employer that he or she intends to take parental leave—however, at most eight weeks before parental leave shall begin—until the end of parental leave the employer is not allowed to terminate the employment relationship. This follows from the ban of dismissal in section 18 BErzGG. Only in very specific cases may a dismissal be

declared admissible, provided that the *Land* Office for Labor Inspection gives its consent. The dismissal protection provided for by section 18 BErzGG is as strict as the one granted by section 9 MuSchG. Figures detailing how many parents are dismissed on the basis of section 18 BErzGG unfortunately are not available.

3. The Right to Part-time Work During Parental Leave

In order to avoid parental leave working as a "family trap" for mothers, the legislature allows parents on parental leave to continue working, albeit at a reduced level. According to section 15(4) BErzGG both parents are entitled to work up to thirty hours per week, either for their old employer or for another company. In the latter case, however, the employee on parental leave needs the employer's consent. The same applies if the employee on parental leave wants to work on a self-employed basis.

In case an employee on parental leave prefers to perform his or her old job but would simply like to reduce the working time, he or she may request a reduction of his or her working time. In such a case, section 15(5) BErzGG calls on both the employer and employee to reach a voluntary agreement within four weeks.

If no voluntary arrangement can be found, employees who have been continuously employed for more than six months and whose employer usually employs more than fifteen employees can claim a reduction of their individual working time for a period of at least three months to an amount of fifteen to thirty hours a week, section 15(7) BErzGG. The employee has to request the reduction of his or her agreed working time in writing and to specify the start date and the volume of the reduction at least six weeks in advance. In addition, the employee shall inform his or her employer, together with the request to reduce the working time, of the requested distribution of the reduced working time, i.e., from when to when the employee would like to work. The employer is obliged to grant the requested reduction of working time and to determine the distribution of working time in accordance with the employee's wishes, provided that no "urgent operational reasons" ("*dringende betriebliche Gründe*") are conflicting.

Contrary to the general right to reduce the working time granted in section 8 TzBfG,[66] the reasons allowing the employer to reject the employee's request to reduce the working time, section 15(7) BErzGG

66. *See infra* IV.C.

requires "urgent operational reasons." The employee's individual motives for a reduction of his or her working time are irrelevant. The legislature has already pondered these interests with the employer's interests by making the right to reduce the working time conditional upon "urgent operational reasons." Of course, these must be more grave than operational reasons in terms of section 8 TzBfG. However, if an employee initially decides to take parental leave with complete release of the obligation to work and the employer has employed a person temporarily replacing the employee in parental leave and if neither the replacement nor any other employee is volunteering to reduce his or her working time, urgent operational reasons are given. Otherwise, the employer would be obliged to employ the employee on parental leave although his or her employment is not required economically.[67]

If the employer denies the request he must inform the employee about his decision within four weeks in writing, specifying the reasons for the disapproval. The employee may seek redress in court. If the labor court finds that there are no urgent operational reasons the court decision replaces the employer's consent to change the employment contract in accordance with the employee's wishes for the period of parental leave.

4. Facts and Figures

More than 85% of parents entitled to parental leave actually take parental leave.[68] This is not amazing if one knows that, for children under three, there are very few child care facilities available in the former FRG: In a European comparison, the former FRG is one of the countries with a relatively low level of facilities for this age group.[69]

Although the number of fathers taking parental leave has slightly increased, still only 5% of persons taking at least a few months of parental leave are male.[70] One main reason for the negligible number

67. BAG, dec. of 16.8.2006, AP No. 44 § 15 BErzGG.

68. Of households having welcomed a child after January 1, 2001, 85.8% were entitled to parental leave, 73.2% actually took parental leave, and 12.6% did not take parental leave. GENDER DATENREPORT, *supra* note 26, at 312, with further proofs.

69. In 2000 in West Germany, only 6% of those aged under three spent part of their day in such facilities. In contrast, the states of Eastern Germany had a particularly high number of child care facilities, also when compared to the other EU countries. In the year 2000, 35% of all children under three were taken care of outside the home, although in 1995 it had been as high as 40%. This drop is probably the result of the reduced labor market participation by East German women with small children. ENGSTLER & MENING, *supra* note 29, at 36.

70. GENDER DATENREPORT, *supra* note 26, at 320.

of fathers taking parental leave is the fact that taking parental leave by fathers is accepted by law but not by society,[71] and especially not by employers, so that male employees taking parental leave fear disadvantages for their career development.[72] Another important restraint is that, due to the fact that men on average still earn more than women, many families would simply rather do without the mother's than without the father's income.[73]

All these societal and financial restraints bring about the above mentioned results: only a very small number of women abstain from taking parental leave. The problem resulting from the very generous German solution is that those who do not take parental leave (or only short periods of parental leave) are subject to social pressure, adding to the already existing burden resulting from the attempt to live in both worlds. However, if they give in, they seriously risk losing accession to occupational life—particularly if they decide to have more than one child.

B. Child Care Benefit

In order to give some financial help in a situation in which a young family needs this most, a so-called child care benefit was introduced in 1985.

1. The Situation *de Lege Lata*

According to section 1 BErzGG, anybody residing in Germany, living together with a child and having the custody of that child, looking after and educating that child, and performing no or no full-time employment, is entitled to receive a so-called child care benefit (*Erziehungsgeld*) for a maximum duration of two years, paid by the public health insurance. Whether or not he or she was gainfully employed before is irrelevant.

