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# Maternity in Europe –Trapped in a Stereotype:

A History of a Fight with Roots and Ties

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## **ABSTRACT**

Women in Europe have long been seen as primary carers and this has significantly influenced their earnings and position in the labour market. The understanding of the importance of women's participation in the European labour market and tackling the issue of declining birth rates across the continent has created a need for a better balance between paid and unpaid work. However, the change in stereotypes deeply rooted in society appears to be more complicated than expected, even for the European Union that claims to be a pioneer in gender equality. The lost opportunity in defining the relationship between the Pregnant Workers Directive and the Recast Directive seems to be a failure that will be difficult to rectify. The non-consideration of existing economic hierarchies in the reconciliation of work-life balance through the introduction of unpaid leave does not make achievement of the goal any easier. The changes in society are often recognized by jurisprudence but show slow, gradual progress in challenging the subsidiary role of men in parental duties and the provision of lengthy leaves solely for mothers, which are still held to be compatible with EU law. In this paper I will outline the shape of maternal and parental protection in Europe including the relevant case law of the Court of Justice of the European Union and the European Court of Human Rights. With the aim of identifying the weaknesses of the legal system of the European Union, I will outline its shortcomings. In doing so, I will illustrate the system using the example of how the Pregnant Workers Directive and Parental Leave Directive were implemented in Portugal and Poland and reveal how, despite limited freedom for Member States in the implementation of the standards, the outcome and results of the introduced measures differ significantly.

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## INTRODUCTION

The European Union (EU) is no longer merely an economic union. For some time, social aims have been and remain on its agenda.<sup>1</sup> One can definitely say that it is a unique project. Its diversity is worth of admiration. Nevertheless, it is also the cause of complexity in the process of the establishment of minimum standards that are often of the utmost importance. One of the fundamental rights, internationally recognized, that regardless of efforts still has a long way to go in its development and fulfilment, is that gender equality. One of the preconditions for meeting the objective of gender equality and non-discrimination in the workplace is maternity protection and it is this that I will be examining in this paper.<sup>2</sup>

As a matter under the subsidiarity principle, it is the Member States who are in charge of family policies in the European Union through their national policies. However, the shift from a sameness non-discrimination strategy to work-life reconciliation focusing on the relationship between care work and typical as well as atypical forms of employment became part of the EU strategy following the Treaty of Amsterdam.<sup>3</sup> The Treaty, entering into force in 1999, was when Member States committed themselves to the promotion of gender equality<sup>4</sup> and, since this time, European law has prohibited discrimination.

Maternity protection, as mentioned, is a universally recognized fundamental human right. The Universal Declaration of Human Rights states: “Motherhood and childhood are entitled to special care and assistance.”<sup>5</sup> The concretisation of that commitment can be found in the International Covenant on Economic, Social and Cultural Rights, which underlines that the special protection of the pregnant worker includes the time before and after birth and that working mothers should not be left without paid leave with or without social security benefits.<sup>6</sup> Further emphasis on the importance of maternity can be found in the Convention on the Elimination of All Forms of Discrimination against Women,

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<sup>1</sup>E. ELIS, EU Anti-Discrimination law, Oxford EC law library, 2005 p. 23

<sup>2</sup>Maternity and paternity at work : law and practice across the world, International Labour Organisation, 2014, p. 2

<sup>3</sup>S. WALBY, The European Union and Gender Equality: Emergent Varieties of Gender Regime, Social Politics, Volume 11, No. 1, Oxford University Press 2004, p. 19

<sup>4</sup> Ibidem, p. 20

<sup>5</sup>UN GENERAL ASSEMBLY, Universal Declaration of Human Rights, 10 December 1948, 217 A (III), available at: <https://www.refworld.org/docid/3ae6b3712c.html> [accessed 13 May 2019] Art 25 (2)

<sup>6</sup>UN GENERAL ASSEMBLY, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3, available at: <https://www.refworld.org/docid/3ae6b36c0.html> [accessed 13 May 2019], Art 10 (2)

which starts with a preamble stressing the social significance of maternity. Article 4 (2) authorises the introduction of special measures with an objective to protect maternity. Article 11 (2) provides specific measures aimed at the prevention of discrimination against mothers, notably in securing an effective right to work.<sup>7</sup>

It should be stressed that giving birth is crucial event for women since it introduces major changes in their lifestyles and constitutes an important role in society. Childbearing is a social act and social value all around the world, as the birth rate is a determinant of the population size and its stability is needed to protect the future of our world. However, in Europe, the debate is often related to the issue of demographic decrease and falling birth rates.<sup>8</sup>In Europe, where the system of “responsible parenthood” was developed, guarantees related to pregnancy do and will define whether the reduction of fertility will continue. Economic growth in the EU has resulted in a reorganization of societal and socio-economic values, creating a demand for children who will be raised to be high skilled and well-educated, reflecting economic realities.<sup>9</sup>Such a shift, therefore, often makes a decision as to whether to have a baby conditional upon the economic security of the family.

The difficulties that pregnant workers meet every day involved a large section of the population, – both directly and indirectly – rather than being a marginal issue. Nowadays nearly half of the workforce constitutes women and more than third of them in the course of their lives will take up the role of being a mother.<sup>10</sup> The variety of roles that a woman takes up after giving a birth – as partner, worker, mother –remains a struggle, especially in a world with a patriarchal model that undermines the value of unpaid work and preserves the unequal distribution of childrearing.<sup>11</sup>Due to the ambition to satisfy both the idea of being a good worker and a good mother, the attempt to successfully realize the expectations and fulfilment of multiple roles can have a major influence on women’s health. According to the Frankenhaeuser psychological model, the well-being of the person is in danger if the

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<sup>7</sup>UN GENERAL ASSEMBLY, Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979, United Nations, Treaty Series, vol. 1249, p. 13, available at: <https://www.refworld.org/docid/3ae6b3970.html> [accessed 13 May 2019]

<sup>8</sup>R. K. DAGHER, P. M. MCGOVERN B. E. DOWD, Maternity Leave Duration and Postpartum Mental and Physical Health: Implications for Leave Policies, *J Health Politics Policy Law*. 2014, p. 370

<sup>9</sup>S. H. PRESTON, Changing Values and Falling Birth Rates, *Population and development review*, 1986, P. 3

<sup>10</sup>J. L. GROSSMAN,G. L. THOMAS, Making Pregnancy Work: Overcoming the Pregnancy Discrimination Act's Capacity-Based Model, *21Yale Journal Law & Feminism* 15, 2009, Available at: [https://scholarlycommons.law.hofstra.edu/faculty\\_scholarship/101](https://scholarlycommons.law.hofstra.edu/faculty_scholarship/101), p. 16

<sup>11</sup> R. K. DAGHER, P. M. MCGOVERN B. E. DOWD, Maternity Leave Duration.. op. cit. p. 370

expectations are greater than the potential: a situation that can happen in connection with childbirth in the absence of given support.<sup>12</sup>

From the very beginning of the EU the true intentions of the legislators and politicians were balanced between two different objectives: economic and social. A frequently asked question is whether the promotion of work-life reconciliation was due to the need to increase economic productivity or to promote gender equality.<sup>13</sup> While avoiding addressing this in detail for now, it must be noted that change appeared in both society and politics and women's efforts to reconcile work and family life have brought changes not only in the social but also legal arena. The role of women changed and the law needed to adapt to the new reality.

Nevertheless, being a woman nowadays is still a challenge. Is the gender equality policy of the EU as beneficial as the big slogans would want us to believe? It is better to save our enthusiasm and look with critical eye at the area of employment regulation in European Union legislation that pertains to gender equality and maternity.

The first major question that comes to mind in this context concerns the notion of employment about which the legal Directives are concerned. The primary focus of European Union legislation is often merely trying to tackle inequality in treatment in standard employment. However, this is not enough, especially in the light of the huge gender division in labour. Women still take the most positions in non-standard forms of employment, and therefore the protection is crucial in temporary and part-time work.<sup>14</sup> Another question is whether the legislation passed at EU level is capable of tackling the roots of inequalities. This is not clear in the light of the pattern taken as the norm in the laws, since the basic structure constitutes the "male breadwinner" model that does not take into consideration the importance of unpaid work. Changes slowly comes and – as our society is now realizing – the biggest barrier for the equality is the burden of care that is still not properly addressed.<sup>15</sup>

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<sup>12</sup> Ibidem, p. 370

<sup>13</sup> A. I. AYBARS, Work-life balance in the EU and leave arrangements across welfare regimes, *Industrial Relations Journal* Volume 38 Issue 6, 2007, p. 569

<sup>14</sup> S. WALBY, *The European Union and ... op. cit.*, p. 6

<sup>15</sup> Ibidem, p. 6

It is clear that bringing change across Europe via Directives is not a dream solution. Member States often comes to the different standards through different modes of implementation into national laws<sup>16</sup> and there remains disparity in effective implementation. But do sensible alternatives exist?

What we know is that women's participation in the labour market is crucial for further development of the European Union. The lack of their full inclusion results in the waste of huge potential and skills. But we cannot just dream about growing job market participation without putting effort towards substantive equality. Often when we talk about the building of policies that are directed towards work and life balance, they are considered in terms of the cost and how expensive they are. The real question, however, should be: what is the cost of not introducing them while our society is changing?<sup>17</sup>

In this paper I will depict the shape of maternity protection in Europe, including relevant case law from the Court of Justice of the European Union and the European Court of Human Rights. With the aim of identifying weaknesses in the legal system of the European Union, I will outline its shortcomings. In doing, I will illustrate the system and show how the Pregnant Workers Directive and the Parental Leave Directive were implemented in Portugal and Poland. Despite the limited freedom of action for Member States in the implementation of the standards, I will assess whether the outcome and results of the introduced measures vary between the countries in question.

