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Gender Equality in Reconciling Work
and Childcare in South Korea

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Abstract

This paper presents an ideal legislative model for South Korea to realize gender equality in reconciling work and childcare. The comparative study on the U.S. and German system is the basis for the legislative model. This paper selects the U.S. and German systems as a comparison group because they are representing the equal treatment approach and special treatment approach in the feminist legal theory.

The current system in South Korea fails to realize gender equality because it provides maternity leave exclusive to women to limit women's right to work and lacks financial support for parental leave. Maternity leave limits women's right to work because it obligates employers to pay women on maternity leave and prohibits women from working after childbirth. The lack of financial support for parental leave forces women to take leave instead of men because the gender wage gap and sex role stereotyping require full remuneration as a precondition to guarantee equal opportunities for men and women to participate in childcare in practice. Therefore, the current system in South Korea is not enough for gender equality in reconciling work and childcare.

The U.S. system guarantees the gender neutral parental leave system. The gender neutral parental leave purports to eliminate discriminatory practices in granting leave for childcare to men and women in the state level. Before the enactment of the gender neutral parental leave system in the federal level, individual States conferred maternity and paternity leave discriminatorily. They were more generous when providing maternity leave than paternity leave. To cease the state-sponsored gender discrimination, Congress adopted the gender neutral parental leave system instead of maternity and paternity leave as distinctive systems.

However, the U.S. system lacks financial support for parental leave. In the federal level, the U.S. system does not provide payment for childcare. Instead, individual States and employers provide partial remuneration for childcare. The lack of financial support in the federal level weakens the original legislative intent of the gender neutral parental leave system. Furthermore, without full remuneration, partial remuneration does not fully effectuate the gender neutral parental leave system as an antidiscrimination regime due to the gender wage gap and sex role stereotyping. Therefore, South Korea should not follow the lack of financial support in the U.S. system.

In contrast to the gender neutral parental leave system in the United States, the German system guarantees maternity leave exclusive to women without paternity leave for men. Maternity leave limits women's right to work because it forces women to stay at home after childbirth in the name of protection. The German system justifies the mandatory maternity leave by procuring full remuneration throughout the leave period. However, the mandatory maternity leave system in Germany is not an ideal model for South Korea because it does not consider individual women's physical differences

which require different periods for recuperation. Therefore, maternity leave without paternity leave in the name of protecting women’s reproductive health women’s right to work.

Despite the adverse impact of maternity leave in the German system, the financial support during parental leave which reflects actual lost income is an ideal model for South Korea. The German system guarantees two-thirds of actual lost income as parental benefits which encourage men to participate in childcare. However, it still does not guarantee full remuneration. Therefore, the reflection of actual lost income is a positive aspect of the German system but full remuneration is still required for gender equality in South Korea.

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I. Introduction

This paper proposes a legislative model for South Korea in reconciling work and childcare: a gender neutral parental leave system with full remuneration. The legislative model for South Korea is based on a comparative analysis of the U.S. and the German systems because they are leading examples of the equal treatment approach and the special treatment approach in the feminist legal theory. The U.S. system provides a gender neutral parental leave system which does not provide leave for women differently from leave for men. In contrast, the German system guarantees maternity leave exclusive to women without paternity leave for men.

Section Two discusses the problems of the current system in South Korea. The first problem is maternity leave exclusive to women. It obligates employers to provide full remuneration for women on maternity leave and prohibits women from working after childbirth. The second problem is the lack of financial support for parental leave which

discourages men from participating in childcare. Therefore, the current system in South Korea fails to realize gender equality in South Korea.

Section Three discusses the U.S. and the German systems. The U.S. system guarantee a gender neutral parental leave system to cease state-sponsored gender discrimination in granting parental leave by distinguishing maternity leave from paternity leave. However, it lacks financial support for parental leave. The U.S. system does not provide a uniform parental benefit system in the federal level. Instead, individual States and employers provide partial wage replacement which does not reach full remuneration. The German system guarantees maternity leave exclusive to women without paternity leave for men. Maternity leave exclusive to women limits women's right to work because it forces women to stay at home after childbirth. With respect to financial support for parental leave, the German system reflects actual lost income in providing financial support. However, it still does not guarantee full remuneration. Therefore, the comparative study on the U.S. and German systems provide a gender neutral parental leave system with full remuneration as an ideal model for gender equality in reconciling work and childcare.

II. Gender Discrimination in Reconciling Work and Childcare in South Korea

South Korea does not guarantee gender equality in reconciling work and childcare because it provides maternity leave exclusive to women¹ and lacks financial support for parental leave.² Maternity leave exclusive to women limits women's right to work because it obligates employers to provide full remuneration for women on maternity leave and prohibits women from working after childbirth. The lack of financial support during parental leave limits men's right to childcare because it does not reflect actual lost income.

To discuss problems of the current system in South Korea, Section A analyzes the maternity leave exclusive to women and Section B focuses on the lack of financial support for parental leave. Section A focuses on the problems created by maternity leave exclusive to women. The first problem of maternity leave is the financial obligation for employers to pay maternity benefits for women on leave. The second problem is the mandatory maternity leave which prohibits women from working after childbirth. This section concludes that maternity leave limits women's right to work. Section B discusses the lack of financial support for parental leave as limitation on men's right to childcare. The current parental benefit system in South Korea provides only a lump-sum amount of benefits which compensates for partial lost income only. Therefore, this section concludes that the lack of financial support for parental leave limits men's right to childcare.

A. Maternity Leave Exclusive to Women

Maternity leave exclusive to women limits women's right to work because it obligates employers to pay maternity benefits for women and prohibits women from

¹ LSA, art. 74 (1) sentence 1(R.O.K.) (stating that "An employer shall grant a pregnant female worker 90 days of maternity leave before and after childbirth.").

² EIA, art. 95 (1) (R.O.K.) [hereinafter EIA] (stating that "The amount of the child-care leave benefits under Article 70 (2) of the Act shall be five hundred thousand won per month.").

working after childbirth. Section 1 discusses the problem of employers' financial obligation to pay maternity benefits and Section 2 discusses the problem of the involuntary nature of the postnatal period. Finally, this chapter concludes that maternity leave exclusive to women limits women's right to work.

1. Employer's Financial Obligation to Pay Full Remuneration

Maternity leave exclusive to women in South Korea limits women's right to work because employers have to pay full remuneration during the first sixty days of maternity leave.³ Small businesses are exempted from the financial obligation but large businesses are still responsible for financial support for women on maternity leave.⁴ The extra costs to pay women on maternity leave limits women's right to work.

The employer's financial obligation started from the first maternity leave system when the Labor Standards Act (hereinafter LSA) introduced sixty days of paid maternity leave in 1953 after Korean War.⁵ In the process of economic reconstruction, the employment insurance fund was not enough to exempt employers from the financial obligation to pay women on maternity leave. As a result, employers were responsible to pay full remuneration for women on maternity leave.

The employer's financial obligation continued when the LSA extended the total duration of maternity leave from sixty days to ninety days in 2001. Employers were still responsible to pay women for the first sixty days of maternity leave.⁶ The employment insurance covered the extended period but it did not expand its coverage to the first sixty

³ LSA, art. 74(3) (R.O.K.) (stating that "Of the leave under paragraphs (1) and (2), the first 60 days' leave shall be with pay, except that if maternity leave benefits, etc., are already paid pursuant to Article 18 of the Act on Equal Employment and Support for Work-Family Reconciliation, the employer shall be relieved of the responsibility to the extent of such amount.").

⁴ EIA, art. 76 (1) (R.O.K.) (stating that "maternity leave benefits, etc., under Article 75 shall be paid in the amount corresponding to the ordinary wages (calculated based on the beginning day of leave) under the Labor Standards Act for the leave period under Article 74 of the Labor Standards Act: Provided that in case of enterprises which fail to meet the criteria set forth by the Presidential Decree, in terms of the number of workers, etc., pursuant to Article 19(2), the payment period shall be limited to the number of leave days (up to 30 days) in excess of 60 days."); Enforcement Decree of the Employment Insurance Act, Apr. 6, 1995, last amended by Presidential Decree No. 20330, Oct. 17, 2007, art. 12 (1) [hereinafter Enforcement Decree of the EIA] (stating that "Enterprises which meet the criteria set forth by the Presidential Decree under Article 19 (2) refer to those (hereinafter referred to as "preferentially supported enterprises" for which the number of workers by industry falls under any of the following subparagraphs: 1. Mining: 300 persons or fewer; 2. Manufacturing: 500 persons or fewer; 3. Construction: 300 persons or fewer; 4. Transportation, warehouse and communications: 300 persons or fewer; and 4. Industries other than those listed in subparagraphs 1 through 4: 100 persons or fewer.").

⁵ LSA, art. 60 (1) (Act No. 286, May 10, 1953) (R.O.K.), http://www.klaw.go.kr/CNT2/LawContent/MCNT2LawEtc3Dan.jsp?s_lawmst=86551&history=H&l_lawm=%ea%b7%bc%eb%a1%9c%ea%b8%b0%ec%a4%80%eb%b2%95&keyword= (stating that "Women are entitled to 60 days of protective maternity leave with full remuneration.") [translated by Kook Hee Lee].

⁶ LSA, art. 72(1) (Act No. 6507, Aug. 14, 2001) (R.O.K.), http://likms.assembly.go.kr/law/jsp/LawThree.jsp?WORK_TYPE=LAW_THREE&LAW_ID=A1531&PROM_DT=19970313&PROM_NO=05309&LAW_KD=법률&Before=LAW_BON (stating that "the employer shall grant 90 days of maternity leave before and after childbirth. 45 days shall be allocated after the childbirth") [translated by Kook Hee Lee].

days of maternity leave.⁷ Consequently, employers' initial financial obligation continued to limit women's right to work.

In 2005, the employment insurance expanded its coverage to the first sixty days of maternity leave but only small businesses could benefit from the expansion.⁸ Large businesses still had to pay full remuneration for women during the first sixty days of maternity leave. The government considered that small businesses had more difficulties than large businesses to hire female workers due to the financial obligation to pay full remuneration during maternity leave.

The financial obligation prevented employers from granting maternity leave as much as employees needed. As a result, women in small businesses benefited from the expansion of the insurance coverage.⁹ However, as large businesses still had to pay full remuneration, female workers in large businesses were excluded from the expansion of the insurance coverage to the first sixty days of maternity leave. Therefore, the expansion was not sufficient to relieve the financial obligation of employers to hire female workers.

Statistical evidence shows that maternity leave was not enough to protect women from discrimination in child-bearing age. Women between the age of twenty five and thirty four did not participate in the labor market as much as women in other age groups.¹⁰ They had to retire for child-bearing or child-raising despite the maternity leave and benefits system to accommodate women's reproductive health. Therefore, the low participation rate of women during the age group between twenty four and thirty five

⁷ EIA, art. 76 (1) (R.O.K.) (stating that "maternity leave benefits, etc., under Article 75 shall be paid in the amount corresponding to the ordinary wages (calculated based on the beginning day of leave) under the Labor Standards Act for the leave period under Article 74 of the Labor Standards Act:

Provided that in case of enterprises which fail to meet the criteria set forth by the Presidential Decree, in terms of the number of workers, etc., pursuant to Article 19(2), the payment period shall be limited to the number of leave days (up to 30 days) in excess of 60 days."); Enforcement Decree of the Employment Insurance Act, Apr. 6, 1995, last amended by Presidential Decree No. 20330, Oct. 17, 2007, art. 12 (1) [hereinafter Enforcement Decree of the EIA] (stating that "Enterprises which meet the criteria set forth by the Presidential Decree under Article 19 (2) refer to those (hereinafter referred to as "preferentially supported enterprises" for which the number of workers by industry falls under any of the following subparagraphs: 1. Mining: 300 persons or fewer; 2. Manufacturing: 500 persons or fewer; 3. Construction: 300 persons or fewer; 4. Transportation, warehouse and communications: 300 persons or fewer; and 4. Industries other than those listed in subparagraphs 1 through 4: 100 persons or fewer.").

⁸ *Id.*

⁹ The number of employees applying for maternity benefits in small businesses increased by 46.7% between 2005 and 2007. The substantial increase in the applicants shows that the financial obligation to pay the pre-leave salary was the primary reason why employers were reluctant to grant maternity leave to employees. However, the revision did not bring any benefits for women in large businesses. The overall increase in the number of female employees applying for maternity benefits was only 19.1% between 2005 and 2007. The increase reflected the growth in small and large businesses. The numerical evidence of 19.1% overall increase and 46.7% increase in small businesses shows that women in large businesses still face difficulties in applying for maternity leave due to the financial burden incurred to employers. See MINISTRY OF LABOR, WOMEN IN SMALL BUSINESSES APPLIED FOR MATERNITY BENEFITS MORE THAN WOMEN IN LARGE BUSINESSES 1-2 (2007) [translated by Kook Hee Lee].

¹⁰ Republic of Korea, The Third Periodic State Report to the Committee on the Elimination of Discrimination Against Women, CEDAW/C/KOR/6, Mar. 5, 2007, at 57 (stating that "Given the low participation rate among 25-34 age group, the three major age categories of women in economic activity form the now familiar "M" on the distribution curve and signify a serious disruption in women's working life due to marriage, child-bearing and care, etc.").

shows the ineffectiveness of maternity leave as a way to accommodate women's reproductive health.

There is an alternative way to protect women's reproductive health without discriminatory impact on women's status as workers. Medical leave for other health conditions can serve the same policy goal to protect women's health conditions related to pregnancy or childbirth. In that case, women and men will face equal circumstances to take medical leave.

The adverse effect of maternity leave exclusive to women is more obvious when the terms and conditions are compared with paternity leave. Men are entitled to take three days of unpaid paternity leave during the first thirty days after childbirth.¹¹ Employers do not need to pay paternity benefits for men during the three-day paternity leave. In contrast, employers need to pay full remuneration for women on maternity leave during the first sixty days. Therefore, maternity leave overburdens employers to hire female workers.

2. The Forced-Postnatal Period

The mandatory maternity leave after childbirth limits women's right to work. The LSA prohibits women from working during the first forty-five days after childbirth.¹² The original legislative intent of the forced-period is to protect women's reproductive health. However, it forces women to stay at home regardless of their ability to work. Because individual women's health conditions may differ, overgeneralization of a period for recuperation harms women's status as workers.¹³

The original maternity leave system did not prohibit women from working after childbirth. When the LSA guaranteed sixty days of paid maternity leave in 1953, it provided sixty days of voluntary maternity leave.¹⁴ It did not allocate any specific period after childbirth. Women could decide how to allocate sixty days of maternity leave.¹⁵ The voluntary nature of the maternity leave system guaranteed women's right to work.

¹¹ EES, art. 18-2 (R.O.K.) (stating that "(1) If a worker requests leave for his spouse's childbirth, the employers shall grant him three-day leave. (2) A worker shall not be eligible to request the leave prescribed in paragraph (1), if thirty days or more have passed after his spouse's childbirth.").

¹² LSA, art. 74(1) (R.O.K.) (stating that "An employer shall grant a pregnant female worker 90 days of maternity leave before and after childbirth. In such case, 45 days or more shall be allocated after the childbirth"); MINISTRY OF LABOR, MATERNITY LEAVE (2008), available at <http://www.molab.go.kr/policyinfo/woman/view.jsp?cate=3&sec=3> (stating that women cannot choose whether to work or not for at least forty five days after childbirth) [translated by Kook Hee Lee].

¹³ This logic has been adopted by the Supreme Court of the United States. Because South Korean Constitutional Court has not addressed this issue yet, this paper refers to the U.S. case instead. See Nevada Department of Human Resources v. Hibbs, 538 U.S. 721, 729 (2003) (citing U.S. v. Virginia, 518 U.S. 515, 533 (1996)).

¹⁴ Keunro Kijun Bub [Labor Standards Act], art. 60 (1) (Act No. 286, May 10, 1953) (R.O.K.), http://www.klaw.go.kr/CNT2/LawContent/MCNT2LawEtc3Dan.jsp?s_lawmst=86551&history=H&l_lawm=%ea%b7%bc%eb%a1%9c%ea%b8%b0%ec%a4%80%eb%b2%95&keyword= (stating that "Women are entitled to 60 days of protective maternity leave with full remuneration.") [translated by Kook Hee Lee] [hereinafter LSA].

¹⁵ For example, a woman could apply for sixty days of maternity leave as prenatal maternity leave. She also could apply for sixty days of maternity leave as postnatal maternity leave. Therefore, women had sole discretion to decide how to take advantage of the system.

However, since 1961, the LSA prohibited women from working for thirty days after childbirth.¹⁶ Individual women's health conditions could be different from one another. Some women might need thirty days for recuperation but others might not. However, the LSA fixed thirty days as a uniform period for recuperation regardless individual women's ability to work.

The involuntary nature of the postnatal period conferred more burdens on employers to hire female workers because employers had to pay full remuneration at least for thirty days for each woman. Before the LSA prescribed the forced-postnatal period, there was a possibility that a woman might take less than thirty days of maternity leave. However, the forced-postnatal period fixed the minimum period for employers' financial obligation. As a result, employers felt more burdensome to hire women than men. Thus, the involuntary nature of the postnatal period limited women's right to work.

In 2001, when the LSA extended maternity leave from sixty days to ninety days, it also extended the involuntary postnatal period from thirty days to forty five days.¹⁷ Originally, the LSA provided sixty days of maternity leave and thirty days of the forced-maternity leave.¹⁸ Afterwards, the LSA extended maternity leave from sixty days to ninety days.¹⁹ At the same time, it also extended the forced-period from thirty days to forty five days.²⁰

Maternity leave exclusive to women limits women's right to work because it creates a financial burden for employers to pay women on maternity leave and prohibits women from working after childbirth. These two limitations are derived from the special treatment approach for women's reproductive health. The emphasis on women's reproductive health brought about limitation on women's right to work after all. Therefore, the current system in South Korea fails to guarantee women's right to work in reconciling work and childcare due to maternity leave exclusive to women in the name of protecting women's reproductive health.

¹⁶ LSA, art. 60 (1), (Act No. 791, Dec. 4, 1961) (R.O.K.), http://likms.assembly.go.kr/law/jsp/LawJoHist.jsp?LAW_ID=A1530&PROM_NO=02708&PROM_DT=19741224&LAW_NM=근로기준법&JO_NO=第60條&JO_TITLE=産前後休暇&REV_DATE=1961·12·4 (stating that "An employer shall grant a pregnant female worker 60 days of paid maternity leave before and after childbirth. Women are prohibited from working during the first 30 days after childbirth.").

¹⁷ LSA, art. 72(1) (Act No. 6507, Aug. 14, 2001) (R.O.K.), http://likms.assembly.go.kr/law/jsp/LawThree.jsp?WORK_TYPE=LAW_THREE&LAW_ID=A1531&PROM_DT=19970313&PROM_NO=05309&LAW_KD=법률&Before=LAW_BON (stating that "the employer shall grant 90 days of maternity leave before and after childbirth. 45 days shall be allocated after the childbirth") [translated by Kook Hee Lee].

¹⁸ LSA, art. 60 (1) (Act No. 2708, Dec. 24, 1974) (R.O.K.), http://likms.assembly.go.kr/law/jsp/LawJoHist.jsp?LAW_ID=A1530&PROM_NO=02708&PROM_DT=19741224&LAW_NM=근로기준법&JO_NO=第60條&JO_TITLE=産前後休暇&REV_DATE=1961·12·4 (stating that "An employer shall grant a pregnant female worker 60 days of paid maternity leave before and after childbirth. In such case, 30 days shall be allocated after the childbirth.") [translated by Kook Hee Lee].

¹⁹ LSA, art. 72(1) sentence 1 (Act No. 6507, Aug. 14, 2001) (R.O.K.), http://likms.assembly.go.kr/law/jsp/LawThree.jsp?WORK_TYPE=LAW_THREE&LAW_ID=A1531&PROM_DT=19970313&PROM_NO=05309&LAW_KD=법률&Before=LAW_BON (stating that "the employer shall grant 90 days of maternity leave before and after childbirth.") [translated by Kook Hee Lee].

²⁰ *Id.* art. 72(1) sentence 2 (stating that "45 days shall be allocated after the childbirth").

B. The Lack of Financial Support for Parental Leave

The lack of financial support for parental leave limits men's right to childcare.²¹ South Korea provides one year of parental leave for each individual until the child reaches three years old.²² However, both parents cannot take leave at a time. Instead, they are allowed to take leave separately.²³ As a result, if parents take leave separately, an infant may spend time with their parents for two years until the child reaches three years old. Currently, the employment insurance provides a lump-sum amount of parental benefits which do not reflect actual lost income.²⁴ As a result, men who earn more than women on average avoid taking leave for childcare because they lose more than women for taking leave.²⁵

The first parental leave system in South Korea initially lacked financial support for individuals on leave. In 1987, the Equal Employment Opportunity Act (hereinafter EEOA) prescribed one year of parental leave for women without any financial support as opposed to full remuneration for maternity leave.²⁶ The parental leave system did not allow men to take advantage of the system. Instead, it allowed only women to be the beneficiaries of the newly introduced parental leave system which was separate from maternity leave for women's reproductive health. The difference between financial support during parental and maternity leave showed that South Korea considered women's role as caregivers as a natural role which did not need any compensation for lost income.

When the EEOA expanded parental leave to men in 1995, it still did not provide financial support for parental leave.²⁷ The EEOA prescribed that a man could take parental leave only if his spouse had to work.²⁸ It presumed that men were secondary

²¹ EIA, art. 95 (1) (R.O.K.) (stating that "The amount of the child-care leave benefits under Article 70 (2) of the Act shall be five hundred thousand won per month.").