The sum paid is rather low, regularly amounting to 300€ per month. Nevertheless, income limits apply: during the first six months, the child care benefit is not paid if the annual family net income exceeds 30,000€ (single parent: 23,000€). During the following

71. Twenty-five per cent hold fathers taking parental leave for effeminate; *cf.* the survey by TNS Infratest for the Spiegel of March 28–30, 2006, published in DER SPIEGEL 17/2006, 26.

72. Twenty-two per cent think that parental leave is incompatible with a father's job; cf. TNS Infratest, *supra* note 71. *Cf.* WORK CHANGES GENDER, MEN AND EQUALITY IN THE TRANSITION OF LABOUR FORMS (Ralf Puchert, Marc Gärtner & Stephan Höyng eds., 2006).

73. Forty-eight per cent are of the opinion that the family cannot do without the father's income. *Cf.* TNS Infratest, *supra* note 71.

eighteen months, the benefit is reduced if the annual family income exceeds 16,500€ (single parent: 13,500€). Parents may also opt for the so-called budget. In this case, they receive 450€ monthly for a maximum duration of twelve months; moreover, even lower income limits apply: 22,086€ for families (single parent: 19,086€).

2. The Situation *de Lege Ferenda*

One of the reasons why only very few fathers take parental leave is that the family cannot do without his income. In order to delete or at least attenuate this financial disincentive, the new government has decided to replace the child care benefit by a so-called parent benefit (*Elterngeld*).[74] Modeled upon the Scandinavian example and different from the present child care benefit, the parent benefit is designed as an income related benefit amounting to 67% of the former net income (maximum: 1,800€, minimum: 300€); income thresholds do not apply. If the former net income was below 1,000€, the parental benefit increases to up to 100 % of the former net income. Parental benefit shall be paid for up to twelve months. The parents can freely decide if one or both of them reduce(s) his or her working time, whether consecutively or simultaneously. But only if the respective other partner (in other words, the father) also reduces his or her working time, parental benefit is paid for two additional months, i.e., fourteen months altogether. According to the plans of government, the necessary statutory amendments shall become effective from January 1, 2007, on.

Not surprisingly, these plans are heavily attacked by those who find that abolishing incentives for the traditional role model already means that the state is interfering with the family's right to organize freely the internal distribution of tasks. A quotation from the cover story of the *Frankfurter Allgemeine Zeitung* (FAZ), one of the most respected German newspapers, of August 24, 2006,[75] tells its own tale: "Today, nobody says to young women that they have to engage in gainful employment. If they nevertheless do so, it is often not due to economic pressure or in order to have a career like a man—no, somebody who has a freely chosen good education and who likes her job, of course also wants to work in her job."[76]

Interestingly, the view that the traditional role model is still to be preferred is also shared by many younger women: A survey among

74. *See* the Bill of an act introducing parental benefit, BT-Drs. 16/1889, of June 20, 2006.
75. Reinhard Müller, *Die Abschaffung der Hausfrauenehe*, comment, cover page.
76. Female employment is obviously not taken seriously.

1,000 mothers between 18 and 60 years revealed that only a third of mothers in Germany think that both parents should take parental leave. Particularly younger women are surprisingly conservative: Only 12% of mothers between 18–29% find a shared parental leave attractive. Sixty-three per cent of them think that mothers should not work before their children go to kindergarten. Nine per cent even think that mothers should not work at all.[77]

IV. PART-TIME WORK

In Germany part-time work is regulated in the Act on Part-time Work and Fixed-Term Contracts (*Teilzeit- und Befristungsgesetz*-TzBFG), in force since January 1, 2001.[78] The obligation to implement the Part-time Directive 97/80/EC[79] was regarded as a stimulus to amend the right of part-time work fundamentally. In doing so, the legislature fixed a level of employee protection much higher than that required by the Community law. The TzBfG replaced the 1985 Act on the Improvement of Employment Opportunities (*Beschäftigungsförderungsgesetz*)[80] which had been passed with the aim of making part-time work more attractive for both employer and employee.

A. Some Facts and Figures

In the year 2003, only 11% of all women in Germany having children under 3 years of age, 13% of those with a youngest child aged between 3 and 5 years of age, 20% of women with a youngest child aged between 6 and 14 years, and 31% of women with children in the household aged over 15 were working full-time with a normal working week of 36 hours and more.[81] The increasing labor force participation of mothers in the former FRG between 1972 and 2003 was reached by way of an increase in part-time work.[82] Eighty-five percent of all part-

77. Study by Emnid, *Weniger Mütter für geteilte Elternzeit—Jüngere besonders konservativ*, FRANKFURTER ALLGEMEINE ZEITUNE, May 3, 2006, at study.

78. BGBl. 2000 I, p. 1966. An (unofficial) English translation has been published in COMMERCIAL LAWS OF EUROPE 379 (2001).

79. Directive of the Council of December 15, 1997, concerning the Framework Agreement on part-time work concluded by UNICE, CEEP, and the ETUC OJ 1997, L 14/9. *Cf.* Marlene Schmidt, NZA 576 (1998); MARLENE SCHMIDT, III DAS ARBEITSRECHT DER EUROPÄISCHEN GEMEINSCHAFT ¶¶ 364–83 (2001).

