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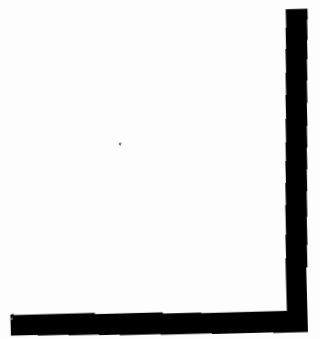
Couples, Parents, Children and the State:
Defining Family Obligations in Germany

Kirsten Scheiwe
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Kirsten Scheiwe

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The International Project on Family Changes and Family Policies

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The International Project on Family Changes and Family Policies, co-directed by Prof. Flora (University of Mannheim, Mannheim Centre for European Social Research) and Profs. Kamerman and Kahn (Columbia University School of Social Work, New York), analyses changes in family structures and family policies in a long-term and comparative perspective in 20 countries in Europe and overseas. Primary output will be publication of a 7-volume-series on family changes and family policies, including five volumes with country studies and two comparative volumes. Another major objective is the built-up of a family policy data base which will include regularly updated time series. The project is supported by the Deutsche Forschungsgemeinschaft (DFG). Related to this project, the European Commission finances a training and mobility programme of young researchers, which concentrates on recent developments of families in the European welfare states in comparative perspective.

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Kirsten Scheiwe, studierte Juristin, ist Mitarbeiterin des Mannheimer Zentrums für Europäische Sozialforschung. Ihre Doktorarbeit mit dem Titel 'Male times and female times in the law' erstellte sie 1991 an der Europäischen Universität in Florenz. Ihr Forschungsschwerpunkt ist die interdisziplinäre und vergleichende Analyse von Rechtsinstitutionen hinsichtlich geschlechtsspezifischer Dimensionen auf dem Gebiet des Familienrechts, des Arbeitsrechts und der sozialen Sicherheit. Außerdem arbeitet Kirsten Scheiwe am Mannheimer Forschungsprojekt über 'Family Change' unter der Leitung von P. Flora, A. Kahn und S. Kamerman mit.

Editorial Note:

Kirsten Scheiwe, trained as a lawyer, is a researcher at the Mannheim Centre of European Social Research. She completed her doctoral thesis on 'Male times and female times in the law' in 1991 at the European University Institute, Florence. Her main research area is the interdisciplinary and comparative analysis of legal institutions and their gender dimension in the field of family law, labour law and social security. She is also involved in the Mannheim research project on family change directed by P. Flora, A. Kahn and S. Kamerman.

1. Preface

The report 'Couples, Parents, Children and the State: Defining Family Obligations in Europe' has been prepared as the German contribution to the international research project 'Defining Family Obligations in Europe', involving sixteen countries. The research project has been directed by Professor Jane Millar and by Andrea Warman, University of Bath/UK and financed by the Joseph Rowntree foundation. I am grateful to the Joseph Rowntree Foundation for a grant that supported the work.

The main task of this report is the detailed explanation of legal institutions that structure different types of family obligations and a review of those provisions where the state steps in and part of the obligations are no longer private, but substituted or supplemented by public support. The structure of the report follows a questionnaire that underlies the various national contributions to the research project in order to make comparison easier. All the national reports have been published by Jane Millar and Andrea Warman, editors, as a working paper of the University of Bath, School of Social Sciences ('Defining Family Obligations in Europe'. Bath Social Policy Papers No. 23, University of Bath).

Mannheim, July 1996

2. Marriage and cohabitation

Marriage survives, despite the declining marriage rate and the increasing number of divorces. It is still the most important institution to create legal obligations between partners which may even survive the breakdown of the marital relationship, especially if it was a long-lasting marriage or when the couple had children. Cohabitation is of growing importance, especially as a trial period before getting married. Cohabiting couples often decide to marry after a certain period of time, especially when they decide to have children.

The marriage rate per 1,000 inhabitants declined from 9.4 in 1960 to 6.4 in 1989, a figure that is nonetheless above the EC average. The ex-GDR had a higher marriage rate (7.9 per thousand inhabitants in 1989).¹ Despite the decline since the 1960s, this is a comparatively high marriage rate in Western Europe. The relative stability of marriage is also shown by the relatively low number of children born out of wedlock in the FRG before unification.² The ex-GDR had a very high level of children born outside marriage, nearly reaching the Danish level. But since both the number of marriages and the fertility rates in the new *Länder* decreased drastically after the 'shock of unification', one should use caution when making claims about statistics at the aggregate level and observe future developments carefully.

Legal recognition for cohabitation has been rather limited; important legal consequences of marriage have not been extended to non-marital unions, such as duties of maintenance and mutual support of the partners, marital property rights or inheritance rights. Under tax and social security regulations, access to some benefits remains exclusively reserved for married partners (such as widow/ers' pensions or the free co-insurance of a dependent spouse in health insurance). Where benefits and services are more linked to having or caring for children, being married is of less importance. Access conditions to means-tested benefits (particularly income support, unemployment assistance and housing benefits) treat cohabitation mostly on an equal par with marriage. This is already an older trend and is intended to limit advantages of unmarried couples over married ones; therefore the means-test is based on the couple's income, and mutual maintenance is assumed whether or not there are legal support duties. As in all countries, cohabitation is recognized earlier where it helps to save public expenditure, while it is acknowledged only reluctantly if doing so opens access to benefits formerly reserved for married couples.

While marriage is still a central institution under family and civil law for creating rights and duties, it has lost ground under social security law because earnings-related benefits to replace

¹ See *Statistisches Bundesamt* (1989: 44).

² In 1989 children born outside marriage made up 10.3% of all live births in the FRG (*Sozialporträt Europas* 1991: 26), while the EC average was 17.1%.

former wages are linked to the individual and because other benefits are linked to having or caring for children, not to the marital status of the recipients. In the latter area, different and often contradictory models determine who should be supported and which risks and needs are covered.

The treatment of married and cohabiting couples in civil law

The model of marriage in private law has undergone considerable change and moved towards a gender-neutral model of the 'partnership marriage' in 1977. Today, both spouses have equal rights and duties. The wife has the right to work outside the home; and important decisions on marital arrangements, the division of labour and on financial matters have to be made unanimously by both spouses. A gender-neutral variant of the 'breadwinner/housewife model' is acknowledged by law as one possible arrangement, since running the household is accepted as fulfilling the duty of marital maintenance towards the other partner and the family. Various prerogatives of the husband have gradually been abolished by the Equal Rights Law 1958, the Marriage Reform Act 1976 and the case law of the Federal Constitutional Court.

The basic requirement that the spouses who wish to enter marriage must be of different sexes is nowhere explicitly written down, but it has been consistently upheld by case law. The latest campaign of lesbian and homosexual groups in 1993 to change this interpretation was once again unsuccessful: various same-sex couples tried to be married by registrars in different municipalities on the same day, which led to a number of lawsuits claiming that denying lesbian and homosexual couples access to marriage violated their human rights. These claims were repeatedly rejected by the Federal Constitutional Court with the argument that the different sex of partners is essential to the institution of marriage, which is protected by the constitution especially to facilitate the foundation of a family with children.

Important legal consequences of marriage are

- maintenance and support obligations
- property division and administration
- inheritance rights
- parental rights and obligations, especially the assignment of paternity
- rules related to the distribution of marital property, the marital home and household goods and to spousal maintenance after separation or divorce.

Maintenance and support obligations under marital law

Both spouses are obliged to maintain the family adequately through their labour and financial assets. Under continental law a duty to provide maintenance for the spouse exists,

which can be enforced through the courts during the marriage or after separation. Under the German Civil Code of 1896 this maintenance obligation was one-sided, with only the husband having to provide maintenance. The Equal Rights Act 1958 declared maintenance duty to be mutual, and the wife's activity of running the household, caring for and raising the children was recognized as a contribution to maintenance; before the Equal Rights Act, it had been considered an unpaid service, but not a transfer of monetary value, and the obligation to provide these services was based on the marital relationship. The upgrading of the wife's unpaid activity in the common household as a maintenance contribution of equal value with monetary provision by the husband was motivated by the equality principle and reinforced by later decisions of the Federal Court of Justice. This argument was used also to justify the introduction of the property regime of 'deferred community' in 1958 and the later rules on the splitting of pension rights and some other assets between the spouses in case of divorce. After the 'partnership model' of marriage was introduced in the 1977 law reform, the recognition of wives' unpaid labour in the household was upheld by a gender-neutral clause stating that, as a rule, the partner with the main responsibility for running the household is thereby already fulfilling the maintenance obligation.

