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The Protection of Mothers in British and German Constitutional Law: A Comparative Analysis and a Contribution to the Implementation of the European Convention on Human Rights in the Domestic Legal Area

By Diana Zacharias[*]

A. Introduction

The universal and regional systems of human rights protection recognize that mothers find themselves in situations which require special protection. For instance, Article 10 para. 2 of the International Covenant on Economic, Social and Cultural Rights stipulates that special protection should be accorded to mothers during a reasonable period before and after childbirth and that during such period working mothers should be accorded paid leave or leave with adequate social security benefits.

Article 11 para. 2 of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) reads, *inter alia*, that, in order to prevent discrimination against women on the grounds of maternity and to ensure their effective right to work, States Parties shall take appropriate measures to prohibit, subject to the imposition of sanctions, dismissal on the grounds of pregnancy or of maternity leave. Additionally, States Parties are to provide maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances, as well as special protection to women during pregnancy in types of work proved to be harmful to them. Moreover, Article 12 para. 2 of the CEDAW provides that States Parties shall ensure women appropriate services related to pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation. Several provisions aiming at the protection of mothers in the working sphere are also included in the three ILO Maternity Protection Conventions.[1] The

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[1] *See* E. Abena Antwi, *Women in the World of Work: After Eighty-Six Years, Has the International Labour Organization Done Enough to Promote Equality?*, 31 N.C.J. INT'L L. & COM. REG. 793, 800-804 (2006); A. Mlinar, FRAUENRECHTE ALS MENSCHENRECHTE 100-102 (1997); S. Fredman, WOMEN AND THE LAW 182 (1997).

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ILO Convention No. 183 requires, for example, that pregnant and nursing women are not obliged to do types of work that would prove detrimental to their health or to their children's health. Furthermore, it provides for a fourteen-week maternity leave and preserves a woman's right to her job in case complications in her pregnancy arise (cf. Articles 3 to 5).[2]

Especially, international humanitarian law contains a series of norms governing the protections available to mothers. Article 38 No. 5 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), in the context of the treatment of refugees, reads that pregnant women and mothers of children under seven years shall benefit by any preferential treatment to the same extent as the nationals of the State concerned.[3] In regard to interned persons in times of conflict, Article 89 para. 5 of the Convention stipulates that expectant and nursing mothers shall be given additional food, in proportion to their physiological needs. Moreover, Article 91 para. 2 of the Convention provides for adequate treatment in maternity cases. According to Article 127 para. 3 of the Convention, maternity cases shall not be transferred if the journey would be seriously detrimental to the mother, unless her safety imperatively so demands. Article 132 para. 2 of the Convention states that the Parties to a conflict shall, during the course of hostilities, attempt to agree to the release, and the return to places of residence or accommodation in a neutral country of pregnant women and mothers with infants. The Additional Protocol to the Geneva Convention and Relating to the Protection of Victims of International Armed Conflict (First Additional Protocol) provides in its Article 70 that in distributing humanitarian aid to the civilian population priority must be given to expectant mothers, maternity cases and nursing mothers, among others. Article 76 para. 2 reads that pregnant women and mothers with dependent infants who are arrested, detained or interned for reasons related to the armed conflict, shall have their cases considered with the utmost priority. Furthermore, Article 6 para. 4 of the Additional Protocol to the Geneva Convention and Relating to the Protection of Victims of Non-International Armed

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[2] *See also* L. J. Wiseman, *A Place for "Maternity" in the Global Workplace. International Case Studies and Recommendations for International Labor Policy*, 28 OHIO NORTHERN UNIVERSITY LAW REVIEW 195-229 (2001); A. Masselot, *Jurisprudential Developments in Community Pregnancy and Maternity Rights*, 9 MAASTRICHT JOURNAL OF EUROPEAN AND COMPARATIVE LAW 57-66 (2002).

[3] For more details about women in refugee law, *see* J. Bucherer, *Frauen und Flüchtlingsrecht*, *in* FRAUEN UND VÖLKERRECHT. ZUR EINWIRKUNG VON FRAUENRECHTEN UND FRAUENINTERESSEN AUF DAS VÖLKERRECHT 171-187 (B. Rudolf ed., 2006); T. S. Roeder, *Frauen als Flüchtlinge: Entwicklungen im Zusammenhang mit der Genfer Flüchtlingskonvention und der Arbeit von UNHCR*, *in* DIE VEREINTEN NATIONEN UND NEUERE ENTWICKLUNGEN DER FRAUENRECHTE 427-476 (S. von Schorlemer ed., 2007). With regards to recent work on the status of women in international humanitarian law in general, *see* S. Schmahl, *Die Stellung von Frauen im humanitären Völkerrecht*, *in* GENDER UND INTERNATIONALES RECHT 171-198 (A. Zimmermann & T. Giegerich eds., 2007).

Conflict (Second Additional Protocol) stipulates that the death penalty shall not be carried out on pregnant women or mothers of young children.

The European human rights instruments do not explicitly mention the protection of mothers in regard to regional protection systems. The American Declaration of the Rights and Duties of Man is more direct; it stipulates in its Article 7 that all women, during pregnancy and the nursing period, have the right to special protection, care and aid.

In light of mothers being protected by such a variety of norms on the international level, this comment will examine the extent that the idea of special protection of mothers has found its way into the domestic constitutional law of Great Britain as a Common Law country and Germany as a representative of the family of Continental European countries. Thereby, the similarities and differences will be presented. Moreover, the article will be a contribution to the European Convention on Human Rights with regard to the two legal systems, which has consequences for the prevailing human rights situation.

B. The Constitutional Protection of Mothers in Great Britain

I. The British Constitution and the Human Rights Act 1998

To speak about a constitutional protection of mothers in Great Britain might, at first, sounds contradictory since there does not exist a written document titled "Constitution" in contemporary British law. However, the United Kingdom has a Constitution which differs from the Constitutions in Central Europe in form, and to a certain extent, also in content. This difference has been acknowledged since Albert Venn Dicey's "Introduction to the Study of the Law of the Constitution" (1885) and Walter Bagehot's "The English Constitution" (1867).[4]

Moreover, Lord Justice Sir John Laws, in his famous *obiter dicta* in *Thoburn v. Sunderland City Council*[5] argued that there were *constitutional statutes* in the United Kingdom. Constitutional statutes could be distinguished from ordinary statutes. Laws explained that a constitutional statute was one which conditions the legal relationship between citizen and State in some general, overarching manner, or

[4] *See* M. Loughlin, *Grundlagen und Grundzüge staatlichen Verfassungsrechts: Großbritannien*, HANDBUCH IUS PUBLICUM EUROPAEUM, VOL. 1, 217, 229-234 (paragraphs 28-40) (A. von Bogdandy, P. Cruz Villalón & P. M. Huber eds., 2007), R. Grote, *Die Inkorporierung der Europäischen Menschenrechtskonvention in das britische Recht durch den Human Rights Act 1998*, 58 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT (ZaöRV) 309 (1998).

[5] EWHC 195 (2002) (paragraphs 60, 62 and 69).

enlarges or diminishes the scope of what is regarded as a fundamental constitutional right. The constitutional statutes possessed a superior status in British law and they were not suitable for implied repeal. Thus, the common law has developed a layer of law which can qualify as constitutional law. Laws held that the European Communities Act 1998 belonged to constitutional law. In the supporting legal literature it is asserted that the Magna Carta, in its 1215 version, the Bill of Rights 1688/89, the Act of Settlement 1701, the Parliament Act 1911 and the Human Rights Act 1998 also had the status of constitutional statutes.[6]

The Human Rights Act 1998 (HRA 1998), enacted in 2000, is presently heavily attacked by a couple of politicians who claim that its provisions were not adequate for the fight against terrorism and, therefore, want to abolish it in favour of a new and less generous Bill of Rights.[7] The HRA 1998 provides for direct enforcement in domestic law of the rights guaranteed by the European Convention on Human Rights (ECHR), which had been ratified by Great Britain but had not been implemented in the British legal area before. Since Great Britain follows a dualistic approach to international law,[8] the Convention did not automatically become part of British law.

The HRA 1998 makes it "unlawful for a public authority to act in a way which is incompatible with a Convention right" (Section 6 subsection 1). Thereby, the term "public authority" is defined in Section 6 subsections 3 and 4 of the Act. It includes any representative of a central or local governmental body, in particular the police, and the courts and tribunals, which are quasi-judicial institutions.[9] In regard to Articles 8 and 10 of the ECHR, the House of Lords explained that the reason for this broad definition[10] was that human rights had *horizontal effects* towards private persons, for instance, press organ and citizen, who could bring their disputes to the courts so

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[6] *See* P. Birkinshaw & M. Künnecke, *Offene Staatlichkeit: Großbritannien*, *in* HANDBUCH IUS PUBLICUM EUROPAEUM, VOL. 2, 107, 123 (paragraph 38) with references (A. von Bogdandy, P. Cruz Villalón, P. M. Huber eds., 2008); focusing only on the Human Rights Act of 1998: D. Morris, *The Human Rights Act 1998: Too Many Loose Ends?*, 21 STATUTE LAW REVIEW 104, 117-119 (2000).

[7] For example, *see* "Cameron 'could scrap' rights act", *in* BBC News of 25 June 2006, available at http://news.bbc.co.uk/1/hi/uk_politics/5114102.stm; W. Woodward, *Cameron promises UK bill of rights to replace Human Rights Act*, Guardian Unlimited of 26 June 2006, available at http://politics.guardian.co.uk/conservatives/story/0,,1805902,00.html (both articles last visited 12 September 2007).

[8] G. Kleve & B. Schirmer, *England und Wales*, *in* VERWALTUNGSRECHT IN EUROPA, VOL. 1, 35, 70 (J.P. Schneider ed., 2007).

[9] MORRIS, *supra* note 6, 104, 114-116.

[10] P. Chandran, A GUIDE TO THE HUMAN RIGHTS ACT 1998 40-41 (1999).

that they are solved there.[11] The courts and tribunals are also required to "take into account" any judgment, decision, declaration or advisory opinion of the European Court of Human Rights (Section 2 subsection 1 (a) HRA 1998). Thus, courts and tribunals are not bound by the jurisdiction of the European Court of Human Rights;[12] the European Court of Human Rights' jurisdiction is only regarded as "persuasive authority".[13]

The Houses of Parliament and any person exercising functions in connection with proceedings in Parliament are exempted from the definition of "public authority" (see Section 6 subsection 3 at the end HRA 1998). Notwithstanding, Section 3 of the HRA 1998 requires all legislation to be interpreted "in a way which is compatible with the Convention rights". This imposes a powerful interpretative obligation on the judiciary, which runs contrary to the literalistic methods adopted by the courts for much of the twentieth century.[14] But the HRA 1998 seeks to preserve the formal principle of parliamentary sovereignty. Consequently, if legislation cannot be interpreted in such a manner as to render it compatible with the Convention rights, the courts are not authorized to strike it down. Instead, under Section 4 of the HRA 1998, courts may issue a declaration of incompatibility, the effect of which is simply giving a signal that the legislation is not compatible with the Convention rights. The relevant provision remains in force, although under Section 10 of the HRA 1998 the Government is authorized to use a fast-track procedure for bringing forward legislation to ensure compatibility. Given that the HRA 1998 strengthens the capacity of the courts to protect basic rights, it is clearly of constitutional significance.[15] More generally, however, the HRA 1998 is of constitutional significance in indicating a fundamental shift that was already taking place in the juristic reconstruction of constitutional arrangements. Since the court is a public authority for the purpose of the HRA 1998, judges are now obliged to develop the common law in conformity with the basic rights. This provides a further impetus to the general rights approach that the British courts had been developing in particular over the previous decade.[16]

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[11] *Michael Douglas, Catherine Zeta-Jones, Northern Shell plc v. Hello! Ltd*., 2 WLR 992 (2001).