²² EES, art. 19 (1) & (2) (R.O.K) (stating that "(1) An employer shall grant childcare leave, if a workers with a nursling or infant aged less than three years asks for leave to take care of the infant or toddler (hereinafter referred to as "childcare leave. (2) The duration of childcare leave shall be one year or less.").

²³ Enforcement Decree of the Act on Equal Employment Support for Work-Family Reconciliation, Mar. 17, 1999, last amended by Presidential Decree No. 20803, Jun. 5, 2008, art. 10 (stating that "Employers may, pursuant to the proviso of Article 19 (1) of the Act, deny the right to childcare leave in any of the following events: 1. If the worker has offered continuous services in the business concerned for less than a year prior to the "scheduled start date of leave"); or 2.If the worker's spouse is on childcare leave provided under other laws").

²⁴ Enforcement Decree of the EIA, art. 95(1) (R.O.K.) (stating that "The amount of the child-care leave benefits under Article 70(2) of the Act shall be five hundred thousand won per month.").

²⁵ In 2007, only 1.5% of the parental leave applicants were male workers. Hae Won Jung, Increase in Parental Leave Applicants, MEDICAL TODAY, Nov. 16, 2008,

²⁶ Namnyukoyongpyungdeungbub [Equal Employment Opportunity Act], art. 11(1) (Act No. 3989, Dec. 4, 1987 (R.O.K.),

http://likms.assembly.go.kr/law/jsp/Law.jsp?WORK_TYPE=LAW_BON&LAW_ID=A0114&PROM_NO=03989&PROM_DT=19871204 [hereinafter EEOA] (stating that "The employer should allow women to take parental leave until the child reaches 1 year old.") [translated by Kook Hee Lee].

²⁷ EEOA, art. 11(1) (Act No. 4976, Aug. 4, 1995) (R.O.K.),

http://likms.assembly.go.kr/law/jsp/LawThree.jsp?WORK_TYPE=LAW_THREE&LAW_ID=A0114&PROM_DT=20071221&PROM_NO=08781&LAW_KD=법률&Before=LAW_BON (stating that "The employer shall grant leave to women for childcare purposes and to their spouses when women should work until the child reaches 1 year old.") [translated by Kook Hee Lee].

²⁸ *Id.*

leave takers as opposed to women's primary status as caregivers. Apart from the lack of financial support, men were initially prohibited from taking leave instead of women unless women had to work. However, even when men were eligible for parental leave, they would not take leave because they did not receive any payment. To overcome the persistent sex role stereotyping, the financial incentives were crucial for men's participation in childcare. Therefore, the lack of financial support did not effectuate the expansion of parental leave to men.

In 2001, the EEOA eliminated the secondary status of men as caregivers and started to provide financial subsidies but it still lacked financial incentives for men to participate in childcare. The EEOA prescribed that employers were required to grant parental leave for up to one year to men or women in equal terms.²⁹ The employment insurance granted 200,000 won (USD 133) a month for each employee on parental leave.³⁰ When the insurance started to provide financial support for parental leave, men's average income was 1,969,000 won (USD 1312).³¹ Men received around one-tenth of their average income during parental leave. Women's average income reached only 1,245,000 (USD 830) which was 63.2% of what men earned.³² Therefore, men suffered more financial loss than women for taking parental leave.

Congress continuously increased parental benefits but it still lacked financial incentives for men to participate in childcare because it did not reflect actual lost income and did not reach full remuneration. Parental leave benefits increased from 200,000 won (USD 133) in 2001³³ to 400,000 won (USD 266) in 2005³⁴ and to 500,000 won (USD 333) in 2007.³⁵ Despite the continuous increase in the amount of parental leave benefits, it still did not reach full remuneration. As a result, men still had to suffer more financial loss than women. Therefore, men could not enjoy equal opportunities to participate in childcare with women.

The increase in the actual amount of parental benefits attracted even more women than men to engage in childcare because men still had to experience more financial loss

²⁹ EEOA, art. 19 (1) (Act No. 6508, Aug. 14, 2001) (R.O.K.), http://likms.assembly.go.kr/law/jsp/Law.jsp?WORK_TYPE=LAW_BON&LAW_ID=A0114&PROM_NO=06508&PROM_DT=20010814 (stating that "The employer shall grant leave to men and women for childcare purposes until the child reaches 1 year old.") [translated by Kook Hee Lee].

³⁰ Enforcement Decree of the EIA, art. 63.8(1) (Decree No. 17403, Oct. 31, 2001) (R.O.K.), http://likms.assembly.go.kr/law/jsp/LawThree.jsp?WORK_TYPE=LAW_THREE&LAW_ID=A1525&PROM_DT=20010814&PROM_NO=06509&LAW_KD=법률&Before=LAW_BON (stating that "Parental benefits shall be 200,000 won a month.") [translated by Kook Hee Lee].

³¹ Republic of Korea, The Sixth State Report to the Committee on the Elimination of All Forms of Discrimination against Women, CEDAW/C/KOR/6, Mar. 5, 2007, at 57 table11-8.

³² *Id.*

³³ Enforcement Decree of the EIA, art. 68.3(1) (Decree No. 17471, Dec. 31, 2001) (R.O.K.), http://likms.assembly.go.kr/law/jsp/LawThree.jsp?WORK_TYPE=LAW_THREE&LAW_ID=A1525&PROM_DT=19941222&PROM_NO=04826&LAW_KD=법률&Before=LAW_BON (stating that "the employment insurance provides 200,000 won a month for parental benefits") [translated by Kook Hee Lee].

³⁴ Enforcement Decree of the EIA, art. 68.3(1) (Decree No. 19246, Dec. 30, 2005) (R.O.K.), http://likms.assembly.go.kr/law/jsp/LawThree.jsp?WORK_TYPE=LAW_THREE&LAW_ID=A1525&PROM_DT=20010814&PROM_NO=06509&LAW_KD=법률&Before=LAW_BON (stating that "the employment insurance provides 400,000 won a month for parental benefits") [translated by Kook Hee Lee].

³⁵ Enforcement Decree of the EIA, art. 95 (1) (R.O.K.) (stating that "The amount of the child-care leave benefits under Article 70 (2) of the Act shall be five hundred thousand won per month.").

than women.³⁶ The original purpose of the increase was to attract more men to participate in the system. However, without full remuneration, men had no incentive to take leave instead of women.

South Korea does not realize gender equality in reconciling work and childcare because it provides maternity leave exclusive to women³⁷ and lacks financial support for parental leave.³⁸ Maternity leave limits women's right to work because it obligates employers to pay maternity benefits and prohibits women from working after childbirth. In addition, parental leave lacks financial incentives for men to participate in childcare because it does not guarantee full remuneration. Therefore, maternity leave exclusive to women and the lack of financial support during parental leave are two major obstacles for South Korea to realize gender equality in reconciling work and childcare.

III. A Comparative Study of the U.S. and the German Systems

This chapter proposes a gender neutral parental leave system with full remuneration as a legislative model for South Korea on the grounds of a comparative study of the U.S. and the German systems. The current system in South Korea guarantees maternity leave without corresponding paternity leave for men. Furthermore, it lacks financial support for parental leave. Therefore, this chapter proposes a gender neutral parental leave system with full remuneration as an ideal approach for gender equality in South Korea.

Section A discusses the U.S. system focusing on the gender neutrality and the lack of financial support. The U.S. system adopts a gender neutral parental leave system to ensure that employers provide leave and benefits for men and women in equal terms. However, it does not provide a uniform parental benefit system. Instead, individual States and employers provide partial wage replacement for childcare. Therefore, this section highly appreciates the gender neutrality of the U.S. system but criticizes the lack of financial support for childcare.

Section B traces the legislative history of the German system with emphasis on maternity leave exclusive to women and the financial support for parental leave. Maternity leave exclusive to women limits women's right to work because it prohibits women from working after childbirth. On the other hand, the lack of financial support for parental leave limits men's right to work because it does not reach full remuneration despite its reflection of actual lost income. Therefore, this section emphasizes the adverse impact of maternity leave exclusive to women on women's right to work and the importance of full remuneration for parental leave to guarantee men's right to childcare.

³⁶ In January 2006, when parental benefits were 400,000 won (USD 266) a month, 21 men and 969 women applied for the benefits, meaning 46 times more women than men applied for parental benefits. In January 2008, when parental benefits reached 500,000 won (USD 333) a month, 34 men and 2,567 women applied for parental benefits, meaning 86 times more women than men applied for the benefits. See KOREA EMPLOYMENT INFORMATION SERVICE, STATUS OF STATISTICS FOR THE EMPLOYMENT INSURANCE IN DECEMBER 2008 27 (2009) [translated by Kook Hee Lee].

³⁷ LSA, art. 74 (1) (stating that "An employer shall grant a pregnant female worker 90 days of maternity leave before and after childbirth.").

³⁸ Enforcement Decree of the EIA, art. 95 (1) (R.O.K.) (stating that "The amount of the child-care leave benefits under Article 70 (2) of the Act shall be five hundred thousand won per month.").

A. A Gender Neutral Parental Leave System in the United States

This chapter discusses the U.S. system which prescribes a gender neutral parental leave system without any distinction between maternity and paternity leave. The U.S. system adopts the gender neutral parental leave system on the grounds of the equal treatment approach in the feminist legal theory. The equal treatment approach purports to consider ability to work as a standard to decide the eligibility of women before or after childbirth to work. Therefore, this chapter focuses on the policy background of the gender neutral parental leave system and addresses the current status of the parental leave system in the U.S. system.

Section 1 discusses the pregnancy discrimination cases which motivated Congress to adopt a gender neutral approach towards women's reproductive health. Pregnancy discrimination cases shows that different treatment of pregnant workers from other similarly situated workers brings about the adverse impact on women's right to work. This section discusses cases before and after the enactment of the Pregnancy Discrimination Act of 1978 which prohibited different treatment of pregnant workers from other similarly situated workers.

Section 2 discusses the policy background and the current status of the gender neutral parental leave system. The first part of this section discusses a case which acknowledged that Congress adopted a gender neutral parental leave system to cease state-sponsored gender discrimination in granting parental leave. This part focuses on the history of gender discrimination when individual States were more generous on maternity leave provisions than paternity leave provisions. The second part of this section discusses the problem of the lack of financial support during parental leave. The U.S. system does not guarantee full remuneration for parental leave. Individual States grant partial wage replacement for childcare. However, the current status of the U.S. system lacks financial incentives to attract men to participate in childcare as actively as women. Therefore, this part emphasizes the importance of full remuneration to support the gender neutral parental leave system.

Finally, this chapter concludes that the gender neutral approach in the U.S. system should be highly appreciated but the lack of financial support should be avoided for the primary purpose of this paper. Because the lack of financial support weakens the antidiscriminatory effect of the gender neutral parental leave system, South Korea should provide full remuneration to support parental leave as an effective mechanism to realize gender equality in reconciling work and childcare.

1. Pregnancy Discrimination Act of 1978

This chapter discusses pregnancy discrimination cases before and after the enactment of the Pregnancy Discrimination Act of 1978 (hereinafter PDA). The PDA explicitly states that employers should not treat pregnant workers differently from other similarly situated workers. However, the PDA did not solve the problem of pregnancy discrimination because individual States and employers continued to treat pregnant workers differently from other workers.

The first section of this chapter discusses cases before the enactment of the PDA. The cases treated pregnancy differently from other physical conditions. In particular, the temporary disability insurance schemes excluded pregnancy-related disabilities from the coverage. The Supreme Court denied acknowledging these policies as in violation of Title VII which prohibits sex discrimination. Therefore, this section will emphasize the adverse impact of different treatment of pregnancy from other physical conditions before the enactment of the PDA.

The second section of this chapter discusses cases after the enactment of the PDA. Despite the explicit statutory languages prohibiting different treatment of pregnancy from other physical conditions, the Court continuously faced pregnancy discrimination cases which treated pregnancy differently from other physical conditions. Therefore, this section will emphasize the adverse impact of different treatment of pregnancy from other physical conditions even after the enactment of the PDA.

Finally, this chapter will conclude that the different treatment of pregnant workers from other similarly situated workers brought about the adverse impact on women's right to work. Because pregnancy discrimination continuous occurred due to the different treatment, Congress adopted the equal treatment approach when it amended Title VII by enacting the PDA. However, even after the enactment of the PDA, the problem of different treatment continued. Therefore, this chapter will emphasize that the different treatment of women's reproductive health limits women's right to work.

a. Cases before the Enactment of the PDA

In *Geduldig v. Aiello*, California's disability insurance system did not cover pregnancy-related disabilities.³⁹ California contended that the self-supporting nature of the insurance scheme did not allow the State to include pregnancy-related disabilities in the insurance coverage.⁴⁰ The California disability insurance system was solely on the basis of the contribution from the wage of employees.⁴¹ However, the dissenting opinion emphasized that the increase in the contribution rate from 1% to 1.364% would not threaten the self supporting nature of the insurance scheme.⁴²

The economic hardship to include pregnancy-related disabilities in the insurance scheme was a pretext for sex discrimination because the insurance covered disabilities from prostatectomies, circumcision, hemophilia, and gout, which were exclusive to men.⁴³ The dissenting opinion argued that California applied one set of rules to female and another to male.⁴⁴ Therefore, employers intentionally excluded pregnancy-related disabilities from the coverage.

³⁹ *Geduldig v. Aiello*, 417 U.S. 484, 484 (1974) (stating that "Appelles, four women otherwise qualified under the program who have suffered employment disability because of pregnancies, only one of which was normal, challenged the pregnancy exclusion.").

⁴⁰ *Id.* at 492 (stating that "It is clear that California intended to establish this benefit system as an insurance program that was to function essentially in accordance with the insurance concepts. Since the program was instituted in 1946, it has been totally self-supporting, never drawing on general state revenues to finance disability or hospital benefits.").

⁴¹ *Id.* (stating that "The Disability Fund is wholly supported by participating employees.").

⁴² *Id.* at 505 (stating that "For example, the entire cost increase estimated by defendant could be met by requiring workers to contribute an additional amount of approximately .364 percent of their salary and increasing the maximum annual contribution to about \$119.").

⁴³ *Id.* at 501.

⁴⁴ *Id.* (stating that "In effect, one set of rules is applied to females and another to males.").

Ultimately, the Court concluded that pregnancy discrimination could not constitute sex discrimination under Title VII⁴⁵ because pregnant women were female but nonpregnant persons were not exclusively women.⁴⁶ The Court stated that nonpregnant persons included both men and women.⁴⁷ Therefore, the Court ignored that pregnant workers who were excluded from the insurance scheme were exclusively female regardless of sex of the comparison group.

In *General Electric Company v. Gilbert*, the Court applied the same logic as the one used in *Geduldig*.⁴⁸ As in *Geduldig*, the employer contended that including pregnancy-related disabilities would threaten the insurance scheme. It reported that women would cost 170% of what men would cost in case the insurance covered pregnancy-related disabilities.⁴⁹ The Court upheld the insurance scheme and rejected including pregnancy-related disabilities on the grounds that pregnancy discrimination did not constitute sex discrimination.⁵⁰

However, the Court's holding was a pretext for sex discrimination as in *Geduldig* because the GE had a long history of sex discrimination in its policy. GE's disability program did not provide any benefit for women when it started the plan in 1926 because it assumed that women would quit working upon marriage.⁵¹ In the 1930's and 1940's, the company finally included women as equal beneficiaries with men.⁵² However, GE continued to pursue a policy of taking pregnancy and other factors into account in order to limit women's wages to two-thirds of the level of men's.⁵³ It even introduced the forced-maternity-leave policy without any procurement of payment during the time that women were not allowed to work.⁵⁴ It abandoned the forced-maternity-leave system

⁴⁵ *Id.* at 496 (stating that “we hold that this contention is not a valid one under the Equal Protection Clause of the Fourteenth Amendment”).

⁴⁶ *Id.* (stating that “While the first group is exclusively female, the second includes members of both sexes.”).

⁴⁷ *Id.* (stating that “The fiscal and actuarial benefits of the program thus accrue to members of both sexes.”).

⁴⁸ *General Electric Company v. Gilbert*, 429 U.S. 125, 135 (1976) (citing the rationale in *Geduldig v. Aiello*, 417 U.S. 484, 496 n.20 (1974), “The program divides potential recipients into two groups-pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes.”).

⁴⁹ *Id.* at 130 n.10 (stating that “At trial, General Electric introduced, in addition to the material cited in n. 9, supra, the testimony of Paul Jackson, an actuary, who calculated that the Plan presently “costs 170% more for females than males....”).

⁵⁰ *Id.* at 145-46 (stating that “We therefore agree with petitioner that its disability-benefits plan does not violate Title VII because of its failure to cover pregnancy-related disabilities.”).

⁵¹ *Id.* at 149 n.1 (stating that “As originally conceived in 1926, General Electric offered no benefit plan to its female employees because “women did not recognize the responsibilities of life, for they probably were hoping to get married soon and leave the company.””).

⁵² *Id.* (stating that “It was not until the 1930's and 1940's that the company made female employees eligible to participate in the disability program.”).

⁵³ *Id.* (stating that “In common with general business practice, however, General Electric continued to pursue a policy of taking pregnancy and other factors into account in order to scale women's wages at two-thirds the level of men's.”).

⁵⁴ *Id.* (stating that “More recent company policies reflect common stereotypes concerning the potentialities of pregnant women, and have coupled forced maternity leave with the nonpayment of disability payments.”).

before the case started.⁵⁵ Overall, the GE's defense on the grounds of the insurance policy was a pretext to discriminate against women.

b. Cases after the Enactment of the PDA

In 1978, Congress adopted the PDA to amend Title VII to define pregnancy discrimination as sex discrimination. The PDA explicitly states that discrimination "because of sex" includes discrimination because of or on the basis of pregnancy, childbirth, or related medical conditions.⁵⁶ The PDA adopts the equal treatment approach as opposed to the special treatment approach. It prescribes that "women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected."⁵⁷ The PDA mandates the employers to make a decision on the basis of "ability or inability to work."⁵⁸

In response to the implementation of the PDA, special treatment proponents criticized that the PDA did not consider women's unique reproductive health.⁵⁹ They presumed that equal treatment proponents did not consider the reality of the working mothers' difficulties in the labor market.⁶⁰ However, special treatment proponents expanded protective measures to women's caregiving work which was irrelevant to their physiological characteristics.⁶¹ They disregarded that men were co-caregivers for children.

Furthermore, special treatment proponents ignored the positive impact of an equal treatment approach on the overall status of workers regardless of sex. The equal treatment approach might raise the standard of working environments high enough to protect women's reproductive health. According to the equal treatment approach, when an employer accommodated special protection for women, the employer should provide equal accommodations for men. It would ultimately raise the standard of working environments for overall employees regardless of sex.

In response to the positive assessment of an equal treatment approach, special treatment proponents argued that the equal treatment approach neglected the possibility that employers would not provide working environments enough to protect women's health conditions.⁶² If employers did not guarantee substantial protection for employees' health and safety in the workplace regardless of sex, they would not provide measures enough to accommodate women's reproductive health.⁶³

⁵⁵ *Id.* (stating that "In February 1973, approximately coinciding with commencement of this suit, the company abandoned its forced-maternity leave policy by formal directive").

⁵⁶ 42 U.S.C. § 2000e (k).

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ Deborah J. Anthony, *The Hidden Harms of the Family and Medical Leave Act: Gender-Neutral Versus Gender-Equal*, 16 AM. U. J. GENDER SOC. POL'Y & L. 459, 467 (2008).

⁶⁰ *Id.* at 468.

⁶¹ Laura T. Kessler, *The Attachment Gap: Employment Discrimination Law, Women's Cultural Caregiving, and the Limits of Economic and Liberal Legal Theory*, 34 U. MICH. J. L. REF. 371, 371 (2001).

⁶² MARTHA CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY 49 (1999).

⁶³ Nina G. Golden, *Pregnancy and Maternity Leave: Taking Baby Steps towards Effective Policies*, 8 J. L. & FAM. STUD. 1, 3 (2006).

The Supreme Court took its position between the equal treatment approach and the special treatment approach in considering *California Federal Savings & Loan Association v. Guerra*.⁶⁴ The Court upheld a special treatment approach by upholding the California statute granting an exclusive right to leave and reinstatement for pregnant workers without corresponding rights for employees with other disabilities.⁶⁵ At the same time, the Court also maintained an equal treatment approach by acknowledging the possibility for the employers to extend the benefits to employees with other disabilities⁶⁶

However, without procuring equal rights for employees with other disabilities, the special right for pregnant workers would be an obstacle for women's right to work.⁶⁷ The employers had to bear extra costs to guarantee leave and the right to reinstatement exclusive to women. As men do not incur extra costs, employers would hire men instead of women to avoid the extra costs to procure special rights for women. If California had mandated the employers to provide equal benefits to employees with other disabilities, women would have had equal conditions in the labor market.

The Court failed to obligate California to amend the law to provide the equal benefits to employees with other disabilities.⁶⁸ Recognizing the possibility for the employers to provide the same benefits to other workers was not enough to remove the discriminatory impact of the special rights limited to pregnancy. Therefore, the Court should have mandated the employers to provide equal rights for workers with other disabilities.

The Supreme Court is still struggling with how to treat pregnant workers in *AT & T Corporation v. Hulteen*.⁶⁹ AT & T provided pregnancy leave as a separate system from other leave systems before the enactment of the PDA.⁷⁰ It did not calculate days of pregnancy leave exceeding thirty days as regular working days in considering eligibility for pension benefits.⁷¹ AT & T argued that the PDA did not apply to the pre-PDA

⁶⁴ *California Federal Savings & Loan Association v. Guerra*, 479 U.S. 272 (1987).

