MAKING EQUALITY LAW MORE EFFECTIVE: LESSONS FROM THE GERMAN EXPERIENCE

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I. INTRODUCTION

In Germany, equality law is more or less synonymous with laws concerning equality between men and women. In contrast to other countries, no detailed legislation exists on race discrimination or discrimination on religious ground. Thus the following will focus on sex discrimination law.

The German experience in this field stems from two sources: the laws of the Federal Republic of Germany (West Germany) and the laws of the German Democratic Republic (East Germany). The socialist model was far more successful than the western model at integrating women into the labor force, overcoming job segregation, and promoting women to higher ranks. Probably the most important component of East German policy was an extensive network of child-care facilities, available all day, for all age groups. Full-time employment was the norm for East German women, even when they had small children. Of course, we must not underestimate the economic environment; East Germany suffered a constant shortage of labor.[1] Meanwhile, however, the division of labor at home hardly changed, so that East German women bore what has come to be called a double burden.

After German reunification, East German women experienced dramatic changes. Rapid introduction of a market economy and West German legislation resulted in large-scale dismissals, closure of child-care facilities and a drastic decrease in the birth rate. These processes reinforced each other. There is general consen-

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1 ANDRÉ CALAME & MARIA FIEDLER, MAßNAHMEN ZUGUNSTEN EINER BESSEREN VEREINBARKEIT VON FAMILIE UND BERUF. ERFAHRUNGEN AUS DER DDR, FRANKREICH, GROßBRITANNIEN UND SCHWEDEN SOWIE EMPFEHLUNGEN FÜR DIE BUNDESREPUBLIK DEUTSCHLAND (1982).

sus[2] that East German women have been the losers in German reunification. The percentage of women who have lost their jobs and are unemployed is much higher than that of men.[3]

Thus the first lesson that can be learned from the German experience is: West German equality law was not strong enough to protect East German women effectively during the process of transition from a planned to a market economy.

I do not feel competent to talk about equality law in the former East Germany, so I will concentrate on West Germany. When speaking of "Germany," I am referring to the Federal Republic of Germany. I will further limit my remarks largely to equality in employment, since this is the area of equality law with which I am most familiar.

We can distinguish roughly between two periods of equality legislation in Germany following World War II. During the first period, almost nothing existed but a clause in the German Constitution (the so-called Basic Law). The second period began in 1980, with changes in the Civil Code and a report by a Commission on Women and Society that led to a series of positive measures, particularly in the public sector.

I shall describe the first period briefly, then go into greater detail on the second period.

II. PHASE I (1949 - 1979)

The Basic Law of 1949 contained two sections prohibiting sex discrimination. Art. 3 (2) stated that men and women have equal rights.[4] Art. 3 (3) laid down a prohibition of discrimination on various grounds, including sex.[5] Art. 3 (2) was adopted as a result of a campaign by women who believed Art. 3 (3) was too weak. They pressed for stronger wording, sending thousands of letters to the commission charged with drafting the Basic Law.[6]

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[2] *See, e.g.*, CHRISTINA OCHS, *Frauendiskriminierung in Ost und West—oder: die relativen Erfolge der Frauenförderung. Eine Bestandsaufnahme in beiden ehemaligen deutschen Staaten, in* FRAUENERWERBSARBEIT. FORSCHUNGEN ZU GESCHICHTE UND GEGENWART 47, 47 ff., 64 (Karin Hausen & Gertrude Krell eds., 1993).

[3] For example, in January 1992 the unemployment rate for women was 21.8%, while for men it was 12.6%. *See id.* at 65.

[4] "Men and women shall have equal rights."

[5] "No one may be prejudiced or favored because of his sex, his parentage, his race, his language, his homeland and origin, his faith, or his religious or political opinions."

[6] *See* INES REICH-HILWEG, MÄNNER UND FRAUEN SIND GLEICHBERECHTIGT. DER GLEICHBERECHTIGUNGSGRUNDSATZ (ART. 3 ABS. 2 GG) IN DER PARLAMENTARISCHEN AUSEINANDERSETZUNG 1948-1957 UND IN DER RECHTSPRECHUNG DES BUNDESVERFASSUNGSGERICHTS 1953-1975 143 FF. (1979).

In spite of this history, the Federal Constitutional Court long held that, as far as sex was concerned, Arts. 3 (2) and 3 (3) meant the same thing. The Court developed the formula that, because of objective biological or functional differences between men and women, different rules for men and women might be justified or even necessary. The Court met with sharp criticism from feminist writers, but held to this formula until recently. Thus it was impossible to accurately predict the outcome of an equality case.[7]

When I became a judge, the Civil Code still contained the following clause: "It is the wife's responsibility to keep house. She is entitled to be gainfully employed to the extent this is compatible with her matrimonial and familial duties."[8] This clause was on the books until 1976, and illustrates the discrimination still possible despite the constitution's equal rights clause.

In labor law, the main achievement of the equal rights clauses of the Basic Law was the principle of equal pay for men and women. In 1955, the Federal Labor Court held that wage deduction clauses[9] for women in collective bargaining agreements were unconstitutional and thus void. But no awareness yet existed of the problem of indirect pay discrimination. The same judges who acknowledged the principle of equal pay for men and women also cleared a path to indirect discrimination by recommending separate wage groups for light and heavy work in an *obiter dictum*.[10]

Apart from that, the impact of Art. 3 of the Basic Law was impaired by a dispute as to the nature of the rights that clause granted. Did they bind private parties, or only the state? A majority of legal experts believed that the anti-discrimination provisions of the Basic Law did not have a direct horizontal[11] effect, but only an indirect horizontal effect via the general clauses of private law.

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7 For examples and a detailed critique, *see* UTE SACKSOFSKY, DAS GRUNDRECHT AUF GLEICHBERECHTIGUNG. EINE RECHTSDOGMATISCHE UNTERSUCHUNG ZU ARTIKEL 3 ABSATZ 2 DES GRUNDGESETZES (1991). Sacksofsky states:

> [T]he central test in (almost) every equality decision is the question whether objective biological or functional differences are present that make it impossible to apply the equality precept. This is not merely a narrowly-drawn exception to the rule; it goes to the heart of it. What, if not biological and functional differences, constitutes the difference between the sexes?