[12] D. Bonner & C. Graham, *The Human Rights Act 1998: The Story So Far*, 8 EUROPEAN PUBLIC LAW 177, 183 (2002); J. Alder, CONSTITUTIONAL LAW AND ADMINISTRATIVE LAW 431 (5th ed., 2005).

[13] GROTE, *supra* note 4, 309, 339.

[14] M. J. Beloff, *What Does It All Mean?*, *in* THE HUMAN RIGHTS ACT 1998: WHAT IT MEANS. THE INCORPORATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS INTO THE LEGAL ORDER OF THE UNITED KINGDOM 11, 28 (L. Betten ed., 1999).

[15] J. Wadham, H. Mountfield, A. Edmundson & C. Gallagher, BLACKSTONE'S GUIDE TO THE HUMAN RIGHTS ACT 1998 51 (4th ed., 2007).

[16] LOUGHLIN, *supra* note 4, 217, 262 (paragraph 84); M. Hunt, USING HUMAN RIGHTS IN ENGLISH COURTS (1997).

Eventually, individuals and organizations under the HRA 1998 are entitled to claim a violation of human rights enshrined in the ECHR in any procedure before any court in Great Britain.[17] To examine the constitutional protection of mothers, it is thus necessary to turn to the provisions of the ECHR, to its interpretation by the European Court of Human Rights and to the relevant jurisdiction of British courts.

II. The Protection of Mothers under the European Convention on Human Rights

The starting point for the innominate protection of mothers in the ECHR are Articles 8, 12 and 14. Article 8 para. 1 of the ECHR guarantees everyone the right to respect for his family life. The right to family life means, in essence, the right to life in proximity as a family so that family ties can develop normally.[18] The central family relationships envisoined by the human rights provision are those between spouses and between parents and their children, although the protected sphere, according to the view held by the European Court of Human Rights and by legal literature, goes far beyond.[19] For example, the relationship between mother and child, even if the child is unborn[20] or illegitimate,[21] is protected.[22] This extends primarily to the natural mother since the

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[17] BIRKINSHAW & KÜNNECKE, *supra* note 6, 107, 128 (paragraph 49).

[18] J. Coppel, THE HUMAN RIGHTS ACT 1998: ENFORCING THE EUROPEAN CONVENTION IN THE DOMESTIC COURTS 282 (paragraph 10.10) (1999); *see* generally J. Liddy, *The Concept of Family Life under the ECHR*, 3 EUROPEAN HUMAN RIGHTS LAW REVIEW 5-25 (1998).

[19] *See* for example Eur. Court H.R., *Marckx v. Belgium*, Judgment of 13 June 1979, Series A No. 31, 6 EUGRZ 454 (paragraph 31) (1979); Eur. Court H.R., *Johnston et. al. v. Ireland*, Judgment of 18 December 1986, Series A, No. 112, 14 EUGRZ 313 (paragraph 55) (1987) *see* comments above; Eur. Court H.R., *Keegan v. Ireland,*.Judgment of 26 May 1994, Series A, No. 290, 22 EUGRZ 113 (paragraph 44) (1995) *see* comments above; Eur. Court H.R., *Elsholz v. Germany*, Judgment of 13 July 2000, Reports of Judgments and Decisions 2000-VIII 29 EUGRZ 595 (paragraph 43) (2002) *see* comments above; Eur. Court H.R., *Kroon et al. v. Netherlands*, Judgment of 27 October 1994, Series A, No. 297-C, (paragraph 30); Eur. Court H.R., *X., Y. and Z. v. United Kingdom*, Judgment of 22 April 1997 No. 21830/93, Reports of Judgments and Decisions 1997-II, 24 EHRR 143 (paragraph 36) (1997) *see* comments above; Eur. Court H.R., *Salgueiro da Silva Mouta v. Portugal* Judgment of 21 December 1999, Reports of Judgments and Decisions 1999-IX, 22; C. Grabenwarter, EUROPÄISCHE MENSCHENRECHTSKONVENTION 2ND ED. 183 (paragraph 16) (2005); P. De Hert, *Artikel 8: Recht on privacy*, *in* HANDBOEK EVRM, PART 2, VOL. 1, 705, 742-744 (J. Vande Lanotte & Y. Haeck eds., 2004); M. E. Villiger, *Expulsion and the Right to Respect for Private and Family Life (Article 8 of the Convention)*, *in* PROTECTING HUMAN RIGHTS: THE EUROPEAN DIMENSION – STUDIES IN HONOUR OF G. J. WIARDA 657, 658 (F. Matscher & H. Petzold eds., 1988); V. Coussirat-Coustère, *Famille et Convention Européenne des Droits de l'Homme*, *in* PROTECTION DES DROITS DE L'HOMME – LA PERSPECTIVE EUROPÉENNE. MÉLANGES À LA MÉMOIRE DE ROLV RYSSDAL 281, 288-289 (P. Mahoney et al. eds., 2000); M. Grigolo, *Sexualities and the ECHR: Introducing the Universal Sexual Legal Subject*, 14 EJIL 1023, 1037-1038 and 1042 (2003).

[20] *See*, for example, COPPEL, *supra* note 18, 284 (paragraph 10.12).

[21] Eur. Court H.R., *Marckx v. Belgium*, Judgment of 13 June 1979, Series A 31, 6 EUGRZ 454 (paragraph 31) (1979); *see* further X. Arzoz Santisteban, *Articulo 8: Derecho al respeto de la vida privada y familiar*, *in* CONVENIO EUROPEO DE DERECHOS HUMANOS 254, 300-301 (I. Lasagabaster Herrarte ed., 2004); M. E.

Court takes the view that birth, *i.e.* the biological tie between mother and child, naturally, creates family life in the sense of Article 8 para. 1 of the ECHR.[23] However, the ECHR does not exclude protection for a relationship between a child and a non-natural parent,[24] for example, a foster mother can fall within the scope of the provision.[25] Article 8 para. 1 of the ECHR, however, gives a mere relationship right; it does not target the mother as such or rather her maternity status.

In its attempt to respect family life as envisioned by Article 8 para. 1 of the ECHR, the Convention requires that the family can live a common life, corresponding to the bindings which exist *inter se*.[26] As the European Court of Human Rights in its permanent jurisdiction holds, the being-together of parent(s) and child is not only a basic part of family life but also one of the objectives pursued by Article 8 ECHR. This is so even if the relation between the parents is broken up.[27] Thus, Article 8 para. 1 of the ECHR gives the parent who is not entitled to custody, even if this person is the mother, the right to visits and contacts with his or her child. Moreover, this right can be exercised by the natural father even in cases where the child is in the mother's custody and the mother does not want him having contact with the child.[28] If the child

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VILLIGER, HANDBUCH DER EUROPÄISCHEN MENSCHENRECHTSKONVENTION 366 (paragraph 572) (2nd ed., 1999).

[22] P. van Dijk & G. J. H. van Hoof, THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 504 (3rd ed, 1998); DE HERT, *supra* note 19, 746-748 (paragraph 29); S. Grosz, J. Beatson & P. Duffy, HUMAN RIGHTS: THE 1998 ACT AND THE EUROPEAN CONVENTION 270 (paragraph 17) (2000).

[23] Eur. Court H.R., *Marckx v. Belgium*, Judgment of 13 June 1979, Series A, No. 31, 6 EUGRZ 454 (paragraph 31) (1979).

[24] *See* Eur. Court H.R, *X., Y. and Z. v. United Kingdom*, Judgment of 22 April 1997 No. 21830/93, Reports of Judgments and Decisions 1997-II 619, 24 EHRR 143 (paragraph 37) (1997); Eur. Court H.R., *Söderbäck v. Sweden*, Judgment of 28 October 1998, Reports of Judgments and Decisions 1998-VII, paragraph 33.

[25] GRABENWARTER, *supra* note 19, 184 (paragraph 18); J. F. Kjølbro, DEN EUROPÆISKE MENNESKERETTIGHEDSKONVENTION 440 (2005); R. de Mello, HUMAN RIGHTS ACT 1998 119 (2000); the question whether the foster mother is protected by Article 8 ECHR was let open with regard to "family life" but scrutinized under "private life" in a the case where a foster mother for years had a child in her care and had reached an intense relationship with it by European Commission of Human Rights, *X. v. Switzerland*, Judgment of 10 July 1978 No. 8257/78, 13 DECISIONS AND REPORTS 248, 253 (1979).

[26] *See*, I. Fahrenhorst, FAMILIENRECHT UND EUROPÄISCHE MENSCHENRECHTSKONVENTION 282 (1994).

[27] Eur. Court H.R., *Johansen v. Norway*, Judgment of 7 August 1996, Report of Judgments and Decisions 1996-III, 52; Eur. Court H.R., *Bronda v. Italy*, Judgment of 9 June 1998, Report of Judgments and Decisions 1998-IV, 51; Eur. Court H.R., *Elsholz v. Germany*, Judgment of 13 July 2000, Report of Judgments and Decisions 2000-VIII, 29 EUGRZ 595 (paragraph 43) (2002); GROSZ ET AL., *supra* note 22, 273-274 (paragraph 24).

[28] *See* European Commission of Human Rights, *X. v. Germany*, Judgment of 2 May 1978, No. 7770/77, 14 DECISIONS AND REPORTS 175, 176 (1980); L. Wildhaber, *Article 8*, *in* INTERNATIONALER KOMMENTAR ZUR

is taken into public care, Article 8 of the ECHR demands that the choice of accommodation and its basic circumstances must meet certain standards; in particular the child must not be given into the custody of someone already convicted for the ill-treatment and abuse of persons entrusted to his care, and the public authority must put a time-limit on the care order.[29] Furthermore, the provision guarantees the parent(s) that sufficient and suitable measures are taken with regard to the reunion of the family.[30] This includes instituting visiting rules and enabling contact *via* letter and telephone in a way which is suitable for fostering a positive development of the relationship between parent(s) and child.[31]

Infringements in the right to family life are to be qualified by state measures which prevent the living together or being-together of parent(s) and child.[32] Such measures can be, *inter alia,* decisions concerning the right to custody for or contact with a child or placing the child into public care.[33] Article 8 para. 1 of the ECHR does not grant one parent in particular, a preference right at the expense of the other parent with regard to awarding custody of the child.[34] Thus, measures granting custody and contact rights in favour of one parent always amount to an infringement in the right to family life of the other parent.[35] Furthermore, decisions about care, for instance, the

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EUROPÄISCHEN MENSCHENRECHTSKONVENTION, 145 (paragraph 400) (loose-leaf book, W. Karl ed., state: August 2007); S. Breitenmoser, DER SCHUTZ DER PRIVATSPHÄRE GEMÄß ART. 8 EMRK 120 (1986); A. Brötel, DER ANSPRUCH AUF ACHTUNG DES FAMILIENLEBENS 318 (1991).