80. BGBl. 1985 I, 710.

81. ENGSTLER & MENING, *supra* note 29, at 33.

82. The sharp drop in non-working mothers in the former FRG is offset by an equally steep rise in the number of mothers engaged in part-time activity of less than twenty hours per week. The proportion of full-time working women with children in the household has not increased

time workers are female; 42% of all female employees are working part-time.[83]

For mothers who have to or want to participate in gainful employment, part-time work is the usual solution. This fact is due to a variety of reasons, the main being the general rejection of working mothers on the one hand, and (of course also resulting thereof) a lack of child care facilities on the other. Although a kindergarten place is statutorily guaranteed for every child of three years and older,[84] and although there are actually kindergarten places for 90% of children between 3 and 6 years (East Germany: nearly 100 %) provided, most of them are only available in the morning between 8 and 12 a.m.[85] The problem is opening hours. Most kindergartens open for only a few hours in the morning (8 a.m.–3 a.m.). A full-time kindergarten place is not granted.[86] In the age group 6½ to 10, there are places in day nurseries for an average of only 14% of children (West: 7.3%, East: 68.5%).[87] Only one-fifth of all school children aged 6 and 7 go to a day nursery after the end of tuition at school (East: 55%).[88]

However, child care is not the only reason why many women are prevented from working full-time. As soon as the children leave home, the grand parents often need to be cared for. Care at home is a female preserve. Eighty per cent of carers are female. Main carers are still wives and daughters.[89] In 1999, some two million people in Germany were in need of care as defined by the Long Term Care Act (SGB XI). Over two-thirds of these were women. Nearly three-quarters (72% or 1.44 million) of those in need of care are looked after at home. Of those being looked after by relatives at home, 12% had an advanced need for care (care stage III). Of those in need of care, 1.03 million were exclusive recipients of care allowances, meaning that they were generally cared for at home solely by relatives. In the case of a further 414,000 people being cared for at home, the care was supplied either wholly or in part by mobile care services. Twenty-eight per cent of care recipients, i.e., some 573,000

since 1972. On the contrary, it has declined, most sharply in the case of mothers with children under 6 years of age.

83. BILANZ, *supra* note 10, at 26.

84. Since January 1, 1999, section 24 SGB VIII grants children over 3 years of age up to their start at school a place in a kindergarten.

85. BILANZ, *supra* note 10, at 55.

86. FRAUEN IN DEUTSCHLAND, VON DER FRAUEN- ZUR GLEICHSTELLUNGSPOLITIK 66 (Federal Ministry for Family Affairs, Senior Citizens, Women and Youth ed., 2004).

87. ENGSTLER & MENING, *supra* note 29, at 35.

88. *Id.* at 36.

89. *Id.* at 44.

were looked after in an institutional setting.[90] Thirty-eight per cent of those receiving care in the home require around the clock attention. A further 24% needs care three times per day or more.[91]

B. The Principle of Equal Treatment of Full-time and Part-time Employees

One of the central provisions of the TzBfG is the principle of equal treatment, granted in section 4(1) TzBfG.[92] Accordingly, a part-time worker[93] may not, because of the part-time work, be treated in a less favorable manner than a comparable full-time employee, unless there are objective reasons justifying unequal treatment; a part-time employee is moreover explicitly entitled to pay or other dividable monetary benefits at least in an extent corresponding to the share of his or her working time in the working time of a comparable full-time employee. The standards of this test as elaborated by the Federal Labour Court are so strict that reasons justifying differential treatment of full-time and part-time employees are accepted in exceptional cases only.

C. The Right to Reduce and to Extend the Agreed Working Time

The most disputed provision of the TzBfG is section 8, granting employees the right to reduce the agreed working time, the so-called right to part-time work.[94] Modeled upon the Dutch example,[95] the right to part-time work was introduced to promote job creation and to

90. *Id.*

91. *Id*.

92. Originally, this principle has been developed by the labor courts. For more information *cf.* Maximilian Fuchs, *Part-time Work: The German Experience*, INDUS. L.J. 2144, 2148 (2001); MANFRED WEISS & MARLENE SCHMIDT, LABOUR LAW AND INDUSTRIAL RELATIONS IN GERMANY ¶ 105 (3rd ed. 2000). Since 1985, it has been codified in section 2 BeschFG (see *supra*, IV.).

93. According to section 2(1) TzBfG, any employee whose regular weekly working time is shorter than that of a comparable full-time employee is working part-time. Hence, part-time work can be anything between 36/35 hours, depending on the branch, and one hour per week. If a regular weekly working time has not been agreed upon an employee is nevertheless working part-time as long as his or her regular working time during a given period of up to one year is on average shorter than the working time of a comparable full-time employee. The TzBfG is also applicable to marginal part-time workers excluded from the statutory systems of social security. This follows already from the definition in section 2(1) TzBfG and is explicitly confirmed in section 2 (2) TzBfG.

94. As to details cf. Marlene Schmidt, *The Right to Part-Time Work under German Law: Progress in or a Boomerang for Equal Employment Opportunities?*, 30 INDUS. L.J. 335–51 (2001).

95. For a comparison of the German and the Dutch right to part-time work see Antoine Jacobs & Marlene Schmidt, *The Right to Part-Time Work: The Netherlands and Germany Compared*, INT'L J. COMP. LAB. L. & INDUS. REL. 371 (2001).

contribute to equal employment opportunities for men and women.[96] The introduction of the right to part-time work was not required by Directive 97/81/EC.