The marital property regime

Since the enforcement of the Equal Rights Act in 1958,³ the legal marital property regime is that of 'deferred community' (*Zugewinnngemeinschaft*). This regime combines a system of separate property and common property, based on the Swedish model of 1921. During marriage, both partners own and manage their property separately and are liable for their own debts. However, if expenses are made to cover the normal needs of a family, transactions of one partner are legally binding for the other spouse as well (para. 1357 CC). In the interest of third parties a similar rule applies to cohabiting couples also; if they give the impression that one partner is entitled to make transactions that also bind the other partner, the other one can be liable for these debts as well. Joint bank accounts, hire purchases or joint loans therefore carry certain risks for a cohabiting couple if they have not made arrangements for distributing the obligations among themselves in case of separation.

There are certain limits on a spouse's rights to dispose of personal property items. For important transactions involving the whole property or household goods and the privately-owned marital home a spouse needs the partner's consent. In case of dissolution of marriage through death or divorce, the increase of both spouses' property assets during marriage is equalized between them, so that this property increase (or decrease) is shared between them. Property owned previous to the marriage or acquired by inheritance is excluded from this

³ The property regime based on the German Civil Code of 1896 gave the husband the right to administrate the wife's property and to enjoy the profits and gains from her property assets; only property derived from the wife's own professional activity was excluded from the husband's control.

property sharing. The property assets of each spouse at the beginning of the marriage are deducted from the assets at the end of the marriage to calculate the increase during the marriage, and the difference in these amounts is then distributed equally among the spouses through a transfer of property. In case of dissolution of marriage by death of one partner, a simpler technique is usually applied to implement the deferred community (see below). Spouses are also free to choose a separate property or common property regime, in which case they must have a marriage contract endorsed by a notary public.

Inheritance rights of the surviving spouse

In the FRG the inheritance rights of the surviving spouse have been improved, which appears to be part of a general trend in different countries (Rheinstein and Glendon 1980). In Germany—unlike the common-law countries—most people do not make a will, and inheritance according to statutory provisions is the rule. The share of the surviving spouse depends upon the existence of other co-heirs: if there are children or other descendants of the deceased, the surviving spouse gets one-fourth; if there are no descendants, but parents or siblings of the deceased or grandparents or descendants of these persons, the spouse inherits half. However, since 1958, if the marriage followed the deferred community property regime, the surviving spouse's share is increased by one-fourth in lieu of calculating the actual increase in property assets during the marriage, as would normally be done under the rules of deferred community property (see above). This rule was adopted in order to ease and speed up the distribution of the inheritance. Thus if no will was made and there are children as co-heirs, the surviving spouse is entitled to half of the inheritance. If there are only more distant relatives, the spouse gets the whole inheritance.

A spouse cannot be completely disinherited by the will of a partner. A minimum inheritance, amounting to half of the above-mentioned sum, is guaranteed. In this case, the property rights based on the deferred community as marital property regime are also maintained. Spouses (but not cohabiting couples⁴) can issue a common will in which they install each other mutually as heirs and postpone inheritance by children or other legal heirs until both of them have died. Changes of such a mutual will can only be arranged by both spouses together; one-sided changes are excluded. All inheritance rights of a spouse are forgone if he/she had started divorce proceedings or if the deceased spouse had given his/her consent to divorce before death.

A provision under inheritance law allowing thirty days of maintenance payments and the right to remain in the common dwelling for those family members living together with the deceased has been extended by case law to cohabiting partners. But while the surviving spouse

⁴ Cohabiting couples do better to make a binding inheritance contract before a notary public, or to draw up personal wills.

is also entitled to household goods and marriage gifts, no similar rights exist for a surviving unmarried partner.

The situation of unmarried couples with regard to spousal maintenance obligations, the marital property regime and inheritance rights

Cohabitation does not *automatically* create any of the above-mentioned legal consequences of marriage. However, cohabiting couples are free to create most of the above-mentioned obligations via contractual arrangements, by issuing a will, or through insurance contracts that provide for old-age security. However, custody over children cannot be regulated by private arrangements, and other disadvantages under private law remain, for example in the field of private insurance contracts.⁵ The major change since the 1970s is that contracts between cohabiting partners or a will that assures inheritance of a cohabiting partner are no longer considered legally void and contrary to public order and morals. They are nowadays recognized as valid arrangements for cohabiting couples, independent of their sexual orientation. However, most cohabiting couples do not go to the trouble of making legally-binding arrangements, which is expensive and time-consuming and requires the assistance of a lawyer or notary. According to a representative EMNID survey of 1983, only 20% of cohabiting couples had made some arrangement (11% orally, 8% written, 2% certified legally by a notary public).⁶ Most young couples did not bother about it, and women were more reluctant to raise the issue than men. The lack of legally-binding arrangements is usually no problem as long as the relationship works, but may put the economically weaker party in a very difficult situation once conflicts arise or the relationship ends. Legal rules usually do not play a big role as long as the couple lives together (which holds true also for marital unions), but are important in case of conflict.

The situation of married and unmarried couples is more similar as far as rights related to *housing* are concerned. Compared to other Western European countries, private homeownership is less common in Germany. Only 46.7% of all households in 1988 owned their own home; this percentage was somewhat higher among married couples with children (EUROSTAT 1991: 118).

Judges have wide discretion regarding the distribution of household goods and the marital home in case of *divorce*, if the partners do not find a common solution. A judge can assign the rented apartment to whichever one of the partners signed the rental agreement. However, if only one partner is the owner, the non-owning partner may be allowed to live in the house in case of exceptional hardship. In the case of death of one of the partners, no special protection

⁵ See *Bundesminister für Jugend, Familie, Frauen und Gesundheit* (1985) for more details.

⁶ Quoted in *Bundesminister für Jugend, Familie, Frauen und Gesundheit* (1985: 87).

for the surviving spouse to remain in the privately-owned marital dwelling is provided for. However, if the couple was living in a rented home, the surviving partner or other relatives living in the apartment can continue the rent contract, even if they did not sign it. This provision under rent law has been extended by case law also to cohabiting partners who have a long-lasting relationship.⁷ If cohabitation is terminated by separation rather than death, no provision for cohabiting couples exists to protect the economically-disadvantaged partner.

Rights and duties of married and unmarried parents towards their children

A central difference is the 'paternity assumption' linked to marriage in all legal systems. The husband of the mother is deemed to be the child's father. There is no similar rule for a cohabiting couple, therefore it may be more complicated to determine the father. Paternity must either be acknowledged by the child's father or proved in court. While all paternal rights and duties are automatically assigned to the man married to the child's mother, the rights of non-married and divorced fathers (or mothers) who do not have custody are restricted.

Some rules treat unmarried mothers differently from married mothers: the youth welfare office assigns a sort of guardianship⁸ *ex officio* to children born out of wedlock, in order to help deal with questions of paternity, child support and inheritance rights. This institution was introduced in 1969 when the rights of children born out of wedlock were improved: before 1969, unmarried mothers did not have full custody rights, and out-of-wedlock children were under the guardianship of the youth welfare office. An unmarried mother can request the juvenile court to abolish this *ex-officio* guardianship on the grounds that it is not necessary for the interests of the child. It is a sort of patriarchal protection for the unmarried mother who is stereotypically seen to be weak and unable to defend her and her child's interests properly. This provision is strongly contested as discriminatory and as a violation of constitutional and international law.⁹ It is one of the few rules not extended to the new *Länder* when West German family law replaced the ex-GDR regulations.¹⁰

Unmarried fathers cannot yet acquire joint custody with the mother, even if they are cohabiting and the mother agrees.¹¹ In case of the mother's death, custody falls to her relatives,

⁷ A ruling by the Federal Civil Court in 1993, published in *Zeitschrift für das gesamte Familienrecht* 1993: 533.

⁸ The *Amtspflegschaft* is a minor sort of guardianship with fewer restrictions; German law distinguishes between two different types of guardianship.

⁹ However, Germany has not signed the European Convention of 15 October 1975 on the rights of children born out of wedlock, which provides for the possibility of custody by the unmarried father if the mother dies or if she is incapable of or unwilling to exercise her custody rights. Unmarried German fathers who made claims based on the European Convention of Human Rights before the European Court of Human Rights have been unsuccessful up to now.

¹⁰ For details of the family law regulations of the former GDR and the application of FRG family law, see the Fifth Family Report (1994: 89ff).

¹¹ A ruling by the Federal Constitutional Court of 1991 has opened the possibility of joint custody by unmarried parents, if the mother agrees. But since the Court was hesitant to declare a contradicting rule null and void, this case law has not yet had any consequences nor been applied by lower courts or by the relevant administrative bodies.

not the father.¹² If the couple is not cohabiting, the unmarried mother is largely free to exclude the father from visiting rights or contact with the child. Divorced fathers (or mothers) also used to be excluded from joint custody, since the legal model was that only one parent should have custody after divorce. In 1982, the Federal Constitutional Court declared this rule in violation of the constitution, and this whole complex of regulations is currently undergoing change. Various reform proposals have been made, though not yet implemented; the current rules are claimed to violate the European Convention on Human Rights as well as basic rights, such as the equality principle or the right to family life. The political pressure for reform increased considerably after German unification, since family law in the ex-GDR was much less patriarchal than the West German rules.¹³ The greater number of children born out of wedlock and of divorcing couples with children in the former GDR exert additional pressure for change, therefore new regulation may soon see the light of day.