[29] Eur. Court H.R., *Scozzari and Giunta v. Italy*, Judgment of 13 July 2000, Report of Judgments and Decisions 2000-VIII, 201-216; *see also* Eur. Court H.R., *Olsson v. Sweden (No. 1)*, Judgment of 24 March 1988, Series A No. 130, 80; M. Palm-Risse, DER VÖLKERRECHTLICHE SCHUTZ VON EHE UND FAMILIE 276-278 (1990).

[30] J. A. Frowein, *Artikel 8 (Privat- und Familienleben)*, *in* EUROPÄISCHE MENSCHENRECHTSKONVENTION. KOMMENTAR. 337, 352 (paragraph 22) (2nd ed., J. A. Frowein & W. Peukert eds., 1996).

[31] Eur. Court H.R., *Eriksson v. Sweden*, Judgment of 22 June 1989, Series A, No. 156, paragraph 71; for analysis of this decision, *see* BRÖTEL, *supra* note 28, 403-409; *see also* Eur. Court H.R., *Andersson v. Sweden*, Judgment of 25 February 1992, Series A, No. 226-A 95; Eur. Court H.R., *Rieme v. Sweden*, Judgment of 22 April 1992, Series A, No. 226-B 69, 73; GROSZ ET AL., *supra* note 22, 276 (paragraph 29).

[32] Eur. Court H.R., *Johansen v. Norway*, Judgment of 7 August 1996, Report of Judgments and Decisions 1996-III, 52; Eur. Court H.R., *Bronda v. Italy*, Judgment of 9 June 1998, Report of Judgments and Decisions 1998-IV, 51; Eur. Court H.R., *Elsholz v. Germany*, Judgment of 13 July 2000, Report of Judgments and Decisions 2000-VIII, 29 EUGRZ 595 (paragraph 43) (2002). *See also* E. Benda, *Verkehrtes zum Verkehrsrecht*, 29 EUGRZ 1-3 (2002).

[33] GRABENWARTER, *supra* note 19, 190 (paragraph 27).

[34] VAN DIJK & VAN HOOF, *supra* note 22, 510.

[35] BREITENMOSER, *supra* note 28, 120; BRÖTEL, *supra* note 28, 189-190; PALM-RISSE, *supra* note 29, 276; WILDHABER, *supra* note 28, 143 (paragraph 400).

temporary or permanent accommodation of a child in a foster family or in a home or the release for adoption, are serious infringement of the parents' and child's right to family enshrined in Article 8 para. 1 of the ECHR.[36] Eventually, domestic decisions in the field of immigration law are often become subject to complaints with regard to the respect of the right to family life. Either the continuation of family life in the host country is impossible because of the deportation of one family member, or the refusal of entry of one family member prevents the (re-)establishment of the (territorial) family union.[37] According to the current jurisdiction of the European Court of Human Rights, in both situations one must assume an infringement of the right to family life protected by Article 8 para. 1 of the ECHR.[38]

According to Article 8 para. 2 of the ECHR, infringements of the right to family life can, however, be justified by sound reasons. In decisions about custody or contact rights, an adequate balance must be found between the interests of the child and those of the parent(s).[39] Thereby, the welfare of the child is always of particular importance; it can overweight the welfare of the parent(s) depending on the way it is concerned or rather threatened in each individual case.[40] The mother's interests, wishes or ideas are, thus, not of greater weight than the child's welfare. Also, no parent is entitled by Article 8 of the ECHR to claim measures which would impair the health or development of the child.[41] Moreover, since decisions about care, like the temporary or

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[36] GRABENWARTER, *supra* note 19, 190 (paragraph 27).

[37] *See* E. Wiederin, MIGRANTEN UND GRUNDRECHTE 11-15 (2003); FROWEIN, *supra* note 30, 337, 354-358 (paragraphs. 24-26); PALM-RISSE, *supra* note 29, 282-309; VILLIGER, *supra* note 19, 657, 659-660.

[38] *See* Eur. Court H.R., *Abdulaziz et al. v. United Kingdom*, Judgment of 28 May 1985, Series A, No. 94), 12 EUGRZ 567 (paragraph 68) (1985); Eur. Court H.R., *Boultif v. Switzerland*, Judgment of 2 August 2001, Report of Judgments and Decisions 2001-IX, 40; Eur. Court H.R., *Yilmaz v. Turkey*, Judgment of 17 April 2003 No. 52853/99, 36; FROWEIN, *supra* note 30, 337, 354-356 (paragraph 24).

[39] Eur. Court H.R., *Olsson v. Sweden (No. 2)*, Judgment of 27 November 1992, Series A, No. 250, 90; Eur. Court H.R., *Johansen v. Norway*, Judgment of 7 August 1996, Report of Judgments and Decisions 1996-III, 52; Eur. Court H.R., *Elsholz v. Germany*, Judgment of 13 July 2000, Report of Judgments and Decisions 2000-VIII, 29 EUGRZ 595 (paragraph 50) (2002). *See* VILLIGER, *supra* note 21, 367-368 (paragraphs 573-574).

[40] Eur. Court H.R., *Andersson v. Sweden*, Judgment of 25 February 1992, Series A, No. 226-A at 95; Eur. Court H.R., *Johansen v. Norway*, Judgment of 7 August 1996, Report of Judgments and Decisions 1996-III, 78; Eur. Court H.R., *Elsholz v. Germany*, Judgment of 13 July 2000, Report of Judgments and Decisions 2000-VIII, 29 EUGRZ 595 (paragraph 48) (2002); Eur. Court H.R. *Sommerfeld v. Germany*, Judgment of 8 July 2003, Report of Judgments and Decisions 2003-VIII, 64. *See also* BREITENMOSER, *supra* note 28, 121-122; WILDHABER, *supra* note 28, 143 (paragraph 401).

[41] Eur. Court H.R., *Johansen v. Norway*, Judgment of 7 August 1996,Report of Judgments and Decisions 1996-III, 78; Eur. Court H.R., *Elsholz v. Germany*, Judgment of 13 July 2000, Report of Judgments and Decisions 2000-VIII, 29 EUGRZ 595 (paragraph 50) (2002); Eur. Court H.R., *Scozzari and Giunta v. Italy*, Judgment of 13 July 2000, Report of Judgments and Decisions 2000-VIII, 169; Eur. Court H.R. (Grand

permanent accommodation of the child in a foster family or home or its release for adoption, are serious infringements of the parents' as well as of the child's right to family life, they must be carried out with reasonable and significant considerations in the interest of the child.[42] This is particularly true in situations of separation of mother and child immediately after birth. Such a separation can only be justified by urgent outstanding reasons.[43]

The measures concerning care must be planned as temporary ones;[44] they must end as soon as circumstances allow, in order to re-establish the original family unit.[45] Thus, any measures concerning care must be taken in a way that is compatible with the final goal of reuniting parent(s) and child.[46] Even after the separation of the family members, the natural parent(s) must be given the opportunity to have further contact with the child in public care. Failure to do so would create obstructions of ordinary access to each other and would weaken the connection between family members and the chance of a successful reunification of the family.[47]

In regard to the respect of the right to family life of foreigners, the ECHR does not guarantee foreigners a right to immigrate, to take residence or to be naturalized in a

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Chamber), *Sommerfeld v. Germany*, Judgment of 8 July 2003, Report of Judgments and Decisions 2003-VIII, 64.

[42] Eur. Court H.R., *Olsson v. Sweden (No. 1)*, Judgment of 24 March 1988, Series A, No. 130, 72; Eur. Court H.R., *Scozzari and Giunta v. Italy*, Judgment of 13 July 2000, Report of Judgments and Decisions 2000-VIII, 148; Eur. Court H.R., *K. and T. v. Finland*, Judgment of 12 July 2001, No. 25702/95, Report of Judgments and Decisions 2001-VII, 168; *see also* PALM-RISSE, *supra* note 29, 279-282.

[43] Eur. Court H.R., *P., C. and S. v. United Kingdom*, Judgment of 16 July 2002, No. 65647/00, Report of Judgments and Decisions 2002-VI, 116; Eur. Court H.R., *Haase v. Germany*, Judgment of 8 April 2004, No. 11057/02, 57 NJW 3401, 102 (2004).

[44] C. Bîrsan, CONVENȚIA EUROPEANĂ A DREPTURILOR OMULUI, VOL. 1, 638 (paragraph 169) (2005).

[45] E. Schumann, *Biologisches Band oder soziale Bindung? – Vorgaben der EMRK und des deutschen Rechts bei Pflegekindverhältnissen*, 54 RDJB 165, 167 (2006).

[46] Eur. Court H.R., *Olsson v. Sweden (No. 1)*, Judgment of 24 March 1988, Series A, No. 130, 81; Eur. Court H.R., *Scozzari and Giunta v. Italy*, Judgment of 13 July 2000, Report of Judgments and Decisions 2000-VIII, 169; Eur. Court H.R., *K. and T. v. Finland*, Judgment of 12 July 2001, No. 25702/95, Report of Judgments and Decisions 2001-VII, 178; Eur. Court H.R., *Kutzner v. Germany*, Judgment of 26 February 2002, Report of Judgments and Decisions 2002-I, 29 EUGRZ 244 (paragraph 76) (2002); Eur. Court H.R., *Covezzi and Morselli v. Italy*, Judgment of 9 May 2003, No. 52763/99 (paragraph 118).

[47] Eur. Court H.R., *Olsson v. Sweden (No. 1)*, Judgment of 24 March 1988, Series A, No. 130, 81; Eur. Court H.R., *Scozzari and Giunta v. Italy*, Judgment of 13 July 2000, Report of Judgments and Decisions 2000-VIII, 174. *See also* PALM-RISSE, *supra* note 29, 281.

certain State.[48] Nor does Article 8 of the ECHR stipulate a general obligation of the State to respect a married couple's choice of the family domicile or to accept that a family member who has a foreign nationality settles down in its territory.[49] However, based on the goal of effective protection of family life, States can be obliged to accept restrictions of their competencies in the field of immigration and residence law and to permit the immigration or residence of a foreign family member.[50] To determine the extent of the State's obligation the circumstances of the individual case must be considered.[51]

Further, Article 8 para. 1 of the ECHR does not give any privileged status to the mother. It protects the relationship between child and parent, be it the mother or the father. It does not recognize that the mother generally fulfils a special, outstanding function within the family, at least as initial provider and as bearer of the child. However, the effect of the provision is not limited to forcing the State to abstain from infringements of the right to family life. Rather, according to the jurisdiction of the European Court of Human Rights, the provision also contains positive obligations for the State. The State must, in general, take reasonable and adequate measures to ensure the rights of the citizen enshrined in Article 8 para. 1 of the ECHR.[52] This means, particularly with regard to the protection of family life, that the State must modify its domestic family law in a way that there does nor result any disadvantages for or discriminations against an illegitimate child or its family.[53] But the State, based on

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[48] Eur. Court H.R., *Boultif v. Switzerland*, Judgment of 2 August 2001, Report of Judgments and Decisions 2001-IX, 39; WADHAM ET AL., *supra* note 15, 171 (paragraph 8.385).

