

## **Normative Issues of the Public Pension in Germany**

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### **1. Outline of the German Pension System**

#### **1.1 Structure of the system**

The central old-age pension system in Germany was established as social insurance at the end of the 19<sup>th</sup> century<sup>1</sup> and until this day chiefly covers employees<sup>2</sup>. The system provides parallel coverage of invalidity and old age, although invalidity was originally in the foreground. Civil servants and the self-employed have their own pension schemes<sup>3</sup>. In the following, the main emphasis is placed on employee social insurance. Social insurance is geared to earned income, which forms the basis for the amount of both contribution payments and benefits. In that respect, it constitutes a uniform system. Social insurance pensions may be augmented by supplementary occupational pension benefits and private forms of retirement provision (1.7)

#### **1.2 Basic character of the pension system**

As a branch of social insurance, the statutory pension system has the function of replacing prior earned income. Given that contributions and benefits are oriented to the income earned throughout entire working life, the system is not designed for the award of a basic pension. This strict reference to income is nevertheless somewhat attenuated by the selective recognition of creditable periods during which specific, statutorily defined activities were carried out (training, child-raising periods, military service, etc.).

According to the insurance-based equivalence principle, statutory pension insurance cannot guarantee a minimum pension. If the awarded pension does not suffice to secure the necessities of life, the subsidiary, tax-financed social assistance scheme is called upon to intervene.

#### **1.3 Unit of pension benefits**

The link to earned income requires that pension benefits be related to the individual insured and not his or her household. As far as the prerequisites are fulfilled, several persons living together in a household can be entitled to the receipt of social insurance pensions. The varying needs of one- or multiple-person households are not taken

into account upon determining benefit amounts<sup>4</sup>.

#### **1.4 Coverage**

Statutory pension insurance originally covered only low-income employees<sup>5</sup>. In the course of time, it was extended to all employees as well as other groups of persons, such as self-employed persons with low earnings and craftsmen. Up until this day, however, the system does not provide universal coverage as self-employed groups and civil servants have their own pension schemes<sup>6</sup>.

#### **1.5 Regulation and level of benefits**

Pension benefits awarded in the event of old age, invalidity and death (to the survivors) depend on the length of the insured period and on the level of compulsorily insured earnings on which contributions were paid. Contribution-free periods are accounted for on a narrow scale.

The pension received by an average earner after 45 years of coverage (net standard pension) amounted to 69.1 percent of net average income in 2002, after deduction of health and long-term care insurance contributions<sup>7</sup>.

#### **1.6 Regulation and level of contributions**

Contributions are calculated on the basis of earned income. Since 1 January 2003, the contribution rate has been fixed at 19.5 percent, half of which is borne by the employer and the employee respectively. Contributions are levied only up to the income limit for the assessment of contributions which is index-linked to the increase in average earnings. The income limit for the assessment of contributions was set at €3,000 a year for western Germany in 2006<sup>8</sup>.

#### **1.7 Additional pension schemes**

Statutory pensions can be augmented by occupational pension benefits and/or private forms of retirement provision, notably life insurances. Such supplementary schemes do not come to bear in all cases as they are not mandatory. Consequently, a large proportion of employees receive no additional pension.

Benefits received under occupational pension

schemes and through private provision moreover vary substantially in terms of amount.

The state promotes additional provision for old age. That applies in particular to personal forms of retirement provision backed by the so-called “Riester” incentives (named after the former federal minister of labour and social affairs). These incentives are geared to the establishment of fully funded private pensions, which are to compensate for the lowering of the state pension level. Yet these “Riester” pensions, too, are not obligatory<sup>9</sup>.

## **2. Avoid poverty in old-age**

### **2.1 Problematic nature of poverty lines**

Every social insurance system, and especially pension insurance, aims to protect people from poverty<sup>10</sup>. How poverty is to be defined and assessed, is, however, dealt with in different ways on both the international and national level.

As far as the individual is concerned, old-age pensions serve to secure the necessities of life in the event of old age. The necessities of life differ according to the living conditions. With respect to very simple living conditions they are defined in terms of money, the level of which may be taken as the poverty threshold. In German Social Assistance, the poverty line is assessed this way<sup>11</sup>.

On the international level, nominal income limits are of little significance with the economic conditions and the living conditions differing from country to country. That is why relative indicators are used, making the median a point of reference, and fixing the poverty line as a percentage thereof (e.g. 40 or 50%). There is, however, a possibility that in a country with a very high average income, a person with a relatively high individual income may already fall below the poverty line.

### **2.2 Other minimum limits regarding old-age provision**

Besides securing the necessities of life also other circumstances may speak well for benefits and services not to fall short of certain limits, a fact which especially applies to contribution-based pension schemes.

(1) In order to be accepted, a pension scheme which is mainly financed via contributions paid by the insured, as it is the case in Germany, must take care that an equivalence ratio between benefits and contributions is maintained, and that the total

amount of contributions does not exceed the total amount of benefits<sup>12</sup>. Consequently, the minimum pension level is predefined though it is not easy to fix it in terms of amount.