The treatment of married and cohabiting couples in the tax system

Married couples are assessed jointly, unless they elect to be assessed separately, while cohabiting couples have no choice but to be taxed individually. Married couples with only one earner or with one partner earning substantially more than the other enjoy considerable financial advantages via an 'income-splitting system' that is strongly biased towards the 'breadwinner/housewife-model' of marriage. Technically, the total income of the married couple is first added up, then twice the basic tax allowance is deducted (regardless of the number of earners in the couple). The remaining income is split into two equal halves and then taxed at the rate for one-half, then this tax amount is finally doubled. If only one partner is earning or the second partner has a much lower income, this procedure saves taxes substantially and reduces the effect of tax progression. High-income recipients profit more than low-income earners, and if both spouses earn about the same, married couples gain hardly anything compared to unmarried individuals.

The tax credits related to parenting are less substantial than the tax advantages deriving from marriage. In some lawsuits lone parents claimed therefore that they were discriminated against. In 1977, a claim before the Federal Constitutional Court was successful, and since 1977 lone parents receive a special tax allowance (*Haushaltsfreibetrag*) of DM 5,616 per year (1993). Another part of the 'compensation package' for lone parents who cannot benefit from the marriage-related tax advantages is that only they can deduct child-care expenses up to DM 4,000 for the first and DM 2,000 for the second and each subsequent child per year (or a lump sum of DM 480 without proof of expenses) from their taxable income. Divorced or separated

¹² The only way to avoid this consequence is if the mother issues a will declaring that the father be invested as the child's guardian in case of her death. The court is then bound to follow her wishes.

¹³ See the Fifth Family Report (1994: 89ff.) for a detailed description of the development of family law in the FRG and ex-GDR and the assimilation process after unification.

partners who pay maintenance can deduct these payments as special expenses up to DM 27,000 per year (1993) when computing their taxable income, while formerly cohabiting couples do not have access to these tax advantages. The bias of the tax system towards marriage and particularly towards a traditional marriage model has widely been criticized, but has not yet been changed substantially. Other tax credits related to children and to educational costs are granted independently of parents' marital status.

The treatment of married and cohabiting couples in the social security system

Marriage has a gate-keeper function for access to widow/ers' pensions and to the free co-insurance of a dependent spouse in health insurance, and plays an indirect role in determining unemployment benefits, which are calculated on the basis of net income and therefore affected by tax provisions differentiating between married and unmarried persons. Cohabiting partners cannot benefit from these provisions.

Widow/ers' pensions

play an important role as old-age provision within the German pension system which is gender-neutral,¹⁴ strictly individualized, earnings-related and status-oriented and does not provide for minimum pensions (Scheiwe 1994a). Widow/ers' pensions amount to 60% of the deceased spouse's pension rights if the widow/er is above the age of 45, caring for a child of the marriage, or unfit to work. If none of these conditions is met, the amount is 25% of the deceased person's pension rights. Own income above a certain threshold (in 1992 DM 1,125 monthly) reduces the widow/er's pension by 40% of the excess amount. No minimum duration of marriage is required, and the entitlement ends upon remarriage. Widows' pensions form a substantial part of old-age income of women in the old *Länder*. In these pensions the outstanding importance of marriage as an institution and the model of derived social security for women based on marriage have been preserved.

Health insurance

Non-employed wives (husbands) or those not insured since they work less than 15 hours a week and remain below the earnings threshold for obligatory social insurance can be covered by their partner's insurance without paying their own contributions. This redistribution towards husbands with dependent wives promotes the breadwinner/housewife model of marriage and has been criticized as outdated. Unmarried cohabiting partners have no access to this free insurance, and neither do lone mothers/parents, since it is not linked to caring for children, but to marriage. Until 1992, the co-insured spouse had a legal status inferior to that of the insured

¹⁴ Since 1985, widowers have access to survivor pensions under the same conditions as widows. Before 1985 they were entitled only if the deceased wife had mainly provided the family income.

partner, since all rights were vested in the insured, who was required to perform all necessary legal acts (filling in application forms or collecting reimbursements for expenses, etc.). This has been changed, and nowadays co-insured spouses as well as children have full rights as insured persons.

There are no other particular allowances or supplements for a dependent spouse (or partner) in the system of contributory insurance benefits. Marriage plays an *indirect role* for the amount of various unemployment benefits, since the wage replacement rate is calculated on the basis of net income after taxes. Since spouses can influence the applicable tax rate and assign the tax rate with higher tax progression to the lower-earning partner (and thus save taxes on the higher income, which is usually the husband's income), husbands' unemployment benefits will usually be somewhat higher than those for an unmarried individual at the same former wage level. This 'marriage premium' for an unemployed husband may penalize an unemployed wife whose wage was taxed in a higher bracket. The linkage of the wage replacement level of various unemployment benefits to net wages and therefore the indirect effect of tax law provisions for married couples was introduced in 1975 when all previous supplements for unemployed married persons were abolished.

While these marriage-related advantages concerning contributory benefits and social insurance have not been extended to cohabiting couples, the situation is different with regard to means-tested benefits. However, regulation in this area is by no means uniform (see Maydell 1989). Cohabiting couples are treated the same as married couples under income support provisions (*Sozialhilfe*) and unemployment assistance (*Arbeitslosenhilfe*). The Federal Constitutional Court had demanded this equal treatment, based on the clause of the German Basic Law that protects the institution of marriage: married couples may not be treated worse than two cohabiting individuals, who might end up with higher benefits by receiving twice the individual rates compared to the married couple's rate. Therefore income of cohabiting as well as married couples is added up for purposes of means-testing. The income of both partners is aggregated for the means-test; it does not matter whether maintenance is actually paid or not. In these cases, cohabiting couples are treated differently from other forms of common households where more persons live together, or differently from two cohabiting persons of the same sex. The income of persons living together in these other forms of common households are aggregated only if maintenance is actually paid and if the other person earns sufficiently to support someone else.

Two benefits do not yet take the income of a cohabiting partner into account (in contrast to the rules applied to married couples): means-tested educational grants awarded under the Federal Act on Educational Support, and child allowances which may be reduced according to the income situation of parents.

3. Parents and their dependent children

Parental support duties

In Germany and under continental law in general a reciprocal duty of support exists between all persons related in direct line, ascendants and descendants, based on the tradition of Roman law.¹⁵ The support duties of parents towards children are greater than the general support duty between relatives: basically, parents are obliged to share everything with their children. The introduction of certain income thresholds reserved for the own needs of an absent parent who has to pay child support is a more recent phenomenon.¹⁶

The responsibility of parents towards their minor children consists of the duties to provide care and financial support. As a rule, a mother fulfills her support duty through caring for and raising the child. The support duty requires parents to provide adequate support according to their 'station in life' and includes the whole range of the child's needs as well as the costs of education and professional training appropriate to the child's capabilities and talents. Since 1958 girls have the same right to parental support for education and training as boys; the former gender-specific rules about dowry have been abolished and substituted by a gender-neutral right, and an adequate education is considered necessary for girls as well.

The *duration of the parental support duty* has been extended over time. It does not cease when a child reaches majority, but can be lifelong in case of need. Since the support duty includes the financing of an adequate education and professional training, university studies or other training courses must also be financed by the parents.

The calculation of child support amounts

The statutory rule in Germany is that support be granted according to the parents' 'station in life', an archaic expression for social status. However, this formula is interpreted mainly as the living standard commensurate with the available means (see Dopffel 1988: 189), though a distinction was made between children born in and out of wedlock. Formerly, only the unmarried mother's 'station in life' was taken as point of reference for calculating the father's support duty.

¹⁵ See the excellent comparative overview of Dopffel (1988) on child support in Europe.

¹⁶ Since 1992, the minimum income reserved exclusively for the personal needs of a parent according to the standards developed by case law ('Düsseldorfer Tabelle') is DM 1150 monthly for a non-employed parent of a minor child, DM 1300 for an employed parent and DM 1600 for a parent obliged to pay support for a child above majority age.

The basic legal rule is that child support be awarded according to the child's needs and the parents' financial capability. If one parent is absent, he is obliged to provide monetary support. The custodial mother fulfills her support duty as a rule by raising and caring for the child, therefore her earning capacity should not be taken into account when calculating the support amount. The interpretation of the above-mentioned criteria by case law of the family courts has led to the development of 'support tables' used in judicial practice. These tables set scales of increasing fixed amounts to be paid by parents in different income groups and according to the number and age of children and the employment status of the father/absent parent. The one most used is the 'Düsseldorf Table'.