Id. at 96.

8 BGB (CIVIL CODE) § 1356 PAR. 1 (old version). There were no constitutional court decisions on this clause, which was repealed on 30 June 1976.

9 An example of such a clause in the carpentry industry was the following: "[f]emale workers receive 75% of the applicable men's wage in the spooling industry; for other wood-processing industries included in this contract, they receive 80%."

10 BAG, judgment of 15 Jan. 1955, 1 AZR 305/54, AP No. 4 on Art. 3 GG.

11 This term, also used in European Community ("EC") law, refers to relationships between private parties. In contrast, the term vertical effect refers to the relationship between private parties and the state.

As a result of this approach, Art. 3 (2) and (3) of the Basic Law were not considered applicable to access to private employment.

In addition to the Basic Law, the Industrial Relations Act[12] and the Acts on Personnel Representatives[13] in the public service contained non-discrimination clauses binding employers and workers' representatives. They referred only to persons already employed in the plant or office.

All statistics on women in employment told the same story: these tools were not sufficient to bring about equality for men and women in real life.[14]

III. PHASE II (FROM 1980 TO THE PRESENT)

A. Implementing European Community Directives

New stimuli were introduced into German equality legislation by the European Community.[15]

1. Amending the Civil Code

In 1980, the Civil Code was amended to implement directives on equal pay[16] and equal treatment,[17] a move that had been due since 10 February 1976 and 9 August 1978. For the first time, this established a right of equal treatment as regards access to employment in the private sector. Yet the sanctions provided for in the

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12 *Betriebsverfassungsgesetz.* All laws and decisions relevant to gender issues are published in a looseleaf collection: HANDBUCH ZUR FRAUENERWERBSTÄTIGKEIT—ARBEITSRECHT/SOZIALRECHT/FRAUENFÖRDERUNG (Klaus Bertelsmann et al. eds.) [hereinafter HzF].

13 *Personalvertretungsgesetze.*

14 *See, e.g.*, ERNST BENDA, NOTWENDIGKEIT UND MÖGLICHKEIT POSITIVER AKTIONEN ZUGUNSTEN VON FRAUEN IM ÖFFENTLICHEN DIENST (1986); BUNDESMINISTERIUM FÜR JUGEND, FAMILIE, FRAUEN UND GESUNDHEIT (FEDERAL MINISTRY OF YOUTH, FAMILY, WOMEN AND HEALTH), FRAUEN IN DER BUNDESREPUBLIK DEUTSCHLAND (1989).

15 The influence of European Community law on the law of member states is governed by Art. 189 of the EC Treaty, which states:

> In order to carry out their task and in accordance with the provisions of this Treaty, the European Parliament acting jointly with the Council, the Council, and the Commission shall make regulations and issue directives, take decisions, make recommendations or deliver opinions. A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States. A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods. A decision shall be binding in its entirety upon those to whom it is addressed. Recommendations and opinions shall have no binding force.

16 Council Directive of 10 Feb. 1975 on the Approximation of the Laws of the Member States Relating to the Application of the Principle of Equal Pay for Men and Women, 75/117/EEC.

17 Council Directive of 9 Feb. 1976 on the Implementation of the Principle of Equal Treatment for Men and Women as Regards Access to Employment, Vocational Training and Promotion, and Working Conditions, 76/207/EEC. The effect of these directives is discussed *infra.*

new clause of the Civil Code were very weak. Often, they amounted to little more than the cost of the postage stamps on the woman's letter of application. The labor courts of Hamm and Hamburg called on the Court of Justice of the European Communities to determine whether this was sufficient in light of EC legislation. The European Court held that more effective sanctions were needed.[18]

In 1994, the German legislature finally reshaped the respective clauses. Again they contained severe deficiencies; for example, because of a collective upper limit on the amount of compensation for discrimination, discrimination became cheaper when several persons were discriminated against at the same time.[19] The new legislation does not conform to the European Court's Marshall II decision[20] or with European judgments on remedies in general.[21] The issue has been referred to the European Court by the Hamburg Labor Court.[22] German legislative measures in this field are examples of ineffective attempts at making equality law more efficient.

The other important novelty of the amendments to the Civil Code in 1980 was the extension of the principle of equal pay for work of equal value. However, the clause has not yet been used in comparable worth claims.

2. Reception of the Concept of Indirect Discrimination

The most important practical change in German law brought about by EC equality law has been the reception of the concept of indirect discrimination. It is applied mainly to part-time work.

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18 ECJ Judgments of 10 Apr. 1984, Case 14/83, von Colson and Kamman, and Case 79/83, Harz, HzF, at 8 no. 2 and 10 no. 6.

19 *See* § 611 (a) (2), sent. 1 BGB and § 61 (b) of the Labor Court Law.

20 ECJ Judgment of 2 Aug. 1993, Case C-271/91, EuroAS 1993, at 6. Among other things, the European Court ruled:

> The interpretation of Article 6 of Council Directive 76/20/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions must be that reparation of the loss and damage sustained by a person injured as a result of discriminatory dismissal may not be limited to an upper limit fixed a priori.

21 *See, e.g.*, Judgment of 21 Sept. 1989, Case 68/88, Commission ./. Greece, HzF. G at 1 No. 6. In this case, the European Court ruled that, where Community law is being enforced, the national remedy must be comparable to the remedy available under national law for infringements of comparable national rights. Why the 1994 legislation on equality did not conform with this principle is explained in detail by Heide M. Pfarr in *Das Zweite Gleichberechtigungsgesetz*, RECHT DER ARBEIT 204 ff., 210 f. (1995).

22 Case C-180/95, Draempaehl.

The European Court's famous Bilka judgment,[23] issued on a reference by the German Federal Labor Court, established the guiding principles of this concept. It concerned the exclusion of part-time employees from an occupational pension scheme by the Bilka department store company. The European Court held that such a measure violated Art. 119 of the EEC Treaty (equal pay with no discrimination based on sex) if that exclusion affected a far greater number of women than men, unless the company could show that exclusion was based on objectively justified factors unrelated to discrimination on the basis of sex. It could justify such a pay policy on the grounds that it sought to employ as few part-time workers as possible, if it were found that the means chosen to achieve that objective corresponded to a real need on the part of the company, were appropriate to achieve the objective in question, and were necessary to that end. This case served as a model for many others.