(2) The difficult financial situation of old-age social protection can result in a lowering of the pension level, which is also the case in Germany<sup>13</sup>. Consequently, the pension level of a pensioner earning an average income during a long working life may lie little above the level of social assistance or may even reach it or fall short of it. This seriously challenges the credibility and the acceptance of contribution-based insurance systems, as the same pension level will also be reached without paying contributions<sup>14</sup>. Querying the purpose of paying contributions will entail a further erosion of the contribution systems by trying to avoid or minimize contribution payments. This again calls for a limit to be imposed on the decline of pension levels without being able to fix an exact amount beforehand<sup>15</sup>.

### **2.3 Structure and function of the present public pension system**

As pointed out in the introduction (1), standard old-age protection was established as a pension insurance system for employees with contributions being oriented to earned income, and benefits to the amount and the duration of contribution payments. Such systems are not designed for the award of guaranteed, needs-oriented basic pensions. Individual measures modifying the insurance principle in terms of “justice of needs” will not alter this general statement.

The pension is to assure the standard of living<sup>16</sup>. This is, however, only possible if at least an average income has been earned and working life has not been interrupted. However, with the changing employment behaviour this objective is often not being achieved these days.

In addition, the burden resulting from the demographic development is not only borne by those paying the (higher) contributions but also by those receiving the (lower) pensions according to the newly restructured pension formula<sup>17</sup>. When the pension level decreases, there is a risk that the pension might no longer suffice to cover the necessities of life. In this case social assistance must interfere and provide a primary benefit in terms of a needs-based pension supplement in old age and

in the event of reduced earning capacity (see 2.7 below).

#### **2.4 Elements involving a modification of the insurance principle**

As pointed out above, social (i.e. pension) insurance does not provide for a basic pension. According to the insurance principle, unsteady and low incomes only account for low qualifying periods. To counteract, the insurance principle has been subjected to a number of modifications which allow for accrued vested rights even in the case of no or low income.

This concerns especially

- (1) periods, during which social benefits are received, children are raised or unpaid home nursing care is provided and no or a low income is earned. In this case contributions are paid by a third party, i.e. by the social insurance institutions (e.g. the employment offices) or the federal government (for child-raising periods)<sup>18</sup>.
- (2) certain periods (e.g. periods of vocational training and education or periods due to events of war) when no contributions are paid. These periods are credited as contribution-free periods when calculating the pension. They improve pension entitlements and increase the amount of pension paid out<sup>19</sup>.
- (3) In order to compensate for the low income earned by women in the past, the so-called minimum income pension was introduced, upgrading the actual earnings in case they were too low to reach a certain pension level<sup>20</sup>. This regulation was valid until 1991. Being restricted in terms of time and with respect to the subject-matter, this regulation cannot be considered as a basis for a basic pension.

#### **2.5 Claims for minimum protection in old age**

Numerous suggestions have been made for a minimum protection being provided within the scope of public pension insurance<sup>21</sup>. Others propose an entire reorganisation of old-age protection by creating a mandatory pension insurance for all citizens (Staatsbürgerversicherung) which can be complemented by personal forms of old-age provision<sup>22</sup>. In this context the Swiss scheme is often referred to, which is characterized by relatively high basic pensions financed via contributions

paid by all citizens (without any contribution assessment limit), and a mandatory occupational scheme<sup>23</sup>.

Whether the German constitution calls for minimum pensions to be paid out within the public pension scheme is disputed<sup>24</sup>. Securing basic needs in old age derives from the welfare state principle and the protection of human dignity (art. 1 GG). The constitution does, however, not say in what form such state protection has to be provided. It needn't necessarily be provided by standard old-age pensions (public pension insurance) but can also be provided by social assistance serving as a "risk absorber".

Moreover it is discussed whether pension adjustments (to price trends) and/or income developments are protected under the constitution. The Federal Social Court dealt with the problem in a decision of 31/07/2002<sup>25</sup> thereby drawing especially on art. 14 GG (constitution), as well as the freedom of making individual provision stated in art. 2 GG, and the principle of fairness under the rule of law. The Federal Social Court derives from the guarantee of property stated in art. 14 GG a constitutionally protected right of the pensioner to protect acquired rights against inflation without taking, however, account of future sources of income<sup>26</sup>. If the Federal Constitutional Court held the same view, pension cuts would no longer be possible and thus a certain minimum level guaranteed. Art. 14 GG is also consulted when total contribution payments are compared to total pension benefits paid out. However, also in this respect, a legal clarification is still missing.

#### **2.6 Securing the pension level by personal forms of old-age provision**

Complementing the public pension by company pension plans (2<sup>nd</sup> pillar) and private forms of retirement provision (3<sup>rd</sup> pillar) has been stipulated by social policy for a long time and has partly materialized. In Germany the old-age property law (Altersvermögensgesetz) of 26/06/2001<sup>27</sup> provides for a state-promoted, capital funded private pension, which is to compensate for the lowering of the pension level in the years to come<sup>28</sup>. State incentives are based on the lowering of the pension level. This private pension, named after the former Federal Minister of Labour and Social Affairs, Riester, is, however, not obligatory. That

means that only those of the insured will be compensated for the lowering of the pension level who opt for this kind of retirement pension. In spite of the wide-ranging state incentives which especially come to bear for insured persons rearing children, persons with low incomes who are particularly in need of pension supplements, should often not draw on this kind of private pension<sup>29</sup>.