Section 8 TzBfG is a rather lengthy and complicated provision. It provides that an employee's working time, be it agreed upon individually or regulated in a collective agreement, has to be reduced and distributed in accordance with his or her wishes, provided that certain requirements are fulfilled. In order to avoid that the employee's interests are not met and therefore the employment promoting effect of part-time work is frustrated, no specific degree of reduction is required. As a consequence any level of reduction can be claimed.

The right to part-time work applies if only two conditions are fulfilled. An employee must have been continuously employed for more than six months by an employer employing more than fifteen employees, section 8(1), (7) TzBfG. Small employers are released from the organizational and administrative burdens resulting from the right to part-time work. The right to part-time work is applicable to employees of any category, be it full-time, part-time, temporary, or fixed-term employees. The TzBfG is even applicable to marginal part-time workers that are excluded from the statutory systems of social security. Moreover section 6 TzBfG unmistakably obliges the employer to facilitate access to part-time work even in managerial positions.

The main procedural requirement of the right to part-time work is the employee's request. According to section 8(2) TzBfG the employee has to request the reduction of his or her agreed working time and to specify the volume of the reduction at least three months in advance. Reasons for the employee's request do not have to be given. The three-months-period shall give the employer sufficient time to provide for organizational arrangements, for instance to hire an additional employee. Voluntary agreements to reduce the working time can, of course, still be concluded at any time. Section 8(2) TzBfG furthermore stipulates that the employee shall, together with the request to reduce the working time, inform his or her employer of the requested distribution of the reduced working time, i.e., from when to when the employee would like to work.

Section 8(3) TzBfG obliges the employer to discuss the requested reduction of working time with the employee, explicitly with the aim of reaching an agreement. Employee and employer shall furthermore reach an agreement about the distribution of the working time.

96. BT-Drs. 14/4374, 16 seq.

Section 8(3) TzBfG demonstrates the legislature's hope that the parties to the employment contract will usually voluntarily agree to reduce the working time. If such an agreement is reached, the employment contract changes accordingly. If no agreement can be achieved, the working time may nevertheless be reduced, provided that the following further requirements are met.

According to section 8(4) TzBfG, the employer has to grant the requested reduction of working time and to determine the distribution of working time in accordance with the employee's wishes, provided that no "operational reasons" (*betriebliche Gründe*) are conflicting. Section 8(4) TzBfG explicitly states that operational reasons may in particular be found if the reduction of the working time interferes considerably with the organization, the course of work or the safety in the establishment, or if the reduction of working time causes disproportionate costs. What that means in detail is highly disputed. In the meantime, the Federal Labour Court has developed a test in order to make section 8(4) TzBfG operable:[97] First of all, the organizational concept established and realized by the employer, forming the basis of the operational reasons claimed by the employer, has to be stated. Second, the labor court has to examine whether the organizational concept in fact conflicts with the requested reduction of working time. Finally, it has to be examined whether the conflicting operational reasons are so important that compliance with the employee's request would considerably interfere with the organization, the course of work or the safety in the establishment, or if the reduction of working time causes disproportionate costs.

If the employee decides to seek redress in court, the labor courts have to decide if there have been operational reasons conflicting with the employee's request to work part-time. If the labor court finds that there are no operational reasons the court decision replaces the employer's consent to change the employment contract in accordance with the employee's wishes. As soon as this decision has become non-appealable, the employment contract changes accordingly.

Although the public debate focuses on the right to part-time work, the TzBfG also grants part-time employees a right to claim an extension of his or her working time to a larger part-time volume or to the regular working time of full-time employees, whether or not the part-time agreement is based on a voluntary agreement with the employer or

97. Fundamentally BAG dec. of 18.2.2003, BAGE 105, 107 and 133; BAG of 18.3.2003, BAGE 105, 248; confirmed in BAG dec. of 19.8.2003, AP No. 4 § 8 TzBfG; of 30.9.2003, BAGE 108, 47; BAG of 9.12.2003, BAGE 109, 81; of 27.4.2004, BAGE 110, 232; of 18.5.2004, BAGE 110, 356.

has been enforced upon the employer automatically in accordance with section 8(5) TzBfG. The right to request an extension of working time follows procedural and material rules that are less complex than those applicable to the right to part-time work. According to section 9 TzBfG, if an employee has informed the employer of his or her request to extend the working time the employer has, "to give preference" to it, unless this would conflict with urgent operational reasons or requests of other part-time employees. Although the wording is vague the duty to "give preference" has to be interpreted as a duty to grant the request provided that the conditions are met. Contrary to the right to part-time work granted under section 8 TzBfG, neither thresholds nor time limits apply to section 9 TzBfG. Hence from the very first day of employment every part-time employee in every enterprise is entitled to claim an extension of his or her working time, as long as there are no "urgent operational reasons" or requests of other employees conflicting.