Today, hardly a month goes by without a judgment by the Federal Labor Court dealing with indirect discrimination against part-time workers.[24]

B. Attempts to Improve Efficiency over and above EC Law

There have also been numerous attempts to improve the efficiency of equality legislation over and above EC law.

1. Preliminary Note: Germany's Federal Structure

To understand these efforts, one must have a rough idea of Germany's federal structure. The country consists of the federal government or federation (Bund) and sixteen states (Länder). The distribution of legislative authority among the federal government and the states is fairly complex. The states have the right to legislate wherever the Basic Law does not confer the right to legislate on the federal government. In some fields, such as immigration, currency, and employment of people in the federal civil service, the federal government has an exclusive right to legislate. Many fields are subject to so-called competing rights of legislation. The states have the right to legislate as long as, and to the extent that, the federal government does not make use of its right to legislate; examples are labor law and social welfare policy. In a few fields, the federal government has the right to issue "framework"

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23 ECJ Judgment of 13 May 1986, Case 170/84.

24 *See* Ninon Colneric, *Aktuelle Probleme der Teilzeitarbeit, in* BRENNPUNKTE DES ARBEITSRECHTS 93 ff. (Deutsches Anwaltsinstitut e.V. ed., 1995).

regulations.[25] These apply to many aspects of the employment relationships of public servants employed by the Länder (states), municipalities, and other public-law entities.

Because of this structure, there has been a rather complicated pattern of legislative efforts to further equal opportunity for men and women in Germany.

2. Historical Overview

The starting point for a whole range of activities in the field of equal opportunity was the 1980 report by a *Bundestag* Commission on Women and Society.[26] It recommended making the civil service a model. In 1983, the states and the federal government began issuing administrative directives on promotion of women in the civil service. Some of them contained quotas favoring women.

Several courts held that administrative directives were not enough to support a quota policy.[27] This led to the replacement of administrative directives with acts of parliament on promotion of women in the civil service. Today, the federal government and almost all the states have adopted laws of this kind. The oldest date from 1989 (Saarland, North Rhine-Westphalia), while the majority were adopted in 1993 and 1994. The federal government was among the last to adopt such a law.[28]

Comparable measures were included on a voluntary basis in some collective bargaining agreements. Some spillover also occurred into political parties and trade unions; here the pioneer was the Green Party, which began very early to compose its lists of candidates for public office on the so-called zipper principle—alternating between men and women. So far, the high point has been the fight to add the principle of positive action for women to the Basic Law.

It is impossible here to present the entire range of initiatives taken by the actors mentioned above, so I have selected the most typical, on the one hand, and the most interesting, on the other.

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25 These are general federal laws that leave room for detailed supplementary laws at the state level.

26 Deutscher Bundestag, 8. Wahlperiode (German Bundestag, 8th session), BT-DRUCKS 8/4461. The Bundestag is Germany's lower house of parliament.

27 *See, e.g.*, Oberverwaltungsgericht Nordrhein-Westfalen, decree of 15 June 1989, 6 B 1318/89; Verwaltungsgericht Köln, decree of 12 July 1989, 19 L 988/89.

28 *Gesetz zur Förderung von Frauen und der Vereinbarkeit von Familie und Beruf in der Bundesverwaltung und den Gerichten des Bundes* (Law for the Promotion of Women and the Compatibility of Career and Family in the Federal Bureaucracy and the Federal Courts), 24 June 1994.

The following material will be presented in systematic rather than historic order.

3. Systematic Presentation

a. The State's Constitutional Obligation to Promote Equality of Men and Women

i. *Federal Government.* In order to understand the debate surrounding the modification of the Basic Law's anti-discrimination clauses, we must look again at the jurisdiction of the Federal Constitutional Court.

Under the impact of EC law, and particularly a decision by the European Court of Justice concerning the prohibition of night work for women,[29] the Federal Constitutional Court in 1992 radically altered its interpretation of the constitution's sex discrimination provisions.[30] The court now holds that differential treatment linked to sex is not compatible with the ban on sex discrimination in Art. 3 (2) of the Basic Law, unless the discrimination is imperative in order to solve problems that, by their nature, occur only in relation to either men or women. The Court also believes that the content of Art. 3 (2) and Art. 3 (3) differs regarding sex discrimination; Art. 3 (2), the Court says, goes farther than Art. 3 (3). It mandates equal rights and extends this requirement to apply to social reality and aims to assimilate the conditions of real life, thereby giving women the same chance at gainful employment as men. According to the Court, actual disadvantages typically suffered by women may be compensated for with regulations favoring women. Since the mandate of equal rights justifies such compensatory measures, it may also justify infringement of the ban on sex discrimination.

As a consequence of German reunification, a debate ensued regarding the restructuring of the Basic Law. A joint constitutional reform commission of both houses of the German parliament was established. Women, in particular, demanded a new wording of the Basic Law's Art. 3 (2). They pressed for a clear statement that the state must promote de facto equality of women, and that measures compensating for existing disadvantages do not constitute discrimination. At one stage, the only proposal that gained a majority of the male-dominated commission was a change in the sequence of

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[29] ECJ Judgment of 25 July 1991, Case 345/89, Stoeckel; *see also* Dagmar Schiek, *The Ban on Women's Night Work in Europe—A Straight Road to Equality in Employment?*, 3 CARDOZO WOMEN'S L.J. 309 (1996).

[30] Judgment of 28 Jan. 1992,1 BvR 1025/82, 1 BvL 16/83 and 1 BvL 10/91.

the words, from "men and women have equal rights" to "women and men have equal rights."

Again women campaigned, drawing attention to the recent reinterpretation of Art. 3 (2) by the Federal Constitutional Court and arguing that they wanted merely a clarification of the language of the constitution. For the most part, they succeeded. Since October 1994, Art. 3 (2) of the Basic Law has read, "Men and women have equal rights. The state promotes the actual enforcement of equality of rights for women and men and works to remove existing disadvantages." This new wording is important in the debate over the constitutionality of quotas for women, making it easier to argue that quotas are compatible with the constitution.[31]

ii. *States.* Prior to the reshaping of the Basic Law, some of the states had already introduced positive action clauses into their constitutions. An example is Art. 6 of the Constitution of Schleswig-Holstein:

> It is the obligation of states, municipalities, associations of municipalities, and other agencies of public administration to promote equal rights for men and women in law and in fact. In particular, they must work to ensure equal representation of women and men in cooperative public law decision-making and consultative bodies.