### **2.7 The role of public assistance in the public pension**

There is a possibility that in the German old-age pension system, which consists of a great number of different individual schemes, a person or a group of persons might not at all be covered. In Germany social assistance provides a last safety net to protect these persons. In addition, according to the insurance principle, the standard pension insurance for employees, i.e. the public pension insurance, will only provide a sufficient pension if a certain number and amount of contributions have been paid. If the insurance has been interrupted or if low contributions have been paid, this will have an effect on the pension. This means that pension amounts may fall below the benefits paid by social assistance. If poverty is to be prevented in old age, these pensions must be supplemented by social assistance<sup>30</sup>.

In the past the number of people who were on supplementary benefits was rather low. In 1999 only about 184000 pensioners out of 14 million did receive assistance towards living expenses<sup>31</sup>. Even if an estimated number of unreported cases is added knowing that not all needy persons claim their entitlement (bashful poverty), it can be observed that pension insurance in the past achieved its aim to avoid poverty in old age to a large extent. Owing to the problems old-age protection has to face, the situation will change and social assistance will assume more and more importance with respect to supplementary benefits<sup>32</sup>.

Social assistance, originally known under the name of "Fürsorge" (welfare), was regulated in the Federal Social Assistance Act (BSHG) and comprehensively conceived for the well-being of the entire population. It used to be divided into assistance towards living expenses and assistance in special circumstances. Benefits were needs-based, assets, income and maintenance claims had to be called upon before claiming benefits under social

assistance.

Before the pension reform of 2001<sup>33</sup>, the general provisions under the social assistance legislation and especially those concerning the assistance towards living expenses also applied to pensioners. Hence, pensioners could only claim supplementary benefits to complement their pensions if their children were not under obligation to provide maintenance for them. To avoid these cases of bashful poverty and to improve the situation of those who lack sufficient protection in old age, a law on needs-based pension supplements in old age and in the event of reduced earning capacity ("Gesetz über eine bedarfsorientierte Grundsicherung im Alter und bei Erwerbsminderung") was created on 26/06/2001<sup>34</sup>. This law underwent several modifications before it was incorporated into §§ 41 - 46 of Book Twelve of the Social Code (SGB XII) which makes up the legislation on social assistance<sup>35</sup>. The objective of this new legislation is to cover the minimum needed to maintain a socially acceptable living standard in old age and in the event of disabilities via an independent social security scheme if income and savings fall short. The new benefits are similar to social assistance in many ways but show also new features. One of them especially concerns the regulation on assets and maintenance claims (SGB XII, § 43). Unlike the former legislation on social assistance, no recourse will be made to a claimant's children or parents with respect to maintenance if their annual income does not exceed 100000 € Having recourse to children or parents will hence be the exception. The regulation saying that the income of persons under the obligation of maintenance will presumably not exceed the 100000-Euro limit also contributes to this fact. Here the principle of social assistance legislation is considerably modified with respect to being assigned lower priority. There is a possibility that pension supplements in old age and in the event of reduced earning capacity might turn into a general minimum old-age protection in the course of a further reform, and will hence emancipate from social assistance legislation<sup>36</sup>.

The old-age pension reform of 2001 especially focused on (1) pension adjustments, (2) state incentives for private forms of retirement provision, (3) the revision of old-age protection for women, and (4) the implementation of a basic protection

(for details, see Ruland, Rentenversicherung nach der Reform – vor der Reform [the public pension prior to and after the reform], NZS 2001, 393 et sqq. (396 et seq.)).

In this connection the survivors' pension was modified with a child aspect being added to the system. Thus, surviving dependants having reared children will be paid a supplement of two earning points for the first child raised and of one earning point for each additional child (§ 78a [1], sent. 1 SGB VI). The surviving spouse's other income in excess of an exempt amount will be deducted from the widow's or widower's pension. The exempt amounts are linked to the current pension amounts and are thus dynamic in order to especially prevent deterioration in the old-age protection of women having raised children. As a consequence of the reform, many widows and widowers raising several children with one spouse dying after 2001 will be better off than those to whom the previous law applies.

What is also new, is that widows or widowers who have been married for less than a year will not be granted a survivors' pension. If the marriage lasts less than a year, it will be refutably presumed that it was arranged with claiming a survivors' pension in mind (§ 46 [2a] SGB VI).

### **3. Family and the Pension System**

#### **3.1 Family Status in the Pension System**

The national social insurance, the normal old-age security system for employees, which is at the center of this paper, is focusing on the individual person rather than on the family or household; and this is also true for the other parts of the old-age security system. Consequently, it is irrelevant for the obligation to insure and for the amount of contributions and benefits, whether the concerned person is married, has to take care of a partner or children, or lives in a household with other persons.