As regards the question of reconciliation of family and professional life, it has to be stated that sections 8 and 9 TzBfG do not ask for the employee's reason why he or she requests a reduction or extension of his or her working time.[98] This way, the legislature intended to make part-time work also attractive to male employees who would possibly be ready to reduce their working time as well, also for any other reason. As a consequence if, for example, a mother, having taken parental leave, intends to return to work after a period of several years and cannot persuade her employer to reduce her working time volume voluntarily to a number of hours compatible with her family obligations, she will have to quit her job.[99] Whether or not she will (ever) find suitable part-time work with another employer remains an open question. Unfortunately, there are no figures available with regard to how many women who would prefer to stay in employment after parental leave cannot due to a lack of suitable part-time jobs.

Interestingly, the Federal Labour Court has also stated that a works agreement regulating the organization of working time can work as an operational requirement entitling the employer to dismiss the employee's request to reduce the working time.[100] Taking into consideration the works council's competences resulting from sections

98. Explicitly emphasizing that point BAG, dec. of 9.12.2003, BAGE 109, 81.

99. This is why Birk, Gutachten für den 60. DJT 1994, E 91, pleads that the legislator should grant priority to employees with children under fifteen years of age as regards access to part-time jobs.

100. BAG dec. of 16.3.2004, BAGE 110, 45.

80 No. 2b and 92a BetrVG,[101] it follows that the works council could exert considerable influence or even enforce the introduction of a working time organization allowing parents to reconcile family and professional obligations. The fact that such a policy hardly takes place[102] tells its own story.

D. Rules for Specific Forms of Part-time Work

Minimum regulations are provided for two specific forms of part-time work by the TzBfG: employment on call and job-sharing.

1. Employment on Call

"Employment on call" is the label for a very flexible form of part-time work, allowing the employer to determine unilaterally if and when the employee has to work and hence is rather convenient for employers, particularly in the retail business: If there is high customer demand, more employees are called to work, often at short notice; if there is less or no work at all, only a few employees are called to work. For employees, however, this form of part-time work is particularly inconvenient. They have difficulties planning and organizing their family life since they cannot rely on fixed working times. In order to find a balance between the employers' interest in flexibility and the employees' interest in reliability, the BeschFG had already provided a few minimum regulations for employment on call. These have been taken over by the TzBfG, only minor amendments being made.

According to section 12(1) TzBfG employer and employee may agree that work is to be performed in accordance with availability of work, that is, the employee has to work if the employer needs him or her. Any such agreement, however, has to set out the number of daily and weekly working hours. It furthermore has to be in writing. This follows from section 2, No. 7 NachwG (*Nachweisgesetz*—Act on the Documentation of Employment Conditions), implementing Directive 91/533/EC.[103] If the number of weekly working hours should not be laid down, ten hours of work shall be deemed agreed. After the Federal Labour Court had determined that contractual agreements allowing the employer to change and in particular reduce the weekly working hours unilaterally were exceeding the managerial prerogative

101. *See supra* VI.A.

102. *Id.*

103. Council Directive 91/533/EC on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship, OJ 1991, L 288/32.

and bypassing the statutory provision of dismissal protection and therefore null and void under section 134 BGB,[104] the legislature felt obliged to restrict the flexibility as regards the number of weekly working hours. In a very recent decision,[105] the Federal Labour Court has stated that today, after the enactment of the Act Modernizing the Law of Obligations (*Schuldrechtsmodernisierungsgesetz*),[106] different criterions—the law of general terms of business, section 305 BGB—had to be applied. As a consequence, the Court found that, according to section 12(1) TzBfG, only a minimum working time has to be fixed. The parties are free to agree that up to 25% of that fixed minimum working time can be subject to the employer's free discretion. For mothers, who have to organize child care for times when they are at work, this decision is obviously not very helpful.

If the number of daily working hours is not laid down, the employer must ask the employee to work at least three consecutive hours on each occasion. Under section 12(2) TzBfG the employee is obliged to work only if the employer gives him at least four days' prior notice of his working arrangements in each case.

Section 6 of the 1985 BeschFG Act on the Improvement of Employment Opportunities[107] already allowed the conclusion of collective agreements containing derogations from the provisions concerning employment on call that are less favorable for the employees. Hence, in 1992 the Federal Labour Court found that—different from agreements between a single employer and a single employee—collective agreements can be valid even if they do not fix a minimum of weekly working hours.[108] This decision was much disputed; in particular its compatibility with the fundamental principles of the law on dismissal protection and with the ban of indirect sex discrimination under EC law was questioned. Today, as a consequence of this debate, section 12(3) TzBfG only admits derogations from section 12(1)–(2) TzBfG unfavorable to the employee on condition that the weekly and daily working hours are specified and a period of prior notice is provided for. Within the scope of application of such a collective agreement, employers and employees not bound by it may agree to apply the collectively agreed provisions on employment on call. The legislature of the TzBfG has hence further restricted the employers' flexibility. However, the

104. BAG dec. of 12 Dec. 1984, AP No. 6 § 2 KSchG.
105. BAG dec. of 7 Dec. 2005, NZA 2006, 423.
106. Act of Nov. 26, 2001, BGBl. 2001 I, 3138.
107. *See supra*, IV.D.1.
108. BAG dec. of 12 March 1992, AP No. 1 § 4 BeschFG.

practical implications of this restriction should not be overestimated. Since trade unions have always fought this kind of flexible part-time work, collective agreements allowing more flexibility than section 12(1)–(2) TzBfG are very rare.