Another example can be found in the constitution of the state of Brandenburg:

> The state is obligated to take effective measures to ensure that women and men enjoy equality in employment, public life, education and training, family, and in the sphere of social security.[32]

It must be noted that these clauses do not confer individual rights; that is, an individual cannot sue the state or municipality to enforce this equality prescription.

b. Institutionalization of Equality Policy and the Female Perspective

Various techniques have been used to institutionalize equality policy and the female perspective in general policy-making.

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[31] *See, e.g.*, Schleswig-Holsteinisches Verwaltungsgericht (administrative court of Schleswig-Holstein), decree of 16 Mar. 1995 - 11 B 32/95; Niedersächsisches Oberverwaltungsgericht (supreme administrative court of Lower Saxony), decree of 5 Apr. 1995.

[32] BRANDENBURG CONST. art. 12 (3), sent. 2.

i. *Women's Affairs Ministries.* The federal government and many states have established ministries for women's affairs or ministries for equality. Some are "pure" ministries for women's affairs, while some are also responsible for other fields, such as labor. In Schleswig-Holstein, the inspiring combination "women and energy" was discussed, though no such ministry was actually created.

ii. *Women's or Equality Commissioners.* The majority of states and the federal government have introduced women's affairs commissioners or equality commissioners for the public sector. The status of these commissioners varies. In some states, such as Berlin, they are a kind of employees' representative elected by the female employees, but most frequently they are part of the administration and are endowed with special rights. In these cases, they are appointed by the heads of administrative departments. The line separating the two types blurs when—as in Schleswig-Holstein—only people nominated by the female employees may be appointed.

The powers of these commissioners for women's affairs or equality vary. Most basic are rights of information and consultation in matters concerning women's and equality issues. More developed versions grant the commissioners the right to exercise a veto over planned measures, which results in deferring adoption of such measures. If the commissioner's veto does not lead to revision of the planned measure, the case goes to the next highest level of the administration for decision. The administration retains the ultimate right to decide.

Women's affairs or equality commissioners do not have the right to take cases to court. Special rules often exist for women's affairs or equality commissioners in universities and municipalities.

Many municipalities fiercely resisted the introduction of women's or equality commissioners. In Hesse, 117 mayors simply appointed themselves women's commissioners. The municipalities claimed that their constitutional right of self-administration was violated by a legally imposed duty to appoint women's or equality commissioners. The Federal Constitutional Court recently dismissed such a complaint by two municipalities from Schleswig-Holstein,[33] stating that sufficient scope remained for self-administration.

iii. *Representation of Women in Public Bodies.* Typically, equality laws also contain clauses supporting equal representation of men

[33] Decision of 26 Oct. 1994, 2 BvR 445/91.

and women in public bodies, such as boards, advisory councils, commissions and committees operating in the public sector. The rules vary in strictness. Federal equality legislation[34] has established the principle of double nomination (a man and a woman for each seat), if qualified persons of both sexes are available.

Much stronger clauses have been adopted by the state of Schleswig-Holstein, where the general rule states that, where only one seat can be nominated or delegated, men and women shall be given alternating preference.[35] A special rule for the composition of Schleswig-Holstein's oversight agency for private broadcasting[36] goes even further: organizations with a right to send a representative to the agency's assembly must delegate a women to *at least* every second term of office. That assembly, which had thirty-seven male and seven female members during the preceding term (five years, beginning in March 1990), is currently almost entirely female because of this rule.

iv. *Works and Personnel Councils.* The principle of equal representation can also be found in legislation on works councils in the private sector and personnel councils in the public sector.[37]

Older clauses in the Industrial Relations Act for the private sector and in the Acts on Personnel Representatives for the public sector stated that the sexes were to be represented on such councils based on their proportion among the employees. However, no rules of election guaranteed that result, so the clauses were rather inefficient. Recent equality legislation has attempted to improve this situation.

The Law on Co-Determination by Personnel Councils[38] in Schleswig-Holstein prescribes that women and men be considered based on their proportion among those entitled to vote when the personnel council is established. The election committee must ascertain the percentage of women, and nominations must include at least as many female and male candidates as are necessary to

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[34] *Gesetz über die Berufung und Entsendung von Frauen und Männer in Gremien im Einflußbereich des Bundes* (Law on Appointment of Women and Men to Bodies Within the Federal Sphere) of 24 June 1994, BGBl. I, at 1406. This law was part of the Second Equal Rights Act.

[35] Section 15, *Gesetz zur Gleichstellung der Frauen im öffentlichen Dienst* (Law on Equality of Women in the Civil Servic)] of 13 Dec. 1994.

[36] Section 42 (2) sent. 2, *Rundfunkgesetz für das Land Schleswig-Holstein* (Broadcasting Law of the State of Schleswig-Holstein), version of 12 Dec. 1991.

[37] Works councils are bodies elected by all employees of a plant, whether or not they are trade union members. The councils have legal rights of co-determination and cooperation that must be respected by the employer. Their equivalents in the public sector are personnel councils.

[38] *Gesetz über die Mitbestimmung der Personalräte (Mitbestimmungsgesetz Schleswig-Holstein).*

obtain proportionate distribution of the seats on the personnel council among women and men. But even this technique has not been enough to yield the desired result.

The state of Hesse introduced stricter rules. They prescribe in detail how seats must be distributed in order to obtain proportionate representation of the sexes. Each list of nominations must separately propose candidates of both sexes and contain twice as many male and female candidates as are to be elected. The least complicated case occurs when there is only one proposal. In this case, each voter has as many female votes as there are female members who must be elected, and as many male votes as there are male members who must be elected.

This legislation was challenged by opposition Christian Democratic members of the Hesse state parliament. They claimed the rules were not compatible with the constitution of Hesse because they violated the requirement of freedom and equal voting. The State Court of Hesse dismissed the complaint.[39]

Attempts by the federal legislature to promote equal representation of both sexes on works and personnel councils have been extremely weak. Only recently was a clause added requiring women and men to be represented on the election committee if both sexes are present in the plant or office.