'Düsseldorf Table' for child support amounts 1 July 1996

Age group	up to six years	7 to 12 years	13 to 18 years ¹⁷	
Monthly net income of the parent obliged to pay in DM	Amount of child support due			Remaining income reserved for own needs of obliged parent
up to 2400	349	424	502	1300/1500
2400-2700	375	450	530	1600
2700-3100	400	480	565	1700
3100-3600	435	525	615	1800
3600-4200	475	570	675	1950
4200-4900	515	620	735	2100
4900-5800	565	680	805	2300
5800-6800	615	740	875	2500
6800-8000 ¹⁸	665	805	945	2800

Family Courts in the new *Länder* have developed their own tables which are more detailed for lower-income groups and usually follow the 'Düsseldorf Table' for parents with income above DM 2400 monthly.

Minimum amounts for child support

are based on a governmental decree (*Regelunterhaltsverordnung*) introduced in 1969 to set minimum amounts of support for children born out of wedlock. Amounts are calculated according to the needs of a child cared for by the mother at a modest living standard, and the legislators' idea of this living standard is very spartan. Support amounts are fixed independently of the father's income at three different levels according to the age of the child. They correspond to the support amounts fixed by the 'Düsseldorf Table' for the lowest income group with monthly net earnings below DM 2400. From July 1996 on, the monthly support amount was DM 349 for children up to six years, DM 424 for children from seven to twelve years and DM 502 for children aged 13 to 18 years. The support amount is further reduced

¹⁷ The child support for a student not living with a parent is assumed to be monthly 1050 DM.

¹⁸ If the obliged parent earns more than DM 8000 per month, the child support is fixed individually according to the particular circumstances.

since child allowances received by the custodial parent are deducted. This minimum support amount is occasionally increased by governmental decree and was last raised in 1996. The amounts fixed for the new *Länder* are about 10% lower.

The purpose of setting these minimum amounts was to speed up support claims of these children and avoid long investigations into the absent father's income record; these minimum amounts can be enforced in a simplified procedure. These minimum support amounts were also used to define the basic claims for children of divorced parents. However, the support claims of children born out of wedlock or of children of divorced parents are not limited to these basic amounts. They can also claim higher rates based on the absent parent's actual income, but this requires a lengthier and more costly legal procedure.

State intervention into parental rights

So far, this paper has described parental support duties: parents are primarily responsible for raising and supporting their children; in the absence of parents, these responsibilities fall on their respective families and relatives. What is the role of the state? State intervention in the rights and duties of parents is limited by the German Basic Law; parental rights are among the human rights guaranteed in Article 6. The role of the state is formulated only as a subsidiary one. The new statute of 1993 on Child and Youth Assistance is also based on this subsidiarity principle and conceives of state intervention as help for parents to fulfill their natural rights and primary duties.

Where are the *limits of parental authority*? When can the state intervene in parental custody rights? The possibility of state intervention in the family has been broadened over the last hundred years, while parental custody rights and authority have been restricted (see Sachße/Tennstedt 1982 for a historical overview). The role of the state has often been described as 'supervisory', and intervention is possible only if parents abuse their constitutionally-guaranteed rights or do not fulfill their duties and thus endanger the child's welfare. As various authors have noted, the notion of the 'child's welfare' or the 'best interests of the child' is vague and open to various and contradictory interpretations.

Para. 1666 I of the German Civil Code allows the guardianship court to intervene in cases when the physical, mental or psychological well-being of the child is endangered by the abuse of parental rights, neglect of the child, non-intentional failure of the parents or through the behaviour of a third person. These general provisions have been specified by case law. The above-mentioned conditions for state intervention are met if children are induced to commit crimes; if their labour is exploited; if they are physically harmed and maltreated; if they are forced to undergo professional training that does not at all suit the child's interests and

capabilities; if parents do not give the necessary consent for a life-saving medical intervention such as blood transfusions; if parents refuse continually to send their child to school, if children are insufficiently fed, clothed and cared for medically; if their school participation is not supervised adequately, etc.

The measures that can be taken by the courts range from a simple warning to the partial or complete withdrawal of custody rights from one or both parents. However, judicial discretion is limited by the constitutionally-guaranteed proportionality principle (measures must be adequate and suited to reach the intended goal). And the most drastic intervention such as removing the child from the family can be taken only if the danger cannot be stopped by other means, through public help and support of the family, or if other measures have been unsuccessful. Other provisions allow for judicial measures to protect the child's property from misuse by their parents. The youth welfare office can also take some provisional measures¹⁹ if a child asks for shelter from his/her family. In this case the parent/s must be informed and, if they do not agree, the youth welfare office must ask immediately for a court decision, or the child must be sent home at once.

The former remarks have sketched the borderline between parental rights and state intervention. There are obviously various other forms of public intervention and advice for parents, children and families (as, for example, around 900 advice centers for child-raising issues). A new Child and Youth Assistance Act regulating these areas went into effect in May 1993 after long debate. Extensive documentation and statistics are published in the 'Youth Report', written by an expert commission and published by the government every eight years.

Public support for the costs of children and public care

The costs of children and the call for more public transfers

The debate over the costs of children and problems of distributing this burden among households with and without children has gained much attention in Germany, particularly after two decisions of the Federal Constitutional Court in 1990 declaring that the existence minimum of families, calculated on the basis of social assistance benefits, must remain untaxed, which requires considerable changes in the tax and benefit system. One main focus of the 'Fifth Family Report' (1994) written by an expert commission on behalf of the government is to calculate the direct and indirect expenses of children and the economic value of services produced within families and to assess the contribution to human capital development of this hidden part of the economy. It would obviously go too far to consider all the methodological

¹⁹ Para. 42 Child and Youth Welfare Act 1993.

and scientific problems involved in such an approach, but some of the main results of this research should be mentioned here.

A study of investments in the younger generation (monetary expenses, care and goods and services provided by institutions external to the family) in 1974 concluded that private households had to bear 74% of the total investments, the state and public institutions 24% and non-governmental organisations 2%. Willeke and Onken researched which share of the 'minimal child costs' were covered by a few public allowances and tax rebates for a great number of different family types in 1986 (Willeke/Onken 1990). A newer study of child costs for a white-collar and blue-collar family with two children calculates the costs per child (direct monetary expenses and human capital investments in care time)²⁰ at DM 890,000 (time spent in care evaluated at the wage level of a care worker in a kindergarten) or DM 790,000 (time spent in care at the wage level of a female blue-collar worker). If one looks at the compensation effect by public transfers (child allowance, tax allowances, parental leave allowance, baby-year credits in pension insurance, free health insurance for children), this corresponds to 20.5% or 23.7% of the above-mentioned child costs (Fifth Family Report 1994: 290ff.).

This calculation gives just an impression of the immense private investments in children. Couples' preference for childless marriages at the expense of families in Germany has been widely criticized, and exercises such as the above underpin calls for change to do away with subsidies and allowances that privilege marriage and high-income earners more than lower-income families and families with children.

The main benefits for parents and children

Before looking at more age-related public support and care measures, some more general provisions will be briefly described here. A very detailed investigation was provided by Oberhauser (1989). Further details on some benefits can be found also in MISSOC (1995).

Child allowances and child-related tax reliefs

Child allowances and tax reliefs were not especially generous in Germany, but have been upgraded in 1996. In international comparison Germany occupied a medium-range position as far as the generosity of child allowances was concerned (Kammerman/Kahn 1991; Bradshaw et al. 1993). The system has undergone some change, and the relative importance of child allowances and tax exemptions varied under the different government coalitions. Social Democrats preferred increasing child allowances, while Christian Democrats and Liberals

²⁰ For details, see the Fifth Family Report (1994: 293).

stressed the importance of redistribution via taxes and re-introduced tax exemptions for children in 1983. One effect of this system was that high earners profited much more from it than low-income families. An impulse for change resulted from decisions of the Federal Constitutional Court in 1990²¹ who declared that the existence minimum of families with children should remain untaxed, and that the combined effect of tax exemptions plus child allowances failed to reach this goal. Since this was considered to violate the constitution, the parliament was requested to change the institutions and upgrade child allowances and/or tax exemptions for children.

Starting in 1996, child allowances have been increased considerably. The amount is now DM 200 monthly for the first and the second child, DM 300 for the third child and DM 350 from the fourth child on. A former income-related supplement to the child allowance for those persons who did not benefit from the child-related tax exemption was abolished, as was the income-test for the higher child allowance (only a lower sum was formerly universal). The tax exemption was also increased by nearly 50% and is now over DM 6,000 per year. However, the child allowance and child-related tax exemptions can no longer be combined: the entitled person must choose between them. The benefits for high-income earners from tax exemptions for children are no longer much higher than the gains from child allowances. In this way a compromise between the governing Christian Democrat/Liberal coalition and the Social Democrats was found to comply with the rulings of the Constitutional Court.

Maternity leave and pay

The duration of maternity leave for eligible employed women is 14 weeks (6 weeks before and 8 weeks after confinement) and corresponds to the EU average. The maternity pay covers the average net wage before employment, but only part of it is paid by health insurance (up to a maximum of 25 DM per day), while employers have to pay the difference up to the former net wage level, which can sometimes be quite substantial. Non-employed mothers or those who do not fulfill the entitlement conditions can receive the 'parental benefit' (*Erziehungsgeld*) during this period, explained below.