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<sup>16</sup>Ibidem, p.6

<sup>17</sup>B. PFAU-EFFINGER, B. GEISLER [ed] care and social integration societies, policy press, 2005, p . 256

## **PRIMARY SOURCES OF MATERNITY PROTECTION IN EUROPE**

### **EUROPEAN UNION**

#### **The Treaty on European Union and on the Functioning of the European Union**

The European Union, unique in its form as a supranational organization, has its direct antecedents in the 1957 Treaty of Rome, which formed the European Economic Community (EEC).<sup>18</sup>The two principal treaties on which the EU (and before it the EEC) is based are the Treaty on European Union (TEU, also known as the Maastricht Treaty, which came in effect in 1993) and the Treaty on the Functioning of the European Union (TFEU), first signed as the 1957 Treaty of Rome (TFEU 1957). These main treaties have been altered by amending treaties at least once a decade since they each came into force, the latest being the 2009 Treaty of Lisbon (TFEU 2009). As one of the foundational elements, Article 6 of the Treaty on European Union outlines principles of “liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States”.<sup>19</sup>

The European Economic Community was focused on the economic field, through the creation of the single market (also known as the common market). The commitment to social policy development was not as strong as nowadays is viewed as desirable. The social component was only progressed to the amount needed for economic growth or – as was put in the original version of Article 117 of the Treaty on the Functioning of the European Union – only to the extent that it was liable to bring a result of market flourishing.<sup>20</sup>

Despite opposition to including ‘social’ policy within the original Treaty, the original Member States<sup>21</sup> did decide to incorporate provision for equal pay for equal work, through Article 119 of the TFEU 1957 (currently contained within Article 157 of the TFEU 2009). That provision is of utmost importance given the scope with which it has progressively been interpreted. The organization that has enabled this broad interpretation of the provision, which plays a significant role with its social

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<sup>18</sup>I. HEIDE, *Supranational action against sex discrimination: equal pay and equal treatment in the European Union*, International Labour Organisation, 2001, pp. 470-471, Available at:

[http://cite.gov.pt/pt/destaques/complementosDestqs2/Women\\_gender\\_and\\_work\\_2001.pdf#page=478](http://cite.gov.pt/pt/destaques/complementosDestqs2/Women_gender_and_work_2001.pdf#page=478)

<sup>19</sup>EUROPEAN UNION, *Consolidated version of the Treaty on European Union*, 13 December 2007, 2008/C 115/01, available at: <https://www.refworld.org/docid/4b179f222.html> [accessed 13 May 2019] Art. 6 TEU

<sup>20</sup>I. HEIDE, *Supranational action against...* op. cit., p. 471

<sup>21</sup>Belgium, France, Italy, Luxembourg, the Netherlands and West Germany



objectives, is the European Court of Justice.<sup>22</sup> In its rulings, the Court has underlined that the principle is conferring positive rights on individuals that are justiciable. What is more, the provision constitutes the foundation for European equality legislation.

However, it is important to mention that the wider appreciation and application of the principle of equal pay for equal work was not always the case. Women's rights at the time of the introduction of Article 119 TFEU 1957 were not on the European agenda. The motivation for incorporation of the Article and its principle was economically driven and the true purpose of the provision was protection of businesses from unfair competition, strongly defended by France.<sup>23</sup> The evolution over the time resulted in shift from imposing a duties on the Member States, to conferring the rights on the individuals that can be invoked directly.<sup>24</sup>

In its first years, the EEC minimized the role of social policy. The first legal activism in this area appeared only in the 1970s and 1980s.<sup>25</sup> Changes were influenced by the active role of the Court of Justice of the European Union, but it was not the sole actor contributing to the progress. Proposals and measures also came from the European Commission, for example through the Commission's proposals of the Pregnant Worker Directive, which was highly directed at meeting the needs of the European economy. Women's skills were found necessary on the market, especially taking into consideration the population in Europe.<sup>26</sup>

### **Charter of Fundamental Rights of the European Union**

The Charter of Fundamental Rights of European Union, ratified on 7 of December 2000, became a legally binding instrument in December 2009 with the Lisbon Treaty (TFEU 2009) coming into force. It constitutes the general principles of EU law.<sup>27</sup> However, what should be born in mind is the limited power of the Charter as far as the scope of its application is concerned. It cannot be seen as a source of freestanding rights but rather provides useful help in interpretation of EU law.<sup>28</sup>

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<sup>22</sup>Ibidem, p. 471

<sup>23</sup>R. A. CICHOWSKI, Women's rights the European Court and Supranational Constitutionalism, *Law & Society Review* 38, 2004, p. 7

<sup>24</sup>R. A. CICHOWSKI, Women's rights the European Court ... op. cit., p. 15

<sup>25</sup>I. HEIDE, *Supranational action against...* op. cit., p. 472

<sup>26</sup>H. COLLINS, *The EU Pregnancy Directive: a Guide for Human Resource Managers*. Oxford: Blackwell, 1994, p. 5

<sup>27</sup>A. CHMIEL, Semester Paper, Commentary to the judgment of the Court of Justice of European Union to the Case C-73/16, University of Antwerp 2018, p. 1

<sup>28</sup>G. FINLAY, Protective measures for pregnant workers in the workplace, *Academy of European Law*, 2010, p. 7

As provided in Article 21, “Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.”<sup>29</sup> The importance of this provision, especially regarding sex discrimination, however is limited since it addresses only the problem of discrimination by Member States when they implement EU law and the discrimination by institutions and bodies of the Union when they exercise their powers.<sup>30</sup> Therefore the role that the Charter can play in the determination of right of a pregnant worker in its legal role is restricted, and, for this reason, limited.<sup>31</sup>

Article 23 of the Charter concerns equality between women and men and was based on the EU commitment to the promotion of gender equality across the Union. That provision – besides reiteration of the importance of principle of equal pay for equal work –underlines the possibility for the need of introduction of special measures to provide advantages for the underrepresented sex that may be necessary to prevent disadvantages in professional life or to mitigate/compensate against existing barriers in the professional careers of workers.<sup>32</sup>

Therefore, we can distinguish two dimensions regarding the equality measures in the EU Charter. The first is negative in Article 21, which prohibits discrimination, and the second is positive in Article 23, which provides for temporary affirmative actions: what is more, Article 23 specifies the prohibition established in Article 21 rather than establishes it.<sup>33</sup> However, knowing that there will be no equality without changing the reality of the situation, just prohibiting discrimination will not enable the ultimate goal to be achieved.<sup>34</sup>

In the context of maternity in the European Union, special attention should be given to Article 33(2) of the EU Charter concerning family and professional life. “To reconcile family and professional life, everyone shall have the right to protection from dismissal for a reason connected with maternity

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<sup>29</sup>EUROPEAN UNION, Charter of Fundamental Rights of the European Union, 26 October 2012, 2012/C 326/02, available at: <https://www.refworld.org/docid/3ae6b3b70.html> [accessed 13 May 2019] Art. 21

<sup>30</sup> EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS, Charterpedia, Available at: <https://fra.europa.eu/en/charterpedia/article/21-non-discrimination> [accessed 13 May 2019] Art. 21

<sup>31</sup>G. FINLAY, Protective measures for pregnant ... op. cit., p. 7

<sup>32</sup> Charterpedia, Art. 23

<sup>33</sup> S. PEERS, T. HERVEY, J. KENNER, A. WARD [ed], The EU Charter of Fundamental Rights: A Commentary, Hart Publishing, 2014, p. 636

<sup>34</sup> Ibidem, p. 637

and the right to paid maternity leave and to parental leave following the birth or adoption of a child”.<sup>35</sup> The explanation provide by the Fundamental Rights Agency clarifies that this provision was inspired by Directive 92/85/EEC and Directive 96/34/EC.<sup>36</sup> Article 33(2) of the EU Charter, however, has been subjected to criticism for the reason that it only codifies already existing provisions on Parental and Maternity leave: it does not advance the issue.<sup>37</sup> From the other side, some authors believe that the description of the rights in the paragraph in question, with the direction at the aim of work-life reconciliation, is crucial and might be seen as a reorientation of the objectives of the measures adopted thus far in EU law. This is notably with regard to maternity leave, which while previously was regulated as a policy aimed at improving the health and safety of women workers in the EU Charter, now finds its connection with policies aiming at ensuring substantial equality.<sup>38</sup> It is also noteworthy that the article links to the Revised Social Charter with the rights of workers with family responsibilities to equal opportunities and equal treatment.<sup>39</sup>

Article 33(2) recognises the fundamental right to paid maternity, but the purpose of maternity leave is not singular. Next to the protection of the biological condition of the women giving birth, the European Union legislation also protects the special relationship of the mother and the child.<sup>40</sup> According to the intentions of the Praesidium of the Convention that was in charge of drafting of EU Charter – clarified in the explanatory note accompanying the Charter –maternity should mean the period from conception to weaning.<sup>41</sup> It should be noted though that the explanatory note accompanying the Charter was intended only to clarify the Charter and has no legal value.<sup>42</sup>

Since the Lisbon Treaty (TFEU 2009) came into force, a trend can be noticed in the European Union that the market economy should become more social; in part, this is also a reaction to the Global Financial Crisis and European Debt Crises that began in 2008 and their concomitant effects. However, an important criticism is the continuous perception of social rights at a supranational level as principles,

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<sup>35</sup>Charter of Fundamental Rights of the European Union, Art. 33(2)

<sup>36</sup> Charterpedia, Art. 33

<sup>37</sup> N. BUSBY, G. JAMES, Regulating working families in the European Union: a history of disjointed strategies, *Journal of Social Welfare and Family Law*, 37 (3), p. 5

<sup>38</sup>S. PEERS, T. HERVEY, J. KENNER, A. WARD [ed], *The EU Charter of Fundamental...*, op. cit.,[33.03]

<sup>39</sup> NOTE FROM THE PRAESIDIUM, Draft Charter of Fundamental Rights of the European Union, Charter 4473/00, 2000, available at: [http://www.europarl.europa.eu/charter/pdf/04473\\_en.pdf](http://www.europarl.europa.eu/charter/pdf/04473_en.pdf) pp. 30-31

<sup>40</sup> M. DE LA CORTE RODRIGUEZ (2018) Child-related leave and women’s labour market outcomes: towards a new paradigm in the European Union?, *Journal of Social Welfare and Family Law*, 40:3, 376-393, DOI: 10.1080/09649069.2018.1493657, p. 377

<sup>41</sup>Charterpedia,Art. 33

<sup>42</sup> B. BERCUSSON, *European Labour Law*, 2nd edition, Cambridge University Press, 2009, p. 224

which undermines their position in the legal order and reduces their potential to bring desired changes in strengthening legitimacy in Europe regarding social issues.