Ensuring equality of men and women has also become an affirmative duty of personnel councils and works councils. To give an example, in Schleswig-Holstein, the personnel council and administrative department share the responsibility of seeing to it that measures are implemented to ensure equality between men and women, and in particular that plans for the promotion of women are drafted, agreed upon and implemented.[40]

Works councils in the private sector have the responsibility of furthering implementation of actual equality of rights between women and men, particularly in the areas of hiring, employment, training and retraining, and promotion.[41]

v. *Educational Policy.* Equality policy has also been introduced into legislation on education; for example, in the new Hesse education law, "equality of rights for women and men" is listed among the aims of education.

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39 Hessischer Staatsgerichtshof, judgment of 22 Dec. 1993, P.St. 1141.

40 Section 2 (2) No. 5, *Mitbestimmungsgesetz Schleswig-Holstein* (Schleswig-Holstein Co-determination Law).

41 Section 80 (1) No. 2a, *Betriebsverfassungsgesetz* (Industrial Relations Act).

c. Furtherance of Women in Employment Programs

An important institution in the German labor market is the Federal Agency for Labor (*Bundesanstalt für Arbeit*). Among other things, this agency is responsible for job placement, promoting vocational training, and job-creation measures. The basis of its activities is the Employment Promotion Act (*Arbeitsförderungsgesetz*) of 1969.

In its original version, the goals of this Act included integration of married women into the job market. A later version of that clause referred to all women whose placement was impeded under normal labor market conditions; it also imposed the duty to help overcome sex segregation in the labor market and in competition for job training.

Yet, statistics revealed serious underrepresentation of women among those profiting from measures adopted by the Federal Agency for Labor. A recent amendment therefore introduced the idea of quotas: "Women shall be assisted based on their percentage of the unemployed."[42]

The states often have their own jobs programs. The state of Hesse introduced women's quotas for all its labor market programs.[43]

d. Furtherance of women in the public sector

Central to all the new equality laws are measures to promote women in the public sector.

i. *Equality Plans.* Often such measures impose an obligation to draw up an equality plan or a plan to promote women. (For the sake of simplicity, both terms are used synonymously.) The basis of such equality plans is a statistical analysis. Administrative departments in the public sector are required to set targets for increasing the percentage of women in fields in which they are underrepresented. In some states, the administrative departments can decide the period for which the equality plan is designed. More frequently, the period is fixed by law.

The state of Hesse has adopted detailed rules regarding the content of plans to promote women.[44] As a general rule, in areas where women are underrepresented, more than half of all job

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42 Section 2 No. 5, *Arbeitsförderungsgesetz.*

43 These programs include any that help improve people's chances on the labor market, such as training programs or subsidies to employers for employing people.

44 *Hessisches Gesetz über die Gleichberechtigung von Frauen und Männern und zum Abbau von Diskriminierungen von Frauen in der öffentlichen Verwaltung (Hessisches Gleichberechtigungsgesetz)*

openings must be earmarked for women. For promotions not following a job opening, the planned percentage of women must correspond to the percentage of women in the next lower rank.

Some states have fairly strict rules on how equality plans are to be drawn up. In Hesse, the consent of the next highest authority or—in the case of ministries—the consent of the ministry responsible for policy on women is needed. A provision in Schleswig-Holstein requires that, in areas where women are underrepresented, no one may be hired or promoted until an equality plan has been instituted.

Some equality laws do not provide for sanctions if the equality plan is not fulfilled.[45] In Saxony, the reasons for the plan's nonfulfillment must be published within the administrative department.[46] Stronger sanctions are available in Hesse:[47] if the aims of the equality plan are not achieved within two years, every hiring or promotion of a man in an area where women are underrepresented requires the consent of the authority that approved the equality plan, until the plan is fulfilled; in the case of the ministries, the consent of the government is needed. Comparable, though weaker, mechanisms have been introduced in the state of Brandenburg.[48]

Official assessments of the merits of senior administrators by their own superiors, which are very important for promotion, function as indirect instruments of enforcement. In Bremen[49] and Berlin,[50] the success of implementation of that state's equality policy must be taken into account in these assessments.

Equality plans are a very new instrument of equality policy in Germany, and no assessment of their usefulness is possible as yet. The different regulations for equality plans in the various states and the federal government will probably also produce differing results.

(Hesse Law on Equal Rights for Women and Men and the Elimination of Discrimination Against Women in Public Administration (Hesse Equal Rights Law)) of 21 Dec. 1993.

45 *E.g., Schleswig-Holsteinisches Gesetz zur Gleichstellung der Frauen im öffentlichen Dienst (Schleswig-Holsteinisches Gleichstellungsgesetz)* of 13 Dec. 1994.

46 *Gesetz zur Förderung von Frauen und der Vereinbarkeit von Familie und Beruf im öffentlichen Dienst im Freistaat Sachsen (Sächsisches Frauenfördergesetz)* (Law on Promotion of Women and Compatibility of Family and Career in the Public Service in the Free State of Saxon) of 31 Mar. 1994.

47 Section 10, *Hessisches Gleichberechtigungsgesetz.*

48 *Gesetz zur Gleichstellung von Frauen und Männern im öffentlichen Dienst im Land Brandenburg (Brandenburgisches Landesgleichstellungsgesetz)* (Law on Equal Rights for Women and Men in the Civil Service in the State of Brandenburg) of 4 July 1994.

49 Section 17, *Gesetz zur Gleichstellung von Frau und Mann im öffentlichen Dienst des Landes Bremen (Bremer Landesgleichstellungsgesetz)* of 20 Nov. 1990.

50 Section 3 (1), sent. 2, *Landesantidiskriminierungsgesetz* of 31 Dec. 1990.

ii. *Announcements of Job Openings.* Typically, equality laws[51] also regulate the advertising of job openings. Schleswig-Holstein is one example. Where women are underrepresented, openings must be announced internally to employees, and leadership positions must be publicly announced in publications and professional journals. The job's requirements must be mentioned in the announcement, which must also address women and men equally. It must contain the information that women will be given preference if equally qualified and must also indicate the possibility of part-time work.

