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Kirsten Scheiwe

Male Times and Female Times in the Law.

**Normative Models of Time in Labour Law,
Social Security Law and Family Law, and Their Impact
on the Gendered Division of Labour.**

**Thesis submitted for assessment with a view of obtaining the Degree of Doctor
of the European University Institute**

Florence, 15 September 1991.

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1. Introduction

It is the purpose of this dissertation to discuss the influence on male **and female times** of the legal norms institutionalizing time arrangements and distributing rights of disposal over time. By male and female times are meant the gender specific time schedules of women and men: the fact that women's average working time in the household economy is higher than men's, since household work, socialization and care - the whole 'labour of love' - are mainly allocated to women. Since time is limited and a person cannot do everything at the same time, a woman's bigger time investment in the household economy is a structural impediment for her equal access to the labour market.

The concepts of male and female times are also used to indicate that the time organization in the exchange economy and the connection of the time factor with rights and economic advantages favour a gender specific division of labour in which men are released from household work by the 'invisible hand' of the housewife so as to be free for a continuous full-time activity with upward working time flexibility, whereas female times in the exchange economy are often characterized by downward working time flexibility. Male times are privileged economically and legally, female times on the contrary are discriminated against.

1.1. Problematic

The following questions are central in the research:

- Which role do legal norms play in the institutionalization of these gender specific time schedules ?
- How do legal norms allocate time, how do they distribute the rights of disposal over time ? Which normative goals are pursued therewith ? What is the economic rationality of this allocation and distribution ?
- Which interdependencies exist between the time organizations of the exchange economy and the household economy ? What are the ruptures and interplays between the different subsystems of law (labour law, social security law, family law etc.), and what is their influence on gender specific working times ?
- What is the distribution of the costs and benefits of the distribution of time and the gender specific division of labour over the different actors in the exchange economy and the household economy ? And what are the

possibilities to redistribute the gender specific costs of time allocation through legal reform, so as to reduce the discrimination of women ?

In treating of these questions several discussions come together. In this way limitations due to fragmentation should be overcome:

- The discussion on **working time reduction** is usually limited to the exchange economy, and omits non-market work in the household economy from consideration. In this way an essential structural cause of women's unequal access to the labour market (their higher time investment in household work) is neglected. Household work is the Cinderella of theories which are narrowly focused on labour in the market and which ignore the economic significance of the production of use values (especially of the unpaid work of women).
- The **legal discussion** on the abolition of legal rules discriminating against women in the labour market reproduces the fragmentation of the different systems and leaves elements external to the market (e.g., the organization of the household, family obligations etc.) out of consideration. Thus formal legal equality remains compatible with substantial inequalities which have their roots in the fact that women do not have the same structural access to the labour market as men because of the incompatibilities of the different time systems.
- The **interdependence and interaction of exchange economy and household economy** in (re-)producing the discrimination of women are neglected. However, the actors in both economies, when formulating expectations and making decisions, take into account **both** systems. The actors in the exchange economy anticipate decisions taken in the household economy (when not on the basis of sufficient information in the single case, then on the basis of statistical discrimination). The interdependence of the divisions of labour in exchange economy and household economy is an essential cause of the continuation of the discrimination (Willekens 1991). A discussion of legal norms must take these interdependencies into account.

The discussion is complicated by the **fragmentation of law into subsystems**. For example, the stereotypes of the housewife and the breadwinner are constructed by family law, but also by labour law, collective agreements, tax law, and the rules of sickness

insurance. For this reason this essay brings together time allocation rules from different legal branches; the approach is of necessity interdisciplinary and enquires into legal norms in the context of economic and social organization. The same is true for the discussion of possible reforms: the limitations of law as a mechanism of social control and change, the interferences between the different regulative systems, the possible counterproductive effects and dysfunctionalities of law must be taken into account as well as the economic interests of the actors who profit from the present organization of female and male times.

The choice for the analysis of **normative time models in law** is grounded in the consideration that it enables one to compare activities in the exchange economy and the household economy which otherwise, because of their different characteristics (paid/unpaid, commodified/non-commodified, economies of scale/individual production), would be incommensurable. This problem of commensurability is illuminated both by the legal discussion on the value of household work in the case damages have to be paid (see Lenze 1989) and by the different proposals of economists with regard to the evaluation of production for own consumption in calculating the gross social product (see Andersen 1988, Schettkat 1982, Hilzenbecher 1986). The comparison of normative models of time enables us to integrate household work and work in the exchange economy and takes into account that time and money can to a large extent be exchanged for one another. Furthermore this approach illuminates the historical dimension of the reciprocal substitutability of different time systems and modes of production: household work times can be substituted for by market services or by institutions of the welfare state, or certain activities can be shifted back to private households and be housewifized. The incorporation of women into or their exclusion from the labour market and the fluctuations in the supply of and demand for labour power have an influence on time schedules.

In as far as they distribute the rights of disposal of time and create or diminish the costs of this disposal, institutional arrangements and law have an important role to play here. On average the costs of time allocation in the exchange economy and in the household economy are not equal for men and women. A detailed analysis of the rules of time allocation in labour law, social security law and family law shows that formally equal and gender neutral norms lead to a gender specific distribution of costs; it follows from empirical inquiries that the distribution of costs and benefits is at the expense of women.

The concept of normative time models is used in a broad sense. It does not only include working time organization in labour law (regular daily and weekly working times, holiday

regulations, claims for temporary release from work) and forms of upward (overtime, night work, shift work) and downward working time flexibility (part-time work, fixed term employment, interim work, employment with minor working hours etc.), but also rules with regard to the length of employment, minimum working hours, the continuity of employment, and, generally, seniority. Especially in social security law, these rules have an important role to play.

Normative models of time organization outside the labour market are to be found especially in family law; they ensure the maintenance of spouses and especially of children. These time models contain rules with regard to the division of labour and minimal standards regarding the allocation of the time of spouses and parents to gainful employment (so as to ensure the maintenance of the partners or children) and to personal care and socialization (so as to ensure maintenance in natura). These rules of time allocation are complemented by the law of marital property, maintenance and divorce, which contains rules regarding the distribution of income and the valuation of unpaid working times (seniority rules in the household economy). Time models influencing the economic valuation and legal securing of working times outside the market are also contained in social security and tax law (for example, the valuation of child rearing times in the law of old age pensions, tax advantages for the patriarchal model of marriage by way of tax-splitting, the exclusion of household work from statutory work accident insurance etc.).

In the final analysis what counts is the **interplay between these different regulative systems**, which not only constructs the time schedule and organization of the standard employment relation in the exchange economy, but also the other standard work relation in the household economy. By the construction of male and female times, subsidiarity rules etc., labour law and social security law shift many risks to women. Certain activities which reduce the disposability for gainful employment and increase the risk of work interruptions (especially the care of children and sick people) are shifted to private households and bundled in the group of housewives. Subsidiarity rules ensure this¹. The enterprises, the state and men (as employees and as 'private men') profit therefrom, women are mainly the losers. The construction of these relations by law, as well as their contradictions, ruptures and potential for change are developed in detail.

In the theoretical framework underlying this analysis several elements of theory come together, but a privileged role accrues to economic theories. The most important principles

¹ For an explanation of the concept of subsidiarity in German social security law see chapter 6.1.1.

of these theories are reported concisely at the end of this introduction. I use elements of the neo-classical **new household economics** (1.2.3) which theorizes time and the time allocation decisions of households. Referring to the economic concept of opportunity costs I evaluate the costs of a chosen action with reference to the second best alternative. This enables one to evaluate the costs of time allocation decisions also in the case that certain activities do not have an unambiguous market price; the approach postulates thinking in terms of alternative actions. Herein lies the transition to the **economic analysis of law** and to **institutional economics** (1.2.4). Economically, rights are understood as allocations and distributions of scarce goods, secured by differential costs (sanctions). The distribution of the rights to dispose of goods by different institutional arrangements of time organization can thus be analyzed from the point of view of the gender specific distribution of costs over the different actors. **Feminist theories** of women's work (1.2.1) and of the gender specific division of labour, and the feminist critique of law form a further continuous thread of this thesis.

The **normative goal** of this work can be formulated as the equalization of the gender specific costs of time allocation in the exchange and the household economy. This concept should overcome the weaknesses of a formal concept of equality as used in labour law, which separates the organization of the household economy from the structurally unequal access of women to the labour market. In this thesis the basics of this concept are explained and its uses as a criterion in legal practice is defended. Certainly, the combination of elements of the neo-classical household economics, of the economic analysis of law, of legal theory in context, of aspects of systems theory and feminism is rather unusual and has not been developed very far until now. I consider it nevertheless worthwhile to break the old rules of the game and to mix the cards anew.

The thesis consists of three parts:

- In the **first part** a theoretical framework for the function of legal norms in allocating time and distributing rights of disposal is developed (Chapter 2). It is applied to the distribution of the costs and utilities of household work for the different actors in the exchange and the household economy; it appears that gains are realized mainly at the expense of the unpaid work of women (Chapter 3). This is followed by a further analysis of female working times in the household economy (and of the non-participation of men in this economy) (chapter 4).

- In the **second part** the normative models of time contained in the rules of labour law, social security law and family law are extensively analyzed; their effects on women are illuminated by reference to empirical research (Chapters 5, 6 and 7). Theoretical models of these normative constructions of female and male times are developed for the hierarchy of working time forms in labour law, the two-tier system in social security law, and the other standard work relationship in the household economy.
- In the **third part** proposals for the legal reform of time organization, already touched upon in the treatment of the separate normative arrangements in the second part, are developed further and discussed with regard to their interrelatedness. Special attention is given to the discussion of the interplay of the different systems and to potential dysfunctional effects to the disadvantage of women. In chapter 8 I describe my position within the spectrum of the feminist critique of law. Then I treat of the most important strategies (such as working time reduction (Chapter 9) and deregulation (Chapter 10) and of their limits (the neglect of factors external to the market). The dissertation ends with a consideration of models of the redistribution of time and income in favour of women (Chapter 11), in which four more general strategies and the possibilities of coordinating them are contemplated (an improved access of women to the labour market; the individualization of rights; the basic income; the redistribution of the costs of child care between private households, women and society).

1.2. Concepts and theoretical elements used

1.2.1. Feminist theories

Since Simone de Beauvoir's famous dictum that one is not born as a woman, but is made a woman, and since the distinction between (social) gender and (biological) sex has been made, the social relations constituting gender have been the object of feminist research. Numerous anthropological, historical and sociological enquiries have falsified naturalistic, ahistoric and eurocentric notions of gender. In comparison the feminist critique of law is a more recent phenomenon². Thus, when this thesis treats of male and female times, it does not refer to cultural or historical constants; it is only concerned with

² See more extensively Chapter 8.

the gender specific expression of very specific time schedules and the regulation of time organization in the FRG³.

The meaning of work, the gender specific division of labour, the social organization of production and reproduction, the organization of households, marriage and the family are essential factors in the constitution of gender. In this respect anthropological and historical scholarship has provided us with rich materials which are hardly known in the legal debate (one only has to remind oneself of the naturalistic vision of the 'biological and functional peculiarities of woman' in the interpretation given to the principle of equal treatment (art. 3 II Basic Law) in the case law of the Federal Constitutional Court⁴).

With regard to the relation between gender and the organization of time it is especially interesting to take cognizance of the historical work in women's studies which analyzes the interconnectedness of production, the reproductive strategies of society and the organization of the household (see Tilly and Scott 1978). The disintegration of the pre-industrial 'economy of the whole house' in which all members of the household performed productive work, and the separation of workplace and household have caused enormous changes in work organization schemes and time structures. The temporal compatibility of production for own consumption and production for exchange has become much more problematical because of their strict separation in industrial societies, because of the localization of the one in the enterprise and of the other in the home, and because of rigid time schedules in the exchange economy. This is illuminated both by the devaluation of unpaid household work and production for proper consumption - which are actually considered to be non-work- and by the inapposite conceptual separation of production and reproduction which retains only work in the market and paid wage labour as productive (and therefore to be rewarded economically and legally), whereas female work is seen as a

3 I restrict myself to the analysis of the example of the FRG and to the development of a theoretical model on the basis of this research. True, the gendered pattern of time organization in other developed capitalist societies looks similar. On closer examination, however, it becomes clear that institutional factors, such as the organization of the welfare state along egalitarian and individualist or along family lines, and the presence or absence of state services and infrastructures as well as their time organization, make a considerable difference. Another relevant dimension, until now little investigated from a comparative perspective, is the influence of the different institutional regulations of time on the income position of women in the different countries. "Time is money" but how much money and how it is distributed, is for women not only dependent on their labour market position, but just as well on institutional regulations and on the interaction of the household economy, the market, the state and other subsystems.

4 The notion of the 'biological and functional peculiarities' of the sexes has been developed by the Federal Constitutional Court in various decisions since 1953, see BVerGE 3,242 ; 5,12; 10,74; 15,343; 21,343f.; 31,4f.; 37,249f.; 43,225; 52,374; 57,342f.; decision of 28 January 1987, NJW 1987,1542. The formula that the 'objective biological or functional (relating to the division of labour) differences may demand or even require differing regulation according to the nature of the specific life situation' was applied by the Federal Constitutional Court to various cases to judge on the constitutionality of special treatment on grounds of sex.

natural resource and a passive generation, and is therefore considered to be not or lowly qualified. The domestication of the woman, who remains more and more at home and specializes in the management of the household, the coordination of consumer activities and child care, makes her more and more dependent on the wage income earned mainly by the man, and constitutes at the same time the "twice free wage labourer" who can sell his labour power without temporal limits.

The **normative model of the housewife** conceals a whole number of empirical facts and must therefore be critically deconstructed. Evidently women used to be productive at home and outside it and to earn a considerable part of the household income by their wage labour. At present, most gainfully employed women do not work part-time, but full-time. However, women pay a considerably higher price than men to attain compatibility between the different time systems: the double burden, the globally longer working times (adding up working time in the household and the exchange economy), the stress and the "bad conscience" are one side of this. The other side is the poorer economic and legal valuation of female times which has a negative influence on women's income position and bargaining power, and increases their dependence on men, marriage and the family. From such a starting point it is very difficult for them to obtain changes in the gender specific division of labour in the household -a vicious circle. The dissociation of family life and gainful employment is mirrored by the domestication of women and the polarization of gender characteristics (Hausen 1978). In this way the conditions for a stricter control of women's labour power by men, legally and institutionally reinforced, were created (Gerhard 1978). The segregation of household work and gainful employment and the segregation within the labour market play a central role in this respect (Hartmann 1979).

The seventies saw the emergence of the feminist **domestic labour debate**, which was to shed a new light on the housewife's "invisible hand". Domestic labour was recognized again⁵ as a productive activity (Delphy 1976), which made it possible to see household and family structures as relations of exploitation and sources of capital accumulation. Dalla Costa (1972) developed a thesis of the triple exploitation of women (as wives by men, as housewives and employees by capital) and demanded a housewife wage. True, the domestic labour debate ended at the end of the seventies without much of a result and suffered from

5 The demand for a more just valuation of domestic work is not very new - see Weber (1919) and her report of the demands of Käthe Schirmacher who sought a "more just valuation of the specific performance of the housewife and mother" for the first time in 1905, so as to obtain "the equality of married women to men and the recognition of women's independence".

many shortcomings⁶. It revolved around the question of whether the Marxist theory of value was applicable to household work and, if so, whether household work created surplus value. This restricted analysis of the costs and benefits of household work for men, the state and capital in terms of the theory of surplus value did not lead to very much. Other fundamental deficiencies were the neglect of the role of children as beneficiaries of the housewifization and the lack of an analysis of the social distribution of the costs of maintenance and socialization of children. Nevertheless, the domestic labour debate brought the significance of household work and of the organization of reproduction out in the daylight and put their significance for the oppression of women and the constitution of gender unambiguously on the agenda. At the end of the seventies and the beginning of the eighties several works on the history and the sociology of domestic labour were published (Oakley 1974, Hartmann 1981a, Finch and Groves 1983; in the FRG Beck-Gernsheim 1976, Bock and Duden 1977, Hausen 1978, Ostner 1978, Kittler 1980, Sichtermann 1985, Lenze 1989, Rapin 1988). At the same time in almost all Western European countries the family law model of marriage and the household division of labour (the breadwinner-homemaker model) was changed and formulated gender neutrally and the possibilities for legal abortions were extended.

Socialist feminists discussed especially the questions of the meaning of the **gender specific division of labour**, the organization of the patriarchal family and the relation between **capitalism and patriarchy** (Barrett 1980, Barrett and McIntosh 1982, Eisenstein 1979, Hartmann 1979, 1981a, 1981b). Sociological and economic theories of women's work and analyses of women's labour market situation integrated, in different ways, the significance of family organization, of the reproductive strategies of households, of factors external to the market and of institutions as factors contributing to the specificity of women's work. The contribution of the psychological and cultural dimension of women's roles, especially as mothers, to the reproduction of gender was researched by psycho-analytically oriented feminist writers (Mitchell 1974, Dinnerstein 1976, Chodorow 1978 and 1979, Flax 1983 and 1990).

Theses about the housewifization of work, already touched upon in the domestic labour debate, were developed further and applied to the **international division of labour**. Werlhof, Mies and Bennholdt-Thomsen (1988) and Mies (1986) developed theories of the relations between housewifization, colonization, the underdevelopment of Third World

6 For an overview see Himmelweit and Mohun (1977), Molyneux (1979). The most important contributions to the Anglo-Saxon debate can be found in Malos (1980).

countries and subsistence production as the foundation of capital accumulation. Housewifization is the process by which, alongside the free wage labourer, is created the complementary figure of the housewife, who, unfree, wageless and dependent, is a condition for the existence of the male wage labourer. Subsistence production consists of the activities necessary for the production of life, from pregnancy and childbirth to the production and transformation of food, clothes, the building of houses, cleaning, the satisfaction of emotional and sexual needs (Mies 1986). The greater part of this work is done by women, but also by small peasants and producers, women and men in underdeveloped countries, the underdevelopment of which is just as much a condition of the development and capital accumulation of other countries as is women's labour for men's labour. Such an approach places the discussion of the gender specific dimension of subsistence production/production for proper consumption, household work and the division of labour in a broader context⁷.

The results of these different feminist research paths form an important background of this thesis: they have historicized my understanding of women's work and put into relief the meaning of the interaction between different systems of production and reproduction and the strategies of the actors (be they enterprises, the state, men, women or households). The feminist discussion has stressed the importance of both household production and household strategies of production and reproduction and elaborated on the patriarchal and hierarchical dimension of the contradictions of the interests of men and women. In connection with this discussion I investigate the institutional dimension and the legal organization of the social relations mentioned.

1.2.2. Theories on time

The theoretical interest in the time dimension has undergone a revival in the eighties. This was symbolized by the 1981 Venice Biennale choosing "Il tempo dell'uomo nella società della tecnica" as a theme for exhibitions and conferences - the stress on technique and the use of the masculine form as an indication for human beings are not without significance for the view on time structures.

⁷ The different organizations of production, reproduction and consumption in different countries, and the interplay between the organization of the market and household strategies, including the institutional regulation of marriage and the family, have in the meantime been researched for many non-Western European countries (An overview can be found in Stichter 1990, 29 ff.).

The renewed interest in time becomes intelligible against the background of a changed social organization of time and of new employment structures. The existing consensus with regard to the dominant structures of time organization became problematical

- due to massive unemployment and the permanent unemployment of certain groups of people in the western capitalist countries, and due to shifts in the composition of the group of the employed;
- due to the changes in the time organization needs of enterprises following from rationalization and technical innovations (flexibilization and the differentiation of collective and individual working times; models of early retirement and other adaptive strategies);
- and, connected to these developments, due to the renunciation of normative standards developed in the times of booms and relative full employment of the fifties and sixties, such as the normative model of the standard employment relationship (Mückenberger 1985)⁸ and the pattern of a continuous male work biography.

These changes mainly affected the dominant male time patterns in the exchange economy. True, there had also been changes in female times due to the growth in female employment and also in the employment of married women and of mothers with small children, the increase in part-time employment and the changes in household structures. Female working time patterns remain, however, of a patchwork-like nature (Balbo 1984) and are subordinated to the dominant time pattern. The new interest in time (and the continuing neglect of the problematic of female times in the discussion) can only be understood against the background of an upheaval of the old hegemonic consensus, which threatens male times and the privileges and identities involved therein.

Changes in trade union strategies and the centrality of the demand for working time reduction and the introduction of the 35-hours week are a response to the trouble. Another response was the growth of more or less alternative forms of production for proper consumption and the development of a shadow economy besides the regulated labour market; these forms of work became a subject for debate⁹, but in this debate household work was usually not recognized as shadow work and was, on a scale of interest, still classified below the marketized black work of unemployed men. In any case the disintegration of certain old time patterns has created the positive possibility of a new

8 For the discussion on the erosion of the standard employment relationship see Bosch 1986, Daubler 1988b, Hinrichs 1988, 154 ff., Mückenberger 1985, 1989b, Plander 1990, Zachert 1988; a critique from a feminist point of view can be found in paragraphs 5.1 through 5.3 of this thesis.

9 See Lakemann 1984, Glatzer and Berger-Schmitt 1986, Merz and Wolff 1988, Offe and Heinze 1990.

definition of time structures, of new relations between the autonomous and the heteronomous determination of time, and of a redistribution of work, which have been elaborated upon in several time utopias (Negt 1984, Gorz 1983, 1988, and single contributions in Schmid 1985, Offe, Hinrichs and Wiesenhal 1982, and Agassi and Heycock 1989). It still remains open, however, whether this process of the "disruption and reappropriation of time" (Zoll 1988) will break down the gender specific division of labour and reduce the discrimination against women.

People have always thought about time. The paradoxes of time, which goes by and yet is always now, is divisible and indivisible, finite and infinite, have been the object of religious and philosophical contemplation since time immemorial. Fantasies of immortality and the recurrence of time, of a final time and a new time have never lost their fascination and recur in science fiction stories about time travel and time machines.

The social organization of time and the time structures of production and the reproduction of life have undergone substantial changes. Early capitalism and the subordination of time to a regime of efficiency and rational organization have, in many respects, brought with them the transition from a cyclical time to a linear time. The principle of competition and the price mechanism of the market have generalized a uniform and standardized time concept. "Time is money", thus wrote Benjamin Franklin in 1748 in his 'Advice to a Young Tradesman'. The market price becomes the measure of things, and an ever more intensive and efficient use of time goes hand in hand with the further development of productivity, and goes on to overtake further domains of life. The victory march of the watch (the attendance recorder, the arm watch, the digital watch, the atomic watch) led to the domination of standardized world time (UTC) and started "precisely when the Industrial Revolution demanded a fuller synchronization of work" (Thompson 1973, 87). The standardized "normal time" or system time of world society takes care of the interconnection of the different time systems and "serves to smoothen, flatten and equalize time relations which in themselves are much more complicated" (Luhmann 1975, 115). The idea of the open time continuum, measurable and divisible, replaces cyclical time and subordinates the proper times of the different time subsystems.

The creation by industrial capitalism of the free wage labourer, selling his labour power as a commodity¹⁰, led to the separation of heteronomously and autonomously determined

10 On the relation between time and capitalism see Weber 1973, Thompson 1973, Scharf 1988, Olk a.o. 1979, Negt 1984 with an extensive discussion of the views of Marx.

time. A strict separation of work and leisure time had been impossible in the context of households functioning as economic communities and producing for proper consumption.

What is being sold are the rights to dispose of time. The enterprise buys the right to use the worker's time within determined limits. "The purchase of the right of the use of somebody else's labour power is nothing but the acquisition of the disposal of the use of the time of those who earn nothing but time" (Olk a.o. 1979, 163). The volume of the rights to make use of time and the intensity of this use within certain limits become therefore the objects of struggles between labour and capital and of corporatist arrangements¹¹. The control of the use of time becomes ever more refined, and, together with the growing complexity of production, ever more complex. Time discipline is not only an external order, it must be internalized, and it breaks down again and again. Several forms of resistance and time niches emerge which are defended against control and interference. As early as 1876 Paul Lafargue wrote his "In Praise of Idleness" against the internalization of the compulsory character of work. Time ethics are central in the Protestant work ethic (Weber 1975) as a guarantee for the disciplinary function of capitalist time organization (Thompson 1973). The Protestant time structure brings together time discipline and the goal-oriented rational use of time. (Weber 1975, Neumann 1988a).

The time structures of gainful employment and of the market entrench ever more upon other time systems and dominate them. The time structures of the labour market have moulded the time organization of households and at the same time created the housewife as a condition for the twice free wage worker. The **interplay between the different time systems** of the exchange economy, public life (infrastructures, public institutions, opening times etc.) and private households is organized in such a way that housewives and female labour are the hinges smoothing the frictions and compensating for the incompatibilities between the different time systems. Since they are the main managers of the individually differentiated time schedules of the members of the household and have to fill unforeseen time gaps, women must perform the most demanding feats of coordination and adaptation in the case of problems of synchronization. They must bear the largest part of the costs following from the interplay, contradictions and incompatibilities between different systems. Several researches document the contradiction between the working time preferences of

11 With regard to the struggle for working time reduction and the construction of the normal working day in Germany see Deutschmann 1985 -which only gives an overview up to 1918-, and for more recent times Scharf 1987, Mayr and Janßen 1984; with regard to working time reduction in the international context see Hart 1985, 1986; with regard to the free week-end Achten 1988, with regard to the defense of the Sunday Spaemann 1989.

female employees and the factual organization of working time (Bielinski and Strümpel 1988, Landenberger 1983, 1985). The solution, if any, of this contradiction is left mainly to the individual creativity of time pioneers (Hirning a.o. 1980). Other approaches, discussed under the heading of increases in the compatibility of family and profession, restrict adaptive possibilities to a large extent to mothers with small children and to the offer of flexibilized working times by firms to this group of persons (BMJFG 1984, Born and Vollmer 1983, Hoff a.o. 1983). More radical changes in working times and in the gender specific division of labour are demanded by feminist authors (see Becker-Schmitt a.o. 1982, Eckart 1990, Kurz-Scherf 1987 and the essays on household work mentioned in the foregoing paragraph).

The functional aspect of female times as a "safety-belt", of high profitability to the other actors, as a rule gets a very low profile. True, women are allowed a subordinate niche, and a description of their proper times is accepted as a completion of the scenario¹²; but these aspects have remained marginal in research until now.

This is also the case of the trade union discussion on working time reduction which is dominated by the male view (as was for instance the case in the fifties with the slogan 'on Saturday daddy belongs to me' (see Hegner and Landenberger 1988 for an overview of the working times discussion since the fifties)). From this point of view the normal working day is limited to the male times oriented wage labour working day as continuous full-time work. Female times are subordinated to male times, the market dominates non-commodified work and integrates it, with the purpose of making profit, as a subordinate subsystem and a functional time element.

There are many arguments against this. Developments in the **natural sciences and in sociological theory** indicate that one should take more account of the **proper times** of different systems (which would require stronger efforts of coordination), and deliver arguments against the domination of the linear, rigid time structures of capitalist gainful employment. The development of the natural sciences has produced a number of arguments against the general validity of the linear view of time, be it by the changed time

12 See for instance the inclusion of the contributions on the times of peasant women in Inhetveen 1982, of the contributions on part-time work in Fieger 1988, on the effects of shift work (Alheit, Dausien, Flörcken-Erdbrüg 1988) and unemployment of the men (Neumann 1988b) on families in Zoll's (1988) reader on time, on shift work and the family situation in Rame and Fo 1987, on the time perception of a very busy trade union official in Hamacher 1987, on the project for a fantastical collective agreement (Kurz-Scherf 1987) in the reader "Wem gehört die Zeit?" (Kurz-Scherf and Breil 1987), and the inclusion of the contribution "Flexible Arbeitszeiten - vor allem ein Frauenthema" (Gerzer, Jaeckel and Sass 1985) in Schmid's reader (1985).

concept of theoretical physics following from Einstein's theory of relativity (Hawking 1988) or by the observation of different time systems and bio-rhythms in modern biology (Ewers 1988); this enables Prigogine to develop the idea that the world contains an infinite multitude of internal times (Prigogine and Stengers 1981). This knowledge, however, hardly has any influence on 'everyday awareness' which is moulded by the dominant social organization of time.

The sociologist Gurvitch developed the thesis of the plurality of social times. In trying to unify the plurality of social times, social forms construct different hierarchies for the harmonization of social times. "Thus, for instance, there is not only an incompatibility between the time of the family, the time of the school, of the factory, of the trade union, of an administration etc. (...), but there is also an incompatibility between the ways of harmonization of the different times (...). Thus the number of social times is increased still further." (Gurvitch 1969, 325). Until now a systematic analysis of the gender specific dimension of time differentiation and of the hierarchical order of times has failed to materialise.

1.2.3. Economic theories of the household's time allocation decisions and of female labour

Economic theory, uninterested in the time demands of household production as long as there was a sufficient offer of labour power, has long neglected time (Bender 1977). Interest in household work times and time allocation decisions was only awakened around 1960 when, due to a conjunctural boom, labour power became scarcer and housewives and mothers of small children were rediscovered as a labour force reserve. Time as a scarce economic good then became the object of empirical time budget studies (see Chapter 4.1). The factors having an influence on household decisions with regard to the mutual substitutions of commodified and non-commodified working time and leisure time were analyzed.

The foundation of the **new household economics** was laid in Becker's 1965 essay on the time allocation decisions of households. He criticized neo-classical economics because it had regarded households merely as consumptive units and only from the point of view of the offer of labour power. The disregarding of the productive importance of households led to an oversimplification of the choice between working time and leisure time. The starting point of the new household economics (Becker 1965, Ghez and Becker 1975, Gronau 1977) is that the division of labour in households has both productive and reproductive functions.

Some consumption goods are produced by families themselves, others are bought in the market with the income earned by wage labour. These activities demand investments in specialized knowledge and skills causing both direct and indirect costs (opportunity costs). The opportunity costs result from the investment of time which otherwise could have been invested in wage labour or in other commodified or non-commodified activities.

In this thesis I use the economic concept of **opportunity costs**. In economic theory the opportunity costs of a given action consist in the loss of utility due to the renunciation of other action alternatives. If more than two alternatives are given, the value of the chosen alternative is determined by the loss of utility due to the renunciation of the second best (the highest valued but not chosen) alternative. "Opportunity costs are, in every decisional situation, the highest valued but not taken option of an individual (i.e. the option which was valued highest after the option chosen)" (Weise 1985:56). This concept has the advantage of making clear the decisional character of human behaviour and of enabling one to conceptualize economically goods which have no direct market price (be it time, rights of disposal and so on).

According to the new household economics the time allocation decisions of the members of households are the result of a rational¹³ weighing of costs and benefits per time unit of work in the exchange economy and the household economy. A substitution of household work time by commodified work time appears to be useful when wages are higher than the savings following from the investment of a unit of labour time in household work. Both the level of female wages and the income level of the partners are therefore important elements in substitution decisions. It is assumed that, starting from a certain level of female wages, there is a positive correlation between the wage level and the offer of labour power (the substitution of household working time by market working time and leisure time). When both wage levels and the income of the partners are relatively high it is likely that working time (either market working time or household working time) is substituted for by leisure time (the 'income effect'). Gershuny (1982, 1983a, 1983b) researched substitution processes and the influence of technical innovations empirically and historically.

13 In economic theory rationality refers to the assumption that human behaviour follows the maxim of utility maximization (the use of means to attain the goal promising the largest utility). The choice of alternatives is restricted by pre-given structures, institutions and factual constraints.

Since households pool income and time, the whole household wins when its individual members practise their special skills. Becker (1981) therefore assumes

- a joint utility function for households
- altruistic behaviour within households
- the absence of conflicts, hierarchies and power differences within households; decisions are interpreted as the expression of individual preferences
- that the gender specific division of labour is explained by the benefits of specialization following from women's biological advantages in reproductive activities (the ability to bear children) and from the demands of efficiency (a division of labour in which someone works in gainful employment, the other one in the household would be more efficient than an equal division of these tasks).

Becker developed his theory of the time allocation decisions of households further to a general economic theory of marriage (Becker 1981, Becker, Landes and Michael 1977) which remains ignorant of power conflicts, but uses the concept of 'relation specific investments'¹⁴ which is very instructive for the analysis of gender specific bargaining power.

The **neglect of inequalities within households** with regard to the division of labour, income, time and power by neo-classical new household economics has been criticized more than once, especially by feminists (comp. England and Farkas 1986, 45 ff. , Stichter 1990, 57 ff.¹⁵ with an overview of the theories which integrate power as a factor of household decisions). From different theoretical perspectives attempts have been made to overcome these shortcomings.

14 For Becker "marriage-specific capital" is the capital which undergoes a considerable devaluation when the specific marriage is dissolved (Becker, Landes and Michael 1977, 338). It comprises investments in children, especially small children, acquired knowledge about the idiosyncracies of the partner and "working exclusively in the non-market sector" (Becker 1981, 142).

15 Stichter (1990) criticizes the ethnocentric concept of the household based on the Western model of the nuclear family. She points out that the concept of the opportunity costs of time in the new household economics is Western biased because in the Third World there is not only the choice between household work and gainful employment, but there are four options (wage labour; self-employment outside of the household; work within the family but for the market; non-commodified subsistence production in households). "In order to determine how a woman would allocate her time among these four options, her income or imputed wage from each would have to be measured so as to include income from domestic work (...). In this more complex and refined analysis a woman with children is faced with a four-way trade-off between various kinds of productive work. The next question that must be examined is the time/effort compatibility of each type of work with reproductive work." (Stichter 1990, 41 f.).

Bargaining models with regard to time allocation and distribution decisions within households have been developed (Pollack 1985, Manser and Brown 1980, McElroy and Horney 1981) and elements of game theory have been applied to decisions in marriage and the family (Ott 1989). In social exchange theory elements of game theory and bargaining theory have been used to analyze unequal starting positions and power elements in reciprocal relations. Andersen (1971) has developed the concept of 'psychical opportunity costs' or of 'psychical profit' to explain hierarchies in relations.

The problems of the **interplay** between the organization of production and of reproduction, between the exchange economy and the household economy, between family organization and the state, and the influence of institutional factors have been developed further in **economic theories of female work**, especially by feminists. Especially economists of the Cambridge Labour Studies Group have developed the thesis of the relative autonomy of the systems of production and reproduction (Humphries and Rubery 1984) and tested their hypothesis in empirical research (with regard to the effects of the economic recession on female work in several countries see Rubery 1988). They combine several approaches to explain the economic function of female work: the **segmentation hypothesis**, the **buffer hypothesis** and the **substitution hypothesis**. The **segmentation hypothesis** researches the allocation of female work and the concentration of women in certain activities, market segments and steps of the labour market hierarchy and rests on theories of dual labour markets (Doeringer and Piore 1971; for a critical reaction see Beechey and Perkins 1987, 134 ff.) and human capital theories. The **buffer hypothesis** starts from the Marxist assumption that women have a function as an industrial reserve army: women's marginal position follows from the fact that they are incorporated in the labour market in phases of labour market expansion and expelled in phases of contraction. The **substitution hypothesis** stresses the function of (cheaper) female work as a substitute for other (male) labour power in phases of economic change, and the flexibility and cost advantages of using female labour.

Still, female work is also moulded by the organization of the household and the family. Thus the earnings of women are not only influenced by the wage level, but also by the organization of child care. Demographic changes and changes in household structures (the size of the households, divorce rates, the proportion of single person households and lone parents, birth rate and life expectancy) also have an influence on women's offer of labour power and their earning strategies. Several researches treat of the influence of these factors and of changes in women's life cycle patterns (Gustafsson 1985). Finally an important

influence on household strategies is exercised by the welfare state and institutional arrangements as "mediating instances" between the systems of production and reproduction. An overview of the approaches integrating the interplays between the different factors in economic theories can be found in Beechey and Perkins (1987, 120 ff.), Rubery (1988) and Stichter (1990, 29 ff.).

However, in general it can be said that the effects of the institutional organization by means of the law and of changes in the legal framework are hardly taken into account in these researches. The new household economics neglects the **effects of institutional factors on the time allocation decisions** of households, for instance the limits on time options resulting from the standardization of working time forms and of the time arrangements of public life. In the ideal-typical model of neo-classical economics the choice of working times knows no limits, but adapts flexibly to the offer of and the demand for working time on the market. In reality the freedom of working time choices is imperfect because of

- the standardization of working times by law, collective agreements on the branch and firm level, and the labour contract
- the problem of the coordination of the different time rhythms of the members of the household (working time/school time/kindergarten time/need oriented times (see CREW 1990))
- the transport time factor (the separation of living place and working place).

The opportunity costs of the different valuation of male and female times caused by institutional arrangements and the distribution of rights are also ignored. For an analysis of the influences of the institutional arrangements I therefore use theoretical elements from institutional economics and from the economic analysis of law (see 1.2.4). The transaction costs approach recognizes the significance of internal organization and structure and makes distinctions with regard to the significance of time factors (for example, between long term and short term contractual relations, and as an element of the costs in negotiations).

1.2.4. The economic analysis of law and institutional economics

From the point of view of the economic theory of law¹⁶ goods are regarded as bundles of rights, as legally secured opportunities to act. Thus law also distributes the rights to

¹⁶ An overview of the economic analysis of law in the United States and of its principles, and the collection of the most important texts in a German translation can be found in Assmann, Kirchner and Schanze 1978. Behrens's (1986) excellent presentation does not only give a comprehensive overview of the theorems and

dispose of time and formulates the rules of primary allocation. Legal rules institutionalize and secure time structures. Legal norms limit alternatives and control thereby individual decisions and actions. From the point of view of the individuals they therefore have the nature of pre-decisions. These pre-decisions between alternatives have an influence on the opportunity costs of actions. In this thesis I use elements of the economic analysis of law to determine the opportunity costs of decisions regarding the distribution of time over the household economy and the exchange economy, and to research how legal rules have an influence on the gender specificity of these opportunity costs. I go on to discuss how changes in legal rules could have an effect and under which conditions they could lead to an equalization of women's and men's opportunity costs of time allocation.

Until now the economic analysis of law has been applied mainly to the analysis of the market (comp. Posner 1977, Polinsky 1983) and for that reason it has often got quite sceptical reviews. I know of no attempt to use the application of these elements of economic theory to the analysis of law for feminist purposes. However, a one-sided limitation to the analysis of the market as an allocative mechanism is not necessarily inherent in the economic theory of law. It is possible to analyze other decision processes (for instance, bureaucracy, associations, collective bargaining) on the same premises, even if these applications have not been developed very far (see in detail Behrens 1986). In the field of labour law there have been some attempts in the FRG (Behrens 1989; Dorndorff 1989 and Buttler and Walwei 1990 with regard to the protection against notice; Duda 1987 with regard to co-determination and the theory of the enterprise; Buttler a.o. 1987, especially Brandes and Weise 1987, with regard to the institutional analysis of the labour market). In the field of family law there are only a few publications (Fuchs 1979) in the FRG which are essentially limited to the reception of the ideas of Gary Becker (Becker 1973, 1974, 1981).

The favourable element in the economic analysis of law is that it has developed categories which enable one to conceptualize the interplay between economic action and the allocative effects of legal norms. We are talking about alternative allocations of resources and their distribution by law, and about alternative ways to coordinate these kinds of decisions. In this way rights of property and disposal are historicized; they do not appear as static and one-sided determinations of legal positions, but take the form of dynamic ways of ordering goods oriented to more efficient uses (Schanze 1978, 13).

problems of the economic analysis of law, but also an insight into its theoretical and methodological premises. A collection of important essays in English can be found in Manner 1975. For an introduction see also Polinsky 1983, and Furuboth and Pejovitch 1974.

The object of the analysis is the influence of legal norms and their efficiency. By efficiency, more precisely allocative efficiency, is meant that scarce resources should always be used where their utility is highest. It is assumed that markets show the tendency to employ resources where they have their highest utility and therefore to increase allocative efficiency. Legal rules must stimulate and support this operation of markets. They are judged to be efficient when, as a result of a move (a change in the legal rules of allocation), the cost-benefit relation is improved. The question is how to decide what is the 'highest valued utility. Often - as in Posner - this concept is one-sidedly equated with the "ability to pay": whoever is able and willing to pay most for a good, represents the highest valued utility. This interpretation amounts to a far reaching reduction of the measure of costs and benefits in the framework of individual preferences. Besides the market other allocative mechanisms must be considered, and the problematic of distributive justice must be taken into account (Behrens 1986). 'Social costs' (Coase 1937) and 'externalities' must be considered: often parties take distributive decisions at the expense of "third groups" who do not take part in the decision taking process and who have to bear part of the costs of the decision. Due to a corporatist regulation of the labour market and to general rules of law a lot of work is shifted to housewives; the enterprises, the employees, the state and men profit thereof without having to pay for the costs of household working times. On the one hand time is allocated by the market mechanism (and valued under the form of wages), on the other hand it is also distributed in a way external to the market in the framework of the allocation decisions of households, which are influenced by many legal rules and other processes of decision-making. The relevance of legal rules for the gender specific division of labour and working times and for its efficiency (the distribution of costs and benefits over the actors) must be determined against this background.

Institutional economics is the name of the theory which treats of the advantages and disadvantages of existing institutions and tries to explain institutional change. The concept of institution comprises on the one hand organized groups of persons, on the other hand networks of rules or more or less permanent structures of social relations (Buttler 1987). Not all institutions take the form of law, but on the other hand law is constitutive of institutions. Institutional economics transcends the perspective of the market with its implicit assumption of isolated individuals, and looks at behaviour from the point of view of the interdependence of the decisions of individuals and of the influence of the institutional framework, therefore also of legal rules. The benefits of institutions are that they reduce transaction costs and increase the security (of the expectations) of the participating actors.

Williamson (1985) distinguishes between two main branches of the new institutional economics:

- transaction costs analysis, which is concerned with the efficiency of certain arrangements from the point of view of their profitability
- incentives analysis, which is concerned with the effects on behaviour of certain arrangements.

Transaction costs analysis (Williamson 1981, building on Coase's theory of institutions of 1937) starts from the observation that decisions (transactions) are not cost free. Transactions demand resources, which are therefore withdrawn from other possible uses. The amount of the costs is dependent on the institutional arrangement in the framework of which decisions are taken. As a rule transaction costs are divided into information costs, bargaining costs and enforcement costs. Thus transaction costs comprise the costs of the identification of the partner in the negotiation, the costs of the negotiation itself and the costs of the implementation of the agreement reached. In choosing and giving form to decisional proceedings law should minimize transaction costs so as to make it possible for resources to be allocated to their optimal use. Law can minimize the transaction costs by

- a reduction of the number of alternatives by typification
- a reduction of the number of actors by representation
- a reduction of the number of consents required
- a reduction of the number of decisions to be taken.

I use the concept of transaction costs to determine the gender specific dimension of the unequal distribution of transaction costs and to research how unequal transaction costs, both in concluding labour contracts and in the bargaining within households, have consequences for the gender specific division of labour and time. Since the theory of transaction costs analyzes the role of institutions in structuring long-term relations and operates on the assumption that inner structure and organization play an important role (for example, in the research of enterprises as hierarchical decision taking processes), it can also be applied to household decisions¹⁷.

17 "Applied to the family, the transaction cost approach generalizes the new home economics by recognizing that internal structure and organization matter. It treats the family as a governance structure rather than a preference ordering (...) By emphasizing the role of institutions in structuring complex, long-term relationships, the contracting perspective of the transaction cost approach elucidates allocation and distribution within the family" (Pollack 1985, 584). See also Ben Porath (1980) who uses both the transaction costs approach and elements of the theory of implicit contracts in the analysis of family structures and the changes in their functions.

2. The functions of legal time regulation and its influence on the gender specific opportunity costs of time allocation

Time is a scarce good (and only therefore it is the case that "time is money"). Goods are determined economically as bundles of rights, as legally secured opportunities to act. Even if time is no "legal concept" and there is no explicit definition of time to be found in law¹, the legal regulation of the rights to dispose of time and the allocation of these rights to groups of persons form the economic good time and distribute opportunities of action.

Legal rules have an influence on the fact that the opportunity costs of time allocation in work in the exchange economy are higher for women than for men (and that, reversely, the opportunity costs of time allocation in the household economy are higher for men than for women).

In economic theory² the opportunity costs of a determined action (in this case time allocation) consist in the renunciation of an alternative action. The cost of time allocation in the exchange economy consists in the renunciation of the "second best" alternative, time allocation in the household economy (and vice versa). A rationally acting individual will always choose the action carrying the smallest opportunity costs (the action due to which the person loses least by forsaking alternative actions).

- How do legal rules distribute the rights of disposal of time?
- How do they influence the use of time, the time allocation over the household and the exchange economy and the gender specific division of labour?
- Which connection is there between the opportunity costs of alternative possibilities of time allocation and the gender specific differences in time allocation in the exchange economy and the household economy ?

¹ The still valid "Arbeitszeitordnung" (Working Time Act) of 1938 defines working time as the time from the beginning until the end of work, with the exception of pauses (para. 2 I Arbeitszeitordnung). Time as such is not defined, it is the external criterion of the duration of the use of labour power. It is a purely quantitative, not a qualitative measure (and since the use of labour power is only subject to these formal limits a process of the intensification of the use of labour power within these external time limits is always to be expected).

² For a presentation of the economic theories used here see the introductory chapter 1.

The functions of the legal regulation of the rights of disposal of time

1. The **unilateral prerogatives**, secured by the labour contract, enable employers to **determine the use of time** within the labour relation and to organize it in the interest of **profit maximisation**.

In recent labour market theory, from Arrow (1974) to Williamson (1984), the necessity of labour market institutions is deduced from the specificity of the labour contract: the performance is at first undetermined and a concretisation (e.g. by the right to give instructions) is necessary. The distribution of time and its use can be determined unilaterally by the employer exercising his prerogatives in as far as they are not limited by a statute, a collective agreement or a contractual clause.

Labour law determines "working time" taking into account the employer's right to dispose of the worker's time and to use his labour power during this time. The **heteronomous determination** of time is an essential characteristic of the status of employee.

2. The temporal use of labour power beyond a certain **marginal utility** is limited by legal norms, so as to **avoid that intemperate consumption would cause losses and counterproductive effects** (e.g. by the increase of illness, work accidents, absenteeism, social conflicts and strikes) and so as to **secure reproduction**.

The border line between "optimal consumption" and "overconsumption" of labour power is historical and dependent on several factors (e.g., the level of productivity, the diet and health of the population - life expectancy, infant mortality -, the social organization of reproduction and the reproductive strategies of the household - the number of children -, the organization of education and vocational training, and the power relations and consensus or conflicts between the actors).

As a rule the individual employer will not voluntarily limit working time so as to avoid 'overconsumption' of labour power, since the wish to maximize profits in competition with other firms gives him an incentive to extend working time or to intensify work within pre-given limits. Even if it is in the collective interests of enterprises to secure future labour power, the long run consideration of securing the reproduction of future generations does not enter into the individual employer's calculus. A solution for this dilemma between

individual and collective interests³ can only be reached by state intervention and legal regulation setting generally binding standards (and thus impeding comparative disadvantages for enterprises with shorter working times). In creating standardised normative employment conditions working time regulation contributes to the **unification of the conditions under which enterprises compete**.

3. The legal organization of a framework of normal working times **reduces transaction costs** in entering into and executing labour contracts. By typifying the forms of labour contract and the organization of time **the number of possible alternatives is reduced**⁴.

Since transactions are not cost free, and the amount of the costs is dependent on the institutional arrangements forming the framework for social decisions (Coase 1960), law should contribute to reducing transaction costs to increase allocative efficiency (by which is meant a utility maximizing use of scarce resources); for transaction costs which are too elevated could impede the optimal use of a good (working time).

The normative model of the standard employment relationship as a continuous labour relation with "upward" working time flexibility turns one of the forms of time organization by a labour contract into the standard. The **typification** of forms of the labour contract and of the organization of time reduces the number of possible alternatives and thereby diminishes transaction costs. Numerous further legal rules in labour and social security law are connected to this normative model. Thus working conditions, the organization of time and the creation of numerous derived rights do not have to be the object of bargaining every time over.

Besides this standard model law proposes other forms of time organization by labour contract. However, compared to the normative model of the standard employment relationship which is economically and legally privileged, these a-typical **forms of the**

³ In the theory of games this constellation is discussed under the heading of the **"prisoner's dilemma"**. This is the decisional situation of two people taken in custody and interrogated separately, having the choice either to confess or to lie. If both lie, both will be set free. This will be the optimal solution for both. But if one of them lies and the other one confesses, thereby proving the first one to be guilty, the liar gets the highest penalty and the other one is released. If both confess, both will get a milder penalty. Thus the optimal result for both of them presupposes that both would lie; but for each individual lying carries the risk that the other one will confess and that the liar therefore gets the maximum penalty. The avoidance of this risk is a sufficient ground for both of them to confess. This prevents the collectively optimal result (both of them lie and are released) to come about. Individually rational decisions bring about a collectively irrational result.

⁴ For an explanation of the theoretical concepts of economic analysis of law used here and for the different ways how law can minimize transaction costs, see chapter 1.2.4.

labour contract secure fewer rights in labour and social security law. They are also less "juridified": the legal consequences are not regulated in the same detailed and uniform way. The more application they find, however, the stronger the need for a fixed "normative shape" of a nature to reduce transaction costs.

In this context the *Beschäftigungsförderungsgesetz* (Law for the Promotion of Employment) 1985 can be seen as a contribution to the reduction of the transaction costs of deviant forms of time organization by the labour contract (part time work, fixed term employment contracts, job sharing, "capacity oriented variable working time"). The costs of collective bargaining had become too high since no consensus between the parties to collective bargaining was in view: the trade unions refused to consent to a "downward leveling" of the existing standards of protection (especially fixed term employment contracts were regulated by collective agreements). With regard to other "new" forms of working time one also had to reckon with very high bargaining costs, since hardly anything had ever been regulated by collective agreements. It is true that the law has not resulted in big changes in the factual spread of fixed term employment relationships: their frequency had gone up dramatically since the mid seventies⁵. Nevertheless, the statutory setting of new standards reduced transaction costs, enlarged the possibility of deviant organizations of working time in labour contracts and filled the vacuum left by the absence of consensus between the partners in collective bargaining.

4. **The time allocation rules of marriage and family law** served the purpose of obliging people to allocate a sufficient part of their time to the labour market, so as to secure the maintenance of the family household (not only of the individual) by gainful employment.

Family law thus contains rules about maintenance and, derived from this, rules about the allocation of time to gender specific employment and household work. As a result of the reciprocal duty of maintenance the possibilities of married people to make choices about the allocation of their time are restricted in comparison to unmarried people.

Family maintenance also requires at least one of the spouses (formally either will do, in fact it is usually the wife) to allocate a certain amount of time to household work, at least when there are children in the household. While the necessary allocation of time to household work following from the reciprocal duty of maintenance of the spouses can, at

⁵ See the empirical research by Büchtemann and Höland 1989 and by Linne and Voswinkel 1989.

least when the household income is high, be largely substituted for by the purchase of market services, this possibility is more restricted with regard to the duty of maintenance of and "personal care" for children.

It is the purpose of these rules of time allocation to guarantee the functioning of the marriage institution (the family household) as a fundamental "social security system" which secures private care and services (especially subsistence production and the reproduction of future generations).

Some functions of private households have been taken over by the state (be it in the form of state services or in the form of transfer payments); this has an influence on the volume of labour power offered in the market. This is however a fluctuating process: measures for the incorporation into or the expulsion from the labour market follow conjunctural cycles. Because of their "double role" as employees and housewives, women are especially affected by the fluctuations.

A state interest⁶ in women's time allocation in household work is the reduction of state expenses (the reduction of state deficits and the realization of balanced finances are original own interests of the state). For reasons of legitimation and on grounds of electoral strategy political parties have an interest in avoiding tax increases.

A further goal of the state regulation of the family - and also of social security and labour law institutions - is to secure reproduction (**demographic policy**). This, however, does not necessarily imply institutional arrangements reinforcing women's time allocation to un(der)paid household work, as is dominantly the case in the FRG. It could also lead to an improvement of state infrastructures (the right to a place in kindergarten etc.) or to changes in working time policy (which, however, are more expensive for the state than the privatization of social costs at the expense of women).

A conflict can emerge between the regulation of the allocation of women's working time to the household economy and the demand for female labour power in the exchange economy as well as between the former and labour and social security law rules pertaining to time allocation to the exchange economy. Family law rules may increase the transaction costs of labour contracts with women/for women so much that the goal of allocative efficiency is impinged upon. The legal rules of family law and social law construct the normative model of the 'household work relationship' in such a way as to present women's

⁶ See also the discussion on the state in chapter 3.6.

unpaid household work to employers and men as an 'external utility' from which they can profit without taking the social costs of this work into account.

5. Family law norms with regard to the allocation of time to the household economy increase the transaction costs of labour contracts with and for women.

Whereas, under earlier law, men and single women had the same civil law legal capacity, for women this changed upon marriage⁷.

These arrangements increased the transaction costs of labour contracts with women compared to those with men, since, in making a contract with a wife, one had to obtain the consent of an extra "contract party". That these rules were no impediment to female employment must clearly find its foundation in the fact that husbands, for economic reasons, agreed to the gainful employment of their wife.

Since 1977 the legal model of the "housewife marriage" has been abolished: both spouses now have the right to exercise gainful employment. The time allocation choices of married individuals are, however, limited by the duty of maintenance (para. 1360 German Civil Code) and by the duty to take into account the interests of the spouse and the family in making decisions regarding time allocation and the division of labour (para. 1356 II German C.C.)⁸. This means that women do not only have to negotiate a labour contract with the employer, but also a time division with their husband. If there are conflicts of interests between man and wife, this can lead to tremendous increases in women's transaction costs. To be sure, the rule is equally applicable to men who are obliged by it to reconcile their time allocation choices with those of the wife. Transaction costs (and bargaining power, influenced by income differentials, career perspectives, discrepancies in

⁷ Extensively on the historical development of women's legal position as a wife and mother: Weber 1907 and Öktinghaus 1923. After the German civil code of 1900 came into force married women had legal competence, but the husband's consent was still required for them to enter into a labour contract. This followed from the wife's legal duty to manage the household: she was only entitled to gainful employment "so weit dies mit ihren Pflichten in Ehe und Familie vereinbar ist" (old para. 1356 German Civil Code). Furthermore the husband had the right to take decisions with regard to all matters concerning the common married life (old para. 1354 German C.C.). As a consequence, until the "Gleichberechtigungsgesetz" (Equal Rights Law) of 1958 came into force, the husband could, with the consent of the "Vormundschaftsgericht" (Guardian Court), also make an end to an employment relationship of his wife. See more extensively chapter 7 on time allocation rules in family law.

⁸ These regulations are treated of more extensively in the chapter 7 on the family law regulation of time allocation and the legal regulation of the "household work relationship".

power, the gains of unpaid household work for men etc.), however, are distributed so unequally that women's transaction costs are considerably increased by family law rules.