Parental leave and pay

Since 1986, a parent (mother or father) is entitled to receive a 'parental benefit' if she/he is caring for a child below the age of three for a maximum of two years. This allowance is independent of the former employment status, but compatible with employment only if the recipient does not work more than 19 hours per week. Since 1994, this part-time employment must not necessarily be with the former employer, but may be with a different employer. The

²¹ Decisions of the Federal Constitutional Court published in *Neue Juristische Wochenschrift* 1990, 2869ff. and 1990, 2876.

parental allowance is related to the income of cohabiting parents and can be reduced gradually if certain income thresholds are passed. An employed parent is also entitled to an unpaid leave of up to three years when caring for a child under the age of three; the duration has been extended gradually. Since 1994, parents can alternate the parental leave between them three times. The 'parental leave package' is built around a motherhood model according to which mothers stay at home at least when children are small (Scheiwe 1994b). Various disincentives for employed mothers are built in (for example, pension credits for up to three 'baby years' are reduced if a parent pays own pension contributions based on employment if the child is below the age of three). Only part-time employment is compatible with the receipt of the parental allowance, which punishes full-time employed mothers, especially lone mothers or mothers in low-income families who must resume full-time employment immediately for economic reasons.

Publicly advanced maintenance payments

If an absent parent does not fulfil his *child support obligations*, a public advance of maintenance can be granted. In 1979 a state support scheme was introduced to substitute for child support not paid by an absent parent. The amounts of these *publicly advanced maintenance payments* through the state were based on the minimum child support amounts for children born out of wedlock, but they are available for children with an absent parent, whether the parents are unmarried, separated or divorced. Access conditions were eased considerably after German unification. Now all children under 13 of lone parents are entitled to publicly advanced maintenance payments if the absent parent does not pay. The maximum duration of the benefit is 72 months.

Sick pay for time off to care for sick children

An insured employee is entitled to time off to care for a sick child, and lost wages will be covered by health insurance if a child below the age of 12 is sick and no other person in the household can care for the child. The maximum duration of time off and benefit receipt is 10 days for each married parent and 20 days for a lone parent. In case there is more than one child, the maximum is 25 days per year for each married parent and 50 days for a lone parent. The entitlement was extended considerably after German unification: previously age limits and maximum duration were lower, and no special rule for lone parents existed.

Household help

If a mother is unable to care for her family due to sickness, hospitalization or childbirth, health insurance can provide a household helper or take over the costs of a substitute for the housewife and mother. These costs are not covered fully if the help is provided by a relative up to the second degree. These persons can be reimbursed for modest travel expenses or lost

wages. Only the husband must have mandatory insurance; whether the non-employed wife is co-insured or insured obligatorily herself does not matter. Although formulated in gender-neutral terms, this is a typical male right. For a family to be eligible, at least one child below the age of 12 or a handicapped child must live in the family and no other person within the household is available to provide the services.

Income support

Income support amounts vary for the different *Länder*, which have the competence to set the amounts. Amounts are individualized, and children above the age of 14 have an individual claim to income support which they can pursue on their own. Benefit levels are differentiated, with a person living on her/his own or the head of household receiving the highest amount. The benefit level of the second adult in the household is 20% lower, and the amounts for children vary according to age. The average basic amounts for the old and the new *Länder* are given in Table 1. It should be noted that various supplements, housing benefits and single benefits can be paid; the basic amounts are insufficient to cover the existence minimum.

Table 1: Basic amounts of income support (1994) in DM: calculated averages for old and new *Länder*

(Source: *Bundesgesetzblatt* 1993: 46)

	head of household and single person	child up to age 7		8 to 14 years	15 to 18 years	adult household member
		living with a lone parent				
Old <i>Länder</i>	518 (100%)	259 (50%)	285 (55%)	337 (65%)	466 (90%)	414 (80%)
New <i>Länder</i>	501 (100%)	251 (50%)	276 (55%)	326 (65%)	451 (90%)	401 (80%)

Care for pre-school children

Pre-school children may be cared for in one of two institutions: *Krippen* (crèches) for children below the age of three, or kindergarten for children aged 3 to 5. These institutions are run mainly by churches or charities and by municipalities. The regional legislators are responsible for regulating these services, not the federal state. Financing is a matter of the regions and municipalities, while the administration and practical organisation falls upon the municipalities. No federal subsidies are paid, which partly explains the reluctance of communes to expand the provision of child-care facilities. One result of the abortion law reform in 1992 after German unification was the introduction of a right to a kindergarten place for each child above the age of three, to be implemented on 1 January 1996. But this goal is still far from being reached, and implementation can now be postponed by the *Länder* until 1998.

There are huge differences in child-care provision between the old and the new *Länder*, and even among different regions in the old *Länder* (see Tables 2 and 3). Demand is not met in the old *Länder*, especially for children under three, while the ex-GDR had extensive full-time child-care facilities, which have been somewhat dismantled. According to research by the *Deutsches Jugendinstitut* (1993), places in *Krippen* were available for only 2.7% of children under three in the old *Länder* (56.4% in the new *Länder*) and in kindergartens for 78.3% in the old *Länder* (113% in the new *Länder*); see Table 3. Berlin and Hamburg offer more places in *Krippen* (for 27% of children under three in West Berlin and for 15% in Hamburg in 1990).

Table 2: Child-care places and after-school care available in 1989: old *Länder*

Source: Fifth Family Report (1994: 190); *Deutsches Jugendinstitut* (1993)

Old Länder*	<i>Krippen</i> % of children 1 to 3 years old for whom place is available	Kindergarten % of children 3 to 6 years old for whom place is available	<i>Hort</i> % of children aged 6 to 10 for whom a place is available
Baden-Württemberg	1.7	103.9	2.8
Bavaria	1.3	72.0	4.5
Berlin (West)	26.9	64.9	29.3
Bremen	3.0	66.8	15.1
Hamburg	15.0	51.1	19.6
Hesse	2.7	90.0	7.2
Lower Saxony	2.5	58.7	3.1
North Rhine-Westphalia	1.3	74.3	3.6
Rhineland-Palatinate	0.8	97.5	2.4
Saarland	1.2	94.7	1.9
Schleswig-Holstein	1.1	54.1	3.9

* Since regional differences among the new *Länder* are much smaller, no detailed breakdown for the new *Länder* is given.

Table 3: Child-care places and after-school care available in 1989: new and old *Länder*

Source: Fifth Family Report (1994: 190); *Deutsches Jugendinstitut* (1993)

	<i>Krippen</i> % of children 1 to 3 years old for whom place is available	Kindergarten % of children 3 to 6 years old for whom place is available	<i>Hort</i> % of children aged 6 to 10 for whom a place is available
New Länder, total	56.4	113.0	88.0
Old Länder, total	2.7	78.3	5.0

It should also be mentioned that usually no full-time care is provided for; kindergartens are open usually between 8.00 a.m. and 12.00 p.m. and do not provide lunch. Fewer places are available until 2.00 p.m. or for the whole day (except in Berlin, where more full-time care is available). There are, again, great differences among the regions (for details see *Deutsches Jugendinstitut* 1993: 41). The underlying social policy model in the old *Länder* is that of the 'mother at home'; even part-time work is hardly compatible with these time schedules.

The fees to be paid by parents vary between regions and municipalities and for *Krippen* and kindergartens. Parents' income is nowadays taken into account more often, though not in general. In North Rhine-Westphalia the fees differ up to DM 600 monthly for a place in a *Krippe*, up to DM 240 for a place in a kindergarten, and up to DM 400 for a full-day place in a kindergarten (Lohkamp-Himmighofen 1993: 119f.). In Mannheim parents' income is not taken into account, a kindergarten place costs DM 130 and a full-day place DM 210 monthly. Additional fees for food may arise (lunch is not generally available). The fees for parents with low incomes, especially lone parents, may be paid by the local youth welfare office.

More informal child care is provided by so-called '*day mothers*' usually in their own home who often care for their own children, either on a purely private basis or under some supervision of the local youth welfare office which sets certain standards for prices and the provision of services. Registered and non-registered '*day mothers*' provide for about 4 to 5% of children below the age of three (Fifth Family Report 1994: 189). Such an arrangement is rather costly for parents and therefore rarely used by mothers earning low wages. Lone parents with low income can get subsidies from the youth welfare office for the costs of a '*day mother*'.

Demand is not met in the old *Länder*, especially for the age group under three and with regard to full-day kindergarten places. If one considers that the employment rate of mothers with children under three is 37%, one can imagine the difficulties of mothers and families in filling the gap between supply and demand; many mothers are forced to remain at home because they cannot find adequate child care or families do not have the necessary financial means.