Some states compile statistics on applicants. Schleswig-Holstein has detailed rules in this respect. For each opening, a record must be kept specifying whether the job was given to a man or a woman, whether the opening was advertised and, if it was, the percentage of women among the applicants and those interviewed, and how many women and men sat on the selection committee.

iii. *Interviews.* Some states include rules on job interviews in their equality legislation. A typical rule requires that, in areas where women are underrepresented, all female applicants, or at least as many women as men, must be invited to an interview if they have the necessary qualifications. Some equality laws prohibit certain questions, such as those concerning pregnancy, family planning, and how the applicant will handle child care while on the job.

iv. *Hiring and Promotion.* Rules regarding hiring and promotion sometimes mention circumstances that may not be taken into account to women's disadvantage, such as family status and partner's income, part-time work, and interruptions in career to care for children. Several laws state that the experience acquired through working in the family must be taken into account if relevant to the job.

Hesse limits the relevance of certain auxiliary selection criteria that once played an important role. One rule requires that years of service, age, and time of last promotion matter only insofar as they are relevant to the applicant's qualifications.

The most controversial aspect of equality laws are rules prescribing that, in areas where women are underrepresented, they will be given preference over equally-qualified men. These rules apply to hiring as well as promotion. Typically, they are mitigated

51 A synopsis of German equality laws can be found *in* STREIT 21 ff. (1995).

by exemptions in case of serious hardship on the part of the male competitor. In Germany, these quotas are called "decision quotas."

When quotas of this type were introduced,[52] the courts were soon confronted with motions for preliminary injunctions by male competitors. These men claimed the clauses violated the constitutional ban on sex discrimination. In the administrative courts that decided cases involving civil servants, male complainants were almost always successful. But labor courts that decided cases involving public-sector employees viewed the situation differently.[53] Several cases also asked for review of the constitutionality of quotas by the Federal Constitutional Court,[54] but it acted too slowly; thus far, all the cases have been settled before decision by the Federal Constitutional Court. Rewriting the Basic Law has not ended the debate. Recently, the Administrative Court of Schleswig held that the preference rule is incompatible with the new version of Art. 3 of the Basic Law.[55]

Women have rarely tried to enforce decision quotas.[56] The future of these quotas depends very much on the European Court of Justice. Recently, the Court held that a national rule giving equally-qualified women automatic precedence over male competitors for promotion in fields where women are underrepresented is not covered by the affirmative action clause of the Directive on Equal Treatment and violates the ban on sex discrimination.[57] Precedence, the court said, may not be absolute and unconditional.

The immediate effect of this judgment was quite limited. The vast majority of laws regarding decision quotas were not directly affected, as they make exceptions for special circumstances in the man's case which justify granting him priority. But the question

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52 The forerunners of equality laws were administrative directives on promotion of equality. In 1983, Hamburg issued the first of these directives; it already contained a decision quota.

53 In the German public sector, there are civil servants whose employment contracts are based in public law and others whose contracts are based on private law despite the public employer. Cases involving the former are tried in administrative courts, the latter in labor courts, as are cases involving private-sector employees.

54 Under Art. 100 of the Basic Law, if a court believes a law to be unconstitutional it must suspend proceedings and ask the Federal Constitutional Court to review the law. This was done by judges who felt decision quotas were incompatible with the Basic Law. Because of the huge backlog of cases in the Constitutional Court, decisions can take several years; the case may be settled in the meantime, removing the basis for referral to the Constitutional Court.

55 Decree of 16 Mar. 1995, 11 B 32/95.

56 For cases in which they have tried, *see* HzF, *supra* note 12, at T 1. The number of women who have been successful is even smaller. Recently a woman won a quota case before the Berlin Labor Court, Judgment of 10 Jan. 1996, 19 Ca 22.236/95.

57 ECJ Judgment of 17 Oct. 1995, Case C-450/93, Kalanke. On the Directive on Equal Treatment, *see supra* note 17.

has arisen whether such clauses are sufficient to avoid infringing EC law. On 21 December 1995, the Gelsenkirchen Administrative Court referred this question to the European Court of Justice.[58]

Where decision quotas have been applied, statistics show only a modest increase in the percentage of women, and this increase may be merely a continuation of existing trends. It is fairly easy to evade decision quotas by simply denying the presence of equal qualifications.

In Germany, decision quotas have been available longer than equality plans. Hesse decided not to adopt decision quotas and instead developed a powerful system of equality plans. Brandenburg, an eastern German state, followed Hesse's example and concentrated on equality plans, though in a less powerful form. Several states combine both instruments.

I question whether such a combination is wise. Equality plans have a better chance of social acceptance than decision quotas.[59] Decision quotas may impair the goodwill that a policy of equality plans can create. In addition, the philosophy behind equality plans seems incompatible with the philosophy behind decision quotas. If a decision in favor of the woman is prescribed for every case of equal qualification, it is difficult to see why it should be necessary to aim for a specific proportion of women with an equality plan.[60]

v. *Vocational Training.* Some states have adopted special quota policies for vocational training. Hesse is an example; in occupations were women are underrepresented, at least 50% of apprenticeship positions must be given to women.[61] An exception is made for areas where the state has a monopoly on training, such as certain jobs in the court system. Suitable measures must be taken to draw women's attention to available apprenticeships for these jobs and to encourage them to apply. If, despite such measures, too few women apply, more than 50 % of the apprentice positions may be given to men.

vi. *Continuing Education.* A broad range of rules has been developed for continuing education and retraining; these include various quotas, instruction in equal rights tools and legislation as part

58 1 K 6303/94. A decision is expected in late 1997.

59 This is the author's personal assessment, based on observation and experience as a labor court judge.

60 As president of the Labor Court of Schleswig-Holstein, the author is also personnel manager of the state's labor courts and thus speaks from practical experience.

61 In Germany, an apprenticeship with a final examination is a precondition for access to many skilled jobs.

of the training of personnel directors, child care during training courses, and more female teachers.

vii. *Duty to Report.* Equality legislation is accompanied by a duty to submit periodic reports. In its strongest version, the report must be made to the legislative assembly.

e. Furtherance of Women in the Private Sector

i. *Public Procurement and Public Subsidies.* North Rhine-Westphalia was the first German state to adopt the idea of linking public procurement to promotion of women in the private sector.[62] After intervention by the EC Commission, they ultimately dropped that policy. Berlin and Brandenburg readopted the idea in their equality legislation, extending it to public subsidies; however, the relevant parts of the law have not yet gone into force, as the details must be regulated through further implementing legislation and executive action.