⁶⁵ California Government Code §12945 (2005) (prohibiting employers from denying a female employee disabled by pregnancy, childbirth, or related medical conditions leave for a reasonable period of time not to exceed four months); *Id.* § 12926 (defining employer as any person regularly employing five or more employees and defining employee as any individual who is not employed by a family member or under special license in a non-profit sheltered workshop or rehabilitation center).

⁶⁶ *California Federal Savings & Loan Association v. Guerra*, 479 U.S. 272, 291(1987) (stating that “[e]mployers are free to give comparable benefits to other disabled employees”).

⁶⁷ *Id.*

⁶⁸ *California Federal Sav. & Loan v. Guerra*, Brief of the National Organization for Women, NOW Legal Defense and Education Fund, National Bar Ass'n, Women Lawyers Division, Washington Area Chapter; National Women's Law Center; Women's Law Project; and Women's Legal Defense Fund in Support of Neither Party Amici Curiae 1986 WL 72368 (Apr. 04, 1986) (No. 85-494) (stating that the two statutes could be read as “imposing mutual and complementary obligations upon California employers to provide up to four months unpaid disability leave to all disabled employees.”).

⁶⁹ *AT & T Corporation v. Hulteen*, 498 F.3d 1001 (9th Cir. 2007), cert. granted, (No. 07-543).

⁷⁰ *Id.* at 1003 (stating that “Before August 7, 1977, AT & T and its predecessor companies classified pregnancy leave as personal leave.”).

⁷¹ *Id.* at 1003-04 (stating that “Employees on pregnancy leave who subsequently became temporarily disabled for reasons unrelated to pregnancy were eligible for NCS credit beyond the thirty-day personal leave credit. By contrast, employees on temporary disability leave who suffered a new disability were eligible for NCS credit for the entire leave.”).

leave.⁷² However, the Ninth Circuit concluded that the excluding the pre-PDA pregnancy leave from the seniority system violated the PDA.⁷³

The core of the problem was the different treatment of pregnancy from other medical conditions as in *Geduldig, Gilbert* and *Cal. Fed.* While AT & T did not consider days of pregnancy leave exceeding thirty days as regular working days to be eligible for pension benefits, it considered days of other medical leave as regular working days for pension benefits. AT & T treated pregnancy leave differently from medical leave because it considered pregnancy differently from other physiological conditions. If AT & T had considered pregnancy-related medical conditions in the same way as other medical conditions, it would have considered days of pregnancy leave exceeding thirty days as regular working days.

The adverse impact from different treatment of pregnancy-related disabilities from other disabilities leaves a question whether maternity leave exclusive to women was the only way to accommodate women's reproductive health. AT & T provided pregnancy leave to safeguard women's reproductive health. However, the exclusive system for women "excluded" women from pension benefits ultimately. Women could have taken medical leave for pregnancy-related disabilities as for other physical conditions instead of taking maternity leave. Therefore, pregnancy or maternity leave exclusive to women was not always required to protect women's reproductive health.

The Supreme Court upheld different treatment of pregnant workers and still faces the same issue in a pending case. However, as far as women's reproductive health conditions play a decisive role in employment decision, women will not be able to enjoy equal opportunities with men as competitive workforce in the paid labor market. Therefore, a gender neutral perspective towards women's reproductive health is required to guarantee women's equal right to work with men.

2. The Family and Medical Leave Act of 1993

The Family and Medical Leave Act of 1993 (hereinafter "FMLA") provides a uniform leave system for men and women on four grounds: for the birth and care of a newborn child, the placement of a child for adoption or foster care, to care for an immediate family member (spouse, child or parent) with a serious health condition, and for the employee's own health conditions.⁷⁴

⁷² *Id.* at 1007 (stating that "AT & T argued to our-three judge panel that *Landgraf* worked a "sea change" in retroactivity principles. Thus, AT & T continued, *Langraf* is intervening authority with which the decision in *Pallas* is "clearly irreconcilable," a retroactivity argument the panel majority embraced.").

⁷³ *Id.* at 1015 (stating that "The district court properly applied our decision in *Pallas* to conclude that AT & T's post-PDA benefits calculations violated the PDA.").

⁷⁴ 29 U.S.C. § 2602 (1) (stating that "an eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period for one or more of the following:

- (A) Because of the birth of a son or daughter of the employee and in order to care for such son or daughter.
- (B) Because of the placement of a son or daughter with the employee for adoption or foster care.
- (C) In order to care for the spouse, or a son, daughter, or parent, of the employee, if such spouse, son, daughter, or parent has a serious health condition.
- (D) Because of a serious health condition that makes the employee unable to perform the functions of the position of such employee.").

The first section discusses the policy background of the United States to adopt a gender neutral parental leave system. The FMLA does not distinguish leave for women from leave for men because it presumes that different treatment of men and women will bring about a discriminatory impact on women's status as workers and men's status as caregivers.

The second section discusses the problem of the lack of financial support during the time for childcare. The U.S. system does not provide any payment system in the federal level. Instead, individual States and employers provide wage replacement for maternity, paternity or parental leave. The reasons and amount of payment vary according to the different laws and regulations adopted by the states and employers.

Finally, this chapter concludes that the gender neutrality of the U.S. system is valuable as an antidiscrimination regime but the lack of financial support for parental leave in the U.S. system weakens the original legislative intent of the gender neutral parental leave system. Therefore, South Korea should refer to the positive and negative aspects of the current system in the United States for gender equality in reconciling work and childcare.

a. The Background of the Gender Neutral Parental Leave System

In *Nevada Department of Human Resources v. Hibbs*, a state employee sued an individual state on the grounds that the State violated the FMLA.⁷⁵ The employee took a family leave under the FMLA to take care of his spouse but the State fired him afterwards. The employee sued the State in federal court for monetary damages.⁷⁶ The State alleged that the Eleventh Amendment protected the State from the civil suit in federal court.⁷⁷

The Supreme Court acknowledged that Congress validly abrogated the State immunity under the FMLA on the basis of the Equal Protection Clause.⁷⁸ The Court explicitly stated that “[t]he FMLA aims to protect the right to be free from gender-based discrimination in the workplace.”⁷⁹ The Court emphasized that the State's gender-based

⁷⁵ *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721, 723 (2003).

⁷⁶ *Id.* at 725 (stating that “Petitioners include the Nevada Department of Human Resources (Department) and two of its officers. Respondent William Hibbs (hereinafter respondent) worked for the Department's Welfare Division. In April and May 1997, he sought leave under the FMLA to care for his ailing wife, who was recovering from a car accident and neck surgery. The Department granted his request for the full 12 weeks of FMLA leave and authorized him to use the leave intermittently as needed between May and December 1997. Respondent did so until August 5, 1997, after which he did not return to work. In October 1997, the Department informed respondent that he had exhausted his FMLA leave, that no further leave would be granted, and that he must report to work by November 12, 1997. Respondent failed to do so and was terminated.”).

⁷⁷ *Id.* (stating that “The District Court awarded petitioners summary judgment on the grounds that the FMLA claim was barred by the Eleventh Amendment and that respondent's Fourteenth Amendment rights had not been violated.”).

⁷⁸ *Id.* at 740 (stating that “For the above reasons, we conclude that § 2602 (1)(c) is congruent and proportional to its remedial object, and can “be understood as responsive to, or designed to prevent, unconstitutional behavior.”).

⁷⁹ 29 U.S.C. § 2601 (a) (5) (stating that “due to the nature of roles of men and women in our society, the primary responsibility for family care-taking often falls on women, and such responsibility affects the working lives of women more than it affects the working lives of men.”); 29 U.S.C. §§ 2601 (b)(4) & (5) (stating that “to accomplish the purposes ... in a manner that ... minimizes the potential for employment

classification should not rely on overbroad generalizations about the differences between men and women to invalidate Congress's abrogation.⁸⁰

The Supreme Court inquired whether Congress had evidence of a pattern of constitutional violations on the part of the States in gender-based discrimination in employment.⁸¹ The Court started with state laws prohibiting women from working as a lawyer or a bartender.⁸² The Court also acknowledged that state even limited women's working hours.⁸³

Then the Court focused on discriminatory practices in leave legislation for the birth or care for a child. The Court found that there was an increase in the number of employers providing maternity and paternity leave policies as time passed. However, the Court focused on the discrepancy between maternity and paternity leave. The Court stated that the increase of employers who provided maternity leave was larger than the increase of employers who provided paternity leave.⁸⁴

The Court also found that the situation in the public sector was not much different from private sector.⁸⁵ The Court focused on state employers' collective bargaining agreements with maternity leave of six months to one year without corresponding agreement for paternity leave.⁸⁶ Furthermore, state laws allowed women to use other unpaid leave for childcare but did not grant the same right for men.⁸⁷

The Supreme Court also emphasized that even where childcare leave policies for men existed, men received discriminatory treatment.⁸⁸ The Court particularly criticized maternity leave far exceeding four to eight weeks, a typical period for recuperation.⁸⁹

discrimination on the basis of sex by ensuring generally that leave is available ... on a gender-neutral basis[,] and to promote the goal of equal employment opportunity for women and men").

⁸⁰ Nevada Department of Human Resources v. Hibbs, 538 U.S. 721, 729 (2003).

⁸¹ *Id.* (stating that "We now inquire whether Congress had evidence of a pattern of constitutional violations on the part of the States in this area.").

⁸² Bradwell v. State, 16 Wall. 130, 21 L.Ed. 442 (1873) (upholding Illinois law prohibiting women from practicing law); Goesart v. Clearly, 335 U.S. 464 (1948) ((upholding Michigan law prohibiting women from tending bar).

⁸³ Muller v. Oregon, 208 U.S. 412 (1908) (upholding Oregon law limiting the hours that women could work for wages and observed that 19 States had such laws at the time).

⁸⁴ Prior to 1990, 33% guaranteed maternity leave whereas only 16% accorded paternity leave. In 1990, 37% guaranteed maternity leave while only 18% provided paternity leave. See S.Rep. no. 103-3, at 14-15 (1993).

⁸⁵ The Parental and Medical Leave Act of 1986: Joint Hearing before the Subcommittee on Labor-Management Relations and the Subcommittee on Labor Standards of the House Committee on Education and Labor, 99th Cong., 2d Sess., 33 (1986) (hereinafter "Joint Hearing") (statement of Maryl Frank, Director of the Yale Bush Center Infant Care Leave Project) (stating that "[t]he proportion and construction of leave policies available to public sector employees differs little from those offered private sector employees").

⁸⁶ *Id.* n.5 (citing The Parental and Medical Leave Act of 1987: Hearings before the Subcommittee on Children, Family, Drugs and Alcoholism of the Senate Committee on Labor and Human Resources, 100th Cong., 1st Sess., pt. 1, at 385 (1987) (hereinafter "1987 Senate Labor Hearings") (statement of Gerald McEntee, President of the American Federation of State, County and Municipal Employees, AFL-CIO)). (testifying that "the vast majority of our contracts, even though we look upon them with great pride, really cover essentially maternity leave, and not paternity leave").

⁸⁷ *Id.* (citing Family and Medical Leave Act of 1987: Joint Hearing before the House Committee on Post Office and Civil Service, 100th Cong., 1st Sess., 2-5 (1987) (statement of Rep. Gary Ackerman)).

⁸⁸ *Id.*

⁸⁹ *Id.* at 16 (stating that 6 weeks are an average period for normal recuperation).

Fifteen States provided women for up to one year of maternity leave and only four of them secured the same period of time for men.⁹⁰

The Supreme Court concluded that Congress had to adopt a uniform parental leave system to cease the state-sponsored gender discrimination in granting parental leave on the basis of sex role stereotyping.⁹¹ The Court noted that Congress was aware of a problem of the different treatment of men and women with respect to their role as caregivers.⁹² To cease gender discrimination on the state level, Congress finally adopted the uniform parental leave system to acknowledge that both genders were entitled to the equal treatment when they needed to take leave for childcare.

Even before the enactment of the FMLA, there were individual States providing a gender neutral parental leave system. The Work and Family Institute conducted a survey in four States which provided a uniform parental leave system prior to the enactment of the FMLA.⁹³ The study found that fathers' participation in childcare increased after the enactment of a uniform parental leave system.⁹⁴

In response to the advocates of a uniform parental leave system, special treatment proponents argue that women's reproductive health conditions are not reflected in the FMLA.⁹⁵ However, the FMLA allows employees to take twelve weeks of medical leave for the employees' own health conditions. When a woman has medical conditions for pregnancy or childbirth, she may request medical leave under the FMLA. When a woman wants to take leave for the birth or care for a child without any medical conditions, she may take family leave under the FMLA. Likewise, FMLA fully accommodates women's reproductive health conditions.

Special treatment proponents argue that medical leave of twelve weeks which does not distinguish women from men does not consider women's physiological conditions. However, the percentage of leave takers under the FMLA shows that among the leave takers for their own serious illness, 58% were men and 49% were women.⁹⁶ Even if pregnancy and childbirth were physical conditions limited to women, more men took leave for their own health conditions than women. Therefore, maternity leave was not always required to accommodate women's reproductive health conditions.

If the legislators perceive that twelve weeks are not enough to accommodate women's reproductive health, they can extend the total duration of medical leave available for men and women.⁹⁷ Extending the period limited to women discriminates against women because it overburdens employers to hire female workers. However, if

⁹⁰ Nevada Department of Human Resources v. Hibbs, 538 U.S. 721, 731 (2003) (citing M. LORD & M. KING, THE STATE REFERENCE GUIDE TO WORK-FAMILY PROGRAMS FOR STATE EMPLOYEES 30 (1991)).

⁹¹ *Id.* at 728 (2003).

⁹² *Id.* at 732 (citing H.R.Rep. No. 103-8, pt. 2, at 10-11 (1993)).

⁹³ Work and Family Institute conducted survey in Minnesota, Oregon, Rhode Island, and Wisconsin in 1988. JAMES T. BOND ET AL., BEYOND THE PARENTAL LEAVE DEBATE: THE IMPACT OF LAWS IN FOUR STATES (1991).

⁹⁴ *Id.* at 77.

⁹⁵ Deborah J. Anthony, The Hidden Harms of the Family and Medical Leave Act: Gender-Neutral versus Gender-Equal, 16 AM. U. J. GENDER SOC. POL'Y & L. 459, 475 (2008).

⁹⁶ AMERICAN ASSOCIATION OF UNIVERSITY WOMEN, THE FAMILY AND MEDICAL LEAVE ACT: FACTS AND STATISTICS (2009), <http://www.aauw.org/advocacy/laf/lafnetwork/library/FMLAstatistics.cfm#stats>.

⁹⁷ Jennifer Thomason, *Family and Medical Leave for the 21st Century?: A First Glance at California's Paid Family Leave Legislation*, 12 U. MIAMI BUS. L. REV. 77, 89-90 (2004) (stating that three months are not enough for childbirth and childcare).

legislators adopt the equal treatment approach and provide an equal duration for either gender, they will not create gender discrimination. Therefore, by extending the total duration of medical leave, women's reproductive health can be fully accommodated.

In addition, even if the equal treatment approach persists, maternity leave can exist without any discriminatory impact on women's status as workers if two conditions are fulfilled. First, the reason for exclusiveness of maternity leave should remain in medical reasons for pregnancy or childbirth. Second, the duration or conditions of leave should be equivalent to leave for other medical reasons applicable for men. The equal treatment approach purports to prevent the discriminatory impact on women's role as workers on the grounds of their caregivers. Therefore, the equal treatment approach does not harm women's reproductive health in the name of equality.

b. The Problem of the Lack of Financial Support

Despite the gender-neutrality of the FMLA as an antidiscrimination regime, the FMLA lacks financial support for an individual's right to take leave for childcare. A study on the basis of data from the Survey of Income and Program Participation examines the impact of payment on individual's leave taking patterns.⁹⁸ The study shows that without full remuneration, men are not in an equal footing with women as caregivers. The study focuses on the first few months following the birth of a child. It finds that on average fathers take only five days of leave after the birth of a child regardless of the enactment of the FMLA.⁹⁹ There was no change in fathers' leave taking patterns.¹⁰⁰ The study concludes that the absence of full remuneration discourages men from participating in childcare.¹⁰¹ The official surveys also confirm that the employees are reluctant to take leave under the FMLA because employees cannot afford the unpaid leave.¹⁰²

The absence of full remuneration will further exclude men from the opportunities to bond with their children in the long-term. A study found that the longer a father takes leave in the early stages of a child's development, the more the father engages in the child's development after the child reaches nine months old.¹⁰³ Without a procurement of payment during the early stage of a child's development, the long-term caregiving role will remain in the domain of mothers. Therefore, full remuneration should be accorded to guarantee equal right for men to engage in childcare.

⁹⁸ Wen-Jui Han & Jane Waldfogel, *Parental Leave: The Impact of Recent Legislation on Parents' Leave Taking*, DEMOCRAPHY: 40 (1), Feb. 2003, at 191, 191 (stating that "We use data from the Survey of Income and Program Participation to examine the impact of leave entitlements on unpaid leave usage by men and women after the birth of a child from 1991 to 1999.").

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² COMMISSION ON FAMILY AND MEDICAL LEAVE, U.S. DEP'T OF LABOR, A WORKABLE BALANCE: REPORT TO CONGRESS ON FAMILY AND MEDICAL LEAVE POLICES 144-46 (1996); WESTAT ON FOR U.S. DEP'T OF LABOR, BALANCING THE NEEDS OF FAMILIES AND EMPLOYERS: FAMILY AND MEDICAL LEAVE SURVEYS 2000 UPDATE (2000) (stating that "78% of those who need leave but do not take it, do not leave because they cannot afford it.").

¹⁰³ Lenna Nepomnyaschy & Jane Waldfogel, *Paternity Leave and Fathers' Involvement with Their Young Children: Evidence from the American Ecls-B*, COMMUNITY, WORK AND FAMILY: 10(4), Nov. 2007, at 427, 427.

In response to the problem of the unpaid nature of the FMLA, President Clinton adopted federal regulations to provide partial wage replacement from the Unemployment Insurance (hereinafter “UI”) Fund for the birth or adoption of a child.¹⁰⁴ At that time, the economy was healthy enough to allow the Clinton Administration to encourage the States to participate in the system.¹⁰⁵

Afterwards, the inherent defect and the external factors of the regulations did not allow the payment system to continue. First, the voluntary nature of the payment system did not fully implement the paid parental leave system.¹⁰⁶ The payment conferred full discretion for the individual States to decide whether to provide partial remuneration or not.¹⁰⁷ Therefore, the voluntary nature of the payment system weakened the uniformity of the parental leave system. The original legislative intent of the FMLA was to provide a uniform parental leave system in a gender neutral way. Therefore, the voluntary nature of the payment system was not in line with the original purpose of the FMLA. Second, external factors weakened the efficacy of the payment system. For example, Republican control of Congress and the Executive Branch, the growing deficiency at the federal and state levels, and increasing unemployment rate obstructed the continuation of the payment system.¹⁰⁸ Finally, the Bush Administration ceased the partial wage replacement system¹⁰⁹ upon the declining economy, and vetoed subsequent legislation for the paid parental leave system.¹¹⁰

When the Clinton Administration introduced a proposal for the payment system, there was an opposition to the proposal on the grounds that the UI and the FMLA served different legislative purposes.¹¹¹ The UI was to protect workers who lost their jobs,¹¹² while workers on FMLA leave were still in employment.¹¹³ Therefore, the opponents argue that the UI could not fund the payment during the leave under the FMLA.

However, the employer’s opposition was a pretext to hide their concerns for the costs to support the system, which were estimated to be \$68 billion.¹¹⁴ The Department of Labor also addressed its concerns about the inadequacy of State UI funds based on the

¹⁰⁴ Birth and Adoption Unemployment Compensation, 64 Fed. Reg. 67, 972-74 (Dec. 3, 1999) (to be codified at 20 C.F.R. pt. 604).

¹⁰⁵ Peter A. Susser, *The Employer Perspective on Paid Leave & The FMLA*, 15 WASH. U. J. L. & POL’Y 169, 181 (2004).

¹⁰⁶ Peter A. Susser, *The Employer Perspective on Paid Leave & the FMLA*, 15 WASH. U. J. L. & POL’Y 169, 184 (2004).

¹⁰⁷ Emily A. Hayes, Notes, *Bridging the Gap between Work and Family: Accomplishing the Goals of the Family and Medical Leave Act of 1993*, 42 WM. & MARY L. REV. 1507, 1534 (2001).

¹⁰⁸ Peter A. Susser, *The Employer Perspective on Paid Leave & the FMLA*, 15 WASH. U. J. L. & POL’Y 169, 186 (2004).

¹⁰⁹ Unemployment Compensation—Trust Fund Integrity Rule: Birth and Adoption Unemployment Compensation; Removal of Regulations, 68 Fed. Reg. 58, 540 (Oct., 2003) (codified at 20 C.F.R. pt. 604).

¹¹⁰ Federal Employees Paid Parental Leave Act of 2008, H.R. 5781, 110th Cong. (2008).

¹¹¹ Family and Medical Leave Act: Preset Impact and Possible Next Steps: Hearing Before the Subcomm. On Children & Family of the S. Comm. on Health, Educ., Labor, and Pensions, 106th Cong. 44 (1999) (testimony of Eric J. Oxfield, President, UWC-Strategic Services on Unemployment and Workers Compensation).

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ Peter A. Susser, *The Employer Perspective on Paid Leave & the FMLA*, 15 WASH. U. J. L. & POL’Y 169, 183 (2004).

experience during the recession.¹¹⁵ During the 1990-91 recession, more than half of the States used up their UI fund and had to borrow from the federal government.¹¹⁶ The hesitance to recognize the UI fund as a primary source of parental benefits shows the background of the opposition towards paid leave system in the federal level.