Within the framework of the social pension insurance, the existence of a marriage does not become significant until the marriage is dissolved (Versorgungsausgleich - statutory equalization) or until the spouse dies and leaves behind relatives entitled to support (spouses and / or children) (Hinterbliebenenrente - survivors' pension). In this context, the question needs to be asked whether statutory equalization and survivors' pensions

require the existence of an effective marriage or whether that of a non-marital life partnership would be considered as a valid reason for raising claims<sup>37</sup>. The life partnership act (LPartG – Gesetz ueber die eingetragene Lebenspartnerschaft) of 2001, as amended effective January 1, 2005, places these partnerships largely on an equal footing with marriages<sup>38</sup>, provided they meet the legal requirement of registration. In particular, the statutory equalization is applicable also to this type of partnerships (§ 20 LPartG). The term marriage or family has insofar been considerably expanded<sup>39</sup>.

### **3.2 Maintenance Adjustment by Divorce and Pension Benefits**

#### **3.2.1 Maintenance Regulations during Marriage**

While married, both partners have the obligation to provide maintenance, i.e. they are obligated to contribute to the shared life<sup>40</sup>. The social insurance pensions are also part of the income to be used for this purpose. Insofar as one social insurance pension is the only income, it has to be used to defray the cost of living, while it may become necessary to add funds from the public assistance program.

The gainfully employed spouse is not legally obliged to prepare for old age by providing for old-age security of the partner who is not gainfully employed but managing the household. The situation is different in the event of a separation starting from the moment the divorce procedures are pending before a court. In this case, § 1361 BGB (Buergerliches Gesetzbuch – Civil Code) stipulates preparation for old age by providing maintenance (this also applies after the divorce according to § 1578 [3] BGB). Any proposals to institute an obligation of this type to provide for old age during an existing marriage have not yet been taken up by the legislators.

#### **3.2.2 Maintenance after Divorce**

After a divorce, an obligation to provide maintenance may continue to exist between the spouses and this maintenance would be based on the respective need and ability (§ 1569 BGB), but not on the degree of guilt for the failure of the marriage. An obligation to provide maintenance becomes particularly relevant in cases of child care, of old age, sickness, infirmity, or unemployment (§§ 1570-1573 BGB).

All income, therefore including social insurance pensions, has to be taken into consideration for the assessment of need and ability. Insofar as a former spouse has no income<sup>41</sup>, while the other receives an old-age pension, this may lead to an obligation to pay maintenance, if one of the conditions of a maintenance obligation exists. In the event that the person having the obligation to provide maintenance dies, no further maintenance payments will be made. An earlier law required that in cases of this kind a so-called alimony / widow's pension be paid by the social insurance – though under very stringent conditions – in order to replace the right of maintenance claims. The introduction of the statutory equalization resulted in the termination of this alimony / widow's pension.

### **3.2.3 Apportionment of Assets and Liabilities in the Event of Divorce**

If a marriage is dissolved, an apportionment of assets and liabilities usually takes place. The question of whether this will occur depends on the respective matrimonial property regime. In the event that no agreement has been made wherein, for example, a separation of property is stipulated, the statutory matrimonial property regime in the form of the equalization of accrued gains will prevail, whereby the assets acquired by each of the two spouses in the course of their marriage are summed up and one half of the difference will be assigned to the partner who has acquired less assets during the marriage (§§ 1363, 1378 BGB). Old-age pensions and vested rights to such pensions are not subject to the equalization of accrued gains, but rather to the statutory equalization (see also below in 3.3).

## **3.3 Pension Splitting (Versorgungsausgleich - Statutory Equalization)**

### **3.3.1 Function of the Statutory Equalization**

The statutory equalization is intended, in the case of a divorce, to equalize the vested support rights acquired by the two spouses, insofar in analogy to the equalization of accrued gains from the asset growth; at the same time, the economic situation of the spouse entitled to the equalization – most often the wife – is to be improved in case of old age or disability. This becomes necessary due to the fact that the economically dependent spouse is

secure as he/she receives maintenance during the marriage. If the other spouse dies, this maintenance is replaced by a survivors' pension. In the event of a divorce, a claim to maintenance exists only in special cases of need and is discontinued if the former spouse having the obligation to provide maintenance passes away. When the surviving former spouse enters old age or becomes disabled, they have to rely on their own old-age security claims. These claims will be low if the person did not – e.g. because of child rearing - have regular gainful employment<sup>42</sup>. In the case of a divorce, these pensions can be increased by pension splitting. Insofar, the statutory equalization has not only the function of equalization, but also that of support<sup>43</sup>.

### **3.3.2 Basic Structures of the Statutory Equalization**

The statutory equalization was not gradually developed by court decisions, as happened in Japan, but was instituted by the legislator as a new legal arrangement in the form of the first marital law reform act passed in the year 1976 and entered into force on July 1, 1977. The statutory equalization is intended to achieve an equal participation of two spouses in the support entitlements which were acquired in the course of the marriage and served the purpose of securing maintenance during old age and during times of reduced earning capacity<sup>44</sup>. This is implemented within the framework of the divorce procedures by the family courts who assess the vested support rights acquired during the last period of marriage, make them comparable, and then sum them up. The equalization for the vested rights of the statutory social pension insurance occurs by means of a splitting, meaning that units of value in the amount of the vested equalization rights are deducted from the social insurance pension account of the person obliged to provide equalization and allocated to the account of the person entitled to equalization<sup>45</sup>.

Different forms of equalization are provided by law for other types of vested rights.