Information and search costs - forming part of the transaction costs in the formation of labour contracts - too are higher for women. As before, vacancies are announced mainly in the male form; para. 611 b II German C.C., which prescribes gender neutral vacancies without providing for any sanction, has not changed very much. Vacancies in the male form create the assumption that the job is not available to women. This reduces the search costs of men compared to women: the costs of finding out whether the assumption is right have to be borne by women.

In view of the gender specific division of labour and of labour market segregation, the relatively higher female unemployment also contributes to higher information and search costs for women. The high unemployment means that there is more competition and that more time has to be invested in the search for jobs. This phenomenon is reinforced by the insufficient offer of jobs allowing for a combination of professional and family work. When child care is a problem because of the lack of crèches, kindergartens and child care facilities after school hours, the job search is often more difficult for women with small children than for men. Women who are not yet gainfully employed find it difficult to obtain one of the scarce places in kindergarten, since they do not get priorities on the waiting list. Information and search costs are higher either because there are too few jobs with a compatible time organization, or because the search for child care facilities compatible with the jobs offered is very difficult and takes a lot of time. These costs do not have to be borne to the same extent by men.

6. The gender specific differentiation of working times over the household and the exchange economy offers enterprises the advantage to be able to complement the dominant "male times oriented standard employment relationship" by other, subordinate forms of working time organization offering "downward" working time flexibility and cost advantages. Thus the advantage of a **typification of a standard model** offering the advantage of a reduction of transaction costs is **complemented** by the availability of a number of (more or less typified and legally regulated) **variations**.

The number of possible variations of contractual time arrangements has increased. Besides the normative standard model of a male times oriented continuous full time employment with "upward" time flexibility the model of the "housewife standard

employment relationship" in the household economy, as supported by family law and social law, provides a variable offer of working time with "downward" time flexibility (discontinuous employment relationships, seasonal work, fixed term employment contracts, part time work, reduced daily or weekly working times, employment for very short working hours, "capacity oriented variable working times"). This ensures that at the same time there is a continuum of possible forms of contractually laid down working time organization and a male normative model ("the standard employment relationship") which is efficient and reduces transaction costs. When environmental conditions (the needs of time organization in capitalist production) change, changes in the legal norms regulating the time organization can become necessary.

7. Keeping the risk of work interruptions as small as possible and **bundling these risks in a group outside of the labour market** is conducive to enterprises' **profit maximization**. The limitation of the number of people who have a claim to be released from work for the purpose of performing household work, especially care and education, has the same function.

The release of male employees from the household work increases their utility to the enterprises: their "upward" time flexibility is higher, and the risk of work interruption is smaller, since they are free from household work, child rearing, the care of ill family members, shopping, accompanying family members to doctor visits etc. Several legal norms make the claim to be released from work without losing pay dependent on the absence of a "housewife" and thereby contribute to the reduction of the risks of work interruption to the enterprises⁹. Family law rules inducing certain people to allocate time in the household economy (the earlier model of the "housewife marriage", in the meantime formulated in a gender neutral way, but factually still mainly allocating household work to women) favour the bundling of risks in the group of women.

8. The institutionalization of social conflict and the **participation** of trade unions and Works Councils in the organization of working time (the system of collective agreements, co-determination, the competence of the labour courts etc.) **reduce the risks of work interruptions and their costs**. At the same time **transaction costs are lowered** by the reduction of the number of actors by representation and by the reduction of the number of consents required and the number of decisions to be taken by collective agreements on the branch and the firm level.

⁹ Compare chapter 3.2. on enterprises as winners of women's unpaid housework.

These regulatory mechanisms work to the disadvantage of women, since women are underrepresented in **collective bargaining**, the partners in the bargaining function to a large extent as "**male associations**" and women have less bargaining power.

In the meantime working time regulation is mainly a matter for collective agreements. Many still existing statutory rules (e.g., the "Arbeitszeitordnung" (Working Times Law) of 1938 or the "Bundesurlaubsgesetz" (Federal Law on Leave) of 1963) have been obsolete for a long time because of more favourable arrangements in collective agreements.

The (limited) participation of Works Councils in the time organization of enterprises can reduce conflicts (and therefore transaction costs), increase identification with the firm, mobilize human capital and have productivity enhancing effects¹⁰. This strengthens internal labour markets which are strongly developed in the FRG.

Works Councils have co-determination rights with regard to the distribution of working time (the beginning and end of daily working time, the distribution of working time over the weekdays, and the cases of overtime and reduced working time (para.87 I, nrs 1 and 2 "Betriebsverfassungsgesetz" (Law on the Constitution of Enterprises))). The constitutional law of firm organization contains also procedural rules for the enforcement of these rights (the right to information (para. 80 I, 1 "Betriebsverfassungsgesetz") and proceedings before the labour courts). However, the Works Councils have no co-determination rights with regard to the duration of working time laid down in the individual labour contract as long as it remains lower than the weekly working time agreed upon in the collective agreement¹¹. The possibilities of the Works Council to resist "downward flexibilisation" (or to realise improved regulation of these forms of working time) are thus very limited. The

¹⁰ According to Sengenberger (1990) there is an intimate connection between the fixity of the staff and the productivity of labour and capital. The FRG shows a fairly small "external" flexibility (in which adaptations are pursued by the exchange of labour power between the firms), but a very high "internal" flexibility (adaptation through the internal labour market of the firm). There are strong impediments to dismissals, and employment times in the same firm are relatively long (internationally the FRG comes at the second place after Japan). This staff fixity would have a positive influence on productivity.

¹¹ In two decisions of 14 October 1987 (1 ABR 10/86 and 1 ABR 53/86, published in DB 1988, 341; AuR 1987, 341) the Bundesarbeitsgericht (the highest court in labour cases) denied the Works Council the right to co-determination in the framework of para.87 I, nr. 2 Betriebsverfassungsgesetz with regard to the minimal duration of labour contracts with working times lower than the weekly working time determined by the collective agreement. However, indirectly the Works Council has possibilities to exercise an influence in this regard, because there is a right to co-determination with regard to the beginning and the end of the daily working time, the distribution of working time over the days of the week and the rules regarding work interruptions.

underrepresentation of women in these bodies adds to the problem. Because of this, trade offs in compromises between the employer and the Works Council are often at the expense of women.

9. The **volume of working time offered and demanded** on the labour market can be **adapted** by legal rules attracting certain groups to the labour market or excluding them from it; thus conjunctural fluctuations are countered. Labour market institutions suppress the potential instabilities and insecurities of the market. Because of their position in exchange and household economy and their "alternative role" as housewives women have a special function in the manoeuvring of groups of persons into and out of the labour market.

Access to the labour market can be restricted temporarily by rules with regard to minimum ages - the ban on child labour -, compulsory education and the duration of school attendance. In the same way the age of retirement, models of early retirement and of part time work for the elderly are instruments of regulation with the purpose of excluding certain groups of people from the labour market. Other regulations, as for instance the rules which allow firms to reduce working times and provide for transfer payments by the state to compensate for the dropped working hours, enable the enterprises to adapt to fluctuations in orders and conjunctural crises.

For its labour market policy the state disposes of a wide range of instruments of insertion into and expulsion out of the labour market influencing the volume of labour time offered (unemployment benefits, employment policy, measures of vocational rehabilitation etc.). By changing the conditions for granting specific rights (the amount of benefits, the determination of what is an acceptable work offer for the unemployed, the criterion of availability for the labour market, the conditions to enter continuation training and vocational rehabilitation courses) one seeks to coordinate offer and demand in the market.

Because of their "double role" as housewives and employees women have a special significance as a flexible working time potential which can be inserted into or taken out of the labour market.

10. Labour law and social security law **reduce the risks of wage losses** because of unemployment, underemployment, sickness, work accidents etc. (labour market institutions redistribute the risks of wage losses for employees according to the **insurance principle**). In this redistribution of risks women are disadvantaged.

For labour market insiders these risks are reduced by the social insurance system. State transfers in the framework of the insurance principle, connected to the duration of employment and the height of the income, guarantee a considerably better protection than the welfare institutions for labour market outsiders, which operate on the basis of the principles of need - and are therefore income dependent - and subsidiarity.

The risks are covered best for male times in the exchange economy (full time employees), worse for female times in the exchange economy (for instance, part time workers with workly weeking hours below certain thresholds do not have a claim to benefits in the case of involuntary temporary working time reductions (Kurzarbeit) and are not liable to unemployment, old age and sickness insurance, see chapters 5.6. and 6.3.). Female times in the household economy are excluded (housewives are not insured against work accidents, unemployment, etc.). Furthermore, some employee risks are excluded from insurance and shifted to housewives by the operation of "subsidiarity rules" (e.g. when employees have certain rights only under the condition that they have no "housewife").

The risk of income losses in times of unemployment is partly shifted to private households. The cuts in unemployment benefits¹² and the increases in the interruptions in the payment of benefits (waiting times under certain conditions, such as when one has given notice oneself or has refused an "acceptable" employment offer) have reinforced this tendency. On the one hand, the partial or complete shifting of the risks of work interruptions to households means that women must compensate for the losses of wage income by an increase in household production. On the other hand, they are disadvantaged as employees with regard to the access to the benefits of the social insurance system.

¹² The conditions under which one can obtain unemployment benefits have become stricter (whereas before 1 January 1982 one had to show six months of employment with obligatory insurance in the course of the last three years before the demand for unemployment benefits, since this date at least 360 days of such employment have to be shown (para. 104 AFG)). The conditions under which one is allowed to refuse a job supply from the labour office because of its "unacceptability" have become stricter; the refusal of an "acceptable" work offer is sanctioned by the temporary or permanent loss of the unemployment benefit (Decree of the Administrative Council of the Federal Labour Exchange Office with regard to the estimation of the acceptability of an employment offer, 16 March 1982, ANBA, 523). For an extensive presentation of the materials see Bieback 1984 and 1985.

Especially discriminatory for women is the rule that women with small children are regarded as "available" for the labour market in the sense of para. 103 I S.1 AFG and therefore have a claim to unemployment benefits only on the condition that they make a statement to the labour office explaining how and by whom child care will be guaranteed in case the women get a job. If the labour office is in doubt about the statement, it may demand confirmation by the person or institution who will take care of the child. Although the labour offices demand such a statement also from lone fathers - but not from every father -, this allocation of the primary responsibility for child care to mothers amounts to a discrimination of women (see Gerhard 1988a, Winkler 1990).

11. The regulation of time has **cultural and ideological functions** and expresses the **hegemony** and **distribution of power** between competing social forces. Gender ideologies are a part thereof.

Sundays and holidays are constitutionally protected as days of "repose from work and the elevation of the mind" (art. 140 Basic Law). The discussions about the inclusion of the weekend in the normal working time elucidate the meaning of power relations and ideological factors; so do the discussions between the state, economic actors and the churches over the number of state holidays and of church holidays recognized by the state. This is also the case for "Mother's Day", which is not a state holiday, but always falls on a Sunday and serves to diffuse ideological kitsch with regard to women's roles. More generally, it is also the case for rules temporarily releasing a person from work so as to increase the compatibility of gainful employment with household work, and for the working time regulations in the framework of protective legislation for women.

12. The labour market institutions of time organization and the family law rules of time allocation are **interdependent**. They can be **conflicting**. The **amendment of dysfunctional rules to labour market changes** has, however, left the **patriarchal structures of time organization intact**.

Family law rules regarding time allocation follow mainly from the reciprocal duty of maintenance of the spouses and from the parents' duty to maintain and care for the children. These rules, in earlier times gender specific, have become more and more gender neutral. Social and labour law rules on the one hand, family law rules on the other hand can be seen to be at crosspurposes when women's time allocation in the household economy becomes an impediment to their time allocation in the exchange economy.

When there is a discrepancy between the working time volume of women offered and the one demanded, law can reduce or exacerbate the problem of scarcity:

- when the demand for female labour power is bigger than the supply, and the scarcity of the supply is caused by labour law or family law rules creating impediments for the access to the market;
- when marriage law pushes up the transaction costs involved in entering into labour contracts too much;
- when women or households are economically dependent on women's gainful employment and the legal rules create labour market access barriers;
- when women's supply of labour power cannot be converted into employment because the organization of working time represents barriers for women's access to the market. Legal rules can be dysfunctional from the beginning, or can become obsolete because of changes in the historical and economic conditions. The possible consequences are that the laws are not applied, that they are adapted and reformed, or that, despite the need for change, they are upheld by coalitions of interests.

3. Costs and Benefits of Housework : Winners and Losers. An economic analysis of legal entitlements to dispose over time

The thesis that women are exploited through the overwhelming allocation to them of unpaid housework is, as we know, not new. The housework debate of the 1970s, however, got bogged down, did not arrive at any satisfactory theoretical analysis and was unclear and contradictory in many definitions¹. I take off from this debate, though bringing into the analysis theoretical elements of the new household economics, the economic analysis of law and games theory in order to determine the distribution of costs and benefits of work in the home.

The initial thesis is that the overwhelming allocation of unpaid housework by women in the domestic economy produces benefits not only for the households themselves, but additionally external benefits consumed by employers in the manufacturing process, by men as a social gender and by children, without the cost of unpaid working time in the home being taken appropriately to account in the social cost-benefit calculation. The time allocation in the domestic economy causes external effects, external costs and benefits, which are distributed differently according to the sexes. To secure the goal of 'equalization of the gendered opportunity costs of time allocation in employment and housework', accordingly, the distribution processes of time and benefit have to be analyzed.

Social costs of socialization and upbringing of children are largely shifted to private households, and have to be borne primarily by women as gender, via the gendered division of labour and the concomitant structural discrimination. Time worked in the domestic economy is unpaid or underpaid. At the same time, the opportunity costs of paid employment are higher for women than for men - and conversely the opportunity costs of housework for men as gender are as a rule higher than for women.

1 The feminist housework debate contributed much towards the treatment of the importance of housework in connection with the institution of marriage for the discrimination of women. Delphy (1976) stressed the importance of housework as production, not as consumption or reproduction. Dalla Costa (1972) called for the valuation of housework through a housewife's wage. It was heavily disputed whether this demand was suitable for promoting the independence of women from the patriarchy, since it consolidated the gender specific division of labour and increased the financial dependence of women. A comprehensive review of the domestic labour debate is given by Molyneux (1979) and Himmelweit/Mohun (1977). One shortcoming of the domestic labour debate was that it focused too narrowly on housework, thus neglecting the broader family/household context. Another problematic aspect was the assumption that housework necessarily lowered the value of labour power by reducing the cost of reproduction of labour power, thereby reducing wage costs to employers.

3.1. Households

The beneficiaries of work in the home are first of all the households themselves, which distribute the time of all household members between paid work and work in the home, with the object of maximizing the benefit to the household as a whole. By increasing the time allocation of one household member (the woman) to unpaid housework, households increase their benefits. Otherwise, the housework time would be substituted by time in paid work or leisure time, if the benefit function of the time allocation could be improved thereby. In the context of this collective rationality of the household, women too increase their benefit by allocating time to unpaid housework, as long as the opportunity costs of housework are smaller than those of paid work.

It is emphasized in the 'new household economics'² that the wage that women could secure on the labour market is a decisive factor in decisions by households as to allocations of time. Replacement of housework time by marketed labour time (and leisure time) seems sensible only where the wage rate is higher than the costs of saving a unit of housework time (marginal costs of time-saving technologies, wage per time unit of purchased service labour). From a particular minimum wage for female labour upwards, a positive correlation will develop between wage rate and labour supply, which given a relatively high income of the partner will switch over to an opposite response (replacement of housework time and marketed labour time by leisure time). Since the consumption possibilities depend on the time budget, with relatively high wages the labour supply will go down.

The possibilities of choice by households in allocating time are however present only above a particular income level. As long as the existence minimum is not covered, as much labour power as possible of households must be invested in paid labour, even if allocating time to work for the household itself would be more beneficial. The compulsion to sell labour power in order to guarantee subsistence thus limits the possibilities of an optimal household decision. The possibility of opting for housework also presupposes that households have minimum basic equipment in such means of production as accommodation, kitchen, appliances, sewing machines, agricultural equipment, garden/land etc. These prerequisites are however often missing, particularly in the case of very poor households (in the Third World, with immigrants, in the historical stages of

² For an overview on the main theoretical concepts of the 'new household economics' used here see chapter 1.2.3.

proletarianization and flight from the land), for which production of their own could maximize benefit more than paid labour at very low wage rates. These historical preconditions are neglected by the new household economics, so that even the figure of the housewife, which became normal for the lower strata too only above a particular income level of households, seems ahistorical.

An exception is Gershuny (1982, 1983a, 1983b), who, on the basis of the "new household economics" studied the substitution processes between market-type and non-market-type production by households from the turn of the century in Britain from the viewpoint of "social innovations", analysing the interactions of the following factors and their effect on benefit maximization strategies of households:

- income and wage developments;
- productivity of domestic labour (influenced by productivity of consumer goods industry, household technology and the price level of household appliances and consumer goods);
- market costs of goods and services that could substitute for households' own production (dependent on productivity and wage developments in the tertiary sector).

These factors, which enter into time allocation decisions of households and into substitution processes, at first appear gender neutral at the level of the collective rationality of households. Structural conditions, however, restrict women's possibilities of choice as a social gender, so that collective rationality of household decisions and individual rationality of women as a gender diverge, though at the same time being kept together by structures that continually reproduce the gender-specific division of labour and allocation of time ³. The differing opportunity costs of paid labour and the power structures and hierarchies in households and families are decisive structural elements, though neglected in the neo-classical market model of the "new household economics". Thus, the concept "power" does not even appear in Gary Becker's "A treatise on the family" (1981); he operates with the assumption of a hierarchy-free group interest ("altruism"). Particular phenomena can, therefore, no longer be consistently explained within the framework of the "new household

3 A decisive structural element is the duty of maintenance in marriage (para. 1360 of the German Civil Code). The rationality of pooling resources and the advantages of specialization for households are increased by the fact that allocating time to unpaid work is met by a counterclaim to 'appropriate maintenance'. Without the entitlement to maintenance (and to compensation for lost benefits in the event of divorce) the risks of income losses for women in the time allocation in the domestic economy would be still greater than they are.

economics", for instance the absence of a redistribution of housework times between household members when women's paid work time increases.

The benefit maximization strategies of households as a "collective actor" in time allocation decisions in which women take part as household members do not yet say anything as to the distribution of costs and benefits of the time allocation between household members, their influence on decisions, their differing "bargaining power" in connection with gender. It is quite possible that women as a social gender may be the "losers" and that the overwhelming time allocation of unpaid housework to women is nevertheless rational in the context of household decisions, as constituting the lesser evil in the context of structurally limited possibilities of decision.

3.2. Firms

Do firms profit from the unpaid labour done by women? This question was discussed in the "domestic labour debate" with a false restriction as to whether housework created surplus value in the capitalist production process, thus ending in a blind alley. However, the gender-specific division of labour affects costs and profits of firms in many respects:

- effects on gender-specific differential wage costs;
- costs of production and socialization of future generations of workers;
- housework by women as precondition and necessary complementary factor of the present time organizations of firms;
- profits from fragmentation of work forces, differentiation of working times and labour market segmentation.

The **hypothesis of direct effects of unpaid housework** (Seccombe 1974) by women on men's wages by lowering reproduction costs is, I feel, problematic and inaccurate. Historical studies to confirm this thesis are absent. In support of it, the current maintenance payments of a husband to a wife doing housework are often compared with the costs that buying corresponding services on the market would bring. These costs can as a rule no longer be paid by average earners. Firms would, then, have to pay men higher wages, so the argument runs, to guarantee their reproduction, if they had no wives working unpaid. In this argument, however, the current price level of services on the market is assumed to be fixed, which is however unacceptable. For if all women had to earn their living by employed labour and were to offer their labour power on the market, this would assuredly lead to considerable changes in wages and in the market prices for services, both

through an increased supply of labour power and increase in competition on the supply side and through the possibilities of rationalization and "economies of scale" of market production by comparison with private, individual household production. Services are even today cheaper in societies with very great differences in income and wage levels and mass poverty. Perhaps men would even perforce take over the housework themselves; they would not necessarily have to buy all services. And firms could, if men were to demand too high wage supplements for lack of unpaid housework, replace it by machines.

Another problem with this thesis is the implicit assumption that wages are negotiated and paid separately according to individual components. The proportion of the wage paid as "marriage allowance" in the Federal Republic of Germany is, however, relatively small. In other respects wage levels are not differentiated according to family status or number of persons entitled to maintenance.

Instead, it is only above a particular level of income and wages that it becomes possible to set one person largely free from paid labour, allocating them more time for housework, so that the role of the housewife spreads beyond the bourgeoisie, first in the families of the labour aristocracy and then into worker families too, at least for particular stages of life.

Indirect effects of gender-specific division of labour and unpaid housework of women on wage costs of firms are, however, considerable. Absence periods by workers during working time, which cause "dead costs", can be reduced by shifting all activities that cause these "absence periods" as far as possible out of the employment relationship.

Flexi-time is an example of the shifting of "absence periods" onto workers, by making such necessary actions as shopping, visits to doctors, banks etc. more compatible with working hours, deducting delays from working hours and increasingly internalizing time discipline. Another possibility of **reducing "absence times"** for firms is **shifting them out of the work sphere by "bundling" them in the person of non-employed household members**. Since particular necessary work such as a minimum of housework, childcare, care of the sick or needy family members will always occur, as will absence periods of employees for illness or pregnancy, the bundling of these risks in the person of the non-employed partner reduces the absence periods and thus the wage costs to firms. The retarding effect of the family as a "mobility obstacle" can thereby be reduced.

The smaller the range of people able to claim a particular right (e.g. continued payment of wages without work), the smaller are the costs. Conversely, the extension of rights hitherto due only to women to both sexes increases the costs, since the range of workers entitled to them is more than doubled.

These cost reduction strategies become clear from the example of the claim against the employer for time off (and against the sickness fund to payment of sickness money) for up to five days per year to look after a sick child under 8, pursuant to para. 45 Social Code V (Sozialgesetzbuch V), which is linked to the requirement that "no other person living in the insured's household can take over the supervision, care or nursing".

The same structure is to be found in other entitlements : the right of an employee to take the 18 months parental leave is excluded in the case that the other spouse is at home and not engaged in employed work (para. 15 Federal Statute on Allowances for Educational Leaves - Bundeserziehungsgeldgesetz). Various regulations in social security law grant allowances and payments for nursing, care at home and household help only in case that no other household member is available to provide these services for free, reducing thus the costs of sickness funds at the expense of women's unpaid work (e.g. para. 37, 38 Social Code 5 granting payments for nursing and medical care at home and household help in case of sickness, or para. 199 German National Insurance Code which entitles the husband to household help in case that the wife cannot manage the household because of pregnancy or childbirth).

And the (few) collective agreements allowing entitlements to be freed from doing obligatory overtime often provide these only for "mothers", thus saving costs by restricting the range of those entitled.

Entitlement to be freed from obligatory overtime was provided e.g. by para.6(5) of the framework collective agreement for industrial employees in the clothing industry (valid as from 1 January 1980) in favour of mothers with children under 10. By para.4(3) of the framework collective agreement between the Verband der saarländischen Textil- und Lederindustrie e.V. and the Frankfurt Textile and Clothing Trade Union (valid from 1 January 1986), women with children under 14 can on application be exempted from overtime. A general, gender-neutral version is by contrast contained in para.8 of the framework agreement for blue- and white-collar workers in the North West/Rhineland/Württemberg/North Baden metal industry (valid from 1 April 1988). It states that where overtime and necessary

night, shift, Sunday and holiday working is ordered, legitimate interests of those concerned must be taken into account. This formulation does not however guarantee any subjective entitlement to exemption, but merely binds employers and Works Councils, so that application in practice largely depends on the power relationships existing and on company policy interests.

It is only given a relatively high rate of employment by women, labour shortage and increased demand for female labour that this strategy of firms is no longer rational.

The production and socialization of future generations of labour depend largely on the unpaid work of women in the household economy. Firms do not pay for this, but consume it.

If enough time is not spent on the reproduction, care and upbringing of future generations, the "social costs" of this are a fall in population, labour shortage or - as in the early stages of industrialization, with extremely long working hours for women, poor nourishment, and inadequate hygienic and medical provision - high infant and child mortality and shorter life expectancy for women than for men. It is, of course, not the individual employer that has an interest in ensuring the necessary time for reproduction, as long as the labour supply is big enough. It is, however, in the interest of capital as a whole to avoid excessive using-up of labour power and to guarantee the reproduction of future labour power too, within particular historical limits. This dilemma between collective and individual rationality of firms is resolved by government policy (government limitation on the maximum working day, population policy).

If the socialization and care of children were not largely based on private, unpaid work by women, but the costs of this labour redistributed onto society (whether through collective arrangements or transfer payments for private childcare), then the costs of this would rise for firms too. They would via taxes or other forms of involvement have to contribute to it (even though it is to be expected that these higher costs would be passed on by firms to workers, male and female, and to the buyers of their products). Through taxation, firms are even now involved in financing the education and socialization of children through national schooling, kindergartens, education allowance, child allowance etc. These transfer payments do not, however, adequately meet the social costs.

While in other countries (as for instance in Italy) all the costs of payments to female employees during leaves related to pregnancy and childbirth have been shifted to an insurance, individual firms in Germany still have to bear the costs of the difference between the previous average net wages of the female worker and the maternity money paid by the sickness funds during maternity leave (a redistribution of this cost risk for the individual firm to all firms in the form of insurance with equal contributions for all employers has long been called for, but implemented only for small firms with less than 20 employees through para. 10 of the Statute on Continued Payment of Wages (Lohnfortzahlungsgesetz) in 1985).

These arrangements, however, internalize only a part of the social costs of the production of future labour power, which have to be borne overwhelmingly by private households. Firms benefit from this distribution of external costs and benefits; any further internalization would increase the costs to firms.

The gender-specific division of labour (and time) creates not just one, but **two "normal employment relationships"**. The overwhelming **allocation of women's time in the domestic economy makes possible the normal employment relationship in the commercial economy as a complementary factor**, which accordingly appears to be oriented to male time patterns. The ideal type of the standard employment relationship, as a continuous, uninterrupted full-time employment relationship, supplemented by overtime, possible shift or night working, stand-by services, periods of absence for business trips, installation work, congresses, professional training etc., presupposes in order to function - at least at particular stages of life - the gender-specific division of labour, with supplementation through the time allocation of the partner in the household economy. Certainly, a proportion of housework can be done even alongside paid work, or standards of housework can be lowered, and other housework replaced (depending on income) by services available on the market. Not everything, however, can be "shifted" in this way; in particular care, nursing, attention, the "emotional work", have their "own time" and their own rhythm, opposed to the "chronological" time of paid employment. This incompatibility is supplemented by other social time structures which are hard to reconcile with the full-time employment relationship, such as school hours, holidays, shop hours etc.

Company time structures and the corresponding labour law regulations constitute a **"rule/exception model"**. The presence of a "full-time or part-time" housewife is as a rule presumed as part of the standard employment relationship, and makes possible the "flexibility upwards" in time. Exceptional arrangements like entitlements to time off to look

after sick children are granted only under the precondition for the full-time worker that no housewife is available, and thus presupposing for entitlement proof of departure from the rule. Or else exceptional arrangements are formulated in gender-specific terms, to keep the range of those entitled as narrow as possible and reduce the costs of claiming entitlement to the right. It will not however be possible to maintain this because of infringement of the equality principle, except for revisions concerning the biological differences of pregnancy, birth and breast feeding. Or else the exceptional arrangements are constituted formally in gender neutral terms as supplementary "atypical" forms of working (time), accompanied by lower labour-law standards as being departures from the "male-oriented" standard employment relationship, and offering lower economic benefits (income, career possibilities).

This combination of typical and atypical forms of working and types of contract, of rules and exceptions in organization of company time, offers, as well as the cost advantages of "bundling" risks of interruptions to work and shifting them out of the work sphere into the standard employment relationship of the housewife, further cost advantages rooted in the fragmentation of labour and the segmentation of labour markets. **These differentiations make possible time flexibility by the workers both upwards (typically male) and downwards (typically female).** The differentiations increase competition on the part of those selling their labour power, thus pressing down on wages and increasing the possibilities for employers to combine various time arrangements. And differences in the outputs of different firms, dependent on branch, size of firm, market strategies, economic position etc.), contributing to segregation of labour markets, call for differentiations in the organization of company time. Firms thus profit from gender-specific division of labour and differentiated supply of labour time, while at the same time these differences are constituted through company practice and norms of labour law, only through which do they acquire their "gender character" as functional roles.

Important examples of time flexibility upwards are overtime, night and shift working, and weekend working. Flexibility downwards is allowed above all by 'minor employment' and part-time working. The cost advantages of combinatory possibilities for firms will be described here only on the example of the combination of part-time working and overtime. Part-time employees receive no overtime bonuses when they work longer than the contractually agreed hours, since overtime bonuses are due only when the collectively agreed weekly normal working hours are exceeded. Part-time work also, however, offers flexibility possibilities upwards, if only because many part-time employees work part-time non-voluntarily and would like to lengthen their working hours, and because part-time

wages are on average very low. Particularly for sectors with big fluctuations in amount of work and seasonal variations in working time, the combination of part-time work and overtime without payment of overtime bonuses is therefore very profitable: the classical example is retail trade.

I do not know of any collective agreement which in principle includes a ban on overtime by part-time employees or an agreement for overtime bonuses when the contractual working hours of part-time employees are exceeded. More typical are such formulations as that in the umbrella agreement for blue- and white-collar workers in the metal industry in North Württemberg/North Baden (valid from 1 April 1988), whereby bonuses for overtime are payable to part-time workers too only where the collectively agreed working hours are exceeded, but no bonuses for late work or night working between 7p.m. and 6a.m. for part-time employees outside manufacturing.

The most favourable arrangement is contained in the umbrella agreement for workers in the metal industry in Lower Saxony (in force from 1 January 1988). While for part-time employees too, overtime continues to mean working hours exceeding the regular weekly hours of 37/36.5 hours, overtime bonuses must be allowed where the overtime was not announced the day before and longer hours than usual in the firm have been worked on a given day.

3.3. Men

The fact that the greater part of housework is done by women frees men from activities, many of which are unpleasant, monotonous and routine (lavatory cleaning, dusting, ironing etc.), unpaid and associated with low social recognition. Undoubtedly, many jobs on the labour market may be more strenuous, more harmful to health or more unpleasant, especially in comparison with the more creative and more satisfactory parts of housework (autonomous organization of work without supervision, cooking, playing with children - activities most likely to be taken up by men too). Contrasting negative aspects are the isolation of housework, lack of social contacts, low social recognition (the invisibility of housework), its repetitive nature, the lack of mental challenge, the absence of clearly delimited working hours and pauses. Housework is done unpaid, is not taken into account for pension purposes (with the exception now of some time spent bringing up children 3), does not have social insurance, and gives no pension entitlement in the event of incapacity for work or for earning following accidents in the home or occupational diseases. Full- or

part-time housewives (including under this term the few men who work in the home) are financially dependent on other sources of income, as a rule, maintenance by the spouse. Men are spared all these disadvantages because of the gendered division of labour and time, so that they are to be counted among the benefits of housework for men.

Do men pay for this labour time through the maintenance they pay to their full-time or part-time houseworking wives?

Maintenance payments of spouses pursuant to para. 1360 of the German Civil Code are not made on the basis of exchange of equivalents and payment of the market price of the specific services, but according to the maintenance principle, that is, in terms of what is generally expected according to social status (appropriate maintenance⁴). As a counterpart, the housewife is due maintenance entitlements for her work (which is a contribution to maintenance), so that housework is not simply done gratis or for nothing. But maintenance payments to the housewife are not payments for running the household, nor are they simply available to the household runner for her personal needs, but are to be used for the purpose of supplying the household. These funds, then, have to buy needed foodstuffs (housekeeping money), clothing and other necessities. The maintenance payment is not the housekeeper's pocket money. And the maintenance amounts are well below the market rates that would have to be paid to buy the corresponding services. Even were it to be assumed that the cost of services that would replace household production would considerably fall if all women were to offer their labour power on the labour market, it cannot even in this case be assumed that all men would then be able to buy housework services on the market at the same level as at present secured through full-time or part-time housework. For were all women to offer their labour power on the market, a lowering of men's wages and a redistribution of jobs and incomes between the sexes would also be likely. Moreover, not all female labour would enter the service sector. It would therefore be expected that the possibility of buying services to replace housework would differ according to income, thus not being reserved as a privilege to men.

Though housework is not gratis, it is considerably underpaid. The present gender-specific division of labour and time gives men the benefit of non-market services in the domestic economy which they could not afford, or only to a lesser extent, as market-provided services.

⁴ See in detail chapter 7.3.3.

Wage labour not only provides more income by comparison with unpaid housework, but also gives more power and social prestige through market connections. The possibilities of transferring resources are greater where time is allocated to employed labour than to the domestic economy, since 'non-relation-specific' investments can be easier transferred in the event of divorce/separation than 'relation-specific' investment, in particular investment in bringing up of children. According to the exchange theory (also resource or bargaining theory), partner A has more power than partner B where A brings more resources into the relationship (in comparison with B's assets without the relationship) than B brings into the relationship (compared with what A would have without the relationship). Usually the person with less power will do more housework, since most housework is seen as unpleasant. This is the person whose likely losses from the relationship are greater than those of the other partner.

The opportunity costs of changing job or dismissal in the domestic economy are much higher than on the labour market, and are equivalent to divorce, that is, to the dissolution of a complex package of investments and numerous transactions. The transaction costs of enforcing claims to alimony are higher than for enforcing wage claims. Women who have mainly allocated time to housework lose out if they start to work again following divorce, in part because of the narrow asset concept of 'property increments'. The devaluation of the woman's human capital on interruption of working is not taken adequately into account, although the consequences for the woman will be lower pay and a lower old-age pension, while the husband benefits from the specialization advantages in uninterrupted paid employment, which was in many respects only made possible by the partner's supplementary allocation of time to the domestic economy (Benham's 'family-firm hypothesis').

These differences in social power also explain why only slight redistributions of housework time in households take place where the female partner changes her time allocation to employed work or is also full-time employed.

In the context of the labour market men benefit from the gender-specific division of labour and time because they as a gender have the better jobs, on average have higher incomes, do work with better promotion possibilities and are increasingly over-represented as one moves up the hierarchy. Time as a criterion for allocating rights on the labour market honours male time patterns of employed labour linked with working hours (full-time, overtime bonuses, night and shift working bonuses etc. give privileges by comparison

with such deviations as part-time working, 'minor employment' etc.) and length of employment (seniority) in many respects, so that redistributions of incomes **within** the labour market too are affected by the overwhelming allocation of time by women to the domestic economy.

3.4. Children

Children as a group are big beneficiaries of the allocation of time by women to housework, but this was frequently overlooked in the debate (for instance in the domestic labour debate of the 1970s). Now that the traditional role of children as labour in the economy of the 'whole home' and for providing care to aged parents has become outdated, they scarcely contribute anything to increasing household incomes. The involvement of children in the cost of women's work in the home is (apart from occasional help in the house) equal to zero. In economic terms, children are no longer 'investment goods' for households, which after a given time create profits, but 'consumption goods', which have costs (the benefit of which may lie in self-realization, emotional satisfaction or whatever). Lengthened education times have increasingly raised the costs that have to be borne by private households. They are replaced only in small part by State transfers (child allowance, education allowance, support for further education, see chapter 6.4.) and apply to an increasingly small group of people (the number of those receiving further education benefits in the F.R.G. fell considerably in recent years). Admittedly, training in schools and universities is mainly made available as a 'public good' (along with a certain private element, as for instance in the dual system of sandwich course training). The maintenance costs are however shifted largely onto the private household. The unpaid labour time of women employed on caring for and socializing children, with the ensuing costs arising for women as a gender, form an enormous proportion of these costs.

3.5. Women

As well as the aspects already mentioned, the connection between income distribution and time allocation in unpaid housework needs to be defined more closely. The poverty of women (55 % of all recipients of welfare payments in 1985 were female) is concentrated among groups that can allocate less time to employment, but whose time investments in the domestic economy are not compensated for by adequate maintenance payments (single parents, divorcees) or, as in the case of many female pensioners, whose insurance-covered employed work does not lead to a pension sufficiently guaranteeing maintenance. The

structure of female poverty has among its causes on the one hand the fact that socially necessary working time in the household economy, in particular looking after and caring for children, is not taken over sufficiently by society (through transfer payments or by substitution through state services) and on the other the financial dependency of women on marriage and the institution of maintenance by the spouse.

Gender-specific differences in time allocation and differing distribution of income constantly mutually intensify each other in a tightening circle. Wage discrimination of women on the labour market makes more allocation of time by women to the domestic economy than by men seem rational for households - and disproportionately often meant poverty for women living alone (with or without children). The greater likelihood of interruption to employed labour by women by comparison with men (who amounted, for instance, to only 5% of those on leave to bring up children) makes 'statistical discrimination'⁵ by employers, in order to lower transaction costs, seem rational. The time patterns of the employment economy make compatible organization of working hours harder, or are bound up with financial and legal drawbacks, as with "atypical" forms of work under particular conditions.

The answer to the question why women do not then leave their environment of externality and stop doing housework is, then, that there are often no better alternatives. The possibilities of choice are structurally limited. There are no "undistorted preferences" as undetermined freedom of choice, but only the choice between various alternatives associated with differing alternative costs. Women have, thus, "themselves chosen" housework from the framework of the (not conflict-free but hierarchical) household structures, but the outcome can say something about preferences only in conditions of a "perfect" market and where there are no transaction costs. The opportunity costs of allocating time to the employment economy are however higher for women than for men.

3.6. The State

Since the State is not a unitary formation but a conglomerate of the most diverse groups, bureaucracies and interests, I shall consider only a few aspects of the costs and benefits of unpaid housework in relation to State interests.

⁵ 'Statistical discrimination' means that a person acts on grounds of general assumptions which may hold true for a majority of cases (i.e. statistically) in general, without investigating whether in the concrete situation these general assumptions hold true or whether the individual case deviates from the average.

Internalization of the external costs of unpaid housework, above all care and upbringing of children, by State compensatory services (transfer payments or State services) would be reasonable in the interests of anti-discrimination policy and of redistribution of gender-specifically unequally distributed costs and benefits. The State is the beneficiary of women's unpaid housework because the costs of a basically social task are thereby shifted onto women as a gender, thereby saving on State expenditure. On the other hand, it may be in the interest of particular groups and forces within the State to secure a maximum in "welfare state" benefits and distributive justice and contribute to the internalization of externalities. The State's own interest in legitimacy (Habermas) might support this. Parties have to be interested in the votes of the female electorate. But the limits to this policy emerge where the reform measures engender costs. This was shown by the abolition of state subsidies for childcare facilities in the Ex-GDR as well as through the deletion of a legal entitlement to a kindergarten place for every child over 3 from the drafts of the new Child Assistance Act, originally supported by the CDU too but then deleted on cost grounds (the obligation on municipalities to make an appropriate number of kindergarten places available would have made federal subsidies necessary). Financing the internalization of the external costs of child upbringing, chiefly by women, would ultimately mean tax increases, which are not however advocated by any party, for reasons of electoral tactics. But interests of women, who do not have any strong lobby, cannot be pushed through. Housewives are undoubtedly among the least organized groups, and because of the structurally determined asymmetry of interests, it is more than likely that compromises reached between the negotiating partners at national level will produce external effects prejudicial to unorganized groups. In this sense the State is the beneficiary of women's unpaid housework.

3.7. External costs and benefits of the housewife, and efficiency

Does the distribution of the external costs and benefits of housework described here mean that the allocatory efficiency of time as a commodity on the labour market is missing? According to the economic theory of law, legal rules are efficient where as a result of a shift the cost-benefit relationship is improved. So far women are the losers; they might gain through redistribution of the rights to dispose of time (the shape of which in detail is a matter for discussion) and a changed allocation of time. By changed allocation of time I mean a redistribution of working time in the household and in employed labour between men and women in the sense of a smoothing out of the hitherto gender-specifically different alternative cost of the domestic economy and **not** only a one-sided raising of time spent in paid employment by women, without more time being invested by men in the domestic

economy, since this would merely increase the total working time of women in absolute terms.

Have all other actors that have hitherto secured external benefits at the expense of women as a social gender only the possibility of losing should rights of disposing of time be distributed?

The object of the allocatory efficiency of time as a commodity on the labour market might be missed if the lower amount of work time offered by women on the labour market meant that firms had to accept losses of "human capital", since part of the "best labour" (counting on a statistical distribution of 50% men and 50% women) would not be offering its labour time on the market, or not to its full extent. This does not however as a rule seem to be a problem for firms, since there is an oversupply of labour on the labour market; it is only in periods of labour shortage that the issue becomes acute (and then, in addition to women, there are other groups, like foreign workers, available as a "silent reserve"). In principle, the problem is also soluble for firms if they offer an attractive job for women or more flexible working hours where they are interested in employing female labour with a specific qualification profile; where there is simple substitutability, the problems are even smaller. The problem can thus be solved via the price mechanism (amounts of wage offered) for firms, in the main. Firms interested in keeping specialized female workers or those that have made big investments in the "human capital" of the female worker can guarantee this through a more flexible attitude to the shaping of work time. Typically, firms that have concluded company agreements for longer upbringing leave than the statutory one, with reinstatement guarantees, include the concerns with the biggest turnovers, like BASF, Bayer, MBB, Daimler-Benz, for which it is worthwhile accepting some cost for this flexibility in work time.

Particular special protective provisions for female labour, such as the night working ban for female workers, and particular bans on types of employment in the Working Time Regulations may for firms constitute a restriction on efficient time allocation. Reforms to these regulations, which are in the main based on traditional gender-role stereotypes ("the weak, tender woman") are however being called for by various forces. The real controversy is about the distribution of costs of a gender-neutral formulation of the regulations (general reduction in the standard of protection, or inclusion of men in the provisions hitherto applying to women only, i.e. adaptation upwards or downwards, extension or restriction of the range of people protected). The trend is going in the direction of "cost-free" reform at the

expense of women, as the harmonization of the pension age for women upwards to that for men has shown⁴.

In other respects the differing gender-specific allocation of time manifestly raises no problems of allocatory efficiency on the labour market, but increases the profits of other actors at the expense of women.

A redistribution of rights to dispose of time and time allocation in the sense mentioned above (harmonization of differing gender-specific opportunity costs) would also not be in line with Pareto's criterion that efficiency can be increased where a change is still possible that would put one person in a better position and no-one in a worse one. For an improvement for women would mean a reduction in benefits to other actors that derive external benefits from women's unpaid housework. Nor would a change be efficient in accordance with the Hicks-Kaldor criterion ("a reallocation of resources is efficient if the winner could compensate the losers and still be better off"), since on the basis of the differing gender-specific differential distribution of income (wage discrimination, un(der)paid housework) and of the nature of housework as unpaid work, women could not compensate men adequately for increased allocation of time to the domestic economy, nor compensate for the external benefits to other actors. Ultimately, the efficiency objective is not contravened, for it is intrinsic to the economic theory of law that efficiency is equated with ability to pay. The structurally unequal access of men and women to the labour market and the differing gender-specific "ability to pay" (income distribution and alternative costs of time allocation) are not theorized about but explained as "preferences". These preferences are however already "distorted" outside the market in decisions by households, since gender-specific alternative costs including the unequal transaction costs caused by unequal "bargaining power", make decisions at the expense of the "individual" rationality of women as gender appear "rational" in the collective interest of the household.

4. Women's Time at Working in the Household Economy

4.1. Material position and methodological questions

Women's activity in households was of little interest as long as there was no shortage of labour power. Correspondingly, there is a scarcity of studies on time worked in the home, productivity of domestic work and specific activities. Occasional studies are available since the start of the boom in the late 50s, when with the expansion situation of the "economic miracle" labour power became scarce and married women with homes and families came to be in demand on the labour market¹.

In the U.S. and Canada, after the rediscovery of time as an economic asset by the "new household economics" after Becker (1965), several time-budget studies were carried out, and older surveys since 1920 re-evaluated (Vanek 1974). Informative work on Britain comes from Gershuny (1983, 1984) on "social innovation" and changes in the relationship between households' own production, services and goods output, based on time-budget data since the 1920s. Hartmann (1981) and Oakley (1976) studied work in the home sociologically from a feminist viewpoint.

More recent empirical material for the FRG, based on representative surveys, is supplied by a study of the Institute for Social and Family Policy of the University of Marburg in 1982² (Krüsselberg et al. 1986, Hilzenbecher 1986) and the socio-economic panel of the Third Special Studies Section of the Universities of Mannheim and Frankfurt (Microanalytic Bases of Social Policy). Regular statistical surveys on time worked in the home have not been carried out, in the tradition of "market bias", whether in the context of a micro-census or that of random samples of the labour force, either at national or at European Community level.

¹ The few empirical studies done between 1950 and 1980 display a large number of methodological shortcomings and are therefore scarcely comparable and not representative. Frequently, such decisive data as the number of children in the household and the number of hours in paid work by the woman were not asked for. A review of the studies is given in Lakemann (1984) and Hilzenbecher (1984).

² Carried out on 1106 families in Baden-Württemberg using a "diary method".

4.2. Time worked weekly in the home by women

What is housework ? The services produced in homes can largely also be produced in market fashion or provided by the "welfare state". There is no special "housework" or "women's work" as constants of cultural anthropology; even spinning and weaving vary between the sexes (an exception is the specific "female labour capacity" of bearing children). Housework cannot therefore be defined primarily by the content of the work, but by its unpaid nature and the assignment of housework to the sphere of individual production as production of use-values chiefly for the members of the household (this rules out paid "moonlighting" in the informal sector, which is of a market nature). "The housewife's work is to accomplish everything that is to be gratis for "society", is placed outside the responsibility of firms" (Werlhof 1983:127).

Housework today includes mainly

- bearing children
- food, cooking, production and processing of foodstuffs, shopping
- cleaning work, dusting, washing, ironing, sewing, making clothes, repairing and looking after textiles
- socialization and upbringing of children
- care and attention to other family members
- maintenance work (repair, maintenance, household renovation, gardening)
- transport (to work, school, kindergarten, shopping).

The total weekly housework time of women ranged in 1982 between a minimum of 22 hours (childless women in full-time paid employment) and a maximum of 55 (full-time housewives with two or more children).

Table 1: Time spent on housework by women in hours per week, broken down according to the women's weekly paid working time and number of children (1982)
Source: Hilzenbecher 1986:119

| Women's Weekly Paid Working Time | Type of household Number of Children | Time Spent on Housework in hours per week |
|-------------------------------------|--|--|
| 0 | 0 | 45.86 |
| | 1 | 51.10 |
| | 2 and over | 54.88 |
| 40 and over | 0 | 21.93 |

The total weekly time worked by women (housework time plus paid work time) lay between 46 hours per week (full-time housewife with no children) and 68+ hours (full-time working women with two or more children), and daily housework time between 3 and 8 hours. Other surveys done between 1953 and 1977 came to similar results for housework time since the 1960s³. In the early 1950s housework times were still higher (between 6.3 and 4.8 hours per day for women in full-time paid employment and 10 hours per day for women not in paid employment).

Older studies on housework times in Germany before the Second World War are not available. American and British analyses show that housework times remained almost unchanged from the 1920s until the second half of the 1960s, and fell thereafter. Vanek (1974) shows in a secondary analysis of 20 studies for the U.S. that the weekly housework time for women ranged from 1920 to 1970 between 51 and 56 hours. Housework time was still more stable according to Hensen (1970), with weekly average values of 47.1 (1920), 47.6 (1952) and 47.5 hours (1968).

Gershuny (1982:24) indicates a housework time for Britain of 47.5 hours per week for 1937, rising to 52 hours (1961) and then falling again (women in full-time paid employment were excluded from this study)⁴. This development (the "housework paradox") was based on two opposing trends: the housework time of housewives in the working class fell continuously from 66 hours per week (1937) to 52 hours per week (1961) and to 40.5 hours per week. As against this, for housewives in the middle classes housework time rose from 1937 to 1961 and has since the 1960s, as for working class women, been showing a falling trend. One reason is the almost complete disappearance of domestic staff in middle-class households (rising wage costs for domestic staff, and replacement by household appliances and own work). The use of modern household appliances (washing machines) led at the same time to an increase in the quantity of washing being done (change in demand towards "cleaner washing" on the basis of increased productivity).

3 References in Lakemann (1984:51a), who documents the findings of eight studies from the survey years 1953 up to 1976-77.

4 According to Oakley, married women in Britain in 1970 were working an average of 77 hours per week (Oakley 1976:6). Hartmann indicates for the U.S. in 1970 55 hours per week, and with one child under one up to 70 hours (Hartmann 1981:388 f). (Time in paid work is included in this).

4.3. Childbearing

Childbearing and breast-feeding are productive activities, not simply passive "bringing forth" by women as a "natural resource". Knowledge about birth, methods of contraception and family planning are handed down (and at the same time repressed) knowledge, production experience. The equation of the productivity of the female body with animal fertility is the result of patriarchal division of labour, not a precondition for it (Mies 1988:17). The concept of "reproduction"⁵ contains (alongside other problematic aspects) these implications of passivity, and I therefore feel it more correct to term these activities production.

The time allocated to childbearing and breast-feeding in a woman's life has been greatly shortened by falling numbers of children. In 1880 the birth of 5 children per family was normal; 100 years later the figure on average is 1.5 children per family. At the same time women's life expectancy rose: in 1880, for a 25-year-old woman, it was 61 years, and in 1980 by contrast 77. Improvements in hygiene, medical care, nutrition and income levels reduced the risk of "death in childbed" for women (death in childbed was a major cause of the former shorter life expectancy of women than men). The fall in child mortality (24.1% in 1890, and today 1.5%) improved children's survival chances.

Table 2: Indicators of women's social position, 1880-1980
(Wilms-Herget 1985:25; Sources from the Federal Statistical Office)

| Dim. | 1880 | 1890 | 1900 | 1910 | 1920 | 1930 | 1940 | 1950 | 1960 | 1970 | 1980 |
|---|------|------|------|------|------|------|------|------|------|------|------|
| 0 | | | | | | | | | | | |
| Total life expectancy 25 y. old woman, in years | 61 | 63 | | 66 | | 70 | | 74 | 75 | 76 | >77 |
| Child mortality in first year of life, in % | | 24.1 | 23.4 | 20.2 | 11.5 | 8.5 | 6.8 | 6.2 | 3.5 | 2.6 | 1.5 |
| No. of children per marriage entered into in year concerned | 4.9 | | 3.9 | 2.9 | 2.3 | 2.2 | 2.1 | 2.1 | 2.0 | 1.6 | <1.5 |

⁵ For an overview on the discussion about the relation between production/reproduction, the definition of "reproduction" and the distinction between social and biological reproduction see Stichter (1990:32).

Measured by these indicators, "productivity" has increased, the relative share in a woman's life (work) time that goes to bearing children has been sharply curtailed both by the falling number of children per household and because of women's lengthened life expectancy (now longer than men's). Infant mortality has fallen - productivity has been improved not only by more intensive use of time and higher output per time unit, but also qualitatively improved as increased chances of survival.

4.4. Changes in housework activities and their relative shares in time

In recent decades the shares of time going to shopping, moving about and planning housework have increased (Vanek 1974). The quantity of goods shopped for and their complexity has increased. Transport has increasingly been shifted to private households, and distances to shopping places are longer (supermarkets in peripheral areas instead of corner shops). Proportions of time spent on child rearing have increased, and times preparing meals fallen (use of more ready-made products, conserves, deep-freeze food, prepared baby foods; increase in productivity through improved energy supplies and household appliances, electric cookers, water heaters, running hot water) as has time spent washing up. The proportion of time going to home cleaning has remained essentially unchanged.

The distribution in time of the individual housework activities of women displays great differences according to the number of hours of paid work and the number of children. The higher the number of hours of paid work the shorter is the time of individual housework activities. The more children the longer are housework times - but even with the same number of children, housework times of full-time housewives are longer.

The daily housework time of women ranges between 6+ hours (full-time housewife with no children) and a bare 8 hours (full-time housewife with two or more children). It decreases with rising number of hours of paid work. Women with more than 40 hours weekly of paid working time are employed daily in the household between 3 hours (no children) and 4 hours (two or more children).

Table 3 : Average time spent by women on housework activities in minutes per day (1982)
Source : Institute for Social and Family Policy, Marburg, 1982 Survey
(Hilzenbecher 1986:116)

| Women's weekly time in paid work, hours | | 0 | | 1 bis 20 | | 1 bis 39 | | 40 und mehr | |
|---|--------------------------------------|----|----|----------|----|----------|-----|-------------|----|
| Number of children (2=2 and over) | | 0 | 1 | 2 | 0 | 1 | 2 | 0 | 1 |
| Number in sample | | 79 | 82 | 166 | 30 | 63 | 129 | 66 | 87 |
| Home cleaning | Bed making, cleaning, tidying | 95 | 98 | 106 | 76 | 86 | 94 | 67 | 75 |
| (without cleaning turn) | Washing dishes | 35 | 36 | 35 | 25 | 30 | 31 | 24 | 23 |
| | Other (e.g. maintenance) | 13 | 11 | 10 | 11 | 9 | 11 | 11 | 9 |
| Doing cleaning turn | | 4 | 3 | 2 | 2 | 3 | 2 | 3 | 2 |
| Gardening | | 30 | 22 | 27 | 21 | 15 | 21 | 19 | 20 |
| Care, maintenance and repair to vehicles | | 1 | - | 1 | - | - | - | 1 | 1 |
| Looking after domestic animals (not including walks) | | 5 | 3 | 3 | 4 | 4 | 7 | 5 | 2 |
| Washing and clothes washing, cleaning, drying, ironing, mending | | 39 | 38 | 43 | 33 | 34 | 36 | 29 | 32 |
| | Other (e.g. tailoring) | 10 | 10 | 10 | 7 | 6 | 8 | 7 | 6 |
| | | 14 | 14 | 13 | 20 | 7 | 8 | 14 | 8 |
| Doing shopping | | 40 | 36 | 33 | 41 | 34 | 31 | 32 | 26 |
| Preparing meals : | breakfast | 17 | 16 | 18 | 15 | 16 | 17 | 12 | 14 |
| | lunch | 50 | 50 | 51 | 35 | 42 | 43 | 29 | 33 |
| | dinner | 27 | 22 | 22 | 20 | 20 | 19 | 23 | 18 |
| | intermediate meals, meals for guests | 13 | 11 | 14 | 9 | 12 | 13 | 9 | 7 |
| Looking after sick or disabled family members | Going to doctors, hospital etc | 6 | 8 | 8 | 8 | 5 | 5 | 4 | 6 |
| | Nursing | 4 | 2 | 9 | 2 | 2 | 1 | 2 | 2 |
| | Other (e.g. keeping company) | 2 | 2 | 2 | 1 | 1 | 1 | 1 | 1 |
| Looking after children (not including talking to them) | Physical care, un-/dressing | - | 22 | 25 | - | 6 | 11 | - | 5 |
| | taking to kindergarten/school | - | 2 | 7 | - | 1 | 5 | - | 1 |
| | collecting etc. | - | - | - | - | - | - | - | - |
| | Supervising homework | - | 6 | 19 | - | 8 | 15 | - | 4 |
| | Minding during play, sport etc | - | 24 | 23 | - | 3 | 12 | - | 8 |
| | Attending events etc. | - | 5 | 11 | - | 4 | 11 | - | 4 |
| | Other (e.g. reading aloud) | - | 10 | 11 | - | 4 | 7 | - | 3 |

How are the differences in housework time depending on the time women spend in paid employment to be explained? It is to be assumed that non-market housework will be substituted by purchase of ready services or goods on the market and that the proportion of such expenditure must be correspondingly higher in the financial budget of households with women in paid employment. This will be different depending on income. The opportunity costs of housework vary in amount and depend on the income that could be earned in the same time (lost wage as alternative cost). The higher the income from paid employment per unit of time by comparison with the costs of substitution for housework (by cleaning woman, baby sitter or other services), the more does it pay to specialize in the paid employment. It is also to be expected that women with relatively high incomes from paid employment will do less housework. The lower the opportunity costs of housework, the more rational it is to invest a lot of time in housework (e.g. in time spent searching and gaining information on favourable purchasing possibilities etc.) and to spend relatively more time on improving the quality of household production. Longer housework times by full-time housewives may also be a result of forced under-employment in paid work (unemployment), the concomitant reduction in income and the resulting substitution of purchase of goods by own production (e.g. production of foodstuffs in own garden, tailoring etc.).