School-age children

School hours in Germany are rather short, traditionally half-day and irregular (for details and a comparison between EC countries see Eurydice 1993), and usually children do not get lunch at school. School lasts from 7.30/8.30 a.m. to 12.30 p.m. in primary schools and a bit longer at the secondary level, but the teaching time may vary from one day to another. In the former GDR, full-day schooling including the provision of meals was usual, and this pattern remains predominant in the new *Länder*.

After-school care for children aged 6 to 10 (in an institution called '*Hort*') is very rare in the old *Länder*, with the exception of the regions Bremen, Hamburg and Berlin where places are available for 15 to 30% of schoolchildren; again one finds big regional differences (see Table 2). On average, these places are available only for 5% of primary school-aged children in the

old *Länder*, but for 88% in the new *Länder*. In some regions, schools now provide supervision for pupils during certain 'core hours' (*Kernzeiten*) from about 7.30 a.m. to 1.00/2.00 p.m. or 4.00/5.00 p.m., but these initiatives of different *Länder* have not yet been fully implemented.

An investigation in Lower Saxony revealed that one-third of all parents would like a place for their child in a *Hort* or *Krippe*, depending on the child's age (Heye 1992). According to surveys, people in the new *Länder* are more convinced that provision of child-care facilities and after-school programmes, as well as holiday programmes (which were very common in the ex-GDR), are the legitimate responsibility of the state.

Financial support for the education of children is provided on a means-tested basis under the Federal Education Promotion Act 1971, although eligibility has been increasingly restricted in recent years.²² These measures do not apply to professional education. Pupils are entitled only from the tenth year of school and up, thus roughly from the age of 16 on, but with the introduction of cost-cutting measures in 1983 pupils are eligible only if they do not live with their parents or because school is too far away from the parental home. This is rarely the case, and the number of pupils receiving the grant has decreased from 455,000 in 1982 to 68,000 in 1986 (Bäcker et al. 1989: 187).²³ Students at universities and in other forms of higher education may be entitled up to the age of 30²⁴ and for certain fixed periods, if parental income, the student's own income and/or that of the spouse²⁵ do not exceed certain rather low income thresholds. The amount varies for school and university students and is dependent on income.²⁶ From 1983 to 1990 this benefit was paid to university students only in the form of a loan that had to be repaid; nowadays half of the amount received is a grant, the other half a loan. The public grants are financed by the federal government (65%) and the *Länder* (35%). But since the income thresholds are very low, only 33% of all students received a 'BAFÖG grant' in 1991 in the old and the new *Länder*. Of these recipients, 19% received up to DM 100 to 300 monthly, 20% DM 300 to 500 monthly and 60% between DM 500 and 1000 monthly.²⁷ The number of recipients decreased steadily, increased with German unification, and is now decreasing again (in 1993, 8.8% fewer pupils and students received a grant). From 1975 to 1986, the proportion of university students receiving a grant decreased from 43.6% to 21.4% (Bäcker et al. 1989: 189). This was due to cost-cutting measures in 1983 and a lowering of income thresholds, but also because the benefit and income thresholds are not indexed for

²² See the Federal Act on Educational Promotion (*Bundesausbildungsförderungsgesetz BAFÖG*).

²³ It is seen as a regional, not a federal task to support pupils living at home with their parents. Most *Länder* now have regional legislation which provides for this group, but the conditions vary considerably.

²⁴ This age limit does not apply to a parent who has interrupted education to care for children under the age of 10.

²⁵ As mentioned above, the income of a cohabiting partner is not taken into account for the means-test in this case.

²⁶ From July 1992 on, the maximum for pupils not living at home was DM 665 per month in the old *Länder* and DM 590 in the new *Länder*. For university students, the maximum for those not living with their parents was 940 DM (including an amount for housing and sickness insurance fees) in the old *Länder* and DM 855 in the new *Länder* and was about 20% lower for those living at home. However, only a small proportion of recipients receives the maximum amount.

²⁷ Source: BAFÖG grant statistics of the Federal Ministry for Education and Training 1992.

inflation. A 1990 study reported that these grants cover on average only about 12% of students' living expenses, with the rest having to be raised by the families of university students and by the students themselves.²⁸

4. Access to divorce and financial obligations after divorce

The main changes concerning access to and the legal consequences of divorce were introduced by the First Marriage Law Reform Statute 1976, in force since 1 January 1977. It is no longer essential to prove guilt of the other party to get a divorce, but the principle of irretrievable breakdown of marriage is central. The breakdown of the marital relationship can be proved by a one-year separation (which is possible also within the common dwelling), if both partners ask for divorce, or by three years of separation if only one partner applies for divorce. A special clause gives the judge the option of refusing a divorce if deemed necessary in the interest of minor children, or if divorce would cause special hardship for the party opposing it, but this option is rarely used. For access to divorce guilt no longer plays a role, though it may affect post-divorce maintenance. The economic consequences of divorce are not all 'thrown into one pot', as tends to be the case under English divorce law, but rather the division of property rights, pension splitting, etc., and the question of maintenance and child support are dealt with separately. An overview of the property division in case of divorce is given in Voegeli and Willenbacher (1992). In the following section, only maintenance and child support are discussed.

The authority of judges in divorce proceedings was strengthened in the 1977 reform, since all related matters (maintenance and child support, custody over children, visitation rights, distribution of marital property and household goods, splitting of pension rights and other assets) must be decided jointly in the divorce procedure. The parties must be represented by a solicitor, but one solicitor may represent both of them. The possibilities for contractual arrangements out-of-court between the parties are rather limited; agreements and bargains have to be confirmed by the judge or in some cases by a notary public. This makes the procedure rather costly, particularly if it was a long-lasting marriage or if the parties have high earnings and some property, but legal aid is available for low-income couples.

While access to divorce has been eased, regulation concerning some post-marital duties has been extended, especially where children are involved. The basic model of the divorce law reform was that after divorce each partner should provide for her/himself and should be economically independent. But after having stated this principle, legislation introduced a broad range of exceptions where maintenance obligations still exist. German provisions for

²⁸ 'Social Report' 1990 of the *Studentenwerk*, commissioned by the Federal Ministry of Education, quoted in *Frankfurter Rundschau* of 4 October 1990.

maintenance after divorce are, as a result of party compromises in the legislative process, among the most extensive legal texts in this area. The maintenance entitlement is independent of guilt, but the judge can reduce or delete the maintenance rights if awarding maintenance seems grossly and obviously unfair (para. 1579 German Civil Code). The statute lists various cases which were extended in 1986, among them a very short duration of the marital relationship, the negligence of his/her maintenance duty during marriage by the entitled person or gross misconduct.

Post-divorce maintenance duties

Post-divorce maintenance must be provided if a former spouse cannot provide for herself/himself. The most important case is that of a partner caring for a child from the marriage and therefore unable to work outside the home (para. 1570 German C.C.). Case law assumes that the age and number of children and the former status of the couple play a role. Employment cannot be expected if the child is still below school age or younger than eight years. If a child is eight to fifteen years old, part-time employment of the mother can be expected, sometimes even full-time work if the child is above the age of 16. If there are two children living with the divorced mother, employment can be expected when the youngest child is at least twelve years old; but if there are three children, courts would argue that employment cannot be expected. However, this depends also on the former arrangements between the partners: if the mother was employed before the divorce, one might expect her more easily to continue even after divorce, or the same would be requested if the partner obligated to pay is unfit to work. A maintenance right may continue even after child-care obligations cease due to the age of the child or because the child leaves home, if the mother after periods of child care cannot be reasonably expected to take up employment due to her age, sickness or inability to work.

Other statutory clauses grant post-divorce maintenance rights on the grounds of age, sickness or physical disability, for a limited period to find adequate employment, or on the grounds of retraining and education or due to the fairness principle. The amount of maintenance must be fixed by the judge; it is related to the former living standard of the couple and calculated on the basis of income according to different tables used by judges. The most frequently used table, the Düsseldorf Table, has already been mentioned with regard to child support. Post-divorce maintenance is calculated according to similar principles, but child support is privileged in various ways: child support is deducted from the obliged parent's income first, and the amount reserved for personal needs of the parent obliged to pay is lower than in the case of post-divorce maintenance.

Maintenance is due as a monthly payment; a lump-sum payment is possible if the entitled ex-spouse asks for it, but only if there is an important reason and if the partner obliged to pay is not unduly burdened by a payment in capital. Therefore lump-sum payments are the exception in Germany, and the idea of a 'clean break' less widespread (also due to the fact that child support is seen as an ongoing obligation that cannot fall under the clean-break principle). If the income of the divorced partner is only about DM 1,000 to 1,400 monthly after the deduction of child support obligations, he would not be obliged to pay post-divorce maintenance. He is not allowed to reduce his income arbitrarily (e.g., by quitting his job); if he does so, maintenance is calculated on the basis of the former or the hypothetical income.

In case of remarriage, the maintenance rights of the ex-spouse take precedence if she is caring for a child. Otherwise a new marriage of the partner who has to pay may reduce post-marital maintenance claims; while remarriage by the maintenance recipient erases the claim, and cohabitation will reduce it or delete it fully.