In response to the concerns for utilizing the UI fund to subsidize parental leave, there were supporters of the UI fund as a practical source.¹¹⁷ When Congress adopted the FMLA, the financial burdens for the federal government obstructed Congress from procuring payment in the statutory languages of the FMLA.¹¹⁸ Therefore, the UI system will not face oppositions on the grounds of federal expenditures to maintain the payment system for parental leave. In fact, paid parental leave legislation subsequently failed in Congress due to the extra expenditures that the federal government has to bear to support the system. In 2000, a bill introduced paid parental leave for federal employees but failed in the Committee.¹¹⁹ In 2003, a bill introduced grants for an individual State or a local government with payment for individuals on parental leave but failed again in the Committee.¹²⁰ The failure repeatedly continued afterwards.¹²¹ The extra expenditures eventually brought about a bipartisan struggle in Congress passing the bill for paid parental leave for federal employees. When the 2008 bill for federal employees passed in the House, 99% of Democrats supported the bill but 75% of Republicans were opposed to

¹¹⁵ Unemployment Compensation and the Family Medical Leave Act: Hearing before the Subcomm. On Human Res. of the House Comm. on Ways & Means, 106th Cong. 11 (2000) (testimony of Sen. Judd Gregg, Chairman, Senate Subcommittee on Children and Families).

¹¹⁶ *Id.*

¹¹⁷ Emily A. Hayes, Notes, *Bridging the Gap between Work and Family: Accomplishing the Goals of the Family and Medical Leave Act of 1993*, 42 WM. & MARY L. REV. 1507, 1534 (2001).

¹¹⁸ RONALD D. ELVING, CONFLICT AND COMPROMISE: HOW CONGRESS MAKES THE LAW 42 (1995).

¹¹⁹ H.R. 4567, 106th Cong. (2000) (proposing 6 weeks of paid leave for the birth, adoption or fostering of a child).

¹²⁰ In 2003, several laws related to the FMLA were introduced to amend the FMLA. The first relevant law was the Family and Medical Leave Expansion Act which had a subsection in the name of "Family Income to Respond to Significant Transitions Insurance Act." The Act mandates the Secretary of Labor to make grants to a State or local government to pay for Federal share of the cost of carrying out projects that assist families by providing wage replacement for individuals taking off from work under the FMLA for at least 6 weeks in a year. Prior to the proposal in 2003, the wage replacement was limited to federal employees and the birth or the placement of a child. The bill in 2003 expanded the wage replacement for the private sector and other reasons under the FMLA. Furthermore, the Family and Medical Leave Fairness Act of 2003 tried to extend coverage to employees at worksites where the employer employs at least 25 employees at the worksite and within 75 miles of that worksite whereas the original text of the FMLA stated that the employers should employ at least 50 employees to be regulated by the FMLA. The expansion of the coverage was in response to the criticism which was continued since the introduction of the FMLA. The Federal Employees Paid Parental Leave Act of 2003 permitted the Office of Personnel Management to contract with one or more employing agencies to conduct a demonstration project that provides paid leave for eligible individuals who are responding to caregiving needs resulting from the birth or adoption of a son or daughter or other family caregiving needs. The payment was supposed to be continued at least 6 weeks during a 12-month period. The coverage was expanded from the birth or the placement of a child to care for family members. However, all these proposals were referred to the Committee but failed to be reported as other previous bills. Separately from the comprehensive amendments for the FMLA, the Federal Employees Paid Parental Leave Act of 2003 was once again introduced in the same form as the bill in 2000 and 2002. It failed again in the Committee as other previous bills. See H.R. 2363, 108th Cong. (2003).

¹²¹ To keep track of subsequent legislation, see <http://www.govtrack.us/congress/bill.xpd?bill=h110-5781>.

it.¹²² The bill finally failed in the Senate. In 2009, Committees in the House and the Senate are reviewing the similar bills once again.¹²³

In contrast to the failure in the federal level, individual States provide various ways to guarantee partial payment during parental leave. Firstly, “At-Home Infant Care” programs allow low-income parents to receive a child-care subsidy to take care of their new child at home.¹²⁴ However, the At-Home policy does not provide any subsidy for families with higher-income even if they suffer financial difficulties during parental leave. The At-Home Infant policy is more likely a social welfare policy to support families in the poverty line rather than an antidiscrimination policy to guarantee equal right to parental leave for men and women. Another policy is to use the temporary disability insurance system. For decades, California, Hawaii, New Jersey, New York, Rhode Island, and Puerto Rico provided partial income replacement for workers temporarily disabled for non-work-related reasons such as pregnancy and childbirth.¹²⁵ Two of those States, California and New Jersey, expanded their temporary disability leave programs to cover leave for employees with family members with serious health conditions or to bond with a new child.¹²⁶ Nevertheless, California requires an individual to be the only available caregiver to be eligible for the payment.¹²⁷ California focuses on the welfare of a child rather than a parent’s right to spend time with a child. Furthermore, the Californian system does not guarantee full remuneration, providing partial wage replacement.¹²⁸ Men will not take leave instead of women without full compensation due to the gender wage gap. In particular, because only one parent can receive partial payment during parental leave, parents tried to decide who should take the payment. Because the payment does not guarantee full remuneration, a man will hesitate to take leave instead of a woman. Therefore, the Californian system is not enough to guarantee gender equality.

In response to the partial remuneration system, an academic suggests a payment system exceeding full remuneration.¹²⁹ The system is called the “compensatory system” because payment on top of full remuneration is presumed to be compensation for the caregiving work that an employee takes instead of paid work in the labor market. The compensatory system considers that the partial- or full- wage replacement system merely allows possibility for men to take part in childcare but does not guarantee practicality of the opportunities to participate in childcare.¹³⁰ The compensatory system offers more

¹²² To see the passing rate, refer to <http://www.govtrack.us/congress/bill.xpd?bill=h106-4567&tab=related>.

¹²³ S. 354, 111st Cong; H.R. 626, 111st Cong.

¹²⁴ National Partnership for Women & Families, *Work and Family Working Together: Policy Options for Advocates and Legislators 2* (2009).

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ California Unemployment Insurance Code § 3303.1(a)(4) (stating that “An individual is not eligible for family temporary disability insurance benefits with respect to any day that any of the following apply: (4) Another family member, as defined in Section 3302, is ready, willing, and able and available for the same period of time in a day that the individual is providing the required care.”).

¹²⁸ Nina G. Golden, *Pregnancy and Maternity Leave: Taking Baby Steps towards Effective Policies*, 8 J. L. & FAM. STUD. 1, 14-15 (2006) (supporting California model as an ideal model in the federal level).

¹²⁹ Ariel Meysam Ayanna, *Aggressive Parental Leave Incentivizing: A Statutory Proposal Towards Gender Equalization in the Workplace*, 9 U.P.A. J. LAB. & EMP. L. 293, 293 (2007).

¹³⁰ *Id.* (stating that “To eliminate the gender imbalance, we must make paternal leave taking not merely a suitable or attractive option, but rather an undeniable one.”).

financial incentives for men to engage in childcare than other financial models.¹³¹ It considers that financial incentives are the most effective mechanism to overcome the prolonged history of sex role stereotyping in the labor market.¹³²

However, the compensatory system is too ambiguous to apply because there is no absolute standard to assess the appropriate amount on top of full remuneration. The compensatory system considers payment on top of remuneration as payment for the caregiving work that an individual takes instead of paid job in the labor market. A parent's caregiving work cannot be considered as if it were the caregiving work of a staff in a childcare center. Therefore, the compensatory system lacks its practicality.

Furthermore, it is not easy to secure financial resources for the compensatory system. Traditionally, individual States supported the partial wage replacement system with their unemployment insurance scheme. However, because of the limited funds in the unemployment insurance balance, an independent insurance system is required to fund the compensatory system. Considering the continuous failures in passing the full wage replacement system in Congress, the compensatory system will not be a realistic way to secure gender equality in the parental leave system.

In response to various ways to secure payment during parental leave, Jane Waldfogel suggests 'early childhood benefits' as a way to supplement income loss during parental leave.¹³³ The early childhood benefits are practically the same as the parental benefits system in South Korea. The benefits are flat-rated without any consideration for actual lost income. She refers to the early childhood benefits as a 'third' way in relation to two other options: the employer's subsidy and the public fund system.¹³⁴ She opposes to the employer's subsidy because it creates a discriminatory impact on female workers who are dominant leave takers under the FMLA.¹³⁵ She is also afraid of the public fund system because it is too costly to subsidize all the individual households.¹³⁶

Nevertheless, the "third" way is not a desirable approach to solve the problem of unpaid nature of the FMLA because a father will not be willing to lose the difference between his original salary and the lump-sum amount of benefits far less than his income. The "third" way is not different from the partial wage replacement system because both of them do not reach full remuneration. In addition, as it does not reflect actual lost income, it is more detrimental to men's right to childcare than the partial wage replacement system.

The United States adopted the gender neutral parental leave to guarantee equal opportunities for men and women to enjoy time with their children. The FMLA allows

¹³¹ *Id.* at 294 (stating that "Such a proactive approach to legislation represents a realization that in order to achieve actual gender equalization in leave-taking or elsewhere in the workplace, we must actively seek to change gender norms, instead of simply seeking to change the ratios, biases, and protocols that exist within them.").

¹³² *Id.* (stating that "We must create powerful incentives that overcome trenchant gender norms that strongly encourage a traditional work/family gender split; this may be accomplished by appealing not to men's consciences or family values, but rather to their pockets.").

¹³³ Jane Waldfogel, *Family-Friendly Policies for Families with Young Children*, 5 EMPLOYEE RTS. & EMP. POL'Y J. 273, 294 (2001).

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

individuals to take leave for childbirth or childcare regardless of gender. Before the enactment of the FMLA, individual States differentiated maternity leave from paternity leave and were more generous when providing maternity leave than paternity leave. To cease the state-sponsored gender discrimination, Congress finally adopted the gender neutral parental leave system as an antidiscriminatory regime to reconcile work and childcare.

However, the current U.S. system lacks financial support for time with children because it does not provide full remuneration during parental leave in the federal level. The FMLA guarantees the gender neutral parental leave system in the federal level so that individual States can observe gender equality as the core of the parental leave system in the state level. In contrast, the U.S. system does not provide a uniform parental benefit system in the federal level. As a result, individual States and employers provide partial wage replacement to compensate for the time with children. It does not reach full remuneration. Therefore, the lack of financial support in the U.S. system should not be a model for South Korea to follow.

B. Paid Parental Leave with Maternity Leave Exclusive to Women in Germany

Germany fails to realize gender equality in reconciling work and childcare because it maintains maternity leave exclusive to women. Maternity leave prohibits women from working for eight weeks after childbirth with full remuneration.¹³⁷ As women's reproductive health can be accommodated by individual assessment of health conditions, a uniform maternity leave system forbidding women from working after childbirth limits women's right to work particularly when they are able to work.

The German system provides financial support for parental leave which reflects actual lost income. In the U.S. system, men have difficulties in participating in the parental leave system despite its gender neutrality because of the unpaid nature. In contrast, the German parental benefits system reflects actual lost income to guarantee men's right to childcare in practice. However, it still lacks financial support for men's right to childcare because it does not guarantee full remuneration. Therefore, despite the financial support reflecting actual lost income, the German system still lacks financial support for gender equality.

As a point of comparison to the U.S. system, this Chapter traces the history of German legislation to reconcile work and childcare. The legislative history is divided into three phases. The first phase, discussed in Part 1 of this chapter, spans approximately 60 years from the first modern maternity leave legislation passed in 1878 to the division of the German nation following World War II.¹³⁸ From 1878 onwards, Germany continuously expanded the benefits afforded to pregnant women and new mothers. Women were seen as the exclusive child caregivers, so men were completely excluded from legislation to reconcile work and childcare. The parental leave and

¹³⁷ Mutterschutzgesetz [MuSchG] [Maternity Protection Act], June 20, 2000, BGBl. I at 2318, §6(2), *translated in* Stefan Lingemann, Robert von Steinau-Steinruck & Anja Mengel, *Employment Law in Germany* 426-43 (2008) (stating that “[m]others shall not be employed until eight weeks, and in the case of premature or multiple births, twelve weeks, after delivery”).

¹³⁸ Gustav Adolf Bulla & Herbert Muchner, *Mutterschutzgesetz* 66-67 (1976), *cited by* Mona L. Schuchmann, Note, *The Family and Medical Leave Act of 1993: A Comparative Analysis with Germany*, 20 J. CORP. L. 331, 335 (1995) (stating that “[t]he Maternity Leave Act first became law in 1878”).

benefits system for men to qualify for such benefits would not come to Germany for decades.

Part 2 of this chapter deals with the second phase of the legislative history in Germany: legislation in the German Democratic Republic. After World War II, Germany was divided into the German Democratic Republic to the east (hereinafter “GDR”) and the Federal Republic of Germany (hereinafter “FRG”). In the GDR, maternity leave and benefits continued as they had before the national division. Throughout its existence and despite communist rhetoric proclaiming sexuality equality, the GDR never recognized men’s right to childcare benefits. It maintained the traditional discriminatory policies until Germany was reunified.

Finally, Part 3 deals with the third phase of the legislative history: legislation in the FRG before the unification and legislation after the unification. There was no need to make separate chapters for the FRG before and after unification because the unification did not affect legislation in the FRG. Laws and regulations in the FRG before unification continued to be the laws and regulations in the FRG after unification. The Unification Treaty stated that legislation in the FRG would rule the territory of the former GDR.¹³⁹ As a result, maternity and parental leave legislation in the FRG before the reunification continued to be the legislation in the reunified Germany.

Gender discrimination in employment was common problems in the GDR and the FRG. Both regimes could not solve the problem and the problem continued even after unification. While the GDR did not promulgate any legislation for men to engage in childcare, the FRG introduced new legislation for either parent to take part in childcare. However, leave and benefits system for either parent does not realize gender equality in reconciliation of work and childcare because it still maintained maternity leave exclusive to women. Furthermore, because of the gender wage gap, fathers would not take advantage of the system unless full remuneration should be guaranteed during the time that fathers could not work for childcare. The financial support reflecting actual lost income should be appreciated but full remuneration is required for gender equality.

1. Maternity Leave and Benefits System until World War II in Germany

Germany introduced its first Maternity Leave Act in 1878 to guarantee 3 weeks of postnatal period for female workers.¹⁴⁰ The influx of female workers in the labor market after the Industrial Revolution brought about the concerns for the health of women and children.¹⁴¹ The original legislative intent was obviously that pregnant women should not

¹³⁹ Germany, The Second and Third State Report to the Committee on the Elimination of All Forms of Discrimination Against Women, Nov. 4, 1996, CEDAW/C/DEU /2-3 at 64 (stating that “The Unification Treaty thus stipulates that the Federal Laws of the Federal Republic of Germany are also to apply in the former German Democratic Republic for virtually all provisions related to women and the family as of 1 January 1991.”).

¹⁴⁰ Gustav Adolf Bulla & Herbert Muchner, *Mutterschutzgesetz 66-67 (1976)*, cited by Mona L. Schuchmann, Note, *The Family and Medical Leave Act of 1993: A Comparative Analysis with Germany*, 20 J. CORP. L. 331, 335 (1995) (stating that “[t]he Maternity Leave Act first became law in 1878”).

¹⁴¹ *Id.* at 67 (stating that “The Maternity Leave Act first became law in 1878 as a response to the growing number of women working outside the home during the Industrial Revolution”).

be overburdened during pregnancy.¹⁴² To protect the health conditions of women and children, legislators increased the duration of the leave and the amount of the benefit afterwards.¹⁴³

Although Germany introduced its maternity leave system prior to the establishment of the International Labour Organization (hereinafter ILO), the ILO influenced the subsequent maternity leave policy in Germany. The ILO introduced the Maternity Protection Convention in 1919.¹⁴⁴ It mandated that the States Parties to provide a right to take leave for the last six weeks prior to childbirth upon the medical certificate that she was expecting to give birth in six weeks.¹⁴⁵ The requirement of the medical certificate shows that the Maternity Protection Convention purported to protect women's reproductive health. In addition, States Parties were obliged to prohibit women from working for the first six weeks after giving birth.¹⁴⁶ While the right to take leave during the prenatal period was an entitlement which could be chosen by an individual, the postnatal period was a compulsory leave requiring all new mothers to stay home and not work.

The Maternity Protection Convention guaranteed an individual's right to request the full compensation for the health care expenses of mother and child.¹⁴⁷ The provision affirmed that the purpose of maternity leave was to protect women and children's health. However, the Maternity Protection Convention did not foresee its adverse impact. Because it did not compensate for the loss of income during the time that women could not work, the Maternity Protection Convention deepened gender inequality, perpetuating women's role as caregivers rather than workers.

Upon ratification of the ILO Maternity Protection Convention in 1927, Germany introduced an "Act Respecting Employment Before and After Childbirth."¹⁴⁸ The Act devoted a whole section to articulating a leave system available for women before and

¹⁴² *Id.* (stating that "To best ensure a normal pregnancy and birth of a healthy baby, doctors believed that pregnant women should not be overburdened during pregnancy.").

¹⁴³ *Id.* (stating that "Generally, amendments to the Maternity Leave Act, increasing the amount of leave and pay, were considered to be desirable improvements based upon progress made in the German social system and newly acquired medical knowledge.").

¹⁴⁴ The Maternity Protection Convention 1919 (No. 3).

¹⁴⁵ *Id.* art. 3 (b) (stating that "In any public or private industrial or commercial undertaking, or in any branch thereof, other than an undertaking in which only members of the same family are employed, a woman shall have the right to leave her work if she produces a medical certificate stating that her confinement will probably take place within six weeks.").

¹⁴⁶ *Id.* art. 3 (a) (stating that "In any public or private industrial or commercial undertaking, or in any branch thereof, other than an undertaking in which only members of the same family are employed, a woman shall not be permitted to work during the six weeks following her confinement.").

¹⁴⁷ *Id.* art. 3 (c) (stating that "In any public or private industrial or commercial undertaking, or in any branch thereof, other than an undertaking in which only members of the same family are employed, a woman shall, while she is absent from her work in pursuance of paragraphs (a) and (b), be paid benefits sufficient for the full and healthy maintenance of herself and her child, provided either out of public funds or by means of a system of insurance, the exact amount of which shall be determined by the competent authority in each country, and as an additional benefit shall be entitled to free attendance by a doctor or certified midwife; no mistake of the medical adviser in estimating the date of confinement shall preclude a woman from receiving these benefits from the date of the medical certificate up to the date on which the confinement actually takes place.").

¹⁴⁸ Gesetz über die Beschäftigung vor und nach der Niederkunft [Act Respecting Employment Before and After Childbirth], Jul. 16, 1927, RGBI. I 1927 Nr. 31, S. 184 (G.D.R.), *translated in* INTERNATIONAL LABOUR OFFICE, LEGISLATIVE SERIES 1927, 829-31 (1927).

after childbirth.¹⁴⁹ Section 2(1) allowed a pregnant woman to take leave during the last six weeks prior to confinement upon the medical certificate of pregnancy.¹⁵⁰ The prenatal period was an entitlement for women to decide whether to take leave or not, identical to the prescription by the Maternity Protection Convention of 1919.¹⁵¹

The problem of the German system in 1927 was its ban on work performance after childbirth. In contrast to the voluntary nature of the prenatal period, the postnatal period was compulsory. Specifically, section 2 (2) provided that a woman should not be employed during the first six weeks after childbirth, in which¹⁵² she was not allowed to work until she could provide a certificate proving that six weeks had elapsed after childbirth. The prohibition on working during the first six weeks stemmed from the Maternity Protection Convention which mandated that States Parties ban work performance during the first six weeks after childbirth¹⁵³ While it was medically proven that recuperation required six weeks on average to regain an ability to work,¹⁵⁴ the problem with the ban on work performance during the first six weeks after childbirth was its generalization of a period necessary for recuperation. Even if the normal recuperation required six weeks according to statements from experts, it was the “average” period. Some women might need less than six weeks and some women would need more. The more desirable way to accommodate the reproductive health conditions of women would have been to assess the health conditions on the basis of individual physical differences among women.

In response to the criticism against the compulsory postnatal leave, its mandatory nature of the postnatal period might be upheld on the grounds it was the most realistic protection of women and children’s health. If the law did not prohibit women from working during a certain period of time after childbirth, employers would abuse women’s status as workers by forcing them to return to work regardless of their health conditions.

¹⁴⁹ *Id.* § 2.

¹⁵⁰ *Id.* § 2(1) (stating that “A pregnant woman shall be entitled to refuse to perform the work incumbent upon her under her contract of employment if she produces a medical certificate stating that her confinement will probably occur within six weeks.”).

¹⁵¹ Maternity Protection Convention 1919 (No. 3) art. 3 (a) & (b) (stating that “[i]n any public or private industrial or commercial undertaking, or in any branch thereof, other than an undertaking in which only members of the same family are employed, a woman—(a) shall not be permitted to work during the six weeks following her confinement; (b) shall have the right to leave her work if she produces a medical certificate stating that her confinement will probably take place within six weeks”).

¹⁵² Gesetz über die Beschäftigung vor und nach der Niederkunft [Act Respecting Employment Before and After Childbirth], Jul. 16, 1927, RGBI. I 1927 Nr. 31, S. 184, § 2 (2), *translated in* INTERNATIONAL LABOUR OFFICE, LEGISLATIVE SERIES 1927, 829-31 (1927) (stating that “A lying-in woman shall not be employed during the six weeks following her confinement: she shall not be permitted to work unless she produces proof that at least six weeks have elapsed since her confinement. During a further period of six weeks she shall be entitled to refuse to perform the work incumbent upon her under her contract of employment if she produces a medical certificate stating that she is prevented from working by an illness which is a result of her pregnancy or confinement or which has been materially aggravated by these causes.”).