[49] Eur. Court H.R., *Abdulaziz et al. v. United Kingdom*, Judgment of 28 May 1985, Series A, No. 94, 12 EUGRZ 567 (paragraph 68) (1985); Eur. Court H.R., *Gül v. Switzerland*, Judgment of 19 February 1996, Report of Judgments and Decisions 1996-I, 38.

[50] *See also* Eur. Court H.R., *Abdulaziz et al. v. United Kingdom*, Judgment of 28 May 1985, Series A, No. 94, 12 EUGRZ 567 (paragraph 67) (1985); Eur. Court H.R., *Moustaquim v. Belgium*, Judgment of 18 February 1991, Series A, No. 193, 43; B. Weichselbaum, *Die Regelung des Familiennachzugs in Österreich im Lichte der Vorgaben der Europäischen Menschenrechtskonvention*, 23 ZAR 359, 361 (2003).

[51] Eur. Court H.R., *Gül v. Switzerland*, Judgment of 19 February 1996, Report of Judgments and Decisions 1996-I, 38; FROWEIN, *supra* note 30, 337, 357-358 (paragraph 26).

[52] *See*, for example., Eur. Court H.R., *Rees v. United Kingdom*, Judgment of 17 October 1986, Series A, No. 106, 37; Eur. Court H.R., *Powell and Rayner v. United Kingdom*, Judgment of 21 February 1990, Series A, No. 172, 41; Eur. Court H.R., *Guerra v. Italy*, Judgment of 19 February 1998, Report of Judgments and Decisions 1998-I, 58; Eur. Court H.R. (Grand Chamber), *Hatton et al. v. United Kingdom*, Judgment of 8 July 2003, Report of Judgments and Decisions 2003-VIII, 95; VAN DIJK & VAN HOOF, *supra* note 22, 534-535. *See also* BRÖTEL, *supra* note 28, 69-73; BÎRSAN, *supra* note 44, 595-596 (paragraph 10); COPPEL, *supra* note 18, 286-287 (paragraphs 10.19-10.22).

[53] *See* Eur. Court H.R., *Marckx v. Belgium*, Judgment of 13 June 1979, Series A, No. 31, 6 EUGRZ 454 (paragraph 45) (1979); Eur. Court H.R., *Johnston et al. v. Ireland*, Judgment of 18 December 1986, Series A,

Article 8 ECHR, is not obliged to support a mother, even if she has an illegitimate child, to an extent going beyond the support of other parents.

A provision in the context of Article 8 of the ECHR which might be established to be more likely in favour of mothers is Article 12 of the ECHR. That provision guarantees men and women of marriageable age the right to marry and to create a family. Both guarantees are substantially linked with each other,[54] although they have differentiable contents.[55] Thereby, the right to a family includes the right to father the female partner or to become pregnant, or to give birth to a child[56] or to adopt a child.[57] This right can be infringed, for instance, by rules about birth control, limitation of the number of allowed children, non-voluntary sterilisation or abortion, but also by restrictions concerning artificial reproduction and adoption.[58]

One could argue that the right to a family protects the mother, at least during pregnancy and birth of the child. However, Article 12 of the ECHR, according to a textual interpretation, guarantees the right to *become* a mother and not to *be* a mother. The provision only protects pregnancy as such but not the mother in her function as first provider and bearer of the child. The direction of protection is a different one. Furthermore, the European Commission of Human Rights understands the right to have a family, in essence, as a collective right of both partners. It holds, for example, that based on Article 12 of the ECHR adoption can only take place by a married couple, not by a single person.[59] Similarly, in a recent preliminary decision, which can

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No. 112, 14 EuGRZ 313 (paragraph 74) (1987); Eur. Court H.R. (Grand Chamber), *Sommerfeld v. Germany*, Judgment of 8 July 2003, Report of Judgments and Decisions 2003-VIII, 86.

[54] PALM-RISSE, *supra* note 29, 133-134.

[55] GRABENWARTER, *supra* note 19, 209 (paragraph 62).

[56] European Commission of Human Rights, *X. and Y. v. Switzerland*, Judgment of 3 October 1978, No. 8166/78, 13 DECISIONS AND REPORTS 241, 244 (1979); PALM-RISSE, *supra* note 29, 136.

[57] European Commission of Human Rights, *X. and Y. v. United Kingdom*, Judgment of 15 December 1977, No. 7229/75, 12 DECISIONS AND REPORTS 32, 34 (1978); European Commission of Human Rights, *X. v. Netherlands*, Judgment of 10 March 1981, No. 8896/80, 24 DECISIONS AND REPORTS 176, 177 (1981). *See also* KJØLBRO, *supra* note 25, 599; BÎRSAN, *supra* note 44, 855-856 (paragraph 31); DE MELLO, *supra* note 25, 165 (paragraph 2.212).

[58] GRABENWARTER, *supra* note 19, 210 (paragraph 63); VAN DIJK & VAN HOOF, *supra* note 22, 611; I. Fahrenhorst, *Fortpflanzungstechnologien und Europäische Menschenrechtskonvention*, 15 EuGRZ 125-131 (1988).

[59] European Commission of Human Rights, *X. v. Belgium and Netherlands*, Judgment of 10 December 1975, No. 6482/74, 7 DECISIONS AND REPORTS 75, 77 (1977); European Commission of Human Rights, *Di Lazzaro v. Italy*, Judgment of 10 July 1997, No. 31924/96, 90-B DECISIONS AND REPORTS 134, 139 (1997). *See also* M. Kirilova Eriksson, THE RIGHT TO MARRY AND TO FOUND A FAMILY 153 (1990).

rightly be discussed controversially, the European Court of Human Rights argued that a woman whose eggs, before a medical treatment against cancer, which would cause infertility, had been taken out and fertilized by the sperm of her then-spouse and frozen for a later use, cannot claim that the eggs are to be implanted in her uterus if the former partner has meanwhile revoked his consent to such a procedure.[60] Thus, the Court also seems to interpret the notion of "family" in Article 12 of the ECHR in a narrower sense than in Article 8 para. 1 of the ECHR. The notion in Article 12 of the ECHR does not only refer to the relationship between (one) parent and child but refers to *two* parents, at least in the phase of family creation. It is questionable whether the view of the Court and of the Commission is current, given the changing social understanding of what constitutes marriage and family, in particular whether the scope of Article 12 of the ECHR should not be extended to single persons, both men and women,[61] or unmarried couples.[62]

There is one exception where the interests of the woman are given priority over those of her male partner. This is the case of abortion. When there is already an unborn child, the two partners have, either intentionally or not, taken a first step to create or add to the family. If they do not agree whether the pregnancy is to continue, a consultation of both partners should take place,[63] but ultimately, according to the common opinion in legal literature, which may rightly be challenged in the case of the father wanting to have the child born, the rights and interests of the woman must have priority, since the consequences for the woman of the performance or non-performance of abortion will be much more intensive and serious than for the man.[64] Admittedly, abortion ends the process of a child being born, which was initiated by the execution of the right to create a family. Thus, based on Article 12 of the ECHR, the rights of the woman, insofar, cannot be used as an argument that the woman can also decide alone about *becoming* pregnant. But the woman can decide alone, as far as it is in her power, about *remaining* pregnant until the child is born. After all, Article 12 of the ECHR guarantees to a certain extent protection of the mother of an unborn child.

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[60] Eur. Court H.R. (Grand Chamber), *Evans v. United Kingdom*, Judgment of 10 April 2007, No. 6339/05, 90, 92.

[61] WADHAM ET AL., *supra* note 15, 215 (paragraphs 8.659-8.660).

[62] In this direction GRABENWARTER, *supra* note 19, 209 (paragraph 62); DE MELLO, *supra* note 25, 165 (paragraph 2.211); KIRILOVA ERIKSSON, *supra* note 59, 162-163.

[63] *See also* GROSZ ET AL., *supra* note 22, 277 (paragraph 33).

[64] VAN DIJK & VAN HOOF, *supra* note 22, 612; KIRILOVA ERIKSSON, *supra* note 59, 163-164; for a critique, *see* T. Meron, HUMAN RIGHTS LAW-MAKING IN THE UNITED NATIONS 72 (1986); J. Greenberg, *Race, Sex, and Religious Discrimination in International Law*, *in* HUMAN RIGHTS IN INTERNATIONAL LAW, VOL. 2, 307, 330 (T. Meron ed., 1984).

That is, the mother is protected against measures which would end her pregnancy by killing the child against her will. This, of course, is only a minimum protection of her status.

Ultimately, Article 14 of the ECHR must be taken into consideration with regard to the protection of mothers. This provision reads, *inter alia*, that the enjoyment of the rights and freedoms set forth in the Convention shall be secured without discrimination on any ground such as sex, social origin, birth or *other status*. Maternity or pregnancy could be an "other status" in the sense of the provision. However, Article 14 of the ECHR does not aim against discrimination in general but only against discrimination in relation to the rights and freedoms guaranteed by the Convention;[65] it gives an accessory right.[66] Hence, it is not suitable to enlarge the legal sphere of the affected person. This means that the protection of mothers does not add anything to these rights and freedoms. It merely states that maternity and pregnancy are, in principle,[67] no adequate criteria for differentiation but does not stipulate that they allow affirmative action, a positive support of mothers by financial or other means.

The ECHR does not fully reflect the ideas regarding the protection of mothers which are grounded in the universal human rights instruments. Article 8 of the ECHR protects the relationship between mother and child, Article 8 of the ECHR gives mothers a right to repel measures which would kill the child during the period of pregnancy, and Article 14 of the ECHR prohibits discrimination on the grounds of maternity and pregnancy. But none of these provisions acknowledge that the mother as such needs special protection. The ECHR does by no means privilege the status or function of the mother.

Therefore, it is not surprising that the British courts, when referring to the rights of the mother protected under the ECHR, most of the time have to deal with questions about the care of and contact with a child.[68] For instance, in *Re L. (Removal from Jurisdiction: Holiday)*, the House of Lords (Family Division) allowed a mother who was from Pakistan and separated from her husband to take her son on holiday to the United Arab Emirates to visit the child's grandparents, since the rights of the child, of the mother, and of the father according to Article 8 para. 1 of the ECHR were protected on

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[65] European Commission of Human Rights, *X. v. Germany*, Judgment of 13 December 1979, No. 8410/78, 18 DECISIONS AND REPORTS 216, 220 (1980).

[66] VAN DIJK & VAN HOOF, *supra* note 22, 711-712; BRÖTEL, *supra* note 28, 108-111.

[67] GRABENWARTER, *supra* note 19, 377 (paragraph 9).