Although one may vividly imagine that section 12 TzBfG is often ignored in everyday life, court decisions dealing with employment on call are rather rare. This surely has to do with the fact that the jobs offered "on call" usually do not require long vocational training so that employees can be replaced easily and hence fear to be dismissed.

2. Job-sharing

Another highly flexible form of part-time work is job-sharing, i.e., several employees sharing the working hours at one workplace. It is explicitly admitted in section 13(1), s. 1 TzBfG. Contrary to employment on call, the flexibility inherent in job-sharing is not only of benefit to the employer but also to the employees involved. For it is assumed to be up to the job-sharers themselves to determine who is working when. Job-sharing may hence entail a high level of "working time sovereignty." Consequently, it could be particularly interesting for working parents.

However, in 1985 the legislature has set minimum standards restricting the potential of flexibility inherent in job-sharing and, at the same time, restricting its attraction for employers. In terms of section 13(1), s. 2, 3 TzBfG, job-sharers shall only be obliged to cover for another job-sharer unable to work if they either have agreed to do so in every individual case, or if the employment contract provides for a replacement obligation in cases of urgent operational reasons and if a replacement can reasonably be expected in every individual case. Furthermore, section 13(2) TzBfG stipulates that the mere termination of the employment contract of one job-sharer shall never justify a dismissal of other employee(s) involved in the job-sharing relationship; the employer's right to dismiss an employee in order to change working conditions (*Änderungskündigung*) on this occasion or due to other reasons remains unaffected. This very strict limitation, also applicable to very small employers, is deemed to be the main reason why job-sharing hardly ever occurs in Germany.

According to section 13(3) TzBfG, section 13(1)–(2) TzBfG shall apply *mutatis mutandis* where groups of employees work alternately at particular workplaces at fixed times without job-sharing existing within the meaning of section 13(1) TzBfG. Finally, even derogations from section 13(1), (3) TzBfG that are unfavorable to the employee

are, in terms of section 13(4), s. 1 TzBfG, permitted provided that the collective agreement contains provisions regulating the replacement of job-sharers. Within the scope of application of such a collective agreement, employers and employees who are not bound by the collective agreement may agree that the provisions governing job-sharing contained in the collective agreement shall apply. However, to date such agreements do not exist.

E. Information and Training

The employer is also obliged to advertise vacancies as part-time jobs provided that a certain job the employer intends to advertise either in public or within the establishment is suitable for part-time work, section 7(1) TzBfG. Furthermore, the employer has to inform employees who have informed him of their wish to change the duration or the distribution of their working time about corresponding vacancies in the enterprise or in the plant, section 7(2) TzBfG. In addition, the employer has to inform the employee representatives about part-time work in the establishment or the company, in particular about existing or planned part-time jobs and about the transformation of part-time jobs into full-time jobs or vice versa. At the request of the employee representatives the necessary documents have to be put at their disposal, section 7(3) TzBfG.

The employer is moreover obliged to "see to it" that part-time employees can participate in vocational training and occupational training aiming at the promotion of occupational development and mobility unless urgent internal company reasons or wishes of other full-time or part-time employees concerning vocational or occupational training are an obstacle, section 10 TzBfG.

F. Ban of Dismissal

Last but not least, section 11 TzBfG prohibits the termination of an employment relationship because of an employee's refusal to change from a full-time employment relationship to a part-time relationship or *vice versa*. Such a dismissal is invalid. Section 11 TzBfG does not explicitly affect the employer's right to terminate the employment relationship for other reasons.

G. Exclusion of Marginal Part-time Workers from the Statutory Systems of Social Security

Except for the work accident insurance, so-called marginal part-time workers (*geringfügige Beschäftigung*) or mini-jobbers, earning not more than 400€/month are excluded from the statutory social security schemes (section 27 II SGB III, sections 7 SGB V and 5 II SGB VI). If a person has several jobs, whether mini-jobs or others, the incomes resulting thereof are added, except for the income of one mini-job performed in addition to another job liable to social security contributions.

In the early 1990s the exclusion of marginal part-time workers from the statutory systems of social security was heavily disputed, last but not least because the vast majority was (and is) female. The ECJ, however, found that the exclusion of marginal part-time workers from the German statutory systems of social security did not infringe the ban of indirect discrimination in respect of the scope of statutory systems of social security and the conditions of access hereto, as established in Article 4 of Directive 79/7/EEC.[109] The Court accepted the justification put forward by the German government that, on the basis of the social demand for marginal employment, the inclusion of marginal part-time workers into the statutory system of social security would lead to a proliferation of illegal forms of employment and to an increase of *de facto* circumventions.[110]

Marginal part-time workers excluded from the statutory social security schemes are neither obliged to contribute to these schemes nor entitled to benefit. Only as regards the statutory pension scheme they are bestowed a right to "opt in," section 5(2), s. 2 SGB VI.[111] Nevertheless employers are obliged to pay 13% of the employee's gross income to the statutory health insurance scheme (section 249b SGB V) and 15% to the statutory pension scheme (section 168 No. 1b SGB VI).[112] In addition, the employer has to pay a flat rate tax of 2%.

In December 2005, 6.5 million people were employed in marginal part-time work. For 72% (4.73 Mio.) of them, the marginal part-time

109. Council Directive 79/7/EEC of December 19, 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security, OJ 1979, L 6/24. Decisions of December 14, 1995, Case C-317/93 (Nolte), ECR 1995 I-4625.