In particular when vested rights to equalization have not yet become non-forfeitable, an immediate equalization at the time of the divorce is not possible. This is why, aside from the value equalization, a different form of equalization, i.e. the statutory equalization governed by the law of

obligations, is provided. This statutory equalization governed by the law of obligations is not applied until the vested rights to support have become due and payable claims. The person entitled to the equalization then has the right to an equalization claim governed by the law of obligations in the amount of the equalization value. Should the right to support cease to exist due to the death of the recipient, the claim to equalization will also end legally. This shows that the equalization governed by the law of obligations is weaker than the equalization of support governed by public law in the form of a splitting.

### **3.3.3 Problems with the Implementation of the Legislative Concept**

In principle, the concept of the legislator is reasonably self-critical and consistent. Vested rights to support are to be divided among the spouses just like property rights. In practice however, the implementation is fraught with considerable difficulties which have led to numerous corrections by the legislator, frequently on the basis of objections from the Federal Constitutional Court<sup>46</sup>.

- One essential reason for the complexity of the statutory equalization is the fact that - largely based on the principle of equal treatment of article 3 GG (Grundgesetz – constitution) - all vested rights under the old-age security system are to be included. In view of the diversity of the various parts of the old-age security system in the realm of the normal and the supplementary security systems, this stipulation creates innumerable problems for the evaluation and the division of vested rights. Just think of the inclusion of foreign vested rights in the equalization<sup>47</sup>.
- Other difficulties arise from the fact that the statutory equalization is associated with a particular point in time – the end of the marriage period<sup>48</sup>. Even if the time of decision may come at a later date, one cannot exclude the possibility that the vested rights and the entitlements develop differently than was projected at the time of the decision. This again leads to the necessity of a correction of equalization decisions which is an extremely difficult process<sup>49</sup>.
- The differentiation between static and dynamic vested rights has proven to be particularly problematic, because the dynamic is referenced to

greatly differing issues (development of wages and salaries, development of prices, etc.). Moreover, it is uncertain whether an accepted dynamic will become reality, as shown within the last few years by the example of the statutory social insurance pension, where the assumed wage and salary dynamic did not occur in actuality<sup>50</sup>.

- Due to the complications in the calculation and the execution of pension splitting, a growing number of cases are left to the statutory equalization governed by the law of obligations. This type of equalization, however, is in many respects less favourable than the value equalization governed by public law in the form of splitting. With the statutory equalization governed by the law of obligations, the person entitled to the equalization has to ensure the collection, thus being forced to deal with the person obliged to provide equalization for years and decades to come. Furthermore, the statutory equalization governed by the law of obligations expires with the death of the person obliged to provide equalization.
- The statutory equalization is a legal arrangement of family law with social law-related elements. Therefore, family law and social law should cooperate seamlessly. This is not always ensured. In one example, the equalization – exceptionally – is implemented by means of a capital sum, though most often the recipient has no economically meaningful way of using this amount within the framework of the social security law. Insofar, this person's only recourse is the private life insurance.

### **3.3.4 Continuous Reform Process**

The described difficulties - though mentioned only briefly – have the effect that the legal arrangement of statutory equalization is subject to a continuous reform process. This again leads to a further increase of the complexity and thus still and for this very reason the failure to reach the goal of a just equalization which was to be achieved by this continuous refinement.

It should therefore be seriously considered whether it wouldn't make sense to further develop the features which make a simplified equalization possible. Very small vested rights might then be ignored. In addition, more generous room for

agreements could lead to decisions providing a just solution in individual cases. However, the discussion about a basic reform has not yet reached its conclusion in Germany<sup>51</sup>.

### **3.4 Evaluation of Unpaid Work in a Family within the Pension System**

#### **3.4.1 Point of Departure**

As the old-age security system for workers and employees is based on contributions and knows no basic pension, it is inevitable for any unpaid family activity to have negative effects on the amount of the respective old-age security pension. These effects quite predominantly affect women who due to child rearing and household management still today perform most of the family work. For this reason, the separate old-age security system for women has for decades been a social-political postulate<sup>52</sup>. Nevertheless, in spite of an overwhelming array of reform proposals, the basic problems, though mitigated by a series of measures, still have not yet been solved. One approach to the mitigation of the effects lies in the consideration of family work within the social insurance law (see 3.4.2) as well as in special conditions for the social insurance pension that are linked to family issues (see also below in 3.4.3).

#### **3.4.2 Consideration of Family Times in the Social Pension Insurance**

Insofar, periods spent bringing up children are of particular significance. A maximum of one year is calculated for births occurred before 1992, while three years are allowed for births after 1992 (§§ 56, 249 I SGB VI – Sozialgesetzbuch – Social Code)<sup>53</sup>. This compulsory insurance is triggered by the fact that child rearing occurred. The compulsory insurance begins no earlier than with the lapse of the birth month and ends no later than after 12 or 36 calendar months, respectively. In the event that several children are reared at the same time, the insurance for the second and each additional child is extended by the number of calendar months during which several children were reared simultaneously. The child rearing period is recognized only for children brought up within the country and only for mothers or fathers normally living there. The citizenship of the child or the parents is of no significance in this context. In principle, this insurance period is assigned to the

mother unless the parents jointly decide to have the periods assigned to the father. Multiple insurances exist in cases where child rearing periods coincide with other contributory periods<sup>54</sup>.