[68] *See* M. Welstead, *England and Wales: The Influence of Human Rights and Cultural Issues*, *in* THE INTERNATIONAL SURVEY OF FAMILY LAW 143, 146-147 (A. Bainham ed., 2003).

condition that the son's return was ensured for the benefit of his paternal extended family.[69] In a similar case, *Payne v. Payne*,[70] the mother, who was from New Zealand, wished to return to her home country with her four-year-old daughter. The father claimed that such a move would infringe the right to respect for his family life under Article 8 of the ECHR. The Court of Appeal of England and Wales initially applied the domestic law following the approach outlined in its judgment in *Pole v. Pole*,[71] which stressed that the child's welfare was paramount. The Court held that there is no legal presumption in favour of granting the application of the parent with care of the child. Nevertheless, the Court's decision suggests that, *de facto*, this parent will almost certainly succeed. Thorpe LJ acknowledged that in a broad sense the health and well-being of a child depends upon emotional and psychological stability and security. Both security and stability came from the child's emotional and psychological dependency upon the primary care-giver. The mother's psychological and emotional stability would be affected if her application to leave the jurisdiction were to be denied, and this would have negative impact on the child. In this consideration of Article 8 of the ECHR, Thorpe LJ maintained that human rights legislation did not necessitate a change in approach to that applied by domestic law to relocation applications over many years. He explained that, once family breakdown has occurred, the right to family life of all members of the family becomes a right for each of them to a fragmented family life. In balancing the rights of all, the child's welfare came first. The Court held that, as the mother's proposal was reasonable and genuine and not in conflict with the paramountcy principle, she should be allowed to return to her home country. The father's right became a limited right to participate in the child's life to the extent permitted by the circumstances.[72] Insofar, the rights of the mother have priority over those of the father if they are in line with the child's welfare.

A special area where Article 8 of the ECHR played a dominant role in jurisdiction was the situation of mothers and their children in prison.[73] In *R. (P. and Q.) v. Secretary of State for the Home Department and Another*,[74] two mothers in prison for drug offences applied for judicial review, thereby challenging the lawfulness of the prison service

[69] 1 FLR 241 (2001); *see also Re S. (Leave to Remove from Jurisdiction: Securing Return from Holiday)* 2 FLR 507 (2001).

[70] EWCA Civ 166 (2001); see also *Re X. and Y. (Leave to Remove from Jurisdiction: No Order Principle)* 2 FLR 118 (2001).

[71] 1 WLR 1469 (1970).

[72] Taken up later, for example, by the judgment in *Re B. (Removal from Jurisdiction)*; *Re S. (Removal from Jurisdiction)* 2 FLR 1043 (2003).

[73] *See* WELSTEAD, *supra* note 68, 143, 148-150.

[74] 2 FLR 1122 (2001).

policy, which demanded that babies leave their mothers when they reached the age of 18 months. Both mothers had children aged 20 months who were in separate baby units of the prison; they wished to have the children remain with them until their sentences ended. The lawsuit of mother Q. succeeded. The Court of Appeal held that the prison service must consider whether its policy of interfering with the right to family life guaranteed in Article 8 of the ECHR is proportionate to the pursuit of its legitimate aims. In circumstances as grave as those in the case, which involved the separation of a young child from its mother, the more compelling must be the justification. The prison service must balance the welfare of the individual child, the necessary limitations on the mother's freedom, and the extent to which allowing the child to remain with the mother would be problematic for the discipline of other prisoners. At the date of Q.'s release, her child would be aged between three and four years old. The nature of the prison and the provision of facilities locally meant that it was feasible for the child to remain with Q. until release. Furthermore, Q. was a Roman Catholic and her child was of a mixed Anglo-Indian and African-Caribbean descent. The Court accepted that there was no Catholic, non-white or mixed race family close to the prison who would be satisfactory as a foster family for the child. The potential harm to the child of being placed with an alternative family without any of these characteristics was regarded as outweighing all other considerations.

Conversely, P., however, failed in her claim. She was from Jamaica and her child would be aged between four and five years when she was due for release. It was held that the prison in which she was incarcerated was an inappropriate environment for her child and a "culturally appropriate" black foster family had been found for her child. The somewhat simplistic emphasis on the skin colour and religion of an appropriate family was very controversial since it led to a differential treatment for two mothers and of two children who were facing the potential of similar psychological trauma to the children caused by separation from their mothers. Viewed in this light, the consultant psychiatrist as expert witness in the case suggested that there should be a significant reduction of custodial sentences, and an increase in alternatives to custody for pregnant women and mothers of young children.[75] This could, in fact, be taken as a requirement resulting from the positive obligations of the State to protect the right to family life in Article 8 of the ECHR.

[75] 2 FLR 1122, 1139 (2001).

C. The Constitutional Protection of Mothers in Germany

I. The Status of the European Convention on Human Rights in the German Legal Area

In Germany, the ECHR as such, as other international and regional human rights conventions, has the status of merely statutory law,[76] since it has been implemented in the German legal area by a so-called consent or contract act[77] (*Zustimmungs-* or *Vertragsgesetz*) according to Article 59 para. 2 sentence 1 of the Basic Law (*Grundgesetz*) and, thus, shares the legal nature of this act in the domestic sphere.[78]

However, there had been some attempts to provide the ECHR directly or indirectly with constitutional status. For instance, it was argued in legal literature that the declaration in "inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world" in Article 1 para. 2 of the Basic Law gives a constitutional status to the ECHR.[79] Characterizing the Basis Law as a "normative constitution",[80] it is necessary to interpret the declaration in Article 1 para. 2 of the Basic Law in a way that it has normative content. But to understand the norm as an incorporation clause would extend the scope of this basic provision, not least against the background that Article 1 para. 3 of the Basic Law reads that the "*following* basic rights" have binding force. Hence, Article 1 para. 2 of the Basic Law does not fit as legal basis for putting the rights enshrined in the ECHR on the same level as the rights of the Basic Law. Other attempts to constitutionalize the rights of the ECHR, for example, by including them into the core content of the general freedom of action in Article 2 para. 1 of the Basic Law, or by interpreting the Strasbourg system as a supranational "Conventional community" in the sense of Article 24 para. 1 of the Basic Law, are also not convincing. Even the approach

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[76] *See* S. Mückl, *Kooperation oder Konfrontation? – Das Verhältnis zwischen Bundesverfassungsgericht und Europäischem Gerichtshof für Menschenrechte*, 44 DER STAAT 403, 407 (2005); B. Schaffarzik, *Europäische Menschenrechte unter der Ägide des Bundesverfassungsgerichts*, DÖV 860, 861 (2005); K.-P. Sommermann, *Offene Staatlichkeit: Deutschland*, *in* von Bogdandy, Cruz Villalón & Huber eds., *supra* note 6, 3, 30 (paragraph 56).

[77] *See Gesetz über die Konvention zum Schutze der Menschenrechte und Grundfreiheiten* of 7 August 1952, BGBl. II 685 (1952), in particular Article 2 paragraph 1.

[78] In general about the implementation of international agreement in the German legal area, *see* A. von Bogdandy & D. Zacharias, *Zum Status der Weltkulturerbekonvention im deutschen Rechtsraum*, 26 NVWZ 527, 528-530 (2007) with references.

[79] *See*, for example, R. Echterhölter, *Die Europäische Menschenrechtskonvention im Rahmen der verfassungsmäßigen Ordnung,* 10 JZ 689, 691-692 (1955); A. Bleckmann, *Verfassungsrang der Europäischen Menschenrechtskonvention?*, 21 EUGRZ 149, 154-155 (1994).

[80] For more details on this type of constitution and its differences with respect to other types, see K. Loewenstein, VERFASSUNGSLEHRE 152-157 (4TH ed., 2000).

which had sometimes been supported by the Federal Constitutional Court and which qualifies acts contravening the ECHR as arbitrary and, thus, as a violation of the principle of equality before the law in Article 3 para. 1 of the Basic Law is of limited use.[81]

Notwithstanding, the ECHR is of constitutional relevance. Article 1 para. 2 of the Basic Law, which was written under the influence of the Universal Declaration of Human Rights of 1948,[82] indicates that the German Constitution is moulded by a friendly attitude towards human rights instruments. Moreover, it contains, according to the jurisdiction of the Federal Constitutional Court, the special requirement that the provisions of the Basic Law must be interpreted in accordance with the universal and regional human rights instruments. The Court for the first time in 1987 argued that when interpreting the Basic Law the content and development of the ECHR must also be taken into consideration, provided that this did not lead to a restriction or reduction of the protection of basic rights enshrined in the Basic Law, an effect which was intended to be excluded by the Convention itself. Thus, even the jurisdiction of the European Court of Human Rights served as a help for interpreting the content and scope of basic rights and fundamental legal principles of the Basic Law.[83] In 2004, the Court referred to this judgment in the *Görgülü* case and explained that the Basic Law with its Article 1 para. 2 assigned special protection to the core of international human rights. Article 1 para. 2 in conjunction with Article 59 para. 2 of the Basic Law was the basis for the constitutional obligation to use the ECHR as a help for interpretation when exercising the German basic rights.[84] Consequently, the German basic rights must be read in a way that the rights of the ECHR determine the minimum standard. Furthermore, the violation of Convention rights can be claimed indirectly, *i.e.* by

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[81] For details on the above-mentioned approaches K.-P. Sommermann, *see Völkerrechtlich garantierte Menschenrechte als Maßstab der Verfassungskonkretisierung*, 114 AöR 391, 408-410 (1989); R. Uerpmann, DIE EUROPÄISCHE MENSCHENRECHTSKONVENTION UND DIE DEUTSCHE RECHTSPRECHUNG 102-108, 176-187 (1993); N. Sternberg, DER RANG VON MENSCHENRECHTSVERTRÄGEN IM DEUTSCHEN RECHT UNTER BESONDERER BERÜCKSICHTIGUNG VON ART. 1 ABS. 2 GG 40-53, 136-176 (1999); F. Hoffmeister, *Die Europäische Menschenrechtskonvention als Grundrechtsverfassung und ihre Bedeutung in Deutschland*, 40 DER STAAT 349, 365-367 (2001); M. Ruffert, *Die europäische Menschenrechtskonvention und innerstaatliches Recht*, 34 EUGRZ 245, 246-247 (2007).

[82] *See* STERNBERG, *supra* note 81, 222, with references in footnote 853.

[83] BVERFGE 74, 357, 370; *see also* SOMMERMANN, *supra* note 81, 391, 414-418 and 219-230; HOFFMEISTER, *supra* note 81, 349, 367-369.

[84] BVERFGE 111, 307, 329; *see also* K. Grupp & U. Stelkens, *Zur Berücksichtigung der Gewährleistungen der Europäischen Menschenrechtskonvention bei der Auslegung deutschen Rechts*, 120 DVBL. 133-143 (2005); S. Kadelbach, *Der Status der Europäischen Menschenrechtskonvention im deutschen Recht*, JURA 480-486 (2005).

referring to a basic right which must have been interpreted in the light of the ECHR, by means of a constitutional complaint to the Federal Constitutional Court.[85]

II. The Protection of Mothers by Provisions of the Basic Law

In the Basic Law, a series of provisions are relevant for the protection of mothers. In particular these include: Article 6 para. 1 with two liberal extractions or specifications in Article 6 paras. 2 and 3; Article 6 para. 4 and Article 3 para. 2 in conjunction with para. 3 sentence 1. According to Article 6 para. 1 of the Basic Law, marriage and family shall enjoy the special protection of the state order. This provision protects the family in its function as a community for life, education, mutual support and care.[86] Thereby, the term "family" covers, as formulated by the Federal Constitutional Court, primarily "the narrower family, which means the parents and their children, united in a household".[87] With regard to the community of a mother with her illegitimate child, the Court said that it was merely "generally acknowledged" as being a family.[88] In a later decision concerning the family quality of the community of a father with his illegitimate child, the Court explained this view by arguing that Article 6 para. 1 of the Basic Law did not exclude ruling the relationship between father and child irrespective of natural descent, if the natural descent of the child from the mother's husband remains being acknowledged as the rule.[89] Hence, origin and lived community of care can cumulatively and even alternatively create a family in the constitutional sense.[90] Notwithstanding, there is a growing tendency in literature to generally accept bipolar relationships as families.[91]

Article 6 para. 1 of the Basic Law has three functions. First, it guarantees a defensive right against state measures which would restrict the substantial or personal sphere of the family.[92] This right protects the undisturbed living together within the family

[85] SOMMERMANN, *supra* note 76, 3, 31-32 (paragraph 58).