110. For more details see Fuchs, *supra* note 92, at 2156.

111. If they avail themselves of this option they have to pay a share of contributions amounting to the difference between the regular rate of contributions (currently 19.5%) and the reduced rate (currently 12%) paid by the employer.

112. For marginal employment in private households, reduced rates of 5% apply.

job is the only employment, for 27.3% (1,78 Mio.) the marginal part-time job is an additional job. Of all mini-jobbers, 68.1% are female.[113]

However, if the income exceeds 400€ but not 800€, the employer is solely liable to the full amount of social security contribution. The employee's rate increases incrementally from 4% until it reaches the regular rate of 21% at 800€. This way, disincentives to earn more than 400€ should be abolished.

V. PAID LEAVE FOR ATTENDING A SICK CHILD

To discuss in depth how far the reconciliation of family and occupational life is furthered by the statutory systems of social security would far exceed the scope of this article.[114] Only one specific arrangement of the statutory health insurance shall be sketched in the following.

If a child under twelve years of age is sick and, according to medical reference, needs to be taken care of, and if there is no other person living in the household who could take care of the child, employees insured in the statutory health insurance are entitled to be released from work for up to 10 days (single parents: 20 days) per year and child, section 45(3), (2) SGB V. For disabled children, no age limit applies. For several children, not more than a total of 25 days are granted (single parents: 50 days). During that time, parents receive sickness benefit (*Krankengeld*) from the health insurance, amounting to 70% of the employee's gross income but not exceeding 90% of the net income, section 47 SGB V.

For taking leave in terms of section 47 SGB V, the employer's consent is not required. The employee is only obliged to inform the employer in time that he or she avails himself or herself of the right to leave.[115]

In 2000, about three million days of leave in accordance with section 47 SGB V were taken. This corresponds with 3.1 days per person. Interestingly, 13% of fathers also take leave on the basis of section 47 SGB V.[116] This relatively high percentage, compared to the percentage of fathers taking parental leave, might be due to the fact that the number of days granted for one person per year may often

113. Gerhard Bäcker, *Was heißt hier "geringfügig"? - Minijobs als wachsende Segment prekärer Beschäftigung*, WSI-MITTEILUNGEN 255, 256 (2006).

114. Cf. instead Maximilian Fuchs, *Gutachten F zum*, DJT 60 (1994); Renate Jäger, *Referat*, DJT 60 (1994), O 27–59.

115. LAG Hamm, dec. of 8.10.2001, LAGReport 2002, 196.

116. Jannecke Plantenga & Ivy Koopmans, *Freistellungsregelungen für Sorgearbeit und ihre praktische Bedeutung im internationalen Vergleich*, WSI-MITTEILUNGEN 161, 166 (2002).

prove too small so that the father is forced to do his part as well. It therefore seems doubtful whether leave for the care of sick children should be extended or even granted for care of elderly parents in need of care.[117] It is true that, at first glance, a prolongation could contribute to the reconciliation of family and professional life. But it has to be feared that these extensions would be at the expense of working mothers/daughters, forced by societal expectations to actually take the leave.

VI. RECONCILIATION OF FAMILY AND PROFESSIONAL LIFE IN COLLECTIVE AGREEMENTS

In Germany, collective agreements concluded at establishment level between works council and employer—so-called "works agreements"—must be distinguished from collective agreements, concluded either at plant or branch level, between a trade union and a single employer or an employer's association.

A. Works Agreements

Section 80, No. 2b BetrVG (*Betriebsverfassungsgesetz*—Act on Works Councils), introduced 2001,[118] explicitly declares that the enhancement of reconciling family and professional life belongs to the general tasks of the works council. The task is specified in section 92a BetrVG. Accordingly, the works council is entitled to confront the employer with proposals on how to promote and secure employment. Such proposals may in particular refer to *inter alia* flexibilization of working time, to promotion of part-time work and part-time work for elderly employees, to new forms of work organization, to the skill of employees. The employer is obliged to consult the works council on these proposals. Works councils as well as employers can include in these consultations a representative of the regional agency for labor. If the employer does not want to follow the works council's proposals, the employer is obliged to justify his decision. In establishments with a size of more than 100 employees, this justification has to be given in writing. Even though the employer is not forced to take specific measures, the mechanism established in section 92a BetrVG has to be seen in light of the fact that the employer normally tries to prevent

117. These were some of the demands of Birk, *supra* note 24, at 79.

118. In the context of a general amendment of the BetrVG; cf. Manfred Weiss, *Modernizing the German Works Council System: A Recent Amendment*, IJCLLIR 252 (2002).

conflicts with the works council for the simple reason that he or she needs the works council's consent in matters of codetermination.[119]

However, the mechanism of "voluntary" cooperation of the employer in view of the necessity to obtain the works council's cooperation in other matters of obligatory codetermination only works if the works council is interested in the matter voluntarily dealt with. As regards reconciliation of family and professional life, this is obviously not the case. Measures at establishment level aiming at that objective still only have a subordinate position. In less than 10% of German establishments, a works agreement dealing with that subject exists.[120]

The Federal Ministry of Family Affairs, Senior Citizens, Women and Youth, is determined to improve this rather desolate picture.[121] Whether or not the actions planned will have any effects, however, remains to be seen.