The contributions for the child rearing periods are effected from the federal budget (§ 177 SGB VI – Sozialgesetzbuch – Social Code)<sup>55</sup>. The child rearing periods are by now calculated as if the entitled person had received an average income during the three years, i.e. they will be assigned one point of the personal income index per year. Thus, starting from July 1, 2003, one year of child rearing raises the social security pension by € 26.13 per month<sup>56</sup>. The respective person's own contributions made during the child rearing period are added in up to the contribution ceiling, i.e. they do not decrease the value of the child rearing period. Insofar, the legislator has chosen the additive solution. The child rearing periods are in every respect considered equal to mandatory contributions. They are taken into account for the qualifying period so that a woman who was not gainfully employed and has raised two children since 1992 will receive an age-related social security pension for this reason alone.

One additional activity – aside from child rearing – leading to insurance periods of the statutory social insurance is care-giving which however may also occur outside of the family. Caregivers are insured by virtue of the law (§ 44 SGB XI). This insurance is contingent upon care given to a person entitled to benefits from the social and private long-term care insurances. The care cannot be provided on a commercial basis and has to take up at least 14 hours per week within the home area of the person needing the care. Care-giving will not be considered a commercial activity just because the person needing the care forwards the money received for the care partially or entirely to the caregiver. Insofar as individual persons are exempt from insurance as recipients of an age-related full retirement pension or of a civil servant's retirement pension after reaching the age of retirement, this is applicable to care-giving periods as well. A recipient of a social security pension taking care of her elderly husband thus cannot thereby acquire additional vested rights to social security pension payments.

The accumulation of care-giving periods and contributory periods is limited only by the fact that

caregivers are no longer insured when they regularly are gainfully employed for more than 30 hours per week. In the event that several persons receive care, the result may be multiple insurance up to the contribution ceiling. If a person needing care receives care jointly from several caregivers, these are insured proportionally (§ 166 [2], sent. 2 SGB VI)<sup>57</sup>.

### 3.4.3 Benefits of the Social Pension Insurance as Related to the Existence of Family

The existence of a family can also be considered under the social pension insurance, since special benefit cases are referenced to certain family-related conditions. The most important example in this context is the survivors' pension, although its significance is decreasing, in particular, due to the inclusion of income from other sources into the calculation of the survivors' pension. On the other hand, the existence of child rearing remains significant for the amount of the survivors' pension<sup>58</sup>.

A further family-related insurance case is the so-called child rearing pension. This child rearing pension was introduced by the first marital law reform act. A spouse divorced after June 30, 1977 who did not remarry will receive the child rearing pension after the death of their former spouse for the period during which the respective spouse raised their own child or a child of the divorced spouse, if the general qualifying period of 60 months was completed before the death of the divorced spouse (§ 47 SGB VI)<sup>59</sup>.

### 3.5 Result: Transitional Situation

The current legal situation with respect to the significance of the family for the social security insurance is to a certain extent a transitional situation. On the one hand, there is the tendency to create and develop a separate old-age security system for spouses, for example, based on the statutory equalization, on child rearing periods, etc. On the other hand, there are still consequential insurance benefits linked to the status of the spouse, such as above all the survivors' pensions. We will probably have to expect these programs to continue to exist side by side for the near future<sup>60</sup>

Germany *Fisch/ Haerendel* (eds.), *Geschichte und Gegenwart der Rentenversicherung in Deutschland*; see also [www.bmas.bund.de](http://www.bmas.bund.de).

<sup>2</sup> *Ruland*, in: *von Maydell/ Ruland* (eds.), SRH, C 16 Rdnr. 1.

<sup>3</sup> *Battis*, in: *Cramer/ Förster/ Ruland* (eds.), *Handbuch zur Altersversorgung*, pp. 117 et sqq.

<sup>4</sup> About the basic principles of pension insurance *Ruland*, in: *von Maydell/ Ruland* (eds.), SRH, C 16 Rdnrn 12 et sqq.

<sup>5</sup> *Döring, Diether*, in: *Fisch/ Haerendel* (eds.), *Geschichte und Gegenwart der Rentenversicherung in Deutschland*, pp. 169 et sqq. (169).

<sup>6</sup> Detailed *Cramer/ Förster/ Ruland*, *Handbuch zur Altersversorgung*; *Roth*, ZRP 2004, 154 et sqq.

<sup>7</sup> *Ruland*, in: *von Maydell/ Ruland* (eds.), SRH, C 16 Rdnr. 2 m. w. N.; numbers can also be find at [www.deutsche-rentenversicherung.de](http://www.deutsche-rentenversicherung.de) (Nov. 2006); *Steinmeyer*, RdA 2005, 345 et sqq. (345).

<sup>8</sup> *Ruland*, in: *von Maydell/ Ruland* (eds.), SRH, C 16 Rdnr. 1.