Help with housework by the partner of women in paid employment is certainly no explanation for the gradual decline in housework times with increasing paid employment, since it is a negligible quantity. It is true that men with employed partners do a little more housework. But this is of an order of magnitude of 30 minutes more per week than for husbands of full-time housewives (Metz-Göckel/Müller 1986).

Through **childcare facilities** (kindergartens, schools or private childcare institutions), part of housework time is replaced. The younger the children, the more time-intensive is it to look after them and the less alternatives to looking after children in private households are available. Childcare is done overwhelmingly by women (Moss 1988), and the time investments of men are small. Childcare leave was applied for by men in only 1.5% of cases in the FRG in 1987. On the birth of a child, men's housework time falls again (Metz-Göckel 1986), even if the involvement of men with employed partners was previously a little higher.

4.5. Housework times of men - their absence

The gender-specific division of labour in a home economy does not change, or changes only slightly, despite rising paid employment of women⁶. The average housework time of men (housework including childcare as in table 3) ranged in 1982 between one and one and a half hours weekly. Krüsselberg/Auge/Hilzenbecher (1986:205) indicate a maximum of 99 minutes (home with no children, wife in paid employment for 30-39 hours per week) and a minimum of 54 minutes (homes with three or more children, wife's number of paid hours per week 30 and over). The differences are accordingly slight, and not significantly affected by number of children or amount of wife's occupational activity.

For married couples, husbands do less than 25% of the housework (Gershuny/Thomas 1982:21), if routine work and occasionally arising work are taken together. For routine work the proportion is below 10%, and for the more satisfying occasional work around 50%. Ironing, washing and window cleaning is women's work, and repairs are more often done by men. They prefer more creative activities in the home, like cooking or playing with children.

Table 4: Housework by men (Metz-Göckel/Müller 1986:554) in %

| "never" | | "only occasionally" | | "my job" | |
|----------------------|----|---------------------|----|----------|----|
| ----- | | | | | |
| Ironing | 87 | Tidying | 72 | Repairs | 55 |
| Doing washing | 79 | Shopping | 63 | | |
| Windowcleaning | 73 | Vacuuming | 61 | | |
| Floor cleaning | 66 | Drying dishes | 57 | | |
| Hanging out washing | 64 | Washing dishes | 55 | | |
| Cleaning bath | 57 | Cooking | 49 | | |
| Looking after plants | 56 | Taking out | 39 | | |
| | | rubbish | | | |

Why does men's housework time not increase in proportion with the partner's time in paid employment? The neo-classical model of time allocation decisions fails here, since according to it a redistribution of housework time among the household members in the event of changes in the paid work time of one member would be rational. The model suffers

6 According to Hartmann (1981:378f., 382 f.) men increase the volume of housework time by approximately 8 hours per week.

from the defect of postulating a harmonious cooperation among the household members - a perfect market in which adjustment processes could be expected. Power disparities, hierarchies and conflicts are not considered (thus, in "A treatise on the family" Becker (1982) does not even mention the problem of "power" within marriage). A socio-economic investigation of "power" should instead look into how one partner gets more benefit out of the relationship (gets more of what s/he wants").

An integration of conflicts and power disparities in the framework of neoclassical models of household decisions has been conceived of through their inclusion as "psychical costs" in the framework of the opportunity cost model. These are however hard to quantify and therefore predictions as to future developments when these factors are included become steadily harder: explanations run the risk of becoming circular and tautological.

Another possibility for including power hierarchy and conflict in an economic theory of time allocation decisions is to treat marriage and cohabitation in partnership as a "bilateral monopoly" and apply **elements of exchange theory and games theory**⁷ to these decisions. On this, partners in a fairly long-lasting relationship enter, following an initial phase of market-type competition with others, a stage of "bilateral monopoly" on the basis of high, exclusive relation-specific investments. In monopoly situations free-market mechanisms are squeezed out by "bargaining power". At the same time transaction costs and "implicit contracts" are an incentive to solve problems inside the relationship as long as it produces a "surplus". According to "couple-specific investment" each person in the relationship is probably in a more advantageous position than from a return to the market. This amount of difference ("surplus") in possibilities of gain on the market is distributed within the relationship on principles that are not strictly market ones. According to games theory the outcome of this "bargaining over the surplus" depends on prospects outside the relationship. The better the alternatives outside the relationship, the tougher the negotiating strategy and the higher the chances of success. The one that has made more "relation-specific investments" is in a poorer position than the one with more easily transferable investments ("specific versus general investments"). And the investments differ gender-specifically: men accumulate more resources usable both outside and inside the relationship, whereas women make more "relation-specific" investment and specialize in

7 For a discussion of the relevance of "social exchange theory" within this context see England/Farkas (1986) who discuss as well models of marriage and "bargaining power" (ibid. p.51 ff.). Ott (1989) applies elements of game theory to intra-family decision-making and bargaining. Manser/Murray (1980) develop an economic model of "bargaining analysis" in marital and household decision-making. An overview on different explanatory approaches of gender-specific "power"-differences is to be found in Stichter (1990:29ff.).

emotional, empathetic work. "Earning power" is more liquid than, for instance, time invested in rearing children. Men's "bargaining power" is therefore as a rule greater than women's.

PART 2

Normative models of time organization, time allocation and gender-specific division of work in labour law, social security law and family law

5. Labour law models of time organization in the exchange economy. Time as a criterion distributing rights

In labour law, rights and entitlements (economic rights, participation rights and the level of labour law protection) are connected in various ways with time factors (duration of working hours, minimum working hours, length of employment, seniority, age, continuity of employment, length of interruptions). An essential criterion in defining the concept of an employee and classifying the category of the contract, to distinguish whether labour law applies or not, is to test the degree of control over time organization. 'Personal dependency' as an essential element of the employee status is indicated by the "work-organizational moment of dependency", the employer's control over time organization¹. The assumptions underlying the normative model of the time logic in labour law, including its ruptures and contradictions, will be treated in the following chapters.

5.1. The concept of labour

Labour as defined in labour law only relates to waged work based on a private contract (or a 'factual employment relation' put on a par with it). Excluded thus are housework and the work of family helpers based on marital or family law obligations² as well as honorary and unpaid activities. In an exchange economy organized by markets where the production of commodities rules over home production this exclusion leads to a devaluation of housework and women's work³ - a manner of 'commodity fetishism'.

The question of which activities fall within the field of labour law and to what extent they do is the subject of controversies in which economic interests and power relations play

1 For the test of the criterion 'control over time and subordination' see the judgments of the Federal Labour Court, BAG AP 18,24,42,45 about para. 611 German Civil Code 'dependency'.

2 See chapter 7 on time allocation rules of marriage and family law. Sinzheimer (1929) defined dependant work in terms of labour law as given only when no other dominating relationships (as for instance marriage) exist except those of dependent work.

3 "In a society in which money determines value women are a group who work outside the money economy. Their work is therefore valueless, is therefore not real work." (Benson 1982:195).

a decisive role. The closer activities are to the household economy and familial forms of work and production, the lesser is the degree of their labour law protection.

Controversies over the level of labour law and social security law protection for work in households are not at all new. The question of whether servants should be covered by labour law was one reason for the split in the 18th century German women's movement between the bourgeois and the proletarian factions (Gerhard 1978:60 ff.). The reform of the outdated feudal regulations for servants was not considered a subject for the authors of the German Civil code, and neither was it for the Organization of German Women's Associations founded in 1894, which was striving for the inclusion of women's rights in the new civil code.

In the meantime the situation has changed : there are nearly no servants left. Nevertheless, the degree of labour law protection of domestic servants is today still low (it is weaker in comparison, for example in the case of dismissal protection of pregnant women, a dismissal of a domestic servant is possible after the fifth month of pregnancy, para. 9 s.1,2 Maternity Protection Act). Not regularly employed persons or persons employed in private households are excluded as recipients of shortened work-week allowances (para. 65 s.2 Labour Promotion Act). The situation of persons employed as homeworkers is similar. A big proportion of precarious employment with fewer working hours per week, which is protected very little by labour and social security law, takes place within private households where in 1987 25 % of all employment not liable to social security insurance took place (ISG 1989). Also problematic is the legal position of family helpers cooperating with self-employed or in a family business without having an employment contract or being a partner.

Thus labour law reflects on the one hand the existing division between market work and non-market home production, although regulating only the labour market. But it does not play merely a 'passive' role taking into consideration the existing division of labour, on the contrary it differentiates actively and creates various standards, which on the one hand assume women's unpaid work in the household economy and reinforce it, and on the other hand disadvantage women's work and female times in the exchange economy.

5.2. The normative model of the standard employment relationship in the exchange economy and its orientation towards male times

As the normative model of the standard employment relationship I understand, following Mückenberger (1985,1988) the legal construction of an employment relationship provided with the maximum of labour law and social security law rights and entitlements. It is economically privileged compared to differing forms of legal organization of other employment forms. It underlies historical changes. Here I treat as the standard employment relationship (abbreviated as SAR) the model of continuous full-time work which has been legally privileged since the fifties (e.g., in the concept of 'job protection' (Bestandsschutz) in unfair dismissal law), underlying as well social security law (e.g., see the concept of the typical pension career). The time factor plays a role as a requirement for the entitlement to rights (minimum working hours), as do requirements of minimum length of employment, of seniority and as requirements of continuity of employment (loss of rights in case of interruptions).

While during the first wave of industrialization in the 18th century women and children were the wage workers, the model of the SAR has become oriented in the mean time towards a male biography. Continuous, uninterrupted full-time employment topped up by time flexibility upwards (overtime, shift work, weekend work, further training after official work hours) is favoured - assuming that the ideal typical employee is freed from house and family work. The full- or part-time housewife is - at least for certain life cycles - a precondition for flexible male times assumed by the labour law standard model.

Despite the increasing employment participation of women and shorter interruptions of employment, the overwhelming assignment of housework (especially child care and care of sick or elderly relatives) is bringing about that women as a gender can adapt to these male times of the exchange economy less frequently and not so continuously. Female times are characterized by considerably longer working hours in the household economy and on average shorter weekly working hours, less seniority and employment forms with time flexibility downwards (part-time, precarious work etc.) in the exchange economy.

The labour law standard model contains the component of the **"family wage"** for the stereotypical male wage earner. On average higher male wages show this as well as the concept of job security (Bestandschutz) in unfair dismissal law connected with criteria such as length of employment and number of dependent family members, intended to secure

maintenance for the employee himself and his family⁴. Women's wages in activities deviating mostly from the standard employment relationship in terms of time flexibility downwards usually cannot assure an independent existence, but relegate a person to dependence on maintenance or welfare payments. This fact is often used as an argument to justify the fact that these forms of employment are economically and socially less secure. It is argued that an improvement of the protection level would not be necessary because the persons involved must already be secured otherwise - e.g., via marriage - since these employment forms cannot assure the existence minimum. In this circular argument, the gender-specific division of work in the household economy and its affirmation by the institution of marriage as well as the disadvantaged position in which labour law and social security law put female times reinforce each other mutually - a vicious circle.

5.3. The hierarchy of labour law and social security law protection of different forms of working time and employment relations

The hierarchy of employment forms is centered around the normative model of the standard employment relationship. With increasing time flexibility upwards, more economic and legal incentives are granted, while time flexibility downwards brings about further economic and legal disadvantages.

Bonuses for overtime, night and shift work

=====

continuous FULL-TIME EMPLOYMENT

=====

TEMPORARY WORK - FIXED TERM EMPLOYMENT CONTRACTS (status also depending on weekly working hours - see PART TIME - and on duration of contract)

AGENCY-SUPPLIED TEMPORARY WORK (status also depending on length of contract, permanent or temporary contract, and weekly working hours)

PART-TIME WORK above 19 hours weekly

PART-TIME WORK between 19 and 10 hours weekly

PART-TIME less than 9 hours weekly/45 hours monthly ('minor work')

HOME WORKERS

DOMESTIC SERVANTS

=====

FAMILY HELPERS

HOUSEWIVES

⁴ Judgment of the Federal Labour Court, AP no.5 to para. 11 Unfair Dismissal Act.

In the following chapters, different forms of time organization and time as a criterion entitling one to rights and benefits are analysed in detail with respect to its gender-specific impact. Results of empirical investigations are integrated to document the effective disadvantages suffered by women by gender-neutrally formulated rules.

5.4. Overtime work - time flexibility upwards

5.4.1. The extent of overtime and its gender-specific distribution

Overtime work beyond the working hours fixed by contract, collective agreement or law is very common and is one of the main instruments of flexibilization for enterprises in order to adapt the effective working time volume to shifts in demand caused by fluctuations of orders or conjunctural changes. Enterprises use overtime work to a wide extent (Brinkmann et.al. 1986, BMAS 1986, Kohler/Reyer 1988). In times of a booming economy and relatively full employment in 1970 the number of overtime hours worked reached a maximum of 8.1 % of the yearly working time volume and have declined since then (Kohler/Reyer 1988). Since the beginning of 1988 this trend was again reversed. Especially in sectors where workplaces had been cut back considerably (ship-building industry, construction branch, steel industry), now extra-shifts are worked regularly. The reduction of work-places also enormously inflated the amount of overtime worked by train drivers - if all of them were to ask for compensation for over-time worked in free time, no train would run in the FRG for two weeks.

According to the calculations of the Federal Labour Exchange Office, the overtime volume in 1988 of 22.2 million dependent employees amounted to 1460 million working hours. This corresponds arithmetically to 850 000 full-time jobs. If one assumes only an employment effect of 25 % when transforming overtime worked into new jobs, this would create 200 000 new workplaces (Bispinck et.al. 1989).

The overtime worked is distributed differently according to groups of employees and gender : white-collar workers and women work less overtime. The total overtime volume of male employees is nearly the triple of that worked by women, and blue-collar workers' overtime amounts to the double of overtime worked by white-collar workers (Kohler/Reyer 1988). Newer data of an investigation of the ISO institute (Groß-Thoben 1989) allow further conclusions about the distribution of overtime between different groups of employees : one

third of all employees work regularly overtime (i.e. at least once or twice a month), and 25 % of this group work overtime once or twice a week. Those working overtime regularly adds up to an average 6.6 hours overtime a week (men : 6.8 hours, women : 5.6 hours weekly).

The importance gained in the meantime of **overtime worked by part-timers** is proved by the fact that the overtime volume worked by part-timers within the above-mentioned group of employees working overtime regularly amounts to 5.1 hours weekly - not much less than the corresponding figure for full-time employees (6.6 hours a week). Thus the 'normal' advantages of part-time work for employers (working time flexibility downwards and lower wage costs) wage are combined with the advantages of overtime as a form of time flexibility upwards without having to pay overtime premiums.

5.4.2. Regulation of overtime by statutory rules and collective bargaining - the lack of efficient limits and control

An employer's order to work overtime requires the consent of the Works Council (para. 87 s.1 no.3 Employees Representation Act). The very wide extent of overtime allows, however, the conclusion that employers do not meet a great deal of resistance from works councils. Either works councils do not feel able to refuse overtime more often because of the asymmetries of power, and/or there is a congruence of interests between insiders at the plant level favouring the extension of the overtime volume (between the financial interests of employees in overtime/shift work/weekend work bonuses which are to a large extent tax-exempted and the strategic interests of works councils not to increase the conflict potential with employers too much over a matter where employees agree largely with employers ; works councils instead are using consent on the question of overtime as a positive share in the whole 'package deal' with employers).

Since by works councils at the plant level apparently an efficient limitation of overtime work cannot be fought through, the regulatory level should be changed towards the level of collective agreements or statutory regulation.

The existing statutory rules of the **Working Time Act from 1938** have become obsolete to a large extent because of the shortening of working hours and collective agreements regulating overtime bonuses. The Working Time Act allowed for overtime of up to two hours daily, exceeding the regular daily working hours (8 hours) up to thirty days a

5 Working Time Act 1938 (Reichsgesetzblatt I, p.447), last amendment in 1975 (Bundesgesetzblatt I,p.685).

year and obliged the employer to pay an overtime bonus of 25 % if no other contractual arrangement had been stipulated (para. 15 Working Time Act). Relevant still is the regulation of para. 17 Working Time Act limiting the working time of women on days before Sunday or a public holiday to a maximum of 8 hours (sectors exempted are public transport and communication, hotel and restaurant business, health care institutions etc., para. 17 II).

An efficient **limitation of overtime** would require a statutory prohibition, or effective collective agreements would have to be agreed upon. Employers' associations however refuse a strict limitation of overtime and are apparently willing to pay higher overtime bonuses in order to keep this possibility of upwards working time flexibility. So the overtime bonuses have been augmented in the collective agreement between the metal branch employers' association and the IG Metall in 1989 after a tax law reform which for the first time partly taxed overtime bonuses.

Trade unions, for a long time considered overtime solely as a matter of pay, took up the question again in the context of shorter working hours. The number of collective agreements containing regulation to reduce overtime work is, however, very low. The clauses in collective agreements are usually phrased in a very vague way, not containing binding provisions ("Overtime work should possibly be avoided" - e.g. in collective agreements for the electricity sector, banking sector, retail trade, Volkswagen - or "as far as feasible, overtime should be avoided by internal redeployment of labour power or fresh engagements in accordance with the enterprise's and technical capacities" - e.g. in collective agreements for the chemical industry, shoe-producing industry, textile industry, see Bispinck/Kurz-Scherf/WSI Tarfarchiv 1989). Absolute time limits do exist only in collective agreements for the sectors of coal mining, the metal industry and Volkswagen, providing for direct limits of a maximum number of overtime hours. The collective agreement for the printing industry also provides for a limit of 25 hours maximum on overtime within three months. Some collective agreements limit this indirectly, providing for daily or weekly maximum working hours. The maximum number of working days a months on which overtime work is permissible was limited for the sectors of conveyance and transport (on Saturdays maximum twice a month), Federal railway company and public sector (occasional overtime for a maximum of six days a month). The vague formulation that "the legitimate interests of the employees concerned should be taken into account" is included in collective agreements for the metal, printing, shoe production sector, retail trade, whole sale and foreign trade sector (see Bispinck et.al. 1989).

A reduction of overtime work could be promoted by regulation that provides for an **obligatory compensation in free time** from a certain, relatively low, threshold of overtime hours onwards (instead of pay of overtime bonuses). Employees should be free to choose the time when they take up this compensatory time-off. Thus overtime would become less financially attractive for employees, and for employers it would be less advantageous because of the compensation in free time, the connected working time interruptions and problems to plan this in advance. This could be an incentive for new engagements and improved time planning in enterprises. However, only very few positive examples of such regulation have been found (Bispinck et.al.1989). Only the national collective agreement of Volkswagen provides obligatory compensation in free time for overtime exceeding ten hours monthly.

Very few older collective agreements foresaw **rights to be exempted from overtime work**, granting this entitlement in a cost-saving way to **mothers**. The framework collective agreement for blue collar workers in the textile industry (in force since 1 January 1980) granted a right to be exempted from overtime work to mothers of children below the age of 10 (para. 6 s.5). The framework collective agreement for the textile and leather industry in the region of Saarland gave mothers of children below the age of 14 the possibility to be exempted (para. 4 s.3, in force since 1 January 1986). These rights are replaced increasingly by gender-neutral formulations, lowering the protection level at the same time as widening the number of persons entitled. The general gender-neutral formulation included in some recent collective agreements, that the legitimate interests of the concerned employees should be taken into consideration when overtime work and necessary night work, shift work or weekend work is ordered by the employer is not binding on the employer; it is a recommendation directed only towards the employer and works council rather than the entitlement of a right for an employee.

Overtime work of part-time employees is highly problematic. Part-timers do not receive overtime bonuses as a rule, since overtime is defined in collective agreements with reference to the standard employment relationship and full-time work. Overtime is defined as exceeding the collectively agreed weekly working hours, thus above a threshold of 37 or 36.5 hours a week (see WSI Tarfarchiv 1984 and Bispinck et.al. 1989). Sometimes bonuses for late shifts and night work for part-timers are explicitly excluded⁶.

6 According to the regional framework collective agreement for the metal industry Nordwürttemberg/Nordbaden, in force since 1 April 1988, part-time workers not employed in manufacturing do not receive bonuses for late shifts or nightwork between 7 p.m. and 6 a.m. . The national framework

Also the past **case-law** assumes that employers owe overtime bonuses to part-timers only in cases where the normal weekly working hours of full-time employees is exceeded⁷. The judgments of the Federal Labour Court argue essentially that the legal problem has been settled definitely by statutory provisions (para. 15 Working Time Act 1938 : overtime bonuses have to be paid from the 48th weekly working hours onwards) or by collective agreements (overtime bonuses have to be paid when the stipulated weekly working hours are exceeded), and thus that no regulatory gap exists to be filled by court decisions would exist. The question of unequal treatment of men and women and potential indirect discrimination against women by these regulations is not touched upon. Only the Regional Labour Court in the judgment of 21 May 1971⁸ deals with objective reasons which could justify unequal treatment of full-timers and part-timers with regard to overtime bonuses. The "physical stress" is considered to be an objective ground for this differentiation which would increase when exceeding a certain threshold of working hours and thus justify overtime bonuses.

This argument, used also in most labour law literature, to argue against the entitlement of part-timers to overtime bonuses, is however not sound. There is no unified or absolute "stress limit" equal for all employees from where stress would start to increase over proportionately, so that granting overtime bonuses from precisely this threshold upwards appears to be objectively justified. No ergonomic expertise exists which could show that this limit coincides exactly with the weekly working hours stipulated by collective agreements. Physical stress depends on a number of specific factors such as the organization of the particular job to be performed, intensity of work, physical constitution and age of the employee etc. Fixing a time limit upwards from which overtime bonuses have to be paid is not objective, but depends on the power relations between the parties to collective bargaining and is therefore coupled with the weekly working hours agreed upon in collective agreements, corresponding to the working time of most unionized employees. The degree of unionization of part-timers is much lower⁹. The "stress argument" as a

collective agreement for the chemical industry 1979/1987 and the national framework collective agreement for the paper-manufacturing industry from 15 June 1988 exclude part-timers explicitly from overtime bonuses if 39 hours weekly are not exceeded.

7 Judgment of the Federal Labour Court of 23 February 1977, AP No.1 to para. 1 Collective Agreements Statute; Federal Labour Court 1985, AO no.48 to para. 37 Employees Representation Act 1972 ; compare also the judgment of the Regional Labour Court of Bremen of 21 May 1971, Der Betrieb 1971:1429 f.

8 Regional Labour Court Bremen, Der Betrieb 1971:1429f.

9 According to Schupp (1989) the degree of unionization in 1985 of full-time employees was 32.9 %, of employees working less than 35 hours weekly 12.5 %, and for those working less than 20 hours weekly less than 20 % .

justification for the exclusion of part-timers from overtime bonuses appears altogether to be very questionable, and can certainly not explain why e.g., steel workers receive much higher bonuses for nightwork than nurses. As it is well known, wage questions are a matter of power relations.

On top of this, the argument about physical stress ignores with a typical male bias, the time load and stress caused for part-time workers by housework, since the main share of housework and child care is assigned to them. Their total working hours (i.e. in employment and at home) are on average longer than those of men. Therefore the physical stress for part-timers when exceeding the working hours fixed by the employment contract could be even higher than that of a full-time employed man who does not do any housework.

Granting overtime bonuses to part-timers when exceeding the weekly working hours fixed in the employment contract could have the effect that "normal" working hours would be cheaper for employers than the overtime of part-timers. This would on the one hand make part-time work more expensive as a resource of flexibilization for employers and is therefore counter to employers' interest in profit maximization. It could, however, be at the same time an incentive to calculate part-time employment relations not always within the "bottom time range", and to create more part-time jobs above the threshold of 19 working hours a week with better labour law and social security entitlements.

Although giving an entitlement to overtime bonuses to part-timers appears to be a necessary step to reduce indirect discrimination against women and to promote qualified part-time jobs with working hours granting a higher level of labour law and social security rights, it is however doubtful whether trade unions with their mainly male clientele would support such a measure. It is true that proposals for women-friendly regulations have emerged from the internal discussions of unions. A model collective agreement of the trade union HBV (commerce, banking and insurance sector) proposes in para.4 : "Each working hour exceeding the contracted daily working hours of part-timers is overtime and admissible only with the consent of the Works Council. This is valid also for only temporary shifts of working time" (HBV 1984). But such proposals have not yet been able to be put into practice. Pfarr/Bertelsmann (1989:233) report only three older collective agreements which define overtime of part-timers in this way¹⁰.

¹⁰ Framework collective agreement for Aral Company Bochum of 1 January 1982 ; Collective agreement on wages for the dairy branch Bavaria of 1 January 1982 ; framework collective agreement for the printing industry Nordrhein-Westfalen from 1 January 1982.

5.4.3. Possibilities to reduce overtime work

Possible measures are

- statutory or collectively agreed rules prohibiting overtime fully or above a certain threshold or limiting them by procedural rules
- the obligatory compensation of overtime in free time, not pay
- the definition of overtime as exceeding the daily or weekly working time stipulated in the individual employment contract.

Kurz-Scherf (1988:554 f.) in her model of a **utopian collective agreement** provides for the possibility of overtime only in case of unforeseeable emergency, where the works council has to consent, and where the upper limit is twenty days a year. Furthermore a time limit on daily working time is set : inclusive of overtime, it may not exceed 9 hours a day and 40 hours weekly. For part-time workers overtime work is not permissible. Overtime has to be compensated in principle by free time within two months in a relation of one hour overtime to 1.5 hours "free time".

The **Proposal of a Working Time Statute of the Greens** does not provide a direct limit on overtime. The proposed amendment of para. 17 Working Time Act includes, however, a clause according to which no employee can be obliged against her will to work overtime except in cases of unforeseeable catastrophes or force majeure. Overtime is defined as a transgression of the collectively agreed weekly working hours. "For employees whose contracted weekly working time is shorter, these contracted working hours are the limit" (para. 17 s.1,2 of the proposal). From this limit upwards overtime bonuses have to be paid. In another proposal of the Greens, the **Statute on Reduction of Overtime**¹¹, a corresponding definition is included. In para. 9 of this proposal the obligatory compensation of overtime by free time is provided for.

The **proposal of a Working Time Statute of the SPD**¹² allows for a weekly maximum of two hours overtime on up to twenty days a year. Overtime should be compensated by free time regularly, if collective agreements do not provide otherwise. When compensating overtime working hours by free time, a bonus of 25 % extra free-time is to be granted. The

¹¹ Proposal of a Statute on the Reduction of Overtime of 2 April 1987 (Bundestag Drucksachen 11/136).

¹² Proposal of a Working Time Act of the Social Democrats (Bundestag Drucksachen 11/1617).

social democrats' **proposal of a Statute on Equal Treatment**¹³ provides for compensation for overtime of part-timers within a period of three months according to the wishes of part-timers within the regular weekly working hours agreed upon. If this is impossible, part-timers are entitled to the same overtime bonuses as paid to full-time employees. In addition to these two hours overtime a week allowed by statute, two further hours overtime weekly should be possible based on collective agreements. The proposal includes also the possibility to accumulate overtime in shifts (i.e. a maximum of two extra shifts of 8 hours each in a month would be permitted).

The **Proposal for an amendment of the Working Time Statute of the Federal Government** does not provide for limits for overtime work at all. Overtime is not regulated in this proposal, neither are overtime bonuses (which up to now has been fixed in the Working Time Statute in force in para.15, providing for a 25 % overtime bonus in cases where no other provision exists in a collective agreement or the individual employment contract). Based on the foreseen flexible working hours (up to ten hours a day and 60 a week) the statutorily permitted overtime, according to the governmental proposal, would even be widened. This proposal is not at all adequate to limit overtime, but rather allows for its extension.

5.5. Night work, shift work, weekend work

As with overtime, this form of working time organization provides for upwards time flexibility, extending the standardized "core" working hours of full-time work which are concentrated in the time period between 7 a.m. and 6 p.m. during the day. Women are underrepresented in these forms of working time (with the exemption of some strongly segregated areas as e.g. the health sector or hotel and restaurant business, which are also largely excluded from the applicability of protective legislation for women and working time restrictions). The reason for women's underrepresentation in nightwork, shift work and weekend work is mainly the time organisation of housework, especially child care. In the evening, during the night and on weekend nearly no childcare facilities are available. In some cases, however, women work late shifts or night shifts because this is the only time when they can make private arrangements with the partner or with relatives who can look after the children and who would not be available during the day.

13 Proposal of a Statute on Equal Treatment of the Social Democratic Party of 13 December 1988 (Bundestag Drucksachen 11/360).

Representative empirical data on the extent of shift work, night work and work on Sundays and public holidays are mostly lacking. For the FRG they exist only for 1975¹⁴. In 1975, 3.6 million employees (among them 25 % women) were working irregularly on Sundays or public holidays, the corresponding figure for those working regularly was 1.3 million employees (among them 0.4 million women, thus approximately one third). 3.4 million employees were engaged in shift work in 1975 (among them 0.8 million women). This corresponds to a proportion of 18 % of male shift workers out of all male employees, and to 10 % female shift workers out of all female employees. 1.3 million employees performed nightwork on a regular basis in 1975, this accounts for 5.6 % of all employees. The share of women among night workers is lower than 20 % (1.1 million are men, 0.2 million are women). According to sectors, night-, shift and weekend work are concentrated in manufacturing for men, and in trade and commerce, hotel and restaurant business, transport and communication and other services (including health) for women.

Compared to other EC countries and the United States, in 1975 the share of employees engaged in changing shifts in the FRG (18 %) was higher (OECD 1986)¹⁵. Undoubtedly these forms of working time bring about serious health risks and stress (Rutenfranz et.al. 1975). Among shift workers an alarmingly high consumption of tranquillizers, psychopharmaceutic medicines and alcohol was found (Müller-Wichmann 1988). These working times mean a far-reaching exclusion from social life and represent a psychical and social burden for shifter workers and their families.

Night work is regularly connected with deprivation of sleep and psychical stress since bodily rhythms cannot be divorced from the day/night-rhythm. Thus night work always has a deleterious effect on and is a "pathological event" for the rhythms of life (Rutenfranz et.al.1987). As a reason why they perform night work 62.7 % of the women engaged in permanent night shifts and 70.3 % of those in regular late shifts stated that this was necessary because of the needs of caring for their children (Stein 1963). According to this investigation the sleep deficits of these women were enormous : they got on average only five hours sleep a day, some even less (mothers of infants and babies).

14 See the reply of the Government to parliamentary inquiry of the Green faction regarding the effects of shift work on health and the family and social situation (Bundestagsdrucksachen 11/3992) as well as the motivated request of the Greens (Bundestag Drucksachen 11/3185 of 27 October 1988).

15 According to the figures presented by the OECD (1986), the proportion of employees working changing shifts out of all employees was 18 % in the FRG (1975), 8 % in France (1978), 8 % in the United States (1980=, 13 % in the United Kingdom (1978). The EC Labour Force Survey of 1975 contains slightly differing figures for countries other than the FRG (FRG 18 %, France 15 %, United Kingdom 16 %).

Weekend work has increased considerably in the last years, especially in high-tech manufacturing areas with high capital investment ratios. It is concentrated on Saturdays. Regular Saturday shifts were introduced in 1989 in the automobile industry by Opel and BMW Regensburg, in the high tech communication area by Siemens and IBM Regensburg and Sindelfingen, and by Beiersdorf/Hamburg, Michelin/Bad Homburg and Bad Kreuznach, Continental/Hannover. Goodyear invested 100 million DM in its plant at Fulda bound to the promise of the Works Council to consent to the introduction of Saturday work shifts (EIRR 183/April 1989, p.10 ff.). Works Councils are bargaining increasingly under the pressure of threats that production would be transferred to other countries and that workplaces would get lost if weekend shifts were not accepted by employees' representatives. So multinational firms as General Motors have been able to push through far-reaching collective agreements at plant level in the Opel subsidiaries in Kaiserslautern, Bochum, Rüsselsheim. Weekly hours of operation of 139.5 respective 136 hours were agreed upon, among them two Saturday shifts and one Sunday shift. Otherwise there was the danger of further losses of workplaces and their removal to Zaragoza/Spain (where in 1988 shifts around-the-clock including the weekend were introduced) or to Antwerp/Belgium (EIRR August 1989:12 ff.). This led to conflicts between workers representatives at the plant level and at the higher levels of collective bargaining, between works councils and the trade union IG Metall. The collective agreements at plant level of BMW Regensburg and Opel in Bochum were concluded against the will of the IG Metall. At IBM Sindelfingen this led to an open conflict, and the IG Metall initiated legal procedures questioning the legality of introducing Sunday shifts¹⁶. Works Councils members left the trade union IG Metall which now has no longer a majority in the Works Council.

The **lower evaluation of women's work** is evident from the unequal bonuses for shift work/night work/weekend work. Bonuses are much higher in capital intensive sectors of industry with a bigger bargaining power of employees than in branches with a high proportion of women (service sector, health care, post, hotel and catering branch).

For instance, in the automobile industry at Opel Rüsselsheim for Saturday shifts a bonus of 33 % of hourly wages is paid for the first three working hours and a bonus of 50 % for all following working hours. The employees engaged in the shift from Sunday to Monday receive a bonus of 70 %. An additional premium of DM 15,- ('shift commencement premium') is paid to all employees of the Saturday shift. In contrast, extra bonuses for shift

¹⁶ According to the Industrial Code, Sunday work can be allowed when it is to be expected that the interruption of manufacturing would cause a "disproportionate damage" (para. 105 f. Industrial Code).

work in the health service were agreed upon for the first time in the collective agreement of 1 August 1989. They amount to a sum between DM 70,- and DM 120,- monthly for regular shifts and to DM 150,- monthly for changing shifts. This was the result of the first national strike in the health sector of the FRG since World War II. The bonus for night work was augmented from DM 1.50 to DM 2.50 per hour and for Saturday work from DM 0.75 to DM 1.50 per hour. Also nurses of elderly people now receive for the first time shift bonuses. Summed up, a nurse working continuously changing shifts receives monthly now more or less the same shift bonus as an Opel employee gains for a single Sunday shift.

The working time restrictions of protective legislation for women of the Working Time Statute 1938 are still relevant for the employment of women on weekends, public holidays and during the night, especially the prohibition of night work for female blue-collar workers (para. 19 Working Time Statute). The statute is not applicable to sectors in which the workload on certain days is very high and a high proportion of women is employed (e.g., communication sector, catering, hotel branch, hairdressers, health care institutions, gardening and horticulture, pharmacies, some shops) and not to the agriculture sector (para. 1 s.1 Working Time Statute). For bakeries as well as for nursing personnel and similar employees in hospitals special regulation is applicable¹⁷.

Para.19 of the Working Time Statute regulates night rest and earlier closure times before Sundays and public holidays. In one-shift enterprises female blue-collar workers cannot be engaged between 8 p.m. and 6 p.m., on days before Sundays and public holidays not after 5 p.m. In enterprises with more than one shift female blue-collar workers may be engaged only until 11 p.m. and from 5 a.m. onwards (with a special permission of the factory inspectorate until midnight or from 5 a.m. on if the late shift ends at 11 p.m. - a continuous rest period of seven hours has to be respected). Exemptions can be granted by the factory inspectorate for technical or economical reasons for a maximum period of 40 days a year (para. 20 Working Time Statute). The prohibition of night work for women is not valid for temporary tasks in emergency cases (para.21).

The demand to **abolish the prohibition of night work for female blue-collar workers** has been raised for quite some time from different sides. Protective legislation for women has, as it is well-known, been contested strongly since its introduction in the 19th century and has been rejected on grounds of principle by the women's movement in some countries

17 Decree on Working time in Hospitals and Health Care Institutions of 13 February 1924, amended 2 March 1974, Bundesgesetzblatt I p.469. No relevant working time restrictions for women exist.

(as in England and in Scandinavian countries). They demanded equal protection against risks at work for both gender and improvements of the situation of employed women. In Germany the women's movement spoke initially against special labour law protection for women. The socialist faction of the women's movement, however, swung into line with the social democratic party policy in 1893, based on a mixture of tactical and more profound arguments and voted for special protection for women¹⁸. The controversies nowadays are very similar, but have evolved under considerably changed conditions. Working times, the number of children, infant mortality, mortality of mothers giving birth and the life expectancy of women differ strongly.

The abolition of the prohibition on nightwork for female blue-collar employees is legislated on by the **EC equality directive 76/207/EC in article 5 and 3.s.2 c)**. It is seen as an infringement of the principle of equal treatment and as a barrier to women's access to labour markets and discrimination based on traditional gender stereotypes. Protective legislation should be valid equally for both gender and all sectors of employment (as e.g. in Denmark). Special protection for women, however, is explicitly allowed in case of pregnancy or maternity (art. 2.s.3 of Directive 76/207/EC), the concept of "maternity" remaining fairly vague. In the meantime a preliminary ruling procedure is pending before the European Court of Justice in which the ECJ has to decide whether the French penal law regulations prohibiting night work of female blue-collar workers are an infringement of article 5 of the EC directive 76/207 on equal treatment of men and women (case C 345/89 Stöckel). The EC Commission's position is that numerous rules of women's special labour law protection are an infringement of the principle of equal treatment¹⁹, and apparently the Commission wants to oblige Member States to act in conformity with the EC Treaty (Article 234 Treaty of Rome) concerning this question. The Commission is pushing towards the abolition or respectively the adaptation of still partly existing contradictory legal obligations of the EC Member States based on international conventions of the ILO in this field.

ILO Convention No. 89, providing for the prohibition of nightwork of female blue-collar workers, is at the moment under revision and undergoing reforms. The ILO's 77th

18 For a historical inquiry into the development of special labour law protection for women in the 19th century see Quataert (1979), a short summary of the development in Germany is given by Ott-Gerlach (1988).

19 See E.C. Commission (1987) "Protective legislation for Women in EC Member States" (COM (87) 105 fin.). The connection between equal treatment of men and women and improvement of working conditions (article 117 Treaty of Rome) is emphasized. "Equal treatment should not be used to deteriorate working conditions for one sex, and it would be insufficient merely to abolish necessary protective measures which are at the moment limited to one sex" (ibid. p.7). For an overview on the development in different EC countries see Schetwe (1990:32 ff.). The main tendencies in this area are deregulation on the one hand, and inaction on the other hand.

World Conference in June 1990 voted a convention which allows for nightwork of women in manufacturing on the condition that permission is granted by a state authority. Permission for entire sectors or occupational groups can only be awarded when employees and employers consent to it²⁰. This new convention has to be ratified by the states first and then to be enforced according to national law. The solution suggested by the ILO contains basically procedural rules for neocorporatist arrangements via an 'opening clause' for collective bargaining. This solution has already been introduced in some countries (e.g. in Italy by Article 5 of the Statute 903/1977). The problematic aspect lies mainly in the fact that women are not adequately represented in trade unions. Therefore further procedural rules should be enacted assuring a sufficient participation and bargaining power of women (e.g. quotas for women in the bargaining commission and/or a separate voting procedure for women before the introduction of night work with a veto right). Otherwise the danger is that agreements are made at the expense of women, where the question of the introduction of night shifts for female blue collar workers is part of the "package deal" of male-dominated trade unions. Thereby women's interests are often insufficiently taken into account. In "package deals" disadvantages for women can be exchanged with advantages for men. Similar conflicts have been reported from Italy²¹.

That the prohibition on nightwork for female blue-collar workers is based on gender stereotypes and represents a discriminatory condition for women's access to labour markets, is a widely accepted opinion. Also the unequal treatment of the group of female blue-collar workers compared to white-collar workers or female employees in health care institutions or the catering sector shows, that it is not simply protection against working conditions leading to health risks that is at stake - otherwise nightwork would have to be prohibited for all employees, since it is always damaging to health. The discussion is concentrated around the question of whether a protective rule should be abolished without any compensation, or whether giving up these rights should be compensated at least partially by an improvement of working conditions, and whether the additional stress and workload for women caused by nightwork should be admitted only under the condition of

20 This regulation is oriented at principles voted upon by the ILO conference of July 1989. Accordingly, the prohibition on night work should be essentially upheld, but supplementary protocols should allow for amendments and derogations with the consent of the parties to collective bargaining within a national framework legislation. The permissibility of nightwork during pregnancy should be limited and different protective rules be extended to men and women (medical control checks, guarantees in cases of temporary inability to work, first aid centres and social services).

21 In a collective agreement of 1989 between the enterprises SGS Thompson and three metal sector trade unions, valid for 4700 employees, a general shortening of yearly working hours was agreed upon, but additional night and weekend work shifts for women were introduced. In a ballot 55 % of all employees voted for the collective agreement, but among the women 80 % were against it (EIRR no.191/December 1989, p.7).

setting off against it economic and social improvements (for instance infrastructures, transport facilities and childcare facilities organized by the firm etc.).

The **employers associations** demand the uncompensated abolition of the prohibition on night-work which is the most cost-saving solution for enterprises. They ask for the further flexibilization of working times so that three shifts a day including night shifts for women can be introduced (Arbeitsring Chemie 1980).

The **proposal for a Working Time Statute of the Federal Government** kept the old version of a prohibition on nightwork for female blue-collar employees in para. 10 (corresponding to para.19, 17 of the regulation actually in force), widening the permissibility of nightwork for women in the field of control, cleaning and maintenance of firm equipment (para. 7 II no.2 of the proposal). In the governmental coalition agreement of 1987, however, the general abolition of the prohibition on nightwork for women was agreed upon by the different parties (Zmarlik 1987:15).

The **trade unions** are against the abolition and fear a "levelling down" of protective standards. They demand equalization as "levelling up", the prohibition on nightwork or its further limitation for all employees, independent of gender (DGB 1981, 1988 ; Dobberthien 1981, 1982). Others ask for the abolition and the substitution by individual and gender-neutral criteria (Krell-Tammling 1979) and for formally equal, improved labour protection and infrastructures (Pfarr/Bertelsmann 1989).

The fear of a "levelling down" is evidently reasonable. The trend towards a deregulation of special labour law protection in some countries as for instance, in the UK without compensation through an improved gender-neutral organization of health protection or better infrastructures underline this. It is probable that easier access for a few women to jobs requiring availability for night work is contrasted with a higher number of women being forced against their will to work night shifts, especially in enterprises with a high proportion of women workers organized in two shifts up to now, where now a third shift (night shift) could be introduced. However, no estimates based on empirical evidence exist on how many female employees might be affected by similar changes and which branches of industry might mainly be affected.

Pfarr/Bertelsmann (1989:154 f.) argue that the prohibition on night work for women would infringe the equality principle of article 3 s.2 German Basic Law, but they hold that

the legal consequence of nullity of that rule namely the abolition of the prohibition on nightwork would be illegal since it infringes the requirement of the "welfare state" of Article 20 German Basic Law in connection with art.2 s.2, art.6 s.1,2 of the German Constitution. The only possible solution would be thus an amendment in conformity with constitutional constraints, via "levelling up" or by mitigating the possible negative effects of the abolition of the rule. Possible measures would be the provision of housing facilities which allow for sleep and rest during the day for employees, childcare facilities, adequate transport organized by the firm, a prohibition on nightwork for parents of children aged below 6, a prohibition on permanently working night shifts for men and women fixing a maximum period for it, regular medical checks, a right to another workplace in the same firm in case of quitting nightwork for health reasons, no obligation to work night shifts against the will of the individual employee. A tripartite commission should grant the permission only when adequate infrastructures are proved (Pfarr/Bertelsmann 1989).

In my opinion these provisions should be complemented by rules assuring adequate representation of women in the commissions which deal with for permissions, decision-making and bargaining via quotas as well as a separate ballot for women within the firm/sector where the introduction of night shifts is planned. A positive vote of 75 % of the women as a requirement for accepting the collective agreement should be necessary. Thus one could avoid that neocorporatist arrangements being concluded often at the expense of third parties ("outsiders").

5.6. Part-time Work

Part-time work is the most frequent form of working time organization **granting time flexibility downwards**. 90 % of the part-time employees are women. The increase of women's participation rate during the last years in the FRG is to a large extent due to the growth of part-time work. The proportion of part-time employment (proportion of part-time employees out of all dependent employees) increased from 3.9 % in 1960 over 9.3 % in 1970 to 13.9 % in 1988 (Bäcker/Stolz-Willig 1990:8). This proportion of part-time employment is probably even too low since "minor employment" is statistically underinvestigated (ISG 1989). In international comparison the part-time rate in the FRG is relatively low. The proportion of part-time work out of total female employment in 1985 amounted to nearly 30 % in the FRG, 42 % in Denmark, 44 % in the United Kingdom and 57 % in the Netherlands (Jackson 1990:38).

Part-time work is almost exclusively an employment form for women, 90 % of part-time employees are female, the overwhelming part of whom are married. Only 2.3 % of employed men, but 32 % of all employed women showed working hours lower than the normal weekly working hours agreed upon in collective agreements (Brinkmann/Kohler 1989:474)²². A large part of employed mothers with children to be cared for work part-time since this is often the only way to combine professional activities and family duties in view of insufficient childcare facilities. But other reasons also play a role : in 1984 half of all part-time working women did not have to care for children below the age of 16 (Büchtemann/Schupp 1986:13).

Part-time jobs are concentrated in a few sectors (mainly the service sector, trade and commerce) and in less qualified activities, where no career prospects or in-firm further training possibilities exist. The highest growth of part-time work during the last 15 years occurred in the "minor employment" time range (i.e. less than 15 hours a week)²³ where risks are cumulated because of little labour law and social security law protection. This is, however, caused by supply-side factors and not by demand. Numerous employees expressed the wish to work part-time within the time range of 25 to 35 weekly working hours, but there is no corresponding demand for this (Büchtemann/Schupp 1986, Bielinski/Strümpel 1988). Büchtemann (1989b:191) estimates the potential of full-time employees who would like to reduce their working hours and work only part-time as being 2.7 million persons (with a possible employment effect of creating 500 000 new full-time workplaces if only 50 % of the working time reduction would be compensated by fresh engagements).

For **enterprises** part-time work is the most important form of time flexibility downwards. Part-time jobs can reduce wage costs, especially in the time range of 'minor working hours' via indirect subsidies (no liability to pay social insurance contributions) which are significant. Part-time workplaces can create extra costs for employers by causing additional expenses for personnel especially with regard to highly paid jobs, costs to instal or change

22 The proportion of part-time working men in all EC countries is below 10 % with the exception of the Netherlands and Denmark. These are mainly young men (working part-time after training periods) or elderly male employees who combine part-time work and retirement.

23 The situation in Sweden is different : with a very high part-time rate in time ranges between 20 and 30 weekly working hours (Maler 1987:7). In the GDR part-time work was concentrated between 25 and 35 weekly working hours and thus only slightly below normal full-time working hours (Ott et.al. 1990:9). The GDR with a very high activity rate of women (81 % in 1988) displayed in 1988 a share of part-timers of 23.8 % out of all female employees (Winkler 1990:108). The possibilities of working part-time based on family duties were very restricted. Part-time work was concentrated in the sectors trade, post offices and telecommunication, manufacturing arts and crafts (Bäcker/Stolz-Willig 1990:9).

extra work-spaces, additional transaction costs for information, coordination and administrative procedures. Productivity gains and additional profits are feasible because of higher productivity and work intensity, adaptation of working times to conjunctural changes, prolongation of total business hours, savings caused by lower entitlements to labour law and social security rights (Bäcker/Stolz-Willig 1990:11). Based on these profitability considerations, firms rarely create part-time workplaces in well paid, qualified areas, in top positions within the hierarchy or in managerial positions (although here not only cost calculations play a role, but role stereotypes as well and the problem of "matching of hierarchies").

At the moment part-time jobs are concentrated in the range of easily substitutable activities. The situation is different in the public service and for civil servants since more generous statutory rights grant leaves or a right to working time reduction under certain conditions. Various empirical research illuminated the very **different quality of part-time jobs** (Büchtemann/Schupp 1986, 1988; Büchtemann/Quack 1989; Büchtemann 1989 ; Dittrich/Fuchs/Landenberger/Rucht 1989) and analyzed the factors having an impact (especially sector of the economy/pay level/degree of entitlement to rights/reversibility of part-time work).

For women part-time work presented clearly, despite the economic and legal disadvantages, a **market`opening**. As long as the time patterns of the standard employment relationship are not considerably reduced and housework and family duties are assigned overwhelmingly to women, for many no other choice is left open given the economic and structural constraints but to work part-time in order to combine employment and work in the private household²⁴.

The **income derived from part-time employment** is usually not high enough to cover the existence minimum when it is the only source of income. The monthly net income of nearly 80 % of part-time employed women was below DM 1000,- (Büchtemann/Schupp 1986:30 ff.), each third earned even less than DM 540,- monthly. The gross hourly wages of female part-timers in 1984, calculated on the base of effectively worked hours per week, arrived only at 92 % of those of full-time working women. Part-timers working less than 15 hours a week earned only 83 % of the hourly gross wages of full-time working women, and each second of those in "minor employment" got an hourly wage lower than DM 9,- (Büchtemann/Schupp 1986).

²⁴ For a critical discussion of the pros and cons of part-time work from a feminist point of view see Eckart (1990).

Thus part-time work requires a second income derived from employment and the pooling of resources in a household or sufficiently high maintenance payments - or "welfare" benefits to secure the subsistence level. The model of the "one and a half income household" upholding the gender-specific division of labour is thus stabilized and the dependence on marriage assumed.

5.6.1. The disadvantages of part-time work in labour law and social security law

Indirect discrimination of part-time work by labour law and social security rules is the subject of numerous research²⁵. It is also treated more and more by case-law under the influence of the judgments of the European Court of Justice on this matter.

The disadvantages facing part-time workers are as follows :

- Wages and other elements of pay as extra pay and bonuses (overtime bonuses, shift work bonuses), fringe benefits (holiday pay, a 13th monthly wage, Christmas bonus, efficiency premiums, seniority bonus, occupational pensions, fringe benefits in kind such as a car or accomodation provided by the firm etc.)²⁶
- Career possibilities, promotion, internal training schemes of firms, calculation of length of employment and seniority, particularly calculation of length of employment relevant for promotion
- Exclusion from labour law protective rules (exclusion from sick-pay for blue-collar workers with less than 10 weekly or 45 monthly working hours according to para. 1 s.3,1 Statute on Sick Pay), disadvantages in unfair dismissal law, unequal evaluation of part-timers when calculating the total number of employees of a firm wich is relevant for the applicability of some statutes (when calculating the size of the enterprise according to para.23

25 See in detail Pfarr/Bertelsmann (1989) reporting also the relevant case law ; Bertelsmann (1989) on the discrimination of part-timers in the public service by the Federal Collective Agreement for White-Collar Workers in the public service ; Bertelsmann/Rust (1985); Degen (1986, 1987); Landenberger (1985) on discrimination in social security law.

26 For the FRG up to now no representative empirical research on the subject of exclusion of part-timers from fringe benefits has been carried out. For the United Kingdom see Horrell/Rubery/Burchell (1989) and Down/Monks Partnership (1988). In an article of the "Süddeutsche Zeitung" of 23 October 1989 it is reported that out of all part-timers in the FRG only 57 % receive holiday or Christmas bonuses, 34 % asset-forming contributions, 27 % a 13th monthly pay. See also the Reply of the Federal Government to a parliamentary inquiry of the MP Kroll-Schlüter (Bundestag Drucksachen 11/5529 of 3 November 1989, p.9 ff.).

Unfair Dismissal Act part-timers with 'minor working hours' are not calculated for employment relationships contracted after 1 May 1985 ; this has the consequence that smaller firms are often exempted from protection against unfair dismissal)

- Disadvantages related to participation rights, limitation of eligibility to the Works Council in the public service (employees with less than 18 weekly working hours are not eligible according to the Federal Employees Representation Act for the Public Service and various corresponding statutes of the Länder), limitations on the co-determination rights of the Works Councils concerning the length of weekly working hours stipulated in employment contracts with part-timers
- Exclusion from liability to social insurance obligations and payment of contributions and thus exclusion from benefits depending on weekly working hours : employees with less than 18 weekly working hours are not insured against unemployment (para. 168 s.1,1; 169 no.6 ; 102 Labour Promotion Act - whereby the working hours of different employment relationships with "minor employment" are not calculated together, but each individual employment must exceed the threshold). Times of unemployment are therefore also not recognized as social insurance shortfalls for pension purposes (para. 1259 s.1 no.3, 3a) Imperial Insurance Order, para. 36 White Collar Employees Insurance Act) and access to measures for retraining and others schemes of the Labour Promotion Act is hindered²⁷. "Minor employed" persons with less than 15 weekly working hours and an income below the threshold of DM 470,- monthly (in 1990) or working less than two months a year/less than 50 working days a year are not insured in pension insurance and health insurance systems (para. 168, 1228 Imperial Insurance Order, para. 4 White-Collar Employees Insurance Act and para. 8 Social Act IV).

The **disadvantages for part-timers in collective agreements** consist mainly of

- exclusion of part-timers from the applicability of the collective agreement
- exclusion from different extra pay and bonuses granted
- exclusion of limitation of career prospects and promotion (especially in the public service collective agreements).