Some states, such as Schleswig-Holstein, pursue a policy of not contracting with cleaning services that employ workers below the minimum of hours and wages necessary for obligatory social insurance contributions by the employer.

ii. *Prizes for Businesses that Promote Women.* A simple method of making non-discrimination policy attractive and popular is by granting prizes to businesses that employ policies favorable to women. What counts from the managers' point of view is not so much the amount of the prize as its positive contribution to the image of the business.

The pioneer in this field was North Rhine-Westphalia, which created a 20,000 mark prize called "Women-Friendly Business of the Year" (*Frauenfreundlicher Betrieb des Jahres*). Small and medium-sized businesses were eligible. The jury consisted of members of parliament and representatives of employers' organizations and trade unions. Other states have copied this successful idea.

iii. *Collective Bargaining Agreements.* Because the legislature has refrained from acting in this area, promotion of women in the private sector is a field for voluntary action. Some collective bargaining agreements at the sector and plant level have included elements of the public-sector policies to further women, but such rules are still rare.

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62 This idea was borrowed from the United States, especially Executive Order 11246.

f. Increasing Compatibility of Family and Career

Rules promoting women must be distinguished from rules that improve the compatibility of family and career. There are many rules in Germany dealing with this problem. Employees have a right to unpaid child-raising leave until the child is three years old; in the public sector, this leave may be extended until the child is twelve years old. In the private sector, collective bargaining agreements also often provide for an extension of leave. Wage loss is partly compensated by child-raising benefits paid by the state. Regardless of income, 600 marks per month are paid until the child is six months old; this is not a great deal of money. For low-income parents, the 600 marks are paid until the child's eighteenth month; for those with higher incomes, it is curtailed in the child's seventh month, depending on the parents' income.

Most equality laws contain rules on flexible working time. Also, many regulations applying to the public sector recognize a right to work part-time, assuming this is compatible with the proper functioning of the administration. Similar rights have been established in some areas of the private sector by collective bargaining agreements.

In practice, all of this amounts to mother-child programs, since very few men either take unpaid leave for the sake of family[63] or work part time.[64] From the point of view of equality, these rules are ambivalent. Women are perceived as the less reliable part of the work force, because they are primarily the ones who take advantage of such entitlements.[65]

Feminists are urging that such rights be split between both parents.[66] The idea would be that if the father did not take his share, it could not be transferred to the mother. Some would like to go even further: if the father did not take his share, the mother would not be allowed to take hers.[67]

The idea of splitting rights between the parents has already been implemented in one area of German law. Statutory health

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63 During the period 1986-88, 1.8 million parents received child-raising benefits; this figure included fewer than 20,000 fathers. BUNDESMINISTERIUM FÜR JUGEND, FAMILIE, FRAUEN UND GESUNDHEIT (MINISTRY OF YOUTH, FAMILY, WOMEN AND HEALTH), FRAUEN IN DER BUNDESREPUBLIK DEUTSCHLAND, STAND OCT. 1989 47 (1989).

64 In 1990, the percentage of employed women working part time in Germany was 34%. At the same time, the rate of male part time workers was less than 5%. Bulletin on Women and Employment in the EU, no. 4 p. 1 and no. 2 p. 4 (1994).

65 *See* Heide M. Pfarr, *Welche Maßnahmen empfehlen sich, um die Vereinbarkeit von Berufstätigkeit und Familie zu verbessern?*, ZEITSCHRIFT FÜR RECHTSPOLITIK 309 ff. (1994).

66 *See* Ninon Colneric, *Tarifverträgliche und betriebliche Regelungen zur besseren Vereinbarkeit von Familie und Beruf*, RECHT DER ARBEIT 65, 71-73 (1994); Pfarr, *supra* note 65, at 309 ff.

67 This idea was developed by Heide M. Pfarr, *id.* at 313.

insurance[68] grants a right to sick pay for a certain number of days if the insured must stay at home to care for a sick child. This kind of sick pay is called children's sick pay. If both parents are insured, each has the same right to children's sick pay. In practice, the mother usually claims children's sick pay first, but when her days are used up, the father quite often stays home to care for the sick child and draws his share of children's sick pay.

A major problem is the situation of workers employed as temporary help while an employee is on leave for family reasons or is working part time for a specified period; they are usually also women, and their jobs are insecure. Trade unions have begun to consider "pool" solutions. Also, North Rhine-Westphalia has begun an experimental "personnel pool" for small and medium-sized businesses in order to test various ways of bridging the gaps created by the exercise of family-related rights.[69]

A significant step forward was the federal legislature's recognition of a right to day care, although it was intended not as a means to promote equality between men and women but as a way of preventing abortion.[70] The right became effective on 1 January 1996, and is limited to children three years old and above. Municipalities in the western German states pressed for a delay and managed to achieve some transitional regulations.[71] In the east, implementation is much easier, as many more child-care facilities existed under the socialist regime.

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68 Defined in Socialgesetzbuch—Gesetzliche Krankenversicherung (Social Insurance Code, Health Insurance) (SGB B) of 20 Dec. 1988.

69 *See also* GESELLSCHAFT FÜR ARBEITSMARKT- UND STRUKTURPOLITIK, INSTITUT DER SCHLESWIG-HOLSTEINISCHEN UNTERNEHMENSVERBÄNDE E.V., ZWISCHENBERICHT "MODELLPROJEKT ZUR ERSTELLUNG EINER STUDIE ÜBER ERFOLGSAUSSICHTEN EINES VERBUNDES VON KLEIN- UND MITTELBETRIEBEN ZUM BERUFLICHEN FITNESS-TRAINING FÜR FRAUEN IM ERZIEHUNGSURLAUB." STAND (1992); ZUKUNFTSWERKSTATT E.V. DER HANDWERKSKAMMER HAMBURG, MODELLVORHABEN ZUR ERPROBUNG EINER VERBUNDLÖSUNG ZUR ABSICHERUNG DER RÜCKKEHR VON FRAUEN IN DAS HANDWERK. 1. PROJEKT. BESTANDSAUFNAHME DER AM VERBUND TEILNEHMENDEN INNUNGEN UND BETRIEBE SOWIE PRÜFUNG DER ORGANISATORISCHEN UND RECHTLICHEN FRAGEN. ERGEBNISBERICHT. OCTOBER (1993).