<sup>9</sup> Zur sog. Riester-Rente *Öchsner* (eds.), *Riester-Rente*; *Richter*, IStR 2006, 429 et sqq.; *Zermin*, *Handbuch Altersvorsorge*, pp. 21 et sqq.; *Blomeyer*, NZA 2001, 913 et sqq.

<sup>10</sup> Zur Familienarmut *Borchert*, in: *Boecken/ Ruland/ Steinmeyer* (eds.), *Sozialrecht und Sozialpolitik*, pp. 109 et sqq.

<sup>11</sup> About prevention of poverty see *Lenze*, *Staatsbürgerversicherung und Verfassung*, pp. 203 et sqq.

<sup>12</sup> *Ruland*, in: *von Maydell/ Ruland* (eds.), SRH, C 16 Rdnrn 29 et sqq.; *Färber*, in: *Fisch/ Haerendel* (eds.), *Geschichte und Gegenwart der Rentenversicherung*, pp. 333 et sqq.

<sup>13</sup> *Steinmeyer*, RdA 2005, 345 et sqq.

<sup>14</sup> See *Schmähl*, BKK 2005, 312 et sqq.; *Schmähl*, in: *BfA* (eds.), *Gesundheits- und Alterssicherung 2004*, pp. 1 et sqq.

<sup>15</sup> See *Heinze*, ZRP 2004, 275; *Roth*, ZRP 2004, 154 et sqq.

<sup>16</sup> See *Köbl*, in: *Boecken/ Ruland/ Steinmeyer* (eds.), *Sozialrecht und Sozialpolitik*, pp. 321 et sqq. with the example of orphan's pension.

<sup>17</sup> *Steiner*, NZS 2004, 505 et sqq.