B. Collective Agreements

Collective agreements improving the reconciliation of family and professional life are still rather rare. The developments of the last few years, however, indicate that this issue might gain an increasing importance for collective bargaining.[122] Collective agreements aiming at a better balance between family and professional life particularly contain provisions on part-time work. However, the mainly copy the provisions of the TzBfG.[123] Some collective agreements[124] contain provisions protecting employees with children of a certain age against working late hours, working on Saturdays and (partly) against excess work, provided that this is required due to urgent personal reasons.[125] Moreover, additional days of leave for care for a sick child or other members of the household are granted.[126]

119. *Cf.* Weiss, *supra* note 118, at 261; as regards the German concept of co-determination at establishment level see MANFRED WEISS & MARLENE SCHMIDT, LABOUR LAW AND INDUSTRIAL RELATIONS IN GERMANY ¶ 490 (2000).

120. Lindecke, WSI-MITTEILUNGEN 473 (2005); Lindecke, *Geschlechterpolitik im Betrieb*, WSI-MITTEILUNGEN 322 (2005); Iris Möller & Jutta Allmendinger, *Frauenförderung: Betriebe könnten noch mehr für die Chancengleichheit tun*, IAB-KURZBERICHT (12/2003).

121. *Cf.* Press Release No. 16/2006, Unternehmen profitieren von Müttern in Führungspositionen (Mar. 7, 2006), with a long list of planned acitivities (on file with author).

122. Christina Klenner, *Gleichstellung von Frauen und Männern und Vereinbarkeit von Familie und Beruf – Eine Analyse von tariflichen Regelungen in ausgewählten Tarifbereichen*, *in* WSI TARIFHANDBUCH 39 (2005).

123. *Id.* 50–54.

124. In the study conducted by Klenner, *id.*, only 14% of collective agreements contained such provisions.

125. *Id.* at 55.

126. *Id.* at 56.

VII. CONCLUSION

While the legal framework for reconciling family and professional life provides many interesting and helpful options in today's Germany, the actual situation is lagging far behind. There are mainly two obstacles: the widespread assumption that a working mother necessarily neglects her children, and (partly resulting thereof) a grave lack of child care facilities and full-time schooling. However, other disincentives should also be recalled. In a society where there are hardly any households where grandparents and grandchildren are living together, child care is usually a service to be paid for and hence not affordable for everybody. Furthermore, the requirements of modern professional life[127] contribute to the problems. In addition, taxation of spouses (*Ehegattensplitting*)[128] and the statutory systems of social security[129] contain strong incentives for the traditional model of the housewife marriage and, as a consequence, provide strong disincentives for couples who want to share both family and professional life.

Whether or not a further improvement of the labor law framework will change anything for the better still remains to be seen. The past experience has shown that the forces of societal persistence

127. *See supra* I.A.

128. In Germany, the percentage of taxation is progressive (15–42%), depending on the level of income to be taxed. Those who earn more are supposed to pay a higher percentage of taxes. Spouses get a very interesting tax relief: their incomes are added and divided by two and taxed only then. As a consequence of the progressive taxation, the higher the income discrepancy between the two spouses, the higher the tax relief. With other words: if one spouse does not work at all, they get the highest possible tax relief (the amount depending on the respective partner's income); if both earn more or less the same, no tax relief at all is granted. Critically, see Manfred Zuleeg, DÖV 687 (2005).

This way, one might say, the traditional housewife marriage is subsidized by the state. Even worse: female employees are forced to subsidize their male competitors who enjoy the luxury of having somebody who enables them to concentrate even more on work and career. Or, to put it less polemic: If a woman's husband has a good income, any of her earnings is subject to the highest rate of taxation achieved by the good income of her husband. In such a case, she must earn quite a lot before the couple as such has an extra net income. In any case it is clear that this kind of taxation constitutes a grave disincentive for married women to engage in paid work. Furthermore, it is one of the reasons why the number of mini-jobs (*see supra*, IV.G.) has increased that much. Demands to replace the taxation of spouses by a taxation of families (*Familiensplitting*) have long been put forward; cf. only the recent suggestions of the KOMMISSION "FAMILIE UND DEMOGRAPHISCHER WANDEL," STARKE FAMILIE (2006). Until recently, however, these demands did not have any chances to be realized. In view of the current debate, however, it suddenly seems as if, under the grand coalition, such a reform might eventually be possible.

129. The German statutory health insurance is a family insurance. If one parent is an obligatory member, all children and his or her spouse are automatically also insured. No extra contributions have to be paid. If a formerly family insured spouse takes up employment with an income exceeding 400 €, he or she becomes an obligatory member of the health insurance as well, i.e. he or she has to pay contributions. This is another reason for the steady increase of mini-jobs (*see supra*, IV.G.).

are still very strong. As long as labor law provides only offers to overcome the traditional role model, reconciliation of family and professional life will stay a subject demonstrating the limits of law to govern the German society. In times in which feminism has become a societal issue regarded by public opinion as out-dated and obsolete,[130] pure offers of labor law for reconciling family and professional life obviously run void. If anything, (further) advancements in respect of reconciliation of family and professional life seem only achievable by way of a legal framework opening not only options but setting much stronger incentives for fathers to take over their share of family life. But this is another story.

130. *Cf. Wir brauchen einen neuen Feminismus*, DIE ZEIT, Aug. 24, 2006, at 49–54.