²⁷ Part-time employees who are not liable to unemployment insurance contributions, are largely excluded from measures according to the Labour Promotion Act since as a general principle only persons receiving unemployment benefits or unemployment help participate in retraining courses and other measures (para. 93 s.1 no.1 Labour Promotion Act). Also the entitlement to maintenance benefits during a retraining course requires former insurance periods in unemployment insurance, para. 46,47 Labour Promotion Act.

Trade unions were fierce opponents of part-time work for a long time²⁸. This attitude changed somewhat under the pressure of increasing numbers of part-timers and of internal debates, especially promoted by female union members. In the last years some trade unions have tried to favour a higher level of labour law and social security entitlements for part-timers²⁹.

5.6.2. Trends in collective bargaining regulating part-time work

The following trends and changes can be observed during the latest rounds of collective bargaining :

- Extension of applicability of collective agreements also to some groups of part-timers ; lowering of thresholds of minimum weekly working hours defining the time-range of applicability of collective agreements

Collective agreements usually exclude part-timers below a certain threshold of weekly working hours from the applicability of the collective agreement (mostly employees with less than half of the regular workly weeking hours are excluded, i.e. less than 19 hours). In some collective agreements this threshold was lowered recently so as to include more part-timers than before.

The collective agreement for the retail trade in the region Baden-Württemberg from 1 January 1982 provided for the applicability also for employees with few working hours without any exclusion, applying a "pro rata" rule in general. The collective agreement for the public service 1987 included from 1 January 1988 all employees working at least 18 hours a week (before the threshold were 20 hours). The collective agreement for the banking sector 1989 includes all part-timers with more than one third of regular weekly working hours, i.e. at the moment with more than 13 hours a week (before the threshold was 19.5 hours). The collective agreement on working conditions of employees working on VDV screens for the public service in Bavaria from 1 April 1988 is applicable for employees with 18 weekly

28 For an overview of the development of trade unions' positions on working time matters since the fifties see Hegner/Landenberger (1988), for the internal debate in trade unions see Kurz-Scherf (1985, 1989).

29 See the model agreement of the trade union for trade, commerce, banking and insurance HBV (Gewerkschaft HBV 1984:31ff.), the considerations of the trade union food sector/provisions and fine foods/catering NGG (Graf 1987) and of the trade union for the printing industry, IG Druck und Papier (1987) as well as Kurz-Scherf (1985, 1989) from a feminist point of view.

working hours, according to an additional protocol it should nevertheless be applied to those with smaller working hours if the working conditions are comparable. Similar changes have been made in the collective agreements on social care for the state pension insurance sector from 1 January 1988 and for the blue-collar workers of the national miner's insurance (collective agreement of 1 January 1988).

- Collective agreement regulations of minimum working hours for part-timers and of the distribution of working hours

The collective agreement on part-time work of 18 December 1987 for all subsidiaries of the Volkswagen Company states that part-time jobs shall be created only with more than 20 weekly working hours. Full-time jobs can be transformed into part-time jobs only with the consent of the employees concerned and of the works council. The collective agreement for the retail trade from 1989 provides for a minimum of 20 weekly working hours to be grouped in blocks of at least four continuous hours a day on a maximum of five days per week. The collective agreement for the printing industry 1989 also provides for a minimum working time of 20 hours a week and prohibits contracts with undefined variable working times ("work on call"); also overtime work of part-timers is banned. The collective agreement on part-time work in the chemical industry of 13 April 1987³⁰ provides in para. 5 for a minimum of at least four working hours daily, exceptions are possible although; they have to be explicitly stipulated. This rule is, however, mandatory and is not applicable to employees with 'minor working hours' either. The collective agreement for the banking sector of 1989 contains a discretionary clause providing that the daily working time should be at least three hours.

- Generalization of the **"pro rata"** rule and extension of certain **bonuses and extra pay** from which part-timers were formerly excluded

The collective agreements for the retail trade 1989, the banking sector 1989 and the public service from 1987 (valid from 1 January 1988) include the entitlement of part-timers to Christmas bonuses, holiday pay, asset-forming contributions, occupational social security schemes and protection against rationalization.

30 Published in *Recht der Arbeit* (1987:249), *Neue Zeitschrift für Arbeitsrecht* (1987:482). For a critique see Pfarr/Bertelsmann (1989:268f.).

- **Equalization of seniority requirements for promotion between full and part-timers**

The probation periods for promotion in the public service for part-timers were formerly double in comparison to full-time employees (para. 23a no.6 of the national collective agreement for white-collar employees in the public service, valid until the end of 1987). These probation periods have been equalized by the new collective agreement, valid from 1 January 1988 onwards. Also the shorter time periods of sick pay for part-timers in the public service have been prolonged up to the level of full-timers' entitlement.

- **Priority rights of part-timers to occupy full-time jobs within the firm (and viceversa, of full-time employees of the firm to occupy part-time posts) when competing with external candidates**

Such a rule is included in the collective agreement for the retail trade 1989. The same clause, however as a discretionary rule, is contained in the collective agreement for the banking sector of 1989 (wishes of employees to switch from part-time to full-time or vice-versa should be complied with if work organization and personnel policy allow it). A rather vague formulation is to be found in the collective agreement on part-time work for the chemical industry of 1987. Thereafter full-time jobs should be filled up primarily with newcomers having joined the firm after training in a part-time job having worked one year part-time.

- **Part-time work of elderly employees**

Up to now only one collective agreement has been agreed upon regulating the entitlement of elderly employees to work part-time. Such a collective agreement is needed to transform the general statutory right, based on the Old-age Part-time Act 1988³¹ into a concrete entitlement, since only then the Federal Labour Exchange Office grant transfer payments to level up the reduced wage and pension entitlements of part-timers. The national collective agreement on old-age part-time work for the enterprise Eduscho of May 1989 entitles employees older than 58 years with at least ten years of seniority in the firm to old-age part-time work.

31 Act on the Promotion of flexible transition of elderly employees into retirement (Old-age Part-time Act) of 20 December 1988 (Bundesgesetzblatt I p.2343).



- Extension of co-determination rights regarding part-time work

The collective agreement on part-time work for the Volkswagen enterprise of 18 December 1987 states that full-time posts can be transformed into part-time jobs only with the consent of the employee concerned and the works council. An arbitration settlement of a board of conciliation in Hamburg³², expressed in a dispute between the warehouse Hertie, the subsidiary of Hamburg Barmbeck and the trade union HBV regulates the framework of employment conditions of part-time workers (for instance minimum daily and weekly working hours) in a compulsory way, based on the assumed co-determination rights of the works council.

5.7. 'Minor working hours' - the cumulation of risks and low protective standards of labour law and social security law at the bottom line of time scales

The concept of 'minor employment' or 'minor working hours' indicates part-time work below certain time thresholds or short-term, temporary full-time work. This employment form grants much less entitlement to labour law and social security rights.

'Minor employment' is not liable to social insurance contributions (pension insurance, sickness insurance and unemployment insurance) and provides therefore considerable wage savings for employers. This is the case when the following thresholds are not exceeded :

- the weekly working time is less than 15 hours and the income derived from this employment is lower than DM 470,- (in 1990) a month³³
- the activity is considered not to be permanent because of the time-limitation (maximum two months or 50 working days a year)
- employees are not liable to unemployment insurance contributions independent of the level of earnings if their working time is less than 19 hours a week (various employment relations with different employers are not added up), para. 102 s.1, 169 no.6 Labour Promotion Act).

32 Published in Der Betrieb (1986:1729ff.). This settlement order has been confirmed by the higher court instances, the Labour Court and the Regional Labour Court of Hamburg.

33 It is also considered to be 'minor employment' in cases where the gross income is higher, if the employee also has wage income derived from other activities, but the earnings out of the 'minor employment' do not amount to more than one sixth of the total income.

The regulation of 'minor employment' is complicated and partly contradictory (see the extended debate in ISG 1989:139 ff.). The disadvantaged treatment of 'minor working hours' in social security law is dealt with in chapter 6.3.2.1. . The main **disadvantages of 'minor working hours' in labour law** are the following :

- Blue-collar workers with average working times below 10 hours a week or 45 hours a month are excluded from continuous wage payment by the employer in case of sickness (para. 1 s.3, no.2 Act on Continuous Wage Payment). This rule has already been contested in a case on which the European Court of Justice expressed a judgment in the preliminary ruling procedure ("Rinner-Kühn"³⁴). The ECJ hold that this rule constituted an indirect discrimination against women and inflicted article 119 Treaty of Rome, if it cannot be justified by the Member State on grounds independent of sex ; and that the Member State has to prove that the means selected serves a necessary goal of social policy and is adequate and necessary to reach this goal.
- Since the enactment of the Employment Promotion Act 1985 part-timers with less than 45 hours a month or 10 hours a week are no longer counted as employees of the firm when calculating the number of the firm's total staff in order to define whether the Unfair Dismissal Act is applicable or not according to para. 23 s.1, ss.2,3 Unfair Dismissal Act (it is applicable only when more than 5 employees are engaged by the firm). Small enterprises (in which women are over represented) can thus circumvent the applicability of unfair dismissal law by stipulating employment contracts below the thresholds described.

5.7.1. The extent of 'minor employment' relationships and its gender-specific profile

Representative empirical data on 'minor working hours' exists for the first time since 1989 when an investigation of the ISG (1989) commissioned by the Federal Ministry of Labour was carried out. Already past research had pointed to the high level of 'minor employment' and the high proportion of women in this employment form³⁵. This group is usually statistically underestimated. The ISG (1989) gave the number of 2.823 million employment relationships with 'minor working hours' not liable to social security

34 Case R.K. v. FWW (171/88), judgment of the ECJ of 13 July 1989.

35 Brinkmann/Kohler (1981) and Büchtemann/Schupp (1986:35) estimated for the year 1984 a number of 1.041 million employees with 'minor working hours', among them 87 % women. Based on the survey on secondary jobs of the special research department 3, Universities Frankfurt/Mannheim the number of employees in jobs not liable to social insurance was indicated for 1984 as being 2.42 million persons (Schwarte 1986:38).

contributions for 1987 (only dependant employees, excluding self-employed), of which 55 % were women and 45 % men. The proportion of women increases to 65 % when looking only at 'minor employment' and excluding all those holding a secondary job, since men are over represented as secondary-job holders (mainly pupils, students, pensioners and unemployed).

A considerable increase in 'minor employment' occurred in the years between 1976 and 1986 in the time range between one and nine weekly working hours. The growth of this group amounted to 36.2 %. Almost exclusively this concerned women (see microcensus data, ISG 1989:204). Even stronger was the growth rate of part-time work between 10 and 20 weekly working hours (44.8 % in the same period as above), also affecting mainly women. But within this second group it can be assumed that many employees were liable to social insurance contributions security if wages exceeded the amount of DM 10,- per hour.

The **gender-specific profile of "minor employees"** displays the following characteristics : the typical male employee not liable to social insurance contributions is either unemployed or still in education or training and younger than 35 years. The typical female employee not liable to social insurance payments is housewife and aged between 25 and 59 years (ISG 1989:III), 95 % of the women in this group are running a household. Women are engaged in "precarious employment" for longer time periods and more continuously. 'Minor employment' of women was in 1987 concentrated in the sectors of private households (32 %), cleaning services (17 %), trade (13 %), manufacturing industry (11 %) and catering (8 %). The kind of activity performed consisted to more than 50 % of "cleaning activities" and a further 14 % of "child care, other activities in private households". 'Minor employment' of women and men is overwhelmingly concentrated in small and medium enterprises; only in 12 % of the employing firms did a works council exist. Only 17.5 % of the women had a written employment contract. Particularly in the cleaning sector the employment situation of women (many of them foreigners) is often scandalous. A revealing report on this was published in 1987 by the representative for women's affairs in the regional Government of Hessen (Jindra-Suß/Kleemann/Merz 1987).

5.7.2. Necessary reforms of 'minor employment' regulations

The following **negative effects of the existing regulations** should be abolished :

- **"Subsidies"** for workplaces with low working hours and little labour law and social security entitlements

The indirect subsidies resulting from savings on wage costs (no social insurance liability) leads to competition distortion and forces competing firms in areas with a high proportion of 'minor employment' (for instance the cleaning sector, but also trade, newspaper and publishing companies and catering/hotel sector) to adopt similar strategies to be competitive, i.e. enterprises with a higher proportion of legally better-protected, more "expensive" employment relationships are under pressure to reduce this segment (a typical trend has been "contracting out" cleaning jobs from the public service and hiring external firms to perform these tasks³⁶). In the long run there is also the risk that technical innovations, modernization and investments in rationalization could be hindered by low wage costs kept artificially low by indirect subsidies. This could influence competitiveness negatively in the long term.

- **Negative employment effects and loss of contribution payments** for social insurance caused by 'minor employment' forms

Subsidizing precarious employment forms can have negative employment effects if employers are thus induced to renounce the creation of full-time jobs or part-time jobs above the threshold of 'minor working hours'. Losses of contribution payments for the social insurance institutions are caused by increasing levels of 'minor employment', the non-creation of posts above this threshold and the possibility of cumulating 'minor employment' relationships and income derived from social insurance benefits (this concerns mainly men as pensioners or recipients of unemployment benefits and unemployment help, see ISG 1989).

An effect of introducing a liability to social insurance contributions also for 'minor employment' could be on the one hand that these jobs would be replaced by (fewer) better-protected full or part-time jobs - a desirable effect. On the other hand the increasing wage costs could make these jobs too expensive in certain sectors of the economy and thus cause job losses, especially in private households (for instance, cleaning activities, child-minding and baby-sitting etc.); or it could lead to growth of jobs in the "shadow economy" in these areas. Different, and more specific regulation is therefore required.

³⁶ Up to now only the Land Northrhine-Westfalia decided to contract out cleaning tasks only to those firms which pay social insurance contributions for their employees.

- **The problematic of abuse of 'minor employment' regulation**

To lower wage costs, often enterprises simulate different 'minor employment' relations, while in fact only one person is employed although registered under different names. The proportion of these "false" 'minor employment' relations is estimated by the ISG (1989) as approximately 20 % (about 430 000 persons) of all employees with minor working hours. The number of recipients of unemployment benefit or unemployment help performing at the same time a "minor job" amounts to around 280 000 persons (ISG 1989 ; Süddeutsche Zeitung 16 January 1989).

- **Indirect discrimination of women**

Mainly women are affected by the negative consequences of 'minor employment' in terms of the above mentioned lower labour law and social security entitlements. The connected long-term negative effects are often underestimated by the employees because of their present time-preferences and privileging immediate income gains over those in the future.

Necessary reforms

Various reform proposals are discussed in the literature (ISG 1989, Schupp/Schwarze/Wagner 1989, Weber 1988, Fauoel 1987, Bertelsmann/Rust 1985). They are concentrated on the abolition of the "minor working hours threshold" and the introduction of liability to social insurance, granting very few exceptions within strict limits. Also the proposals for statutory regulation made by the Social Democratic Party and the Federal Trade Unions Association (DGB) provide for. An alternative to liability to social insurance contributions (to be paid by employers and employees jointly) would be the introduction of unilateral, additional fees to be paid by firms for this employment form. This would abolish competition advantages of this group of employees on labour markets, make wage costs for employers more expensive and equalize them to those of 'normal' employees. But it would not create rights and social security entitlements for the employees concerned, and the problems of disadvantaging women would not be solved this way. One way of making the wage costs of "minor employees" more expensive has been increasing the flat-rate tax to be paid by employers on the total wage sum of "minor employees" from 10 to 15 % from 1990 onwards.

The Federal Government has not developed a coherent policy on the matter up to now. The initiatives are mainly directed at strengthening control mechanism by introducing a "social security book" and integrating "minor employees" into the registration procedure for social security purposes (firms are obliged to provide the data to social insurance institutions)³⁷. Since 1 January 1989 employers are also obliged to keep documentation on wages of all employees. But the implementation of these rules is very difficult to monitor, and infringements are hardly sanctioned.

5.8. "Work on call" (Capacity-oriented variable working times)

This form of working-time organisation is demand-oriented and very flexible for employers; the effective working time is adapted to the changing workload and the employer exercises the general unilateral right to establish the length and distribution of working time (para. 315 German Civil Code). No consent of the works council is needed to working time organisation. Since an upper limit on working time is lacking, no overtime bonuses have to be paid. Some forms of "work on call" have been declared void by labour courts as unfair restrictions of the employees liberty of profession, since employees could not enter another part-time employment relationship when the potential working times are spread out widely. The seventh chamber of the Federal Labour Court declared a contractual clause as void which gave the right to the employer to change the initially fixed working-time later on unilaterally according to need, while pay depended on the effective working time³⁸. Labour Court judgments at first instance held the nullity of some forms of "work on call" with the impermissibility of shifting the business risks upon employees³⁹.

Representative empirical surveys on the extent of "work on call" do not yet exist. Some conclusions can, however, be drawn from the investigation on employment not liable to social insurance (ISG 1989). Accordingly, in 1987 approximately 40 % of the nearly 2.2 million employees not liable to social insurance worked more or less "on call" (37 % of the women and 51 % of the men in this group), so nearly half a million women were concerned (ISG 1987:57). No framework agreement fixing the working time existed for 84.7 % of the interviewed women and 81 % of the interviewed men (an agreement on the total amount of time per week to be worked was asked for, leaving the distribution of the time flexible, ISG 1989:60). Even if only scarce empirical material is available, it becomes clear nevertheless

37 Introduction of a "Social Security Book" Act of 6 October 1989 (Bundesgesetzblatt I 1822).

38 Federal Labour Court, *Neue Zeitschrift für Arbeitsrecht* (1985:231).

39 Labour Court Berlin, *Betriebsberater* (1984:405) concerning contractual obligations of job-sharing ; Labour Court Hamburg, *Neue Zeitschrift für Arbeitsrecht* (1984:358) for "work on call" contracts.

that the problems of "work on call" are concentrated in the time-range of part-time work, especially below the threshold of 'minor working hours' and thus affect mainly women (Meyer 1989). 'Work on call' is concentrated in the retail sector and in catering (Meyer 1989).

Statutory regulation was provided for the first time by the Employment Promotion Act 1985. When no contractual agreement with more favourable conditions exists, the working time of "work on call" is established within the limits of 'minor employment' (para. 4 Employment Promotion Act 1985). This regulation falls back behind the demand to prohibit "work on call"⁴⁰ or to enact minimum standards within the time-range of part-time work above 20 weekly working hours, liable to social insurance and falling under the co-determination competences of the works councils⁴¹.

Further **disadvantages in social security law** are connected to the interruptions and free-time intervals caused by "work on call" - if the employment is liable to social insurance at all. In sickness insurance free-time periods without wage payment up to three weeks have no negative impact on the continuation of insurance protection, but if the interruption is longer, the employee is no longer insured (para. 311 s.1 no.1 Imperial Insurance Act). In unemployment insurance schemes unpaid periods of free-time are not calculated as part of the minimum periods for entitlement to unemployment benefits, and no possibility exists to pay voluntary contributions to bridge these periods. In pension insurance schemes each month without an employment relationship liable to pension contributions is not calculated for pension purposes (entitlement, waiting periods and amount of benefit), para. 1258 Imperial Insurance Act, para. 35 White-Collar Employees Insurance Act). Interruptions of continuous paid employment can also lead to problems with protection against invalidity in pension insurances. The legal problems related to discrimination of part-time working women are researched by Meyer (1989:44 ff.).

40 Asked for by the Green Party, suggesting in para.3 s.4 of the Proposal for a Working Time Statute that each form of "work on call" during normal working hours of enterprises should be prohibited. If nevertheless "work on call" were practiced, the sanction should be that the waiting period is treated (and paid) as normal working time.

41 The Social Democrat Party proposal of a statute regulating part-time work provided for a fictitious working time of half of the regular working time collectively stipulated in cases of "work on call". The distribution of working time should be announced at least 14 days beforehand (para. 630f German C.C. of the proposal). Concerning job-sharing contracts, a duty to replace the other employee in cases of absence was generally prohibited (para. 630g of the proposal).

5.9. Seniority rules

5.9.1. Seniority rules (length of employment, continuity and seniority within a firm as criteria giving rights) in statutory provisions and collective agreements

Seniority rules connect the distribution of economic benefits and rights with length of total employment or, more specifically, length of employment in the firm. The English term "seniority rules" does not coincide fully with the German concepts, describing these different aspects :

- Seniority in a specific firm (length of employment in the enterprise)
- Length of employment in a profession (years of professional activity)
- Certain minimum periods forming a threshold for the entitlement to rights based on statutory provisions or collective agreements, or (formulated reversely) preclusive periods
- Age limits.

I use the term "seniority rules" in this wider sense, including the different aspects as described.

Seniority rules in labour law and social security law play a role in the following statutory provisions :

- 6 months of employment in the enterprise is a prerequisite for the applicability of unfair dismissal law (para. 1 s.1 Unfair Dismissal Act)
- The full holiday entitlement is acquired only after a waiting period of 6 months of the employment relationship (para. 4 Federal Holidays Act)
- A duration of at least 6 months in the firm is a prerequisite for eligibility to the works council (para.8 Employees Representation Act)
- The statutory periods of giving notice are prolonged according to length of employment (para.621, 622 German C.C., para.2 Statute on Periods of Notice for White-Collar Employees) with the proviso that only employment periods from the age of 26 years on are taken into account
- Length of employment in the firm plays a role as a criterion for the control of "social fairness" of business-related dismissals through labour courts (para. 1 s.3,1 Unfair Dismissal Act), for the amount of redundancy payments after a

dismissal (para.10 s.2 Unfair Dismissal Act) and when "social plans" and the amount of redundancy payments are settled after closing-down a firm (para. 112 s.6 Employees Representation Act)

- Unalienability and transferability of an entitlement to an occupational pension is connected to length of employment in the firm (10 or 12 years minimum) and age (minimum age 36 years), para. 1 Statute on the Improvement of Occupational Pension Schemes)
- Seniority is important as a "probation period" for promotions in the public service for civil servants.

Seniority rules in social security law (see chap. 6.3.1. and 6.3.3.) :

- Amount of unemployment benefits and duration of payment depend on length of employment within a framework period in the past (para. 106 Labour Promotion Act)
- Waiting periods for invalidity pensions and old age pensions require minimum periods of length of employment (para.1246 III,1247,1248 s.7 Imperial Insurance Act)
- Length of employment is a multiplier in the formula for calculating the pension amount to be paid (para.1253 ff. Imperial Insurance Act)
- The Statute on Old-age Part-time Work couples minimum employment periods, full-time employment and age as criteria for the entitlement to reduce working-times (para. 2 s.1 no.1,3 demands at least 1080 days of full-time employment liable to social insurance contributions and the age of 58)
- Maternity pay of national sickness insurance according to para. 200 s.1 Imperial Insurance Act requires a minimum employment duration of twelve weeks within the time period of 10 months to four months before giving birth).

Seniority rules in collective agreements and in individual employment contracts :

- Minimum employment periods are often required by collective agreements for entitlement to holidays and Christmas bonuses, a 13th monthly wage, asset-forming contributions and other forms of additional pay
- Occupational Pensions require minimum periods of employment (often differentiated according to weekly working hours)
- The right to parental leave or to re-instatement after periods exceeding the statutory rights are connected to length of employment in the firm (for

instance, four years of seniority are required in the collective agreements for retail trade of 1989, 5 years in the metal agreements)

- The increase of wages fixed in collective agreements is partly connected to age, partly to seniority rules which are important especially for wage guarantees and in reaching the maximum pay rate⁴²
- Protection against dismissal and periods of notice settled in collective agreements, exceeding the statutory provisions, depend on length of employment in the firm, partly linked to with age⁴³.
- Rights to free time for elderly employees or reduced working hours for elderly require minimum periods of seniority.

For the calculation of length of seniority in a firm shorter interruptions are often irrelevant, if they amount to less than one year (explicitly stated for example in the collective agreements for the metal branch 1990).

Statutory regulation provides that employment interruptions related to pregnancy or maternity do not affect seniority in certain cases. If an employment relationship is terminated by a woman during pregnancy or eight weeks after confinement and if the woman is re-engaged by the firm within one year after confinement, the employment relationship is to be considered as uninterrupted, also when calculating seniority in the

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- 42 In the chemical industry the 100 % pay-rate is reached after six years seniority (national wage agreement, 1 September 1988), in the textile industry Bavaria for commercial employees after eleven years (para.6 of the regional wage agreement of 1 May 1987). A guarantee of the wage level reached is granted as follows :

| Seniority | Age | Collective Agreement |
|-----------|-----|---|
| ----- | | |
| 18 years | 53 | Shoe production, national framework agreement for blue-collar employees, 1 January 1985 |
| 10 years | 55 | Textile/leather industry Saarland, 1 May 1975 |
| 5 years | 55 | Metal industry Unterweser, 1 April 1988 |
| 15 years | 40 | National pension insurance institutions, 1987 |
| 1 year | | Metal industry Nordwürttemberg/Nordbaden, 1988. |

- 43 Stronger protection against dismissal is granted according to seniority and age in the following collective agreements :

| Seniority | Age | Collective Agreement |
|-----------|-----|--|
| ----- | | |
| 5 years | 55 | Metal industry Unterweser, 1 April 1988 |
| 10 years | 55 | Textile/Leather industry Saarland, 1 May 1975 |
| 10 years | 55 | Textile industry South Bavaria, 1 May 1985 |
| 15 years | 40 | National Pension Insurance Institutions, 1987 |
| 20 years | | National Shoe Industry, blue-collar workers, 1985. |

Various other agreements include graded regulation.

firm (para. 19 Maternity Protection Act). During the statutory maternity leave and the statutory parental leave since 1986 the employment relation is not interrupted. Recently in a few collective agreements similar rules are to be found, providing that former periods of employment have to be taken into account when calculating seniority also after longer interruptions for child-care when being re-engaged by the firm⁴⁴.

It has to be mentioned within this context that typically male interruptions as for obligatory military service or the substituting periods of conscientious objectors are treated in a privileged manner : times of obligatory military service is to be taken into account when calculating seniority in private industry (para. 6 s.2 Job Protection Act) and in public service (but not as a "probationary period" for promotion or up-grading in the wage-scale in public service; but the public service as employer might be obliged to pay the difference to the next-highest wage group as compensation to the male employee, para. 6 s.4 Job Protection Act). The period of obligatory military service is also to be taken into account when applying to be allowed exams for further qualifications which require seniority (para.13 Job Protection Act). The obligation to take into account the period of military service for seniority purposes is also retroactive in cases where the employee is engaged by the firm after military service in case he is employed at least for six months in the firm (para. 12 Job Protection Act).

44 Former periods of employment have to be taken into account for seniority purposes after periods of interruptions of employment for child-care according to the following collective agreements :

- Plant agreement Bayer Ltd. (Interruptions up to three years after childbirth, in particular cases up to 7 years)
 - BASF programme "parents and child" of 18 April 1986 (periods of time-off granted by the firm up to school-age of the child)
 - Programme "Parents and child" of 1 January 1988 at the plant level, Kali and Salz Ltd.
 - Plant Agreement of Mining Company Auguste Viktoria of 1 July 1987
 - National framework agreement for blue-collar workers in the textile industry of 1 January 1980 (interruptions up to three years)
 - Plant agreement MBB of 1 January 1986 on the re-instatement of employees leaving the firm for child-care purposes (seniority before leaving the firm and up to 18 months of the parental leave, analogous to men's periods of obligatory military service, are included into calculation of seniority after re-instatement, also for calculating occupational pension entitlements).
 - Daimler-Benz Ltd. (one third of the period of interruptions for family reasons is recognized for occupational pension purposes)
 - National framework collective agreement for the sweets-producing industry of 1 June 1989 (Interruptions up to two years connected to confinement of a child do not interrupt seniority)
 - Metal branch agreements 1990 : in cases of re-engagement, seniority is not interrupted by parental leave granted according to these agreements
 - Framework collective agreement dairy industry North-/South-Württemberg of 1 January 1989 : general rule that all documented periods of employment in the firm are added up when interruptions were not longer than five years altogether (not recognized as interruptions are periods of non-employment caused by war).
- (See also chap. 5.10. on regulations of parental leave in collective agreements).

The privileging of male times by these statutory rules is evident - although it is very much contested whether an analogous recognition of periods of child-care would not have dysfunctional effects and might lead to further labour market discrimination of the "protected" and to substitution processes. In general, the disadvantageous impact of required seniority upon women is higher, the greater the requested seniority is. This is evident in pension regulation and social security rules demanding extensive periods of contribution payments (see chap.6.3.3.). The connection of certain rights with age can be more advantageous for women than connecting them to seniority or the requirement of continuous employment. Age limits can disadvantage women when they are formulated as entrance barriers and maximum age thresholds⁴⁵.

5.9.2. Gender-specific differences in length of employment

Women have on average less seniority than men because of the primary assignment of housework and childcare to them. Interruptions of employment for child-care or sick-care periods are more frequent for women. But behind these general trends there are considerable differences according to generations, occupational groups, sectors of the economy and firm size which are hidden.

Older empirical data from 1979 showed that the average length of employment of women in a firm is 4.1 years shorter than men's⁴⁶. With 1.7 years the difference in length of employment in a firm according to gender was lowest in the age group up to 38 years, for those aged between 39 and 54 it amounted to 5.2 years and in the group of employees aged over 55 it was 6.3 years. However, variations were very big according to size of the firm⁴⁷. Furthermore differences in length of employment in a firm are smaller between women and men when looking at higher qualified activities and occupations with higher status. The seniority of the few forewomen and skilled female blue-collar workers at the top of firm hierarchy was only 2.3 years lower than that of comparable men. For female white-collar employees in higher positions and managerial grades differences to their male colleagues were even smaller (1.1 years), and female civil servants in the upper grades of the executive

45 A maximum age is formulated in various regional statutes of the Länder for becoming a civil servant - not only a normal employee in public service - ("Verbeamtung"), for example in art.10 s.1 of the Bavarian Civil Servants Act : persons over 45 cannot become civil servants ; or there are age limits to enter civil service.

46 Pfarr/Bertelsmann (1989:397 ff.); calculations were based on unpublished data of the Institute for Labour Market and Occupational Research (IAB) of 1979.

47 More recent calculations on the firm-specific job-turnover broken down by size of the firm show that the 'life span' of a post in a firm with less than 20 employees amounts to approximately 6 years, while it lasts for 25 years in big enterprises (Rürup 1989:27).

grades and in the administrative class of civil service (university graduates) work on average 2.8 years longer than their male counterparts⁴⁸. Plausible explanations for these differences are offered by economic theories of the functions of seniority rules⁴⁹.

5.9.3. The costs of interruptions of employment for women and the devaluation of human capital

The seniority rules discussed can discriminate against women and raise their opportunity costs of employment compared to men. Further long-term costs are caused by the interruptions of the "employment career" as such and are theorized in economic human capital theories. Interruptions of employment signify renouncing an accumulation of further human capital in the form of occupational experience. Additional losses can be caused by the 'ageing' of knowledge and professional experience as well as simply by forgetting. This devaluation of human capital leads to income losses at the moment of re-entering the labour market (Helberger 1984, Galler 1988). Higher qualifications of the women considerably increase the potential income losses caused by employment interruptions.

Various economic investigations from the United States estimated the impact of employment interruptions upon women's earning capacities based on empirical data. Mincer/Polachek (1974) indicate the loss of human capital with 5 % per year of interruption. Half of the difference in pay between married women and married men would be caused by gender-specific differences in seniority and continuity of employment and the resulting losses of human capital. Galler (1989) estimates the loss of income capacity for university graduates at 12 % when interrupting employment for one year, and up to 50 % in cases of ten year interruption. These losses are nearly halved when employment is not completely interrupted but substituted by part-time employment.

The devaluation of human capital and future income prospects through interruptions of employment/child-care periods is part of the opportunity costs of time allocation

48 Investigation of the Institute for Labour Market and Occupational Research (BIBB/IAB) of 1979 of occupational status of German employees aged 55 and more, quoted by Pfarr/Bertelsmann (1989:407).

49 Incentives graduated according to seniority are a means for firms to assure a sufficiently long period for the amortization of human capital (rewarding 'faith to the firm'). Only when a sufficiently long period of employment within the firm can be expected, extended investments of the firm in firm-specific human capital do pay and can function as incentives for loyalty of the employees as well (incentives through pay are theorized in 'efficiency wage theories', see Lindbeck/Snower 1985 and Rürup 1989). These assumptions are compatible with empirical findings that seniority in big enterprises with developed internal labour markets is at its longest and that seniority increases in correlation to higher qualifications and higher wage levels of women (Mincer/Polachek 1974).

between the exchange and the household economy. The income opportunities in gainful employment are thereby diminished for women, and interdependently raised for men (since the employment interruption of the female partner/mother of the child makes employment continuity of the father possible). These costs of human capital devaluation and connected income losses of women are not adequately compensated, neither by labour law and social security law nor by family law regulation.

5.10. Maternity leave, parental leave, family-related entitlements to time-off

Labour law entitlements to time-off or rights to reduce working time to care for children or for other needs of household members are crucial for the compatibility of employment and housework. They influence the labour market position of women, discrimination based on gender and the gendered division of work. The distribution of the costs for these working times within a society is a measure for the level of discrimination against women and for "quality of life" in general.

Within the trend away from gender-specific rights and towards gender-neutrally formulated entitlements the labour law right to maternity leave for employed women, which reached the highest level between 1979 and 1985, was reduced after 1985 again to a lower standard and substituted by a parental leave based mainly on social security law, independent of the employment status of the mother/father. Parental leave contains various restrictions and rules which discriminate against the employment of women during parental leave. In opposition to proposals which were more oriented towards the Swedish model of parental leave, working time reductions and the financial coverage of wage losses during this time through 'parental insurance', up to now no right has been introduced in the FRG to working time reductions for parents (exceptions are the public law regulations for civil servants)⁵⁰. In case-law starting points for a different interpretation of the managerial prerogative to dispose over time of employees with small children are to be found only in a few judgments of the lower instances. The lack of 'parental insurance' covering the wage losses during periods of shorter working times caused by child-care

⁵⁰ The law regulating the rights and duties of established civil servants granted rights to time-off for childcare initially only to female civil servants. The 6th Statute amending rules governing the public service of 1969 regulated the right to part-time work and long-term leave of female civil servants and judges in cases where at least one child below the age of 16 lived in the household. Long-term leave was possible if there was one child below the age of six or at least two children younger than 10 years. The 5th Statute of 1984 amending civil service regulations improved these rules which are now gender-neutral. Within a total time-range of 18 years leave and reduced working time for family-reasons can be granted. The total leave can amount to nine years (formerly six years).

duties as well as the lack of economic incentives for men to take over housework and care further lead to the result that parental leave is taken up 95 % by women and that the gendered division of labour stays mainly unchanged.

5.10.1. Maternity leave of the employed women under the Maternity Protection Act

The Maternity Protection Act (MPA) contains a number of unalienable prohibitions to employ pregnant or breastfeeding women for certain tasks and special working time regulations for this group. Not employed women are not covered by these rules. However, certain groups of female employees enjoy no or only reduced protection :

- Temporary employees and seasonal workers : they are protected as long as the contract lasts, but when the fixed term expires, there is no further protection
- Domestic servants engaged in a private household to do domestic work in a way that does not demand their whole time and labour power : they have no right to maternity pay during maternity leave against the employer, para.11 s.3 MPA, and protection against dismissal is limited to the first five months of pregnancy⁵¹
- Family helpers in agriculture : No maternity pay from the sickness insurance of farmers is paid to family members according to para.27 Sickness Insurance for Farmers Act if they do not have an employment contract. They receive only a single payment of DM 100,- (para.25 of the above mentioned statute).

The main regulations in the Maternity Protection Act concerning working-time are the following :

- Prohibition to employ pregnant women six weeks before the expected date of delivery (para.3 s.2 MPA)
- Prohibition to employ women during eight weeks following the delivery, in cases of premature birth and multiple birth this period is extended to twelve weeks (para.6 s.1 MPA)
- Entitlement to paid breaks for breastfeeding during work (the necessary time, at least two times half an hour a day or a total of one hour). This regulation is explicitly valid also for homeworkers (para.7 MPA)

⁵¹ This exception and reduction of rights of para.11 s.3 MPA is not valid for full-time working employees in private households and for women employed mainly to fulfill educational tasks or nursing within the household since their activity is not subsumed under the concept of "domestic work".

- Prohibition on overtime work and during the night from 8 p.m. to 6 a.m., on Sundays and public holidays for pregnant women and breastfeeding mothers (with exceptions for the hotel and catering sector, agriculture, health care institutions and hospitals etc.).

During these periods of employment prohibitions the assured 'maternity wage' to be paid amounts to the average earnings during the last three months before pregnancy (para.11 MPA). The problem with this regulation is that not the whole maternity pay has to be financed through an insurance, thus distributing the financial risk equally between all insured persons and employers, but that only a part is paid by sickness insurance and the rest by the single employer. The sickness insurance maternity pay amounts to DM 25,- daily during the maternity leave of 14 weeks (six weeks before, eight weeks after confinement), para.200 Imperial Insurance Act. The difference between the former earnings of the female employee has to be made up by the individual employer. This means that the financial risk is distributed unequally between employers : the costs are higher for enterprises with a high proportion of female employees, a high proportion of women in certain age-groups or for female employees earning relatively high salaries. These rules can act as negative incentives for women's employment and should thus be substituted by regulations spreading the costs equally between all employers according to insurance principles. The Federal Labour Court had expressed doubts about the constitutionality of the above-mentioned rule because some financial risks were transferred to employers unilaterally, but the Federal Constitutional Court rejected these arguments⁵². Since 1985 a voluntary insurance procedure has been introduced by the Employment Promotion Act, limited to small enterprises with less than 20 employees (para.10 ff. Continuation of Wage Payments Act)⁵³. Generalizing this procedure of financing maternity pay by an assessment system and extending it to all firms independent of the number of employees is necessary to reduce discrimination against women.

An extended maternity leave for female employees, but only for the biological mothers of children (not for fathers and not for adopting parents) existed in the FRG **between 1979 and 1985**. After the end of the eight weeks maternity leave after delivery a

52 Federal Labour Court BAG AP no.5,5 concerning para.11 MPA ; Federal Constitutional Court, Neue Juristische Wochenschrift (1974:1461).

53 The compensation of employers' wage costs for 'maternity pay' according to insurance principles is possible for firms employing regularly (without trainees) not more than twenty employees. Up to 80 % of the employer's costs for topping up the maternity pay according to para.14 s.1 MPA are substituted. This procedure is financed by sickness insurance institutions to which the relevant employers have to pay contributions.

prolonged maternity leave could be taken up until the baby reached the age of six months (para.8a MPA of 1979)⁵⁴. For this period a maternity pay of DM 25,- daily was paid by the sickness insurance and financed by the State (up to the maximum sum of the former wage earned). The dismissal of the woman was prohibited until the end of two further months following the maternity leave. This prolonged maternity leave was taken up by 95 % of all employed mothers. This entitlement was cut down slightly in 1982⁵⁵ and abolished in 1985 when the parental leave was introduced.

Against this regulation of maternity leave different **legal proceedings** were initiated claiming an **infringement of the principle of equal treatment** of art.3 section 2 German Basic Law. The Federal Constitutional Court confirmed however the constitutionality of the regulation with the problematic statement that it was justified by the "biological differences" between the sexes as an objective ground⁵⁶. The European Court of Justice had to decide on the compatibility of this regulation with the EC Directive 76/207 in the case 'Hoffmann v. Barmer' and held that the exclusion of fathers from maternity leave does not infringe the equal treatment Directive⁵⁷. The ECJ did not interpret the concept of maternity defined in article 5 of the EC directive 76/207 in more detail, but rather interpreted it widely, as self-evident in a way which leaves room for gender-stereotypes and discriminatory interpretations. The ECJ stated that the national legislator has the competence to regulate the particular relation of a woman with her child in the period after pregnancy and giving birth. E.C. Directive 76/207 would not aim at the regulation of matters of family organisation or at changing the distribution of responsibilities between parents. This restrictive interpretation of the normative goal of the equal treatment Directives and the lack of critique towards the possible discriminatory function of 'protectionism' towards mothers when assigning roles and gender-stereotypes to women may be connected to the fear of the Court to extend the entitlement to fathers as well. This "levelling up" of the right would have extended the number of entitled persons considerably and thus increasing the resulting costs for employers heavily.

54 A requirement of entitlement was a past period of employment of at least nine months or entitlement to unemployment benefits according to the Labour Promotion Act, para.8a s.1,2 MPA 1979.

55 Since 1 January 1983 the maternity pay for the extended leave was cut down and amounted on average only to DM 510,- monthly instead of the former sum of DM 750,-.

56 The Federal Constitutional Court expressed this in a decree of 5 August 1989, rejecting a complaint against a decision of the Federal Social Security Court, see the report in *Der Betrieb* (1986:2286) and *Pfarr/Bertelsmann* (1989:297ff.) giving an overview of the relevant case-law.

57 Preliminary proceeding initiated by the Regional Social Security Court Hamburg by a decision of 9 August 1983 ; Judgment of the ECJ of 12 July 1984, Case 184/83 *Hoffmann v. Barmer Ersatzkasse*, [1985] E.C.R. p.3047-3088.

This failed interpretation of the equal treatment principle by the ECJ became even clearer in another judgment concerning an infringement procedure of the Commission against Italy⁵⁸. According to an Italian statute of 1971 maternity leave could be granted to adopting mothers in the first three months after the effective integration of the child in the adoptive family, but not to the adopting father. The ECJ refused to hold that this rule was an infringement of the equal treatment Directive. The choice of the Italian legislator would be justified since it was based on the legitimate intention to approach the circumstances under which an adopted child is integrated into the adoptive family as much as possible to the circumstances under which a new-born legitimate child is integrated into the family. This judgment legitimizes the traditional gendered distribution of labour - and thus discriminates against women.

5.10.2. Parental leave for mothers/fathers since 1986

Parental leave for parents, mothers or fathers independent of their employment status was introduced in 1986 by the Federal Statute on Educational Allowances 1985. The entitlement of fathers is linked indirectly with family status, since only the person having the right to custody of the child is entitled to parental leave. According to para.1705 of the German C.C., only the mother has the custody of the child born out of wedlock. The unmarried father of a child cohabiting with the mother but not being married to her has therefore no entitlement to parental leave - the regulation privileges marriage and discriminates against other forms of cohabitation.

Also non-employed mothers/fathers can take up parental leave, no further periods of employment or seniority are required. Entitlement is excluded during the maternity leave of employees based on the Maternity Protection Act. It is also excluded where the spouse is already not in employment (para.15 s.2 no.1,2 Federal Statute on Educational Allowances, abbreviated as FSEA) if the reason for it is not unemployment or training/further education. This assures the obligation of at least one spouse to earn a living through gainful employment and hence avoids an increase in the number of persons entitled to receive social assistance benefits. A husband whose wife stays at home is thereby prevented from claiming such an additional benefit, i.e. parental leave⁵⁹. The classical model of the gender-specific division of work between the 'breadwinner' and the 'homemaker' is kept intact as

⁵⁸ Judgment of the ECJ of 26 October 1983, Case 163/82 (Commission v. Italy), [1983] E.C.R., 3273-3298.

⁵⁹ An exception is only made where the education of the child cannot be guaranteed by the housewife/mother, for example because of sickness or similar events. In this case the employed spouse is also entitled to parental leave (para. 15 s.3 Federal Statute on Educational Allowances).

well as the bundling of risks of interruptions of employment in the person outside the employment sphere, thus saving costs for employers.

A mother/father who is not in gainful employment or has no full-time gainful employment is entitled to parental leave (para.1 s.1,4 FSEA)⁶⁰. It is positive that the parental leave can be combined with part-time employment - but only with part-time employment in the firm of the former employer and up to 19 weekly working hours. Possible part-time work during parental leave has thus been allocated in the time-range of employment not liable to unemployment insurance contributions (with the exception of exactly 19 weekly working hours which are liable to unemployment contributions from 1 July 1989 on, since from this date the threshold for employment liable to unemployment contributions has been shifted from 18 to 19 hours a week). There is no legal right to part-time work against the employer so that the possibility depends on the goodwill and cooperation of the firm.

The duration of the parental leave has been raised incrementally from 10 months in 1985 to 12 months for children born after the 31 December 1987 and 15 months for children born after 30 June 1989 up to 18 months for children born after 30 June 1990. During parental leave employed mothers are protected against dismissal. The protection against dismissal is slightly weaker than the absolute prohibition to be dismissed during pregnancy or during the maternity leave based on the Maternity Protection Act, since the competent authority can in special cases grant permission to dismiss the employee on parental leave⁶¹.

The amount of parental allowance paid during parental leave is DM 600,- monthly, and from the six months of the child onwards the amount will depend on a means-test (para.5 FSEA) so that it is reduced in many cases. Also social insurance transfers are

60 Recipients of transfer payments based on social security insurance are not entitled to the child allowance paid under the FSEA when the social security benefit they receive is based on an employment form other than 'short-term'. There is an entitlement, however, for recipients of unemployment help which is based on a means-test and those receiving maternity pay of sickness insurance institutions.

61 Up to now there is only very little known about how this regulation is handled by the authorities and whether the protection against dismissal is interpreted less strictly in cases of parental leave than in cases of maternity leave. The General Administrative Rules of the Federal Ministry for Labour and Social Affairs (Bundesregierung Drucksache 572/85) gave as examples for special situations in which special permission to dismiss should be granted by the authorities : the closing down of a firm, the endangered economic existence of the employer or the employer coming close to this danger because a firm with five or less employees would need to dismiss the employee on parental leave since the continuity of the firm 'required replacement with a substituting employee, having similar qualifications, who can be engaged only if an employment contract temporarily not limited is stipulated with this person' (para.2 s.2 *ibid.*).

deducted from the allowance so that employed mothers have no entitlement to the educational allowance as long as they receive maternity pay during the maternity leave (i.e. 6 weeks before and 8 weeks after delivery).

The **social security dimension of parental leave** includes continued sickness insurance without having to pay contributions (para.311 no.2 Imperial Insurance Act). During educational leave there is, however, no entitlement to sick pay. In unemployment insurance, periods of parental leave when the parental benefit is received are considered to be equal to insured times with contribution payments during employment (para.101 s.1 no5 Labour Promotion Act) and can thus contribute to building up entitlements to unemployment benefits and other benefits under the Labour Promotion Act. In pension insurance periods of childcare are recognized for the first time for pension purposes, they are evaluated with 75 % of average earnings⁶². The rules on recognition of child-care periods for pension purposes contain various aspects disadvantaging a contemporaneous employment of a mother in pension terms (see chap. 6.3.3.3.).

Empirical data on take-up rates of parental leave show a continuity of the gendered division of labour. Only 5 % of those taking up parental leave are men (Bundestag Drucksache 11/2369). Nearly 100 % of the women, not in gainful employment, take up parental leave, compared to 94 % of employed mothers. It is remarkable that of the employed mothers most interrupt their employment only for six months. Only 3 % of employed mothers leave longer than these six months and take up parental leave at its full length⁶³. The trend that women's interruptions of employment on occasion of the birth of a child become more rare and shorter is certainly influenced by the fact that the opportunity costs of employment interruptions for women are rather high (see chap. 5.9.3.). Another reason is that parental allowance after the sixth month of the child is paid only on the basis of a means-test so that for a number of households from this point of time on reductions in the allowance are to be expected. Another trend is that most of the women returning to their job after parental leave reduce their working time : 44 % of the returners reduced their employment activity⁶⁴.

62 Reform of Survivors pension and Recognition of Child-care Periods Act of 11 July 1985 (Bundesgesetzblatt I 1450), National Pension Insurance Benefits for Mothers of the birth years before 1921 Act -Benefits for child education Act of 12 July 1987 (Bundesgesetzblatt I 1585).

63 Chronik für Arbeitsmarktforschung no.38, October 1989, p.14.

64 Reply of the Federal Government to a parliamentary question of the SPD concerning re-entering the labour market after periods of child-care (Bundestag Drucksache 11/2369).

5.10.3. Parental leave provisions in collective agreements and plant agreements

Regulation of parental leave in collective agreements going beyond statutory provisions are a very recent phenomenon. In 1989 the trade union HBV (trade, banking and insurance sector) included relevant arrangements. The collective agreements for the retail sector (a branch with a high proportion of female employees) included a right to parental leave in all firms with more than 100 employees. One condition is employee seniority of at least four years (in some regional agreements it is specified that at least two of these four years must be after the end of the training period in the firm). The total duration of the educational leave (including the statutory parental leave) is a maximum four years. Taking it up in parts and splitting it between two parents working in the same firm is possible. During parental leave the employment relationship is suspended. The parental leave period is taken into account for calculating length of employment, but not for calculating seniority within the firm. When returning to the job, the employee is entitled to an activity "possibly at a post of equal value in the firm". In the regions of Hessen and Nordrhein-Westfalen part-time work is possible during the parental leave, in Hamburg employees on parental leave should have a priority to work temporarily substituting other employees in holidays, sick leave etc.

The collective agreement signed by the same union HBV for the banking sector contains a slightly weaker version of the above : only a conditional promise to re-instate the employee after the prolonged parental leave is made, not a binding one as for the retail trade sector. Women and men leaving the firm after the end of the statutory parental leave can re-enter the firm within three and a half years after the birth of the child "if a request for the special qualification and abilities for a vacancy to be filled in the same firm or in a close subsidiary exists or can be developed". Another condition is at least five years seniority in the firm.

The collective agreement between the metal trade union IG Metall and the Volkswagen Company provides for parental leave of up to three years (including the statutory parental leave). The collective agreements for the metal branch of 1990 provide, with the exception of the regions Berlin and Nordrhein-Westfalen, for enterprises with more than 500 employees the possibility to be re-engaged after interruptions for child-care at a comparable post of equal value - "except if a proper post is not available and will not come into existence within the next future". At least five years seniority in the firm is a prerequisite to this right. The collective agreements for the metal branch of 1990 also provide for the possibility of flexible arrangements for the start and finish of daily working time for employees with children in

childcare facilities or with nannies within the range of possibilities of the enterprise, as well as a very vaguely formulated clause on the space for decision-making and discretion of the individual regarding the distribution of working times.

Collective agreements at the plant level or unilateral programmes of firms without participation of the works council have been made by some big companies in recent years. It is remarkable that nearly all of these firms are to be found amongst the leading enterprises with the highest sales turnover rates in the FRG⁶⁵, all of them investing considerable resources in in-firm training and promotion programmes, having developed internal labour markets and competing for qualified staff. Since they made heavy investments in firm-specific human capital, this works as an economic incentive to try to keep the firm-trained personnel within the enterprise, also after periods of employment interruptions. These companies also usually follow long-term personnel planning policies.

The plant agreement for the Deutsche Bank, in force since 1 April 1990, provides for a legal entitlement of an employee to a part-time job during periods of child-care. This entitlement is not limited in time. The statutory parental leave of 18 months can be prolonged for a further six months. Individual guarantees of re-instatement can be made to 'particularly precious employees' up to the age of 4 of the child, for more than one child up to the maximum age of 7 years of the oldest child. In these cases the employee has a right to a post of equal value to the former one. Special training courses and further education is offered to employees on parental leave. Initiatives of parents to institutionalise child-care facilities can be sponsored financially. Periods of parental leave are taken into account for the entitlement to occupational pensions. During this period special bonuses like shares for the personnel, extra pay in cases of birth of a child, educational subsidies or anniversary bonuses are not shortened. The plant agreement is valid for mothers and fathers with at least three years of seniority in the firm.

A re-employment guarantee after having left the firm for child-care periods is given by BASF Ludwigshafen since 1986 for the duration of seven years after the mother/father left the firm for family reasons. 50 % of the women entitled to this right have taken it up. Besides these 243 women only 3 men took the same opportunity (Süddeutsche Zeitung of 25 July 1989). The chemical company Höchst/Frankfurt guarantees re-employment within a

65 See the list of the companies with the highest turnover rates in the FRG of E. Erlenbach, 'The hundred biggest enterprises', Frankfurter Allgemeine Zeitung of 22 July 1989. Daimler-Benz was on place 1, Volkswagen on place 3, BASF on place 5, MBB still on place 36 (in the meantime merged with Daimler), IBM Germany on place 23. The Deutsche Bank is according to transaction volume the leading German credit institution.

period of three years after the birth of the child. No guarantee, but a prerogative for re-employment is granted for a period up to seven years after child-birth.

In the metal sector, Daimler-Benz is granting family leave of up to ten years (plus parental leave) to employees of the holding company or the Mercedes-Benz Company. The employment relationship is not terminated during this period. Further employment in a "similar" job is guaranteed. During family leave participation in further training courses of the firm is possible. For occupational pension purposes these periods of 'family breaks' are evaluated with one third of the average entitlement. This is valid for male and female employees with at least five years seniority. Furthermore it is planned to extend the proportion of part-time jobs in the enterprise, which amounts to 1.5 % at the moment.

MBB assures via a plant agreement of 1 January 1986 a right to re-employment of a mother/father when the employment relationship is terminated at the end of the parental leave within three years after the termination if a free post is available and when in the meantime no other employment relation with another employer had been stipulated. Former seniority is taken into account in cases of re-employment, the period in between after termination until the re-employment is recognized up to a maximum of 18 months seniority. This holds true also for the calculation of occupational pensions.

IBM Sindelfingen has offered since 1986 the possibility of three-year parental leave (including the statutory one) for parents. This is, however, not formulated as a guaranteed right, but the firm will take a discretionary decisions in each individual case and take into account business needs.

5.10.4. Rights to time-off for nursing sick children, family members or other persons

The applicability of the most important legal provision, **para.616 German C.C.**, is mostly eliminated in practice by contractual agreements or collective agreements, since this provision is open to being contracted away⁶⁶. According to para.616 German C.C., an employee is entitled to continuous wage payments in cases of a temporary impediment to work, if the absence from employment lasts only 'a proportionately not relevant time' and the reason of the impediment is 'a reason based in his person without his fault'. This includes also the necessity to nurse sick children or relatives which has to be proved by a medical certificate. A period up to five days has been considered to be a 'proportionately not

⁶⁶ Federal Labour Court, *Neue Juristische Wochenschrift* (1983:1079).

relevant time' in case-law⁶⁷. This time period starts to run again with a new sickness being based on a different cause. The employer is obliged to continue wage payments.

This statutory regulation is the most favourable one for employees - and is usually contracted out. It is shown once again that "favourable legal positions (as the provision of para.616 German C.C.) then disappear gradually (be it via collective agreements) when they are used usually by women to cope a bit better in practice with specifically their workload of professional work, housework and care" (Bode 1990:100).

The following collective agreements contract away the applicability of para. 616 German C.C. :

- Regional framework agreement for wholesale and foreign trade for Nordrhein-Westfalen of 1 April 1986 (applicability fully excluded, para.10 of the collective agreement)
- Regional framework agreement for the metal trade in Nordrheinwestfalen of 29 February 1988.