¹⁵³ Maternity Protection Convention, 1919 (No. 3), art. 3 (a) (stating that “[i]n any public or private industrial or commercial undertaking, or in any branch thereof, other than an undertaking in which only members of the same family are employed, a woman shall not be permitted to work during the six weeks following her confinement”).

¹⁵⁴ AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, COMMITTEE ON PROFESSIONAL STANDARDS, STANDARDS FOR OBSTETRIC-GYNECOLOGIC SERVICES 21-22 (1989).

However, if individualized assessment had been secured by law, the employers would not be able to force women to participate in the workplace. Because such an alternative was available in Germany, the prohibition of working during the first six weeks after childbirth was not a desirable way to accommodate physiological differences between men and women.

In addition to the prenatal and postnatal period, the Act Respecting Employment Before and After Childbirth of 1927 in Germany paid special attention to the medical conditions related to pregnancy and childbirth. For example, Germany allowed women to take leave for an additional six weeks if she produced a medical certificate attesting an illness related to her pregnancy or childbirth.¹⁵⁵ Women with pregnancy or childbirth related illnesses could rest for twelve weeks in total after the birth of a child.

In 1942, Germany extended the postnatal period for nursing mothers. Section 3(1) stated that the period should be extended to eight weeks for a nursing mother and to twelve weeks for a nursing mother after a premature delivery.¹⁵⁶ The extended period for nursing mothers could be presumed to be a period for women's reproductive health. However, because nursing encompasses the caregiving work at the same time, men were entitled to the same period of time to bond with their newborn child. Therefore, by extending the period for nursing mothers, Germany no longer adhered to the original legislative intent to protect reproductive health conditions for women.

Germany also strengthened its maternity leave system with benefits to secure financial stability for women who could not work because of pregnancy or childbirth. While mothers with normal delivery were entitled to maternity benefit for six weeks after childbirth,¹⁵⁷ nursing mothers were entitled to the pecuniary maternity benefit for eight weeks.¹⁵⁸ In addition, nursing mothers after a premature delivery were entitled to the benefits for twelve weeks.¹⁵⁹

The benefit during the time that women could not work appreciated women's status as workers but simultaneously depreciated women's right to work. On one hand, the financial support during the leave for pregnancy and confinement recognized women's status as workers by compensating the whole amount of money they would lose

¹⁵⁵ Gesetz über die Beschäftigung vor und nach der Niederkunft [Act respecting employment before and after childbirth], Jul. 16, 1927, RGBl. I 1927 Nr. 31, S. 184, § 2 (2) (F.R.G.), *translated in* INTERNATIONAL LABOUR OFFICE, LEGISLATIVE SERIES 1927-Ger. 8 (1942) (stating that "During a further period of six weeks she shall be entitled to refuse to perform the work incumbent upon her under her contract of employment if she produces a medical certificate stating that she is prevented from working by an illness which is a result of her pregnancy or confinement or which has been materially aggravated by these causes.").

¹⁵⁶ Mutterschutzgesetz [MuSchG] [Maternity Protection Act], May 18, 1942, RGBl. I 1942 No. 53 at 321, § 3 (1) (F.R.G.), *translated in* INTERNATIONAL LABOUR OFFICE, LEGISLATIVE SERIES 1942-Ger. 1 (1942). (stating that "A lying-in woman shall not be employed during the six weeks following her confinement. This period shall be extended to eight weeks for a nursing mother and to twelve weeks for a nursing mother after a premature confinement.").

¹⁵⁷ *Id.* § 7 (1) sentence 1 (stating that "Women who are insured under the statutory sickness insurance system shall be entitled, during the last six weeks before and the first six weeks after confinement, to pecuniary maternity benefit equal to the average earnings for the last preceding thirteen weeks, but not in any case less than two Reichsmark a day.").

¹⁵⁸ *Id.* § 7 (1) sentence 2 (stating that "nursing mothers shall be entitled to pecuniary maternity benefit for eight weeks after confinement (after a premature confinement for twelve weeks)").

¹⁵⁹ *Id.* § 7 (1) sentence 2 (stating that "nursing mothers shall be entitled to pecuniary maternity benefit for eight weeks after confinement (after a premature confinement for twelve weeks)").

because they could not work. On the other hand, the financial support limited the German women's opportunities for work. Because women did not lose any income during the time that they were prohibited from working, the ban on work performance could be legitimized in the name of women's health conditions. By justifying the limitation on women's opportunities for work, the financial support adversely affected women's status as workers in Germany.

The financial support during the protected period particularly limited uninsured women's right to work because employers had to pay for them.¹⁶⁰ Employers had to bear extra costs for uninsured women. If benefits were available for either men or women, the adverse impact did not only affect women but also men. However, the benefits were limited to women. Therefore, employers did not have difficulties in hiring men but faced financial obstacles to hire women.

The other problem of the financial support during the protected period was with nursing mothers. By acknowledging additional benefits for nursing mothers, Germany presumed that women were the only caregivers for newborn children.¹⁶¹ The financial source of the payment for nursing mothers also created a problem because all the payments were made by the statutory sickness insurance scheme, which was fundamentally irrelevant to nursing itself. Nursing did not exactly match with the original purpose of the statutory sickness insurance system. Nursing is not a sickness. By expanding the system to irrelevant grounds, the Maternity Protection Act of 1942 made it clear that women should be in charge of childcare instead of men.

In response to the criticism towards the approach taken by Germany, there could be a strong argument for the extra financial resources available for nursing mothers because Germany demonstrated a high appreciation for childcare. Childcare was typically undervalued in comparison to paid employments.¹⁶² The legislators presumed that the financial support for nursing mothers would benefit women because the extra financial resources might encourage working mothers to breastfeed their newborn children.

However, the extra financial resources available for nursing mothers excluded men from the opportunities to the same benefits as women as caregivers. If the legislators had intended to benefit individuals who took care of children, it could have provided equal benefits for men as well as women. By limiting the extra benefits for women only, Germany failed to recognize men's right to childcare.

2. Maternity Leave and Benefits in the German Democratic Republic

Germany's adherence to the traditional sex role stereotyping did not end after the division of the country into the GDR and the FRG. In 1950, the GDR introduced the

¹⁶⁰ *Id.* § 7 (1) sentence 3 (stating that "Women who are not insured under the statutory sickness insurance system shall be entitled to continued payment of their ordinary wage during the protected periods.").

¹⁶¹ *Id.* § 7(2) (stating that "Nursing mothers who are insured under the statutory sickness insurance system shall be entitled to nursing benefit amounting to 0.50 Reichsmark a day, so long as they nurse their children, until the expiry of the twenty-sixth week after the confinement.").

¹⁶² Laura T. Kessler, *The Attachment Gap: Employment Discrimination Law, Women's Cultural Caregiving, and the Limits of Economic and Liberal Legal Theory*, 34 U. MICH. J.L. REF 371, 460 (2001).

“Act Respecting the Protection of Women and Children and Women’s Rights.”¹⁶³ The title of the act demonstrates that the GDR considered the relationship between mothers and children differently from the relationship between fathers and children. There was no other legislation for the relationship between fathers and children.

The background of different treatment of men and women was not the physiological differences between men and women. Article 1 articulated that the purpose of the Act was to support large families and encourage a high birthrate.¹⁶⁴ The Act was far from gender equality in reconciling work and childcare. It emphasized women’s reproductive role in a family.

One of the measures to emphasize women’s reproductive role was to provide financial support for mothers with three or more children when they gave birth to each child.¹⁶⁵ It did not provide any financial support for the birth of the first and second child. Instead, mothers with the fourth child received the additional allowances of 20 DM and 25 DM for every further child until the child completed his fourteenth year.¹⁶⁶ By guaranteeing additional cash benefits for women with four or more children for such a long period of time, Germany reaffirmed its policy goal to encourage women to have a large number of children.

The benefits limited to women confer childcare responsibilities on women. The legislators may have corresponded that families needed the financial support to raise children, especially large families. Nevertheless, because the legislators also could have provided the same benefits for men as well as women, the arguments from the legislators would not justify the benefits limited to women.

Along with the financial support for mothers with children, every employed woman was entitled to maternity leave for five weeks before and six weeks after confinement.¹⁶⁷ In the case of abnormal or multiple births, the leave after confinement was extended to eight weeks.¹⁶⁸ Because the provision differentiated the period for normal, abnormal or multiple births, it explicitly expressed that the period was to protect health conditions of mothers and children.

In addition to the period for health conditions, the GDR provided a leave system for women to take care of their children in subsequent provisions. The managers were required to allow women to take their annual leave immediately after maternity leave if

¹⁶³ Act Respecting the Protection of Women and Children and Women’s Rights, Sep. 27, 1950, GBl, Oct. 1, 1950, No. 111 at 1037 (G.D.R.), *translated in* INTERNATIONAL LABOUR OFFICE, LEGISLATIVE SERIES AS1950- Ger.D.R. 4 (1950).

¹⁶⁴ *Id.* § 1 (stating that “[i]n order to improve the material situation of large families and to promote a higher birthrate, State assistance shall be granted”).

¹⁶⁵ *Id.* § 2(1) (stating that “All mother of large families shall receive-on the birth of the third child a grant of 100 DM; on the birth of the fourth child a grant of 250 DM; on the birth of every further child a grant of 500 DM.”).

¹⁶⁶ *Id.* § 2 (2) (stating that “All mothers of more than three (2) children shall receive a monthly allowance from the State as follows: for the fourth child, 20 DM; for every further child, 25 DM. These allowances shall be payable until the child has completed his fourteenth year.”).

¹⁶⁷ *Id.* § 10 (1) (stating that “every woman in employment shall have maternity leave for five weeks before and six weeks after confinement”).

¹⁶⁸ *Id.* (stating that “In the case of abnormal or multiple birth the leave after confinement shall be extended to eight weeks”).

they request for it.¹⁶⁹ It did not specify grounds to request for the additional leave after the postnatal period.

One problem with the annual leave after maternity leave was the reinforcement of sex role stereotyping. In contrast to women, men could not request their annual leave after women's postnatal period. In response to the criticism against these generous provisions for women, the legislators might have argued that women would breastfeed their newborn children in many cases. However, without any specifications of certain circumstances for the grant of annual leave after confinement, the counterargument from the legislators could not justify the limited availability of the annual leave for women.

Furthermore, the annual leave in the GDR was more discriminatory than the two weeks of additional leave for nursing mothers in Germany in 1942 because whether a mother was actually nursing did not matter to the legislators. Even if women did not breastfeed newborn children, they were still entitled to take their annual leave immediately after the postnatal period. The availability of the annual leave further entrenched women's role as childcare givers.

The other problem with the annual leave available after the first six weeks after childbirth was the deprivation of women's annual leave which could be used for purposes other than childcare. Women could choose whether to take the additional leave or not. However, because the additional leave was not separate from the annual leave for purposes other than nursing, women were not treated in equal terms with men.

Despite the discriminatory provision for women's status as workers, the GDR secured women's income during the time that they could not work as Germany originally did even before it was divided into the two different entities. The social insurance covered the monthly average income for women during maternity leave.¹⁷⁰ The amount should be calculated on the basis of the average income during the last three months before the leave.¹⁷¹ As a result, the maternity benefits reflected actual lost income and reached full remuneration.

One common characteristic between the maternity benefits in Germany prior to the separation and in the GDR after separation was the financial sources of the payment. The social insurance scheme was responsible for the payment during the time when women could not work. Because Germany has traditionally been one with a robust welfare program, it was not hesitant to provide financial support for the welfare of the citizens.¹⁷² The German social security system began when the first social security legislation was passed as early as 1883, and it includes old age, survivors and disability

¹⁶⁹ *Id.* § 10 (2) (stating that “The managers of all establishments and institutions shall be bound to allow annual leave to be taken immediately after maternity leave if the woman concerned so requests.”).

¹⁷⁰ Act Respecting the Protection of Women and Children and Women's Rights, GBl. I Oct. 1, 1950, No. 111 at 1037, § 10(3) (G.D.R.), *translated in* INTERNATIONAL LABOUR OFFICE, LEGISLATIVE SERIES 1950-GER. D.R. 4 (1952) (stating that “The maternity allowances shall be paid by social insurance at the rate of the average monthly income.”).

¹⁷¹ *Id.* (stating that “The amount shall be calculated on the basis of the average income during the last three months before the leave.”).

¹⁷² Anni Pelletier, Comment, *The Family Medical Leave of 1993-Why Does Parental Leave in the United States Fall So Far Behind Europe?*, 42 GONZ. L. REV. 547, 571 (2006-07).

income statutes.¹⁷³ The tradition of material support for welfare of citizens did not change even after the GDR adopted socialism and communism as the national ideology.

In addition to the compensation for the loss of income, the financial support for women with additional children reaffirmed that the GDR presumed that women were more of primary caregivers than workers in the labor market.¹⁷⁴ The additional grant limited to women differentiated the relationship between mothers and children from the relationship between fathers and children. If the GDR had perceived men as equivalent caregivers to women, it would have provided the equal benefits for men with additional children.

Ironically, the GDR was concerned about the interruption of women's role as workers which might occur because of women's role as caregivers. The GDR emphasized that marriage should not interrupt women's employment status.¹⁷⁵ The concerns for the adverse impact of emphasis on women's role as caregivers proved that the legislators already knew that their pronatalistic attitude might bring about an adverse impact on women's status as workers. However, their consideration for the adverse impact was superficial because they did not provide any specific measures to realize this policy goal. It rather emphasized women's role as caregivers in particular with leave and childcare benefits.

In 1961, the GDR introduced a new leave system in its Labor Code allowing women to request leave without pay at the end of the postnatal leave until the child reached one year old.¹⁷⁶ In the Act introduced in 1950, the GDR required managers to allow women to take their annual leave right after maternity leave.¹⁷⁷ The 1961 law that provided special leave for women could be the replacement of the additional annual leave available for women after the expiry of maternity leave as stipulated by the law in 1950. As the additional annual leave in 1950 could force women to take charge of childcare, the extension in 1961 had a similar impact on women's status as workers. Neither of them provided equivalent leave system for men to take care of their children.

One year was long enough to be referred to as child-raising leave limited to women. The FRG introduced a child-raising leave system applicable to either men or

¹⁷³ Carol Daughy Rasnic, *The United States' 1993 Family and Medical Leave Act: How Does It Compare with Work Leave Laws in European Countries?*, 10 CONN. J. INT'L L. 105, 105 (1994).

¹⁷⁴ Act Respecting the Protection of Women and Children and Women's Rights, Sep. 27, 1950, GBl. I Oct. 1, 1950, No. 111 at 1037, § 10(4) (G.D.R.), translated in INTERNATIONAL LABOUR OFFICE, LEGISLATIVE SERIES 1950-Ger. D.R. 4 (1952) (stating that "Every insured mother shall receive from social insurance on the birth of each child a layette grant of 50 DM.").

¹⁷⁵ Gesetz über die Beschäftigung vor und nach der Niederkunft [Act Respecting Employment Before and After Childbirth], Jul. 16, 1927, RGBl. I Nr. 31, S. 184, § 15 (F.R.G.), translated in INTERNATIONAL LABOUR OFFICE, LEGISLATIVE SERIES 1927, 829-31 (1927) (stating that "Marriage must not prevent any woman from practicing an occupation or undergoing vocational training or completing her social and political education, even if husband and wife are temporarily separated as a result thereof.").

¹⁷⁶ Arbeitsgesetzbuch [Labour Code], Apr. 17, 1961, GBl. I Apr. 17, 1961 No. 5 at 27, § 131 (4) (G.D.R.) (stating that "If she so requests, a mother may be granted time off without pay on the expiry of her confinement leave and until her child is 1 year old. She shall not cease to belong to the staff of the establishment on that account.").

¹⁷⁷ Act Respecting the Protection of Women and Children and Women's Rights, Sep. 27, 1950, GBl. I Oct. 1, 1950 No. 111 at 1037, § 10(2) (G.D.R.) (stating that "[t]he managers of all establishments and institutions shall be bound to allow annual leave to be taken immediately after maternity leave if the woman concerned so request.").

women when it ratified the CEDAW.¹⁷⁸ When the FRG introduced the system applicable to men and women in equal terms, parents were entitled to only 10 months of leave and benefits.¹⁷⁹ The GDR provided a longer period for women to raise newborn children than the FRG did for either parent. Therefore, the GDR explicitly acknowledged that women were the only gender responsible for childcare.

In 1977, the GDR revised its Labor Code and introduced new provisions for women's reproductive health. The positive aspect of the revision was emphasis on women's reproductive health conditions. For example, the Labor Code extended the postnatal period from six weeks to twenty weeks.¹⁸⁰ Because normal recuperation required only six weeks scientifically,¹⁸¹ twenty weeks of postnatal leave showed serious concerns about women's reproductive health. In the event of a complicated medical delivery or the birth of more than one child, two additional weeks were available.¹⁸² In addition, the revision took account of the loss of leave in case of the premature delivery and the lack of leave in case of the late delivery.¹⁸³ If delivery would come early, she was entitled to the extended postnatal period. If delivery would come late, she should gain more time for prenatal period. In any event, a woman would not lose the total period of maternity leave and rather gained the extra period of maternity leave. With respect to this detailed consideration for the health of women, the revised Labor Code of the GDR in 1977 should be highly appreciated.

However, on the other hand, the concerns for women's reproductive health could be interpreted as negative signs for women's role as workers. The revision of the Labor Code of the GDR in 1977 was not enough to secure gender equality in reconciliation of work and childcare. Because there was no leave available for men to take care of a child, a flexible and generous period of maternity leave would work as a child-raising period instead of a period for women's reproductive health. Therefore, the GDR lacked consideration for gender equality in reconciling work and childcare.

As with the previous law, the GDR ensured that women could get the full remuneration during the period that they could not participate in the workplace.¹⁸⁴ The

¹⁷⁸ Germany, The Second and Third State Report to the Committee on the Elimination of All Forms of Discrimination Against Women, Nov. 4, 1996, CEDAW/C/DEU/2-3 at 38 (stating that "The Act on granting child-raising benefit and child-raising leave has been in effect since 1986 and has been changed several times since then.").

¹⁷⁹ *Id.* (stating that "[t]he period of child-raising benefit payments has been extended several times, being awarded for a maximum of months for births up to 31 December 1987").

¹⁸⁰ Arbeitsgesetzbuch [Labour Code], June 16, 1977 GBl. I at 85, §244 (2) (G.D.R.), *translated in* INTERNATIONAL LABOUR OFFICE, 1/78 LEGISLATIVE SERIES 82-83 (1978) (stating that "A woman shall be granted pregnancy leave for the six weeks preceding her confinement and maternity leave for the 20 weeks following her confinement.").

¹⁸¹ AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, COMMITTEE ON PROFESSIONAL STANDARDS, STANDARDS FOR OBSTETRIC-GYNECOLOGIC SERVICES 21-22 (1989).

¹⁸² Arbeitsgesetzbuch der Deutschen Demokratischen Republik [Labour Code of the German Democratic Republic], June 16, 1977 GBl. I at 85, §244 (2), *translated in* INTERNATIONAL LABOUR OFFICE, 1/78 LEGISLATIVE SERIES 82-83 (1978) (stating that "The maternity leave shall be increased to 22 weeks in the event of a complicated delivery or the birth of more than one child.").

¹⁸³ *Id.* §244 (2) (stating that "In the event of a premature delivery a woman's maternity leave shall be extended by the period of pregnancy leave not taken. In the event of a late delivery her pregnancy leave shall be extended up to the date of her confinement.").

¹⁸⁴ *Id.* §244 (4) (stating that "For such time as a woman is on pregnancy and maternity leave the social insurance scheme shall pay her pregnancy and maternity benefit at the rate of her net average earnings.").

payment could be interpreted in two opposite ways. One would be that the full remuneration helped women to recuperate without financial difficulties during the time that women could not work. The other would be the reassurance of the traditional family model that women should stay at home for childcare. Financial support during the time that women could not work might justify the limitation on women's opportunities to work.

Furthermore, the Labor Code of the GDR in 1977 continued to exclude men from childcare opportunities. As the law in 1950 allowed women to take advantage of their annual leave after the postnatal period,¹⁸⁵ the Labor Code in 1977 allowed women to take their vacation leave before the pregnancy leave and after the maternity leave.¹⁸⁶ Before the revision, the annual leave was available only after maternity leave. After the revision, the vacation leave was available before the prenatal period or after the postnatal period. However, because the GDR did not accord the same rights for men, it discriminated against men with respect to their role as caregivers. Furthermore, The Labor Code in 1977 continued to maintain traditional conceptions of childcare by preserving a provision to grant a special period for women until the child reached one year old.¹⁸⁷ The continuation of the special provision for women showed that the GDR still did not perceive men as equal caregivers with women.

The exclusion of men from childcare opportunities could be found once again in a special leave for women for three years in certain circumstances. In addition to the special period of one year, the GDR allowed women to take leave until the child reached three years old in case childcare facilities would not be available for their children.¹⁸⁸ The GDR mostly accommodated children in public day care facilities.¹⁸⁹ As a result, there was only a slight chance for a mother to take advantage of the three-year special leave provision. Even if there was only a slight chance for women to apply for the three-year special period, the GDR should have recognized men's right to participate in childcare. Because men were also able to take care of their children, there was no legitimate reason to exclude them from the same opportunities to which women were entitled.

¹⁸⁵ Act Respecting the Protection of Women and Children and Women's Rights, Oct. 1, 1950, GBl. I 1950 at 1037 § 10 (2) (G.D.R.), *translated in* INTERNATIONAL LABOUR OFFICE, LEGISLATIVE SERIES 1950-Ger.D.R. 4 (1950) (stating that "[t]he managers of all establishments and institutions shall be bound to allow annual leave to be taken immediately after maternity leave if the woman concerned so requests").