To calculate the amount of post-divorce maintenance, the net income of the ex-partner must first be calculated and child support obligations deducted. If his income is above the minimum thresholds, the following rules apply (the differences are due to varying case law):

- a) if the ex-spouse who has to pay is employed:
 - if the recipient is not employed and not obliged to be employed: $3/7$ or $2/5$ of the net income of the ex-husband
 - if the recipient is employed or pensioner: $3/7$ or $2/5$ of the difference between his and her net income
 - if the recipient is employed, although she is not obliged to: at least $3/7$ to $2/5$ of the difference between his and her income; but whether her income is taken into account and how much depends on the particular circumstances.

- b) if the ex-spouse who has to pay is definitely no longer employed, for example because he is a pensioner:
 - if the recipient is not employed and has no income of her own: about half of the man's income
 - if the recipient has an income: about half of the difference between his and her income
 - if the recipient is employed, although she is not obliged to: at least half of the difference between his and her income; but whether her income is taken into account and how much depends on the particular circumstances.

In theory, the ex-spouse who is obliged to pay maintenance is also obliged to pay contributions to sickness, pension and life insurance, if the benefiting ex-spouse is not obligatorily insured based on own employment. But this is only in the rare case where the ex-husband is quite rich (and, statistically, those marriages have much lower rates of divorce).

Child support rules have already been explained above. If the ex-husband's income is insufficient to cover all the obligations, entitlements are reduced proportionately, but child support claims are privileged.

The alimony myth

Up to now, legal models and abstract calculation rules have been presented. Reality, however, reveals the '*alimony myth*', showing that far fewer divorced wives actually receive maintenance payments than is generally assumed: according to different surveys the proportion is between 18 and 40% (see the overview in Willenbacher et al. 1987: 103). The range can be explained partly by the timing of the survey: the longer ago the divorce occurred, the less frequent and regular are maintenance payments. Most maintenance payments between 1975 and 1983 were about DM 400 DM; and maintenance that covered the existence minimum was paid only in 5% of these cases (ibid.).

The research project of Caesar-Wolf and others has investigated court decisions. Only in 17% of the judgments of family courts in a medium-sized city (Hanover) in 1980 were ex-husbands required to pay maintenance (and actual payments will be even lower). The other legal provisions were also underused by the courts, although the income and property situation of the divorcing couples did not necessarily lead to such a result. Caesar-Wolf and Eidmann (1987: 21f.) come to the following conclusion:

Though the substantial statutory provisions of the new divorce effects law are egalitarian, i.e., designed to create substantially equal conditions for both divorced spouses, court practice has been such as to render them largely ineffective. The strictly egalitarian equalisation potential of the new law in particular has been almost totally ignored. And even the conditional, compensatory equalisation provisions designed to benefit the problem group of housewives and mothers have tended to be construed according to highly restrictive criteria, limiting their benefits to a 'hard core' within this group—those who have no personal income, *and* have been married for long periods, *and* who were not employed during most of marriage, *and/or* have to care for minor children after their divorce. (...) Only the priority of this child principle has led to an actual, if partial, coincidence between the legal provisions intended to create material equality for divorced women and the criteria by which the courts regulate the consequences of divorce.

If maintenance is not paid, the state can step in for children and for the dependent spouse in different ways. For *children* below the age of twelve, publicly advanced maintenance can be paid for a maximum of six years at a minimum level according to the decree on advanced maintenance payments (see above). This substitution of parental child support is independent of the income of the parent who has custody and with whom the child is living; and the state will claim the money from the parent supposed to pay support. For a *dependent ex-spouse*, the only fall-back position is income support as a means-tested benefit according to the general rules; and there are no special benefits for divorced partners. The state can claim the money from the liable ex-spouse or other relatives according to the general rules.

5. Adult children and their dependent parents

Who pays for the care of the elderly?

First, under continental civil law, relatives are generally obligated to provide financial support for kin in the first degree (i.e., children and parents) in need, as mentioned above. Thus, if elderly parents have insufficient financial resources, children are supposed to provide for them according to this legal principle. They are obliged to do so only if their own financial situation permits it, and income thresholds are higher than for child support or maintenance duties. If maintenance is paid to parents and other close family members, tax credits are granted.²⁹ However, to what degree this obligation is fulfilled in practice remains an open question, and little empirical evidence is available (sometimes network research investigates this issue). Second, income support regulation still contains the rule that adult children are 'liable' for their parents (and vice versa). One of the effects of this clause is that many elderly people do not claim income support since they do not want to be financially dependent upon their children and tend to avoid trouble with bureaucracies and 'liable relatives' by not taking up the benefit.

Elderly people severely in need of care

The following discussion refers to those elderly people who are severely in need of care and who need regular help, physical care and assistance in daily routines since they are no longer able to live independently. It is estimated that between 1.1 and 2 million persons over the age of 65 rely on this kind of assistance and care provided by others (Bäcker et al. 1989: 127; Fifth Family Report 1994: 191). This is a proportion of over 10% in the 60–69 age group and more than 50% of those over 80. The overwhelming majority of these people live at home

²⁹ For relatives above the age of 18, maintenance paid can be deducted from the taxable income up to DM 6300 per year if the own income of the person supported is relatively low (not more than DM 825 per month, which is below the existence minimum).

and are cared for mainly by family members, predominantly women. About 260,000 elderly in need of care are in special old people's homes where care is provided. The proportion of persons over 65 living in old-age homes where intensive care is provided is relatively low at only 4%, but for the population over 80 this proportion is already 20% (Bäcker et al. 1989: 130). Furthermore, about 130,000 persons are dependent upon long-term hospital care.

The distinction between the legal concepts of 'sickness' and 'severe need of care'

is one of the problematic distinctions made in German social law which is highly relevant to decide the question 'Who pays for care?' *Health insurance* provides services and payment for care predominantly for sickness, but not in case of an ongoing and continuous need for care which, as it is argued, cannot be cured or treated medically, since there is no hope for improvement or recovery because the person is continuously helpless, handicapped or suffers from 'natural old-age diseases'. Those are excluded from coverage by health insurance and become what in German is called a 'Pflegefall' (a case in need of long-term care). As a matter of principle, the costs of residential or professional at-home care and treatment have to be paid for privately in these cases. If private resources are insufficient to cover these costs, *income support regulation* is the last resort and the case falls under the jurisdiction of local authorities and social administration. The risk of needing long-term care was not covered by social insurance until recently when mandatory long-term 'care insurance' was introduced (see in detail below). This abstract legal distinction and artificial conceptual difference transferred important powers to physicians who must decide in borderline cases (see the discussion in Bäcker et al. 1989: 125ff.).

This conceptual distinction and its financial implications have various consequences:

- Sickness of younger, non-retired persons is treated more under the aspect of 'rehabilitation' and reintegration into the labour market (and paid for either by health insurance or by the Labour Exchange office), while less money and effort is invested for rehabilitating elderly people.
- Health insurance usually does not pay for medical services other than hospital care. There were only a few exceptions to this principle (if hospital care is required but not possible, or if a stay in hospital could be avoided this way and if the care needed was a type of nursing, i.e., supplementing medical care). Through the Health Reform Act 1988, a few health insurance benefits for at-home care have been introduced since 1991. However, access conditions are very restricted and linked to long periods of own mandatory insurance or co-insurance as a family member.³⁰ For people in need of long-term care, health insurance pays

³⁰ A person must have had health insurance coverage for 90% of the second half of his/her working life. During the last 60 months before the event of severe need of care, at least 36 months needed to have been covered by sickness insurance (para. 54, Book 5 of the Social Code). Sickness insurance can be based upon own employment or assimilated periods (e.g., registered unemployment) or upon co-insurance as a family member. Other people, for example non-employed cohabiting partners without own insurance, are excluded.

for four weeks of care annually up to a maximum of DM 1800; this covers a sort of a 'holiday break' for the nursing family member. In addition, the costs of 25 hours of care services in the household are paid up to a maximum of DM 700 monthly. Alternatively, a monthly 'care benefit' of DM 400 can be granted if these services are not taken up; about 90% of entitled persons prefer the latter solution. These amounts are very small and much lower than the normal costs of a nurse. However, these reforms were a first step to broaden the restricted definition of sickness, services provided and costs paid by health insurance. The new long-term care insurance covers situations that fell outside the coverage of health insurance.

- As long as services outside hospitals (institutional and professional at-home care) were generally not covered by health insurance, they were underused and underdeveloped, meaning that provision of these services also remains insufficient in terms of quantity and quality. This may change under the new long-term care insurance scheme.