Various other collective agreements exclude the applicability implicitly while limiting the entitlement to paid time-off (leaving the unalienable social security entitlement to five days off untouched, see chap. 6.3.2.1 and 6.4.3.) :

- The universally valid framework agreement for the cleaning sector of 8 May 1987 limits in para.10 entitlement to one day off a year for sick-care
- The national collective agreement for white-collar workers in the civil service limits the obligation of the employer to continue wage payments in cases of sick-care to six days a year (including the five days based on social security entitlements)
- One day per year is granted by the framework collective agreement of the Volkswagen company valid since 1 January 1985/1 January 1989 in cases of sickness of a spouse, child, parent or parent-in-law living in the same household as the employee. Entitlement to continuous wage payment is granted only when no alternative entitlement, for example against sickness insurance, exists.
- Up to five days a year in cases of severe sickness of the spouse or a child up to the age of 14 years is granted by the regional metal industry agreement for

⁶⁷ Federal Labour Court, Neue Juristische Wochenschrift (1980:903).

Schleswig Hollstein of 1 January 1979/1 January 1988, a right to wage payment by the employer is given only when no alternative entitlements exist. Two days-off are granted under the same conditions in the framework agreement for the metal industry of the Saarland of 1 April 1990. Two days off are also granted for the metal industry in Nordrhein-Westfalen for severe sickness of the spouse under the additional condition that a child younger than 8 years is living in the household

- Two days off in cases of severe sickness of a child between 8 and 12 years old are granted by the national framework agreement for blue-collar workers in the shoe-industry of 1 January 1985 ; three days off for children of the same age in the framework agreement for blue-collar workers of the clothing industry of 1 January 1980 ; up to 5 days for children aged between 8 and 14 years in the framework agreement for blue and white-collar employees of the metall industry Nordbaden-Nordwürttemberg of 1 April 1988.

All the above-mentioned collective agreements include clauses requiring a medical certificate for the severe sickness, the prove of need of care and the proof that no other person can take over the sick care and nursing.

The motivation for excluding the applicability of para.616 German C.C. via collective bargaining is usually that a social security entitlement to five days pay for sick-care against sickness insurance institutions exists (para.45 Social Security Act, formerly para.185 c Imperial Insurance Act, see chap.6.4.3.) which is connected to a right of five days off a year against the employer and which is subsidiary to para.616 German C.C. This has two advantages for employers : first the obligation to pay continuous wages for sick-care is shifted away from the individual employer towards the sickness insurance, and furthermore the entitlement to days-off for nursing sick relatives is limited to five days a year (reduction of times of interruption of employment), and the group of sick persons mentioned in the regulation is also reduced. For employees instead the situation worsened .

Employees are worse off since social security entitlement is more limited. Para.45 Social Security Act V contains a number of restrictions : entitlement is given only to care for sick children (not relatives or spouses in general) and is time-limited (the maximum period are five days off a year; the sick child must be younger than 8). Only employees paying obligatory contributions to sickness insurance are entitled, not employees with 'minor working hours'. The right to time-off and sick pay is limited to normal working days and is not valid for example when children become sick during holidays. Additional transaction

costs are caused by administrative procedures, applications for sickness insurance and bureaucratic problems with sickness insurance which has to pay the sick-care benefit.

Furthermore no entitlement is given when another person living in the household can take over the sick care - following the model analysed already several times to assign care activities to the housewife to enable the male employee to utilize his labour power without restrictions in employment). The Federal Labour Court stuck to the same logic when deciding that only one parent out of an employed couple is entitled to take up the rights of para.616 German C.C. and that they have to choose since usually sick-care by both of them will not be necessary⁶⁸.

If no entitlement to time-off and pay according to para.616 German C.C., or para.45 Social Security Act V, exists or when it is exhausted, a further **right to unpaid holidays** may exist. The Federal Labour Court has confirmed in its judgments that employees are entitled to take unpaid holidays in order to care for sick relatives⁶⁹. If an employer nevertheless refuses to grant time-off, absence from the firm of the employee is to be considered as being excused⁷⁰.

A similar **right to special holidays in the public service** can be derived from para.50 s.2 of the national collective agreement for white-collar employees in the civil service. An 'important ground' for special holidays based on this regulation is, according to a decision of the Federal Labour Court from January 1989⁷¹, also caring for small children. These special holidays have to be granted by the employer with reasonable discretion (para.315 German C.C) when an important reason exists and the situation in the service or the enterprise allows it.

The former regulations in the Ex-GDR⁷² were much more favourable to employees, but have been abolished in the unification process together with other rules which were mainly advantageous to women, since unpaid housework by women increases market efficiency and profit maximization.

68 Federal Labour Court, AP no.51 concerning para.616 German C.C.

69 Federal Labour Court, judgment of 2 December 1982, Der Betrieb (1983:1602). -

70 Federal Labour Court, judgment of 20 July 1977, AP no.47 concerning para. 616 German C.C.

71 Federal Labour Court judgment of 12 January 1989, case number 8 AZR 251/88.

72 See the report on family policy and former benefits in the Ex-GDR of Scheurer (1990). The social-policy background is enlightened by a feminist analysis of the development of the regulation and situation of female labour-ower in the Ex-GDR by Bastian/Labech/Müller (1990). For an international comparison of time-off for family responsibilities and sick care in Europe see EIRR no.189, October 1989, 17-222.

6. Female times and male times in social policy - patriarchal redistribution relationships in social security law

6.1. Structural basis of women's disadvantage in social security law

Forms of direct discrimination on grounds of gender have been mostly abolished in the FRG's social security law¹ - but often only very late, partly only after case law of the Federal Constitutional Court criticizing infringements of the equality principle of art. 3 II German Basic Law. Thus it was only in 1983 that the unequal evaluation of training periods of men and women for pension purposes was abolished (women's training periods were evaluated as 25 % below those of men). For decades the orphans of the woman liable to social security contributions were entitled to rights only under restricted conditions². Until 31 December 1985 only the orphans and widows of employed men had a right to survivors' pensions. However, despite formal changes, social security law contains still numerous rules that discriminate against women indirectly and on grounds of family status³.

The stereotypical patriarchal family model oriented towards the 'housewife marriage' and presupposing the male-oriented time organization of the exchange economy, has still strong effects in social security law. This model insures women an income not through gainful employment but through maintenance claims and marriage as an institution of maintenance. The income of men, in contrast, is guaranteed primarily through paid employment and complementary social security benefits through insurance. True, women as employees have basically the same access to the social insurance system, but they receive benefits less frequently or at a lower level because of their average shorter periods of employment and lower pay levels.

Alternatively, it is still partly the case that women's access to social security benefits is mediated through their status as wife which means that they are not entitled to personal rights, but have only derived rights.

1 For the implementation of the EC directives 79/7, 86/378 and 86/613 on equal treatment of women and men in social security systems in the FRG and the other EC member states see Scheiwe (1990:93 ff.).

2 See the judgement of the Federal Constitutional Court of 24 July 1963, NJW 1963,1726.

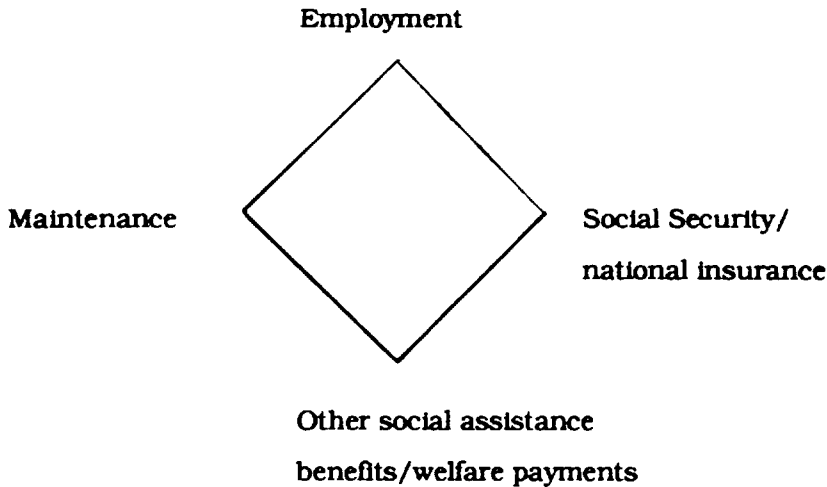
3 Very instructive is the collection of investigations edited by Gerhard/Schwarzer/Slupik (1988) "At the expense of women. Women's rights in the welfare state" containing the results of a research project "Women's rights in the welfare state" of the Hamburger Institut für Sozialforschung. See also Kickbusch/Riedmüller (1984).

The structural bases for the discrimination of women in the welfare state are (Gerhard et.al. 1988:27f.) :

- the close connection of the upper tier of better benefits to paid work;
- the widespread non-recognition of housework, especially child care as a basis for entitlement;
- the prolongation of the labour market's pay discrimination via the link between the former wage level and entitlement to and level of benefits;
- the privileged role of the patriarchal model of marriage and the family (the "breadwinner/homemaker" model) which is subsidised in various ways at the expense of other forms of marriage and cohabitation.

6.1.1. The hierarchy of income resources and the unequal distribution of income between men and women

The main income resources are gainful employment, maintenance payments (in cash and in kind) and state transfers (insurance benefits and other social assistance/welfare payments).



These income resources are distributed unequally between men and women. The assignment of the power of disposition over these income resources was formulated in a gender-specific way for a long time. These rights have been designed increasingly in a gender-neutral fashion. However, this has happened in social security law more slowly than in other fields of law. While the national insurance system has been more strongly individualized, the social assistance and welfare provisions contain still many rules connecting rights with status (family status, household composition, aggregated household income). Social assistance benefits and welfare payments are granted only when no income

through employment can be provided and when also marriage and 'family solidarity' as maintenance institutions fail and when the aggregated household income remains below a certain threshold ("subsidiarity principle")⁴.

In general all individuals in a capitalist economy are relegated primarily to employment and gainful occupation as a source of income (apart from the minority gaining a sufficient income from capital or private property). However, while for men continuous employment is the main source of income (the social security benefits connected to labour market participation replacing wages), for numerous women marital maintenance is the only or a complementary basis of income due to the primary assignment of housework times to women. Because of their shorter times in employment (daily and weekly working times and seniority), they receive social security insurance benefits to a lesser degree since these are connected to length of employment and amount of paid contributions. Women rely more on welfare payments than men since their personal income is lower on average.

6.1.2. The two-tier system of social security law

The system of social benefits is a two-tier one. In the upper part are the better benefits of the national insurance system. The duration of payment of the benefit and its amount is tied to wage work : the longer/more continuously employment is and the higher wages are, the higher the insurance benefit and the period of entitlement. A frequent requirement for receiving benefits is a minimum period of employment or minimum number of weekly working hours. The insurance principle guarantees rights on the basis of own contributions according to the paid amount (an exception is health insurance since, independently of the amount of contributions paid, all insured have access to the same benefits in kind). The social insurance institutions are constituted as corporations under public law; the parties to collective bargaining participate in the management, organization and control of these institutions.

In the **second tier** are the benefits of **social assistance and welfare benefits** which are connected to employment in a reverse way : To be entitled to social assistance payments, it must be proved in many cases that no gainful employment can be achieved and that the (aggregated household) income does not exceed a certain threshold. Welfare

4 The "subsidiarity" of social assistance is assured through para. 2 Federal Social Assistance Act (Bundessozialhilfegesetz) : "Social Assistance is not granted to a person who can help herself or who receives the needed help from others, particularly from relatives or other social insurance institutions. The obligation of others, especially of those liable to maintenance payments or of other social benefits, remains untouched."

benefits are granted only after an inquiry of the particular case and in cases of "need". There is greater leeway for discretion and therefore less legal certainty compared to social insurance entitlements. The examination of these requirements in a bureaucratic procedure represents per se an interference of privacy and is often associated with humiliation and social control⁵ - even if in the last years the entitlement to social assistance has been shaped as a personal right (para. 4 Federal Social Assistance Act).

This splitting up of the welfare state into "a worker and a poverty policy" (Gerhard 1988) structurally disadvantages women. They less frequently qualify for the upper tier of the social security system because of their on average shorter working times and lower seniority, while they rely overproportionately on social assistance benefits and welfare payments when they do not earn wages or high enough wages, do not receive sufficient insurance benefits or maintenance payments. Women, particularly lone parents or divorced women and elderly women without high enough pensions, are thus overrepresented among welfare recipients. This pattern is reinforced by the increasing instability of marriage as an institution of maintenance (statistically, each third marriage arranged nowadays will end in divorce) as well as by the failure to fulfill maintenance obligations.

The underlying normative model of social security law constructs income from paid market work as primary. Former market participation is evaluated higher than women's non-market work in the household economy also when it is interrupted through unemployment, sickness or disability caused by professional diseases or work accidents, unfitness to work. Non-market work is essentially taken into account only as the maintenance contribution of the wife towards the "breadwinner" husband or of the mother towards the children. Childcare, certain types of domestic work and sick care are recognized in social security law only to a limited extent : they are considered to be a legitimate reason for not taking up paid employment as regards entitlement to welfare payments⁶.

5 As for example the possibility to get an applicant "weaned-off from work" "used to work through an adequate activity or to test the willingness to work of an applicant" (para. 20 Federal Social Assistance Act).

6 Para. 18 section 3, 2 Federal Social Assistance Act : "He cannot be expected to take up employment especially in the case that thus the orderly education of the child might be endangered ; moreover the duties are to be considered which are imposed upon the applicant by running a household or caring for a relative".

6.1.3. Redistribution through the state and the position of women

The institutions of the welfare state and social security law contribute - besides marriage and family law regulating primarily the duty of time allocation in housework - to the outcome that **women's contribution to the welfare state** (child rearing, care, housework etc.) will continue to be (nearly) free for the state and that men, married or single, mainly profit from it.

Tax law provisions have an indirect, but very important impact thereupon⁷.

The **state as the mediating agent between the systems of the exchange and the household economies**, market and home-production coordinates the reproduction of labour power and participation in market work. Between the tendency to free further labour power for the labour market (transforming all individuals into abstract bearers of labour power) and the interest in upholding the stereotypical patriarchal family model and the unpaid housework of women, there are tensions and contradictions. Institutions of the welfare state, including infrastructures and public services, influence changes in the household economy by means of substituting partly for women's private housework time (e.g., the ban on child labour, schooling, prolongation of obligatory schooling and training, pension insurances). This changed also the function of children in the household economy as labour power and as "old age insurance".

Also the **organization of infrastructures** (particularly child care facilities, schools, time structure of public institutions, opening hours of shops) influences the organization of the household economy and thus the labour supply of women as well as the compatibility of professional work and care activities for women and men.

7 The German tax law strongly favours marriage as a redistribution tool, particularly the combination of a fully employed spouse with a partner engaged very little or not at all in gainful employment (independent of having children to be reared). The "tax splitting" between spouses allows them to re-allocate the tax progression between them in a way that the spouse with the higher earning chooses the lower tax progression class, while the income of the less or non-earning spouse is taxed at the higher progression rate. This is clearly a disincentive for women's employment especially when relatively high income differences exist between spouses. Thus it favours the patriarchal housewife/breadwinner model of marriage and disadvantages other forms of cohabitation or both spouses being gainfully employed. The "tax splitting" of spouses can be described as a "marriage premium for men who can afford a housewife" (Memel 1988) and causes losses in tax contributions for the state which amounted in 1987 to about DM 34 200 millions a year - "far more than the total expenses of the state for children by means of tax reductions, child allowances and educational allowances" (Gerhard 1988:29). For the discrimination of women through tax law comparing different E.C. member states see Meulders (1988), with regard to tax law as disincentives for women's employment comparing the FRG and Sweden see Schettkat (1987). Galler (1988) investigates the negative impact of tax law on families with children in the context of the whole range of family assistance programmes.

The **state and public sector as employer** affect women's employment since the demand for female labour is strongly increasing when public services substituting family production are expanded. This trend was to be observed mainly in Scandinavian countries, but has not been so pronounced in the FRG⁸. The proportion of women in the public service is, however, also in the FRG relatively high, because the working time arrangements and possibilities to take leave are much more favourable (particularly for civil servants) than in private industry.

Women are affected by **cuts in public expenditure** in a two-fold way. On the one hand this leads to reductions of jobs in the public service sector and therefore to job losses for women. On the other hand the reduction of state services and transfer payments leads to the substitution of these benefits or services by unpaid work of women in private households (and thus the supply of women's working time on the labour market will be affected negatively). Furthermore a trend towards overproportional disadvantage for women can be observed when social security benefits are reduced⁹. Cuts of national insurance benefits affect more women than men when the requirements concerning seniority and continuity of employment as entitlement to rights are augmented. Cuts of welfare benefits affect women more than men since they are more frequently the recipients. "Men's lobbies" have more power to get what they want when cut-backs of public expenditure and redistribution measures have to be decided.

6.2. Income on grounds of social assistance and other entitlements of 'welfare law'

Women currently comprise the majority of recipients of welfare payments : 55 % are female. The proportion of women receiving social assistance benefits remained fairly stable from 1985 to 1988, while the absolute number increased. In the 1960s, a time of full employment, the female proportion was even higher (up to 67 %), the trend since is downward (Schallhöfer 1988:237).

8 The impact of the growth of the "social welfare industry" (defined as public and private activities in the fields of health care, education and social affairs) upon the labour market, especially women's employment is researched by Rein (1985) comparing in his study the United States, Sweden, the U.K. and the FRG. In Sweden the expansion of the public sector and the concentration of women in "welfare services" provided for mainly by the state is an important factor for the high employment participation rate of women. In the public service work interruptions and absence for family reasons are less stigmatized than in the private sector, but wages and career prospectives are poorer (Esping Andersen 1990).

9 An overview of the expenditure cuts and reduction of benefits of the social security system and the connected legal problems can be found in Bieback (1985).

That women are overrepresented among the poor is no new phenomenon : Köppen (1985) showed in her book *Poverty is Female* that in the period from 1880 to 1914 women predominated among the recipients of poor relief¹⁰. The increasing proportion of men among welfare recipients in the last years is mainly a result of continuing long-term unemployment.

The growth of the number of recipients to approximately 4 million persons (1990) - the number almost doubling since the beginning of the 1980s - is also a result of state policy of saving on public expenditure. The reform of the Labour Promotion Act, the cuts in benefits and the requirements of higher seniority as a prerequisite for receiving unemployment benefits have lead to a regrouping : less people get the higher unemployment benefits and more people receive "unemployment help" or welfare payments¹¹.

The target groups mainly affected are **elderly women and lone parents** (of which more than 80 % are women). In 1982 the proportion of women among social assistance recipients in the age group 60 to 65 was 73.3% and 81.4 % of those over 65 years old. Although in the FRG the labour force participation rate of lone mother, especially unmarried lone mothers, is higher than the average female participation rate, their average income is very low. Of the unmarried lone mothers in 1987 55 % were employed, of the divorced mothers 64 %. 33 % of these employed lone mothers had at that time a monthly income below DM 1400,- (BMJFFG 1989:59f.). 18.4 % of all lone mothers received social assistance payments in 1982. The income risks in the "divided welfare state" are cumulated gender-specifically and affect groups which are especially disadvantaged on labour markets on the one hand and not adequately covered through maintenance payments¹² on the other hand.

10 The first official poverty statistic in the German Empire of 1886 showed more than 75 % women in the group of the "permanently supported". In the so-called "open system of poor relief" 68 % were women.

11 This regrouping and shifting between different categories of social security benefits is at the same time an expression of conflicts between the different financing institutions over the amount of their payments. Through the amendment of the Labour Promotion Act 1985 and other budgetary cuts the Federal Labour Exchange Office (Bundesanstalt für Arbeit) was relieved financially, but via the increasing number of welfare recipients the financial burden to be borne by regions, municipal and local authorities more than doubled up to DM 28 700 millions in 1990 (FAZ 3.8.1990) and to 31 600 millions in Western Germany in 1990 (FR 1.6.1991).

12 Even when being entitled to maintenance payments, these rights can often not be realized. Those women who are entitled to social assistance benefits only in case of missing maintenance payments have to go through the bureaucratic procedure of applying for the welfare benefit in each case of missing maintenance payment anew, and its failure has to be proved again. This procedure is very troublesome for the person concerned. The procedure was eased in the case of missing maintenance payments for children through the "Advanced Maintenance Payments Act 1979" (Unterhaltsvorschußgesetz of 23 July 1979, BGBl. I p.1184). A child below the age of 6 years has a right to advanced maintenance payments by the state for a duration of up to 36

Furthermore it has to be taken into account that the relative value of social assistance payments declined since the relief standards which should cover the "necessary existence minimum" (para.12 Federal Social Assistance Act) were not increased in line with standard of living changes (Bieback 1985, Leibfried 1986). In the context of cuts of the welfare benefit standards since 1982 the increase of the benefits was limited to 3 % in 1982 and 2 % in 1983. In addition, the so-called "extra need" (surplus-payment for people in particularly difficult situations), the benefit standards for children, housing subsidies and care allowances were reduced. This affected women heavily. Through the Supplementary Budgetary Acts 1983 and 1984 (Haushaltsbegleitgesetze 1983, 1984) the automatic adaptation of social assistance benefits to the increase of the consumer price index through Federal law was prohibited, and these increased only underproportionately subsequently.

However, since mid 1985 a procedure to define the benefit standards through a "basket of available commodities" was applied again, but the composition of this "basket of available commodities" was not improved essentially and is still inadequate. The benefit standards grew by about 5 % yearly on average (approximately DM 28,- per year). The supplements for "special needs" are now given to recipients from the age of 60 onwards (formerly 65) and introduced for lone parents with a child below the age of 7. These measures favour mainly women.

6.3. Income through social insurance benefits (unemployment benefits, health insurance, pensions)

The proportion of women receiving social insurance benefits is lower according as the requirements of length of employment, minimum weekly working hours and continuity of employment are higher. Egalitarian elements, as for example minimum benefits or equal benefits independent of the height of contributions paid, are largely absent (health insurance and "pensions according to minimum income" for a restricted group of persons being an exceptions). The budgetary cuts in the last years reinforced this trend disadvantaging women in social insurance by changing the requirements for the entitlement to benefits, since the factor of time gained importance (Bieback 1985, Mückenberger 1989). The "Savings Acts" to reduce public expenditure since 1981 reduced transfers and formulated requirements more restrictively in the Labour Promotion Act, Federal Social

months. The amount to be paid is equalized to the standard maintenance payments for children born out of wedlock (DM 228,- monthly in 1989).

Assistance Act, Child Allowance Act and Federal Training Promotion Act. The dominance of continuous employment and the market-oriented insurance principle was strengthened by increasing the importance of the criterion "length of employment" for the entitlement to benefits in case of unemployment and in pension law. While benefits were cut down on the one hand, at the same time the period of payment of unemployment benefits for long term unemployed was prolonged - a redistribution in the unemployment insurance system favouring the "standard employment relationship" (Mückenberger 1989:396).

6.3.1. Unemployment benefits : the proportion of women receiving it is decreasing

Women are more affected by unemployment than men (the female unemployment rate is higher in the FRG), but they receive on average lower benefits. While the proportion of women receiving **unemployment benefits** in 1980 was 53.2 %, this decreased to 46.8 % in 1988. The necessary period of social security contributions while in paid employment to qualify for benefits was augmented from 26 weeks with 20 hours minimum weekly over the last three years to 12 months (amendment of the Labour Promotion Act 1982) and later to 18 months (amendment 1983). Furthermore the rules on the "expected acceptability" of jobs procured by the labour exchange and offered to the employed were narrowed (para. 103 Labour Promotion Act), with the consequence that the unemployment benefit is suspended in case of refusal to take over an "acceptable" job.

Certainly, also less men received unemployment benefits in 1988 than in 1980, since the requirements for entitlement are more restricted and so the number of recipients falls, while the number of people receiving the lower **unemployment help** (a means-tested benefit) increases. The distribution of unemployment benefits and unemployment help paid by the Federal Labour Exchange Office to the registered unemployed (men and women) comprised 51.1 % recipients of unemployment benefits and 13.7 % of unemployment help in 1980, while in 1988 only 42.2 % received unemployment benefits and 23.6 % unemployment help (the remaining group of people not receiving benefits or waiting for a decision on their application changed only slightly from 35.2 % in 1980 to 34.2 % in 1988). The proportion of women fell, however, overproportionately in both groups and increased considerably within the group "no benefits or application not yet decided" (Bäcker/Stolz-Willig 1990:17).

The lower female wages disadvantage women when benefits are calculated as a percentage of former income, as is the case for "**family allowances**" as part of the

unemployment benefits (the height of the unemployment benefit is calculated as 68 % of the former net income for persons with dependent children, and as 63 % for those without children, para. 111 Labour Promotion Act).

6.3.2. Health Insurance : the continuity of the patriarchal family model in sickness insurance schemes

In the context of family insurance the spouse and children of the insurant in sickness insurance can be insured without paying own contributions (para. 10 Social Security Act). Apart from those benefits substituting for lost wages (e.g., sick pay and maternity pay) they are entitled to benefits in cash and kind to the same extent as the contribution-paying insured. While no extra contributions have to be paid for non-employed family members, gainfully employed spouses have to pay each contributions calculated on the basis of the earned wages. Thus a redistribution towards spouses with an economically dependent partner (i.e. usually advantaging men who can afford a housewife) takes place (see Slupik 1988b). The goal of this steering mechanism is to privilege economically the breadwinner/housewife model of marriage in relation to a marriage of two equally gainfully employed spouses or other forms of cohabitation. Therefore Slupik (1988b:220) proposes to slaughter the "holy cow" in sickness insurance law and to make the co-insurance of the non-employed wife liable to contribution payment. As proposed the contributions are to be paid by the husband/spouse as part of his duty of maintenance (as is already the case for voluntarily insured, e.g. of self-employed, in some sickness insurance schemes).

Should **obligatory contributions for the co-insured spouse** be introduced, the contribution standards in general are to be reduced slightly and thus to be individualized (based on a calculation of the expected surplus gained through the contributions of formerly not paying co-insured partners). The obligatory contributions for socially necessary work as certain times of child-care and care for sick and elderly should be paid by the state (or respectively covered by a "parents insurance" or other forms of collective financing). From a labour market viewpoint, the "enhancing of the price" of the housewife for the husband can have the impact of giving positive incentives for extending women's employment.

The **legal status of a co-insured family member** differs from the insurant's in as far as the co-insured has no personal rights, but only derived rights. The recipient of the benefit is legally the insurant paying contributions, i.e. usually the husband (also for

benefits as for example "maternity help" for the non-employed wife). This construction of dependance can have humiliating consequences for the woman, especially in situations of conflict (e.g., spouses living separated)¹³.

The necessary consequence to give co-insured spouses personal rights, not only 'derived' rights has been taken only a short time ago with the amendments of sickness insurance by the Health Reform Act. Personal rights are granted to the co-insured family members. This lowers also the transaction costs for co-insured wives who, within their marital relationship, were dependent on the cooperation of the husband who had to carry out the needed legal actions (signing forms, transfer of received payments etc.).

6.3.2.1. The exclusion of employees with minor working hours from sickness insurance

Excluded from involvement in the obligatory pension and sickness insurance are forms of activities which are considered to be "minor" because of working hours (less than 15 hours per week) and because of the income level (less than DM 450,- monthly in 1989), or temporary jobs which are not classified as permanent employment (up to a maximum of two months or 50 working days a year)¹⁴. These regulations yield considerable savings on wage costs to employers and subsidize low paid part time jobs at the expense of full-time jobs or qualified part-time jobs above the threshold of minor working hours. People who are 'Minor employed' have no possibility to get insured as employees in sickness insurance. This discrimination is complemented by the factual coupling of this employment form with marriage as maintenance institution : many minor employees are wives¹⁵, who are usually co-insured in sickness insurance through their husband. Others are already insured against sickness as pensioners or as pupils/students. Particularly disadvantaged are, however, those who do not have an alternative access to sickness insurance benefits. This group bears the accumulated risks, for them the exclusion from access to sickness insurance is a form of discrimination on grounds of family status.

The abolition of the "minor working hours" threshold in social insurance systems and the obligatory liability of these employees to social insurance or respectively the lowering of these thresholds to low petty working hours (DGB 1990) is therefore a frequent

13 Up to the extreme case that "maternity help" is paid to the separated husband, see Slupik (1988b:216) for further examples.

14 The legal basis of the regulation of "minor employment" are para. 1228 Imperial Insurance Act, Health Reform Act 1988 ; para.4 Insurance Act for White-Collar Employees, para. 8 Social Insurance Act IV and yearly enacted decrees defining the limits of working time and income considered to be "minor employment" anew.

15 We are talking about approximately one million wives, see Schupp/Schwarze/Wagner (1989) and ISG (1989).

demand (Schupp/Schwarze/Wagner 1989, Faupel 1987). The land Northrhine-Westfalia brought in a reform bill in 1989 in the context of the discussion on the Pension Reform Act 1992 suggesting to reduce to half the "minor working hours" threshold. Up to now sickness insurance interests have rejected this since they fear carry over effects, such as self-employed or civil servants achieving full insurance coverage through a second job with modest working hours, paying only very small contributions. But this argument is does not hold since 85 % of all 'minor employed' are already insured in one or another way (ISG 1989:VIII assuming that the integration of the "minor employed" would lead to a positive balance of contributions on behalf of sickness insurances). Furthermore, it could be expected that the abolition of the non-liability of minor employed to social insurance would lead to the elimination of some of these jobs given the removal of former indirect subsidies (lower wage costs) and their replacement by part-time jobs with longer weekly working hours or full-time jobs - and higher contributions to be paid for these workplaces.

6.3.2.2. The priority of unpaid family care as a contribution to "dumping" the costs of health care at the expense of women

The other side of the coin of patriarchal "protection" of the co-insured, non-employed wife is the obligation to care for sick children or other relatives without pay - a measure "dumping" the costs at the expense of women, who overwhelmingly do care work¹⁶.

Various regulation accord **priority of unpaid nursing through "other persons living in the household" over sickness insurance benefits** in cash or kind :

- Para. 37, 38 Social Security Act V regulate the entitlement to be nursed at home in case of sickness and to household help. A right to these sickness insurance benefits is granted only "as far as no other person living in the household can nurse and maintain the sick person to the necessary extent" (para. 37). 'Household help' is granted only in cases when a child below the age of eight or a handicapped child is living in the household and "no other person living in the household is capable to run it" (para. 38 Social Insurance Act V).

16 An investigation of 1987 on the "Number and situation of people in need of sick care living at home" calculated that more women (79 %) than men (21 %) were caring for needed sick people, and that women invest much more time than men do. Each third woman is investing more than 80 % of her available time in nursing, but only 6 % of the men do. Caused by the high time-intensity of sick care, only 12 % of the women nursing at home can be engaged in gainful full-time employment, while another 14 % work only part-time (BMJFFG 1989:58). This has severe consequences for the "pension careers" of these women.

- Para. 45 Social Security Act V grants sick pay to the insured parent in employment when s/he takes a day off in case of sickness of the child and regulates the right to time off against the employer. This "sick care benefit" for employees nursing a sick child below the age of eight up to five days a year is granted only under the restricted condition that another person living in the household cannot supervise the child, nurse or care for her (para. 45 Social Insurance Act V).
- Para. 199 Imperial Insurance Act grants the entitlement to household help to the insurant in case of incapacity of the wife to run the household caused by pregnancy or child delivery only on condition "that no other person living in the household can continue to run the household" (para. 199 Imperial Insurance Act).

This shows clearly how the requirements governing entitlement to sickness benefits presume patriarchal family structures and the availability of a "housewife" to the male insurant. The abolition of the "subsidiarity" of these benefits to unpaid care and housework of other household member (typically the wife) would also contribute to taking into account adequately the social costs of these socially necessary activities instead of shifting them simply on women. This would represent - phrased in the terminology of the economic analysis of law - an "internalization" of external costs of care activities in case of sickness which up to now were mainly borne by women.

Some **"care help" to relieve women nursing at home** has been introduced by the Health Reform Act 1988¹⁷, in force since 1 January 1989. These measures, however, did not fundamentally change the above characterized structures, but rather 'sweetened' somewhat the difficult situation for the concerned nursing women somewhat, granting a sort of holidays of up to four weeks to the woman nursing a sick person severely in need of care at home and a "pocket money" of monthly DM 400,-. From 1989 onwards sickness insurance provides a replacement for the duration of this holiday period, the costs for this person can amount to a maximum DM 1800,- per month. Given this replacement cost it is likely to be a women who will replace the women at home - or a conscientious objector (they earn DM 11.50 a day), but their time is getting scarcer since a shortening of the obligatory military service is planned. Therefore the rightwing of patriarchal family policy has come up again with the suggestion of an obligatory social year for women to solve the problem of the 'sick care emergency'.

17 Health Reform Act (Gesundheitsreformgesetz) of 20 December 1988, BGBl. I p.2477.

From 1991 onwards the relatives nursing seriously sick persons in need of care shall be freed from the burden partially by granting the right to 25 "care services" of basic care and supply at home of one hour each. The costs of this benefit in kind are limited to a maximum of DM 750,- a month. Who does not take up this benefit, can receive a "pocket money" of DM 400,- monthly.

These measures are a mere drop in the ocean - and they lead in the wrong direction. The gender-specific division of work is consolidated, and with it the predominating assignment of domestic and family work to women. It would lead to a different trend if a **legal right to working time reduction to care for sick relatives or for children** would be granted, and if special incentives or quotas would be introduced for men to take up such rights. Alternative would be an obligatory social year for men to be spent in education, care and housework - activities, which conscientious objectors perform already now. Such a step could be an affirmative action to increase the proportion of men in these sectors and would certainly lead to breaking down gender discrimination. But it would be obstructed by a formal interpretation of the equality principle and the resistance of men and male interests against this form of 'forced work'. At least the abolition of 'scrutinizing the conscience' of those refusing the obligatory military service and applying to be accepted as "conscientious objectors" would be an adequate measure to recognize these activities as an equally valid alternative to military service and easy access to it.

Taken together the increasing number of elderly people who need care at some times, the demographic changes between generations and the shifts in family structures and women's employment patterns urge a rethinking of the distribution of paid and unpaid work and a re-evaluation of care and reproductive care. Under the additional pressure of a cost explosion in the health sector and increasing sums to be spent on "care help" for sick people nursed at home as part of social assistance benefits different proposals for a "care insurance" to cover the risk of needing care and nursing have been made. This would be an important step to socialize at least part of the costs for sick care at home which is now covered mainly through unpaid work of women. It depends, however, on the concrete organization of such an insurance scheme. For those engaged regularly in such care work pension insurance contributions should be paid calculated on the base of average earnings of nursing personnel in hospitals. Up to now only the land Berlin pays since 1 January 1989 such a contribution of DM 541,- monthly to persons looking after a seriously sick person in need of care. This amount can be used for the payment of voluntary pension insurance contributions or for a private life insurance. The sum paid has been calculated on the base

of average earning in the health service for sick warders and would grant a pension entitlement of DM 1350,- monthly after having paid 40 years pension insurance contributions.

6.3.3. The privileges of male times in pension insurance schemes

6.3.3.1. Employed women retire later than men

49 % of all female pensioners retiring in 1988 were older than 65 years, compared with 17.8 % of the men. This fact contradicts the widespread opinion that women would retire earlier than men because of their legal right of earlier retirement at the age of 60. Empirical research shows that men can benefit from other types of earlier retirement mainly because of the requirements concerning length of former employment and payment of contributions and continuity of periods liable to pension insurance contributions. Thus the average man has accumulated 36 years of insurance by the age of 55, while women at the same age have only 28 years of insurance contributions, i.e. nearly a fourth less¹⁸.

In 1988 32 % of all retiring male pensioners were younger than 60. At the age of 60 further 22 % of men retired, and only a minority of 16 % had reached 65 years when pension payment started. Among women, however, nearly half of all new pensioners (49 %) were 65 years or older. Only 27 % of the women received earlier pensions at the age of 60.

Table : The pension age of men and women retiring in 1988

Source : Bundesarbeitsblatt 1/1990, p.17

| Pension age | male pensioners (100 %) | female pensioners (100 %) |
|----------------|----------------------------|------------------------------|
| 54 and younger | 17 % | 8 % |
| 55 to 59 | 15 % | 7 % |
| 60 | 22 % | 27 % |
| 61 to 64 | 28 % | 9 % |
| 65 | 16 % | 41 % |
| older than 65 | 2 % | 8 % |

With regard to the distribution of the different types of pensions provided by insurance for women and men, it is clear that the average higher retirement age of women is

¹⁸ Data from the Association of Pension Insurances (VDR) quoted from "Frankfurter Allgemeine Zeitung" of 19 April 1990.

influenced strongly by the fact that very few women receive pensions on grounds of occupational disablement, pensions for elderly unemployed or pensions for severely handicapped.

Table : Pensions paid for the first time in 1988 broken down according to pension type and gender of the recipient
(346800 new male pensioners, 359 000 new female pensioners in 1988)

| pension age | pension type | proportion of male pensioners (total 100 %) | proportion of female pensioners (total 100 %) |
|-------------|--|---|---|
| ----- | | | |
| from 60 on | disability pension | 38,3 | 17,7 |
| from 60 on | unemployment pension | 13,1 | 1,4 |
| from 60 on | pension for severely handicapped persons | 12,4 | 0,9 |
| from 60 on | earlier old age pension for women | | 30,4 |
| from 63 on | earlier retirement pension | 17,8 | 1,3 |
| from 65 on | old age pension | 17,8 | 48,1 |

One important cause has been the restriction of entitlement to earlier **retirement on grounds of occupational disability** which excluded mainly women from access to this pension type. Without going into the details of the complicated legal developments (see Kohleiss 1990:528) it should be mentioned that the high **requirements of continuity of paid contributions** during the last years of employment before the disability occurred plays an important role, which disadvantages mainly women who had interrupted employment. Pensions in case of reduced capacity to earn a living through employment are now paid only for those insured whose disability occurred in a close time nexus with the last contribution payments : during the last 60 month before the event of disability at least 36 months obligatory contributions must have been paid. Although certain circumstances can prolong this period of the last 60 months (para. 1246, 1247 Imperial Insurance Act, para. 23, 24 White-Collar Employees Insurance Act), e.g. the case of child care periods until the age of 6 which matters for women (from 1992 on up to the age of 11 of the youngest child), women were mainly disadvantaged by this regulation since without further payments of obligatory

contributions their former right to disability pensions forfeited in case of employment interruptions at the age of seven of the child (from 1992 on at the age of 12). However, housework as such does not grant access to insurance against the risk of work accidents or to disability pensions.¹⁹

The **five different pension types** (para. 1248 Imperial Insurance Act, para. 25 White-Collar Employees Insurance Act) are granted under the following conditions :

- The **"flexible early retirement" at the age of 63** (for both, men and women) and the flexible retirement at the age of **60 for severely handicapped and disabled** employees requires a period of 35 years of contributions, para. 1248 VII 1,1 Imperial Insurance Act (which men on average reach at the age of 55, while women at the same age have accumulated on average only 28 years of contribution payment). The requirement of 35 years of paid contributions was on 1 July 1988 fulfilled by 68.8 % of men, but only by 21.9 % of women (Bieback 1989:225). Only 1.5 % of all female pensioners retiring in 1988 received the "flexible early retirement" pensions at the age of 63, while 17.8 % of the males did. Through the "early retirement regulation" the labour force participation rate of men between 55 and 64 years old was reduced much more than that of women of the same age group : between 1975 and 1985 it decreased for 11.9 % for men, but only 3.2 % for women (Bosch 1989:636).
- **At the age of 60 unemployed persons as well as women in general can retire** under certain conditions. The early retirement pension for women²⁰ is granted only under the condition that during the last 20 years at least 121 months obligatory pension contributions have been paid (i.e. that the woman has been gainfully employed for more than half of the period) and that in future no gainful employment will be performed generating an income in excess of DM 490,- (1990) monthly. This retirement form was chosen by 30 % of all new female pensioners in 1988.

19 The risk of work accidents at domestic work with the consequence of partial or total disability to work is not covered by social insurance. This unequal treatment is discriminatory especially since various other forms as unpaid work are insured against these risks, e.g., help to construct a family home, blood donation etc., para. 539 I no.8 ff. Imperial Insurance Act. See Bieback (1990) on the question of indirect discrimination against women by this regulation.

20 The possibility of earlier retirement of women at the age of 63 (later 60) which existed in Berlin already since 1946 was introduced in the whole FRG in 1957 for women who were gainfully employed for a major period during the last 20 years with the motivation to compensate for the "double burden" of household and professional work.

- The retirement at the age of 65 requires since 1984 only a period of five years (sixty months) of employment covered by obligatory contribution payments (the so-called "waiting period" which is a minimum period for different sorts of pension entitlements).

Because of the required periods of obligatory contributions and the required continuity of employment, women can retire later than men since they have on average shorter length of employment or more frequent interruptions. Financial factors also play a role : the relatively lower pensions (based on lower wage income of women and lower contributions paid) shall be backed up by continuing gainful employment.

The **equalization of pension ages**²¹ by the Pension Reform Act 1992, introducing an equal pension age of 65 years for men and women (in force from the year 2012 onwards, valid for all insured born after 1 January 1941) will not change this state of affairs. It is rather to be expected that the indirect discrimination against women will increase since a normal "pension career" of 40 years continuous full-time employment is set as the standard. Interruptions of employment and "gaps" in the pension career not covered by obligatory contribution payments can have a more negative impact since in future the "density of contributions paid" will be a more important factor to calculate the height of pensions (see Kohleiss 1990).

6.3.3.2. Women receive lower pensions than men because of the trifling evaluation of "female times"

Pensions received by women on their own right are considerably smaller than men's pensions (on average less than half). Women's pensions in the white-collar employees' insurance amounted to DM 887,- monthly on average (men : DM 1848,-). In the blue-collar employees' insurance women received on average monthly pensions of DM 551,- compared to DM 1354,- of men (Recht der Arbeit 1989:289). Causes are the lower seniority of women (less years of contributions) and lower wages of women. While in 1989 more than half of the pensioners received monthly pensions between DM 1500,- and DM 2500,-, women were concentrated in the group of "receivers of small pensions" between DM 300,- and 600,-

21 The equalization of pension ages for both gender and thus the extension of the principle of equal treatment to legal fields until now exempted by the EC directives 79/7 and 86/378 is provided for in article 9 of the proposal for an EC directive of the Commission promoting equal treatment of men and women in state and occupational systems of social security (COM (87) 494 fin.).

monthly. 53 % of all female pensioners received less than DM 600,- monthly, and only 8 % had an own pension above the level of DM 1500,- monthly.

Table : Monthly amount of pensions paid by state insurance to women and men in 1989 (Source : Bundesarbeitsblatt 4/1990:9) in %, broken down by sex

| Amount of monthly pension in 1989 | Male pensioners (100 %) | female pensioners (100 %) |
|--------------------------------------|----------------------------|------------------------------|
| DM 2500 and more | 8 | 1 |
| DM 2000 to DM 2500 | 21 | 2 |
| DM 1500 to DM 2000 | 29 | 5 |
| DM 1000 to DM 1500 | 19 | 17 |
| DM 600 to DM 1000 | 11 | 22 |
| DM 300 to DM 600 | 7 | 27 |
| below DM 300 | 5 | 26 |

Only where men and women exhibit approximately equal periods of employment are these differences smaller. Younger generations with on average higher activity rates of women exhibit higher pension entitlements, a trend that can be observed for retirements in recent years (Pfaff 1988:305). The Association of German Pension Insurances (VDR) calculated that in case of disability to do employed work at the age of 25 (requiring at least 60 months of contributions paid) the average entitlement to "disability pension" of a man would be DM 1320,- , for women DM 1180,- ("Frankfurter Allgemeine Zeitung" 19 April 1990). This is calculated taking account of the currently similar employment and seniority patterns of young employees. Already the disability pensions actually paid for 40 year-old disabled persons highlights the effects of domestic and family work and employment interruptions on the pension entitlements of women : The average disability pensions paid to women at the age of 40 in the Blue-Collar Employees' Insurance in 1989 amounted to DM 906,- (men : DM 1243,-) and to DM 1092,- in the White-Collar Employees' Insurance (men : DM 1380,-) (Recht der Arbeit 1989:289).

Part-time work increases the **risk of pensions** below the welfare level as well, particularly when low contributions to social security insurance combines with a small number of years in which contributions were paid. In a model calculation Bäcker/Stolz-Willig (1990:15) showed how these two factors in the pension calculation formula effect a

negative impact on the size of pension entitlements. The monthly pension amounted only to DM 506.75 monthly (based on the pension tariffs of 1989/90) when contributions were paid for twenty years based on 66 % of the average income position. The pension level would exceed the level of welfare benefits (at the moment approximately DM 1000,- monthly) if it were the case that in the same income group contributions were paid for forty years.

"Survivor pensions" for widows were intended to compensate for the lower own pension rights of women caused by the gender-specific division of labour (as a wife's "share" of the higher pension of her husband). The entitlement to a widow's pension of 60 % of the former insurance pension of the husband is due to all widows of appropriately insured men since 1 January 1957. Since the normative goal of this pension type was to substitute for maintenance, men as widowers of insured women had up to the end of 1985 an entitlement only when the deceased wife had mainly provided for the family maintenance through employment. After a judgement of the Federal Constitutional Court of 12 March 1975²² concerning the obligation of equal treatment of widows and widowers the Act on Survivors Pensions and Educational Periods was enforced on 1 January 1986. Now also men can receive widower's pensions independent of the fact of whether or not the deceased wife had provided mainly for the family maintenance. From the survivor's pension (60 % of the deceased spouse's former pension entitlement), however, the personal income of the survivor is partly deducted (para. 1279 ff. Imperial Insurance Act, para. 56, 58 White-Collar Employees Insurance Act).

The average monthly widow's pension on 1 July 1985 (before the above mentioned reform) amounted to DM 699.20 in the blue-collar workers' insurance and to DM 699.20 in the white-collar employees' insurance. Nearly half of the female 'double pensioners' entitled to a pension in their own right as well as to a survivor's pension, received a total income below DM 1000,- monthly in 1985. This lies below the average level of male insurance pensions (Gerhard 1988c:45).

Further deficiencies of the concept of widow/er pensions are that they do not presuppose any own contribution of the widow, no minimum duration period of marriage or periods of child care, and that they are paid independently of age and fitness of the widow. "The survivor pension is to a lesser degree a woman's right than it is the entitlement granted to a man to safeguard his wife financially, this entitlement not being connected to any additional expenditure on his side" (Kohleiss 1988:149).

22 NJW 1975:919 ff.

Besides the already mentioned different duration conditions of pension insurance and contributions paid between women and men, **wage discrimination** against women as well as the weighting of the different factors as to calculate amount of pensions play a decisive role in explaining the big income differences in later years. Such differences grew after the pension reform of 1957 since **egalitarian elements levelling out differentiations** were abolished (Kohleiss 1988). Previously pensions were calculated for all pensioners on an equal basis, adding then a differentiated increment on top of it. Also in the case of minimal own contributions **minimum pensions** were paid. These measures favoured recipients of low incomes, particularly women. Minimum pensions and pension calculation according to "equal basement blocks" were, however, done away with in the pension reform of 1957. The removal of these equalizing elements between men and women increased differences, since periods of insurance contributions (time factor) and the level of wages/contributions paid gained a greater weight in the pension calculation formula.

The differences in income levels between men and women play an important role for the extremely complicated **calculation of pension amounts** (para. 1255 Imperial Insurance Act, para. 32 White-collar Employees Insurance Act). The "**personal calculation basis**" expresses the relation between the personal income of the insured person and the average income of employees in each year. The percentage of this "personal calculation basis" of men reaches 100 % of average income already at the age of 30 and grows with increasing age up to 110 and 118 % on average, while the "personal calculation basis" of insured women amounts to 80 % for all age groups, for older generations even lower. Low pay for women and undervaluation of their work leads to low calculation values. The negative effects on women's insurance pensions are contrasted with the positive effects of increased male pensions, since the underpay of women lowers the calculated average wages of all employees in a certain year. Thus also a man remunerated only at an average male wage level will be above the average calculated including women's wages. "Men get therefore accounted calculatory values which are higher than they would be without the underpay of employed women. Pay discrimination of women will increase male pensions all the more the bigger the discrimination is and the more women are affected by it" (Kohleiss 1988:131).

Until 1983 the **evaluation of training periods** (independent of paid contributions) for pension purposes as well as the calculation of the first five years of employment (independent of the height of paid contributions) varied for women and men. The evaluation of these time periods for men (100 % of average income) was 25 % higher than the

evaluation of women's corresponding periods (75 % of average income), justified by the argument that men would earn on average more than women. Only after a judgement of the Federal Constitutional Court of 16 June 1981²³ were the index values for training periods fixed to 90 % of the average income position for women and men equally. The Constitutional Court considered the unequal evaluation an infringement of the equality principle of art. 3 II German Basic Law. The constitutional commandment of article 3 II would lose its function to carry through equal treatment of both sexes for the future if it were reduced to accepting the given social reality as e.g., the existing pay inequities between women and men.

The "**pension based on minimum income**"²⁴ introduced in 1972 was intended as a partial compensation for women's low pay, especially during periods when direct pay discrimination on grounds of sex ("Female reduction clauses" in wage scales) were still legal. For women who could prove 25 years of contributions paid (obligatory contribution payments without periods of voluntary insurance or "omission periods") whose "personal calculation basis" (relation between income earned and average income, see above) lay below 75 % of average earnings, a higher income was simulated. A minimum income of 75 % of average wages was assumed for the purpose of calculating their pension benefits. Mainly women benefitted from this regulation, 81 % of the recipients of pensions according to this fictitious minimum income are women. However, the overall average pension level of women increased only slightly through this regulation. The relevance of this regulation was also limited since the fictitious minimum income of 75 % of average earnings was calculated only for the period until 1972, but not later. This will be changed by the Pension Reform Act 1992 which extends the calculation of pensions on the basis of a fictitious minimum income to all contribution periods up to 1991.

Various problems in the area of pension insurance are faced by women as **family helpers** in small enterprises and for **self-professionals**. Family helpers, lacking the legal status of an associate or employee, are mainly women. An example taken from a pension scheme for farmers should illuminate this point : The pension insurance for farmers pays 50 % higher pensions to a married farmer than to an unmarried one. The cooperating wife of the farmer without an employment contract has, however, no entitlement to that marriage supplement paid to her husband, although they run the agricultural enterprise

23 NJW 1981:2177.

24 Para. 54b White-Collar Workers Pension Insurance Reform Bill 1972, para. 55a Blue-Collar Workers Pension Insurance Reform Bill 1972.

jointly. The abolition of the wife's legal construction and social security for her in her own right in agricultural pension schemes should therefore be promoted²⁵.

6.3.3.3. The inadequate recognition of educational periods in pension law

The Survivors and Educational Periods Act 1986 introduced for the first time the recognition of child care periods for pension law purposes. One year of pension insurance was recognized for the education of each child for all mothers (also of adoptive mothers, step mothers or foster-mothers) born after 1921, receiving from 1986 onwards a disability pension or an old age pension. This one year educational period can be recognized for fathers when mother and father declare consonantly that the father should be insured because of the education of the child. Educational periods are financially evaluated on the basis of 75 % of average income (this corresponds to a pension entitlement of about DM 28,- a month per child). If during the same period own pension entitlements are built up by the insured person through employment, these cannot be cumulated. Where the person caring for the child is already entitled to pension rights on the basis of 75 % of the average income during this year, educational periods have no effect on pension entitlements (thus do not augment the pension).

From the recognition of educational periods for pension purposes first women born earlier than 1921 were excluded, which lead to significant outrage amongst those concerned. The Education Period Benefits Bill 1987 integrated step by step mothers born before 1921, but for reasons of financial policy the integration was graded in a way that many older women would not have lived long enough to see the moment of their entitlement²⁶ - a "policy with the mortality table" (Frankfurter Rundschau 9 July 1987).

For children born after 1992 the educational periods recognized for pension purposes will be prolonged from one year to three years per child (Pension Reform Act 1992). It holds true, however, that also in this case no positive effect on the height of the pension will be reached if the person caring is already entitled to pension rights amounting to 75 % of the average income position through employment for this period.

25 See the expertise of Maydell (1988) commissioned by the Federal Ministry of Nutrition, Agriculture and Forestry on the further development of social security law in the agricultural sector. He also considers the disadvantaged situation of women in agricultural health insurance and work accident insurance and suggests reform measures.

26 The entitlements of mothers born before 1921 was recognized step by step : from 1 October 1987 onwards for those born before 1907, from 1 October 1988 onwards for those born 1907 to 1911, from 1 October 1989 onwards for those born 1912 to 1916, from 1 October 1990 onwards for those born before 1920.

From 1992 onwards child care periods will be recognized also for accounting as part of the 35 years "waiting period" for the early retirement pension at the age of 60 for severely handicapped and the 35 years "waiting period" for the pension based on minimum income.

The recognition of educational periods in pension schemes is a step in the right direction towards reducing the discrimination against periods of child care compared with periods of employment. The realization of these regulations is, however, insufficient :

- Educational periods are recognized in pension insurance schemes not on the basis of 100 % of the average income position, but only with 75 % of it. The pay discrimination against women in the exchange economy is thus doubled, since periods of child care are not treated as equally valuable. Furthermore this regulation works as a negative incentive for men to take up educational leave since the evaluation for pension purposes is lower than the average entitlements built up by men through gainful employment.
- Employment of women during the three years of recognizable educational periods is put at a disadvantage. In cases where women pay obligatory or voluntary contributions to pension insurance during the first year of life of the child (during the first three years from 1992 onwards), these counteract the recognition of child care periods for pension purposes (if the contributions paid correspond already to those paid on the basis of 75 % of average earnings) or reduce its recognition (if the contributions paid are based on an income position below 75 % of average earnings).

A cumulation of entitlements built up through obligatory or voluntary contributions of the woman and of entitlements for educational periods should be possible (since as a matter of fact working times in domestic work and employment of gainfully employed add up as well, because also employed parents have to care for the education of their children). Kohleiss (1988) points out that the present regulation is in contradiction of the treatment of "multiple employment" which provides for the addition of the different pension entitlements from more than one job held at the same time. "Why is it that the same does not hold true for the employed mother as for other insured persons who have to fulfill various tasks at the same time ? It is incompatible with the idea of compensation that especially women living under very difficult social conditions are excluded from these benefits ; since lone

mothers and women whose men earn very little cannot do without employment soon after the birth of a child" (Kohleiss 1988:168).

The evaluation of educational periods on the basis of 75 % of average earnings is also lower than the recognition of training periods (90 % of the average income, independent of whether contributions are paid or not) and of the first five years of insurance (90 % of average income, independent of height of paid contributions) and worse than the evaluation of periods of social insurance shortfall

²⁷ which are designed according to "male times".