Nevertheless, an appreciation for the protections for working carers with the aim of their full integration into economy is needed. The approach taken towards the creation of an inclusive labour market has contributed to the emergence of the concept of work-life reconciliation (also referred to as work-life balance). We should ask, therefore, where we now stand in Europe? When it was created, the concept of gender equality was viewed as being limited in scope, whereas now it is well understood that it has a key role in economic and wider social development. However, the relationship between the two – economic and social developments – is often perceived by law as being in conflict, and both are intrinsically connected with gender equality issues. With time, we shall consider whether such an approach should not be viewed as complementary. The operation of the market economy, the career development of either partner and the desires of families brings us to the point where unpaid care liabilities require balancing, a balancing that takes into consideration gender dimensions.

## **COUNCIL OF EUROPE**

The foundation for the creation of the political organisation, the Council of Europe, was the Congress of the International Committee of Movements for European Unity at the Hague in May 1948, with the Council being established on 5 May 1949.<sup>43</sup> The goal of the organization “is to achieve a greater unity between its members for the purpose of safeguarding and realising the ideals and principles which are their common heritage and facilitating their economic and social progress.”<sup>44</sup> Hence, the aim of the organisation is twofold: not only the protection of democratic values but also the promotion of social and economic development<sup>45</sup> through the means of promotion and protection of democracy, the rule of law and human rights, while also fostering co-operation in Europe. Today, the Council consists of 47 member states, 28 of whom are also members of the European Union (pre-Brexit).<sup>46</sup>

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<sup>43</sup> JACOBS, WHITE, OVEY, *The European Convention on Human Rights*, 5 edn 2010, p. 4

<sup>44</sup> COUNCIL OF EUROPE, *Statute of the Council of Europe* : London, 5th May, 1949, Art 1 a

<sup>45</sup> F. BENOIT-ROHMER, H. KLEBES, *Council of Europe law; Towards a pan-European legal area*, Council of Europe, 2005, p. 20

<sup>46</sup> COUNCIL OF EUROPE, *The Council of Europe 800 million Europeans Guardian of human rights, democracy and the rule of law*, 2012, p.3

The Council of Europe has worked for decades on gender equality through the development of policy and legal frameworks.<sup>47</sup> Of utmost importance for maternity protection has been the introduction of two instruments of the Council that establish the standard for working mothers across Europe.

Drafted by the Council of Europe, the European Convention on Human Rights (1950) constitutes the core treaty that protects human rights and safeguards civil and political rights throughout the organisation's membership. The rights guaranteed in the Convention are justiciable and enforceable, with the body responsible for their protection being the European Court of Human Rights, based in Strasbourg.<sup>48</sup> What is unique in the European system is that there is direct access to the Court for anyone who satisfies the admissibility criteria.<sup>49</sup>

However, what needs to be emphasised is that while the rights of workers who are carers are not protected under the European Convention on Human Rights, the inventive approach of the European Court of Human Rights means that it has made a substantive contribution to the discussion of these rights. This is possible on the basis of two of the articles of the instrument, namely the interpretation of the right to family and private life and the definition of non-discrimination, which have been broadened and widened the scope of the Convention, covering matters relating to the protection of social rights.<sup>50</sup> The best way to demonstrate this is through an example and will be presented below.

The second instrument, the European Social Charter from 1961 (revised 1996) guarantees social and economic rights across Europe. The monitoring body of the Charter is the European Committee of Social Rights, which operates through a reporting system and collective complaints procedure.<sup>51</sup>

Two Articles of the European Social Charter relate to the issue being discussed. Article 8 provides for the protection of maternal health and safeguards the right of employed pregnant women. In the provision is the guarantee of fourteen weeks of maternity leave with the specification that six shall be taken as post-natal.<sup>52</sup> It also contains the provision that lays down the obligation of payment during maternity leave, regardless of whether the Member State would decide to ensure such payments

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<sup>47</sup> COUNCIL OF EUROPE, Gender Equality and Women's Rights; Council of Europe Standards, available at: <https://rm.coe.int/090000168058feef,p.2> [accessed 23 June 2019]

<sup>48</sup> Ibidem, p. 2

<sup>49</sup> COUNCIL OF EUROPE, Practical Guide on Admissibility Criteria, European Court of Human Rights, 2018, pp. 7-8

<sup>50</sup> P. FOUBERT, Š. IMAMOVIC, The pregnant workers directive: must do better: lessons to be learned from Strasbourg?, *Journal of Social Welfare and Family Law*, 2015, 37:3, 309-320, DOI: 10.1080/09649069.2015.1081221, p. 314

<sup>51</sup> COUNCIL OF EUROPE, Gender Equality and Women's Rights; Council..., op. cit., p. 2

<sup>52</sup> COUNCIL OF EUROPE, Children's Rights under the European Social Charter, 2005, [factsheet] available at: <https://rm.coe.int/1680474a4b> [accessed 23 June 2019]

through public funds or social security benefits. Furthermore, pregnant women shall not be dismissed from their work. The protection is granted in the moment of notification of an employer and lasts until the end of maternity leave. The Article in question also ensures time-off for working mothers for the purpose of nursing: such time should be regarded as normal working time and thus compensated for on the same basis. Further, Member States are required to regulate the night work of pregnant women, women who have recently given birth and who are breastfeeding, as well as prohibit the same groups from working in underground mining and other work that would appear to be unsuitable.<sup>53</sup>

Turning to the second Article, Article 27 of the European Social Charter guarantees the right of workers with family responsibilities to equal opportunities and equal treatment. This provision puts an obligation on Member States to not only introduce measures (such as childcare) that enabling workers who have family responsibilities to enter and remain in employment, but it also requires them to promote and develop services such as daycare. Even though there is no specific arrangement laid down in the provision, the right to parental leave for either parent is provided in the European Social Charter. There is also general prohibition on the termination of employment for a worker who has family responsibilities, unless a valid reason is found.<sup>54</sup>

Member States are responsible for introduction of the standards from aforementioned Articles. Although the Articles are not directly enforceable, the rights provided in the system should nevertheless positively influence progress in the area of social rights in national laws and jurisprudence.<sup>55</sup> However, the limitation on the justiciability of the presented rights constitutes a significant weakness of the system. The strong competences of the national governments in the area of social rights contributes to the growth of differences in standards from country to country and a lack of pressure regarding the introduction (or updating) of the standards often leads to a failure to achieve the aims of the Articles.

Clarification is needed with regard to the relationship between the Charter of Fundamental Rights of the European Union and the European Convention on Human Rights, as there are no members of the European Union who are not the members of the Council of Europe, and what results, some scholars argue, in the existence of competing legal orders that protects rights in parallel, including

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<sup>53</sup>COUNCIL OF EUROPE, European Social Charter (Revised), 3 May 1996, ETS 163, available at: <https://www.refworld.org/docid/3ae6b3678.html> [accessed 23 June 2019], Article 8

<sup>54</sup> European Social Charter, Art. 27

<sup>55</sup> COUNCIL OF EUROPE, European Committee of Social Rights, [website] available at: <https://www.coe.int/en/web/european-social-charter/european-committee-of-social-rights> [accessed 23 June 2019]

the rights important for parents. Of importance amongst the provisions here would be Article 52(3) of the European Union Charter of Fundamental Rights: ‘In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.’<sup>56</sup>What we should understand from this provision is that the protection provided in the European Convention on Human Rights constitutes a minimum protection, which means that European Union is permitted only to provide more extensive protection than laid down in that instrument, and consequently should never lead to lesser standard than the corresponding fundamental right of the Convention. The relationship and consistency should be preserved not only in the provisions of the law, but also in jurisprudence and therefore the interpretation of the law should also build on the other’s achievements. Unfortunately, as has been pointed out by Foubert and Imamović (2015), when the Treaty of Lisbon came into force in 2009 there was a moment where the Charter acquired a binding force that often started to omit references to the system of the European Convention of Human Rights.<sup>57</sup>It may therefore be that the time has come to renew the closer relationship between the Court of Justice of the European Union and the European Court of Human Rights.