<sup>18</sup> *Ruland*, in: *von Maydell/ Ruland* (eds.), SRH, C

<sup>1</sup> Detailed about history of pension insurance in

- 16 Rdnrn 38 et sqq.; *Meyer/ Blüggel*, NZS 2005, 1 et sqq.; *Karuth*, Kindererziehungszeiten in der gesetzlichen Rentenversicherung; *Kirchhoff/ Kilger*, NJW 2005, 101 et sqq.; *Berghahn*, FPR 2005, 508 et sqq.
- <sup>19</sup> *Meyer/ Blüggel*, NZS 2005, 1 et sqq. (2 et sqq.).
- <sup>20</sup> *Ruland*, in: *von Maydell/ Ruland* (eds.), SRH, C 16 Rdnr. 43.
- <sup>21</sup> *Kreikebohm*, in: Lexikon des Rechts, Sozialrecht 11/535.
- <sup>22</sup> *Lenze*, Staatsbürgerversicherung und Verfassung,.
- <sup>23</sup> *Schmid*, in: *Cramer/ Förster/ Ruland*, Handbuch zur Altersversorgung, pp. 1153 et sqq.
- <sup>24</sup> *Heinze*, ZRP 2004, 275 f.; *Roth*, ZRP 2004, 154 et sqq.
- <sup>25</sup> Az: B 4 RA 120/00 R.
- <sup>26</sup> About this decision *Lenze*, NZS 2003, 505 et sqq.; about future pensions BVerfG, Urteil vom 28. 2. 1980 = BVerfGE 53, 257 (289 et sqq.); BSG, Vorlagebeschluss vom 16. 11. 2000 – B 4 RA 3/00 R.
- <sup>27</sup> BGBl. I, S. 1310; *Steinmeyer*, in: *Boecken/ Ruland/ Steinmeyer*, (eds.), Sozialrecht und Sozialpolitik, pp. 683 et sqq.
- <sup>28</sup> See *Ruland*, NZS 2002, 505 et sqq. (506).
- <sup>29</sup> *Von Maydell*, in: *Münsterische Sozialrechtsvereinigung e. V.* (eds.): Reformen in der privaten und betrieblichen Altersvorsorge pp. 1 et sqq.; *Richter*, IStR 2006, 429 et sqq.; *Zermin*, Handbuch Altersvorsorge, pp. 21 et sqq.
- <sup>30</sup> *Lenze*, Staatsbürgerversicherung und Verfassung, pp. 203 et sqq.; 224 et sqq.; 461.
- <sup>31</sup> *Ruland*, in: *von Maydell/ Ruland* (eds.), SRH, C 16 Rdnrn 255 et sqq.
- <sup>32</sup> *Zermin*, Handbuch Altersvorsorge, S. 311 et sqq.; *Blomeyer*, NZA 2001, 913 et sqq. (914 et sqq.).
- <sup>33</sup> About reform of pension insurance see *Ruland*, NZS 2002, 505 et sqq.; *Lenze*, NZS 2003, 505 et sqq.; *Ruland*, NJW 2001, 3505 et sqq.
- <sup>34</sup> BGBl. I, p. 1310; *Kötter*, FPR 2004, 689 et sqq.; *Mayer*, ZEV 2003, 173 et sqq.; *von Koppenfels-Spies*, FPR 2003, 341 et sqq.
- <sup>35</sup> See *Schellhorn*, in: *Schellhorn/ Schellhorn/ Hohm*, Kommentar zum SGB XII, Teil A: Einführung; *Schellhorn*, in: *Boecken/ Ruland/ Steinmeyer* (eds.), Sozialrecht und Sozialpolitik, pp. 595 et sqq.
- <sup>36</sup> *Schnitker/ Grau*, NJW 2005, 10 et sqq.; *Flanze*, NZA-Beilage 2006, 21 et sqq.; *Klemm*, NZA 2006, 946 et sqq.
- <sup>37</sup> *Hohnerlein*, FPR 2001, 49 et sqq.
- <sup>38</sup> See *Kemper*, FPR 2003, 1 et sqq-.
- <sup>39</sup> See *Kemper*, FPR 2003, 1 et sqq.; *Epple*, FPR 2005, 305 et sqq.; *Reinecke*, FPR 2001, 56 et sqq.; *Hohnerlein*, FPR 2001, 49 et sqq.
- <sup>40</sup> § 1353 Abs. 1 Satz 2 BGB.
- <sup>41</sup> See *Berghahn/ Wersig*, FPR 2005, 508 et sqq. (509 et sqq.).
- <sup>42</sup> *Karuth*, Kindererziehungszeiten in der gesetzlichen Rentenversicherung; *Berghahn/ Wersig*, FPR 2005, 508 et sqq.; *Kirchhoff/ Kilger*, NJW 2005, 101 et sqq.
- <sup>43</sup> See about the basic structure of *Maydell*, FamRZ 1977, 172 et sqq.; actually *Bergner*, NJW 2006, 2157 et sqq.; *Brudermüller*, NJW 2006, 3184 et sqq.
- <sup>44</sup> Detailed *Creifelds*, Rechtswörterbuch, pp. 1515 et sqq.; BVerfG, NJW 2006, 2175 et sqq.; BVerfG, NJW 2006, 2177 et sqq.; also detailed *Ruland*, in: *Boecken/ Ruland/ Steinmeyer* (eds.), Sozialrecht und Sozialpolitik, pp. 575 et sqq.
- <sup>45</sup> See BGH, FPR 2003, 439 et sqq.; BGH, FPR 2003, 238 et sqq.
- <sup>46</sup> See *Bergner*, NJW 2006, 2157 et sqq.; *Bergner*, NJW 2005, 2751 et sqq.; *Brudermüller*, NJW 2006, 3184 et sqq.; BVerfG, NJW 2006, 2175 et sqq.; BVerfG, NJW 2006, 2177 et sqq.
- <sup>47</sup> *Schmeiduch*, NZS 2006, 240 et sqq.; about changes BGH, NJW-RR 2006, 2 et sqq.
- <sup>48</sup> *Brudermüller*, NJW 2006, 3184 et sqq. (3185).
- <sup>49</sup> BGH, FPR 2003, 439 et sqq.; BGH, FPR 2003, 238 et sqq.
- <sup>50</sup> *Bergner*, NJW 2005, 2751 et sqq. (2753).
- <sup>51</sup> *Ruland*, NZS 2001, 393 et sqq.; *Lenze*, Staatsbürgerversicherung und Verfassung; *Ruland/ Dünn*, NZS 2005, 113 et sqq.; for further figures *Flanze*, NZA-Beilage 2006, 21 et sqq.
- <sup>52</sup> *Ruland*, FamRZ 2001, 129 et sqq.; *Mascher*, SozSich 2001, 89 et sqq.; *Ruland*, NJW 2001, 3505 et sqq. (3508); *von Maydell*, Die Neuordnung der sozialen Alterssicherung der Frau.
- <sup>53</sup> *Hirsch*, in: LPK-SGB VI, § 56 Rdnrn 3 et sqq.; *Hirsch*, in: LPK-SGB VI, § 249 Rdnrn 3 et sqq.
- <sup>54</sup> See *Rolfs*, NZS 1998, 551 et sqq.; *Karuth*, Kindererziehungszeiten in der gesetzlichen

- Rentenversicherung.
- <sup>55</sup> *Reinhardt*, in: LPK-SGB VI, § 177 Rdnr. 2.
- <sup>56</sup> This factor is adapted as well as the pension, see *Ruland*, GK-SGB VI Einleitung Rdnr. 172.
- <sup>57</sup> *Reinhardt*, in: LPK-SGB VI, § 166 Rdnrn 4 et sqq.
- <sup>58</sup> *Karuth*, Kindererziehungszeiten in der gesetzlichen Rentenversicherung; *Berghahn/Wersig*, FPR 2005, 508 et sqq.; *Kirchhoff/Kilger*, NJW 2005, 101 et sqq.
- <sup>59</sup> *Quinten*, in: LPK-SGB VI, § 47 Rdnrn 2, 4 et sqq.
- <sup>60</sup> See also *Lenze/Zuleeg*, NZS 2006, 456 et sqq.;
- Steiner*, NZS 2004, 505 et sqq. (506); *Schmähl*, in: *Fisch/Haerendel* (eds.), *Geschichte und Gegenwart der Rentenversicherung*, pp. 351 et sqq.; *Döring*, in: *Fisch/Haerendel* (eds.), *Geschichte und Gegenwart der Rentenversicherung*, pp. 169 et sqq.; *Ruland*, in: *Cramer/Förster/Ruland* (eds.), *Handbuch zur Altersversorgung*, pp. 935 et sqq.
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