6.3.3.4. Necessary reforms in pension law

To eliminate or reduce the disadvantages women suffer in pension law the following steps would be adequate :

- Introduction of minimum pensions or egalitarian elements (an amount founding an "equal basement") for pension calculation
- The "splitting" of pension entitlements between spouses not only in case of divorce but also during the existence of marriage, so that "derived rights" of a spouse are replaced by personal rights
- Obligatory insurance and contributions to pension insurance for all forms of employment, abolition of the exceptional rules for "minor working hours"; obligatory insurance for all persons from a certain age on, also for housewives
- Recognition of child care periods and sick care for needed persons for pension purposes effecting an increase of pension entitlements, contributions being at charge of the state for these periods
- Evaluation of educational and care periods at a rate of 100 % of average earnings for pension purposes

²⁷ "Shortfall and attributable periods" in German pension law are periods during which no pension contributions were paid due to reasons for which the persons is held not to be responsible so that credit will be given for pension expectancy although no contributions were paid. "Shortfall periods" (para. 1259 Imperial insurance Act, para. 36 White-Collar Employees Insurance Act) are e.g., school education after the age of 15, university studies, professional training, interruptions caused by unemployment, sickness connected to occupational disability, rehabilitation measures, also treatments for alcohol or drugs addiction etc. Not included are times of interruption for child care, with the exception of 4 to 8 months maternity leave based on the statute on prolonged maternity leave of 25 June 1979, which was in force only up to 31 December 1983 (these periods are recognized, however, only on the basis of 30 % of average earnings). "Looking at the catalogue of time periods recognized for pension purposes without any personal contribution, it is to be found that the legislator has really done everything to assure a pension entitlement corresponding to a life-time employment also to those insured with rather little own contributions - but only as far as a man's pension is in question" (Kohleiss 1988:134).

- Unlimited recognition of educational periods in pension law also for employed mothers/fathers possibility to accumulate pension entitlements derived from employment and from education periods above the limit of 75 % of the average earning position
- Integration of housework in social insurance against work accidents and insurance against occupational diseases, thus granting access to disability pensions
- Integration of "family helpers" of self-employed into pension insurance.

The introduction of **minimum pensions** which has been asked for from different sides and exists already in various countries (and existed in the GDR, but was abolished when taking over west German pension law) or of elements of basic existence insurance in pension law (as e.g., the 'equal basement' in pension law until 1957) should be aspired to as social compensation and income redistribution towards the recipients of the lowest incomes - mainly women.

Obligatory pension insurance also for those running the household would reduce the subsidies to the "breadwinner/housewife"-model of marriage and could act as an incentive for higher labour force participation of women. This should be coupled with elements safeguarding minimum existence. The concept of a minimum existence insurance financed through personal contributions has been developed in Krupp (1987), Wagner (1988), Rolf/Wagner (1988) and Ott/Wagner (1989) combining these different elements. It is proposed to take a minimum existence insurance financed by contributions of all inhabitants as a starting point of social security, connecting social insurance closer with the person and not with the workplace.

6.4. Which proportion of the cost of rearing and socializing children does the state take over ?

The contribution of the state to the costs of educating, rearing and caring for children can consist of transfers (direct benefits or indirect ones as e.g., tax deductions or provision of institutions, services and infrastructures substituting for part of women's working times in households). The concept of state contributions used here is wider than the traditional concept of "equalization of family burdens" (Familienlastenausgleich) which, in my view, is insufficient²⁸. At this point I do not distinguish the legal and administrative organization of

28 The concept of "equalization of family burdens" is understood as containing benefits through advantages for families in tax law, child allowances and, since 1986, educational allowances during educational leaves and

the state benefits and benefits at regional or local level and the different competences to grant these benefits, but I use a wide concept of "state participation" in the costs, since I am essentially interested to demarcate the public contributions to these costs from "private" investments (time and money) by mothers/fathers/private households in children.

6.4.1. Promotion of training and schooling, child care facilities and infrastructures

An area in which the costs are taken over by the state and services are organized collectively is public education in schools and universities. Training and education is provided in this field as a "public good". The introduction of compulsory education for all children, duration of schooling and time organization of schools (school hours, full-time or part-time schooling, holiday structures, beginn and end of school day) as well as connected supplementary provisions (school meals, monitoring pupil's task, kindergardens, holiday care and programmes) have an important impact on the working time volume offered by women on the labour market. The fact that in the FRG nearly no full-time schooling exists nor school meals or supervision of pupils in the afternoon, causes enormous problems for the labour force participation of mothers with children at school age. Thus full-time employment is rendered enormously difficult. The demand for a sufficient offer of **full-time schools, schools meals and after-school supervision of children** is therefore important to reduce discrimination against women as far as access to labour markets is concerned. The maintenance of full-time schools by the state in the former GDR is thus required for the realization of the equality principle of article 3 II German Basic Law. Since here we are concerned with infrastructures which influence and indeed create obstacles to women's access to labour markets, this has to be part of state labour market policies. The lack of sufficient infrastructures represents indirect discrimination against women in access to workplaces, since based on structural grounds (the overwhleming assignment of child care to women) they cannot have equal acces to employment forms oriented to male times. However, these discriminations cannot be assigned legally to the individual employer and therefore do not constitute an infringement of the principle of equal treatment, since the provision of sufficient child care facilities is not considered to be a task of private firms or of the market.

the recognition of child care periods in pension law. In a wide sense, the concept contains as well all direct monetary transfers to families, e.g., housing benefits too. The concept is problematic since all "transfers in kind" are neglected (e.g., co-insurance of family members in health insurance, provision of infrastructures for child care or health care) and since analytically the legal framework for transfers within families and households are neglected (e.g., marriage and family law provisions, maintenance and divorce rules). An interesting analysis of "equalization of family burdens" policies and its gender-specific different impact is to be found in Galler (1988).

Parents have to contribute to the costs of schooling by paying fully or partly instruction media (only in some Länder basic instruction means are provided for free). Otherwise parents have to bear the costs of maintenance of pupils privately since in the context of the "savings Acts" the **educational allowances** for pupils from low-income families on grounds of the Federal Training Promotion Act 1983 have been abolished widely.

Also for college students and university studies the allowances and grants have been cut down considerably. Since 1983 the income threshold for parents has been lowered and the allowances were transformed into a credit to be paid back at the end of university studies. The proportion of students coming from working-class families went down after the reform of these allowances to 8.2 %, also the proportion of women declined slightly²⁹. The credits granted by the state to finance university studies cover only approximately 12 % of the living expenses of students, the rest has to be made up by the families of the students (20 %) or by the students themselves (33 %).

Most time-intensive, however, is the **care for babies and young children at pre-school age**. In this case the provision of infrastructures in the FRG is completely inadequate and much lower than in other EC countries as e.g., France, Belgium or Denmark. Places in nurseries or kindergardens for children below the age of three exist only for 3 % of this age group (in Belgium and France 25 % of the under 3 years old frequent publically financed nurseries, in Denmark 44 %). 60 % of the children aged 3 to 5 go to kindergarden, but a place during all the day is provided for only for 12 %. Most kindergardens are open only until lunch time (Moss 1988). The insufficient infrastructures and childcare facilities affect directly the occupational chances and the employment rate of mothers with young children. The EC countries with the highest offer of places in nurseries and kindergardes available Belgium, France and Denmark are the only countries where the labour market participation rates of mothers with children under 5 years old exceed 50 % (Denmark : 73 % in 1985), while they remain below 40 % in the FRG (Moss 1988).

Various studies (CREW 1990, Moss 1989, Moss 1988, Cohen 1989) stress the connection between lacking or insufficient child care facilities and infrastructures (including incompatible time organization of different public and private institutions, CREW

29 Results of an investigation commissioned by the Federal Ministry, "Social Report" of the German Students Association of 1990 (Frankfurter Rundschau 4 October 1989).

1990) and the discrimination against women on labour markets as well as concerning income distribution.

In the FRG the planned guarantee of a **legal entitlement of each child to a kindergarden place**, although it was included in the first draft of the new Youth Help Act and initially also supported by the Christian Democrats, could not be realized. It was cut off after litigations between the Federal state, the Länder and local authorities about federal contributions to finance it (the financing of kindergardens is a matter for the Länder and local authorities), but the Federal government was unwilling to contribute to the costs of such an entitlement. It remains to be seen what will happen to the existing quantitatively well-developed childcare facilities in the former GDR. The financing and continuation of these facilities was assured by the "State Treaty" only until June 1992. If the existing trend towards saving public expenditure at the expense of women will be pursued, the well-developed net of nurseries and full-time kindergardens in the Ex-GDR may well be sacrificed.

6.4.2. Child allowances

A direct state transfer for the costs associated with child-rearing is the child allowance, based on the Federal Child Allowance Act³⁰. It was introduced in 1954 and has undergone various reforms since (see Slupik 1988a). It is granted for children up to the age of 16, in case of longer periods of school or university education or professional training up to the age of 27 (if the own income of the child does not exceed DM 750,- monthly). The child allowance amounts to DM 50,- monthly for the first child, DM 100,- for the second child, DM 220,- for the third one and DM 240,- for the fourth and each following child (para. 10 I Federal Child Allowance Act). The "saving bills" introduced a means-test from the second child onwards since 1987 (between 1975 and 1987 the child allowance was paid independent of height of income). It can be reduced to DM 70,- from the second child onwards according to household income.

The child allowance which is relatively low in international comparison is complemented by a complicated systems of **tax deductions**. "Tax-exempt amounts" amounting to DM 3024,- per year for each child are granted. Tax-payers constructing or buying a personal home can deduct a tax-free allowance of DM 750,- yearly per child for the duration of eight years ("child-related building allowance"). This highly problematic

30 Child Allowance Act, amended on 21 January 1986 (Bundesgesetzblatt II p.222).

organization of income thresholds coupled with tax exemptions privileges higher income classes (the higher the income, the higher the savings based on tax-exemptions because of tax progression) and favours middle-class families through the "child-related building allowance" since lower income households will build or buy personal homes less frequently³¹.

In a court order of 29 May 1990³² the Federal Constitutional Court expressed a judgement on the "child-related tax exemptions" and the unequal impact of these tax law regulations upon tax-payers. The court declared that the so-called "equalization of burdens for children" according to the Accompanying Public Budget Act 1983 was partly unconstitutional. The "child-related tax-exempt amounts" of article 32, sect.8 Income Tax Bill were judged as infringe the equality principle of article 3 I German Basic Law and article 6 I German Basic Law (protection of the family), since the child allowances plus the tax-exemptions for child rearing would not compensate for the financial burdens caused by child rearing. The income taxation should take into account an amount at the height of the existence minimum of a family which has to remain tax-free, only the income exceeding this existence minimum may be taxed. If the legislature is to take into account the reduced capacity of some households to pay taxes by means of granting social benefits and tax reductions, these should be calculated in a way that a comparable relief is granted. Up to now the legislature has not yet taken the necessary action to comply with this court order. This could take the form of either a general increase of child allowances or in a higher tax relief for low income groups depending on the number of children (increase of "child-related tax exemptions").

The **child allowance** in the FRG is **paid mainly to men**. in 1974 only 9 % of the recipients of child allowances were women (Slupik 1988a:195). The administrative organisation of transferring child allowances (the labour exchange office is competent) as well as the legal realization of the entitlement demonstrate that child allowances are not intended to be a reward of the woman's work of care and education, but a subsidy and an additional benefit for the employed man. The maintenance contributions towards children accomplished mainly by women as care work (the "maintenance in natura" in terms of

31 The same group is favoured through tax deductions of household help which is deductible only in case that obligatory social insurance contributions are paid for the household helper. Since this is the case only for monthly wages above DM 490,- monthly and is rather expensive for private households caused by relative high insurance contributions, only upper class households can afford it and thus profit from this tax reduction. Up to DM 12 000,- for household help can be deducted as special expenses from the taxable income per year for a household with at least two children.

32 Court order of the Federal Constitutional Court of 29 May 1990 (1 BvL 20/84, 1 BVL 26/84, 1 BvL 4/86), published in Betriebsberater 1990:1750.

family law) are not considered as being of equal value to "maintenance in cash" contributions provided for via gainful employment. In the regulation of the entitlement to child allowances (para. 3 Federal Child Allowance Act) it is said that parents can define the entitled person themselves (only one parent receives the child allowance). If they do not take a decision the child allowance will be granted "to the person maintaining the child mainly ; it is, however (!), granted to the mother in cases where custody is awarded only to her" (para. 3 III Federal Child Allowance Act). The family law principle of equal value of maintenance contributions by running the household or gainful employment is often not fully recognized in social security law as e.g., in this case when the higher value of gainful employment as contribution towards maintenance is assumed as self-evident.

The **case-law** of courts interpreting this regulation is contradictory. Even when courts try partly to correct the trend of evaluating maintenance "in cash" higher than maintenance "in kind"³³ which is clearly underlying the wording of the above quoted rule, nevertheless the burden of proof of who maintains the child mainly is thus shifted upon the woman who therefore has to bear higher transaction costs.

A changed regulation which would not disadvantage women should contain the following elements :

- The child allowance is high enough to cover the basic needs of children and the average costs of care and child rearing.
- The favouring of high-income classes by granting them higher tax advantages per child should be eliminated at best through paying direct transfers independent of earned income (fixed amounts).
- Entitled to receipt of the child allowance should be vested in the child. It is paid regularly to the mother since women invest overwhelmingly more time in child care than men (formulated gender-neutrally : the benefit is to be paid to the primary care-taker).

33 While the Supreme Land Court of Bavaria is referring to the case law of the Federal Supreme Constitutional Court (see Chapter 7 on family law rules of time allocation) and assumes the equal value of maintenance contributions "in cash" and "in kind" as stated in family law (para. 1606 III German Civil Code) (Bavarian Supreme Land Court Familienrechtszeitung 1984:1142), the 10th chamber of the Federal Supreme Social Court is comparing the maintenance contribution "in cash" with the economic value (monetary value) of the specific care activity (calculated on the basis of the costs for a substituting employee) (Federal Supreme Social Court, Familienrechtszeitung 1983:113f.).

In the Scandinavian discussion on "women's law" the demand for entitling house-working women as recipients of state transfers connected to family work and child care has played an important role as part of a strategy to foster the economic independence of women and to re-evaluate reproductive work vis-a-vis market work ("towards a housewife's law, see Dahl 1987). In Norway child allowances have been paid to the mother as representative of the child since 1946. A late 1960s plan to substitute this direct benefit to which the mother was entitled with tax reduction for persons with dependent children had to be dropped after active protest of Norwegian women (Dahl 1987:127).

6.4.3. Family benefits of health insurance

Obligatory insured persons in sickness insurance can co-insure their spouse (if the spouse is not liable to obligatory contributions based on employment) and their children without paying further contributions for their family members. Thus the costs of sickness and preventive health care for children are socialized and redistributed towards all adults liable to health insurance contributions.

Another benefit of health insurance in case of sick children needing care is the **sick care allowance**. A sick pay is paid to the insured employee by health insurance if it is necessary to take a day off from work to nurse a sick child below the age of 8 according to a medical certificate (para. 45 Social Insurance Act V). This entitlement grants up to five work days sick pay a year, but only under the restricted condition that no other person living in the household can supervise, nurse or care for the child. The same regulation entitles the employee also to a right to take time off against the employer which is not mandatory (para. 45 III Social Insurance Act V).

These rules of social security law should be seen in the context of the labour law provision of para. 616 German Civil Code³⁴ which grants a more extended right to time off in case of sickness of relatives to employees and at the same time an entitlement to continuous pay of wages by the employer. But para. 616 German C.C. is mandatory, and thus the applicability of the right is usually contracted away by employers in employment contract or also in collective agreements³⁵. The social security entitlement to a sick care benefit and the connected right to time off against the employer has therefore a sort of a

34 According to para. 616 I German C.C. an employee can stay away from work when urgent personal reasons exist and these reasons have not been caused by one's own negligence and if the time off from work concerns a "relatively not relevant period of time".

35 See in detail chapter 5.10.4. as well as Bode (1990:98ff.).

"stop-gap function" compared to the more favourable labour law entitlement of para. 616 German C.C. which is, however, contracted away mostly by employers because of the costs involved.

The existing social security entitlement needs some amendments. The maximum period of the benefit (5 days per year) and the age limit of the sick child (8 years) are inadequate; an extension is therefore required (at least to a maximum of 15 days per year and an age limit of 14 years). The requirement that no other person living in the household is able to take over the care and nursing of the sick child should be dropped. An **individualization** of this entitlement is desirable which makes it independent of the organization of the household.

6.4.4. The parental allowance of the Federal Educational Allowance Act³⁶

Since 1986 a mother or a father can receive a parental allowance called "educational allowance" of DM 600,- monthly if s/he cares for the child (also an adopted child or step child) herself during the first months of life and no employment of a full-time nature is performed (para. 1 Federal Parental Allowance Act). The duration of the benefit lasted 12 months up to 1986 and has been prolonged step by step (15 months for children born after 30 June 1989 and 18 months for children born after 30 June 1990). From the beginning of the seventh month the allowance is means-tested. It is reduced when certain income thresholds are exceeded (DM 29 400,- income per year of a married couple, DM 23 700,- for other entitled persons plus DM 4200,- for each further child). The educational allowance cannot be received in case of contemporaneous full-time employment : the weekly working time may not exceed 19 hours. The positive potential of part-time work during the parental leave is thus limited to part-time jobs not liable to unemployment insurance (with the only exception of 19 hours weekly being liable to unemployment insurance). A legal right to part-time work against the employer during parental leave does not exist, so the possibility depends on the good-will of the employer.

The educational leave is taken nearly exclusively by mothers (95 %). Most of the employed women, however, take it up only for the duration of six months after childbirth and return thereafter to their gainful employment. A longer take-up is apparently connected to big occupational disadvantages and financial losses (for the problems of the inadequate recognition of educational periods in pension law see above). Given the means-test from the

36 Federal Educational Allowance Act amended 25 July 1989 (Bundesgesetzblatt I p.1550).

seventh month on many married mothers would receive no more or only a reduced educational allowances because the income thresholds are rather low.

The educational allowance of DM 600,- a month is not high enough either to cover the maintenance of the educating person or the real costs of care for the child and its maintenance. Therefore another income resource is presumed. Furthermore the educational allowance does not have the function of substituting for the lost wages in times of parental leave, it is financially rational that more mothers than fathers take the parental leave. Thus, the lost earnings will be on average lower than should the father interrupt his employment.

The lower the foregone wages of the mother are, the more rational it is for her to take up the educational leave at full length. Especially for households with low aggregated income it makes sense economically to take up the full educational leave since educational allowance will be paid without any reduction after the seventh month of the child if the income threshold is not exceeded. Thus a negative employment incentive for mothers with low income is set up and longer interruptions will be more frequent. This is reinforced by the specific rules on recognition of educational periods for pension purposes (see above chapter 6.3.3.3.), since for women with low wages beyond the level of 75 % of average incomes it does not pay in terms of building up pension entitlements to return to employment earlier, but it makes sense to renounce to paid employment for one respective three years to profit from the full recognition of educational periods in pension law. This specific "poverty trap" is a result of the combination of income threshold and the prohibition to cumulate pension entitlements based on employment and based on periods of child care. This negative incentive for women's employment can lead to a prolongation of employment interruptions, especially for women earning low wages, and thus worsens their already precarious employment position.

7. Rules of marriage and family law regarding time-allocation in the exchange and household economy

Legal norms of marriage and family law lay down obligations on the provision of maintenance through gainful employment and through work in the home. The duty of domestic and educative work follows for married persons from the duty of maintenance in marriage, paras.1360, 1356 German Civil Code (a spouse's autonomy is restricted by the duty of maintenance¹, and for parents from the duty to maintain children (para.1601 German C.C.) and from the "right and duty of upbringing" (para.1666 German C.C.). By contrast, no legal obligations on the allocation of time in the household economy exists for people who are not married and have no children.

7.1. Beyond labour law - the 'other standard employment relationship' in the household economy

The relationship of work in the home regulated by marriage and family law is not covered by labour-law provisions, and work in the home is not "work" within the meaning of labour law (cf. Chapter 5.1.). The housewife has no claim for wages upon her husband and her worktime is unregulated. There are no maximum worktimes, night work is not forbidden, work continues on Sundays and holidays and there is no entitlement to leave. Statutory protection of motherhood does not apply and security of employment is unregulated. In the event of accidents at the workplace, the housewife has no entitlement to professional or occupational disability pension. Provisions to protect personal safety at the workplace and physical integrity are deprived of force to such a extent that even rape by the husband does not constitute a criminal offence. The housewife's work is not subject to the obligation of pension and sickness insurance. Work in the home establishes no separate entitlements to pension insurance - with the exception of the time spent on upbringing and care, now recognized to a limited extent (things are different only if the marriage fails: in the event of divorce she has since 1977 a claim of her own, in the "splitting" procedure, to part of the pension expectation). What she does have is the claim to maintenance upon the husband - a very ambivalent right, since the institution of mutual maintenance obligation of spouses also obliges her to allocate time to work in the home which is not equivalently compensated for by the maintenance provided by the husband (cf. Chapter 3).

¹ BGH 75,272.

7.1.1. Patriarchal rights of disposal of the wife's labour power in the 1900 German C.C.

After the German C.C. came into force on 1 January 1900 and up to the entry into force of the "Equality Act" of 18 June 1957 (which entered into force on 1 July 1958), work in the home was legally treated as "unpaid service" which the wife had to render the husband in the context of her "housewifely duty". The obligation to do work in the home is actionable in an action for "restoration of marital cohabitation" on the basis of para.1353 German C.C.² "The concept of 'marital duty', not explicitly contained in the Civil Code, already contains, in the very wording, everything that the nature of marriage as a legal institution can involve by way of brutalities" (Weber 1907:416).

The husband's right to dispose of the wife's labour power and worktime organized on a patriarchal pattern corresponded on the woman's side to the duty of "unpaid service". It is in this connection too that the husband's rights are to be seen: he could until the Equality Act of 1958 terminate an employment of his wife's with prior permission from the Guardianship Court, without complying with any notice period³. Originally, in the first version of the German C.C., a still further-reaching right for the husband had been provided, whereby the wife would have needed the husband's agreement in order to conclude a labour contract. This was then reduced to the husband's right to terminate with permission from the Guardianship Court, following "tough, energetic action by Baron von Stumm-Haltberg, who pointed out that particularly in industrial worker circles greater independence for the wife was thoroughly necessary"⁴. It seems to have dawned upon the parliamentary gentlemen (women were excluded from the right to vote and to stand for election until 1919) that proof of the husband's assent for every labour contract with a woman worker was not practical (putting it in terms of transaction-cost theory: the need for further assent to the labour contract would have increased the information and negotiating costs too much and reduced allocative efficiency).

The husband had not only rights to dispose of the wife's labour power but also rights to take proceeds on the wife's assets, in virtue of the marriage. According to para.1363

² This is even now the case. Even if the actionable right to housekeeping cannot be subjected to compulsory enforcement (para.888 II German Code of Civil Procedure), it is an under-estimate to assume that para.1356 BGB has an "overwhelmingly symbolic function" (Lenze 1989:97).

³ In principle the wife was able on the basis of her basic legal capacity to undertake to render personal services to third parties (para.1358 II BGB, old version). But where the husband's entitlement to compliance with "housewifely duty" (equivalent to the husband's duty of maintenance) was infringed by such services to third parties, the husband had the right, on prior permission from the Guardianship Court, to terminate her employment (though not if he had previously given his assent).

⁴ Proceedings of the Reichstag Committee, cited from Weber 1907:434.

German C.C., the wife's assets came into the husband's administration and usufruct through the marriage. Income on the wife's assets was the husband's income, as was the yield of the wife's work in a business of the husband's, to which the wife was, along with running the household, obliged. The obligation of maintenance lay in principle only on the husband, but he could comply with this obligation even without any contribution of his own, if the wife had assets, from the income on the wife's assets alone.

The unilateral right of decision by the husband was guaranteed by para.1354 German C.C.⁵ (not repealed until the Equality Act of 1958). The wife's forced abandonment of her name (para.1355 German C.C.) too was "purely historically determined, a residue of primitive 'father right' acquired on the basis of bride purchase, under which the wife, not yet legally treated as a personality, possessed no special separate legal existence of her own at all, but received her name and position, like her rights, from the husband" (Weber 1907:420). And the rights to dispose of the woman's body (still persisting in the absence of punishment for rape within marriage) derived from the tradition of medieval "wardship". The direct effects of the development of the capitalist economy on the legal structure of marriage were therefore hardly very far reaching, being confined to the further development of legal institutions already developed by the Middle Ages on the basis of the needs of commerce (e.g. removal of the restriction of the wife's legal capacity to act as entrepreneur, cf. Weber 1907:379ff.). Patriarchal restrictions were loosened slightly more in the German C.C. on the basis of the interest in employing female labour.

7.1.2. From "unpaid services" to the model of the "housewife marriage", 1958

The legal assessment of the wife's household management and work in the home did not change until the entry into force of the "Equality Act" on 1 July 1958, with the provisions on maintenance (paras. 1360, 1360a and 1606 III German C.C.) being changed. Running the household was no longer treated as a "duty of unpaid service" to the husband, but as the wife's contribution to maintenance, legally equated with the husband's gainful employment. The Federal Constitutional Court declared in 1963 that "the contributions of mother, housewife and helpmate" had now, by contrast with previously, to be assessed as

⁵ Para.1354 read: (I) The husband is competent to decide in all matters affecting joint marital life and in particular determines the dwelling and the place of residence. (II) The wife is not obliged to follow the husband's decision where the decision constitutes abuse of his right.

maintenance and that "this change in the concept of maintenance follows not from family law but directly from the Basic Law"⁶.

In 1958 the husband's right to terminate the wife's employment with permission from the guardianship court was also eliminated. The Equality Act of 1958 also introduced as the statutory marital position on assets the "community of acquired assets", so that separate assets, independent administration of assets and an equal distribution of assets acquired during the marriage were in the event of divorce guaranteed. This to a certain extent created "compensation" for the wife's work in the home, which is after all not paid for. The background to the reform is described by Zieseler as follows: "At a time of high unemployment rates, needs to re-establish the family (the family as a 'bulwark' against collectivism, socialism and communism) and wide lack of kindergartens, the principle of equal participation in economic development (balancing assets acquired during the marriage) recognized that the housewife and mother makes a contribution to family life of equal value to the husband's earnings"⁷.

Until 1977 the model of marriage in the German C.C. was the so-called "**housewife marriage**" (para.1356 German C.C., old version⁸). This legally obliged the wife to run the household. As a rule she met her maintenance obligation by running the household⁹. At the same time numbers of wives had always been obliged, for economic reasons and even legally, to work for pay in order to provide maintenance ("to the extent that the husband's labour and the spouses' income were insufficient to maintain the family", para.1360 German C.C., old version). Over and above the marital duty of maintenance was the family-law duty to work in the other spouse's profession or business¹⁰, no longer explicitly mentioned in the Act after 1977¹¹.

⁶ BVerfGE 17,1 (12ff.), NJW 1963, 1723: In the light of Article 3 II German Basic Law, the wife's indirect services in running the household and looking after children are to be assessed as contributions to maintenance of equal value alongside the contribution to maintenance by providing the necessary financial resources. Cf. also BVerfGE 22, 93 (96f.), NJW 1967, 1507 and the Federal Constitutional Court's decision of 2 July 1969, NJW 1969, 1617.

⁷ Alternativkommentar-BGB, paras. 1363 ff., Rz.4.

⁸ "The wife runs the household on her own responsibility. She is entitled to be in gainful employment insofar as this is compatible with her duties in marriage and the family" (para. 1356 I BGB, old version).

⁹ Para. 1360 BGB, old version, read: "The spouses are mutually obliged to maintain the family adequately by their work and with their assets. The wife meets her obligation by contributing work to sustain the family, as a rule by running the household; she is obliged to take up gainful employment only where the husband's labour and income are insufficient to maintain the family, and the spouses' circumstances are not such as to permit them to make use of the basis of their assets."

¹⁰ Para. 1356 II BGB, old version: "Each spouse is obliged to collaborate in the other spouse's profession or business to the extent that this is usual according to the circumstances in which the spouses live."

¹¹ Though it still continues very largely to be assumed, based on para. 1353 BGB (obligation to establish marital cohabitation).

The wife's "entitlement" to professional activity still falls, as it did, under the restriction of "compatibility with the family" ("insofar as this is compatible with her duties in marriage and family", para.1356 I German C.C.); this restriction still applies, though since the first Marital Law Act of 1 July 1977 it has been worded in gender-neutral terms.

7.1.3. The family law reform of 1977 - how equal are paid and family work?

The 1977 reform of family law abolished the normative model of the "housewife marriage" and replaced it by a gender-neutral model¹². This regulates running the household by agreement between the spouses, and both spouses have the right to be in gainful employment (para.1356 German C.C.¹³).

The structural elements that legally regulate time allocation in the household economy are retained:

- the duty to run the household in the context of the mutual maintenance obligation of spouses
- the limitation on allocation of time to gainful employment in terms of "family compatibility".

In collaboration with the **de facto** gender-specific division of labour and against the background of the discrimination against women's work in the exchange economy, this gender-neutrally formulated rule of time allocation in the household economy still leads to housework being assigned overwhelmingly to women. The most important legal duty on time allocation in housework arises from the family law rules on the duty to care for and bring up children, which have still not yet been worded fully gender-neutrally.

¹² One effect of the gender-neutral wording is that in the words of the Act it is now "he" that runs the household (this being the pronoun corresponding to the word "spouse", since it is "the spouse" who does everything).

¹³ Para.1356 BGB in the new version of 1 July 1977, which regulates household management and gainful employment, runs: "(1) The spouses arrange the running of the household by mutual agreement. If household management is left to one of the spouses, that spouse shall run the household on his own responsibility. (2) Both spouses are entitled to be in gainful employment. In choosing and carrying out such employment they shall take due account of the interests of the other spouse and of the family."

7.2. Legal rules of time allocation in the household economy on the basis of the family law duty of parents to maintain children

Parents' duty to maintain children is regulated by paras.1601 ff. German C.C.. Parents are entitled and obliged to "parental care" (para.1626 I German C.C.), which covers "personal care" and "care of assets". "Personal care" means the work of upbringing: the duty to look after the child, bring it up, supervise it (para.1631 German C.C.). Breach of these duties may be penalized in the case of "detriment to the child's welfare" (para.1666 I German C.C.) (in extreme cases by separating the child from the family, para. 1666 b German C.C.), where the child is "neglected".

While the obligation to run the household as part of the marital obligation of maintenance has since 1977 been worded gender-neutrally, this is not the case with the legal duty to allocate time to child upbringing and care. According to para.1606 III, second sentence, German C.C., the **mother** is to fulfil her duty to contribute to the maintenance of a minor child, as a rule by caring for and bringing up the child. The normative model of the law is the woman's time allocation to child rearing and care; it is not gender-neutral.

In principle the duty to maintain children covers both the obligation to allocate time to paid employment (where "assets" are not sufficient to cover maintenance, which is very seldom the case), as well as the obligation to allocate time to the work of upbringing ("personal care")¹⁴. For the father this as a rule means that maintenance is to be provided by gainful employment (para.1606 I s.1.: the person obliged to maintain guarantees maintenance through gainful employment and assets), while for mothers the allocation of time to the work of upbringing was treated as the rule and the normative model. This pattern increases transaction costs for the mother where the parents by agreement wish to depart from this normative model.

Accordingly, there exists the difference between the legal regulation of spouse maintenance and that of child maintenance that the wife is obliged to the husband to

¹⁴ If, for instance, parents still in education have not enough money to finance all-day care of their child, they cannot ask the youth office for restitution of child care costs. As the Baden-Württemberg Administrative Court said in 1990 in a judgment (Az 6 S 661/89): Where money was lacking for accommodation in a child day-care centre, then it followed from the duty on the parents in Article 6 GG that there was an "obligation to make a corresponding renunciation of 'self-realization'", and therefore arrange studies in such a way as to make sufficient time available for looking after the child all day at home. The parents, married students, had brought an action against the youth office for it to pay the charges for a child minder to look after a child all day (DM 230 monthly), in order to guarantee their fundamental right to professional freedom (freedom of training).

allocate time to gainful employment not only economically, but also legally, where one income is not enough to maintain the family. **The mother is legally not obliged towards the child to allocate time to gainful employment (in contrast to the father)**, since as a rule she has already met her maintenance obligations by caring for and bringing up the child (para.1606 III, second sentence, German C.C.). Where the child does not live with the mother at all but is accommodated in an institution or a home, then - according to the Federal Constitutional Court - para.1606 III, second sentence, German C.C. is not applicable and the mother must then make a contribution to the costs of maintaining the child by gainful employment too¹⁵.

As long as the marriage continues, this distinction¹⁶ need not have any importance since in this case spouse and child benefit jointly from the wife's housework¹⁷. Disputes are settled before the courts in cases of a father's monetary maintenance obligations for a child born out of wedlock or where the marriage has broken down and the parents of a child are separated or divorced - for in this case the (divorced) husband and or father has an interest in the wife "adding earnings", and this income leads to a reduction in his cash maintenance obligations. As the facts show, the willingness of divorced husbands to pay maintenance is very low once they no longer benefit directly from the wife's housework¹⁸. Their interest in more gainful employment by the mother then conflicts with the normal model's formulation of the mother's contribution to maintenance through the work of upbringing, as in para.1606 III, second sentence, German C.C..

Some lower courts and part of the literature have required that a mother's income from employment should have the effect of reducing the child maintenance the father has to pay. The grounds are that the employment brings about a "reduction in the contribution to care", no longer justifying the favouring of the mother by legally freeing her from the obligation to contribute to child maintenance by paid employment. As a consequence, all kinds of models of calculating the mother's income from employment, allocating proportions

¹⁵ BVerfG Order of 2 July 1969, BVerfGE 26,265.

¹⁶ Legally, the maintenance entitlements of spouses and child are separate. Several people entitled may be due entitlements of their own (no combination) which could have separate destinies in extent and duration (BGH NJW 1972, 1716; FamRZ 1973, 129).

¹⁷ Cf. Voegeli (1985).

¹⁸ An interesting article on the "fairy tale of the fleeced ex-husband" and the growing discrimination of the mere housewife in maintenance law was published by Wiegmann (1989). According to studies in 1978, 1979 and 1983, only 29% of all divorced mothers had an entitlement to maintenance. The average maintenance amounted to less than DM 500 monthly. More than one-third of all divorced mothers were receiving social assistance benefits, and 74% were working (again).

of the father's and mother's incomes in calculating maintenance and assessing the economic value of the work of upbringing have been proposed¹⁹.

Case law has however so far rejected a mother's share in cash maintenance and the counting of the mother's income from voluntary employment against the father's child maintenance, since according to **para. 1606 III, second sentence, German C.C. the mother's maintenance in kind is equivalent to the father's cash maintenance**²⁰. Any additional cash maintenance obligation on the mother would exist at most where her income exceeded the father's²¹. The decisive point is held to be not when but that the mother comply with her obligation to supply care²². On the same grounds, obligations on a mother to take up employment as from a particular age in order to share in the child's cash maintenance have so far mostly been rejected by the case law²³.

A different assessment is given of the duty of the divorced partner that previously ran the household to make a contribution to employment in order to maintain herself (not the child). There is a claim for maintenance against the spouse by someone looking after minor children (child-care maintenance). However, the obligation to take up an occupation exists as from a particular age of the children. It is largely affirmed by the courts that until the child's eighth year of age or third year of primary schooling there is no obligation to take up employment. Thereafter half-time working has to be taken up, and as from the youngest child's fourteenth year of age full-time work.

¹⁹ See the article by Derleder/Derleder (1978); they reject taking voluntarily earned income of the mother into account in calculating the father's maintenance obligations.

²⁰ BGB NJW 1981, 1559; BGB 70, 151.

²¹ BGB NJW 1980, 2306.

²² Köln FamRZ 1981, 487.

²³ The parent with custody is as a rule not obliged to take up work until the child's majority, and any voluntarily earned income is not to be counted towards the child's maintenance - as decided by the Federal High Court of Justice for the case where the other parent is able-bodied and has at least as high an income (BGH NJW 1980, 2306), as also did the 6th Senate of the Düsseldorf Regional Appeal Court, NJW 1980, 1001, with exhaustive justification. A different view was taken by the 3rd Senate of the Düsseldorf Regional Appeals Court (FamRZ 1978, 855; 1980, 19). This was that the parent with custody can be expected to take at least half-time employment once the (youngest) child has turned 15. Even where the father is not able to work or his own "adequate maintenance" is prejudiced by the contributions towards maintaining the child, the mother's obligation to allocate time to employed work to secure the cash to maintain the child was affirmed by lower courts (FamRZ 1979, 139: according to which a mother of a 17-year-old apprentice had even to take up full-time employment, given the poor asset position of the unemployed, disabled father). This case law on the mother's need to allocate time to employed work where the father's earned income is inadequate for the child's cash maintenance and the child has reached a certain age comes close to the interpretation of the time allocation rules in spouse maintenance.

7.3. Legal norms on division of working time between spouses

While, since the entry into force of the first Marital Law Act on 1 July 1977, running the household has no longer been assigned to the wife, the spouses having instead, according to para.1356 I German C.C., to regulate household management by mutual agreement, the patriarchal interpretation of this gender-neutral formulation nonetheless became clear in the explanatory statements accompanying the draft act: the legislature expects greater complaisance on the part of wives, for instance where children have to be looked after and brought up²⁴ and in the case of necessary care of family members, where the family includes not only family members living together in the same household, but also those towards whom there is a moral obligation of care and attention²⁵. While the model pattern of the housewife marriage in principle no longer applies, nevertheless "the housewife marriage seems particularly maritally appropriate for particular stages in marriage - for instance where infants or young children are present"²⁶.

7.3.1. The legal duty on the husband to take part in housework - a fine illusion

Theoretically, husbands too are obliged to take part in housework. The explanatory statement to the bills for the "Equality Act" stated as long ago as 1954 that the husband's obligation to support the wife in running the household followed from para.1353 German C.C. (obligation to establish marital cohabitation)²⁷. In a 1959 judgment, the Federal High Court of Justice gave its ideas on how much housework husbands ought to do ("to the extent that this is usual having regard to the circumstances in which the spouses live"). The use of his time and effort in his occupation were to be taken into account, so that "help was confined to heavier, difficult work that could not be expected of the wife. This was particularly so where the husband himself exercises a tiring, laborious occupation"²⁸. The husband ought at any rate to help in the house after his retirement²⁹. The Federal High Court of Justice repeated this in 1971: running the household ought not to be incumbent on the wife alone, but where she was fully or partially employed the husband too was obliged to help in the home and in looking after and bringing up children³⁰. Other courts

²⁴ BT-Drucks. 7/650, p.98.

²⁵ BT-Drucks. 7/4361, p.26.

²⁶ Explanatory statement on the government bill, BT-Drucks. 7/650, p.98.

²⁷ Explanatory statement to the federal government's bills of 4 January 1954 and 29 January 1954, BR-Drucks. 532/53, p.27 and BT-Drucks. 224, p.29.

²⁸ BGH judgment of 10 November 1959, JZ 1960, 371 (372).

²⁹ BGH judgment of 17 October 1972, FamRZ 1973, 129; BGH LM, BGB para.845 No.10, FamRZ 1960, 21.

³⁰ BGH judgment of 13 July 1971, NJW 1971, 1983.

proclaim that household work should be distributed equally over both spouses, where both are in gainful employment and work the number of hours laid down in collective agreements³¹. A husband's involvement in housework ought to change in line with the wife's working hours in employment. They ought to look after the children jointly³². Similarly, for the case of conflict, where the spouses were unable to find any "agreed solution" as to the division of labour within the meaning of para.1356 German C.C., both - according to the Federal High Court of Justice - were obliged to manage the household³³.

However, between these normative claims and the legal reality there is a deep gulf - the legal fiction that with wives' increasing employment husbands do correspondingly more housework is just as illusory as the corresponding assumptions of redistribution in neo-classical economic theories. In fact the total work times of women in employment and housework increase, and husbands' involvement in housework is vanishingly small (cf. Chapter 4).

7.3.2. The family law duty on spouses to work together - unpaid work in the partner's business or profession

Until 1977 the obligation on each spouse to work together in the other's profession or business to the customary extent was explicitly codified (para.1356 II German C.C.). This rule mostly obliged wives to allocate time to employment in their husband's business or profession - without pay. The family law duty of collaboration went further than the obligation to allocate time to (paid) employment on the basis of the maintenance duty in marital law. It was overwhelmingly husbands that profited from the right to dispose of the unpaid labour of the spouse (being more often owners of a business, or self-employed) - in addition to the profits from the un(dер)paid housework of wives. The customariness of such assistance was for long interpreted very broadly by the courts³⁴.

³¹ Bamberg VersR 1977, 724.

³² Federal Social Tribunal, FamRZ 1977, 642.

³³ BGH FamRZ 1974, 367.

³⁴ According to the Reichsgericht case law of 1939, a wife remained obliged to provide assistance usual in the spouses' circumstances even where the couple acquired a better asset position and increased their income (RG 22 May 1939, HRR 1939, 1221). The Federal Constitutional Court too, in 1962, affirmed the "usualness" of assistance, even where economic circumstances did not necessitate the wife's assistance (BVerfGE 13, 290 (312f.)). A duty of assistance was, for instance, assumed for a wife in the case of legal and notarial practice (BGB 10 July 1959, FamRZ 1959, 454f.) or in a small toy factory (BGHZ 46, 385, FamRZ 1967, 208). Cases where the husband's duty to assist was at dispute are rarer. The husband's duty to collaborate on his wife's farm, a small family enterprise, was affirmed by the BGH on the grounds that the farm's income placed the husband in a position to meet his duty to maintain both the family and an illegitimate child (BGH 25 May 1966, FamRZ 1966, 492). In cases where husbands' duty to assist is at issue, the case law tends to assume

These regulations were eliminated without replacement by the first Marriage Law Act of 1977; however, a family law obligation of assistance is still very largely assumed under certain circumstances³⁵. But this legal obligation has lost much of its economic importance with the decline in numbers of family businesses. It still plays an important role in the area of agriculture, where many female family members work to provide assistance. The "customariness" of the obligation is interpreted increasingly restrictively, so that at most an obligation to provide assistance for a transitional period in emergency situations is held to exist³⁶. Problems arise as a rule in conflict situations here too, for instance in subsequent disputes over property and absence of agreements between the partners (no company contract or labour contract for assistance), since the question of remuneration for voluntary assistance and of its legal treatment were left unregulated by the first Marriage Law Act.

7.3.3. The legal duty to allocate time to gainful employment to secure marital maintenance

Until "appropriate maintenance" is reached both spouses are - irrespective of sex - obliged to allocate time to gainful employment. According to para.1360 German C.C. the spouses are obliged to maintain the family adequately through their work and with their assets. The "adequate maintenance" pursuant to para.1360 a) German C.C. is status-oriented (appropriate to the spouses' circumstances); it must be enough to meet the cost of the household and the spouses' personal needs, and to cover the vital needs of the children entitled to joint maintenance.

The contribution to maintenance by the spouse running the household is as a rule housework. Although the housewife thus makes her contribution to maintenance by housework, where earnings are totally insufficient she is not only economically, but also legally, obliged to take up gainful employment³⁷ where assets plus one spouse's earned income are not enough. This was put explicitly in para.1360 German C.C. (old version) -

an "internal company" (remuneration by involvement in profits) (e.g. BGH 14 April 1967, FamRZ 1968, 589; BGH 11 July 1967, FamRZ 1967, 618) more than in the case of unpaid assistance by wives.

³⁵ The grounds being the general duties of assistance and support arising out of the duty of marital cohabitation pursuant to para. 1353 BGB (BGH JZ 1977, 607).

³⁶ Alternativkommentar BGB para. 1356 Rz. 6. Otherwise the right of both spouses to occupational work would be too severely restricted.

³⁷ The legal obligation on the spouse running the household to allocate time to employment does not however exist where maintenance able to guarantee existence is available but additional income would be necessary to "increase living standards and provide for special acquisitions" - and specifically not where the spouse running the household could earn considerably more from work than domestic staff employed in their place would cost (BGH Mdr 69, 564).

the wife (the normal case) running the household was obliged to take up gainful employment "insofar as the husband's labour and the spouse's income were insufficient". According to the new law no agreement is reached in a childless marriage as to who is to run the household, the wife too is held to be obliged to take up gainful employment³⁸.

The obligation to allocate time to employment to guarantee maintenance cannot be simply eliminated by mutual agreement by the spouses within the framework of para.1356 German C.C. or by unilateral change to the existing allocation decision. **The limits to a possible agreement** are the household expenses and the spouses' personal needs, as well as the vital needs of the children entitled to joint maintenance³⁹.

The possibility for marital partners to agree, on the basis of para.1356 German C.C., to an alternative solution for time allocation (both engage in running the household and spend more time in household management and childcare than in employment) and unilateral change are limited by the legal obligation to guarantee maintenance where

- either the claim to maintenance of other entitled persons (divorced marital partners or children entitled to maintenance) would be reduced thereby, or
- governmental transfer allowances would have to be claimed, though maintenance could be earned by employment.

The obligation to allocate time to gainful employment is interpreted in the case law to the effect that **no right to subsequent alteration and reduction of time spent on gainful employment exists if appropriate cash maintenance of those entitled to maintenance would be endangered thereby.**

The rules become clear in **conflict situations** (in the case of separation, divorce, several people entitled to maintenance, children from various marriages). Spouses obliged to maintain their children from a previous marriage cannot confine themselves to running the household in their new marriage since in terms of the law relating to maintenance this benefits only members of the new family, and maintenance duties resulting from claims of those entitled from a former marriage would be neglected⁴⁰. The spouse running the household is obliged in this case to take up subsidiary activity and has to work hours in the

³⁸ Dieckmann FamRZ 1977, 89.

³⁹ BGB FamRZ 1984, 980.

⁴⁰ BGH FamRZ 1981, 341.

former profession to the extent of the maintenance obligations. The new spouse has to put up with the additional burden brought about by this absence⁴¹.

An assessment is made of what combination of time allocation by the marital partners increases family income more: in a case where a father obliged to maintain a child from a first marriage took up household management in the second marriage, the Federal High Court of Justice decided that this would have to be "accepted at any rate where family maintenance in the new marriage would be more favourable because the other spouse was fully employed than would be the case were the latter to take over the care and the parent with the maintenance obligation to be fully employed"⁴².

Where those with maintenance obligations are unemployed, there is verification whether they are merely seeking thereby to evade their maintenance obligation: someone with a maintenance obligation must show to have exhausted all possibilities of finding a job (say by producing the applications made and the like); merely signing on at the labour office is not enough (consistent case law).

On the other hand, **the normative purpose of guaranteeing family maintenance may require a change in occupation or post where this seems a reasonable demand**⁴³. A change in occupation or job is unreasonable where there is no prospect of securing a new lifetime position, or during the period of professional training (if, that is, no higher income can be secured thereby in the medium and long term). Should someone with a maintenance obligation omit to take up a reasonable, considerably better paid, activity, then in calculating the amount of maintenance due it is the figure they could have earned that is taken as a basis⁴⁴. Conversely, someone with a maintenance obligation does not have the right to give up employment for the sake of further training and give family members over to social security⁴⁵.

The efficiency criterion of time allocation for the securing of maintenance through employment is, accordingly, how most can be earned immediately or in the

⁴¹ Thus a father obliged to maintain his child from a first marriage may not in the second marriage be a house-man doing without any additional earnings (Krefeld NJW 1977, 1349). A mother obliged to provide cash maintenance for her children from a first marriage had to return to her profession, dental assistant, and could not confine herself in her new marriage to running the household (Cologne FamRZ 1979, 328). The new marital partner had to put up with this.

⁴² BGH 75, 276.

⁴³ Stuttgart FamRZ 1972, 643; Bremen NJW 1955, 1606; Celle FamRZ 1971, 106.

⁴⁴ Cologne MDR 1972, 869.

⁴⁵ BHG VersR 1975, 551.

medium term. In principle a person with a maintenance obligation must employ his labour power "as profitably as possible"⁴⁶.

At the same time, **claims on governmental transfer allowances should be reduced as far as possible**. The private autonomy of marital partners in deciding their division of labour is thereby restricted, or the entitlement to public transfer payment denied. Thus, the Schleswig Administrative Tribunal decided that spouses have no entitlement to rent subsidies where they have agreed that the husband should take over household management and the wife pursue employment, but the wife finds no job and the husband refuses, on the basis of the agreement, to take up work in the profession he is trained for⁴⁷. The same logic is followed by the decision, already cited above, according to which a person with a maintenance obligation has no right to give up work for the sake of further training, leaving family members to social security⁴⁸.

7.3.4. Agreements on division of labour by spouses: the "family emergency" and necessary childcare work as limits to time allocation in employment

The "appropriate maintenance" within the meaning of para.1360 German C.C. must be guaranteed. It is only above this limit of "**family emergency**" (which depends on average income and standard of living) that spouses' autonomy in agreeing on their division of labour is in principle guaranteed.

The "protection of the status quo" of arrangements once arrived at between spouses against short-term fluctuations is assured by the case law in the interpretation of the concept of the "**acceptability**" of the taking up of employment. The "acceptability" is determined according to the actual "family emergency position", which has to be weighed against the "interest in continuing" of the spouse running the household. The criteria to be taken into account here are age, physical ability, prior training and time since last employment. For the case of divorce, this is codified in para.1574 German C.C..

Even were the taking up of employment by a wife who has hitherto run the household economically desirable, reliance on the existing arrangement of the division of labour is thus gradually protected. This also contributes towards creating "legal security", since according to the law in force until 1977 the wife was obliged to run the household (with all

⁴⁶ Landgericht Cologne DAVorm 1978, 137.

⁴⁷ VG Schleswig FRES 2, 346.

⁴⁸ BGH VersR 1975, 551.

the disadvantages arising for her therefrom in terms of interruption of her own profession, career, pension position etc.), so that there was scarcely any room for "agreements". On top of this were the forced elimination of employment by law or by "male alliances", such as the former "celibacy clauses" providing for a woman's dismissal on marriage. So called "old marriages" may be treated differently for purposes of verifying acceptability and appropriateness than marriages concluded recently.

Part 3 : REFORMS

8. What contribution can law make to changing the gender-specific division of labour(time) ? - Positions in the feminist debate and their limits

The following aspects are discussed:

- the definition of the function of law in the various feminist theories
- normative conceptions of objectives and alternative legal models
- epistemological and methodological assumptions.

8.1. What function does law have ? What role do legal norms play in the construction of gender ?

These questions are answered in various ways; there can be no notion of one homogeneous feminist position. Differences and conflicts of interests among feminist positions make reference to "woman" as a universal subject look increasingly questionable.

Positive law posits a "naturalistic" gender concept, without explaining it more closely or defining it. The bipolarity of the sexes is implicitly presupposed. There are two sexes, sharply delineated from each other and mutually exclusive: men, women; and nothing else. The problems with these legal definitions have been dealt with particularly in connection with the legal treatment of transsexuals (Willekens 1986, O'Donovan 1985b). Biological sex, social gender and sex role are equated; "sex" and "gender" are as a rule not distinguished. This becomes clearest in the formulation of the "biological and functional specificity of woman", used by the Federal Constitutional Court since the 1950s as an essential criterion in interpreting the equality principle and the precept of equal treatment. Biological sex and the role as mother and housewife were largely equated here. It is only very recently that in some decisions the accents have shifted, though without the standard formula of the "biological and functional specificity of women" - as a departure from the objective, universal, in other words "male" standard - being given up. The legal definition of sex at the same time implies heterosexuality, without this being explicitly mentioned, for instance when in consistent case law it is taken as a basis that a legal marriage can be concluded only between a man and a woman, although the Marriage Act does not mention this condition in a single word.

Against this background, the **function of law in the "internal perspective" of positive law** presents itself overwhelmingly as the mere reproduction of already present "natural", pre-legal sexual differences. Accordingly, law plays not an active but a "passive" role in constituting "gender". This dominant view is not fully maintained: particularly the family law reform of 1977 and the advancing conversion of gender-specifically formulated laws into gender-neutral ones have increased the internal contradictoriness of the legal rules and in individual cases led to a "historicization" of the case law¹. The controversy concentrates on the interpretation of the equality precept of Article 3 of the Basic Law, which constitutes the most general formulation of the legal criterion of allocation ("treat the equal equally and the unequal unequally"), the interpretation of which is open to value-judgements and political decisions.

All **feminist critiques of law** start from the point that the subordination of women is a function of the law, which guarantees men's privileges. But there are considerable differences over whether this is regarded as the only, one among many or the decisive function of legal norms and as to where the social causes of women's subordination are localized.

The narrowest position confines itself to defining the function of law as guaranteeing male hegemony and dominance over women in the sexual hierarchy (MacKinnon 1982). Dominance over women's bodies is the decisive function of law (Eisenstein 1988). The subordination of women is at the same time their answer to suffering and fear caused by male violence (West 1988).

Other positions define the cause of the repression of women in different ways (e.g. in production relations, in the family structure, in the securing of unpaid work by women², in the separation between the "public" and the "private" spheres³, but likewise start from a model of law as "men versus women" (Brown 1986). Men and women are here assumed as fixed categories. Law is an instrument made by men which establishes and extends the power of men as a class over the class of women. Unequal power relationships are created, and the law's main function is the suppression of women, made operational chiefly by refusing rights to women. Studies have concentrated first on the areas of law where women

¹ Slupik (1988) discusses the development of the Federal Constitutional Court's case law in detail; see also Willekens (1986).

² Cf. the analysis by Barrett (1980), Barrett/MacKintosh (1983), Hartmann (1981) and, including the international division of labour, Mies (1983) and Mies (1986).

³ See Olsen (1983), O'Donovan (1985), Pateman (1989), Rose (1987).

are clearly visible as disadvantaged or as victims: as mothers/housewives (family law, marital law, childcare law, divorce law), as bodies (objects) (particularly in criminal law, abortion, rape, pornography, prostitution), or as labour power (labour and social law, family law).

Such work has refuted the myth of the gender-neutrality, objectivity, impartiality and universality of the law - Sachs/Wilson (1978) formulated the counter-programme of the feminist critique of law as being to "discover that law disguises reality by myth, 'beliefs' and rationalizations; reveal tell-tale 'contradictions', biased decisions of judges, demystify the doctrine of female 'natural' biological inferiority and myths of male protectiveness". The orientation of legal norms to "male" interests, value-concepts and life organization were disclosed, and the abstract individual identified as a "male" legal subject, as a market citizen and as gendered⁴. The feminist "research into law as fact" brought together ample empirical and historical material in order to make "invisible women" visible and write a women's history "from below", display the systematic nature of disadvantage and draw up lists of demands for legal reforms to remove discrimination against women. The orientation of feminist legal critique to practical political change as a counter-function to the patriarchal function of prevailing law was for long largely undisputed. Under the influence of the slight success of legal reforms in the 1970s and early 1980s, the increasing use of the "equality principle" by men to claim their rights against additional "women's rights", and the differentiation of feminist positions in the "post-modern disillusionment process", this consensus has broken down.