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<sup>56</sup>Charter of Fundamental Rights of the European Union, Art. 52 (3)

<sup>57</sup>P. FOUBERT, Š. IMAMOVIĆ, The pregnant workers directive: must do better..., op. cit., p. 316



## THE LEGAL FRAMEWORK OF MATERNITY AND PARENTAL PROTECTION IN THE EUROPEAN UNION

### CHARACTERISTICS OF A PROBLEM

Historically speaking, women through the centuries were underestimated and their reproductive role – instead of representing social value – was an excuse for exclusion from public life. The effects of the subordination of women are still visible, as demonstrated in the proportion of women in part-time work as well as through market segregation.<sup>58</sup> Since paid as well as care work both constitute indispensable elements for most families, reconciling these elements is a challenge that must be addressed. With the allocation of a greater value to the role of women as a child giver and due to the increase in women's participation in the paid labour market, changes have to come not only in law but also in practice. Nevertheless, women's active role in the labour market still has no reflection in the division of unpaid work, meaning that the taking up of paid work by women does not correspond to an increasing participation in male care giving, which often results in an overburdening of women.<sup>59</sup>

Based on the traditional concept of maternity leave, policies across Europe are mostly designed for pregnant women, those who have recently given birth and those who are breastfeeding. Changes in this through the introduction of paternity and parental leave and the supporting of new divisions of care are still recent and not popular in all countries in Europe.<sup>60</sup> Irrespective of popularity, the traditional concept situation will soon change, as on 13 June 2019 the Council of the European Union adopted new rules on Work-Life Balance in order to improve the situation of parents and carers across Europe, thus repealing Council Directive 2010/18/EU on Parental Leave. The adoption of the new Directive constitutes a step forward in the achievement of gender equality. Nonetheless not every country supported the initiative, with, for example, Poland abstaining in the voting procedure.<sup>61</sup> The most important amendments introduce 10 working days of paternity leave<sup>62</sup>, with further improvements in

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<sup>58</sup>N. BUSBY, Division of labour: maternity protection in Europe, *Journal of Social Welfare and Family Law* 22(3) 2000, p. 278

<sup>59</sup>J. LEWIS, *Work-family balance, gender and policy*. Edward Elgar, Cheltenham, UK, 2009, p. 1

<sup>60</sup>L. STRANG, M. BROEKS, Maternity leave policies Trade-offs between labour market demands and health benefits for children, RAND Europe, 2011, p. 3

<sup>61</sup>COUNCIL OF THE EU, Press release; Better work-life balance for parents and carers in the EU: Council adopts new rules, 13 July 2019, available at: <https://www.consilium.europa.eu/en/press/press-releases/2019/06/13/better-work-life-balance-for-parents-and-carers-in-the-eu-council-adopts-new-rules/> [accessed 25 July 2019]

<sup>62</sup> Proposal for a Directive of the European Parliament and of the Council on work-life balance for parents and carers and repealing Council Directive 2010/18/EU, COM/2017/0253 final, Art. 4



the area of parental leave (such as two out of four months of the leave now being able to be transferred).<sup>63</sup> Paternity leave will now have to be paid at the same level as is currently guaranteed in the case of maternity leave. Unfortunately, the parental leave allowance is still up to the Member States and social partners to determine.<sup>64</sup> The deadline for the implementation of the Directive is three years, and therefore it will take time for the changes and more importantly for the fruits of the reforms to feed through.

Women often are presented by law as designated “by nature” to be caregivers. Such a construction imposes on them the role of being the main caregiver in the family, reinforcing the existing organization of the labour market and creating an obstacle to gender equality.<sup>65</sup> As far as childbirth and breastfeeding can be qualified as a matter of biology, childrearing is strongly connected with socially-constructed meanings of gender. Nevertheless, motherhood is still – for most people – intrinsically connected with caring.<sup>66</sup> What is unfortunate in equality legislation within the European Union, is that there are gender biases within its policies. A lack of challenge to the traditional role of the women in society is cementing existing inequalities, and this does not match the image that the Union promotes of itself.<sup>67</sup> How is it therefore possible that the Union calls itself a pioneer in tackling gender-based discrimination and cannot escape from traditional gender roles by leaving them unchallenged?<sup>68</sup>

## SECONDARY LEGISLATION

### Pregnant Workers Directive

In order to bring changes in the Union it is important to understand the complexity of the process of decision making in European Union. This is not just a matter of proper recognition of the right legal basis in the various treaties and the proportionality of chosen measures, but also the entire

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<sup>63</sup> Work-life balance Directive Art. 5

<sup>64</sup> Work-life balance Directive Art. 8

<sup>65</sup>C. GREBE, Reconciliation Policy in Germany 1998-2008: Construing the 'Problem' of the Incompatibility of Paid Employment and Care Work, 2010, p. 154

<sup>66</sup> C. GREBE, Reconciliation Policy in Germany ... op. cit., p. 156

<sup>67</sup>P. FOUBERT, Does EC Pregnancy and Maternity Legislation Create Equal Opportunities for Women in the EC Labor Market? The European Court of Justice's Interpretation of the EC Pregnancy Directive in Boyle and Lewen, Michigan Journal of Gender and Law Volume 8, Issue 2, 2002, pp. 221-222

<sup>68</sup> EUROPEAN EXTERNAL ACTION SERVICE, Gender Equality: one of the fundamental values of the EU, published 08/03/2018, Available at: [https://eeas.europa.eu/headquarters/headquarters-homepage/40929/gender-equality-one-fundamental-values-eu\\_mt](https://eeas.europa.eu/headquarters/headquarters-homepage/40929/gender-equality-one-fundamental-values-eu_mt) [accessed 13 May 2019]

process of reaching consensus between Member States, who – as the motto says – are united in diversity. To say that reaching consensus is often challenging is an understatement.

The adoption of the Directive regarding pregnant women in the 1990s is a useful example of this, with regard to how sensitive and difficult consensus can be when it comes to social matters. Due to the opposition towards the proposal as a social matter, the modification had to view the matter of equal treatment in employment through the creation of a link with the protection of health and safety of the worker.<sup>69</sup> Nevertheless there had to be compromises. Originally the plan of the Commission was to introduce very strong protection for pregnant workers across the Union. Maternity leave was expected to be paid and for a duration of 16 weeks and the proposal envisaged the introduction of paternity leave that would be allocated at the time of birth. In the end the Commission opted for a weaker version. The proposal that was adopted in September 1990 (COM(90)406 final) introduced only 14 weeks of maternity leave, with a mandatory 2 weeks before or after the birth and removed references to paternity leave.<sup>70</sup>

Still, the 1990's should be remembered as a very important decade in the history of women's rights in the European Union. One of the reasons for such a statement is that the Commission's action programme was implemented to put into practice the Charter of Fundamental Social Rights of Workers (introduced on 9 of December of 1989), through Council Directive 92/85 /EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding.<sup>7172</sup> The Pregnancy Directive introduced a minimum protection for workers who are pregnant, who have recently given birth and who are breastfeeding. The main purpose of the law is the improvement of the health and safety in the working environment for the previously mentioned three categories of workers. The Preamble states that the Directive shall not result in a reduction of the standard of protection that Member States had already achieved. The opposite, indeed, is true. Individual Member States are encouraged to introduce higher protections in their national policies and adopt more favourable arrangements for the workers in question.

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<sup>69</sup>P. FOUBERT, Does EC Pregnancy and Maternity a legislation Create Equal ..., op. cit., pp.227-228

<sup>70</sup>E. ELLIS, Protection of Pregnancy and Maternity, *Industrial Law Journal*, Volume 22, Issue 1, March 1993, p. 63

<sup>71</sup>The legislation was an individual Directive derived from the framework Directive 89/391/EEC on protection of the safety and health of workers at work

<sup>72</sup>EUROPEAN COMMISSION, Press Release on adoption of Directive on the protection of pregnant workers, women workers who have recently given birth and those who are breastfeeding, Available at [http://europa.eu/rapid/press-release\\_IP-92-832\\_en.htm](http://europa.eu/rapid/press-release_IP-92-832_en.htm) [accessed 12 May 2019]

The Directive was adopted under Article 118a EC, which at the time of the adoption of the law was a new provision introduced to the Treaty in 1986, with the so-called Single European Act. This was a strategic move, that paved the way for the adoption of legislation by qualified majority vote in the Council of the European Union, which was an alternative to the unanimity voting previously required for proposals on gender equality.<sup>73</sup>

Not everybody, however, applauds the success in the same way. Nicole Busby has commented that the legal basis for the Pregnant Workers Directive is not principally related to the social measures as it focuses on the health and safety of workers. She adds that the compromises made in the early 1990s might be seen as difficult to repair. Nevertheless, even she admits that the progress made was impossible without such a choice to compromise as the unanimity required in the Council related to gender equality measures was not possible to reach at that time.<sup>74</sup>

It is fair to say that the final version of the directive, passed in the Council, was inadequate, both with regards to the Commission's proposal as well as the European Parliament request directed to Member States to maintain the original character of the draft directive as presented by the Commission. The areas that are particularly unsatisfactory in the opinion of the Commission were the provisions concerning night work as well as maternity leave benefits. Nevertheless, the adoption of the Directive, taking into consideration the improvements that were brought about through this legislation, still deserve consideration.<sup>75</sup>

Firstly, the Preamble mentions Article 15 of Council Directive 89 / 391 / EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work. The purpose of recalling of that provision is to point out the need of protection for particularly sensitive risk groups against endangerment that affects especially them. By underlying that provision, the Commission wanted to draw attention to the fact that the three groups of protected workers

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<sup>73</sup>J. J. RICHARDSON[ed], *European Union: Power and Policy-making*, Third edition, Routledge, 2006, p. 181

<sup>74</sup>N. BUSBY, *A right to care? Unpaid care work in European Employment Law*, Oxford Monographs on Labour Law, 2011, pp. 114-115

<sup>75</sup>EUROPEAN COMMISSION, Press Release on adoption of Directive on the protection of pregnant workers, women workers who have recently given birth and those who are breastfeeding, Available at [http://europa.eu/rapid/press-release\\_IP-92-832\\_en.htm](http://europa.eu/rapid/press-release_IP-92-832_en.htm) [accessed 12 May 2019]

recognized in the Pregnancy Directive should be perceived as specific risk group, requiring special attention when it comes to the workplace environment.<sup>76</sup>