[86] BVerfGE 80, 81, 95; 57, 170, 178.

[87] BVerfGE 48, 327, 339.

[88] BVerfGE 18, 97, 106.

[89] BVerfGE 79, 256, 267.

[90] *See* A Schmitt-Kammler, *Art. 6, in* GRUNDGESETZ. KOMMENTAR 344, 352 (4th ed., M. Sachs ed., 2007); R. Gröschner, *Art. 6*, *in* GRUNDGESETZ. KOMMENTAR, VOL. 1 (2nd ed., H. Dreier ed., 2004) 751, 790.

[91] *See*, for example, D. Schwab, *Familienrecht im Umbruch*, FAMRZ 513-518 (1995); G. Robbers, *Art. 6*, *in*. KOMMENTAR ZUM GRUNDGESETZ, VOL. 1, 671, 693-694 (5th ed., H. von Mangoldt, F. Klein & C. Starck eds., 2005); M. Burgi, *Art. 6*, *in*, BERLINER KOMMENTAR ZUM GRUNDGESETZ, VOL. 1 (loose-leaf book, K. H. Friauf & W. Höfling eds., state: September 2007), 1, 21-23 (paragraph 21).

[92] BVerfGE 6, 55, 76; 6, 386, 388; 55, 114, 126-127; 81, 1, 6.

according to the familiar entelechy, which is, as the Federal Constitutional Court put it, "a closed area of autonomy and life, shielded from the State",[93] by a State-directed rule of reserve.[94] Insofar, the content of Article 6 para. 1 of the Basic Law parallels Article 8 para. 1 of the ECHR.

Thus, one might not be surprised that questions regarding the immigration and residence of foreigners are a major area of application of Article 6 para. 1 of the Basic Law.[95] The Federal Constitutional Court in its permanent jurisdiction holds that ordinarily, the provision does not give foreigners a right to realize their family community in Germany.[96] Article 6 para. 1 of the Basic Law is held to have been violated only in cases where it was either impossible or unreasonable for the family member to follow the foreigner abroad.[97]

Second, [98] Article 6 para. 1 of the Basic Law does not only guarantee the relation between parent(s) and child but also the family as institution.[99] This is a substantial enlargement of the protection in comparison with Article 8 para. 1 of the ECHR. It is evidenced by the wording of the provision, which does not speak about a right to family life but envisages the family as such. This means that the legislator must respect the structural principles of the traditional core elements of the rules forming family law; that is, a conservatory approach.[100] At any rate, the institutional guarantee refers to the family and not to single family members and their traditional role in family life. Thus, it does not give by itself a privileged status to mothers. Notwithstanding, it could be argued that the provision guarantees motherhood as one elementary factor or rather as *conditio sine qua non* of the family institution and, consequently, at least as a reflex the mother as decisive figure standing behind motherhood.

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[93] BVerfGE 91, 130, 134. *See also* U. Di Fabio, *Der Schutz von Ehe und Familie: Verfassungsentscheidung für die vitale Gesellschaft*, NJW 993, 994 (2003).

[94] BVerfGE 21, 329, 353.

[95] *See* ROBBERS, *supra* note 91, 671, 698-126 (paragraphs 112-125); SCHMITT-KAMMLER, *supra* note 90, 344, 354-355 (paragraph 22); GRÖSCHNER, *supra* note 90, 751, 799 (paragraphs. 93-94).

[96] BVerfGE 76, 1; 80, 81, 92.

[97] Federal Constitutional Court, NJW 3155 (1994).

[98] *See* T. Marauhn & K. Meljnik, *Privat- und Familienleben*, *in* EMRK/GG. KONKORDANZKOMMENTAR ZUM EUROPÄISCHEN UND DEUTSCHEN GRUNDRECHTSSCHUTZ 744, 766 (R. Grote & T. Marauhn eds., 2006).

[99] BVerfGE 6, 55, 72.

[100] *See* BVerfGE 80, 81, 92. In detail: U. Mager, EINRICHTUNGSGARANTIEN 206-211 (2003); H.-U. Erichsen, ELTERNRECHT – KINDESWOHL – STAATSGEWALT 24-27 (1985).

Third and finally, Article 6 para. 1 of the Basic Law is an objective basic norm,[101] a binding value assessment for the entire area of the law concerning the family.[102] The Federal Constitutional Court deduces from this function an obligation of the State to prevent disturbances of and damages done to the family by either the State itself or by private persons, to abstain from discrimination against the family, and to support the family by suitable measures.[103]

Thereby, the legislator, as main addressee, of the objective elements of Article 6 para. 1 of the Basic Law has a considerable margin of appreciation when fulfilling its tasks to protect and support the family.[104] It does not need to compensate for any financial burden of the family;[105] furthermore, Article 6 para. 1 of the Basic Law ordinarily does not give rights to concrete services.[106] So far, the main areas where the provision played a role in jurisdiction were: social security, taxation, child benefit and institutional looking after children, for instance, in kindergartens.[107] In a path-breaking decision concerning the requirement of care for and bringing up of children, the Federal Constitutional Court held that the obligation to protect in Article 6 para. 1 of the Basic Law included a task of the State to enable and foster the conditions for the child care in the form of complying with the parents' wishes. Looking after the children was a service which was in the interest of society and, thus, needed recognition. Consequently, the State had to ensure that it was equally possible for the parents to be temporarily unemployed in order to personally look after their children and to allow family activities in connection with employment. The State must create precautions that ensure that undertaking of bringing up a child does not lead to professional disadvantages, that a return to the job as well as a juxtaposition of education and employment, including professional advancement, during and after the times of bringing up the child are possible for both parents, and that the offers of

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[101] BVerfGE 6, 55, 72-73.

[102] *See* SCHMITT-KAMMLER, *supra* note 90, 344, 359 (paragraph 30).

[103] BVerfGE 6, 55, 76; *see* in detail M. Tünnemann, DER VERFASSUNGSRECHTLICHE SCHUTZ DER FAMILIE UND DIE FÖRDERUNG DER KINDERERZIEHUNG IM RAHMEN DES STAATLICHEN KINDERLEISTUNGSAUSGLEICHS 123-144 (2002).

[104] BVerfGE 21, 1, 6; 97, 332, 349; 106, 166, 177; 107, 205, 213; 110, 412, 436; Federal Constitutional Court, NJW 1413, 1415 and 1417, 1418 (2005); D. Coester-Waltjen, *Art. 6*, *in* GRUNDGESETZ-KOMMENTAR, VOL. 1 (I. von Münch & P. Kunig eds., 5th ed., 2000), 479, 494 (paragraph 35).

[105] BVerfGE 23, 258, 264; 103, 242, 259; 110, 412, 445.

[106] BVerfGE 82, 60, 81; Federal Constitutional Court, FAMRZ 541 (1997).

[107] *See* the references at SCHMITT-KAMMLER, *supra* note 90, 344, 360-363 (paragraphs 35-42); GRÖSCHNER, *supra* note 90, 751, 794-798 (paragraphs 86-91).

institutional care are improved.[108] This reading of Article 6 para. 1 of the Basic Law brings into focus the direction of impact of the ILO Conventions on Maternity Protection. The mother should not suffer any disadvantages in her professional career as a consequence of taking care for her child. Moreover, the decision reveals that the essential content of the rule is to grant state measures and services which do not just aim at balancing disadvantages which are inherent to the system of certain parts of the legal order. Rather, the rule to support focuses on treating families according to the standard of family justice. This standard demands a just treatment of families in the sense that their special needs, in particular the family's material aspects, education of and care for children, are considered in other parts of the legal order.[109] Thus, disadvantages caused, for instance, by high charges for kindergartens can be compensated by tax allowances or child benefits.

A special means to balance disadvantages in practice is through the maternity grant. The maternity grant can be viewed as part of the area of family support although it primarily is a protective measure of labour law and social security law. The maternity grant is planned as a substitute for wages, which shall compensate the loss of income of working pregnant women and mothers during the period when they are not allowed to work. It has the function to secure approximately the net income which would be earned by regular work wages.[110] Thus, it serves to balance the indirect costs of children.[111]

Thus, Article 6 para. 1 of the Basic Law goes beyond the scope of Article 8 para. 1 of the ECHR as it does not only, according to a liberal perspective, protect familiar relations against infringements by the State and by private persons but guarantees positive support for the family as a complex institution necessary for society and for motherhood as essential part of this institution. However, a more specific provision concerning the protection of mothers is Article 6 para. 4 of the Basic Law. It reads that every mother shall be entitled to the protection and care of the community.

Thereby, the subject of Article 6 para. 4 of the Basic Law is every *natural* mother, regardless whether her child is legitimate or illegitimate[112] or whether a complete

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[108] BVerfGE 99, 216, 234.

[109] *See* TÜNNEMANN, *supra* note 103, 138-139.

[110] Federal Ministry for Work and Social Order, EINKOMMENSBEZOGENES SOZIALLEISTUNGSRECHT. FORSCHUNGSBERICHT NO. 256, 397-398 (1996).

[111] TÜNNEMANN, *supra* note 103, 139.

[112] SCHMITT-KAMMLER, *supra* note 90, 344, 380 (paragraph 84); GRÖSCHNER, *supra* note 90, 751, 821 (paragraph 144).

family community exists or is strived for.[113] According to the common opinion, mothers only in a social sense, for example, adoptive, foster and step mothers, do not fall within the scope of the provision[114] since it refers to the biological event of bearing a child[115] as the core constituting fact for the creation of parents and family.[116] There is a difference between parenthood and motherhood as a status and family as a relation;[117] thus, women considered mothers in a social sense are sufficiently protected by Article 6 para. 1 and Article 6 paras. 2 and 3 of the Basic Law.[118] The latter provisions, as extracted from Article 6 para. 1 of the Basic Law, explicitly mention the parents' right to bring up a child and to be together with their child. Therefore, the personal scope of Article 6 para. 4 of the Basic Law is narrower than that of Articles 8 para. 1 and 12 ECHR.

In regard to the time dimensions, Article 6 para. 4 of the Basic Law rightly assumes that the mother must be in a situation where she needs the protection and care of the community. This is the case when the mother is exposed to burdens arising from the fact that she is carrying and bearing the child. Hence, the substantial scope of the provision is flexible in times of direct physical and psychical restrictions,[119] which means during pregnancy, birth, the time of breast-feeding or rather the first months after birth.[120] Furthermore, the mother can be in a situation worthy of protection even in later phases of her life, if she suffers negative consequences of pregnancy and birth.