¹⁸⁶ Arbeitsgesetzbuch [Labor Code], Jun. 16, 1977 GBl. I at 85, §245 (1) (G.D.R.), *translated in* INTERNATIONAL LABOUR OFFICE, LEGISLATIVE SERIES 1977-Ger. D. R. 1 (stating that "If a woman so requests, she shall be granted her annual vacation leave either before her pregnancy leave or immediately after her maternity leave.").

¹⁸⁷ *Id.* § 246(1) (stating that "If a mother so requests, she shall be released from work after her maternity leave until her child's first birthday.").

¹⁸⁸ *Id.* §246 (2) (stating that "Where it is not possible to grant a mother's request for a place in a crèche, she shall be entitled to apply for her release from work beyond her child's first birthday and until a place in a crèche becomes available, but not beyond her child's third birthday.").

¹⁸⁹ German Democratic Republic, The Initial State Report to the Committee on the Elimination of All Forms of Discrimination against Women, CEDAW/C/5/Add.1, Nov. 12, 1982, at 8 (stating that "The establishment of public facilities which afford, where parents wish so, free care and education for their children up to 6 years of age and of pupils of grades 1 to 4 (aged 6 to 10 years) during parents' daily work hours has created an essential prerequisite for the combination of vocational or professional careers and motherhood.").

On the other hand, the GDR at least considered that men would be in charge of childcare instead of women in limited circumstances. It acknowledged that any other worker assuming responsibility for childcare in substitution for the mother should be entitled to the special leave system for one year or three years.¹⁹⁰ If men had taken charge of childcare instead of their spouses, they were entitled to take special leave available for women. However, this particular provision still did not recognize men's equal opportunities to participate in childcare because it acknowledged workers other than mothers were entitled to the same leave and benefit in "substitution" of mothers. The provision manifested that fathers were secondary caregivers to children in comparison with mothers' role as primary caregivers. It even considered that fathers were as secondary as others who were not parents of children. Therefore, the provision was insufficient to guarantee gender equality in reconciling work and childcare.

The GDR reaffirmed the secondary status of fathers as caregivers by prescribing a lone-father's clause in particular.¹⁹¹ The lone-father clause allowed lone fathers to enjoy the same rights as mothers if mothers were not available. The lone-father clause suggested that the legislative intent behind laws creating special rights for women were focused more on the welfare of children than the rights of women. If the women-only provisions were for women's rights, they should not be available for men. Instead, the GDR adopted the lone-father clause to ensure that at least one parent would be available for the welfare of children. Therefore, the original legislative intent of the special rights for women to protect their reproductive health loses its legitimacy to limit those rights to women only.

These special rights limited to women forces women to be charge of childcare regardless of their active participation in the labor market. In the GDR, 91.9 % of all women of working age were gainfully employed, studying, or in training.¹⁹² Women accounted for 49 % of the entire labor force.¹⁹³ To avoid harming children's welfare, the GDR tried to secure that at least one parent should be available for a child at home. When it had to provide a legal regime to regulate the leave system for parents, it did not consider men and women as equal caregivers. It rather chose only women as traditionally recognized through the sex role stereotyping.

In 1978, the GDR continued to provide special rights for mothers with children in its new ordinance called "Vacation Leave Ordinance."¹⁹⁴ The basic leave entitlement

¹⁹⁰ Arbeitsgesetzbuch [Labour Code], Jun. 16, 1977 GBl. I at 85, §245 (2) (G.D.R.), *translated in* INTERNATIONAL LABOUR OFFICE, LEGISLATIVE SERIES 1977-Ger. D. R. 1 (stating that "A mother who exercises her right to be released from work in accordance with subsection (1) of section 246 after she has taken her maternity leave shall be granted her full annual leave entitlement in respect of the calendar year in which she begins to be released.").

¹⁹¹ *Id.* § 251 (stating that "The provisions as to the hours of work and vacation leave of working mothers who are employed full time shall also apply to lone fathers who are employed full time, if necessary for the welfare of the child or children. A decision shall be taken by the manager, with the consent of the appropriate trade union committee in the undertaking.").

¹⁹² Concluding Observations upon the Second Periodic Report of the German Democratic Republic (CEDAW/C/13/Add.3 and Amend. 1 and Corr. 1) at its 144th meeting on 28 February 1989 (CEDAW/C/SR.144) CEDAW A/44/38 (1989), para. 316.

¹⁹³ *Id.*

¹⁹⁴ Vacation Leave Ordinance, Oct. 3, 1978, GBl. I 1978 at 365 (G.D.R.), *translated in* INTERNATIONAL LABOUR OFFICE, LEGISLATIVE SERIES 1978-Ger. D. R. 1.

was 18 working days¹⁹⁵ but mothers with children got 20, 21 or 23 additional working days. Mothers employed full time on a multiple shift system and having two children up to 16 years of age as members of their households received 20 additional working days.¹⁹⁶ Mothers employed full time and having three or more children up to 16 years of age as members of their households or severely handicapped child were entitled to 21 additional working days.¹⁹⁷ Lastly, mothers entitled to 21 additional working days but on a multiple shift system received 23 additional working days.¹⁹⁸

In this specific ordinance granting special rights for mothers, the GDR adhered to the traditional family model as did in previous legislation. The extended vacation leave could have been applied to either men or women with children because women's reproductive health was irrelevant. However, the GDR limited the availability of the extended period to women only. Thus, the extended period failed to recognize gender equality in reconciling work and childcare.

In 1988, the GDR once again revised the Labor Code right before the German reunification and strengthened its adherence to the traditional family model by providing a right to post-birth leave of up to 19 months for mothers with full remuneration.¹⁹⁹ Fathers or other relatives (often grandmothers) were entitled to the same leave and benefits if the mother died or was unfit for childcare²⁰⁰ as the previous law guaranteed the same entitlement for others who were for childcare instead of mothers.²⁰¹

The argument supporting this gender specific approach is that these provisions effectively secured economic independence of mothers, whether single or not, and reconciled motherhood and employment as much as possible.²⁰² The positive assessment on the provisions for women was on the basis of two features of the provisions.²⁰³ One

¹⁹⁵ *Id.* § 3 (1) (stating that “The basic leave entitlement shall be 18 working days.”).

¹⁹⁶ *Id.* § 3 (2) (c) (stating that “mothers employed full time on a multiple shift system and having two children up to 16 years of age as members of their households---20 working days”).

¹⁹⁷ *Id.* § 3 (2) (d) (stating that “mothers employed full time and having three or more children up to 16 years of age as members of their households or a severely handicapped child qualifying for class III or IV attendance allowances, special attendance allowances or class IV, V or VI blind person's allowances or a blind or virtually blind child who is 3 years of age or over...21 working days”).

¹⁹⁸ *Id.* § 3 (2) (e) (stating that “mothers covered by clause (d) who are employed full time on a multiple shift system...23 working days”).

¹⁹⁹ Dagmar Schiek, *From Parental Leave to Parental Time: German Labour Law and EU Law*, 31 *INDUS. L. J.* 361, 362 (2002) (stating that “In Eastern Germany, prior to re-unification, mothers had a right to post-birth leave of up to 19 months (§ 248 *Arbeitsgesetzbuch* [Employment Act] *AGB*), during which they could claim the net equivalent of their former pay from the relevant social security body.”).

²⁰⁰ *Id.* (stating that “Fathers or other relatives (often grandmothers) could claim the paid leave if the mother died or was unfit to care for the child.”).

²⁰¹ *Arbeitsgesetzbuch* [Labour Code], Jun. 16, 1977 *GBI. I* at 85, §246 (3) (G.D.R.), *translated in* INTERNATIONAL LABOUR OFFICE, LEGISLATIVE SERIES 1977-Ger. D. R. 1 (stating that “Any other assuming responsibility for a child's upbringing and care in substitution for the mother shall be entitled to apply for a release from work in terms of subsections (1) and (2).”).

²⁰² Dagmar Schiek, *From Parental Leave to Parental Time: German Labour Law and EU Law*, 31 *INDUS. L. J.* 361, 362 (2002) (stating that “While these provisions did not further intra-family gender equality, they effectively provided for economic independence of mothers, whether single or not, and thus rendered motherhood and employment fully reconcilable.”).

²⁰³ *Id.* (stating that “The ideological model of independence for mothers rested on two pillars.”).

was the full payment during the leave for upbringing children, and the other was the availability of full-time childcare facilities when women decided to return to work.²⁰⁴

However, the GDR still ignored the adverse impact of maternity leave and benefits exclusive to women. By providing special rights and benefits for women, they could maintain financial independence during the time to raise their children in the GDR. However, the same policy goal could have been achieved by allowing men to take advantage of the system in equal circumstances. Excluding men from the leave and benefits was the error that the GDR made throughout its legislative history.

3. Maternity and Parental Leave in the Federal Republic of Germany

After the separation of the GDR and the FRG, the FRG extended leave for medical conditions related to pregnancy or childbirth in 1952.²⁰⁵ It maintained the postnatal periods of six weeks for normal recuperation, eight weeks for nursing mothers and twelve weeks for nursing mothers with premature delivery.²⁰⁶ In addition, it provided unlimited additional leave for any woman who received medical certification that she was unfit to work.²⁰⁷

The extended period showed the concerns for women's reproductive health. Before the separation of the GDR and the FRG, the Act Respecting Employment Before and After Childbirth guaranteed six weeks of additional leave for medical complications related to pregnancy or childbirth.²⁰⁸ By contrast, the Maternity Protection Act of 1952 did not specify how long women could be away from work, thereby demonstrating an increased consideration for women's reproductive health. In addition, as it required the medical certificate, the Act's provision for unlimited time would not be used as childcare leave which might force women to be in charge of childcare.

In 1965, the FRG extended the postnatal period to eight weeks, which were limited to nursing mothers in the Maternity Protection Act of 1952.²⁰⁹ The period could be extended to twelve weeks in the case of premature or multiple births.²¹⁰ The FRG still

²⁰⁴ *Id.* (stating that "The first was a fully paid period of educational leave: the second was the availability of full-time professional care for their children upon their guaranteed return to work.").

²⁰⁵ Mutterschutzgesetz [Maternity Protection Act], Jan. 24, 1952, BGBl. I No. 5 at 69 (F.R.G.), *translated in* INTERNATIONAL LABOUR OFFICE, LEGISLATIVE SERIES 1952-Ger.F.R. 2.

²⁰⁶ *Id.* § 6 (1) (stating that "No woman shall be employed during the six weeks following confinement. This period shall be extended to eight weeks in the case of nursing mothers whose child was born prematurely.").

²⁰⁷ *Id.* (stating that "Even after the expiry of the said periods the woman shall not be employed for such time as she is certified by a medical practitioner as being unfit for work.").

²⁰⁸ Gesetz über die Beschäftigung vor und nach der Niederkunft [Act Respecting Employment Before and After Childbirth], Jul. 16, 1927, RGBL. I 1927 Nr. 31, S. 184, § 2 (2)(F.R.G.), *translated in* INTERNATIONAL LABOUR OFFICE, LEGISLATIVE SERIES 1927, 829-31 (1927) (stating that "During a further period of six weeks she shall be entitled to refuse to perform the work incumbent upon her under her contract of employment if she produces a medical certificate stating that she is prevented from working by an illness which is a result of her pregnancy or confinement or which has been materially aggravated by these causes.").

²⁰⁹ Mutterschutzgesetz [MuSchG][Maternity Protection Act], Nov. 9, 1965, BGBl. I No. 67 at 1821, § 6 (1) (F.R.G.), *translated in* INTERNATIONAL LABOUR OFFICE, LEGISLATIVE SERIES 1965-Ger.F.R. 2 (stating that "No woman shall be employed until eight weeks after her confinement.").

²¹⁰ *Id.* (stating that "This period shall be extended to 12 weeks in the case of premature and multiple births.").

preserved its original intent to protect women's reproductive health because it provided different periods for different health conditions.

However, the extension expanded women's role as caregivers in some sense. Because the previous Maternity Protection Act provided eight weeks for nursing mothers,²¹¹ the extension of the postnatal period from six weeks to eight weeks could be interpreted as a way to recognizing in every woman a responsibility for childcare as a nursing mother.

In response to criticism against the extension of the compulsory postnatal period, the extension could be upheld on the grounds of its concerns for women's health conditions. Although six weeks were necessary for normal recuperation according to the study of the experts, a generous provision for women's health conditions would benefit women's situation after childbirth. If medical complications were to arise, then women would need more than six weeks after childbirth. As a result, there would be an argument that six weeks could not be enough time to physically recover from childbirth. Nevertheless, the physical protection of women's health conditions could be solved by the individual assessment of each woman's condition. Because there is an alternative way to achieve the same policy goal of protecting women's reproductive health, the generalization of women's conditions loses its legitimacy.

The financial support during the protected period continued even after the extension of the postnatal period in 1965. The statutory health insurance scheme covered the benefits during the protected period.²¹² The financial support during the time that women were physically unable to return to work could be legitimately covered by the health insurance system but the period exceeding the time for recuperation was not covered by the health insurance system. Because the eight weeks of postnatal leave could not be uniformly considered as medical leave, the health insurance scheme should not be abused by the generalization that all women needed eight weeks for recuperation.

In 1979, the FRG explicitly recognized women's role as caregivers without corresponding recognition for men's role as caregivers by extending the postnatal period

²¹¹ Mutterschutzgesetz [MuSchG][Maternity Protection Act], Jan. 24, 1952, BGBl. I No. 5 at 69, § 6 (1), *translated in* INTERNATIONAL LABOUR OFFICE, LEGISLATIVE SERIES 1952-Ger.F.R. 2 (stating that "No woman shall be employed during the six weeks following confinement. This period shall be extended to eight weeks in the case of nursing mothers whose child was born prematurely.").

²¹² Mutterschutzgesetz [MuSchG][Maternity Protection Act], Nov. 9, 1965, BGBl. I No. 67 at 1821, § 13, *translated in* INTERNATIONAL LABOUR OFFICE, LEGISLATIVE SERIES 1965-Ger.F.R. 2. (stating that "(1) During the protected periods referred to in subsection (2) of section 3 and subsection (1) of section 6 a woman who is insured under the statutory sickness insurance scheme shall receive maternity benefit at federal expense in accordance with the provisions as to maternity benefit contained in the Federal Insurance Code. (2) During the protected periods referred to in subsection (2) of section 3 and subsection (1) of section 6 a woman who is not insured under the statutory sickness insurance scheme shall receive maternity benefit at federal expense in accordance with the provisions as to maternity benefit contained in the Federal Insurance Code (which shall be applied. *Mutatis mutandis*) if she is a party to an employment relationship is lawfully terminated by her employer during her pregnancy. Such benefit shall be paid to her by the general local sickness fund for her place of residence; where there is no such fund, it shall be paid by the sickness fund for the Land concerned. The provisions of section 200d of the Federal Insurance Code shall apply, *mutatis mutandis*, subject to the proviso that the Federal Republic shall reimburse the funds in full for any proven expenditure on maternity benefit. The maternity benefit paid under section 205a of the Federal Insurance Code shall be deducted.").

until the child reached six months old.²¹³ Except for the two months of the postnatal period, the other four months were for childcare. As a result, during the four additional months, women had to be solely in charge of childcare without corresponding opportunities for men to engage in childcare.

The extension brought about a greater financial burden for the employer to hire female workers of child-bearing age. The insurance scheme covered substantial part of the payment for women on maternity leave.²¹⁴ However, the insurance did not cover full remuneration. The employer had to supplement the difference between maternity benefits and the loss of income.²¹⁵

²¹³ Mutterschutzgesetz [MuSchG][Maternity Protection Act], June 25, 1979, BGBl. I No. 32, at 797 (F.R.G.), translated in INTERNATIONAL LABOUR OFFICE, LEGISLATIVE SERIES 85-93 (1980).

§8a (1) (stating that “A mother shall be entitled to maternity leave immediately after the end of the protected period referred to in subsection (1) of section 6 and until the date on which her child reaches the age of six months. She shall receive cash maternity benefit under subsection (1) or (3) of section 13 in respect of the leave period.”).

²¹⁴ *Id.* § 13 (stating that (1) During the protected periods referred to in subsection (2) of section 3 and subsection (1) of section 6 and the maternity leave referred to in section 8a, a woman who is insured under the statutory sickness insurance scheme shall receive cash maternity benefit in accordance with the provisions as to such benefit in the Federal Insurance Code or the Farmers’ Sickness Insurance Act. (2) During the protected periods referred to in subsection (2) of section 3 and subsection (1) of section 6, a woman who is not insured under the statutory sickness insurance scheme shall receive cash maternity benefit at federal expense in accordance with the provisions as to such benefit in the Federal Insurance Code (which shall be applied mutatis mutandis) if she is a party to an employment relationship is lawfully terminated by her employer during her pregnancy. Such benefit shall be paid to her by the Federal Insurance Office. Case maternity benefit paid under section 205a of the Federal Code or section 33 of the Farmers’ Sickness Insurance Act shall be deducted. (3) A woman covered by subsection (2) shall continue to be paid cash maternity benefit at federal expense during maternity leave taken under section 8a. A woman who is not insured under the statutory sickness insurance scheme and whose employment relationship is lawfully terminated by her employer during her pregnancy or ceases during or after the protected periods referred to in subsection (2) of section 3 and subsection (1) of section 6 shall continue to be paid cash benefit at federal expense during the period for which she could have claimed it if she had been a party to an employment relationship.”).

²¹⁵ *Id.* § 14 (stating that “(1) A woman who is entitled to cash maternity benefit payable per calendar day under section 200 of the Federal Insurance Code, section 27 of the Farmers’ Sickness Insurance Act or subsection (2) of section 13 of this Act shall, during the protected periods referred to in subsection (2) of section 3 and subsection (1) of section 6, receive a supplement from her employer equal to the difference between such benefit and her average remuneration per calendar day, less any statutory deductions. Where she is provided with care in a maternity home or hospital or with assistance and attendance by a nurse at home, the supplement shall be calculated on the basis of the rate of benefit that would be payable if such services were not provided. The average remuneration per calendar day shall be calculated for the last three complete calendar months or, where the remuneration is paid weekly, the last 13 complete weeks, preceding the commencement of the protected period referred to in subsection (2) of section 3. No account shall be taken of non-recurring gratuities or of days on which no remuneration, or less remuneration, was earned as a result of short-time, interruptions or excusable absence. Where it is impossible to calculate the remuneration in this way, the basis taken shall be the average remuneration per calendar day in a similar type of employment. (2) A woman whose employment relationship is lawfully terminated by her employer during her pregnancy or during the protected period referred to in subsection (1) of section 6 shall receive the bonus under subsection (1) at federal expense from the authority responsible for paying cash maternity benefit.”).

Although the reimbursement was possible amounting to 60-70% for small businesses employing 20 employees or less,²¹⁶ the large corporations were not entitled to get the reimbursement, and even small businesses could not receive 100%. Therefore, the maternity leave system failed to recognize childcare as a common responsibility and threatened women's employment status in the labor market by conferring financial burdens on employers that hired female workers.

Maternity leave and benefits exclusive to women until the child reached six months old was upheld by the European Court of Justice in *Hofmann v. Barmer Ersatzkasse*.²¹⁷ The ECJ emphasized the special relationship between mothers and children to uphold maternity leave and benefits exclusive to women. The rationale flawed because the special relationship did not have a legitimate ground on the physical differences between men and women. It was rather based on the traditional sex roles stereotyping.

Upon the ratification of the Convention on the Elimination of All Forms of Discrimination Against Women (hereinafter "CEDAW"), the FRG abolished a period available for women to take care a newborn child until the child reached 6 months old.²¹⁸ The CEDAW mandated the State Parties to ensure that family education would include the recognition of childcare as a common responsibility of men and women.²¹⁹ The FRG finally acknowledged the adverse impact of the additional period available for women.

To solve the problem of discrimination on the basis of sex, the FRG adopted the Federal Parental Benefit Act which provided a parental benefit of DM 600 per month to mothers and fathers who raised their child themselves.²²⁰ It was the first official grant for

²¹⁶ Germany, The Fourth State Report to the Committee on the Elimination of All Forms of Discrimination Against Women, Nov. 11, 1998, CEDAW/C/DEU/4 at 80.

²¹⁷ *Hofmann v. Barmer Ersatzkasse*, Case C-184/83, 1984 E.C.R. I-3047.

In this case, the European Court of Justice upheld the differentiation of the mothers' relationship with their children from the fathers'. This case dealt with the Maternity Protection Act of 1979 in Germany which guaranteed 8 weeks of statutory period of maternity leave for women for recuperation and additional leave for women to take care of newborn children until the child reached 6 months old. Mr. Hofmann argued that the exclusion of men from the same protection violates women's equal right to work during the leave for childcare. The Court recognized the legitimacy of the leave on the grounds of Article 2(3) of the Equal Treatment Directive in two respects:

First, it is legitimate to ensure the protection of a woman's biological condition during pregnancy and thereafter until such time as her physiological and mental functions have returned to normal after childbirth; secondly, it is legitimate to protect the special relationship between a woman and her child over the period which follows pregnancy and childbirth, by preventing that relationship from being disturbed by the multiple burdens which would result from the simultaneous pursuit of employment. *Id.* at 25.

²¹⁸ Bundeserziehungsgeldgesetz [BERZGG][Federal Parental Benefit Act], Jun. 12, 1985, BGBl. I at 2154.

²¹⁹ Convention on the Elimination of All Forms of Discrimination Against Women art.5, Dec. 18, 1979, 1249 U.N.T.S.13 [hereinafter CEDAW] (stating that "States Parties shall take all appropriate measures: (a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women; (b) To ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children, it being understood that the interest of the children is the primordial consideration in all cases.").