The source of this inspiration, which is not based in the equality principle, resulted in the provisions of the Pregnant Workers Directive being classified as *sui generis*. That, however, contributed to the fact that the beneficiaries of the increased protection are very restricted. The final outcome, according to Foubert and Imamović (2015), only strengthens the stereotype of the women as primary carers.<sup>77</sup>

Therefore, it should be pointed out that the Directive is not presented as a measure for gender equality. It introduced the protected worker as vulnerable, and on that basis gave rise to the necessity for increased protection against the risks at the workplace, thus making it necessary to grant maternity leave. This construction contributes to the consolidation of the model in which women are and are viewed as the primary caregiver of a child. The confirmation of such a presumption might be seen in lack of the provisions concerning fathers in the whole Directive. The lack of paternity leave provisions, which initially were part of the proposal, are the subject of frequent criticism.<sup>78</sup> Still, the need to safeguard women in the labour market is emphasised in the Directive, as there is a high likelihood of unfavourable treatment.<sup>79</sup>

The Directive was adopted without prejudice to the protection guaranteed by the Directive on equal treatment of men and women. Therefore, the provisions of the directives when they related to the area of gender equality shall not work to the detriment of the other. On the contrary, the Court of Justice of the European Union, as will be shown later in this paper, often in its rulings examines not only the provisions of the Pregnancy Directive, but also the relevant articles of the Equal Treatment Directive.<sup>80</sup>

What need to be emphasised is that even though the guarantees related to maternity leave allowances refers to the minimum level of pay at the level of entitlements in case of illness, such an analogy is purely technical and in no case should be interpreted as constituting a connection between

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<sup>76</sup> Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding, Preamble

<sup>77</sup>P. FOUBERT,Š. IMAMOVIĆ, The pregnant workers directive: must do better..., op. cit., p. 310

<sup>78</sup>S&D, PES WOMEN, Let's unblock the "Maternity Leave" directive! Or why this is not an old-fashioned text, 2015, pp.3-5

<sup>79</sup>Council Directive 92/85/EEC of 19 October 1992, Preamble

<sup>80</sup>G. FINLAY, Protective measures for pregnant ... op. cit., p. 4

pregnancy and illness. It is important to stress this, since the analogy should under no circumstances be allowed.

Turning to the analysis of relevant provisions of the Directive, the definitions in Article 2 of the Directive provides that protection is awarded for workers who have informed an employer about their status. This, however, was subject to the interpretation of the European Court of Justice and an Opinion by the Advocate General was given.<sup>81</sup> In the Opinion of Advocate General Sharpston in the case of *Jessica Porrás Guisado v. Bankia SA and others*, delivered on 14 September 2017, we can observe how this matter might be more recently seen. The issue was, if the rights under the Pregnant Workers Directive are guaranteed to the individual that constitutes a pregnant worker within the meaning of Article 2 of the Maternity Directive, whether the pregnant women who has not informed an employer about the pregnancy still deserves the protection granted by the Directive.<sup>82</sup> In this respect, the *Danosa* case was revoked as the Court held there that the procedural requirement shall not have a negative effect on the substantive protection of the Directive: therefore formal notification is not required and an informal way of learning about the condition of the pregnant employee should be considered as sufficient to award the protection.<sup>83</sup>

Article 4 opens the first group of the substantive protections guaranteed in the Directive and imposes the obligation on the employer to conduct an assessment of the working conditions, processes, risks or dangerous agents, so that the activities of the pregnant workers, workers who have recently given birth or workers who are breastfeeding will not constitute a threat to their safety or health. This assessment should take into consideration the duration of the exposure to the risk, its nature and degree. Such an assessment is correlated with the duty to inform the worker about the result of the assessment, and to react if the assessment reveals risks.<sup>84</sup>

As we can see in Article 5, there are three different approaches to how the situation may be handled if the assessment carried out within the meaning of Article 4 identifies an existing risk. Firstly, the avoidance of the exposure of the protected worker to the risk could be managed by the temporary adjustment of working conditions or hours. This, however, might not be possible due to technical obstacles. Such an adaptation also should not be performed if it is neither objectively feasible nor

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<sup>81</sup>Council Directive 92/85/EEC of 19 October 1992, Art. 2

<sup>82</sup>OPINION OF ADVOCATE GENERAL SHARPSTON delivered on 14 September 2017(1) Case C-103/16, *Jessica Porrás Guisado v Bankia*, ECLI: EU:C:2017:691 Par. 29

<sup>83</sup>OPINION OF ADVOCATE GENERAL SHARPSTON *Bankia*, par. 33

<sup>84</sup>Council Directive 92/85/EEC of 19 October 1992, Art. 4

reasonable to require on duly justified grounds to introduce the necessary changes. In such a case, the worker should be moved to a different job. Alternative work, however, must be suitable and its conditions cannot be substantially less favourable than the original job. If this move is also impossible, protected workers should be granted leave for the period that is required for the protection of their health and safety.<sup>85</sup>

Article 6 provides special provisions concerning the prohibition to exposure to materials liable to jeopardize the safety and health of women protected under the Directive. Further, the Article prohibits the performance of certain duties, providing a non-exhaustive list of risks. Pregnant workers should not be subjected to physical, biological and chemical agents, and should not be working in underground mining. Moreover, workers who are breastfeeding should not work with chemical agents that are able to be absorbed into the human organism and also should not work in underground mining.<sup>86</sup>

Article 7 concerns night work and provides that no women should be obliged to perform night work, provided that she possesses a medical certificate. The protected period starts at the moment of becoming pregnant and includes time after birth. However, this provision does not constitute a prohibition of night work: there is an obligation for the night work to be optional and for the possibility of switching to daytime work to be given. If that is impossible for technical reasons or if it is neither objectively feasible nor reasonable to require on duly justified grounds to provide such an opportunity, pregnant workers, workers who have recently given birth or who are breastfeeding should be granted the possibility of taking leave for necessary period of time.<sup>87</sup>

Article 8 provides for maternity leave. The Directive entitles women to take no less than 14 weeks of continuous maternity leave that shall be allocated before and/or after confinement. From that period at least two weeks before or after birth must be compulsory.<sup>88</sup> The minimum 14 weeks leave provided in the Directive is perceived, however, by certain Member States as leave only for women. It should also be noted that the length of the leave might sometimes go beyond the time required from the perspective of health and safety, but unfortunately there is a lack of the incentives for more equal distribution of care activities between men and women, especially considered together with the issues

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<sup>85</sup>Council Directive 92/85/EEC of 19 October 1992, Art. 5

<sup>86</sup>Council Directive 92/85/EEC of 19 October 1992, Art. 6

<sup>87</sup>Council Directive 92/85/EEC of 19 October 1992, Art.7

<sup>88</sup>Council Directive 92/85/EEC of 19 October 1992, Art.8

regarding paid labour.<sup>89</sup> As Foubert and Imamović (2015) argue, this approach (through Directive 92/85/EEC) does not bring developments in the position of women, already perceived as primary carer of the child.

Article 9 ensures that if pregnant workers need a medical examination that is scheduled during working hours, they should have the possibility to take time off for ante-natal examination without loss of pay.<sup>90</sup>

As we can see, therefore, amongst the protective measures provided for the protection of pregnant workers we can distinguish three types of leave: maternity leave, time for ante-natal examination, and ‘special’ leave if the post or the workplace poses a risk for the health and safety of the worker and ameliorating measures cannot be taken.<sup>91</sup>

Article 10 introduces the most far-reaching right guaranteed by the Directive.<sup>92</sup> By this provision women are protected against dismissal from employment from the moment they become pregnant until end of maternity leave. The only situations when the dismissal is permitted are very narrow and highly exceptional. Firstly, under no circumstances can dismissal be connected with the condition of the protected worker; secondly, such a dismissal must be provided for in national legislation or practice; thirdly, if necessary, the dismissal should take place only with the consent of a competent authority. The protection against dismissal is guaranteed by the duty of an employer to provide in writing duly substantiated grounds as to why the dismissal has taken place. Moreover, Member States are obliged to introduce measures to provide protection for workers from the consequences of unlawful dismissal if it took place as a result of pregnancy.<sup>93</sup> The importance this provision is justified by the harmful effect that dismissal might have on mental or physical state of a pregnant, recently given birth or breastfeeding working women.<sup>94</sup>

Article 11 constitutes a second group of substantive protections and covers the employment rights of pregnant workers, workers who have recently given birth or who are breastfeeding. The aim of this provision is to ensure the effective protection of the workers that is guaranteed in the Directive. According to the provision, workers benefiting from the opportunities of taking leave should not lose

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<sup>89</sup>P. FOUBERT, Š. IMAMOVIĆ, *The pregnant workers directive: must do better...*, op. cit., p. 310

<sup>90</sup> Council Directive 92/85/EEC of 19 October 1992, Art. 9

<sup>91</sup>G. FINLAY, *Protective measures for pregnant ...* op. cit., pp. 5-6

<sup>92</sup>*Ibidem*, p. 6

<sup>93</sup>Council Directive 92/85/EEC of 19 October 1992, Art. 10

<sup>94</sup>C. PALMER, *Gender equality under EU law: how far does it protect pregnancy and maternity*, Leigh Day & Co, 2011, p. 9



their employment rights associated with their employment contract i.e. they should maintain their “payment” and be entitled to adequate allowances. The leave being referenced here is the leave when an assessment conducted by an employer reveals that working conditions expose women to a health and safety risk, or when exposure to the risks is prohibited as provided in Article 6 or in case of employees on night duty. Moreover, workers on maternity leave shall maintain their “payment”, be entitled to adequate allowances and have ensured all other rights that are related to the employment contract. The allowances – according to the intentions of the legislator – are adequate if they are not lower than those that would be paid in the case of leave connected with state of health. That provision, however, does not prevent Member States whose national legislation have introduced such a possibility from making entitlement to allowance or pay conditional. However, conditions for access to the benefits cannot exceed the period of 12 months immediately prior to the presumed date of confinement.<sup>95</sup>