Many of the models of "law as men versus women" (also termed "standpoint feminism"⁵) simplify the functions of legal norms down to **one** function, the suppression of women. Brown (1986: 435f.) criticizes this position in a review of Sachs/Wilson (1978) and Hoggett/Aikins (1984), on the grounds that 1) women and men are seen without differentiation as classes, and it is assumed that all stereotypical legal concepts disadvantage women, with the disadvantage of individual women and of women as a class being equated and that 2) law is treated as a mere social reflex without specific characteristics of its own. Bottomley/Gibson/Meteyard (1987: 50) criticize the implicit

⁴ For labour law see e.g. Conaghan (1986), Nielsen (1978, 1983), Dahl (1987).

⁵ Harding (1986) distinguishes among "standpoint feminism", "empiricism" and "post-modern feminist theories". These concepts are taken up by other authoresses, e.g. Smart (1990), Bartlett (1990). I however regard these terms as problematic because they suggest rigid separations that do not exist in that way. There is scarcely any work in the area of feminist critique of law that is confined to purely empirical analyses. Likewise, a "standpointless" feminist position seems to me to be impossible and self-contradictory - even the standpoint of mere "negative critique" taken by some post-modern female theoreticians is a standpoint, and often involves abandoning the demand for rights for women and for reforms of law.

adoption of demarcations among various areas of law (say between employment and housework), the absence of the construction of new ways and terrains and the ghettoization of feminist legal theory into areas in which women are clearly visible.

But law fulfils several functions; it is a compromise among various interest groups, lobbies and classes and is used to secure various (often not compatible) present objectives. It may be dysfunctional and display internal contradictoriness, which increases with the growing complexity of law. The split into various sub-systems also means that the construction of "gender" by legal norms is not unitary. There is not just one normative model of "woman" and gender in law, there are several.

8.2. The Scandinavian tendency of "women's law"

Overcoming the traditional demarcations of areas of law that presuppose the subordination of women (e.g. in the concept of work or that of bodily self-determination) is a goal of the Scandinavian tendency of "women's law", known chiefly from work by Tove Stang Dahl (Dahl 1984, 1986, 1987, Weis Bentzon 1986)⁶. It is not merely a "negative" response to the function of prevailing law as "men's law" but the building up of a "women's law" as a combination of the areas of law of relevance to women (analogous to the organization of such legal areas as consumer law or environmental law) that is the goal ("take women as a starting point by applying a perspective of law grounded from 'below'", Dahl 1986: 240). Starting from women's most important work and life situations, a sub-division of women's law into the areas of "money law", "housewife's law", "paid-work law" and "birth law" is proposed (Dahl 1987). The task of law is "to describe, analyse, explain and understand the legal status of women in order to improve their status in law and in society in general". "...Law is thus defined as a critical social science and discipline, aimed at developing action-oriented theories centered around the status of women" (Weis Bentzon 1986: 259).

The normative objectives formulated are justice (redistribution of money, time and work) and freedom (dignity, integrity and self-realization). "Women's law should aim at

⁶ An introduction to these positions can be found in a special number of the "International Journal of Sociology of Law", Year 14/1986, in which papers of the first major European conference on feminism and law, "Feminist perspectives on law", were published. "Women's law" was institutionalized as a subject in several Scandinavian universities. A sub-section of "women's law" as part of the Department of Public Law was set up at the University of Oslo in Norway in 1975. Women's law is an optional subject in the fifth year of study. Lectures on aspects of relevance to women were later introduced as part of the compulsory courses in initial semesters. Since 1976 women's law has been recognized as a course at the University of Copenhagen and in 1984 a Chair was set up. Other universities in Sweden and Finland too followed (Weis Bentzon 1986).

gathering, evaluating and developing the fragmented rules which today regulate birth and caretaking work, and which through increased legal protection can support the values which this work represents (Dahl 1986: 245); "Considerations of justice require an essential societal re-evaluation of care of house and family" (ibid.p.244).

The problem with this approach is that gender roles are presupposed as normatively given and as to be maintained (as is clear from the organization of the subject areas of women's law), while on the other hand the goal of redistribution (of time, money and work) between the different gender is being pursued, which potentially changes gender roles. The danger exists that "women's law" has an affirmative function and does not dissolve gender as a social phenomenon (in order, irrespective of sex, to enhance possibilities of choice among various roles, activities and life patterns), but strengthens it⁷.

8.3. Normative objectives in the feminist critique of law: equality conceptions - what equality?

The position represented here is that the demand for equality and gender-neutrally formulated legal norms must be a component part of a feminist legal critique and legal policy. This does not rule out "positive discrimination", the preferential treatment of women, in particular areas and for a limited time. "Equality", "equal treatment", formulated negatively as "no unequal treatment on the basis of sex" (ban on discrimination) cannot be the highest normative goal - that is "emancipation". The demand for "equality" as the removal of discriminations on the basis of sex is however a precondition for this, as calling in an "unfulfilled promise". Though a number of direct discriminations on the basis of sex have since been removed, the process is far from being completed. The centre of discussion has since shifted to "indirect discrimination" which does not directly disadvantage women on the basis of their sex but is based on gender-neutrally formulated criteria that nonetheless chiefly disadvantage women and are based on gender-roles, status and the like.

The process of "**individualization**" of law is still incomplete in many areas and has so far primarily concerned men (in their role of "market citizens" and labour power), while

⁷ Cf. for instance Dahl (1986:246) : "Women can never participate 'on a par with men' in waged labour and public affairs, and will never have the same real possibilities as men, since we necessarily must - and gladly - give much of our energy to the work of birth (pregnancy, delivery, breast-feeding and the first infant care)." It is true that Dahl largely confines the distinction to acts that because of biological differences are possible for women only. But even the mention of infant care is ambiguous : why should only women do it ? Other work by Scandinavian representatives of 'women's law' similarly goes in the direction of neglecting the distinction between sex and gender.

women have in many respects not been construed by legal norms as "abstract individuals" with political, economic and social rights of their own, but as dependent and equipped with "derived rights" (as wife, as family member, as subordinate contributor to the "family income", by contrast with men as "head of household" etc.). The implementation of formal equality came quicker for "market citizens" and labour power, because of the tendency to transform all individuals into "abstract bearers of exchange value", while in the household economy, dependency relationships, interdependency and "family solidarity" continue to be underpinned normatively as pooling of resources.

The regulation of the labour market and of the exchange economy reacts upon this organization of the household economy, as do norms of social law and public law, while individuals incorporate this interdependency as an element in their decisions. This mutual reference leads to a circle that constantly reproduces "gender". I regard as one essential element in breaking down this circle the further "individualization" of rights and the complete implementation of formal equality (not only for female "market citizens" and sellers of their labour power on the labour market, but also for female producers in the household economy⁸; not just in labour law, but also in social law⁹, tax law, family law). Whether the further implementation of individualization of rights and formal equality also means a step in the direction of more substantive equality, however, depends on *what* rights are granted.

The limits to a liberal concept of equality have often enough been criticized; formal equality is far from meaning substantive equality, and gender-neutrally formulated legal norms can often be straightforwardly combined with a practice that disadvantages women. Women's exclusion from civil rights was, as long ago as 1791, a central point of Olympe de Gouges' criticism in her manifesto for the rights of women, of Wollstonecraft in 1792, and in 1869 also of the liberal John Stuart Mill; they were able to conceive of correcting a concept of equality oriented towards "male" norms.

⁸ Pateman (1988a, 1988b, 1988c) discusses this from the viewpoint of how women as women can secure full rights as citizens of the State, and not merely by adapting to norms oriented to "male" values. It seems to me reasonable to develop this feminist interpretation of the liberal concept of "citizenship" of Pateman's, worked out in political theory, in terms of legal theory too.

⁹ As called for by Dutch feminists too in respect of social security law (Holtmaat 1989).

8.4. The endless debate on equality and difference - and its limits

This debate has been pursued chiefly in the USA, under the slogans 'equality/difference' or 'equal rights/special rights'¹⁰. It has turned in spirals and circles around the question whether women and men ought to be treated equally or unequally, having regard to existing differences. What is meant by these "differences" is already very controversial: on the one hand "biological" differences (pregnancy, birth, breast-feeding) and on the other "motherhood" and associated psycho-social capacities of women - a broad concept, and a snare for all ideologies that explain the social role of "mother" and gender-specific division of labour and hierarchies as "natural order".

The debate is not so new: similar debates were being carried on in the 19th century over labour protection legislation and special protection for women at work¹¹. The frontlines ran between those who called for gender-neutral, equal protection of labour for men and women and expected negative effects on female employment from special protection for female labour (segregation and exclusion from better-paid jobs), and those who in view of the special health risks and the dual burden on women advocated special protection for female labour. The female advocates of equal labour protection for both sexes then split on tactical considerations (easier implementability of rights for a numerically smaller group - only women - since this was cheaper for entrepreneurs; possibility of broad coalitions around special protection for female labour with bourgeois forces too). The introduction of laws giving special protection to female labour and the case law based on them impressively document the ambivalence of "protective laws" that often exclude and disadvantage those protected and on which a paternalistic protectionism is built up as an ideology¹² that postulates the subordination and inferiority of women.

The debate, starting in the US, on "equality" and "difference" can be better understood if the background is taken into account: the absence of legally guaranteed protection for mothers, protection against dismissal during pregnancy and immediately after birth, maternity leave or continued wage-payment in these cases and parental leave (there are

¹⁰ On the question of pregnancy and the "equality/difference debate" in the US cf. Williams (1984/5), Krieger/Cooner (1983), Law (1984), Littleton (1987), MacKinnon (1979), Scales (1981), Strimling (1989), Vogel (1990). A mediating position to overcome the "either/or" dilemma is suggested by Finley (1986) and, using post-structuralist theories, Scott (1988).

¹¹ An overview of court decisions on special protection of female labour in the US is given by Hill (1979). The historical development in various European countries in the 19th century is discussed by Quataert (1979), and a brief summary of historical developments in Germany can be found in Ott-Gerlach (1988).

¹² For a critique of the ideology of protectionism see O'Donovan (1987).

only collectively bargained rules for individual firms but not statutory norms generally valid for all US States). A large number of court judgments have rejected such rights in the name of formal equality¹³, or else treated pregnancy as an "illness" and thus given it "equal treatment" in non-gender-specific fashion. It should further be borne in mind that the women's movement in the US is much more heavily influenced by liberal ideas and more closely linked with the civil rights movement against race discrimination than, say, in the FRG, where parts of the women's movement were historically in closer coalition with the labour movement, and the women's movement was split into a bourgeois and a socialist tendency (Marx Feree 1989). Again, the slight success of the much more developed anti-discrimination measures in the US in the 1970s affected this debate; it emerged increasingly more clearly that essentially only a few groups of women benefited from them.

The "either/or" postulated by representatives of both sides of the "equality/difference" controversy confined the debate to a false alternative. The formulation of this alternative gives an inadequate analysis of the causes leading to this dilemma:

- on the one hand the fact that the allegedly gender-neutral equality norm is oriented towards "male" values, life patterns and roles and therefore necessarily disadvantages women if they cannot adapt to these norms¹⁴
- on the other, the restriction of the equality postulate to particular spheres, while other areas were ignored (particularly social and economic rights of women resulting from their work in the household economy).

As long as the use of anti-discrimination provisions, e.g. in labour law, is oriented towards normative morals and standards which can more rarely be met by women because of the overwhelming allocation of family work to them, their disadvantage is perpetuated. If these models are retained, then special rights for women such as special protection for female labour cannot change anything in principle (although they could mean an improvement for individual groups of women), since the associated costs to entrepreneurs in some circumstances mean that the specially protected group will be more

¹³ For instance in *re Geduldig v. Aiello*, 417 US 484 (1974), the US Supreme Court found that the exclusion of pregnancy from the risks covered by state employee insurance did not constitute discrimination on the basis of sex but merely a non-discriminatory distinction between pregnant and non-pregnant persons. In a further Supreme Court judgment (*General Electric Co. v. Gilbert*, 429 US 1225 (1976)), the exclusion of compensation for lost wages in the event of pregnancy in a private company health insurance fund was found lawful. Both judgments were overturned by the "Pregnancy Discrimination Act 1978". Debate flared up again over a querying of the lawfulness of statutes on maternity leave of the states of California and Montana.

¹⁴ MacKinnon (1987), Finley (1986), Kenney (1986) offer the criticism of both "equality" and "difference" positions that they uncritically accept the underlying orientation to men as the norm, with women then appearing as "deviant" and "different".

squeezed out of the labour market. Both positions ignore the differing situation and conflicts of interest among the various groups of women: not all women are present or potential mothers, and preferences as regards form and amount of gainful employment are very different. Both "equality" and "difference" will, given the prevailing "male" normative model as a standard, always lead to conflict of interests among various groups of women, since not all women can correspond either to the bipolar "male" or the "female" model constructed in this way.

Gender-specifically formulated rights I consider necessary in two situations: on the one hand protection of woman in pregnancy and for a certain period after the birth of the child; on the other hand in the context of measures of "positive discrimination". If the biological differences in reproduction between women and men were not taken into account in the first case by the generally valid statutory arrangements, equal access for women to the labour market would be rendered impossible since a disadvantage for them would arise that cannot happen to men and therefore ought to be compensated for. In the second case the continued operation of the outcome of past discrimination would continue to lead to present or future disadvantage.

In such areas as the new regulations on special protection for female labour in the FRG¹⁵ the debate is complicated by the fact that arguments of political tactics are not brought out clearly as such but appear as a defence of the "difference" position, whereas the main motive for this position is not one of principle. Opponents of removing the ban on night work by women frequently are so because they fear an effect of providing a signal to lower labour protection standards "downwards", not compensated by any improvement in women's employment situation, but nevertheless disguise this for reasons of political tactics or the pragmatics of female legal practitioners using arguments of the "biological and functional peculiarities of women". However, this theoretical imprecision distorts constructive debates on, say, the question of the cost in terms of improving women's employment situation at which agreement to remove the ban on night work and other provisions of special protection for female labour seems possible to female trade unionists too, and what "package deals" might be possible on the political scene.

¹⁵ In the US the debate on special protection for female labour ended when the Supreme Court in 1968, in the *Rosenfeld v. Southern Pacific Co.* decision (293 F. Suppl. 1219) (C.D.Cal. 1968) found the provisions of the special protection for female labour to be discrimination against female workers and infringement of Title VII of the Civil Rights Act.

On the basis of the arguments listed, I rather tend to regard an instrumental conception of the "equality principle" as **"a means to an end"** and not as an "end in itself" as more advisable. The equality principle, as the most general formulation of a legal criterion of distribution ("treat the equal equally and the unequal unequally") and in its specific manifestation as the precept of equal treatment (ban on discrimination on grounds of sex) is necessarily formulated generally in order to be able to cover a multiplicity of cases. Its present shape as legal norms that disadvantage women and are oriented to "male" norms is not necessarily intrinsic to the equality principle, but based on interest-oriented legislation and interpretation by courts and the administration (which is in any case neither unitary nor free of contradiction). The choice of the "tertium comparationis" in interpreting the equality principle need not necessarily be oriented to a "male" individual proclaimed as gender-neutral - that is a political decision¹⁶. But a reorientation requires not only a changed legal interpretation but also changes in power relationships and power positions (including the proportion of women in parliament, courts and other institutions and an increase in women's "bargaining power"). The role of law here is relatively limited.

8.5. What equality?¹⁷ Equal opportunity costs of allocating time to household work and gainful employment

This question is answered in this paper with the call for **equalization of the gender-specifically differing costs of allocating time between gainful employment and the household economy**. This does not mean that the effective worktimes of all persons should be equal (in the sense of "equality of outcome"). Such a solution would not do justice to differing life situations and personal preferences, nor to processes of differentiation. Instead, the costs of alternative options between allocating time to gainful employment or to housework (or the costs of combination of these), which have so far been gender-specifically different, would be equalized. The normative goal represented here constitutes a form of "equality of resources" (Dworkin 1981b). The criterion would be the assessment of the statistically average cost of various forms of time allocation (benefit assessed according to different incomes - wages, contributions to maintenance, social benefits, expectancies, State transfer payments - to be secured from alternative forms of

¹⁶ Cf. Gerhard (1990) for exhaustive historical and legal philosophical arguments justifying this position, and Böttger (1990), who reworks historical materials and Elisabeth Selbert's biography and portrays the history of the controversy over equality and difference in the German women's movement and the implementation of the equal-treatment principle of Article 3 II German Basic Law.

¹⁷ On the legal philosophical debate over the various models of equality ("equality of welfare", "equality of opportunities", "equality of resources", "equality of outcome" etc.) see Dworkin (1981a, 1981b) and Sen (1980, 1981).

time allocation). This would bring about an extension of possibilities of choice irrespective of gender. The normative goal of harmonizing alternative costs of allocating time between employment and the household economy thus combines egalitarian elements with libertarian aspects (increasing possibilities of choice for both sexes).

Some feminist critics are now totally rejecting the demand for "equality" or for rights. This position is based partly on the assessment that the function of law is mainly the guarantee of "male" dominance and that it therefore cannot be used by women if they are not to fall into the trap of the predominance of "male" organization of life and value-concepts, under the label of gender-neutral values. Not all the representatives of this position, however, have abandoned an active legal policy; e.g. MacKinnon - not entirely without contradictions - wishes, despite the analysis of this function of law, to utilize the patriarchal State and legal norms to protect women (e.g. in the proposals for laws against pornography and sexual harassment (Dworkin 1981, German translation Dworkin 1987; for a criticism see Smart 1989). This has been taken up in the FRG particularly by the feminists around Alice Schwarzer and the journal "Emma" (Schwarzer 1988).

The tendency known in English-language terminology as "cultural feminism" opposes equality and gender-neutral norms, and the further individualization of rights, on the basis of a fundamentalist position of guaranteeing "female values" and "female norms" (e.g. "cultural feminism" currents in the US such as Elshtain (1981, 1982), Ruddick (1980, 1983), representatives of "maternal thinking" like Irigaray in France (1989, 1990)¹⁸, or most recently parts of the Italian women's movement too¹⁹). The position on an active legal

¹⁸ Irigaray's catalogue of fundamental gender-differentiated rights includes e.g., along with the call for inviolability of the female body, the legal claim by women to virginity and motherhood as integral components of the female identity. Among feminist jurists in the FRG, Bahr-Jendges (1990) bases herself on Irigaray's position.

¹⁹ A 1987 publication of the Milan women's bookshop bears the characteristic title "Don't believe you have any rights" (Libreria delle donne di Milano 1987, German translation idem 1988). The Diotima Group around Adriana Cavarero and female philosophers at the University of Verona (various authors, Diotima 1987, German translation Diotima 1989) take a rigid position of "philosophy of difference", which constitutes a "rigid and metaphysical" (Braidotti in l'Unità, 3 December 1990) variant of "cultural feminism". According to this there is an "original" difference between men and women, there are two sexes, two types of human being. Everything that the patriarchal world has produced is male, has fallen into disrepute and is therefore "unutterable". Accordingly, the concepts of equality, freedom and democracy are also thoroughly suspect - as is the demand for rights, removal of discrimination etc. What, then, is left over for "speechless women" in a male culture? The proposal of the Italian difference feminists is a "new political practice" of "affidamento", or trusting oneself to women's communities, in order to experience a new female subjectivity and define it as the basis of their "female freedom". This variant of a new feminist fundamentalism presupposes a biological, historical and ontological nature of the "eternal feminine" and is to that extent complementary - albeit with opposite sign - to patriarchal theories of the "nature of woman" with which women's subordination was legitimated. The "filosofia della differenza" is ahistorical and ignores the differing manifestations of gender in different societies shown by historical and anthropological work. On the response to and critical discussion

policy is however varied; from this standpoint it is possible to derive a complete rejection of involvement in patriarchal law as "father right", or else to derive the demand for gender-specific positively formulated women's rights.

Still other sections of the women's movement, while stressing the importance of the women's movement's autonomy, the need for political mobilization and the abandonment of illusions as to possibilities of change through law, nevertheless pursue an active legal policy from this relativizing standpoint, including the demand for formal legal equality and a change away from norms oriented towards "male" values and privileges.

8.6. Epistemological and methodological questions of a feminist critique of law

The reference by feminists to "woman" as a universal subject is being increasingly treated as a problem. One criticism is that the appeal to "feminism" has contributed to an implicit presupposition of a definition of "woman" and a standard of "women's experience" that are rigid, exclusive, homogenizing and bipolar. The tendency to use "woman" as a unitary analytical category is held to obscure or even to deny the important differences that exist among various groups of women and feminists, in particular distinctions of class, race and sexual orientation (Bartlett 1990, Smart 1989; 1990, Flax 1987, Monbow 1988 et al.). The problem with the terms "feminists" and "women" is "its tendency to reinstate what most feminists seek to abolish: the isolation and stigmatization of women (Bartlett 1990: 835).

"Woman" (like "man") is then being accepted uncritically as a "natural" (or ontological) category and regarded as an essential quality inherent in individuals. "Sex" instead of "gender" becomes the decisive reference point. Behind this lies a naturalistic view of "facts" and "ideas" and of their relationship and constitution through social processes. The danger exists of "victimizing" women, regarding them only as victims. On the level of feminist (legal) policy, the development of a feminist theory and practice is neglected and in part sacrificed to a short-sighted policy of "improving women's situation", which may have an affirmative function.

What underlies the debate is the fact that feminists on the one hand are working on the project of removing the bases for the oppression and disadvantage of women and

of these theories in the FRG see the document from the congress "Human rights have (no) gender" 1989, Frankfurt, Gerhard/Jansen/Maihofer et.al. (1990).

thereby in general removing "gender", or removing the rigid allocation of roles to sexes constructed in bipolar fashion. On the other hand, in order to remove specific forms of disadvantage and oppression it is essential to refer to "women" as interest group(s) and to constitute these against fragmentation and subordination as a collective subject (or collective subjects) with autonomous identities. The prevailing social circumstances and dominant ideologies continually reproduce gender; and in the political debates and tactical endeavours at coalitions, various ideologies are mixed (e.g. special protection for female labour). The appeal to existing roles and gender-role stereotypes may also be "empowering" and offer possibilities of exercising political pressure, as, e.g. in hunger strikes by women or others against war. Moreover, in view of the existing circumstances there is a need not only for a theoretical project but for actual political steps to improve women's situation. Their present work, role and activities have to be taken into account in this. These issues cannot simply be answered by a negative project of "deconstruction" of gender, but also call for a critical theory and practice of "reconstruction" - which involves the danger of affirming what is after all to be overcome.

Two extreme solutions to this problem within the feminist spectrum are on the one hand "cultural feminism" tendencies that base themselves on the essential nature of the "feminine" (not necessarily on the basis of biological but on that of cultural or ontological qualities) and a "female order", "female values", as a counter-model to the dominant "male" culture, on the other hand the "deconstruction" of the concept "woman" (defended by some feminists in post-structuralist currents) and the destruction of this "fiction", which in principle rules out the possibility of a positive policy in the interest of women.

Sexes as bipolarly constructed subjects are dissolved by Foucault and Derrida into multiple overlapping social structures and discourses; there are no natural, ahistorical, essential characteristics linking all "women" that would be the basis for a common coherent "identity"²⁰. The binary oppositions establish hierarchies and dominance relationships in which one side is privileged ("male, rational, objective") by comparison with the subordinate side ("female, irrational, subjective"). Starting from these positions, such post-structuralist feminists as the Frenchwoman Julia Kristeva deny the possibility of feminist politics - it is

²⁰ "Perhaps (...) 'woman' is not a determinable identity. Perhaps woman is not something that announces itself from a distance, at a distance from some other thing. (...) Perhaps woman - a non-identity, non-figure, a simulacrum - is a distance's very chasm, the out-distancing of distance, the interval's cadence, distance itself." Derrida 1978: 49).

dissolved into a "negative critique"²¹. The political struggle can have only a negative function and be based on the rejection of "everything finite, definite, structured, loaded with meaning, in the existing state of society" (Kristeva 1981:166). This position marks the "deconstruction" project, in the limit going as far as the dissolution of the bases of feminism.

Other feminists defend more moderate versions in which the "negative function" of post-structuralist theories is changed more into a skepticism towards the "rhetoric of rights" and a shifting of the point of concentration from unreflected legal policy to the development of a critical feminist legal theory is called for (e.g. Smart 1989, 1990). There is also discussion of the possibility of combining the project of "deconstruction" with the project of "reconstruction".

Moreover, it seems to me also possible to combine certain elements of post-structuralist positions with other ones - the idea of breaking down gender into the social relationships and processes that constitute gender was, we know, already formulated by Simone de Beauvoir in her 1949 saying "One is not born woman but made woman"²². The contrast with "pure" post-structuralist theories lies in the fact that a distinction is drawn between "text" or discourse and otherwise structured forms of environment. Even if it is true that "discourses" and practice are constituted by language and meaning, preformed by interaction, there nonetheless exist differences between texts, discourses and institutions, to name only a few examples. In her criticism of post-structuralist feminist theories of knowledge, Hawkesworth (1989: 555f.) writes: "There is a modicum of permanence within the fluidity of the life-world: traditions, practices, relationships, institutions and structures persist and can have profound consequences for individual life prospects (...) It is a serious mistake to neglect the more enduring features of existing institutional structures and practices while indulging the fantasies of freedom afforded by intertextuality."

In the context of a feminist critique of law, I regard the absence of a distinction between "discourse" and institutions/rights as a lack that can lead to neglecting the role of institutions and by contrast over-estimating declared intentions and justifications of those involved (legislators, judges). On the other hand I regard empirical studies ("research into

21 "A woman cannot be; it is something which does not even belong in the order of being. It follows that a feminist practice can only be negative, at odds with what already exists so that we may say 'that's not it' and 'that's still not it'" (Kristeva 1981: 137).

22 "Woman is determined not by her hormones or by mysterious instincts, but by the manner in which her body and her relation to the world are modified through the action of others than herself (Beauvoir 1972: 295).

law as a fact") in order to clarify the alleged function of legal norms as a decisive component of a feminist critique of law. This includes "interdisciplinarity", the incorporation of the findings of historical, anthropological, economic etc. studies of differing forms of social organization and gender, in order to be able to distinguish "long-term" and "short-term" factors operating in their various contexts. By contrast, post-structuralist theories tend towards a relativism which in the feminist critique of law leads to a wholesale rejection of practice to bring about change and thus ultimately leads the starting-point of the feminist critique of law itself *ad absurdum*²³.

Methods of feminist criticism of law are increasingly an object of debate (MacKinnon 1982, 1983; Smart 1989, 1990; Bartlett 1990²⁴). MacKinnon (1982), the first to discuss this explicitly, declared "consciousness-raising" (self-experience, development of awareness as a collective process) to be the decisive method. "Consciousness-raising is the major technique of analysis, structure of organization, method of practice, the theory of change of the women's movement." (MacKinnon 1982: 519). "Consciousness-raising" arose in the women's movement as a practice on the basis of the recognition that the personal is political and should be recuperated from its confinement to atomized personal, isolated experience onto the plane of collective, social experience of women, whose life circumstances and experiences are made largely invisible by the prevailing culture. While the importance of "consciousness-raising" as a practice for the reappropriation of identity and of self-awareness as a subject is recognized, the importance of "consciousness-raising" as a scientific method and the claim to the "truth content" of the findings so arrived at is disputed (e.g. Smart 1989).

Bartlett (1990: 831) describes three elements as methods of a feminist critique of law: first, partiality in favour of women, second the orientation in practice towards juristic alternatives, and thirdly interaction on the basis of personal experience. These are important features of a feminist critique of law - but is the drawing up of a definitive methodological catalogue reasonable and possible? The partiality in favour of women and the description of one function of law as subordinating women is presumably the "lowest common denominator" of the "feminist critique of law". Beyond that, though, as far as

²³ "At a moment when the preponderance of rational and moral argument sustains prescriptions for women's equality, it is a bit too cruel a conclusion and too reactionary a political agenda to accept that reason is impotent, and equality is impossible. Should post-modernism's seductive text gain ascendancy, it will not be an accident that power remains in the hands of the white males who currently possess it. In a world of radical inequality, relativist resignation reinforces the status quo." (Hawkesworth 1989: 557).

²⁴ On the debate on methodological questions and feminism in general and not merely in the area of legal criticism, see Harding (1987), Harding/Hintikka (1986), Hawkesworth (1989).

methods used are concerned I start from the principle "anything goes" (Feyerabend) - use can be justified by the results secured, the explanatory content of hypotheses. Elements of subjectivity, intuition and selectivity are unavoidable and necessary, since phenomena cannot be grasped and theorized in their full complexity, but instead theory isolates individual aspects. This is not a peculiarity of feminist critique of law, even though it has been more heavily emphasized by the women's movement, against the alleged "objectivity" of male-dominated science.

It seems that particular currents in feminist epistemology believe more in the alleged "objectivity" of science than it does itself, where bipolar oppositions are constructed between "feminine" thinking (subjective, intuitive, emotional, committed, "caring") and "male" rationality (objective, rational, realistic, hard - or indeed morphologically and functionally analogous to the male sexual organ: linear, hard, penetrating but not penetrable; thus Irigaray (1985a; 1985b)) are constructed. One consequence of these positions is the construction that only "feminine thinking" (or "maternal thinking", Ruddock 1980, 1983; Elshtain 1981, 1982) can provide salvation from the danger of unbridled masculinity. I regard these views as unacceptable on the grounds discussed so far. One cannot simply conclude from the dominance of men in the practice of science and the orientation of science and theory to "male interests" that there is an inherent "male" character of science and thinking, but initially only that they are dominated by them, interpreted and used in their sense and inappropriately legitimized as "objective" and "rational"²⁵, and that the importance of subjectivity and the historical role of women in development of thought and science are denied.

²⁵ "The pervasive tolerance for and indulgence in 'gender symbolism' within feminist discussions of epistemology reproduce patriarchal stereotypes of men and women - flirting with essentialism, distorting the diverse dimensions of human knowing, and falsifying the historical record of women's manifold uses of reason in 'daily life'." (Hawkesworth 1989: 547).

9. Working time reduction - for men in the exchange economy, for women in the household economy ?

Only by a general **reduction of daily working time** can the gender specific division of labour (time) be changed fundamentally. It would on the one hand free enough time for men so as to enable them to perform the regular (as opposed to occasional or discontinuous) household chores, especially the care for children or other persons. On the other hand only a radical reduction of working time (one could think in terms of a 30 or 20 hours week or a 6 or 4 hours day¹) would release a potential for the redistribution of labour time such as to create enough jobs to enable considerably more women to participate in the exchange economy (at present women's demand for jobs is higher than the offer and women's unemployment is relatively higher than men's).

Labour law's dominant abstract individual "employee" is male and has a "one-and-a-half person job" (Beck-Gernsheim 1980). The existence of a "housewife", who takes care of household work and the children, is presumed. The necessity of deconstructing this model by a radical reduction of daily working time is stressed again and again in the feminist debate (e.g. Beck-Gernsheim 1987, Kurz-Scherf 1987 and 1988). The goal of this deconstruction is the reduction of the heteronomously determined labour time in order to gain more self-determination of time use ("time sovereignty"). The normative model of the standard employment relation based on "male times" must be overcome and replaced by a new model : Shorter working times for all employees, making it possible to combine professional and household work (also for men). The (presently dominant) variant which stabilizes the "male times"-oriented standard model of full-time employment with "upward" time flexibility through the introduction of "atypical" forms of the labour contract and time organisation (part-time work, fixed term employment contracts etc.), is to be rejected. The work variant ("part-time work") which is presently less legally safeguarded in labour and social security law should, on the basis of a 20- to 30-hours week, become the new idealtypical model of a future gender-neutral "standard employment relation" and be organized economically and legally according to this principle.

The development of labour time reduction over the last years is analyzed here from the point of view whether this new idealtypical model is closer approached or not ; and what

¹ This demand is still modest compared to Keynes' idea that a three hours working day in the year 2030 would lie within "the economic possibilities of our grandchildren". A six hours day was already proposed by Thomas More in "Utopia" (1516), a four hours day by Campanella in "Civitas Solis" (1623).

effects working time reduction has on gendered division of labour and labour market segregation.

9.1. Trends in working time reduction since 1985

Starting with the collective agreement in the metal trade, since 1985 collective agreements for the different sectors of industry have been stipulated which provide for step-by-step working time reductions. In 1985 the 38.5-hours week was introduced. In 1987 a phased progression was agreed upon (introduction of the 37.5-hours-week from 1 April 1988 and of the 37-hours week from 1 April 1989 onwards). The concrete realization had to be agreed upon at firm level between the management and the works council. IG Metall, the forerunner in realising working time reduction, agreed in 1990 upon a further step-by-step reduction of weekly working time to result in a 35-hours-week by 1995. In the printing industry a reduction of the weekly working time from 37 to 35 hours by April 1995² was agreed upon in the collective agreement in 1990.

Which trends can be observed in the realization of working time reduction ?³

- * The **working time** agreed upon in collective agreements has been **reduced to an average of 37.7 hours weekly** on 30 June, 1990.

When comparing different sectors and branches of industry, working time is at its shortest in the capital goods trade (1990 : 37.2 hours). The agreed upon working time reductions - not all of them yet in force - lead to the shortest working times in the industrial sector of the iron and steel industry (36.5 hours), then in the metal-processing industry and the printing industry.

² It was agreed that weekly working time would be reduced to 36 hours by 1 April 1995 and to 35 hours by 1 October 1995, without loss of wages, but with the qualification that each time the parties should negotiate implementation three months beforehand, with regard to economic developments, employment situation, the growing together of the two German states and working times in the E.C.

³ Several empirical researches and theoretical essays have treated of these developments; see Ellguth/Schmidt/Trinczek (1989) researching the implementation of working time reductions in the collective agreement district for the metal branch Nürnberg/Erlangen/Fürth on the basis of 176 collective agreements at plant level, Brosius/Oppholzer (1989) for the metal branch, and the regular overviews of the developments in collective agreements appearing each six months in "WSI-Mitteilungen", the last one Blaspinck (1990). The strategies of the actors in labour time politics were researched by Wiesenthal (1987) and (1988), who used rational choice theories to enlighten the regulative potential of these strategies and the limits of their rationality under constraints.

The shortest working times were reached in the fields where employees' bargaining power (and the proportion of men employed) is very high (export-oriented branches with a very high rate of capital to labour, a highly strike sensitive labour organisation and powerful trade unions, see Tilly 1988). Working times agreed upon in collective agreements - not all of them yet in force - in branches with a high proportion of women were, however, longer. They amounted at the end of December 1989 on average to 39.1 hours in the leather trade, 38.5 hours in the textile trade, 38.8 hours in the provisions and fine foods trade, 37.5 hours in retail trade, 38.5 hours in the insurance companies, loan institutions, social insurance institutions and local authorities, 39.4 hours in the service sector, of which 40 hours in the hotel and restaurant branch (data taken from Bispinck 1990:133).

It should be pointed out, however, that, due to overtime, effective working time is higher than the collectively agreed upon working time⁴. The volumes of overtime work of men and women differ considerably⁵.

- * In the metal industry Ellguth/Schmidt/Trinczek (1989) observed, from 1987 onwards, a **trend away from "free day solutions"** when the reduction was bundled in daily blocks of free time **to weekly working time reductions** and combined solutions.

This bend in the trend after 1985 is to be explained by the growth of the volume of working time reductions. Whereas in 1987 working times was only reduced by an average of 18 minutes a day and the reductions were therefore bundled into blocks of "free time pools", by 1988 working time reduction on the 1985 basis had gone up to 2.5 to 3 hours a week, i.e. 30 to 36 minutes a day, thus making a daily working time reduction more "perceptible" and therefore more attractive to employees. At the same time, it became more difficult for the enterprises to reconcile growing "free time pools" (14 to 17 free days a year from April 1988 onwards) with work organization, especially when the employees were given options as to when to take the free days. For reasons of the organization of the firm, this element of choice and "individual time sovereignty" was reduced again in favour of uniform arrangements. In the field they researched Ellguth/Schmidt/Trinczek (1989) observed also a reduction of agreements on "early Friday closure", according to them to be explained by

⁴ Although the collectively agreed upon working times in the FRG are among the shortest internationally, the Federal Republic only takes a middling place when comparing effective working times in Europe (ILO 1988:24).

⁵ A trend towards equalization of male and female working times in the exchange economy is only to be found in the Scandinavian countries. Finland shows up the smallest differences (Bergmann 1989).

the lower acceptance of Saturday shifts by the employees when Friday afternoon was free, while enterprises wanted to include Saturday work into these agreements.

This trend towards a daily instead of a pooled reduction of working time is favourable to a potential redistribution of labour time in the household economy, since "free time pools" in irregular daily blocks do not allow men to take part on a continuous basis in regularly recurring household activities and are not compatible with the "proper times" of the needs-oriented rhythms of children and other people cared for in the households, nor with the time organization of the infrastructures (schools, public institution, shops etc., comp. CREW 1990). It remains to be investigated empirically, however, whether the trend away from "free day arrangements" is present also in collective agreements outside the metal branch and what is the influence of enterprise size on this trend⁶.

- Working time reductions go together with **flexibility gains for the enterprises**, especially with regard to the distribution of working time.

The 1987 collective agreements in the metal branch provided for a flexible working time reduction at the firm level by granting the possibility of a differentiated distribution of working times. The 1990 collective agreements for the metal branch explicitly provide for the possibility to differentiate arrangements for different groups of employees. At the plant level working time arrangements are becoming more and more differentiated and complex. The goal of a uniform working time reduction for all employees intended to prevent the splitting up of the staff of a firm in groups with separate time schedules, could not be upheld by trade unions and was replaced, in IG Metall's 1990 collective agreements⁷, by a "regulated differentiation" of groups of employees, excluding part of the crew (limited to 13 % of the firm's total workforce) from the working time reduction and retaining a 40-hours-

⁶ Ellgüt et.al. (1998) point out that enterprise size has a significant influence in the branch they researched, and that for large enterprises, in view of their strategic interest in the temporal extension of their activities, weekly working time reductions are of a slight interest; "freeday arrangements" and "free time pooling" accorded, in consideration for weekend work and irregular work shifts, are on the contrary more in use.

⁷ The 1990 collective agreements in the metal branch regulate weekly working time for a period of eight years (till the end of 1998). Working time should be reduced to 36 hours a week from 1 April 1993 onwards, to 35 hours from 1 October 1995 onwards. Part of the staff (up to 13 %) can go on to work 40 hours a week and may choose between more pay and free time with normal pay to be awarded in one or more pools within a period of two years. No employee can be forced to accept a 40-hours-week. Since this collective agreement is sufficiently concrete, the Works Councils, in implementing the working time reduction, do not have the task which they had in the 1987 agreements anymore to work out the working time reduction at firm level. This does not imply that the trend to bring down working time regulation to the firm level has been fundamentally reverted; but it is true that with regard to some matters the trade unions have succeeded in bringing back regulation to the level of regional collective agreements.

week for this group. The price to be paid for a general working time reduction is the breaking up of uniform, standardized working times.

- * In some important fields over the last years the **duration of collective agreements** has become considerably longer.

65 % of the 1989 collective agreements having a duration of 36 to 43 months and 60 % of those having a duration of 44 to 48 months were reached in the capital goods industry (Bispinck 1990:129). The 1990 metal branch collective agreement was reached for a record period of 8 years. The duration of collective agreements has increased in the areas of production which are most sensitive to strikes and other interruptions and have a highly complex time organization - this element of augmenting time stability secures the functioning of a system with an increasingly flexible time organization.

9.2. Flexibility gains of the enterprises - differentiated working times and the trend towards "individualized differentiated weekly working times"

Since 1985 the **flexibilizing elements** were contained mainly in agreements at the **plant level**, since collective agreements had relegated the concrete realization of working time reductions to the firm level and thus heightened the enterprises' flexibility potential by allowing them a stronger adaptation of working times to firm specific needs. The main elements of flexibility were

- working times differentiation
- working times variabilization.

Differentiation of working times is to be defined as the assignment of 'differentiated individualized weekly working hours'⁸ to various groups of employees ; the upper and lower limits of working time agreed upon in the collective agreement as well as an average working time for the firm must be respected. This possibility which in the beginning was not frequently used, has become more significant as working time reductions have increased in volume, and has become the new regulatory paradigm in the 1990 collective agreements in the metal branch.

⁸ The German term is 'individuelle regelmässige wöchentliche Arbeitszeit' (IRWAZ).

Differentiation gives enterprises the possibility to exclude some scarce types of labour power and rare qualifications from the application of working time reduction and to award more than average working time reductions to easily substitutable employees. It is to be expected that especially highly qualified employees and office workers will be excluded from the application of working time reduction.

Variabilization of working times is defined as the unequal distribution of working times over the working days or weeks. It is the function of this form of flexibility for enterprises to absorb the regular fluctuations of the need for labour power without having to resort to other solutions, such as expensive overtime work.

Another form of flexibility consists in "shifting worktimes", e.g. the shifting of 15-minutes breaks (not all employees having a break at the same time) to make it possible for expensive machines to go on running without interruptions - a covert introduction of shift work (Ellguth et.al. 1989) used especially for highly qualified technical staff.

In this context the increase in **weekend work** should be mentioned. Representative empirical surveys are not available, but some data nevertheless indicate that, especially in large enterprises, weekend work has considerably increased⁹. Sunday work is stipulated for only in a few agreements at the firm level. Weekend work is concentrated on Saturdays.

9.3. Working time reductions have as yet had no qualitative impact on the gender specific division of labour in households

A general working time reduction is a necessary, but not a sufficient condition for a redistribution of working times between women and men. The "patchwork"-like structure of time and labour organization which is characteristic for women's work (Balbo 1984), is now more and more affecting men's labour in the exchange economy. The times in which labour time organization was, for the largest part of the work force, standardized, uniform and rigid, are over.

The working time reduction agreed upon in collective agreements since 1985 have lowered normative working time to an average of 37.7 hours a week in 1990. This reduction is a necessary, but not yet a sufficient condition for the redistribution of household work

⁹ Ellguth et.al. (1989) observed Saturday work in more than 50 % of the firms with more than 500 employees in the area they investigated (the metal branch in Nürnberg/Erlangen/Fürth). No information is given about the extent the Saturday work took in these firms.

times between men and women. This result - which was to be expected, given weekly working time reductions of only 1.5 (1989) respective 2 hours (1990)- is confirmed by some empirical studies (Tegen 1989).

Tegen questioned 170 employees (135 men, 35 women) of the metal industry in Hamburg about their participation in household work, their opinion about the effects of working time reduction on this participation and the differential effects of different modes of implementation of working time reduction at the plant level. Two thirds of men judged the possible effect of working time reduction on an increase of their participation in household work to be positive while the women were much more sceptical. But when asked what the real effect of the working time reduction was, only 3 out of 10 men declared that they were occupying themselves more with household work than before (and this was their subjective self-evaluation - who knows what their partners would have said). Of those 30 % half indicated that they were doing more shopping and running more errands; each fifth was performing more house and car reparations ; only each twelfth (2.5 % of the interviewed men) was participating more in child care or cleaning. This can hardly be called progress. Further, the survey did not show the different models of realization of working time reduction at the firm level to have differential effects on the household division of labour.

Several elements are playing a role : The working times agreed upon in the collective agreements and the effective working times differ strongly. This is to be explained mainly by the considerable volume of surplus work (overtime). This form of "upward" labour time flexibility has not been restricted by the working time reductions. Overtime is mainly performed by men. An effective restriction of real weekly and daily working time is lacking.

The trend to dissolve the uniform time organization of working time is thus pursued also within the limits of the "standard normal working times" agreed upon by the parties to the collective agreements; working times become more and more differentiated. The new forms of differentiation and variabilization of working times within the limits of a contractually restricted weekly working time represent the prototype of the flexibilization of the "standard employment relation" by a "dilution" of time within given normative limits and by procedural rules which engage the trade unions and Works Councils in the implementation of labour time organization at the plant level.

Flexibilization and working time reduction are thus not in contradiction with each other (and consent to a further differentiation of working times was the price the trade unions had to pay for the realization of general working time reductions).

The working time reduction leaves the normative model of the "standard employment relation" and its privileged status compared to "atypical" employment relations with deviating time organizations untouched. The different status of "male and female times" oriented normative models of labour law and social security law is upheld.

What men do in their "free time" is connected to cultural representations of roles and the division of labour as well as to men's and women's bargaining power and capacity to get what they want. Men usually do not increase their participation in household work voluntarily ; such an increase must be fought for by women (and which rationally acting man would voluntarily give up the privilege to be free from household work ?). The improvement of women's bargaining power has a lot to do with the redistribution of income and the opportunities to obtain an income. The reduction of working time can influence women's labour market opportunities and the income distribution between women and men only if it is much more radical than at present and if thereby new jobs are created. The employment effect of the working time reduction we have known until now was very slight indeed, and was countered by labour intensification and overtime work.

Working time reduction is and remains a decisive demand - but then we are talking about the realization of the old utopia : the generalized 6- or 4-hours day ; and we are talking about a change of the normative standard which at present discriminates economically and legally against shorter working times and which maintains the paradigm of male times oriented full-time employment at the expense of housewives' 'invisible hands'.

10. Deregulation and removal of working time restrictions as an opportunity for women ?

10.1. The neoclassical arguments for deregulating the labour market

Calls for deregulating the labour market¹ are justified on the ground that some legal norms, (particularly dismissals protection, restrictions on working times, the restricted admissibility of "atypical" forms of employment contract, participation rights for unions and workers' representatives, special protection for women's labour) would present obstacles ("rigidities") to the self-regulatory mechanisms of the market and cause dysfunctions. Governmental regulation of the labour market was held to contravene the principle of free collective bargaining. As bias to market access, labour law norms are alleged to be a bar to market access by "outsiders", also for women. The removal of protective norms under labour law would lower labour costs, thus favouring labour intensive sectors with a high proportion of labour costs (in particular small and medium sized enterprises and crafts) and thus allow new appointments and the creation of new jobs. The demands for the removal of legal norms differ in how far they go (things left unaffected in every case are property rights, contractual freedom and the enforceability of contracts) and differ strongly in their approach to their justification and their degree of differentiation². Deregulation demands raised mainly by neoliberal and conservative forces, can be found in the left-wing area too, in the context of the debate over introducing basic income³.

The competitive situation for women would improve, runs the argument, if removal of barriers to market access that protect "job occupants" would bring about an opening to "outsiders", particularly through making working time regulations more flexible (part-time working, work on call, job sharing, greater acceptability of shift-working and weekend work), removing discriminatory provisions especially protecting women (worktime

- 1 The call for "More market in labour law" (Kronberger Kreis 1986) relates to further removal of dismissal protection rules in force, removal of the social planning regulations in the Betriebsverfassungsgesetz (Company Constitutions Act), elimination of the Federal Labour Office's monopoly on employment procurement, abolition of the declaration of universal validity of collective agreements, a facilitation of time-limited labour contracts going beyond the provisions of the Employment Promotion Act 1985 and regulatory shifting of collective agreements and regulatory competences from the level of the parties of collective bargaining to the level of company agreements.
- 2 For a discussion of theories of labour market deregulation see Simitis (1985), Schmid (1986), Daubler (1988a, 1988b), Mückenberger (1989, 1990), Büchtemann (1990), Buttler (1990). Teubner (1985:329-334) exhaustively discusses Hayek's theory. The demands for reducing competences to set norms through collective bargainings and to make wages more flexible are discussed by Buttler (1990:69-76), Neumann (1990:109-114), Matzner (1986).
- 3 See e.g. Van Parijs (1990:19 ff.) and the controversial contributions to the discussion in Opielka/Vobruba (1986).

restrictions in the World Time Orderance (Arbeitszeitordnung), ban on night working and bans on certain types of employment), as well as extended permissibility of "atypical" labour contracts, in particular time-limited labour contracts.

In the model of the "perfect market", deregulation might lead to women getting a greater share of jobs if they offered their labour power at prices and/or terms below those of their male competitors ("substitution hypothesis"). Extension of women's employment through replacement of male workers would thus be conceivable.

10.2. Critique

- Models of neoclassical deregulation advocates are largely based (except for Hayek⁴) on the false assumption of the "perfect market" and make the simplified assumption of the replaceability of particular types of labour (e.g. overtime) of "insiders" by other types of labour (e.g. time-limited contracts or part-time work) by "outsiders" (the unemployed, women).
- The function of legal norms in organizing the labour market (coordination, reduction of uncertainties, lowering of transaction costs) is interpreted reductively.
- The partial rationality of markets is overemphasized and the importance of factors external to the market neglected. Women's work in the household economy is overlooked (at the same time being presupposed as infrastructure) thus perpetuating the effects of discrimination against women on the labour market.
- In these circumstances, individual deregulatory measures might act partly to open up the market to women, but empirical study is required of whether this is only a quantitative extension of qualitatively poor jobs or otherwise. What is basically desirable in the interest of women is the deconstruction of the "standard employment relationship" oriented to "men's times". But the present trends to flexibilization are a "zero sum game" at the expense of women.

⁴ In the most differentiated variant of deregulation theories, Hayek does not assume a "perfect market", but criticizes the simplification of complicated market processes by simplified models (Hayek 1973-1979).

10.2.1. The fiction of the "perfect market" in neoclassical deregulatory models

Most deregulation strategies assume a model of the "perfect market" and equate the labour market with markets in other goods⁵. But the market is "imperfect", competition on the side of the offerers of labour power is constrained :

- **Horizontal and vertical labour market segregation** : Women and men in most cases do not compete for the same jobs (by branch/sector, occupation/qualification, hierarchical level, organization of working time) (Jonung 1984, Doeringer/Piore 1971, Beck-Gernsheim 1976, Autorinnengemeinschaft 1990).
- **Internal/external labour markets** : Access to internal labour markets is harder for women, who are overrepresented in smaller companies and underrepresented in big ones, whose "bargaining power" is smaller and who are underrepresented in trade unions/works councils (Doeringer/Piore 1971, Sengenberger 1987).
- **Wage costs** : Wage costs differ considerably according to company size, branch, degree of "feminization" of activities (Craig/Garnsey/Rubery 1984, Autorinnengemeinschaft Paderborn 1989, Gerlach/Schmidt 1989).
- **Degree of organization, union influence, "bargaining power"** :
The unionization rate for men is markedly higher, and women are underrepresented in union hierarchies and as employees' representatives at the plant level. The "bargaining power" of employees in production centers with a high proportion of men (e.g. investment goods industry, export oriented sectors, sectors with high capital concentration per employee, see Tilly 1988) is higher in many areas than in areas with a high proportion of women (service sector, textile industry, sectors with a high proportion of labour costs). Deregulation may further weaken groups with poor lobbies, inadequate representation and poor market power (Simitis 1986:44). Deregulation strategies increase the power of a small group of individuals on the labour market at the expense of weaker groups (Schmid 1986, Rubery 1988).

⁵ Wolfram Engels of the Kronberg circle : "Nothing more is true of labour than of bananas, railway tickets or carpets : When the price rises, demand falls. If there is unemployment, then labour costs are always too high." (Engels 1985:35).

- Unequal offer in respect of working time by men and women on the basis of **factors external to the market** : the gender specific division of labour, the overwhelming assignment of women's time to the household economy, enhanced by missing or inadequate infrastructures with incompatible organization of time (asynchrone opening and working hours of public institutions, kindergardens, shops and factories, public transport⁶).

These aspects have to be taken into account in order to estimate the effects of deregulation measures on women's work without false simplifications⁷ - and they can only be verified by empirical research. International comparative studies of the effects of recession on women's employment point to the fact that the "substitution hypotheses" (which also underlies theories of positive employment effects of deregulation for women's employment) is tenable only to a limited extent. Thus, for instance, Italian studies have shown that the proportion of women in the (deregulated) shadow economy is not markedly higher than on the official labour market (Bettio 1988).

The alleged positive employment effects of lowering protective standards in labour law, from the expanded permissibility of time-limited labour contracts in the Employment Promotion Act 1985 have also largely proven inaccurate. A representative empirical study commissioned by the Federal Ministry for Labour and Social Affairs (Büchtemann/Hoeland 1989) showed only very slight positive effects on employment, further reduced by substitution and take-along effects.

10.2.2. The function of legal norms in organizing markets is interpreted reductively

The function of legal norms to stabilizing markets and reducing transaction costs is neglected. By norming contractual forms and labour conditions, law contributes to standardizing markets, unifying competition conditions and thus reduces transaction costs. The integrative function of labour law norms reduces the costs that can arise from disputes, work interruptions or strikes. Co-determination at plant level constitutes a form of co-management and makes a contribution to the organization of stable internal labour markets (Streeck 1984, Krause 1985). Uniformed norms set quality standards and can thus

⁶ On this see in detail CREW (1990) and Moss (1988).

⁷ For a comprehensive discussion of the various hypotheses on the economic function of women's work and their possible compatibility against the background of empirical studies of the effects of recession on women's employment, see Humphries (1988:16 ff.). A discussion of the possible effects of further deregulation measures in connection with the completion of the European Community internal market in 1992 on women's employment - completely neglected in existing research - can be found in Jackson (1990).

have effects of promoting quality and productivity (Schmid 1986, Sengenberger 1990). The reduction of particular risks for employees in the case of unemployment, sickness or age increases readiness for mobility.

The more differentiated and complex the organization of a firm becomes, the more important do rules laid down for organization and cooperation become. The harder it is to replace labour alternative workers, male or female, the more necessary is cooperation according to agreed rule. This is still further enhanced by production organization sensitive to interruption ("just in time" manufacture) or high costs where capital intensive equipment is down. On the employers side, in the Federal Republic, the codetermination model has not been seriously questioned⁸. The report by the "deregulation commission", set up by the Federal Government, which was to be presented in early 1990, has after protests by sections of the employer associations because of the deregulation commission's overbrusk approach been frozen for the moment. And once the GDR has been so largely "deregulated", there is no doubt initially more need for regulation of the "uncertainties" caused by "more market".

When the environment changes, adaptation of norms to changed conditions can be necessary ("flexibilization"). Previous studies come to the finding that regulated adaptation processes of adjustment are superior to deregulation in a situation where a shift in demand from mass production to differentiated "high quality" production takes place (Piore/Sabel 1984). Streeck (1987a) came to the conclusion, in an international comparative study of restructuring processes in the automobile industry, that regulated adjustment processes secured greater employment effects and that among the factors for this were improved organization of internal labour markets, cooperation between company management and unions, flexible, non taylorist work organization and high skill levels of the labour force. Regulation can thus be a stimulus to more complex and ambitious adjustment strategies and give incentives to increasing competitiveness and rationalization⁹. These general considerations point to the need to study the relationship between stability through legal

⁸ The criticism of the Kronberger Kreis (1983:11 f.) has been very cautiously worded.