²²⁰ Federal Ministry for Family Affairs, Senior Citizens, Women and Youth, Women in Germany 4 (2007), available at <http://www.bmfsfj.de/Publikationen/women-in-germany/c.html> (last visited Nov. 14, 2007).

men to raise a child in equal terms with women. The benefits did not reflect actual lost income but supported parents while taking care of their children.

However, the problem of the new system was its disregard of the employment status of individuals who claimed for the benefits.²²¹ The new system was based solely on the fact that individual was engaged in childcare activities regardless of the employment history. Even though an individual did not work before raising a child, he or she was eligible for the benefits. As a result, it was viewed as gender-neutral parental leave not for equal treatment of women and men but rather equal treatment of employed mothers and voluntary housewife mothers.²²² The legislature intended to compensate for the unpaid caregiving work rather than secure working parents' right to take leave for their newborn children. This was not a way to comply with the mandate from the CEDAW to recognize childcare as the common responsibility of men and women.²²³

Furthermore, one particular provision emphasized that the system was on the basis of the traditional family model. If both parents could take care of their newborn child together at the same time, they could not receive the double amount of benefits.²²⁴ Instead, only one parent was eligible for benefits. In addition, when the parents had to decide whom to be the beneficiary and they did not reach an agreement, the law designated the wife to be the eligible person.²²⁵

Nevertheless, the introduction of the parental leave and benefits system in the FRG should be appreciated because it was the first system in the history of Germany to recognize men's role as caregivers in the equal terms with women. Before the FRG introduced this new system, maternity leave was the only leave available for parents to take part in childcare either in the GDR or the FRG. Therefore, the recognition of men's role as caregivers should be recognized as an important step towards gender equality in the area of reconciling work and childcare.

Despite this positive aspect of the parental leave and benefits system in the FRG, it still did not provide equal opportunities for women to participate in the workplace or for men to engage in childcare. Even after the introduction of the parental leave and benefits system, women remained the primary caregivers.²²⁶ Because men's income constituted the major part of the income for the individual household, it was not easy for men to choose to raise their children instead of working. Therefore, full remuneration

²²¹ *Id.*

²²² Dagmar Schiek, *From Parental Leave to Parental Time: German Labour Law and EU Law*, 31 *INDUS. L. J.* 361, 361-62 (2002).

²²³ Germany, The Second and Third State Report to the Committee on the Elimination of All Forms of Discrimination Against Women, Nov. 4, 1996, CEDAW/C/DEU/2-3 at 39 (stating that "[b]oth child-raising benefit as well as child-raising leave are still primarily claimed by mothers").

²²⁴ *Bundeserziehungsgeldgesetz [BERzGG][Federal Parental Benefit Act]*, Dec. 6, 1985, § 3 (1), *translated in R. BLANPAIN, INTERNATIONAL ENCYCLOPEDIA FOR LABOUR LAW AND INDUSTRIAL RELATIONS* (1991) (stating that "Only one person shall receive parental benefit for the care and upbringing of a child.").

²²⁵ *Id.* § 3 (2) (stating that "Should the choice not be decided by the end of the third month of the child's life or if no agreement is reached then the wife shall be the eligible person.").

²²⁶ Both child-raising benefits as well as child-raising leave are still primarily claimed by mothers. In 1994, a mere 2.2 percent (16,920) of the applicants for child-raising benefit were fathers. Fathers accounted for 1.5 percent (6,049) of the people who took child-raising leave in 1994. Germany, The Second and the Third Periodic Report to the Committee on the Elimination of All Forms of Discrimination Against Women, Nov. 4, 1996, CEDAW/C/DEU/2-3 at 39.

was required to guarantee equal opportunities for men to participate in childcare in practice.

If Germany had considered the importance of the loss of income which would hinder men from participating in the system, it could have considered providing benefits incremental to the loss of income. If Germany had adopted full remuneration, it would have achieved the original policy goal by allowing women and men to enjoy the equal rights to decide how to share work and childcare. The income that an individual earned in the workplace could not be an absolute standard to evaluate the parenting role for each individual. However, if the original policy goal was to realize gender equality, full remuneration was the only way to provide equal opportunities for men to engage in childcare.

In 1991, Germany introduced part-time parental leave which was intended to facilitate child-raising opportunities for working mothers and fathers.²²⁷ The continuation or commencement of a limited gainful activity was permitted from three months after the birth.²²⁸ The employment in a part-time position did not deprive them of the eligibility to request child-raising benefits.

The FRG introduced part-time work provisions to accommodate flexibility in childcare, but it was once again failed because of the absence of the full-wage replacement system. Women were 90 percent of the overall workers in part-time job in the FRG.²²⁹ In fact, 77% of women who lived with a partner and children looked for part-time work whereas only 28% of men in this category wanted to maintain part-time employment.²³⁰ The introduction of part-time availability for childcare opened a door for women to maintain some source of financial security while taking care of children. However, women were the predominant part-time workers compared with men. Men did not prefer part-time work to full-time work because they still had to lose substantial amounts of money for childcare. If both spouses can choose between part-time and full-time jobs, a spouse who earns less than the other might decide to take part-time work so that the household could save as much income as possible. Because men earned more than women in average, women rather had to choose to lose a part of income by shifting to the part-time schedule. In gender politics in an individual household, an economic efficiency is a decisive factor. Unless the system secured full remuneration for the loss of income, part-time availability for childcare would not help to provide equal opportunities for men and women to engage in childcare. Particularly, considering the prolonged history of the gender wage gap, full remuneration is essential to realize gender equality in reconciling work and childcare.

²²⁷ Bundeserziehungsgeldgesetz [BErzGG][Federal Parental Benefit Act], Dec. 6, 1991 BGBI. I at 2142 § 2 (1), translated in Manfred Weiss, *Legislation: Federal Republic of Germany* in R. BLANPAIN, INTERNATIONAL ENCYCLOPAEDIA FOR LABOUR LAW AND INDUSTRIAL RELATIONS: LEGISLATION 2 216, 220-36 (1991) (stating that “[t]he applicant shall be considered not to be performing a full-time gainful activity: 1. if the working week does not exceed 19 hours”).

²²⁸ Germany, The Second and the Third State Report to the Committee on the Elimination of All Forms of Discrimination Against Women, Nov. 4, 1996, CEDAW/C/DEU/2-3 at 39.

²²⁹ Germany, The Second and Third State Report to the Committee on the Elimination of All Forms of Discrimination Against Women, Nov. 4, 1996, CEDAW/C/DEU/2-3 at 12 (stating “Part-time employment also continued to increase. At approximately 4.5 million, the number of gainfully employed persons in part-time jobs in the west was about 600,000 higher in 1994 than in 1990. Roughly 90 percent of these are women.”).

²³⁰ *Id.* at 13.

The Federal Parental Benefit Act continuously increased the duration of parental benefit but it was not enough to guarantee equal opportunities for men and women to take advantage of parental leave as much as they wanted.²³¹ For births from January 1993, the leave was available until the child reached 3 years old.²³² However, the benefits were available for 24 months only.²³³ The absence of payment during third year did not have any legitimate ground because there was no difference between childcare during the first 2 years and the last year. The limited financial resources would be the reason why Germany could not provide benefits during the whole period of time until the child reached 3 years old. During the last 1 year, if the family would plan to have at least one parent to be available for childcare at home, then women would more likely stay at home for childcare instead of men to avoid substantial financial loss.

The statistics also showed that the parental leave and benefits system failed to realize gender equality in childcare because both parental benefits as well as parental leave were still primarily claimed by mothers.²³⁴ In 1994, a mere 2.2 percent (16,920) of the applicants for parental benefit were fathers.²³⁵ Furthermore, fathers accounted for 1.5 percent (6,049) of the people who took parental leave in 1994.²³⁶

In 1997, in response to the implementation of the Pregnancy Directive of the European Union,²³⁷ Germany lessened the financial burden that the employer had to bear to hire female workers of child-bearing age.²³⁸ The Pregnancy Directive mandated its Member States to provide adequate allowances equivalent to benefits available for other health reasons.²³⁹ In the FRG, the financial burden was created by the lack of full

²³¹ *Id.* at 38-39 (stating that “The period of child-raising benefit payments has been extended several times, being awarded for a maximum of 12 months for births from 1 January 1988, a maximum of 18 months for births from 1 July 1989, a maximum of 18 months for births from 1 July 1990 and a maximum of 24 months for births from 1 January 1993.”).

²³² *Id.* at 39 (stating that “Child-raising leave is granted parallel to child-raising benefit, being initially extended from 10 to 24 months for births from 1 January 1986. For births from January 1992, leave is granted until the child is three years of age.”).

²³³ *Id.* at 28-39 (stating that “The period of child-raising benefit payments has been extended several times, being awarded for a maximum of 12 months for births from 1 January 1988, a maximum of 18 months for births from 1 July 1989, a maximum of 18 months for births from 1 July 1990 and a maximum of 24 months for births from 1 January 1993.”).

²³⁴ Germany, The Second and Third State Report to the Committee on the Elimination of All Forms of Discrimination Against Women, Nov. 4, 1996, CEDAW/C/DEU/2-3 at 39.

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ Council Directive 92/85/EEC, 1992 O.J. (L 348) (on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC)).

²³⁸ Germany, The Fourth State Report to the Committee on the Elimination of All Forms of Discrimination Against Women, Nov. 11, 1998, CEDAW/C/DEU/4 at 80 (stating that “During the maternity protection periods, female employees who are insured under the statutory health insurance system and fulfill the other insurance conditions receive a maternity allowance of up to DM 25 per calendar day. The difference between this and the previous net wage is paid by the employer as a supplement to the maternity allowance. Female employees with private insurance receive the same supplement. However, their maternity allowance-at the expense of the Federal Government-only amounts to a total of DM 300 from the Federal Insurance Office in Berlin.”).

²³⁹ Council Directive 92/85/EEC, art. 11, 1992 O.J. (L 348) (on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given

maternity benefits given by the statutory health insurance scheme. Before the revision, the Act on the Continued Payment of Wages provided 60% to 70% reimbursement for small businesses which supplemented the loss of income due to the protected period of women for pregnancy and childbirth.²⁴⁰ After the revision, it provided 100% reimbursement for small businesses with up to 20 employees and, in certain circumstances, small businesses with up to 30 employees.²⁴¹

Although the revision helped women in small businesses avoid any discriminatory impact created by the financial burden that the employers had to bear due to pregnancy or childbirth, it did not have any legitimate ground to differentiate small businesses from large businesses. Because of the lack of financial resources to reimburse the supplement from the employer, the FRG prioritized small businesses to large ones. The small businesses covered by the reimbursement system were 90% of the whole enterprises in the FRG.²⁴² However, the exclusion of large businesses was not a desirable approach for Germany because there would be no difference in the fact that women would suffer from discriminatory impact regardless of the size of the businesses.

The fundamental reason why maternity leave and benefits system continuously discriminated against women was the exclusion of fathers from the same leave and benefits systems that women were enjoying. Because the systems were applicable only to women, subsequent measures had to be implemented to ensure that women were not adversely affected by women-only legislation. Nevertheless, it was practically impossible for the legislators to take into account every single effect which might occur because of the maternity leave and benefits system.

The European Court of Justice (hereinafter ECJ) acknowledged the adverse impact of maternity leave exclusive to women in Germany.²⁴³ In *Land Brandenburg v. Ursula Sass*, the ECJ held that when assessing the length of a qualifying period for the purposes of promotion and pay raises, any period on statutory maternity leave should be included.²⁴⁴ The problem occurred because the period of maternity leave in the GDR and

birth or are breastfeeding (tenth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC)).

²⁴⁰ Germany, The Fourth State Report to the Committee on the Elimination of All Forms of Discrimination Against Women, Nov. 11, 1998, CEDAW/C/DEU/4, at 80 (stating that “often only approx. 60-70% under the previous law”).

²⁴¹ *Id.* (stating that “To avoid small businesses with up to 20 (possibly 30 employees) being excessively burdened by the costs of maternity protection (employer’s supplement to the maternity allowance and continuation of wage payments owing to existing bans on employment), there is a compensation procedure pursuant to the Act on the Continued Payment of Wages. Since early 1997, their corresponding expenses have been completely reimbursed.”).

²⁴² The Committee of Experts on the Application of Conventions and Recommendations of the International Labour Organization, The Maternity Protection Convention 1919 (No. 3): Germany, CEACR 1998/69th Session, available at <http://webfusion.ilo.org/public/db/standards/normes/appl/appl-displayAllComments.cfm?hdroff=1&ctry=0240&conv=C003&Lang=EN#1998> (last visited Jan. 23, 2009) (stating that “In so far as these new regulations only cover small enterprises which, according to the information provided by the Government, nevertheless represent 90 per cent of all enterprises in Germany, the Committee hopes that the Government will be able to re-examine the matter with a view to ensuring the application of this Article of the Convention also with regard to medium and large enterprises.”).

²⁴³ *Land Brandenburg v. Ursulas Sass*, Case C-284/02, 2004 E.C.R. I-1143.

²⁴⁴ *Id.* para 58 (stating that “Accordingly, if the national court reaches the conclusion that the maternity leave provided for by Paragraph 244 of the AGB-DDR is such statutory leave intended to protect women who have given birth, the whole of that leave must be counted towards the qualifying period to be

the FRG were different from each other.²⁴⁵ The GDR granted twenty weeks of postnatal leave whereas the FRG prohibited women from working during the first eight weeks after childbirth.²⁴⁶ The difference of twelve weeks became an issue after Germany was reunified. When women were assessed for promotion, the reunified Germany considered only the first eight weeks of the postnatal leave when measuring a mother's participation in the workplace against that of other employees. Consequently, women who took maternity leave in the GDR before the unification lost twelve weeks of the postnatal period which she had expected to be calculated as regular working days. The adverse impact on women's status as workers was ruled as violating the Equal Treatment Directive of the European Union which acknowledged special treatment for pregnancy and maternity.²⁴⁷

This case shows the adverse impact created by maternity leave as an exclusive system for women. If the GDR and FRG had accommodated women's health conditions by the medical leave system applicable to men and women in equal terms, there would have been no discriminatory effect on women's status as workers. However, by treating pregnancy and childbirth related medical conditions differently from other health conditions, the reunified Germany had to face discrimination against women.

This case is similar to a case pending in the Supreme Court of the United States. In *AT & T v. Hulteen*, the Court faced whether to apply the PDA to invalidate the seniority system which excludes a part of pre-PDA pregnancy leave from the regular working days to be eligible for pension benefits.²⁴⁸ If AT & T had not provided pregnancy leave exclusive to women and accommodated pregnancy-related medical conditions with medical leave applicable to men and women in equal terms, women would not have suffered discrimination. Therefore, the comparison of the U.S. and the German system affirms that maternity leave exclusive to women adversely affects women's status as workers.

In contrast to the ECJ's recognition of the adverse impact of maternity leave exclusive to women, the Pregnancy Directive emphasized the protective attitude towards women's reproductive health.²⁴⁹ The Pregnancy Directive prohibited women from

completed in order to be classified in a higher salary grade, to prevent a women who has taken such leave from being placed in a worse position, because of her pregnancy and her maternity leave, than a male colleague who started work in the former GDR on the same day as she did.”).

²⁴⁵ *Id.* para. 9 (stating that “Under Paragraph 244 of the AGB-DDR, women were entitled to maternity leave for a period of 20 weeks after confinement. For the duration of that leave women received a maternity allowance equivalent to their net average earnings from the social insurance fund.”).

²⁴⁶ *Id.* para. 11 (stating that “The first sentence of Paragraph 6(1) of the MuSchG prohibits the employment of women in the eight weeks following confinement. During that period of maternity leave working mothers receive an allowance from their employers as well as a maternity allowance.”).

²⁴⁷ *Id.* para. 59 (stating that “Having regard to the foregoing considerations, the answer to the question referred should be that Directive 76/207 precludes a collective agreement such as the BAT-O from excluding from a qualifying period the part of the period for which a female worker took maternity leave, under the legislation of the former GDR, which exceeds the protected period of eight weeks provided for by the legislation of the Federal Republic of Germany to which that agreement refers, where the objectives and purpose of both periods of leave are the protection of women as regards pregnancy and maternity, as provided for by Article 2(3) of that directive.”).

²⁴⁸ *AT & T Corporation v. Hulteen*, 498 F.3d 1001, 1003 (9th Cir. 2007), cert. granted, (No. 07-543).

²⁴⁹ Council Directive 92/85/EEC, art. 8, 1992 O.J. (L 348) (on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given

working for at least two weeks before or after childbirth. The legitimacy of the limitation on individual women's right to work under the Pregnancy Directive has been recognized by the Equal Treatment Directive from the initial Directive in 1976 to the comprehensive consolidated text in 2006.²⁵⁰ The interplay of the Pregnancy Directive and the Equal Treatment Directive legitimized the ban on work performance after childbirth in Germany.

However, the emphasis on protective measures for women motivated Germany to pay attention to women's reproductive role. According to the National Report on the Implementation of the Pregnancy Directive, Germany reported its concerns for the shortage of opportunities for prenatal leave for manual workers.²⁵¹ However, the ground for the concerns was not women's health conditions but the probability of giving birth to a healthy child.²⁵² In addition to the period itself, Germany expressed its concerns for the voluntary nature of the prenatal period, also on the basis of concerns for the birth of a healthy child.²⁵³ Because the original legislative intent of the Pregnancy Directive was for health and safety of pregnant workers, children's welfare should not come into place in the Maternity Protection Act. Germany used the original legislative purpose of the Maternity Protection Act to reinforce the traditional sex role stereotyping.

The impact of the European legislation continued when the European Union introduced Parental Leave Directive. After the European Union introduced the Parental Leave Directive, the FRG revised the Federal Parental Benefit Act so that both parents could take advantage of the system at the same time.²⁵⁴ The Parental Leave Directive manifested the principle of non-transferability which did not allow one spouse to transfer a right to parental leave to the other spouse. As a result, the FRG finally acknowledged the individuality of the right to parental leave by allowing both parents to take leave simultaneously.²⁵⁵ Nevertheless, because the Parental Leave Directive did not mention

birth or are breastfeeding (tenth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC)).

²⁵⁰ Council Directive 76/207/EEC, art. 2 (3), 1976 O.J. (L 39) (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) (stating that "[t]his Directive shall be without prejudice to provisions concerning the protection of women, particularly as regards pregnancy and maternity"); Council Directive 2002/73/EC, art. 2 (7), 2002 O.J. (L 269/15) (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); Council Directive 2006/54/EC, art. 2 (2) (c), 2006 O.J. (L 204/23) (on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation) (stating that "[f]or this purposes of this Directive, discrimination includes any less favorable treatment of a woman related to pregnancy or maternity leave within the meaning of Directive 92/85/EEC").

²⁵¹ Germany, *National Report on the Implementation of Directive 92/85, Directive 96/34 and Directive 86/613* in BULLETIN LEGAL ISSUES IN GENDER EQUALITY 32, 33 (2005) (stating that "Since the 1980s, studies have shown that the prenatal protective period is too short in the case of manual workers in the light of the probability of giving birth to a healthy child, which also call into question the voluntary nature of the period.").

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ Dagmar Schiek, *From Parental Leave to Parental Time: German Labour Law and EU Law*, 31 INDUS. L. J. 361, 361 (2002) (stating that "However, Directive 96/34/EC raised questions as to whether this law required revision, as it did not afford each parent an individual right to parental leave and it made prenatal leave fully transferable between the mother and the father.").

²⁵⁵ Thorsten Schulten, *New provisions on parental leave and childcare payments*, available at <http://www.eurofound.europa.eu/eiro/2000/07/feature/de0007271f.htm> (last visited Jan. 19, 2009) (stating

anything about the payment during the time for childcare, the FRG did not accommodate full remuneration. Therefore, the FRG failed to secure the individuality of the child-raising benefits despite its implementation of the principle of non-transferability to the right to parental leave.

In addition, the revision in 2000 brought about the expansion of the part-time leave system for childcare.²⁵⁶ Before the revision, the part-time work was available for up to only 19 hours a week.²⁵⁷ The revision finally allowed parents to work for up to 30 hours a week.²⁵⁸ Germany purported to maximize the flexibility of working hours for employees with children.

After all, the extension of the hours available for part-time work schedule strengthened women's role as primary caregivers. For example, at a point of 18 months after the birth of their child, 45% of women on parental leave who worked part-time were taking between 20 and 30 hours per week.²⁵⁹ Before the revision in 2000 extended the part-time from 15 hours to 30 hours, women would not be able to take between 20 and 30 hours per week. Women were more likely to work part time especially when they were qualified enough to handle a high-level training or work requiring an advanced education.²⁶⁰ These statistical results proved that the FRG originally sought to the woman's role as caregivers along with her continuous participation in the workplace. Thus, the extension of the hours for part-time work should not always be interpreted as a desirable way to reconcile work and childcare.

The emphasis on positive aspects of the extension of hours for part-time was especially dangerous for women's status as workers because women were the primary labor force in part-time employment.²⁶¹ By extending the hours for part-time as a way to allow an individual to reconcile work and childcare, the legislature presumed that women should continue to be the primary caregivers.

that "In July 2000, the German parliament adopted new provisions on parental leave and childcare payments. For the first time, both parents are allowed to take parental leave at the same time and have the right to work part-time during this period.").

²⁵⁶ *Id.*

²⁵⁷ Bundeserziehungsgeldgesetz [BERZGG][Federal Parental Benefit Act], Dec. 6, 1991, BGBl. I 1991 at 2142, § 2 (1), translated in ROGER BLANPAIN ED., INTERNATIONAL ENCYCLOPEDIA FOR LABOUR LAW AND INDUSTRIAL RELATIONS 216-31 (stating that "[t]he applicant shall be considered not to be performing a full-time gainful activity: 1. if the working week does not exceed 19 hours").