Following this description of the system in force, the question is what should we be thinking overall about the Directive adopted in 1992? A critique of the European Union legal framework can be found in the work of Busby and James (2015), who call the regulation of working carers as weak and undertaken only because it was needed, not because it was planned.<sup>96</sup> It could also be argued that the social changes that occurred in the area of maternity, pregnancy and parenthood are still not reflected in the legal framework: these areas of jurisprudence are covered below.<sup>97</sup> The rights of pregnant workers provided in the Directive, often extended by the rulings of the Court of Justice of the European Union, appear to be still rooted in an idea of parenthood that is outdated and which does not take into consideration the direction of the perception of caregiving in more gender neutral way.<sup>98</sup> There is no doubt that the atypical forms of employment are dominated by the women. That, however, is the result of the strong connection between child bearing and child rearing, which strongly influences women's participation in the labour market.<sup>99</sup> The question is how it can possibly be changed, when we allow for lengthy leaves that are almost exclusive for women.

The negative side of the Directive that is visible when we look at the principle of equality and its realization by legislation needs to be examined. The European legislators have contributed to the

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<sup>95</sup>Council Directive 92/85/EEC of 19 October 1992, Art. 12

<sup>96</sup>N. BUSBY, G. JAMES, *Regulating working families in the European...*, op. cit., p. 3

<sup>97</sup>P. FOUBERT, Š. IMAMOVIĆ, *The pregnant workers directive: must do better...*, op. cit., p. 309

<sup>98</sup>N. BUSBY, G. JAMES, *Regulating working families in the European...*, op. cit., pp. 7-8

<sup>99</sup>N. BUSBY, *A right to care? Unpaid care work in European Employment...*, op. cit., p. 114



division of formal and substantive equality. Instead of the promotion of rights of women as the citizen and mother, they chose the path of protection of female workers, which fails to challenge the existing special structures.<sup>100</sup> Moreover, as argued by Guerrina (2002), the result of the legislative process that took place in the 1990s shows how the political elites see (or, at the least, saw) the relationship between social and economic interests. They perceived them as being in conflict, with a lower value assigned to women's contribution to the economy, as the contribution to work-life balance policies clashes with current shape of the labour market.<sup>101</sup>

What unfortunately can be concluded is that the Directive delivers the message that women as primary caregivers should stay at home and sacrifice their career development potential. The result of such a situation is a continuation of social exclusion, child poverty and the gender pay gap<sup>102</sup>. Often, some voices argue that maternity protection with its' current construction should be perceived as a setback, as it is an exclusive right for women. The most problematic issue therefore is that maternity leave is not shared. Modern solutions should give women the possibility to advance in their careers. It is true that longer maternity leave results in not only lesser experience and a weaker career portfolio, but also in a smaller network for the individual.<sup>103</sup>

While there are great differences among Member States due to the diverse ways of how the directives are implemented, strong traditions remain unchallenged. Sometimes the law seems to even prevent cultural changes through the construction of mandatory leaves: it encourages increased employment for women but unfortunately in the lower pay scale jobs.<sup>104</sup> With the current standards, the difficulties in reaching managerial and senior level positions start even before pregnancy. This unequal treatment is often actually based on the female ability to give birth, not on the individual pregnancy as such, since the costs imposed on businesses through maternity protection makes it less likely that women will be hired. Fair access to work is undermined, despite the protection through anti-discrimination legislation. The unequal division of leave in the legislation, despite being positive from the perspective of the health of mothers and babies, does not take into consideration wider economic

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<sup>100</sup> R. GUERRINA, *Mothering in Europe; Feminist Critique of European Policies on Motherhood and Employment*, *The European Journal of Women's Studies*, Vol. 9(1), SAGE Publications, 2002, p. 56

<sup>101</sup> *Ibidem*, p. 57

<sup>102</sup> G. PASCALL, J. LEWIS, *Emerging Gender Regimes and Policies for Gender Equality In a Wider Europe*, *Jnl Soc. Pol.*, 33,3 Cambridge University Press, 2004, pp. 377-378 and 387

<sup>103</sup> A. FRECH, S. DAMASKE, *The Relationships between Mothers' Work Pathways and Physical and Mental Health*, *Journal of Health and Social Behaviour* 53(4), American Sociological Association, 2012 p. 397

<sup>104</sup> J. RUBERY, *Why is women's work low-paid? Establishing a framework for understanding the causes of low pay among professions traditionally dominated by women*, OXFAM, 2017, p.4

implications and the influence this has on their career prospects. The incentives to encourage the change in the direction of the sharing of leave and household responsibilities should come from the European level and be supported by a commitment towards improvements in the area of gender equality. Of course, just passing the law is not enough, but a lack of progressive advancement in the standards required that follows closely the direction of societal development will undermine the efforts of those who are the most effective in lessening the current problem of work-life conflict.

Another question however arises in that context. Should work and life be perceived as in conflict? The perspective for that issue might be subject to modification if participation in paid as well as unpaid work would be separated from stereotypical roles, namely the social role of women and the economic role of men.

As Foubert and Imamović (2015) argued, the Pregnant Workers Directive is concentrated merely on the health and safety at work of workers who are pregnant, who have recently given birth or who are breastfeeding. Due to the lack of reform in the directive since 1992, the relationship between the directive with the Recast Directive (2006/54/EC) is problematic.<sup>105</sup> Even though in the hierarchy of legal acts in the European Union the Pregnant Workers Directive and the Equal Treatment Directive should be treated equally, there is the possibility of the priority of one over the other, as the Equal Treatment Directive specifies a basic principle of law, namely equal pay for equal work.<sup>106</sup>

Regardless of the critique of the relationship, the Pregnant Workers Directive is often regarded as relating to Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast). The majority of the cases decided by the European Court of Justice concerning discrimination on the grounds of pregnancy and maternity in the European Union involve an analysis of that Directive.<sup>107</sup> For that reason is also important to have a closer look at the provisions introduced in that secondary legislation.

## **Recast**

The Recast Directive was adopted in 2006 and combines into one document existing provisions regarding different gender equality directives, including Council Directive 76/207/EEC of 9

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<sup>105</sup>P. FOUBERT, Š. IMAMOVIĆ, The pregnant workers directive: must do better..., op. cit., p. 309

<sup>106</sup> P. FOUBERT, Does EC Pregnancy and Maternity a legislation Create Equal ..., op. cit., pp.228-229

<sup>107</sup>C. PALMER, Gender equality under EU... op. cit., p. 4

February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, which was important in the analysis of the Court of Justice of European Union before the Pregnancy Directive was adopted. The incorporation process took account of the most notable developments of the Court of Justice of the European Union by including them into the law. Therefore, the aim of such a consolidation was clarification of the present *acquis* and bringing the protection all together in a single place.<sup>108</sup>

It is important to start the summary of the legislation with Article 28 of the Recast Directive, which defined the relationship between the Equal Treatment and the Pregnancy Directives, stating that “This Directive shall be without prejudice to provisions concerning the protection of women, particularly as regards pregnancy and maternity.” This indicates that woman as regarding pregnancy and maternity is framed as the exception to gender equality. Such a construction of the concept in European Union law is subjected to criticism from a human rights perspective. The main allegation is that of a failure to use the opportunity to redefine the labour market in order to adapt it to the changes that have occurred in society in the area of gender equality.<sup>109</sup>

The close connection between gender equality and the ensuring of a high level of protection regarding workplace safety and health issues are presented in recitals 24 and 25 of the Directive. It is clear from them that an improvement in the above mentioned areas would constitute a component of the aim of the Union in achieving and promoting of equality between men and women, and therefore, it would be legitimate to grant protection for working women with regards to their biological conditions during pregnancy: in particular, maternity leave would be a necessary instrument in the attainment of substantive equality. What is more, the bridge between measures introduced in both Recast and Pregnancy Directives was established and showed their interrelatedness, for example through the exercising of employment rights, such as the right to return to the same or equivalent post, that would not be subjected to unfavourable terms and conditions by taking advantage of the maternity leave and not losing the opportunity to benefit from the improvements occurring during the absence.<sup>110</sup>

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<sup>108</sup>S. BURRI, S. PRECHAL, EU Gender Equality Law Update 2013, S. BURRI [updated], European Commission 2014, p, 8

<sup>109</sup>N. BUSBY, A right to care? Unpaid care work in European Employment..., op. cit., p. 112

<sup>110</sup>Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on ... of men and women in matters of employment and occupation (recast). Preamble

Recital 1 of the Preamble makes it clear that the Directive is the result of bringing together gender equality laws of the European Union and was inspired by the developments of the case-law of the European Court of Justice. Recital 2 recalls that equality between men and women constitutes a fundamental principle of the Union and is its objective. It also recounts that according to Treaty provisions, one of the tasks of the European Union is the promotion of gender equality in all of its activities. Recital 5 refers to the provisions of the Charter of Fundamental Rights, in particular Articles 21 and 23 pointing out that in the European Union discrimination based on sex is prohibited and that equal treatment of men and women in all areas is constituted as a right. Recital 8 make reference to the Founding Treaty provision establishing the principle of equal pay for equal work, underlying the importance of progressing further in its implementation across Europe.<sup>111</sup>

Another thing worth noting is the possibility provided for by the Treaty for the introduction of temporary affirmative action in order to enable substantive equality and compensate under-represented party for disadvantages in pursuing careers presented in Recital 22. The measures might be introduced, for example, in order to improve the working life situation of women.