70 Art. 5, *Gesetz zum Schutz des vorgeburtlichen/werdenden Lebens, zur Förderung einer kinderfreundlicheren Gesellschaft, für Hilfen im Schwangerschaftskonflikt und zur Regelung des Schwangerschaftsabbruchs (Schwangeren- und Familienhilfegesetz)* (Law on Protection of Unborn/Potential Life, to Promote a Child-Friendlier Society, to Assist in Pregnancy Conflicts and to Regulate Abortion) of 27 July 1992, now § 24 Sozialgesetzbuch (social insurance code) (SGB), Achtes Buch (VIII), Kinder- und Jugendhilfe.

71 Deadline regulations for 1996 (one deadline), 1997 (two deadlines) and 1998 (three deadlines). Children turning three years old after the deadline must wait until the next deadline. *See Rechtsanspruch auf einen Kindergartenplatz - Stichtagslösung: Erst einer, dann zwei, dann drei,* Zweiwochendienst Frauen und Politik Nr. 107/1995, at 4.

g. Collectivization of Maternity Costs

Another measure not aimed at equality of men and women but helpful in this context is the partial collectivization of maternity costs. In Germany, an employee's pregnancy and maternity spells not only organizational trouble for the employer, but typically also financial burdens during the period of maternity leave before and after birth; if maternity pay from the health insurance carrier is less than the employee's net wage, the employer must pay the difference. For employers with not more than twenty employees, a system of funding has been developed to recover most of these costs,[72] and plans exist to expand this system.

h. Protection against Sexual Harassment

Finally, explicit protection against sexual harassment in the workplace has been introduced. Some of the equality laws for the public service contain more or less detailed rules on such harassment. Recently, the federal government passed an Act on the Protection of Employees against Sexual Harassment in the Workplace[73] that applies to the public and private sectors.

IV. ASSESSMENT

In summary, Germany is well on its way to developing a coherent equality or anti-discrimination policy. The lesson has been learned that, if we are to bring about true equality between men and women, it is not enough simply to create equal rights for men and women. A more active approach is needed.

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72 The system is integrated into the existing system of funding to recover most of the expenses for sick pay. *See* §§ 10-19 *Gesetz über die Fortzahlung des Arbeitsentgelts im Krankheitsfalle - Lohnfortzahlungsgesetz* of 27 July 1969. In Germany, employees can claim sick pay from their employers for up to six weeks when unable to work due to illness. Employers with not more than 20 employees are reimbursed 80% of the sick pay paid out to their employees from the statutory health insurance carrier. They must, on the other hand, pay contributions to a special fund administrated by the health insurance carrier. Reimbursement of most of the sick pay is financed through this fund. The effect of this system is to replace individual risk with collective risk. Where sick pay is involved, the system dates back to 1970. It was extended to cover maternity costs in 1986 by the Beschäftigungsförderungsgesetz 1985. *See* Heinz Schneider, *Die Erweiterung des Ausgleichsverfahrens nach dem Lohnfortzahlungsgesetz*, BETRIEBS-BERATER 2114-20 (1985).

73 *Gesetz zum Schutz der Beschäftigten vor sexueller Belästigung am Arbeitsplatz* (Law to Protect Employees from Sexual Harassment in the Workplace) of 24 June 1994. Under this law, an employer must protect employees against sexual harassment (§ 3), and harassed employees have a right to complain to the competent authority at the plant or office (§ 4) and to refuse to work if the employer does not take measures to stop the sexual harassment or the measures are patently ineffective (§ 5). The public took little notice of this legislation, which was passed as Art. 10 of the *Zweites Gleichberechtigungsgesetz* (Second Equal Rights Act).

The future will show whether the variety of techniques employed to further women in the public sector will produce the desired results. Quota systems, with the exception of decision quotas, are promising. The best thought-out equality legislation seems to be that of the state of Hesse; it was designed at a time when the internationally known anti-discrimination specialist Prof. Heide Pfarr was Minister for Labor and Women's Affairs. It is to be hoped that the most successful models will be extended to cover the private sector.[74]

The deficiencies in German equality policy are still serious. For example, tax law strongly favors a marriage of the "housewife and gainfully employed husband" type. The greater the difference in earnings between husband and wife, the more favorable the taxation. Another problem is a lack of collective procedures to enforce equality legislation. Germany has neither an agency nor a women's rights organization with the right to take cases to court and collectively enforce laws protecting individuals.

In Germany, the most interesting models have been developed not as part of equality policy, but as aspects of crisis management. I am referring specifically to the introduction of the thirty hour work week in some sectors of German industry.[75] Thirty hour weeks means, on average, six hours per day. If both parents were gainfully employed for six hours per day, the joint volume of work would be about the same as it is in the conventional pattern, in which men work full-time and women part-time. Yet the consequences for the division of labor in the family and the assessment of the value of women and men on the labor market would be entirely different.

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74 There is, however, little likelihood of this as long as conservatives remain in power at the federal level.

75 The first and best known case took place at the Volkswagen car manufacturing plant during a serious labor shortage in 1994. The measure was taken to prevent dismissals. *See, e.g.*, Hermann Unterhinninghofen, *Zwei Jahre sichere Arbeitsplätze - Vier-Tage-Woche bei VW*, ARBEITSRECHT IM BETRIEB 82-87 (1994). Other plants in the metal and steel industry followed suit. *See* Burghard von Seggern, *Kürzere Arbeitszeit bei weniger Geld gegen Arbeitsplatzgarantien*, ARBEITSRECHT IM BETRIEB 585 - 89 (1994). For further examples and an assessment of the effects, *see* REINHARD BISPINCK, *Tarifpolitik 1994, in* GEWERKSCHAFTEN HEUTE - JAHRBUCH FÜR ARBEITNEHMERFRAGEN 1995 129 ff. (Michel Kittner ed., 1995).