Where good services with high standards are provided for, they are often extremely costly (as in the case of prestigious old-age residences with individual flats, which offer support services for elderly people who are otherwise able to live independently). Residential care for those who cannot live independently is also very costly. According to Bäcker et al. (1989: 126), monthly costs, which vary according to the degree of care needed, were on average DM 2,800 in 1988. Even high pensions cannot cover these expenses, and therefore most elderly people not living with the family are dependent upon *means-tested income support* (claimed back from their children by local authorities). This has inflated social expenditure for these 'care costs', and more than one-third of income support payments are currently spent on elderly people in need of care, with 90% of this sum going to institutions in which elderly people are cared for.

The new long-term 'care insurance'

In 1994, a statute on a new obligatory long-term 'care insurance' was enacted after long negotiations between different actors. This insurance covers special care for those who cannot care sufficiently for themselves due to a physical, mental or psychological condition for a period of at least six months. Various services and benefits are covered, and at-home care, including nursing and medical treatment as well as help with daily household routines, has priority. Different combinations of services (by specialized personnel, in old-age homes, partly at home and partly in special institutions, by persons chosen by the one in need of care) and of benefits in cash and in kind are possible. The 'care allowance' for a nursing person chosen by the beneficiary ranges between DM 400 and DM 1,300 monthly according to the degree of invalidity. Pension contributions for private carers are covered by the care insurance. The care insurance may contract out service provision and care to specialized institutions or individuals.

The care insurance is financed by mandatory contributions from employees and employers (1.7% of the income of the insured; employers must pay half of this amount for employees).

Care help under means-tested schemes

Means-tested *income support* provision contains a special '*care allowance*' for people who are, as a result of sickness or handicap, so helpless that they cannot remain without assistance and care (para. 68 Federal Income Support Act). The exact amount is fixed annually; since July 1993 the monthly amount in the old *Länder* was DM 366 for persons considerably in need of care and DM 997 for severely handicapped people; in the new *Länder* it is DM 281 and 766 respectively. Special expenses (travel, etc.) of relatives or neighbours who provide the care can be covered, or the income support authorities can pay for specialized nursing personnel provided by local organizations (para. 69 *ibid.*). If a special diet is needed, a supplement to income support and a special diet allowance can be granted.

Income support is financed at the local and regional levels, not by the federal state, which has caused many problems for municipalities and led to ongoing conflicts between the different actors about financing and development of special care services for the elderly. This decentralization of financing and the conflicts between different actors who try to shift the costs upon others are among the explanations of why public provision in this area is comparatively underdeveloped in Germany, and why families are so important in providing and financing care.

Who is providing care at home

for those elderly in need who are neither in hospitals nor institutions for the elderly? Ninety per cent are cared for by close family members (Bender 1993), and local social services are rarely used, even if they are available. Mainly women are involved in providing care; men are usually involved only indirectly. The older the people are, the more women are relied upon. Daughters provide care more often than sons (43% versus 8%), daughters-in-law more often than sons-in-law (14% versus 0.3%) and even daughters-in-law more often than sons (14% versus 8%) (*Bundesministerium für Familie und Senioren/Infratest* 1992: 313). There are few signs of growing involvement of men in this kind of family work and physical care, despite women's increasing participation in employment (Fifth Family Report 1994: 193).

What are the *social rights* of those family members or others providing private care at home? If one looks at their situation, it is important to note that a large proportion of these carers are themselves already elderly or close to pension age (Bender 1993). Their situation and needs are obviously different from those of carers who are still younger and have jobs and families.

6. Disruptions to independence

Unemployment

Two kinds of unemployment benefits (see MISSOC 1995: Table XI) exist, the higher unemployment insurance benefit and the lower, means-tested unemployment assistance that can be paid for an unlimited duration up to pension age. Benefits are individualized and paid to each individual who fulfills the conditions; there are no supplements for a dependent partner. Supplements were abolished in 1975, and since then marriage has played an indirect role for the benefit because the wage replacement rate of unemployment benefits is calculated on the basis of net wages. Therefore the special tax treatment of married couples may have an impact (see above, Section 1). This favours mainly married men and puts married women at a disadvantage, but has no impact if both partners earn more or less the same.

Higher benefit rates for families were reintroduced as cost-cutting measures. They are no longer linked to marriage, but favour unemployed persons with dependent children living in the same household. Beneficiaries with children receive higher wage replacement rates than those without children. From January 1994 on, the unemployment benefit amount is 67% of the former net wage for beneficiaries with children (without children: 60%). The means-tested unemployment assistance amounts to 57% if a beneficiary is living with a child (without children 53%). Cut-backs of benefit rates, implemented from 1994 on, affect unemployed persons with children less than those without children. Since the child-related increase of benefits is proportional and not paid as a flat-rate supplement, unemployed persons whose former wages were higher receive higher benefits per child than do those who earned lower wages. This also has gendered effects.

Since unemployment benefits and unemployment assistance are strictly linked to the former wage level, men receive on average higher unemployment benefits than women, and since they are linked to former employment periods and continuity, duration of payment is on average longer for men than for women. The indirect link to the tax privileges of married persons usually favours husbands and contributes to the gender gap. The proportion of unemployed women receiving the means-tested unemployment assistance compared to unemployed men drops even more steeply since the income of the husband or cohabiting partner is taken into account; and since men's income is mostly higher, more women with a partner are excluded than men.

Since there are no minimum amounts for unemployment benefits or unemployment assistance, the benefits calculated as a percentage of former wages may be too low to live on.

In this case, *supplementary income support* may be paid to registered unemployed people not receiving benefits or whose benefits are below the income threshold. The percentage of unemployed persons receiving income support is increasing due to cut-backs of benefits, restricted access conditions and economic crisis. In 1989, 33.6% of the recipients of regular income support payments were unemployed, which shifts part of the social costs from social insurance onto the regions and municipalities who have to finance income support. As in the case of means-tested unemployment assistance, the means-test under income support provision takes into account the income of a partner and assumes that family solidarity comes first and that state help is only subsidiary (see above). The claims of children to income support follow the same rules as explained above in Section 2; for a child's right to income support it does not matter whether the insufficient household income is due to unemployment or other circumstances.

Short-term illness, chronic illness and disability

The situation differs for employed persons or those assimilated and for those without employment. Obligatorily insured *employed persons* receive *sick pay* for the same illness for a period up to 78 weeks over a three-year period; this period starts again for a different illness. The benefit amount is 80% of the gross salary, but not more than the net salary (see MISSOC 1995: Table IV). Dismissal of sick employees is restricted by labour law, but a chronically ill person can be dismissed after a certain period. Sick pay is strictly individualized and linked to wages; no supplements for dependants are provided. There are no explicit assumptions about family solidarity. Whether someone can live on sick pay without support from others depends on the former wage level.

The treatment of *invalidity* also depends on the employment status of the person concerned: if a minimum 'waiting period' of five years of obligatory social insurance is fulfilled (24 months for handicapped persons), benefits in case of occupational invalidity or general invalidity are paid which are also related to the former wage-level or the expected wage-level if the employment career had continued (see MISSOC 1995: Table VI for details). No supplements for a dependent spouse/partner or children are paid. Whether these benefits provide a decent living standard or not greatly depends, as in the case of sick pay, on the former wage level. Whether family solidarity or state support are needed as a 'safety net' depends therefore very much on the former labour market status of the person concerned.

If an ill, invalid or handicapped person has not been employed and properly insured, the situation is very different. There is no special scheme to provide non-contributory minima for ill, handicapped or invalid persons, and they have to rely upon the family or upon means-tested income support. As far as the need for care is concerned, the new long-term care insurance will

provide benefits and services from 1995 or 1996 on (see above), but it will not grant benefits to substitute for lost income or normal living expenses. Income support makes special provisions for these groups (higher benefit rates and special care provisions), but these benefits are only subsidiary and assume that the family comes first to provide financial and practical support.

Some special provisions for those families who provide support and care for sick, handicapped or invalid persons exist under *tax law*. Financial support for close family members can be deducted from the taxable income (see above), and a special tax exemption (*Pflegepauschalbetrag*) of DM 1,800 per year is granted if a person severely in need of care is cared for at home, in a nursing home or if a household help is engaged. A much higher sum can be deducted from taxable income in these cases if an obligatorily insured household help is employed in the private household (up to DM 12,000 per year as special expenses), but this is a reasonable option only for well-to-do households. As usual, families with higher income benefit more from these tax provisions than do low-income households.

Under *income support provision*, handicapped persons can receive a 40% higher benefit than the normal rate if they make use of reintegration measures (education or retraining). In this case, other costs can also be taken over (to provide housing, education, special help for handicapped people to live on their own, etc.). The income thresholds for the means-test of handicapped persons are higher, and they receive the *care allowance* under income support regulation (see above) more often than sick people (see para. 39-47 Income Support Act). Persons who are not covered by health insurance can receive *sick help benefit* under means-tested income support provisions if they are ill and household income is below the thresholds. This benefit covers the same expenses and services as obligatory health insurance does. Sick persons, those who are recovering, handicapped or threatened by a serious disease can receive a special supplement to income support for a special, more expensive diet.

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