Recital 23 of the Directive reflects previous rulings of the Court and establishes that discrimination on the basis of pregnancy constitutes direct discrimination and cannot be justified on the ground of financial or managerial considerations of the employer.<sup>112</sup> Classification of the discrimination on the grounds of pregnancy as ‘direct’ not only acknowledges how serious a matter is the unfavourable treatment of pregnant women, but also shows how widespread and persistent is the practice and the gravity the situation.<sup>113</sup>

As Article 1 states, the Recast Directive was adopted with the aim of implementing the principle of equal treatment and opportunities for both sexes in employment and occupation matters. Therefore, it covers issues connected with effective access to employment in the wide sense and working conditions, as well as occupational social security schemes. Importantly, ‘pay’ was explicitly included in the definition of working conditions, blurring the line between equal treatment and equal pay.<sup>114</sup>

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<sup>111</sup>Directive 2006/54/EC of the European Parliament and of the Council, Preamble

<sup>112</sup>G. FINLAY, *Protective measures for pregnant ... op. cit.*, p. 4

<sup>113</sup> *Ibidem*, p. 4

<sup>114</sup>G. FINLAY, *Protective measures for pregnant ... op. cit.*, p. 4

Article 2 provides an extension of the definition of discrimination within the meaning laid down in Directive 92/85/EEC in relation to the unfavourable treatment of the pregnant worker or while on the maternity leave, therefore prohibiting discriminatory treatment on the ground of pregnancy.<sup>115</sup>

One far-reaching right is guaranteed by Article 9 paragraph 1 (g). This paragraph provides as an example of discrimination that is contrary to the principle of equal treatment the suspension of the acquisition or retention of rights provided by law that should be paid by employer while the worker was on maternity leave or other leave granted for family reasons.<sup>116</sup>

Article 15 introduce guarantees connected with the return of the woman to work after maternity leave, in that there in an entitlement to return to the job performed before taking leave or to an equivalent post. This provides assurances related to terms and conditions of the work, stating that they shall be no less favourable and that Member States must ensure that employers are providing such workers with all the benefits or improvements in working conditions that were introduced during the absence.<sup>117</sup>

It is enough to note here that this Directive brings a change in the approach to bringing the desired advancement to reality. The focus in the new legislation switches from a symmetrical model by committing to efforts to eliminate existing barriers to women's integration in the paid labour market and stressing the importance of the distribution of unpaid work, given that the current system regularly leads to discrimination. The law constitutes a commitment to the achievement of substantive gender equality.<sup>118</sup>

That being said, there are critiques. Busby (2011), for example, focuses on the weakness of the Directive in the form of what it omits. The Recast Directive – by lack of regulation on the matters of parental, maternity leave and pregnancy – confirms the existence of two regimes. As can be seen, equal treatment and equal pay, together with pregnancy, did not deserve at the time of adoption the formal acknowledgment of their interrelationship.<sup>119</sup> Therefore, the decision of the European Commission in

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<sup>115</sup> Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006, Art. 2

<sup>116</sup> Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006, Art. 9

<sup>117</sup> Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006, Art. 15

<sup>118</sup> N. BUSBY, A right to care? Unpaid care work in European Employment..., op. cit., p. 111

<sup>119</sup> Ibidem, p. 111

2006 meant that the gap that existed between distinct grounds for discrimination could not yet be closed.<sup>120</sup>

### **Parental Leave Directive**

The Directive on parental leave and leave for family reasons went through a long process before being adopted. The first proposal of the Commission was prepared in 1983. The motivation for the introduction of a minimum standard across the Union (then the EEC) was a belief that differences existing in national laws might constitute an obstacle to the harmonious development of the Single Market.<sup>121</sup> This may be the reason why Busby and James (2015) argue in their paper that generally EU regulation in the parental leave area lack cohesion and a clear legislative strategy, resulting in the existing inconsistencies in the provisions.<sup>122</sup>

The initial draft of the Directive suggested the introduction of three months of parental leave that could be taken up until the child's third birthday. The pay element was to be optional, with Member States individually taking a decision on that matter. Moreover, the Commission proposed an obligation for provision of days off for family reasons, leaving leeway for the individual Member States with regard to the number that should be granted, with pay at the level of any other time off with pay. The Commission was of the opinion that the right to parental leave should be non-transferable.<sup>123</sup>

Due to the unanimity voting procedure, the proposal did not pass, and it took the Commission more than a decade to come back to the idea of harmonisation in this area. The Council directive was finally adopted on 3 June 3 1996, which authorized the implementation of the collective agreement on parental leave into national laws across the Union.<sup>124</sup> But was it a real success?

Parental leave is defined as short period of leave provided to care for children in the first year of life.<sup>125</sup> The system currently in force was established by Council Directive 2010/18/EU of 8 March 2010, implementing the revised Framework Agreement on parental leave (concluded by

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<sup>120</sup> Ibidem, p. 112

<sup>121</sup> EUROPEAN COMMISSION, *Paternity and parental leave policies across the European Union; Assessment of current provision*, Luxembourg: Publications Office of the European Union, 2018, p. 1

<sup>122</sup> N. BUSBY, G. JAMES, *Regulating working families in the European...*, op. cit., p. 14

<sup>123</sup> EUROPEAN COMMISSION, *Paternity and parental leave policies...* op. cit., p. 1

<sup>124</sup> G. FALKNER, M. HARTLAPP, S. LEIBER, O. TREIB, *Transforming social policy in Europe? The EC's parental leave directive and misfit in the 15 member states*, Max-Planck-Institut für Gesellschaftsforschung, Köln, No. 02/11, 2002, Available at: <http://www.mpifg.de/pu/workpap/wp02-11/wp02-11.html> [Accessed 13 May 2019] pp. 7-8

<sup>125</sup> EUROPEAN COMMISSION, *Paternity and parental leave policies...* op. cit., p. 1

BUSINESSEUROPE, UEAPME, CEEP and ETUC) and repealing Directive 96/34/EC. The leave introduced by the secondary legislation is unpaid, of a duration of a minimum of four months, applicable also to atypical employment contracts and with one month being non-transferable.<sup>126</sup> The aim of the Directive is the promotion of the participation of women in the labour market, the equal sharing of responsibilities with regards to care, and support of the work-life balance. Taken into consideration were also the special needs of parents with children with long term illness or with disabilities.<sup>127</sup>

Some explanation is needed regarding the strong position of the Commission as concerns the promotion of leave as non-transferable. At first glance, it might seem that transferability of the leave is positive since it would appear to be equal and fair. By not imposing the duty of the childcare specifically on one of the parents the choice would be in the hands of family. In practice, however, this constitutes a problem due to deep society norms, resulting in women taking parental leave and interrupting their professional careers.<sup>128</sup> In the current construction, parental leave encourage women to stay longer at home, due to the traditional gender roles in paid and unpaid work.<sup>129</sup> Even though evidences shows that a more equal participation of fathers in childcare is beneficial not only for mothers but also for children, fathers themselves as well as employers, the decisions as to who will take care of infants made in a family setting still results in limited take up of parental leave by men.<sup>130</sup>

To evaluate the legislation we must consider the general purpose of the Directive and whether the adopted provisions were capable of playing their role in achievement of the goal.

It is certain that parental leave is highly complex, as finding the right balance between the time needed for after birth recovery and breastfeeding and the "time out" from the labour market affecting mothers earnings must be difficult to determine.<sup>131</sup> However we should not forget that being a mother means that a range of costs have to be taken into consideration: amongst others the break from work

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<sup>126</sup>Y. EMRE, A. J. PLANTENGA, Labour Market Effects of Parental Leave: A European Perspective, Utrecht School of Economics, Utrecht University, April 2011, p. 2

<sup>127</sup> C. PALMER, Gender equality under EU... op. cit., p. 7

<sup>128</sup> Carmen Castro-García & Maria Pazos-Moran (2015): Parental Leave Policy and Gender Equality in Europe, Feminist Economics, DOI: 10.1080/13545701.2015.1082033, p. 5

<sup>129</sup> R. CICCIA, M. VERLOO, Parental leave regulations and the persistence of the male breadwinner model: Using fuzzy-set ideal type analysis to assess gender equality in an enlarged Europe Journal of European Social Policy 2012, p. 524

<sup>130</sup>EUROPEAN COMMISSION, Paternity and parental leave policies... op. cit., p. 6

<sup>131</sup>J. GALTRY, P. CALLISTER, Assessing the Optimal Length of Parental Leave for Child and Parental Well-Being; How Can Research Inform Policy?, Journal of Family Issues Vol. 26 No. 2, Sage Publications, 2005, p. 220



can result in not only loss of earnings, but also missed training opportunities, depreciation of experience and loss of skills, a signalling to the employer of lack of commitment, and so on.<sup>132</sup>The career cost connected with having a children and then caring for it is high.<sup>133</sup>

Further, it must be said that policymaking does often not have much in common with the research that is conducted in order to (purportedly) inform policy. The result of the legislative process is often a matter of compromise, as the final outcome is often far away from the identified "best practice".<sup>134</sup>

What seems to be a reality is that effects in practice of the 2010 Directive on Parental leave remain marginal, even though it was meant to bring improvements in the existing framework, as the goal of an increased share of children care between parents still seems to be very distant. This is largely due to the trade-off between the aim of gender equality and harmonisation.<sup>135</sup>