⁹ Possibilities of expanding diversifying "high quality" production are, often seen too optimistically. Mass production will continue to exist in certain areas, and the opening up of eastern European sales and labour markets with lower wage levels could increase this. Through advances in organization of production (flexible manufacturing systems), "just in time" manufacture, computer controlled net-working and optimal delivery timing), according to indications by "Wirtschaftswoche" (4 April 1986), up to 35 % of all costs could be saved, so that in many sectors "recovery" of parts of mass production previously shifted to "low wage countries" seems possible. A critical discussion of the limits to "post-fordist" transformation of work can be found in the collective work edited by Stephen Wood (1989). "...There is no reason to suspect that changes in work organization all aim in the same direction", *ibid.* p.43).

organization and contraproductive effects from "rigidities" specifically and empirically. This is also pointed to by the conjunctural nature of the demands of deregulation as "by-phenomena of recession" (Simitis 1985:106), since in times of full employment regulation was not seen as an obstacle opposed to the functioning of markets (thus, e.g., dismissals protection was extended in the seventies, and three E.C. directives on equal treatment for men and women at work were adopted).

While neoliberal advocates of deregulation deny the potential productivity-guaranteeing functionality of regulations stressed here and regard labour market institutions as dysfunctional in terms of allocational efficiency, opponents of deregulation often neglect analysis of the unintended dysfunctional side effects and distributive effects.

However, protective laws have in principle an ambivalent character. On the one hand they act as barriers to market access and protect competition of "insiders" against "outsiders" and thus constitute a mechanism of repression. Working time regulation and special protection for women have this function, too. On the other hand, agreements with effect of restricting market access constitute protection of work conditions. Work time regulation thus provide protection against possible deterioration from unrestrained extension of competition, by reducing the amount of supply of labour on the supply side. This is in the interest of all (actual or potential) workers, irrespective of gender.

Thus, removal of a number of dysfunctional provisions of special protection of women's work based on gender-role stereotypes, which cement the gender specific division of labour and discriminate against women in access to a number of types of employment is reasonable. But abolition of these provisions without any replacement conceals the danger of mere "levelling down" of protective standards, without compensation through corresponding advantages for workers (female or male). For these "market access barriers", such as bans on types of employment for women, are certainly not the decisive cause of labour market segregation or discrimination against women, which exists even where these regulations do not apply, but they are only one factor among many. Trade unions and opponents of deregulation therefore base their resistance on the fact that the point is ultimately, under the pretext of flexibilization, to bring about a redistribution of power and opportunities of action in favour of firms.

If as was hitherto the case "deregulation" comes about not as a reduction of regulatory intensity or of the level of regulatory competences in labour law regulation, but instead lack

of consensus by the partners to collective bargaining is replaced by national laws (regulatory intensity or level being in part raised thereby), then the demand for deregulation can be unmasked as "interest-lead propaganda cloaked as alleged social consensus on reduction of juridification, debureaucratization and employment promotion" (Buttler 1990:82).

10.2.3. The partial rationality of markets is assumed and the importance of factors external to the market neglected

The need for allocation of time in housework/homeproduction is no subject for those demanding deregulation¹⁰ (and it is therefore still assumed to be women's 'natural' task) and the limits of the market mechanism for coping with particular social tasks (e.g. in reproduction and child rearing), or more generally in providing collective goods are overlooked. That the future generations of wage earners, taxpayers, and recruits are produced in the non-market household economy mainly through the "invisible hand" of women is based on far-reaching consensus among the actors who profit from the un(der)paid domestic work of women. The subsistence production of private households, family solidarity, retained as subsistence insurance and an alternative social insurance system are resorted to still more through deregulation and flexibilization measures where social costs are "privatized" and redistributed to the private households. Deregulation, better re-regulation, can then be seen as redistribution of costs by legal allocation between the subsystems of the labour market, the welfare state and private households (Deakin 1986, Simittis 1985:128). Women, with their "alternative role" as housewives (Offe 1977) here constitute a major potential for inclusion in and exclusion from labour markets.

The legal institutions outside the labour market that underpin these functions of households and of women's work (above all marriage and the family law maintenance obligations between spouses and towards children) still much more "rigidly" oriented to "status" than to "contract", are not questioned by the neo-classical advocates of deregulation (making the interest-lead nature of these demand clear as profit-maximization for firms and as male interests). To the extent that deregulation of welfare state guarantees took place and particular social costs were reprivatized at the expense of households (e.g. by eliminating promotion of school children's training through federal allowances, cutting of

¹⁰ A criticism of the totally inadequate consideration given to the gender dimension in the various fields of flexibilization can be found in Walby (1989) and Jenson (1989).

benefits under the Labour Promotion Act etc.¹¹), this means on the one hand extension of unpaid women's work, which initially restricts the "mobility" of women on labour markets. On the other hand, the further reduction of household incomes by cutting state benefits can lead to increasing the supply of women's labour and the amount of paid work by women. Overall, this could lead to lowering wages and living standards generally. For households, substituting paid working time of men by women or extending women's paid working time would not in every case be rational¹² in view of the possible negative income effects. They could however be forced to this non-rational behaviour of extending working time offer despite falling prices if wages fell below a particular marginal limit. If women's wages are very low, this at the same time brings about increased dependance on the institution of marriage or on maintenance payments by other family members.

10.2.4. Flexibilization trends as a "zero sum game" at the expense of women

The positive potential for changing hitherto rigid standards on working time and for replacing the "standard employment relationship" as a possibility of reconceptualizing the relation between paid and unpaid work (Mückenberger 1985) and thus for replacing the rigid structures of a gender specific division of labour have so far not been brought to bear.

Certainly, the proportion of women in work has risen continuously in these years. A greater proportion of the jobs newly created after the recession went to women, a fine attributeable chiefly to the increase in part-time jobs. But the quality of these jobs is questionable, they are often associated with relatively low wages and no promotion possibilities¹³. "Indirect deregulation" through quantitatively increasing "new" forms of employment and extending "non-typical" labour relationships below labour law and welfare protective standards, and the non-adjustment of the system of welfare state guarantees and

¹¹ The biggest reductions in labour law and social standards through reregulation (not de-regulation) in the FRG since 1984 were amendments to the Youth Labour Act 1984 and the Disabled Act 1986 (extension of power of the authorities to grant exceptional permits), the Employment Promotion Act 1985 (easing of conclusion of time-limited labour contracts, loosening of dismissal protection in small firms, restriction of social plans, liberalisation of provision on agency-supplied temporary work), amendments to the Labour Promotion Acts (para. 116 reduced state transfer payments to workers in eventual strikes ; 1988 brought further restrictions of benefits), state transfers under the Labour Promotion Act, the Federal Social Assistance Act, the Child Allowance Act and the Federal Training Promotion Act were reduced (cf. Mückenberger 1990).

¹² A further consequence of falling wages would likely be a reduction of social benefits, since probably no one would sell their labour power at prices below the level of social benefits. This would raise problems of the legitimacy of the welfare state and of labour contracts.

¹³ On this see European Commission (1990), and on part-time work Büchtemann (1986), Büchtemann/Schupp (1988). The function of non-typical employment as "entry" to career in the labour market or as blind alleys, as "bridges" or "traps", is discussed by Büchtemann/Quack (1989).

participation rights to the changed employment structure has brought about a bigger impact than direct deregulation measures of the legislator (Büchtemann 1990:240).

10.3. Coordinated flexibility against women's discrimination

This shows the necessity of flexibilization through coordinated re-regulation and not deregulation. "Flexibility" is understood here as capacity to adapt the economic organization to changing environmental conditions (Streeck 1987b)¹⁴. The coordination of expectation of behaviour becomes the more necessary, the scarces time und the more intertwined events become. This coordination is a function of law : production, creation, management and sanctioning of congruent expectable decisions (Luhmann 1972). The function of a law intending efficiency as well as solidarity should it be to promote coordination with the goal of a positive sum game (Schmid 1986:39), not a zero sum game (in which the increase of freedom of behaviour of the one player is at the expense of the freedom of behaviour of the others - as it is the case at the moment). The rationality of the subsystem household economy, which is structurally coupled with the exchange economy, should be taken into account in the "flexibilization debate" - and certainly not only as a "zero sum game" at the expense of women as gender.

¹⁴ "A general capacity of enterprises to reorganize in close response to fluctuations in their environment", "a permanent property of economic organization ... in a situation in which adaptation seems to consist above all in increasing the general capacity to adapt" (Streeck 1987b:290).

11. Models of the redistribution of time and income between women and men

How can the gender-specific costs of time-allocation over the household and the exchange economy be equalized ?

"Time is money"¹ - this is also the case for unpaid or underpaid domestic labour, because it has its "opportunity costs" which are different according to gender. Since the resources time and money are pooled and exchanged for another, I here treat of models of the redistribution of time and income in combination with each other².

The normative goal of redistribution is "equality", not considered in general and abstractly, but operationalized as the equalization of the gender-specific costs of time-allocation over the household and the exchange economy. This can only be expressed under the form of a statistical average. This normative goal avoids the problems and contradictions of the unclear concept of "equality of opportunities"; a criterion of evaluation is proposed which can be used also by the courts and can serve as a measure for indirect discrimination. The criterion takes account of the interdependence of the discrimination of women in the exchange economy and their position in the household economy, which is usually neglected. The ignorance of a normative concept of formal equality with regard to substantial inequality could be partially overcome by the use of a concept of 'equal opportunity costs of time allocation'. The further development of this concept, and its operationalization for the possible use for judicial decision-making, is one of my future research topics.

An equalization of the costs of time allocation can be reached by

1. An increase of women's opportunity costs of time allocation in the household economy (time allocation to domestic labour becomes "more expensive" for women, and work in the exchange economy becomes therefore "cheaper")
2. A decrease of men's opportunity costs of time allocation in the household economy (time allocation to domestic labour becomes "cheaper" for men, and work in the exchange economy becomes therefore "more expensive")

¹ This formula goes back to Benjamin Franklin (1748). "Remind yourself that time is money ; whoever could own ten shillings a day by his labour and goes walking for half a day or lies idle in his room, should, even if he only spends six pence on his enjoyment, not only calculate this, he has also spent or rather thrown away another five shillings." (cited from Weber 1975:14).

² A more elaborate discussion of the income dimension, containing empirical data for the FRG and United Kingdom, and of stretches for the redistribution of income in favour of women can be found in Daly/Schewe (1991).

3. A decrease of women's opportunity costs of time allocation in the exchange economy (compared to domestic labour, work in the exchange economy becomes "cheaper" for women)
4. An increase of men's costs of time allocation in the exchange economy (compared to domestic labour, work in the exchange economy becomes "more expensive" for men).

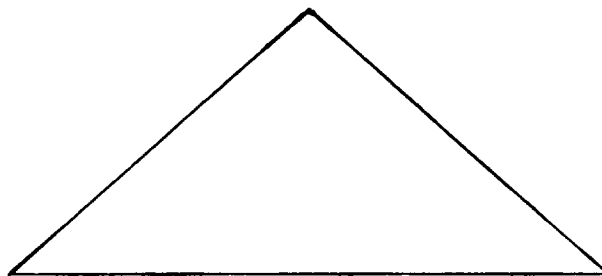
Redistributions of time and income in favour of women are possible

- within households between women, men and children
- on the labour market between male and female employees and between enterprises and employees
- between the market and private households
- between the state and private households
- between the state, the market and private households.

The following scheme may illuminate the possibilities of redistributions between different systems of time and income allocation³ :

the **labour market** allocates

- working time in the exchange economy
- wages



Households allocate

- paid and unpaid working time
- maintenance in money or in natura

The **state** allocates

- money transfer
- services
- infrastructures.

³ It is treated of more extensively in chapter 6.1.1. on the hierarchy of income resources and the unequal distribution of income between men and women.

In the discussion of measures of redistribution the interdependences between these different systems must be taken into account, since the situation of women is determined by their position in the exchange and household economy and institutional factors play an essential role. (Since the reproduction of a gender-specific distribution of labour is essentially a result of the interactions between the household and the exchange economy, legal strategies for social change must be judged with regard to their effects on the mutual reinforcement of the division of labour in both economies (Willekens 1991).)

11.1. Redistribution of working times by a new regulation of working times

The condition of this would be that the state would take up again the **regulatory competence** regarding working times in the exchange economy which after the Second World War has been largely transferred to the parties in collective bargaining. Furthermore an **extension of the competences with regard to the regulation of the time dimension of public life** and infrastructures - on the local and regional level as well as on the state level - is required. The state and the local authorities must be obliged to take the time dimension of planning and administration⁴, until now largely neglected, into account, so as to remove the discrimination of women. In this context women's **participation rights** in the organization and coordination of time structures should be extended. Until now women were in an unfavourable position in this regard because of their under-representation both in the organisations of corporatist time regulation in the labour market and in state and local authorities. This was due to their reduced bargaining power. The interests of women as users of public institutions and infrastructures (opening times of schools, kindergardens, administrations, public transport, holiday regulations etc.) and of private services (shops) and the interferences between the time structures of the labour market, the infrastructures and the needs of private households are far too little taken into account. Fundamental causes of this are the failing coordination between these different time systems and the absence of procedural rules which should safeguard the participation and hearing of women as managers of the different time regimes. The losses due to friction between the different systems of time organisation are therefore mainly at the expense of women, whereas male times are more uniformly molded into the time structures of the labour market. It is for this reason that 'time ruptures' due to events like unemployment or retirement generally lead to more severe identity crisis for men than for women.

⁴ About the shortened view of time and space in politics and planning see Rüschi (1982), concerning the underlying concept of the space/time-dimension Parkes/Thrift (1975).

Redistribution is only possible if the idealtypical normative models of male times and female times are changed. **Male associations** have no vital interest in redistribution, since they are mainly profiting from the present state of affairs⁵. This **insider-/outsider-**problematic is treated of in the economic analysis of law when collective bargaining theories and the function of the "associative principle" as a mechanism of control are analyzed (Olson 1968, Behrens 1986 , on the economical discussion : Lindbeck/Snowier 1985). The group compromises reached in collective bargaining can be at the expense of people (housewives) whose 'ability to pay' is not defined by an income as employee or entrepreneur. It is then possible that a collective agreement does not redistribute between the parties involved in bargaining, but between those partners (insiders) on the one hand and a third group (outsiders) on the other hand, to the expense of the latter. This is a typical allocative failure of the 'associative mechanism' (and also of the market mechanism) which must be compensated by the operation of other allocative mechanisms. In this respect the welfare state, therefore, plays an important role in determining the social position of women.

It seems also necessary to bring back certain aspects of working time regulation in the exchange economy to the level of the state so as to be able to overcome the "prisoners dilemma" in changing the time organization within the labour market. In a competitive market the individual enterprises are confronted with the following situation : If only some of them internalize the "social costs" of domestic labour (externalities at the expense of women) and reduce working time in a relevant way, so as to make the working times in exchange and household economy more compatible, then those enterprises, bearing extra costs, run the risk of a reduction of profit which itself implies the danger that the internalizing practice will be eliminated from the market by the principle of competition. Measures of working time reduction must be implemented on a general scale - which requires legislative intervention. The counterargument to this is that intervention restricts the autonomy of labour and management to reach collective agreements, which is itself a consequence of the fundamental principle of freedom of association. Behind this argument one feels the comprehensible fear that state regulation, in view of conservative government majorities, might be worse for employees than collective agreements. The principle of contractual autonomy, however, has until now not been able to prevent that employers' syndicates and also to a large extent trade unions function as 'male associations' (Pinl 1977, Kurz-Scherf 1986). A purely labour-market oriented approach would also ignore the conflicts of interest between women in different situations (for example, contradictions with

⁵ For an extensive motivation of this thesis see chapter 3 on "Costs and benefits of household work, winners and losers".

regard to the opening hours of shops, between consumers and saleswomen, cashiers; between employees of the administration and users who can only come after 5 p.m. etc.).

For collective bargaining to be an appropriate instrument to overcome the circularity of women's discrimination due to the mutual reinforcement of the divisions of labour in exchange and household economy, trade unions would be required to represent also the interests of women as housewives. This however is largely incompatible with "the logic of the association" and with corporatist interests. Sociological work shows that corporatist interest representation is often more "patriarchal" than organization by state. It must be conceded that an extension of the welfare state increases the possibility of patriarchal control over women by the state (Hernes 1987, 1988 ; Nielsen 1983). But this would seem to be the 'lesser evil' compared to women's dependence on individual men and the strong neglects of women's interest in corporatist arrangements and in the aggregation of interest in male-dominated associations.

The following legal **reforms** could contribute to a **redistribution of working times** :

- 1) A general reduction of working time in the exchange economy
- 2) A reduction of "upward" working time flexibility by strict limits on overtime and/or compulsory time-off in compensation for overtime
- 3) A legal claim on working time reduction in special situations, especially for rearing children and care activities
- 4) Extended rights for taking time- off for reasonable causes (e.g. the care for ill members of the households), inalienability of the rights granted by para. 616 German C.C.
- 5) A new legal interpretation of the employer's managerial prerogative with regards to working time (a bounded rationality); recognition of a legal right of employees to reduction of working time/changes in the distribution of working hours under certain conditions
- 6) A revaluation of part-time work in labour law and social security law; abolition of the "indirect economic subsidies" for employment relations with very short working hours; better minimum standards for all forms of "downward" working time flexibility
- 7) Improvement of women's participation rights at the different levels of regulation and measures to increase women's bargaining power
- 8) Reform of the time-models in social security law and tax law which directly or indirectly discriminate against women and favour the "housewife/breadwinner model" of marriage ; further individualization of social security law on the basis of more egalitarian normative models
- 9) Recognition of socially necessary work, such as child socialization and care, as giving a claim to certain benefits
- 10) Compatibility of the time-structures of the labour market, public institutions, infrastructures and household work ; the coordination of these time-structures should be a structural element of public planning and administrative action, and the administration should get the competences necessary for this coordination
- 11) The duty for the state and local authorities to create an efficient offer of duly qualified childcare institutions and ancillary infrastructures

- 12) Efficient legal stimuli and sanctions tending to the increase of men's working time in household work, care and socialization activities.

11.2. Models of the redistribution of income in favour of women

Redistribution **within households** is possible by

- 13) Income-splitting between spouses or cohabiting partners (analogous to the "splitting"-procedure in the case of divorce) through which each partner, in the course of marriage or cohabitation gets a personal legal claim to half of the work income and the labour law and social security rights of the other partner
- 14) A financial compensation of the losses in "human capital" incurred by a partner due to an interruption of gainful employment with the purpose of investing more time in household work (typically in child socialization or the care for ill members of the household).

Income redistribution **within the labour market** is possible by an increase of women's wages and an improved access of women to well-paid jobs by means of

- 15) Abolition of pay discrimination
- 16) An increase of the proportion of women employed and of the proportion of female labour in the total working time volume
- 17) Wage increases and an improvement of labour law and social security protection for certain "feminized" working time forms
- 18) A reduction of "male wages" and a redistribution to women by means of a "solidarity fund"
- 19) Internalization of the external costs of household work and a partial transfer of these costs to the enterprises (provision of firm kindergartens, financing of a "parents insurance" for the substitution of wages in the case of working time reduction or absence for family reasons, continuation of wage payment in the case work is temporarily stopped to care for an ill member of the household etc.).

Income redistribution **by the state to women** is possible by

- 20) Elimination of the "splitting"-rules in taxing spouses which favour the husband c.q. the model of the "housewife marriage"
- 21) The introduction of a basic income for all inhabitants ; partial steps in this direction can be the elaboration of the existing elements of subsistence security, the increase of the level of the transfer payments involved therein and the abolition of the principle of "subsidiarity"
- 22) Transfer payments for women for socialization and care activities and household work in general, in the form of direct transfers and of the recognition of this work as giving rights to old age pensions, unemployment benefits and benefits in the sickness and work accident insurances ; the introduction of a minimum pension/basic income for the elderly
- 23) An increase of the transfer payments to children to a level which covers the costs of their socialization; the authority to receive and manage this money should be

awarded to the person entitled to custody who performs the larger part of the socialization work (generally the mother)

- 24) An elimination of the legal rules granting the authority to receive transfer payments to the "main wage-earner" or the "head of household"
- 25) A socialization of the costs of child-care by the development of public childcare facilities and other infrastructures
- 26) An increase of female employment in the public sector by the further development of public services and infrastructures.

Up to this point I listed a wide range of possible reforms without taking into account their feasibility. It is, however, necessary to be critical about the potential of "social engineering" through legal regulation. This potential is limited and should not be overestimated. Legal reforms often have different effects from those intended. This follows already from the fact that often several contradictory or incompatible goals are pursued at the same time (goal conflicts). Dysfunctional, unwanted side effects can emerge ; thus the improved legal protection of a certain group can lead to its elimination from the labour market, frustrating the goal of the improvement of its labour market situation. Gender-neutrally formulated rights can also have this effect, if they are mainly used by women⁶. If then the normative criterion of "normality" (the "male times" oriented standard employment relation in the exchange economy and the "privatization" of child care mainly at the expense of women) is not changed, women can as result of the increased "protection" be constructed as deviant and therefore discriminated against. The legal norms must therefore always contain sufficient economic stimuli and sanctions which lead to an increase in men's working times in the household economy (e.g., a time portion for men which can not be transferred to women and is forfeited when men do not make use of it).

In practice legal norms can be ignored if they are not adequately sanctioned or if the costs of control necessary for their implementation are too high. Their realization can also be prevented by insider coalitions, 'male unions' and 'old boys networks' based on economic interests, power mechanisms or the 'strength of acquired customs'.

11.3. Strategies

I will now discuss general strategies which are of relevance to several reforms

- * The improvement of women's labour market situation

⁶ Widerberg (1991) reports that private employers in Sweden did not employ women with children any more after the introduction of paid leave for the care of sick children up to a yearly maximum of 60 days per child. Since the use of this right entails also other problems (a higher workload for the colleagues leading to tensions in the team, no hiring of substituting employees) it is only made use of very moderately by women.

- The individualization of rights
- The demand for a guaranteed minimum income
- The redistribution of the costs of child-care between private households and society, between women and men.

11.4.1. Strategy 1 : The improvement of women's labour market situation

Many strategies pursued since the 70ies have been focusing on the improvement of women's labour market situation without regard for the effects of factors outside the market. Strategies against wage discrimination, therefore, had only limited success and began to stagnate once direct forms of unequal pay had been eliminated, but indirect forms were still active. Affirmative actions, programmes to desegregate the labour market and improve equality of opportunity have until now only brought improvement for a few specific groups of women, without showing significant results for women in general⁷. One of the causes is the lack of efficient stimuli and sanctions for the realization of these measures, together with the mainly "individualist" approach to legal and procedural implementation of these rights and programmes. The risk of enforcement is borne mainly by the individual woman, who most of the time has to start an individual suit. The costs and risks involved therein are relatively high. Only exceptionally collective rights (e.g., participation rights, information rights and rights to workers codetermination for women, quota regulations safeguarding their participation, a right to have women's assemblies at the plant level, class action for women's organizations) are provided for. Some Feminists have criticized the equality-oriented strategies because of the adaptation to the male-oriented norms of the labour-market organization, to which women should be adapted. This is structurally impossible ; it does not take into account women's role in the household economy. Because of this limitation of currently prevailing structures I will not treat of them at further length : they should be developed further, especially with regard to efficient mechanisms of implementation, but they are not sufficient.

Needed are labour-market oriented reforms which break down the male model of the standard employment relation at the expense of women's unpaid domestic work. The measures for the redistribution of working time mentioned under 1) to 12) are going in this direction, as well as the steps mentioned under 17) to 19). The main problem about them, however, is that they are in far reaching contradiction with the enterprises' interests of

⁷ For an evaluation of the implementation of programmes to improve women's employment situation in the member states of the E.C. see Schetwe (1990:56 ff.).

profit maximization as well as with the interests of men in general, who are mainly profiting from the prevailing arrangements. Whereas a complementation of the male standard employment relation by "feminized" forms of employment with "downward" working time flexibility is acceptable for the enterprises, since it serves the interests of a differentiation of working times and flexibilization, a substitution of the dominant normative model by a more gender-neutral model (shorter weekly working times, a redistribution of the total working time volume over more people, limitations on "upward" working time flexibility) would cause extra-costs for the enterprises. To take steps in this direction would require allocative mechanisms other than the market mechanism and collective bargaining.

The example of Sweden can serve to illustrate this. The normative model underlying the Swedish reforms is built on the ideal that every person, independently of gender or family status, should earn an income by gainful employment. The infrastructures, the social security systems and the rights to working time reduction and to leave for child socialization and for care activities (Moen 1989, Petterson 1989, Widerberg 1991, Bradley 1990a, 1990b, 1990c) make the labour market more accessible for women. Sweden has a very high participation rate and a high age of retirement, just as well as a very high rate of employees being absent from work full-time or part-time on leave for the purpose of child-rearing, the care for a member of the household or because of part-time for elderly employees⁸.

These structures are promoted by an individualized tax policy which gives economic incentives even for working times under the full-time norm - contrary to tax-policy in the FRG which, by means of "marital tax splitting" financially rewards the absence or modesty of the wife's gainful employment (Schettkat 1987, Gustafsson 1988).

This orientation of the "Swedish model" is complemented by strong egalitarian and universalist elements in the social security system (minimum old age pensions, equality-enhancing basic benefits, relatively high benefits for lone parents, the possibility to cumulate specific social benefits with an occupational income) which disconnect the social benefit of a welfare state much more strongly from the labour market career than it is the case in the FRG. There are, however, hardly any benefits for women or mothers without a gainful occupation ; rather, the system is oriented towards the earning of income through gainful occupation by all individuals and compensates for disadvantages caused by factors

⁸ More than 80 % of the women in Sweden are in gainful employment, included the mothers of two children between 0 and 2 years (1985 : 82.4 %). Daily about 20 % of female employees are absent from work with pay. Among the women with babies this proportion goes up to 47.5 % (Esping-Andersen 1990:155).

outside the labour market (family situation, old age, handicap) by an extended network of state redistribution.

Connected to this is the "achilles heel" of the Swedish model. Gender-specific segregation is enormously high (Jonung 1986, Hernes 1988, Rein 1985, Esping-Andersen 1990). More than half of female employment is concentrated in the state sector. In 1985 the proportion of women among employees in the public sector in Sweden was 67.1 % (FRG 1983 : 39.4 %). The increase of jobs in educational, health and welfare branches was to the amount of 87 % to the profit of women (Esping-Andersen 1990:202). Men on the contrary are employed mainly by private industry which offers better pay and career prospectives and fewer part-time jobs. Since economic prosperity, high taxes and tax progressivity are conditions of the Swedish welfare state model and full employment, consensus is very fragile and especially endangered in times of economic recession and reduced tax incomes.

A strategy aiming for a redistribution of time and income between women and men by means of gainful employment for as many people as possible presupposes institutional arrangements and state intervention in the operation of the market mechanism. This redistributive strategy by means of a relative "full employment" and a kind of "right to paid work" of the individual depends on :

- Arrangements which enhance the compatibility of the time structures of exchange economy and household economy
- The improvement of infrastructures and public services substituting for private housework of women
- Egalitarian and universalist elements in the social security system which compensate for women's discrimination due to factors external to the market and grant benefits to a certain extent independent of the labour market career
- State intervention in, therefore state competences with regard to the coordination of the different time-systems
- A high tax level and an extension of public employment.

The institutional arrangements regarding women's labour market access and situation in the **FRG** differ strongly from this model. The **welfare state model of the FRG** contains fewer individualizing and equalizing elements. In the still prevailing Bismarckian model the labour market connectedness of social benefits, the protection of the acquired status and the confirmation of the traditional role of unpaid female labour in private households ("the

subsidiarity principle") play a more important role (Langan/Ostner 1991, Leibfried/Ostner 1991, Esping-Andersen 1990). The system of social insurances takes the duration of employment and the height of contributions heavily into account and does not provide minimum old age pensions or equality enhancing basic benefits (and these elements of the social security law of the GDR were abolished immediately at the reunification). Infrastructures are less developed and the state plays a lesser role as the employer of women than is the case in other countries of the EC (Rein 1985, Esping-Andersen 1990). The normative model of the "breadwinner/housewife marriage" has kept strong roots, especially in social security and tax law.

The trend in the FRG is not in the direction of a reduction of these "male-oriented" elements protective of acquired statuses⁹. New institutional regulations tendentially protecting female labour in the household economy, such as parental leave and making allowances for child-rearing times in calculating old age pensions, contain a series of clauses punishing financially women's simultaneous gainful employment and therefore giving negative economic incentives for their labour market participation. This attitude finds its expression both in tax law, which favours patriarchal marriage, and in the relatively modest family allowances in the FRG, which are honouring marriage rather than women's economic contribution by means of child-rearing. The chance towards more individualized and egalitarian concepts, present in the law of the former GDR, was thrown away when nearly all the elements pointing in this direction were eliminated in the reunification process.

11.3.2. Strategy 2 : Individualization of rights

Individualization of rights means that rights are allotted independently of group membership or status (family, marriage, kinship, class, station, income). The "abstract individual" becomes a legal subject. This process has not taken place simultaneously for men and women. Processes of individualization

were driven by the demands of the capitalist market and were only lately applied to the spheres of life not organized as markets. The individualization of men as "market citizens" took place faster than that of women who used to have no access to many political and economic rights.

⁹ See more extensively chapter 6 on "Male and female times in social security law".

The burden of applying the male model of the abstract individual was weighing heavily on the shoulders of women whose unpaid work in household and family made it possible for men to participate in the market without restrictions. Because of this household division of labour the significance of the family as an obstacle to workers' mobility was reduced. The husband had a legal monopoly of decisions in all matters concerning the family. In this way the transaction costs due to possible conflicts of interest were reduced. The reduction of the conflict potential at the expense of women lead to a certain form of stability (Beck/Beck-Gernheim 1990). The legal position of women was strongly defined by their status as wife/mother/daughter/widow and not individualized. In times following, women got political rights faster than economic rights, for rights which grant access to economic resources cost men and the state more.

The seventies brought a series of reforms leading to a further gender-neutral formulation of rights and to individualization even in fields like marriage and family law. However, there was still only a slight material recognition of women's unpaid work in the household. Despite the gender-neutral formulation of rights many institutional regulations go on being based on the stereotype 'breadwinner/housewife'-model of marriage and the family. Access to legal rights is connected to the statuses of 'head of the household', 'main wage-earner' etc. which favour men and construct women as dependent beings. In this construction women have no personal legal claims, but only derived rights as co-insured family member, widow, person not liable to pay contributions etc.

It is in the interest of women to pursue a further individualization of these rights, since non-individualized rights privilege men and construct women as dependent persons bound personally to individual men. Non-individualized rights also reinforce role stereotypes and the gender-specific division of labour. Their discriminatory function becomes especially clear in the case of women not conforming to the underlying normative models of the patriarchal marriage and family. Thus, lone mothers, divorced women, single elder and retired women are threatened disproportionately by poverty. They are only "one man away from welfare"¹⁰. Both the growing instability of marriages and changing life patterns (more lone parent families and cohabitations outside wedlock) and the increasing unemployment and underemployment lead to an increase in these risks. "Breadwinners" are less and less able to discharge their function of maintenance. Therefore the strategy of further individualization of rights seems to be necessary also to break the circularity of women's

¹⁰ Nila Bevan in *Ms.*, July 1984, p.37.

discrimination following from the mutual reinforcement of exchange economy and household economy.

Such a strategy finds its limits in the fact that household work, the whole "labour of love", remains unpaid and is hardly recognized and remunerated economically and legally. A strategy of individualization which leads only to an adaptation of women to "male-oriented" models of work and life¹¹ cannot solve these problems and entails the risk of a further impoverishment of women. And even if women adapt themselves to the male time patterns of work in the exchange economy, the problem remains : who will do the household work ? And who will be the "housewife" of the gainfully occupied women ?

On the ground of this argumentation some feminists completely reject strategies of individualization as male-norms oriented. The model of the independent and self-sufficient abstract individual neglects the social bonds and reciprocal dependencies between human beings in this field of life not organized in accordance with the market form. The introduction of the market rationality in the family would not improve women's position, but cover up substantial inequalities (Olsen 1983). Often these feminist positions are embedded in romanticising descriptions of family life. It is feared that strategies of individualization will undermine the unalienated and altruistic family bonds. Since these arguments are mainly concerned with the cultural and moral (under-)evaluation of female labour as "care" or "labour of love" and utter very interesting insights from this point of view, the economic and material dimension of care which is my main concern is usually neglected.

I think, therefore, that a strategy of further individualization of rights is necessary to reduce women's dependence and discrimination. The risk of a further impoverishment of women which is inherent in such strategies does not follow from the individualization of rights as such, but it is dependent on the substantial content of the right. The question is : Which rights are being guaranteed, and at what level ? For financial reasons legislators, in individualizing rights and formulating them in a gender-neutral way, have often chosen options which made women worse off (e.g., when the retirement age of women and men has been equalized upwardly, or when rights only vested in women have been abolished without a substitution). These are political questions. To avoid the risks of individualization

¹¹ "Das Idealbild der arbeitsmarktkonformen Lebensführung ist der oder die vollmobile Einzelne, die ohne Rücksicht auf die sozialen Bindungen und Voraussetzungen seiner Existenz und Identität sich selbst zur fungiblen, flexiblen, leistungs- und konkurrenzbewußten Arbeitskraft macht, stylt, hin und her fliegt und zieht, wie es die Nachfrage und Nachfrager am Arbeitsmarkt wünschen" (Beck/Beck-Gernsheim 1990:15).

strategies they must be supplemented by other strategies which re-evaluate women's labour economically and socially.

11.3.1. Strategy 3 : The basic income

This strategy aims at both a radical individualization of rights and a more egalitarian distribution of income. A basic income is understood as a state transfer payment to each individual granted independently of income, family status or employment situation. It is unconditional in the sense that it is not dependent on a means tests or on willingness to take up employed work. The introduction of a basic income would have an influence on the distribution of time because it would at least partially overcome the equation of time in the exchange economy with paid working time and of household work time with unpaid working time. The basic income can be combined with other sources of income (which are taxed) and it therefore avoids the poverty traps implied in present social security law. The basic income does not depend on former contributions paid or seniority in employed work. It replaces the numerous benefits of present social insurance and welfare law. Essentially an equal amount is paid to all recipients although some differences according to age are discussed as well as higher payments for handicapped people (it is controversial whether the household composition and related economies of scale should be taken into account). Opinions differ considerably concerning the level of the basic income. While some favour a basic income covering a decent existence minimum, others propose an amount below this threshold or leave it to procedural solutions which can adapt the amount in a flexible way.

Without going into the details of the extended debate¹², I will discuss those aspects of the basic income which are relevant to the gender-specific division of labour and time. I will not enter into the question of the financial feasibility of the basic income¹³. The gender dimension has been widely neglected in the whole debate¹⁴.

Arguments for a basic income as improving women's income position :

- Since women are over-represented among the poor, they would profit overproportionately from a basic income and it might reduce female poverty considerably.

¹² See Schmidt (1984), Opielka/Vobruba (1986), Opielka/Ostner (1987), Van der Veen/Van Parijs (1986a, 1986b).

¹³ See the contributions in Van Trier (1990).

¹⁴ Exceptions are the contributions of Blickhäuser/Molter (1986), Eriker (1986), Ostner (1986), Schreyer (1986), Ravaloli (1990), Saraceno (1990).

- A basic income can compensate for the unpaid housework and care activities which have not been taken into account adequately in social security schemes up to now.
- A basic income would make women more independent of ties such as marriage and other economic forces which bind them to individual men, improving thus their bargaining power and freeing them from the economic constraints that force them to take over bad jobs in the labour market or serving men in households.
- The share of costs of bringing up children and caring for them to be borne by private households can be reduced through a basic income, particularly if children are also entitled to it.
- If a basic income covers the existence minimum, people would no longer be economically forced to take over badly paid, particularly unpleasant and stressing jobs. This may lead to pay increases in these sectors.
- If a basic income covers the existence minimum, men could take over more household tasks and childcare since the amount of hours in employment can be reduced without endangering the financial basis of the household. Based on their increased bargaining power, women might be in a better position to force men to participate in housework (or to leave them easier).

The basic income proposal pulls together different dimensions on the social security of "jobless" persons (housewives, retired women, welfare clients, the unemployed, artists etc.), thereby bundling the small bargaining powers of these lobbyless groups.

The **main counter arguments** include

- The dual structure of labour markets and the concentration of women in the lower segments might be reinforced since the basic income subsidizes wage costs for employers. If this happened, men could defend and even increase their privileged position in labour markets (Glotz 1986).
- The duality of paid and unpaid work would remain basically unchallenged and the social character of care and other forms of non-market work would not be recognised adequately (Ostner 1986, Werlhoff cited in Blickhäuser/Molter 1986:113).
- A certain amount of socially necessary work should be done by everybody, therefore a basic income is not a solution (leaving it to the individual decision how much of such work will be done) but a combination of a minimum income and an obligation to invest a certain amount of time in necessary work is needed (Gory 1985, 1988). This argument is not opposed to the basic income as such, but proposes a different conception of it.
- The basic income strategy tends towards "state fetishism" : the individualization of claims against the state takes the place of autonomy, solidarity and self-administration.
- The qualitative aspects of work and production are not taken into account ; the alienated and unecological character of capitalist production would remain unquestioned (Schreyer 1986).

A common element in some of these counterarguments is that access to the labour market (sometimes phrased as a right to work) is evaluated as being more important than a right to income of each person independently of work in the exchange economy. But why

would those two strategies exclude each other ? They should be combined so as to compensate for the possible negative effects of a system geared to one system of income distribution only (through the labour market or the "welfare state").

A 'right to work' strategy which reduces work to the "male times" oriented continuous full-time employment in gainful occupations is male-biased and neglects women's work situation in the household economy. Family law rules and practical economic constraints do not only postulate a right to work in the household economy (a right which men have as well as women, even if they take it up only very reluctantly), but also a duty to work - and without pay. With regard to women's household labour, work and income are already 'disconnected'. A basic income would at least partially make up for this.

A strategy of the redistribution of time and income by gainful employment for all would - as stated above - presuppose a change of working time patterns in the exchange economy. Part-time wages at their present level could, however, not secure the individual subsistence minimum. A basic income could contribute to this, and thus make it possible to have shorter working times. A combination of part time wages with the basic income would be sufficient to secure the subsistence minimum and would get one around the poverty traps of present day welfare benefits, which work as negative incentives to employment. The economic feasibility of part-time work, enhanced as it would be by the basic income, could contribute to an opening up of the labour market to more people.

How a basic income affects the dual structure of labour markets is an empirical question which is difficult to answer a priori. It is not at all evident that it would lead necessarily to a growth of the bad jobs in the economy, because it might enable people to refuse to take up these jobs (if it is high enough to subsist on). Also employers' reactions to economic change or recession have varied considerably. While in some countries or some segments of the economy a strategy to rely on 'cheap labour' was followed (as was largely the case in the U.K.), others pursued a strategy of rationalization and investments in modernization. Women were not necessarily always discriminated against most as an "industrial reserve army" or "buffer" (Rubery 1988). So there is no a priori evidence that a basic income would lead necessarily to the reinforcement of secondary labour markets (the same holds true for minimum wages).

The argument that a basic income would leave untouched the gendered division of labour and the dichotomized character of paid and unpaid work does not seem to hold.

Women who do the work of childcare now unpaid or underpaid would be economically better off with a basic income. Clearly the level of the basic income is crucial and it is also important that children too have a right to it covering the cost of their care and maintenance. Their parents would then be enabled to decide whether they want to care for the child themselves (and the costs of the caretaker's time should be covered through part of the child's basic income), if they want to pay private childminders or use public childcare services (which could be paid collectively, i.e. deducted from the basic income of a child beforehand, or through fees of the users).

Other counterarguments which do not hold true belong to the maximalist type. It is certainly true that the basic income is not aimed at resolving all problems, e.g. the unecological character of capitalist production or exploitative relations between different countries remain untouched. But this state of affairs would not be worsened by a basic income either. If nobody would be worse off, but some could be better off, it is a worthwhile goal to pursue.

11.3.4. Strategy 4 : Redistribution of costs of childcare and its organization

Childcare and bringing up children impose heavy burdens upon private households. While the resources of maintenance are provided for in cash mainly through wages, the bulk of the investment women make is in kind, through unpaid work and heavy investments of their time. A part of the cost is taken over by the state, providing benefits in cash (family allowances, childcare allowances, tax reductions) and in kind (childcare services, schooling, health care, and so on). This part, however, remains relatively modest. A redistribution of the contributions between the welfare state and private households would contribute in an essential way to an improvement of women's income situation, since it would mean that formerly unpaid working time is now partially paid or is being substituted for by the collective organization of childcare. Since time and money are interchangeable, a redistribution can be induced through increasing transfer payments to cover the costs of caring for and bringing up children, and/or through collectivizing childcare, improving childcare facilities and infrastructures which substitute women's working time (proposals 22 to 26). If public services were, for this reason, to expand, this strategy would at the same time contribute to the extension of women's employment in the public sector.

A part of this strategy would be the necessary measures to increase the temporal compatibility of childcare, infrastructures and gainful work, so as to reduce the negative effects of "time frictions" between the different systems. This requires also an extension of the planning and coordination competences of the state and local authorities.

12. Summary

In this thesis the influence of legal norms on the decisions of households with regard to time allocation in the exchange economy and the household economy, on gender specific female and male times and on the gender specific division of labour was investigated. Compared to male times, female times in the exchange and household economies are discriminated against economically and legally. The thesis analysed the causes of this discrimination and the social arrangements which institutionalize it and organize it legally, and discussed possible reforms. The normative goal is the equalization of the opportunity costs of time allocation in the household and the exchange economies, which hitherto have been different for women and men, thereby leading to higher average time investments of women in household work and to longer global working times of women in the household and exchange economies.

Normative models of time in law and legal rules of time allocation and organization have been researched. The research is not restricted to working time schedules in the sense of "maximum working times" or "weekly working times". Rather, the rights to dispose of time and the connectedness of the time criterion with economic and social claims laid down in legal norms are analysed within a broad context. This includes standardized working time schedules in the exchange economy: on the one hand the combination of the male times oriented standard employment relationship (continuous full time work) with "upward" working time flexibility in the form of overtime, shift work, night and week-end work, on the other hand the economically and legally less secured working time forms with "downward" working time flexibility (part-time work, home work, employment with minor working hours, discontinuous employment such as interim work, fixed term employment, work on call etc.). Women are overrepresented in these forms of the labour contract, since these forms often offer the only possibility to combine working times in the household and the exchange economy or to re-enter full time employment after a career interruption. Besides these forms of working time regulation the thesis treats of norms which make claims to social benefits (or at least their amount) dependent on time criteria such as employment duration, the continuity of employment or a minimal number of weekly working hours. The integration of the separate rules of labour, social security and family law, and their study in the context of the social conditions of female work is necessary to overcome the fragmentation of law and the "male prejudice" underlying the conception of the normative models. On the basis of an analysis of the legal rules and of empirical data with regard to their gender specific effects the underlying model of a "hierarchy" of working time forms is

reconstructed, and it is shown that working time forms are less secured economically and legally the closer they are to the household economy and to family forms of production. The strong normative orientation of social security law to male times and the systematic under-valuation of female times, especially of unpaid socialization and care activities, are summarized in a "two classes model" of social security law. The analyzed legal rules do not constitute **one** standard employment relationship, but two - the "other" standard employment relationship in the household economy presupposes the "invisible hand" of the housewife.

Which function does the differentiation of female and male times have for labour market organization and the actors in the exchange economy? The dominant allocation of unpaid household working times to women has several advantages for the enterprises:

- the risks of work interruptions are to a large extent taken out of the enterprise sphere and bundled in a group outside of the labour market;
- the mobility and the "upward" working time flexibility of the male standard employee are increased and the mobility impeding character of the family is reduced;
- the social costs of the production of certain goods, which otherwise would have to be borne by society, are shifted to private households, especially to women;
- the combinatory potential of different working time schedules (male times with "upward" working time flexibility, female times with "downward" working time flexibility) is increased, thereby enhancing the potential of adaptation to changed time demands.

The advantages of these arrangements for men are their liberation from lowly valued activities and routine work in the household economy, their relatively better labour market position and income situation and their more extensive bargaining power, which better enables them to pursue their interests within and outside of households and to establish structures in which "collective rationality" is realized often at the expense of the group of women.

The organization of the different social "time systems" of the market, of private households and of public life is such that female times are the hinges cushioning the frictions and reducing the incompatibilities between the different time systems. In the case of "synchronization problems" between the different time systems the highest feats of

coordination and adaptation are demanded from women; they have to bear the main costs of frictions and interferences.

Which role do legal norms play in the institutionalization of these gender specific time schedules? Because of the complex interdependencies between the different systems (between the economy, social organization and law; between the different subsystems of law; between different segments of the economy such as market and household production; between mutual expectations with regard to behaviour and anticipative strategies of the actors in the exchange and the household economy) a simple answer to this question is impossible. Legal rules with regard to time organization have an influence on the opportunity costs of men's and women's time allocation decisions, since they constitute different costs for different social arrangements, thus constructing the framework of choice for the actors and influencing the household's collective rationality. Several alternatives are imaginable, and therefore the role of legal rules cannot be reduced to a "passive" reproduction of pre-given social practices constituting a gender specific division of labour. An explanatory scheme conceptualizing legal norms in this way is often circular and neglects the influence of the gender specific costs of time allocation on household decisions, the collective rationality of households (often at the expense of the "individual" rationality of women) and the unequal power of men and women.

On the other hand the significance of law with regard to economic factors should not be overestimated. The economic interests, efficiency and profit maximization of enterprises, as well as economic power structures, have such a decisive influence on social organization and the structuring of time that the implementation of legal norms incompatible with them cannot but be structurally impeded. Such legal norms are not applied, are ignored by the actors (especially when they are not accompanied by effective sanctions and mechanisms of implementation), and can be counterproductive or dysfunctional or can have undesirable side effects.

The effects of legal norms can be controlled only within limits. Nevertheless in this essay the thesis is defended that legal reform should be used to change male times and female times in the direction of an equalization of men's and women's opportunity costs of time allocation in the exchange economy and the household economy. Such reforms must, however, take into account the interdependence of the exchange economy and household economy and of the different systems of time organization, and anticipate possible interplays and interferences. The potential micro-economic effects of legal regulations as

positive or negative incentives for the employment of women in the exchange economy must be taken into account so as to avoid an unwished for reinforcement of the gender specific division of labour in the household economy. The enforcement of legal rules -their effective sanctioning and procedural rules with regard to implementation- must be planned taking into account these considerations.

Legal policies which do not take into account the aspects mentioned and do not develop coordinated strategies are not suited to break down the discrimination of women in the vicious circle of the mutual reinforcement of the household and the exchange economies. Legal rules which ignore the gender specific division of labour (time) in the household economy and postulate the equal access of women and men to the labour market without questioning the "male-oriented" normative time schedules of the exchange economy cannot achieve the goal of overcoming women's discrimination in the labour market. They cannot encroach upon the privileges of male times and the discrimination of female times, which is itself a functional prerequisite for the existence of male times. For this reason a new interpretation of the legal concept "indirect discrimination" is proposed. In the context of time regulation the legal concept of equality should be specified as the equalization of women's and men's opportunity costs of time allocation in the household and the exchange economy.

Which reforms are suitable to reach this goal? Potential reforms are treated of on the one hand in the context of the special rules of labour, social security and family law (chapters 5, 6, 7), on the other hand discussed (in chapter 11 on models of the redistribution of time and income over women and men) with regard to their interplay, possible dysfunctional effects and micro-economic effects as to female employment, and situated within the contexts of more general strategies. In view of the complex interplay of the different systems of the economy, of law and of time organization, there is no "simple" strategy. Several elements must be coordinated and combined. An essential element in the strategy would be a general reduction of working time in the exchange economy and the development of a new normative model of the standard employment relationship which would establish shorter weekly working times (around 30 hours) as the standard model for labour and social security law. Only in this way can the smaller legal and economic security of "female working times" and part-time work be overcome and a relevant volume of working time be socially redistributed. This strategy must be combined with restrictions on "upward" working time flexibility, especially with an effective limitation of overtime.

As experiences with working time reduction have shown, this is a necessary, but not a sufficient, condition for an increase of men's time investment in household work. This is connected with the gender specific costs of time allocation and has its roots in differences in bargaining power, the distribution of income between women and men, and women's economic dependence. A change in the distribution of the costs of child care and socialization between private households and society is an essential condition for the removal of the discrimination against women. For as long as the social costs have to be mainly borne by private households, and as long as, within households, they take the form of an un(der)paid time investment of women, women will remain discriminated against. Female times in the household economy are structural barriers for the equal access of women to the labour market. The economic and legal advantages accruing to male times in the organization of the labour market reinforce this effect and increase redistribution at the expense of women. An economic and legal revaluation of certain activities (especially child care) in the household economy is therefore necessary; this revaluation, however, should avoid conferring negative employment incentives. To attain this, extended rights to be released from gainful employment or to a working time reduction for the periods of child care are required; the loss of wages must be compensated for according to the principle of insurance, and incentives must be given to men to make use of these rights. Furthermore, it is necessary to extend the egalitarian and universalist elements in the system of social benefits, so as to compensate for the discrimination of women due to factors "external to the market", and to partially disconnect benefits from labour market career. A further individualization of social rights, in the FRG traditionally strongly oriented to the family model of the patriarchal "housewife marriage" and to the "principle of subsidiarity", is required. The risk that the individualization of rights will lead to a further impoverishment of women must be countered by a strengthening of the egalitarian elements in social security law.

An improvement in public child care facilities and infra-structures and with regard to the compatibility of the time structures of gainful employment, private households and the public life are essential elements to overcome the discrimination of female times. This also requires procedural rules improving women's participation rights and bargaining power, so as to counter the negative effects of a neo-corporative labour market regulation, which is often at the expense of women, the "outsiders". On the one hand these measures require a stronger state intervention and the integration of the time dimension in social planning and administration. On the other hand such measures have "costs": they presuppose an extension of state employment and public institutions, and a relatively high tax level. To

overcome the discrimination of female times would mean limiting the privileges of male times, which to a large extent have their foundation in the allocation of un(der)paid household work to women. Until now the "winners" of the dominant time organization have shown little readiness to give up their time privileges.

13. List of abbreviations

| | |
|------------|--|
| AFG | Arbeitsförderungsgesetz (Labour Promotion Act) |
| ANBA | Amtliche Nachrichten der Bundesanstalt für Arbeit (Official Journal of the Federal Labour Exchange Office) |
| AO | Arbeitszeitordnung (Working Time Statute) |
| AP | Hueck/Nipperdey-Dietz (eds.) Nachschlagewerk des Bundesarbeitsgericht - Arbeitsrechtliche Praxis - (collection of decisions of the Federal Labour Court) |
| AuR | Arbeit und Recht (review) |
| AVG | Angestelltenversicherungsgesetz (National Insurance Act for white-collar employees) |
| Az | Aktenzeichen (case number) |
| BAFÖG | Bundesgesetz über die individuelle Förderung der Ausbildung (Statute on Grants and Educational Allowances) |
| BAG | Bundesarbeitsgericht (Federal Labour Court) |
| BAGE | Entscheidungen des Bundesarbeitsgericht (Amtliche Sammlung) (Official collection of decisions of the Federal Labour Court) |
| BAT | Bundesangestelltentarifvertrag (National collective agreement for white-collar employees in the public service) |
| BayObLG | Bayerisches Oberstes Landesgericht (Bavarian Supreme Land Court) |
| BB | Betriebsberater (review) |
| BERzGG | Bundeserziehungsgeldgesetz (Federal Statute on Parental Leave and Allowances) |
| BeschFG | Beschäftigungsförderungsgesetz (Employment Promotion Act) |
| BetrVG | Betriebsverfassungsgesetz (Employees Representation Act) |
| BGB | Bürgerliches Gesetzbuch (German Civil Code) |
| BGBI. | Bundesgesetzblatt (Federal Law Gazette) |
| BGH | Bundesgerichtshof (Federal High Court of Justice) |
| BGHZ | Entscheidungen des BGH in Zivilsachen (Amtliche Sammlung) (official collection of decisions of the Federal High Court of Justice) |
| BMJFFG | Bundesministerium für Jugend, Familie, Frauen und Gesundheit |
| BR-Drucks. | Bundesratsdrucksache (documents of the Federal Council) |
| BT-Drucks. | Bundestagsdrucksache (documents of the Parliament) |
| BVerfG | Bundesverfassungsgericht (Federal Constitutional Court) |
| BVerfGE | Entscheidungen des Bundesverfassungsgerichts (Amtliche Sammlung) (Official collection of decisions of the Federal Constitutional Court) |
| C.C. | Civil Code |
| CREW | Centre for Research on European Women, Brussels |
| DB | Der Betrieb (review) |
| DGB | Deutscher Gewerkschaftsbund (Federal Trade Unions Association) |
| ECJ | European Court of Justice |
| E.C.R. | European Court Reports |
| EIRR | European Industrial Relations Review |
| FamRZ | Familienrechtszeitschrift (review) |
| FAZ | Frankfurter Allgemeine (daily newspaper) |
| FR | Frankfurter Rundschau (daily newspaper) |
| FSEA | Federal Statute on Educational Allowances |
| GG | Grundgesetz (German Basic Law) |
| HBV | Gewerkschaft Handel, Banken und Versicherungen (Trade Union for Commerce, Banking and Insurance Sector) |
| IAB | Institut für Arbeitsmarkt- und Berufsforschung (Institute for Labour Market and Occupational Research) |
| JZ | Juristenzeitung (review) |
| LAG | Landesarbeitsgericht (regional labour court) |
| LFG | Lohnfortzahlungsgesetz (Statute on Sick Pay for Employees) |
| MDR | Monatsschrift für Deutsches Recht (review) |

| | |
|------------------|--|
| MittAB | Mitteilungen des Instituts für Arbeitsmarkt- und Berufsforschung (review) |
| MPA | Maternity Protection Act |
| NGG | Gewerkschaft Nahrung, Genußmittel und Gastronomie (Trade Union for Food Stuff and Catering Sector) |
| NJW | Neue Juristische Wochenschrift (review) |
| NZA | Neue Zeitschrift für Arbeitsrecht (review) |
| RdA | Recht der Arbeit (review) |
| RG | Reichsgericht (Imperial High Court of Justice) |
| RVO | Rechtsversicherungsordnung (Imperial National Insurance Act) |
| SAR | Standard Employment Relationship |
| SGB | Sozialgesetzbuch (Social Law Statute) |
| U.S. | United States Reports : Cases Adjudged by the Supreme Court |
| VersR | Zeitschrift für Versicherungsrecht (review) |
| VDR | Verband Deutscher Rentenversicherungen (Federal Association of National Pension Insurances) |
| WSI | Wirtschafts- und Sozialwissenschaftliches Institut des DGB (Economic and Social Sciences Research Institute of the Federal Trade Unions Association) |
| WSI-Mitteilungen | Mitteilungen des WSI (review) |
| WZB | Wissenschaftszentrum Berlin |

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