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[113] BVerfGE 76, 1, 48.

[114] *See* Federal Social Court, NJW 2719 (1981); BAGE 43, 205, 209; Higher Administrative Court of Berlin, 19 NVwZ 221 (2000); COESTER-WALTJEN, *supra* note 104, at 479, 522-523 (paragraph 104), I. Richter, *Art. 6*, *in* KOMMENTAR ZUM GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND (ALTERNATIVKOMMENTAR), VOL. 1 (3rd ed., loose-leaf book, E. Denninger, W. Hoffmann-Riem, H.-P. Schneider & E. Stein eds., state: August 2002), 1, 60 (paragraph 54); differentiating ROBBERS, *supra* note 91, 671, 731.

[115] *See* T. Aubel, DER VERFASSUNGSRECHTLICHE MUTTERSCHUTZ. EIN BEITRAG ZUR DOGMATIK DER LEISTUNGSGRUNDRECHTE AM BEISPIEL DES ART. 6 ABS. 4 GG 101-124 (2003); K. Stern, DAS STAATSRECHT DER BUNDESREPUBLIK DEUTSCHLAND, VOL. IV/1, 555-556 (2006); SCHMITT-KAMMLER, *supra* note 90, 344, 380 (paragraph 84).

[116] SCHMITT-KAMMLER, *supra* note 90, 344, 378 (paragraph 79).

[117] GRÖSCHNER, *supra* note 90, 751, 821 (paragraph 144).

[118] Federal Constitutional Court, NJW 179 (1987); M. Sachs, GRUNDRECHTE 340 (paragraph 54) (2nd ed., 2003); SCHMITT-KAMMLER, *supra* note 90, 344, 380 (paragraph 84).

[119] COESTER-WALTJEN, *supra* note 104, 479, 523 (paragraph 104).

[120] *See* TÜNNEMANN, *supra* note 103, 189; STERN, *supra* note 115, 557-559; SACHS, *supra* note 118, 340 (paragraph 54); H. F. Zacher, *Elternrecht*, *in* HANDBUCH DES STAATSRECHTS DER BUNDESREPUBLIK DEUTSCHLAND, VOL. VI, 265, 321 (paragraph 115) (2nd ed., J. Isensee & P. Kirchhof eds., 2001); for a more extensive view, refer to ROBBERS, *supra* note 91, 671, 729 (paragraph 278) and 731 (paragraph 292).

Thus, economic or professional disadvantages which are an indirect effect of the protection of the mother guaranteed during pregnancy and birth are also covered by Article 6 para. 4 of the Basic Law. The burdens to the mother which arise because of caring for and bringing up of her child, however, do not create a relevant need for protection under the provision, since it does not aim at fostering or honouring the traditional division of roles between man and woman.[121] Consequently, only economic and professional disadvantages of the activities concerning the bringing up of a child can and must be recognized under Article 6 para. 1 of the Basic Law.[122] Ultimately, Article 6 para. 4 of the Basic Law does not give any protection with regard to the phase before pregnancy; it does not give a right to *become* a mother but only to *be* amother, which is, to a certain extent, the negative of the rule in Article 12 of the ECHR. State measures directed against the decision of a woman to have a child prior to pregnancy must comply with Article 6 para. 1 or rather with Article 2 para. 1 of the Basic Law giving a general right of action.[123]

Although an "entitlement" suggests a subjective right of the mother, the Federal Constitutional Court interprets Article 6 para. 4 of the Basic Law primarily in the sense of an objective protection rule[124] or protection order.[125] The provision contained a binding order for the State to give every mother the protection and care of the community.[126] This view can be based on three aspects.[127] First, according to systematic considerations, Article 6 para. 4 of the Basic Law aims at protecting the mother in a similar way as Article 6 para. 1 of the Basic Law marriage and family;[128] thus, also with regard to the protection of mothers, the institutional order directed to the legislator is of main importance. Second, Article 6 para. 4 of the Basic Law is a concretization of the principle of the social state for a certain area;[129] hence, it is, not unlike this principle, an objective principle in the sense of an order for optimization, to

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[121] TÜNNEMANN, *supra* note 103, 189.

[122] *See* S. Berghahn, *Ehe und Familie in der Verfassungsdiskussion – vom institutionellen zum sozialen Grundrechtsverständnis?*, 26 KJ 397, 400 (1993).

[123] With respect to the time dimension of Article 6 paragraph 1 of the Basic Law, *see* AUBEL, *supra* note 115, 127-139 with extensive references; SCHMITT-KAMMLER, *supra* note 90, 344, 378-379 (paragraph 79).

[124] BVerfGE 60, 68, 74.

[125] BVerfGE 85, 360, 372.

[126] BVerfGE 60, 68, 74 with reference to BVerfGE 32, 273, 277; 52, 357, 365; 55, 154, 157.

[127] *See* GRÖSCHNER, *supra* note 90, 751, 819 (paragraph 140).

[128] BVerfGE 60, 68, 74.

[129] BVerfGE 32, 273, 279.

be fulfilled first[130] by the legislator. Third, the wording must not be overestimated, because an "entitlement" in the sense of a relationary claim requires a sufficiently concrete adverse party, which cannot be the unconstituted, vague "community".

In fact, the text and the history of the provision speak in favour of an interpretation of the norm as a binding order to pass legislation. While the predecessor of Article 6 para. 4 of the Basic Law, Article 119 para. 3 of the Weimar Constitution, stipulated that *motherhood* is entitled to protection and care by the State, the new provision is formulated more concretely, giving a title to every *mother*.[131] Since there are "levels of entitlement to elementary protection and elementary care, which must not be undercut, the legislator's margin of appreciation is in the case of Article 6 para. 4 of the Basic Law limited with regard to both "if" and "how" of protection and care.[132] For instance, the protection of pregnant and breast-feeding mothers by the provisions of labour law are essential.[133] In light of Article 6 para. 2 of the Basic Law, there is nothing speaking against a leave granted to the father to look after the newborn child, but a constitutional binding of the legislator's discretion by Article 6 para. 4 of the Basic Law only exists in favour of the mother. Thus, Article 6 para. 4 of the Basic Law limits the legislator's margin within the framework of the general principle of equality before the law enshrined in Article 3 para. 1 of the Basic Law.[134] Moreover, with regard to the differentiation between fathers and mothers, Article 6 para. 4 of the Basic Law is *lex specialis* to Article 3 para. 2 of the Basic Law, which requires equal treatment of men and women and reads in its sentence 2 that the State shall promote the actual implementation of equal rights for women and men and take steps to eliminate disadvantages that still exist. Consequently, privileging mothers cannot be regarded as discrimination of men.[135]

Like Article 6 para. 1 of the Basic Law, Article 6 para. 4 of the Basic Law is "expression of a constitutional value assessment which is binding for the entire area of private and public law".[136] This assessment is not based on the recognition of the simple fact that there would not be any parents and, thus, also not any families without mothers;

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[130] *See* SACHS, *supra* note 118, 341 (paragraph 57).

[131] BVerfGE 32, 273, 277.

[132] ZACHER, *supra* note 120, 265, 323 (paragraph 118).

[133] *See* BVerfGE 85, 360, 372 with reference to BVerfGE 32, 273, 277.

[134] BVerfGE 65, 104, 113; SCHMITT-KAMMLER, *supra* note 90, 344, 379 (paragraph 82).

[135] K. Hesse, GRUNDZÜGE DES VERFASSUNGSRECHTS DER BUNDESREPUBLIK DEUTSCHLAND 187-188 (paragraph 436) (20th ed., 1999); ROBBERS, *supra* note 91, 671, 730 (paragraph 287).

[136] BVerfGE 32, 273, 277; *see also* BVerfGE 47, 1, 20; 52, 357, 365; AUBEL, *supra* note 115, 27-79.

rather it acknowledges the value of the services of mothers for the community mentioned in the provision.[137] Thus, Article 6 para. 4 of the Basic Law must not be reduced to its perspective of population policy, since the number of children is not the decisive criterion for the interpretation of the provision, but the willingness to take over the responsibility for the child's life, which is founded by pregnancy and birth and, thus, in a different way than in the case of fathers.[138]

Article 6 para. 4 of the Basic Law is not only a provision of objective law but also gives a subjective right to the mothers.[139] It has a defensive and a benefit dimension, although the boundaries of each are blurred. Viewed on way, the State must abstain from infringements of the right of the mother to give birth to her child[140] and it must protect the mother against pressure by third persons aiming at the abortion of her child.[141] The last point resembles Article 12 of the ECHR, which contains a similar guarantee. Viewed alternatively, the State must take positive steps to foster mothers. In that context, it is not easy to make precise the "entitlement" since it is mainly addressed to the legislator. The order to the legislator must be consolidated under the circumstances of the protection of mothers to an existing legislative obligation and, correspondingly, to an existing right of the individual mother to legislation. Thus, Article 6 para. 4 of the Basic Law must be qualified as giving a right to procurement, *i.e.* a claim against the legislator to grant under the named circumstances a claim for protection and care towards the public authorities, which can be pursued before the courts.[142]

Ultimately, Article 3 para. 2 in conjunction with para. 3 sentence 1 of the Basic Law, which stipulates that no person shall be favoured or disfavoured, *inter alia*, because of sex, prohibits discrimination on the grounds of pregnancy and maternity, but Article 6 para. 4 of the Basic Law is, insofar, more special and, thus, gains priority. Furthermore, the provisions are not a suitable constitutional basis for privileging mothers over women who do not have a child or rather over fathers and men in general. The situation is compatible with that under Article 14 of the ECHR.

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[137] SCHMITT-KAMMLER, *supra* note 90, 344, 379 (paragraph 81).

[138] GRÖSCHNER, *supra* note 90, 751, 820 (paragraph 142).

[139] *See* BVerwGE 47, 23, 27.

[140] AUBEL, *supra* note 115, 93-94.

[141] BVerfGE 88, 203, 296; 103, 89, 102; ROBBERS, *supra* note 91, 671, 733 (paragraph 303); SCHMITT-KAMMLER, *supra* note 90, 344, 380 (paragraph 84); SACHS, *supra* note 118, 341 (paragraph 58); STERN, *supra* note 115, 554; ZACHER, *supra* note 120, 265, 323-324 (paragraph 119).

[142] GRÖSCHNER, *supra* note 90, at 751, 821 (paragraph 143).