²⁵⁸ Germany, The Fifth State Report to the Committee on the Elimination of All Forms of Discrimination Against Women, Feb. 5, 2003, CEDAW/C/DEU/5, at 23 (stating that "Part-time working of up to 30 hours per week is permitted during parental leave, and of up to 60 hours per week if parental leave is taken jointly.").

²⁵⁹ *Id.* (stating that "At a point 18 months after the birth of their child, 45% of those women on parental leave who had decided to work part time were working between 20 and 30 hours per week.").

²⁶⁰ *Id.* (stating that "In general, women are more likely to work part time and to decide against being completely released from their work duties if they are highly qualified and have a comparatively high level of education.").

²⁶¹ Lothar Funk, *Recent Trends in Female Employment Examined*, Aug. 19, 2003, available at <http://www.eurofound.europa.eu/eiro/2003/08/feature/de0308105f.htm> (last visited Jan. 17, 2009) (stating that "Part-time employment is still dominated by women, even if the percentage of part-time workers who are male is gradually rising. In Germany in 2002, 84.6% of part-time employees were women, compared with an EU average figure of almost 80%.").

The last amendment brought in 2000 was the postponement of one year of leave until the child reached eight years old.²⁶² The amendment purported to allow parents to be available when the child starts to attend school.²⁶³ The flexible management of time for childcare advanced the individual's right to decide how to share work and childcare, along with the availability of simultaneous leave for parents and the extension of part-time work for parents taking care of children.

Even if the amendment brought about a positive aspect for an individual's right to decide how to share work and childcare, it still lacked consideration for men's right to participate in childcare because of the absence of full remuneration. As a result, it was highly predictable that women would take advantage of the postponement of the last year until the child reached 8 years old. Even if the legislators allowed both parents to take the leave simultaneously, they still maintained their original attitude towards the limitation on the number of beneficiaries of the parental benefits. The revision in 2000 did not bring about the availability of the benefits for both parents if they would take leave at the same time. It rather preserved the old provision which stated that only one parent was eligible to receive the benefits.²⁶⁴ Therefore, the revision in 2000 failed to realize the original legislative intent of the implementation of the principle of non-transferability.

Despite the lack of consideration for gender equality, the amendment in 2000 brought about an increase in men's participation in the parental leave and benefits system. The proportion of fathers taking advantage of the parental leave system since the amendment increased from 1.5 percent to 4.9 percent.²⁶⁵ Even if fathers were still the minority among those claiming for the benefits, the amendment brought about a slight increase in the proportion.

However, the problem of the traditional family model still existed because among 4.9% of fathers taking advantage of the system, only 0.2% of them were taking full-time

²⁶² Bundeserziehungsgeldgesetz [BERzGG][Federal Parental Benefit Act], Oct. 23, 2000, BGBI. I at 1426, § 4 (1), *translated in* International Labour Organization, Federal Law on Child-Raising Leave and Allowances-Germany, available at http://www.ilo.org/public/english/employment/gems/eeo/law/germany/l_flcr.htm (last visited Jan. 19, 2009) (stating that "For adopted children and other children under the custody of the recipient, parental benefit is granted for up to two years and until the child's eighth birthday (art. 4 (1)).").

²⁶³ Thorsten Schulten, *New Provisions on Parental Leave and Childcare Payments*, Jul. 28, 2000, available at <http://www.eurofound.europa.eu/eiro/2000/07/feature/de0007271f.htm> (last visited Jan. 17, 2009) (stating that "Furthermore, the new BERzGG gives parents the opportunity to postpone the third year of parental leave until the eighth birthday of the child, in order to take parental leave, for example, when the child starts to go to school.").

²⁶⁴ Bundeserziehungsgeldgesetz [BERzGG][Federal Parental Benefit Act], Oct. 23, 2000, BGBI. I at 1426, § 3 (1), *translated in* International Labour Organization, Federal Law on Child-Raising Leave and Allowances-Germany, available at http://www.ilo.org/public/english/employment/gems/eeo/law/germany/l_flcr.htm (last visited Jan. 19, 2009) (stating that "Parental benefit for the care and education of a child is payable to only one person for each and every child in the household (art. 3 (1).).").

²⁶⁵ Martin Behrens, *Government Publishes Report on Parental Leave*, available at <http://www.eurofound.europa.eu/eiro/2004/08/inbrief/de0408203n.htm> (last visited Jan. 17, 2009) (stating that "While earlier estimates from before the 2001 reform of the law stated that only 1.5% of all fathers entitled to parental leave took advantage of this opportunity, according to the new study this share has increased to 4.9%.").

leave for childcare.²⁶⁶ The other 4.7% were taking part-time leave simultaneously with their spouses.²⁶⁷ The government also reported that men were more likely to take advantage of the system when both spouses' salaries were equal or when the woman's income was higher than the man's.²⁶⁸ As a result, women were still primary caregivers for their children.²⁶⁹

The absence of full remuneration for each individual is especially significant for the FRG because the gender wage gap of Germany has been the highest among all the European Union member states.²⁷⁰ Between 2003 and 2004, there was no change in the gender wage gap in Germany.²⁷¹ Women earned only 70% of what men earned.²⁷² Unless Germany would provide full remuneration for each individual on leave, women and men would not be able to enjoy equal opportunities to participate in either paid work or raising children.

In 2004, the FRG expanded the individual's right to parental leave by amending the Federal Parental Benefit Act.²⁷³ The legislators tried to view each parent's right to parental leave as an individual right which would not be affected by the other spouse's right to take parental leave.²⁷⁴ Before the revision, if one parent did not use two years of

²⁶⁶ *Id.* (stating that "An additional 0.2% of the fathers in the survey were taking parental leave while being released from work.").

²⁶⁷ *Id.* (stating that "As shown in the table below, 4.7% of all respondents answered that both father and mother were taking advantage of parental leave while working part-time.").

²⁶⁸ *Id.* (stating that "The study also found that men are more likely to take parental leave when the individual income of both parents is equal or when the mother's income is higher.").

²⁶⁹ *Id.*

Use of parental leave by gender and form of leave	
Form of parental leave (PL)	Use of parental leave in %
Mother takes PL (released from work)	60.1
Mother takes PL (works part-time)	32.2
Father and mother in PL (both work part-time)	4.7
Father in PL (released from work)	0.2
Single parent (released from work)	1.1
Single parent (works part-time)	1.7

Source: Ministry for Family, Senior Citizens, Women and Youth.

²⁷⁰ Verena Di Pasquale, *German Gender Pay Gap Is EU's Largest*, Nov. 4, 2002, available at <http://www.eurofound.europa.eu/eiro/2002/11/inbrief/de0211201n.htm> (last visited Jan. 17, 2009) (stating that "An EU study published in October 2002 revealed that Europe's largest gaps in earnings between men and women are to be found in Germany.").

²⁷¹ Heiner Dribbusch, *New Evidence in Gender Wage Gap and Low Pay*, Apr. 21, 2004, available at <http://www.eurofound.europa.eu/eiro/2004/04/feature/de0404205f.htm> (last visited Jan. 17, 2009) (stating that "In March 2004, the Federal Statistical Office reported that in 2003 the average monthly income of women in Germany was 30% below that of men - the same gap as found in 2002.").

²⁷² *Id.*

²⁷³ Germany, *The Sixth State Report to the Committee on the Elimination of Discrimination Against Women*, Oct. 22, 2007, CEDAW/C/DEU/6, at 80 (stating that "on January 1 2004 additional amendments regulating parental leave in the Act on the Granting of Child-Raising Allowances and Child-Raising Leave came into effect").

²⁷⁴ *Id.* at 80-81 (stating that "each parent's leave is viewed separately").

parental leave during the first three years after childbirth and postponed one year of parental leave until the child reached eight years old, then the other spouse could use only two years of parental leave. In the same case, the revision allowed the other spouse to take three years of parental leave and even allowed the other spouse to postpone one year until the child reached eight years old.²⁷⁵

The amendment in 2004 also brought about greater individual freedom with respect to parental leave in cases of multiple births and with children born in short succession. In cases of multiple births and with children born in short succession, the parents also had three years for each child, up to the end of the child's third year of life.²⁷⁶ In addition, an individual maintained a right to postpone one year of parental leave for each child.²⁷⁷

In 2003, the Maternity Protection Act was challenged by female workers on the grounds that ineligibility of large businesses for the reimbursement system with respect to their financial obligation to pay women on maternity leave. The Constitutional Court invalidated the reimbursement system because it discriminated against women in large businesses.²⁷⁸

In response to the Constitutional Court's decision in 2003, the FRG finally relieved the employer's of the additional financial burden they had carried when hiring women of child-bearing age in 2006. The FRG expanded the scope of the beneficiaries for the reimbursement system to all enterprises including the large corporations employing more than 20 workers.²⁷⁹ Before the FRG introduced the new distribution system, only small businesses employing 20 or fewer employees could get full reimbursement for maternity benefits paid to employees.²⁸⁰ In 2000, the financial burdens for employers in Germany resulting from maternity benefits amounted to 2.89

²⁷⁵ *Id.* at 81 (stating that “[t]his means that as much as 12 months parental leave can be postponed until the time when the child is between three and eight years of age, and that this is also possible for each of the children in these cases”).

²⁷⁶ *Id.* at 82 (stating that “In cases of multiple births and with children born in short succession, the parents also have three years for each child, up to the end of the child's third year of life.”)

²⁷⁷ *Id.* (stating that “This means that as much as 12 months parental leave can be postponed until the time when the child is between three and eight years of age, and that this is also possible for each of the children in these cases.”).

²⁷⁸ *Id.* (stating that “The Federal Constitutional Court ruled, on 18 November 2003, that the employer supplement to the maternity allowance, according to Article 14 of the Maternity Protection Act, was unconstitutional.”).

²⁷⁹ *Id.* at 47 (stating that “As a result of the amendment in force since 1 January 2006, the employers' supplement to maternity assistance was altered in such a manner that now all employers are included in the payment distribution system.”).

²⁸⁰ The Committee Experts on the Application of Convention and Recommendation of the International Labour Organization, Comment on the Ratification Status of Germany with Respect to the Maternity Protection Convention 1919 (No. 3), CEACTION 2005/76th Session, available at <http://webfusion.ilo.org/public/db/standards/norms/appl/appl-displayAllComments.cfm?hdoff=1&ctry=0240&conv=C003&Lang=EN#1998> (stating that “Moreover, given the burden that this payment represents for employers, new legislation on the continued payment of wages, which entered into force on 1 January 1997, envisages the reimbursement by the statutory health insurance scheme of the amounts paid in respect of maternity by employers with up to 20 employees (up to 30 employees in certain cases.”).

billion DM.²⁸¹ Employees were paid up to 100% of the net wage, but the employers had to bear 40% of gross payroll costs during maternity leave.²⁸² Therefore, the expansion of the eligibility for the reimbursement system practically benefited large businesses which had to bear substantial amounts of maternity benefits to hire female workers.

In 2007, Germany introduced a system of income-related parental benefits.²⁸³ It replaced the previous system of the parental benefits system which did not reflect actual lost income.²⁸⁴ Parents were entitled to receive the parental allowance during the first 14 months after childbirth. Among these periods, 2 months had to be used by the other spouse. Each parent could not take advantage of the system more than 12 months. Parents could decide who would take which part of the first 14 months after childbirth.

The new system compensated for the loss of income for at least 67% of lost income.²⁸⁵ If an individual household had monthly net earnings of less than 1000 euros before the birth of the child, parents were entitled to receive 100 percent of the lost income.²⁸⁶ In addition to the higher compensation rate for low-income households, the law guaranteed that all parents would receive a minimum of 300 euros per month.²⁸⁷

Even though the new system adjusted parental benefits according to income, it still did not provide full remuneration and it did not allow both parents to claim the parental allowance at the same time.²⁸⁸ Because women earned less than men on average,²⁸⁹ the lost income should be fully remunerated to ensure that men could decide to take leave for childcare. In addition, because only one parent can claim parental benefits at a certain point, women would be the one to take advantage of the system instead of men.

To avoid the disproportionate usage of the parental benefits by men and women, Germany introduced the two additional months of leave for fathers.²⁹⁰ The original legislative intent behind introducing the two additional months was to ensure that fathers

²⁸¹ Marlene, Schmidt, *Employment, the Family, and the Law: Current Problems in Germany*, 27 COMP. LAB. L. & POL'Y J 451, 459 (2006) (stating that “[i]n 2000, the financial burden for employers in Germany resulting from section 14 MuSchG amounted altogether to 2.89 billion DM”).

²⁸² Dorothea Alewell & Kerstin Pull, *An International Comparison and Assessment of Maternity Leave Legislation*, 22 COMP. LAB. L. & POL'Y J .297, 297 (2001) (stating that “it reaches up to 100% of the net wage with German employers bearing approximately 40% gross payroll costs during maternity leave”).

²⁸³ Germany, The Sixth State Report to the Committee on the Elimination of All Forms of Discrimination Against Women, Oct. 22, 2007, CEDAW/C/DEU/6 at 7 (stating that “[a] decisive step in this direction was taken with the introduction of a system of income-related parental allowances (Elterngeld) on 1 January 2007”).

²⁸⁴ *Id.* (stating that “It replaced the previous system of child-raising allowances (Erziehungsgeld).”).

²⁸⁵ *Id.* at 18 (stating that “It is intended to compensate for at least 67 percent of the net sum of earned income lost by the parent who cares for the child during its first year.”).

²⁸⁶ *Id.* (stating that “For people with low incomes, monthly net earnings of less than 1000 Euros before the birth of the child, the substitution rate is raised incrementally to a level of 100 percent, and all parents who are entitled to parental allowances will receive a minimum of 300 euros.”)

²⁸⁷ *Id.*

²⁸⁸ *Id.*

²⁸⁹ Germany, The Sixth State Report to the Committee on the Elimination of All Forms of Discrimination Against Women, Oct. 22, 2007, CEDAW/C/DEU/6, at 47 (stating that “Women earn 78 percent of what men earn.”).

²⁹⁰ *Id.* at 18 (stating that “This parental allowance can be claimed for the first 14 months of the child’s life. If two parents are available to care for the child, neither of them is allowed to receive a parental allowance for longer than 12 months, hence the entitlement to at least two months’ parental allowance is reserved for the other partner, provided that she or he reduces the amount of time spent working.”).

could take part in childcare. Legislators felt that assigning particular months to men would help them to utilize the system more often than before.

In contrast to the original purpose of realizing gender equality, those two additional months created a discriminatory impact on women's status as workers and men's status as caregivers. The parental benefits were available for only one parent at a time and full remuneration was not guaranteed for the loss of income. Because of the prevailing gender wage gap, fathers were more likely to apply for only two so that the individual household could maximize its economic efficiency.²⁹¹ Therefore, the introduction of the new system could not achieve the original policy goal to realize gender equality in reconciliation of work and childcare.

The fundamental reason of the adverse impact was the gender specific perspective that Germany maintained with respect to the months available for parents claiming the benefits. Germany could have provided fourteen months of parental benefits without any segregation between twelve months and two months. By providing two additional months only if the other spouse should participate in childcare, Germany fixed the period that men would practically apply for parental allowances. As a result, Germany limited men's opportunities to participate in childcare to two months in comparison to twelve months for women. If Germany had been seriously concerned about the disproportionate share of childcare between men and women, it could have divided the period into six months for women and six months for men. If Germany wanted to provide a longer period of parental allowances, it could have provided a longer period for each spouse.

In response to these criticisms of the new system, the supporters of the income-related system may argue that the adjustment for actual income and the introduction of the two additional months brought about an increase in men's participation in childcare. In fact, the statistical evidence shows that men started to apply for the parental benefits increasingly more than before the new system was introduced in Germany.²⁹²

However, an increase in the total proportion of male applicants does not guarantee that the new system brought about the ultimate gender equality in reconciling work and childcare. The statistical evidence shows that men usually apply for two fathers' months whereas women take advantage of the full period of twelve months.²⁹³ The final

²⁹¹ Federal Statistical office, Parental Allowances-A First Look Back, Oct. 28, 2008, available at http://www.destatis.de/jetspeed/portal/cms/Sites/destatis/Internet/EN/Content/Publikationen/STATmagazin/SocialBenefits/2008_10/2008_10ParentalAllowance.templateId=renderPrint.psml (last visited on Jan. 21, 2009) (stating that "While about 562,000 mothers (87%) intended to claim parental allowance for a period of twelve months, the relevant share of fathers was only 13,000 (13%). The majority of fathers decided to claim parental allowance for two months (approximately 67,000 or 65%). As regards mother, however, only 1 % of them (7,000) took a parental leave of two months.").

²⁹² Between January 2007 and June 2008, the parental allowances were granted to 752,000. One hundred and three thousand applications were submitted by fathers (14%) and 649,000 by mothers (86%). See Federal Statistical Office, Parental Allowance-A First Look Back, Oct. 28, 2008, available at http://www.destatis.de/jetspeed/portal/cms/Sites/destatis/Internet/EN/Content/Publikationen/STATmagazin/SocialBenefits/2008_10/2008_10ParentalAllowance.templateId=renderPrint.psml (last visited on Jan. 21, 2009); Germany, The Sixth State Report to the Committee on the Elimination of All Forms of Discrimination Against Women, CEDAW/C/DEU/6, 22 Oct. 22, 2007 at 81 (stating that "Concerning fathers taking parental leave, it can be noted that the proportion of fathers taking parental leave since the amendment to the Act on the Granting of Child-Raising Allowances and Child-Raising Leave, on 1 January 2001, has increased from roughly 2.5% to 5%.").

²⁹³ Federal Statistical office, Parental Allowances-A First Look Back, Oct. 28, 2008, available at <http://www.destatis.de/jetspeed/portal/cms/Sites/destatis/Internet/EN/Content/Publikationen/STATmagazin>

consequence of the fathers' months was the segregation of father's leave and mother's leave. The result was contrary to the original legislative intent to equalize the circumstances under which, men and women could apply for the parental benefits system.

Germany initially provided maternity leave and benefits only to secure that mothers' and children's health conditions would not be threatened by women's participation in the workplace. The voluntary period of the prenatal leave and the compulsory period of the postnatal leave were supported with partial remuneration from the health insurance system and the remainder from the employer. The employer's portion was eventually reimbursed with federal tax dollars. The maternity leave and benefits were adopted to protect the health conditions of women and children, and Germany is still concerned about the physical hardships that women may suffer by participating in the workplace before or after childbirth.

Focused on women and children's health, Germany neglected the adverse impact that women would experience in terms of gender equality. Because the prohibited period after childbirth did not let individual women to decide whether to work or not, women who wished to work instead of staying at home could not do so. Even without maternity leave exclusive to women, Germany could have protected women's reproductive by accommodating the health conditions by regular medical leave applicable to men and women in equal terms. Therefore, the current system in Germany failed to recognize gender equality as the primary policy goal to achieve with its leave system.

In response to the ratification of the CEDAW, Germany introduced the parental leave and benefits system available for either parent. The system was subsequently revised to increase the period of leave and benefits. Finally, an individual could take leave for up to three years and the benefits were available for up to two years. The introduction of this new system broke away from the old mindset that only women would engage in childcare.

However, because the parental benefit was available for only one parent at a time and the benefit did not reflect the actual loss of income, the gender wage gap obstructed men from taking advantage of the new system. To rectify this problem, Germany adopted a parental leave and allowance system which reflected the actual loss of income and even provided a certain period of parental allowances particularly for men. Even when Germany introduced a parental allowance system which compensated for 67% of the loss of income and provided two months of benefits exclusively for fathers, it still did not realize gender equality because it did not provide full remuneration and did not abandon the gender specific perspective towards the area of reconciliation of work and childcare.

The ultimate solution of the disparate impact on women's status as workers and men's status as caregivers would be to provide a gender neutral parental leave system without maternity leave exclusive to women and to guarantee full remuneration. Germany focused on the extension of the period of leave available for individuals to take

[/SocialBenefits/2008_10/2008_10ParentalAllowance.templateId=renderPrint.psml](#) (last visited on Jan. 21, 2009) (stating that "While about 562,000 mothers (87%) intended to claim parental allowance for a period of twelve months, the relevant share of fathers was only 13,000 (13%). The majority of fathers decided to claim parental allowance for two months (approximately 67,000 or 65%). As regards mother, however, only 1 % of them (7,000) took a parental leave of two months.").

care of children throughout its legislative history. However, if it had been sincerely concerned about equal opportunities that men and women to participate in childcare, it should have considered individual choice as the most important policy goal to achieve with its legislative amendments. To ensure that individuals could enjoy the equal opportunities for childcare regardless of sex, Germany should have provided a uniform parental leave system without maternity leave and secured full remuneration. Without these two preconditions, Germany will not achieve gender equality in its parental leave and allowances system.

IV. Conclusion

South Korea currently fails to realize gender equality in reconciling work and childcare because it maintains maternity leave exclusive to women and lacks financial support for parental leave. South Korea limits women's right to work because it obligates employers to pay women on maternity leave and prohibits women from working after childbirth. It also limits men's right to childcare because it lacks financial support for parental leave.

The experience in the United States and Germany provides that a gender neutral parental leave system with full remuneration is an ideal model for South Korea to achieve gender equality. The gender neutral parental leave system of the U.S. system is an ideal model for gender equality. In addition, the German system which reflects actual lost income is required to effectuate the gender neutral parental leave system as an antidiscrimination regime. However, the German system does not guarantee full remuneration. Instead, it provides only partial remuneration. Considering the gender wage gap and sex role stereotyping, full remuneration is an important precondition for the gender neutral parental leave system to function as an antidiscrimination regime. Therefore, a gender neutral parental leave system with full remuneration is an ideal legislative model for South Korea to realize gender equality in reconciling work and childcare.