Thus, Article 6 paras. 1 and 4 of the Basic Law with their objective elements, their order to positive support and their special focus on mothers go far beyond the stipulations of the European Convention on Human Rights, which essentially protect the relationship between mother and child in an individual, defensive and liberal perspective and not community-related under the auspices of the social state. The reason for this difference is that in Europe there had been a general reluctance towards social rights; in particular the inter-American human rights system, which is much more progressive. Furthermore, there is presently no possibility for a family policy in a narrower sense on the level of the ECHR; only the national legislator can take protective and supportive measures and, among other things, decide on the financial resources for their realization in favour of mothers.[143]

D. Conclusion and Outlook

In Great Britain the human rights provisions of the ECHR have been implemented in the domestic legal sphere by the Human Rights Act 1998, which has the status of constitutional law. Thus, the relevant protections of mothers are found in Articles 8 para. 1 and 12 of the ECHR. These rules provide for no infringements to the relationship between mother and child and to the pregnancy of the mother; the mother has a right to carry and give birth to her child and to have care for and contact to it. In Germany the ECHR has only the status of statutory law. However, its provisions are used for the interpretation of catalogue of rights in the Basic Law. The Basic Law protects mothers through Article 6 paras 1 to 3 and, moreover, expressly by Article 6 para. 4. These provisions essentially include the substantive content of the ECHR articles, but go far beyond that with their objective elements. They give an order in particular to the legislator to take positive measures to protect mothers against discrimination and, moreover, to support them in regard to their special needs during pregnancy, birth and time of breast-feeding of the child in the areas of private and public law, not only financially. The mothers are perceived as a group worthy of special treatment and protection. The provisions of the Basic Law show similarities to the relevant norms of the Geneva Conventions and their Protocols. The reason might be that they were passed, as their predecessors in the Weimar Constitution, after the experiences of a terrible war threatening the survival of the nation and, thus, were, at least partly, motivated by the same ideas as the international human rights instruments.

Notwithstanding, the future of the protection of mothers in Great Britain and Germany may be influenced by the European Charter of Fundamental Rights,

[143] MARAUHN & MELJNIK, *supra* note 98, at 744, 763 (paragraph 18). *See also* J. Kersten, *Demographie als Verwaltungsaufgabe*, 40 DIE VERWALTUNG 309, 319 (2007).

which was signed and proclaimed at the European Council meeting on 7 December 2000 and is going to become part of the primary law of the European Union.[144] Article 7 of the Charter guarantees a right to respect for family life; it is, insofar, formulated based on the text of Article 8 para. 1 of the ECHR. Therefore, it will have the same meaning and consequences as the latter according to Article 52 para. 3 sentence 1 of the Charter.[145] Article 9 of the Charter reads, *inter alia*, that the right to create a family shall be guaranteed in accordance with the national laws governing the exercise of this right. This provision is orientated to the aims of Article 12 of the ECHR. It is problematic since the right to create a family shall be guaranteed only according to the national laws. However, it has also positive effects. In particular, it can function as a European model and, thus, as a means to secure a core of norms which is contoured by the common international obligations of the Member States in the field of the protection of human rights and which must be saved from an undermining caused by the national laws.[146] It is rightly argued that the guarantee for the existence of the family as institution forms a part of that core.[147] Thus, Article 9 of the Charter stipulates that the legal institution of the family must not be abolished or fundamentally modified. The provision does not provide for any new obligations to the Member States that go further than Article 12 of the ECHR. At the least, it makes visible the individual human rights position as a basic right of the European Union and gives relevant objective guidelines for the further development of the European Union law with regard to the family.

Article 23 of the Charter contains rules against the discrimination of women. It reads that equality between men and women must be ensured in all areas, including employment, work and pay; the principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex. Thus, a positive discrimination aiming at the creation of factual equality is explicitly allowed. One could, insofar, argue that Article 23 of the Charter makes it possible for or even requires that the national legislator compensates disadvantages for mothers in the consequence of pregnancy

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[144] *See* Council of the European Union, *Presidency Conclusions of 21/22 June 2007*, Doc. 11177/07, 17 (paragraph 9).

[145] *See* P. J. Tettinger, *Art. 7*, *in* EUROPÄISCHE GRUNDRECHTE-CHARTA 289, 291 (paragraph 1) (P. J. Tettinger & K. Stern eds., 2006); H.-W. Rengeling & P. Szczekalla, GRUNDRECHTE IN DER EUROPÄISCHEN UNION 460 (paragraph 656) (2004); M. Panebianco, REPERTORIO DELLA CARTA DEI DIRITTI FONDAMENTALI DELL'UNIONE EUROPEA 113 (2001).

[146] P. J. Tettinger, *Art. 9*, *in* EUROPÄISCHE GRUNDRECHTE-CHARTA 314, 318 (paragraph 26) (P. J. Tettinger & K. Stern eds., 2006); N. Bernsdorff, *Art. 9*, *in* KOMMENTAR ZUR CHARTA DER GRUNDRECHTE DER EUROPÄISCHEN UNION 165, 169-170 (paragraphs 13-14) (J. Meyer ed., 2003).

[147] TETTINGER, *supra* note 146, 314, 319 (paragraph 27).

and birth. However, the jurisdiction of the European Court of Justice concerning pregnancy and motherhood must be taken into account when interpreting Article 23 of the Charter.[148] It holds that pregnancy and motherhood are characteristics which can only occur in cases of women. Therefore, protective measures for the time of pregnancy and motherhood are not considered discrimination against men.[149] Additionally the *direct* effects of pregnancy, in particular the inability to work, be it because of a legal prohibition to work or because of health problems, cannot be considered a starting point for discrimination.[150] The situation is different if there are only *indirect* effects of pregnancy, such as absence from work as a consequence of a disease which was caused by pregnancy but appeared or continued after the end of the time of maternity protection. After that time unemployment is possible.[151] Besides, the jurisdiction distinguishes between legal consequences of pregnancy and of motherhood.[152] In the case of motherhood negative consequences like the loss of pay and the insufficient compensation by the maternity grant must be accepted.[153] Therefore, mothers can be supported in order to balance direct disadvantages of pregnancy, birth and breast-feeding; but this is far from creating a privileged status for mothers.

A further guarantee concerning family life is Article 33 of the Charter. This Article reads in para. 1 that the family shall enjoy legal, economic and social protection. Thereby, the term "family" has the traditional meaning; it does not encompass modern forms of living-together.[154] Hence, Article 33 para. 1 of the Charter does not individually provide for the protection of the relationship of mother and child or rather of the mother as such. Its content seems to be similar as the objective guarantees enshrined in Article 6 para. 1 of the German Basic Law. Para. 2 of

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[148] A. Nußberger, *Art. 23, in* EUROPÄISCHE GRUNDRECHTE-CHARTA 492, 507 (paragraph 81) (P. J. Tettinger & K. Stern eds., 2006).

[149] *See* ECJ, Case C-177/88, *Dekker*, E.C.R. I-3941 (1990); Case C-421/92, *Habermann-Beltermann*, E.C.R. I-1657 (1994); Case C-32/93, *Webb*, E.C.R. I-3567 (1994). *See also* M. Coen, *Art. 141*, *in* EU- UND EG-VERTRAG (4th ed., C. O. Lenz/K.-D. Borchardt eds., 2006) 1600, 1623 (paragraph 40).

[150] ECJ, Case C-207/98, *Mahlburg*, E.C.R. I-594 (2000); Case C-177/88, *Dekker*, E.C.R. I-3941 (1990); Case C-394/96, *Brown*, E.C.R I-4185 (1998).

[151] ECJ, Case C-400/95, *Larsson*, E.C.R. I-2757 (1997).

[152] *See* E. Caracciolo di Torella & A. Masselot, *Pregnancy, maternity and the organisation of family life: an attempt to classify the case law of the Court of Justice*, 26 E.L.REV. 239, 250 (2001).

[153] ECJ, Case C-432, *Gillespie*, E.C.R. I-475 (1996).

[154] P. J. Tettinger, *Art. 33*, *in* EUROPÄISCHE GRUNDRECHTE-CHARTA 145, 563, 564 (paragraph 5) (P. J. Tettinger & K. Stern eds., 2006); E. Riedel, *Art. 33*, *in* KOMMENTAR ZUR CHARTA DER GRUNDRECHTE DER EUROPÄISCHEN UNION 146, 382, 387 (paragraph 13) (J. Meyer ed., 2003).

Article 33 of the Charter stipulates that to reconcile family and professional life, everyone shall have the right to protection from being fired for a reason related to maternity and the right to paid maternity leave and to parental leave following the birth or adoption of a child. Since everyone can make use of the mentioned rights as long as there is a reason relating to maternity, which spans the time from fathering to breast-feeding, the provision is not only for mothers but also for fathers and other primary care-givers.[155] Thereby, it focuses on the work force. Working women and men shall be enabled to intensively look after a newborn or adopted child. However, the Member States still have a considerable margin of discretion.[156]

Ultimately, Article 34 para. 1 of the Charter reads that the European Union recognizes and respects the entitlement to social security benefits and social services providing protection, *inter alia*, in cases of maternity, in accordance with the rules provided by Community law and national laws and practice. At first glance, the provision could be understood in a way that it only confirms what is already the law. But this would be a hasty conclusion. Although the provision does not stipulate positive obligations for the Union or for the Member States to take special measures, it is important because of two aspects. First, it guarantees that policies of the Union do not endanger the continued existence of the social systems of the Member States so that they cannot grant the individual's access to the mentioned services. And second, it is constitutive for a European model of values[157] which takes into account the social welfare of the individual and, by mentioning maternity, in particular of the mother as a relevant factor and recognizes maternity as a situation which justifies specific state support. This must be taken into account when restricting other fundamental rights in the processes of balancing.[158]

Therefore, the Charter can recognize that maternity is a situation which requires special protection and that mothers must be granted special services. This might lead to a protection of mothers that is not restricted to abstaining from infringements of the mother's right to carry, give birth to, take care for and have contact with her child. It includes positive support during pregnancy, birth and at the time of breast-feeding. However, the Charter provisions will only have limited

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[155] TETTINGER, *supra* note 154, 563, 565 (paragraph 7).

[156] TETTINGER, *supra* note 154, 563, 565 (paragraph 13).

[157] For further details about the Charter as concretization of common European values *see*, for example, T. Schmitz, *Die Charta der Grundrechte der Europäischen Union als Konkretisierung der gemeinsamen europäischen Werte*, *in* DIE EUROPÄISCHE UNION ALS WERTEGEMEINSCHAFT 73-97 (D. Blumenwitz, G. H. Gornig & D. Murswiek eds., 2005), with an English abstract.

[158] *See* A. Nußberger, *Art. 34*, *in* EUROPÄISCHE GRUNDRECHTE-CHARTA 566, 575 (paragraphs 53-54) (P. J. Tettinger & K. Stern eds., 2006).

force in Great Britain insofar as Great Britain has declared in the negotiations for the future Treaty of Lisbon that the Charter does not extend the ability of the Court of Justice, or any court or tribunal of the United Kingdom, to find that the laws, regulations or administrative provisions, practices or actions of the United Kingdom are inconsistent with the fundamental rights, freedoms and practices that it reaffirms. In particular, in order to avoid any doubt, nothing in the Charter can create justifiable rights applicable to the United Kingdom except in so far as the United Kingdom has provided for such rights in its national law. Moreover, to the extent that a provision of the Charter refers to national laws and practices, it shall not apply in the United Kingdom to the extent that the rights or principles that it contains are recognized in the law or practices of the United Kingdom.[159] Thus, the Charter will not play an independent role in the British legal system. However, the Charter will not be excluded from the legal system in that the British courts will use its provisions as guidelines for the interpretation of the norms of the ECHR which had been implemented in the British legal sphere by the Human Rights Act 1998 or of other provisions in statutory law, similar to the course of action of the German courts in the case of the ECHR *vis-à-vis* the Basic Law.

[159] COUNCIL OF THE EUROPEAN UNION, *supra* note 144, 25 (at footnote 3).