The research conducted in Nordic countries that invested in policies providing incentives for fathers to more greatly participate in taking care of their newborns, shows that situations where fathers were exercising their rights to leave in a greater-than-average way positively and directly influenced the situation of their partners.<sup>136</sup> But it also demonstrated that fathers would not decide to take time off from work unless the security of the family finances would not be threatened. Therefore, what should be concluded is that the Parental Leave Directive does not provide a solution for the gender-neutral distribution of employment and care, as it does not take into consideration existing economic hierarchies.<sup>137</sup>

The issue of income during the period of parental leave is strongly associated with equal use of parental leave. This is because the absence of remuneration will often give fathers a pause for thought as to whether they should exercise their rights, especially when they usually have higher levels of income than the mother in the family: in economic terms, the opportunity-cost calculation is higher.<sup>138</sup> Busby agrees with such a critique. She notes that substantive changes in the mandatory pays levels are necessary not only for maternity but also for parental leave, as both the achievement of a proper work-

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<sup>132</sup> Ibidem, p. 221

<sup>133</sup> Ibidem, p. 223

<sup>134</sup> Ibidem pp. 220-221

<sup>135</sup> N. BUSBY, G. JAMES, *Regulating working families in the European...*, op. cit., pp. 11-12

<sup>136</sup> Ibidem, p. 224

<sup>137</sup> R. GUERRINA, *Mothering in Europe; Feminist Critique of European...*, op. cit., p. 58

<sup>138</sup> M. DE LA CORTE RODRIGUEZ (2018) *Child-related leave...*, op. cit., p. 381



life balance and long-awaited gender equality are not possible without this.<sup>139</sup> Moreover, giving only one month out of the four as non-transferable to the partner makes it very likely that fathers will decide to exercise individually their right to leave in limited way (i.e. they will only take that one month at most). Furthermore, the introduction of the notice period and possibility for Member States to maintain the period of one year as a qualifying period for the eligibility to exercise the right to leave may be seen as a further contribution to the low level of take-up of the parental leave by the men<sup>140</sup>, with an intent on the part of some to take the leave later during the year but this never occurs in practice.

The legislation on Parental leave – as an attempt to encourage neutrality in the share of caregiving among workers – is, as a result of necessary compromises, something that should be considered as a rather weak instrument in the attainment of its goals. Among the biggest critiques is the fact that the minimum standards imposed on the Member States do not specify many of the operational details that need to be determined in national policies, notably a measures of utmost importance in the effective enjoyment of the right; the issue of payment.<sup>141</sup> Moreover, the reorganisation of the care responsibilities seems distant as the potential possibility to transfer the leave gives in many cases simply a possibility to lengthen the maternity leave for mothers.<sup>142</sup> Even though the Council Directive from 2010 on Parental Leave introduced improvements in order to better address its goals, there is considerable leeway left to Member States in its implementation.<sup>143</sup> It is a shame that national policies, instead of taking actions in favour of the liberalisation of the market for women, still make use of freedom to reinforce existing stereotypes.

In conclusion, the Directive from 2010 does not address the issue of the discrimination that exists nowadays. Men and women in reality are both discriminated in relation to the take-up of parental leave and this cannot be overlooked. The system does not allow for a real chance of equal participation by both parents in childcaring during the first months of life, notably due to economic reasons, and that is harmful for both parents. A lack of guarantee with regard to payment imposes a limit on family choices and reaffirms already existing stereotypes. The only measure we could have to aid an increase in male participation in parental leave concerns payment and non-transferability, as the non-individualized right is hardly shared. Progress in equal division will be also beneficial for businesses

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<sup>139</sup>N. BUSBY, A right to care? Unpaid care work in European Employment..., op. cit., p. 118

<sup>140</sup> N. BUSBY, G. JAMES, Regulating working families in the European..., op. cit., p. 13

<sup>141</sup> Ibidem, p. 12 Busby

<sup>142</sup> Ibidem, p. 12 Busby

<sup>143</sup> Ibidem, p. 13 Busby

that are unfortunately blinded by costs concerns. Paying for leave is an investment, which is costly, but which pay backs only if provided with real chance. The size of the workforce expected after societal shifts should be reflected not only in the quantity of the workforce but also in the quality of the workers available on the labour market. The gain for society is important since ruling out discrimination will help to close the pay gap and eradicate poverty. It should also be born in mind that the protection of women's choices over private and work life is connected with many diverse factors, but nevertheless the most crucial step that needs to be taken at the political level is economic. How else can we motivate the equal division of paid and unpaid work for either partner if it requires something more than simply good will, namely moving beyond deeply rooted traditions? Only a strong encouragement for men to take leave will lead to an increase and guarantee of participation to the same extent in the market. We need to be cautious of halfway measures as they may lead to unsatisfactory results and such solutions may often cause more harm than good.

## REVISION OF PREGNANCY DIRECTIVE

On 20 October 2006, the Commission began consultations with European social partners on the reconciliation of work and family life. The initiative covered (among others) improvements in maternity protection and improvements in parental leave legislation.<sup>144</sup> As previously presented, the improvements to provisions to help the better achievements of the aims of parental leave were successful, in that they resulted in a revision of the legislation from 1996. However, successful effects in practice were limited. This cannot be said about the efforts in the area of protection of pregnant women.

In 2008, the Commission issued a proposal with the key objective of improving the protection of health and safety at work for workers who are pregnant, have recently given birth or are breastfeeding (COM (2008) 0637), amending Council Directive 92/85/EEC.<sup>145</sup> The Commission proposed an extension of minimum maternity leave 14 to 18 weeks, reserving such a long period for women in special circumstances. Moreover, it introduced prolonged compulsory maternity leave from two to six weeks after the birth. Further, the protection from dismissal would be extended to six months after the end of maternity leave. Absence from work on the grounds of maternity, as well as during maternity leave, according to the new draft, were planned to be on full pay. There was also a provision granting the right for women to request flexible working after a return from maternity leave.<sup>146</sup>

The European Parliament was very positive about the proposal, and even proposed the extension of the maternity leave period to 20 weeks: it was also eager to introduce paternity leave under the conditions that currently applied to maternity leave. However, the Council could not reach an agreement for a considerable period of time, which resulted in the Commission withdrawing the proposal, while at the same time starting its work on the work-life balance initiative.

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<sup>144</sup>EUROPEAN TRADE UNION CONFEDERATION, Revision of the Maternity protection (Pregnant workers) Directive - 92/85/EEC, state of play and follow up, Published 1-2/12/2009, Available at: <https://www.etuc.org/en/document/revision-maternity-protection-pregnant-workers-directive-9285eec-state-play-and-follow> [accessed 13 May 2019]

<sup>145</sup> UEAPME position paper on the proposal for a directive of the European Parliament and Council amending Council Directive 92/85/EEC on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding, 2008, p. 1

<sup>146</sup> Summary of responses to consultation on European Commission proposals to amend the Pregnant Workers Directive, Department for Business Innovation & Skills, 2010, Available at: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/207459/10-904-pregnant-workers-directive-consultation-responses.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/207459/10-904-pregnant-workers-directive-consultation-responses.pdf) [Accessed 13 May 2019] p. 5

Even though the proposal was in accordance with the aim of improving the minimum standard across the Union for pregnant workers and workers who have recently given birth or are breastfeeding and many of the Member States already exceeded the standards proposed by the Commission, the matter is very difficult to decide at a European Union level. Notwithstanding the fact that the changes triggered by the legislation adopted over last couple decades are considerable, it must be concluded that further reforms are needed.

The failure to reform the Pregnant Workers Directive (1992) was the result of many factors. One of them was the co-decision procedure that was introduced as an ordinary legislative procedure with the Lisbon Treaty (TFEU 2009).<sup>147</sup> The 2008 Commission proposal, accepted and even improved by the European Parliament, was – according to the Council – too costly and such a minimum standard, taking into consideration the existing diversity of policies in different Member States, could not succeed at the time of the debates.<sup>148</sup> The position of the Council in such a matter is understandable as its position is significantly influenced by the financial budgetary burden in increasing the standard across Europe.<sup>149</sup> What speaks in favour of reconsideration of the reform package is the question as to whether increased protection that has neither a guarantee of the possibility of sharing nor an incentives to do so would not lead to a setback in the area of gender equality, as the fight with gender stereotypes is not even close to victory.

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<sup>147</sup> J. HELSTROFFER, M. OBIDZINSKI, *Codecision procedure biases: the European legislation game*, Springer Science + Business Media, 2013, p. 30

<sup>148</sup> *Ibidem*, p. 41

<sup>149</sup> *Ibidem*, p. 43

## **THE CASE-LAW OF THE COURT OF JUSTICE OF THE EUROPEAN UNION AND THE EUROPEAN COURT OF HUMAN RIGHTS**

The jurisprudence of the Court leads not only to the clarification of the laws, but often also to their expansion through its activism and wide interpretation. Therefore, rulings of the Court of Justice of the European Union can be seen as an instrument that develops protections, even though sometimes where the matter is crucial it meets opposition from Member States, ultimately restricting the outcome of new policy developments.<sup>150</sup>

Before the Pregnancy Directive came into play, the Court of Justice of the European Union started developing protection of workers against discrimination on the basis of pregnancy under Article 2(3) of Directive 76/207/EEC (nowadays included in the Recast Directive). This jurisprudence was an essential contribution to the improvement of the position of women in the labour market and constituted an attempt to fill a legislative gap. The European Court of Justice, however, at the very beginning clarified that the European Union is not engaging in the reorganisation of family responsibilities. EC law, therefore, is outside of the private sphere.<sup>151</sup>

The development of the prohibition of discrimination on the basis of pregnancy can be traced back to 8 November 1990, when the Court of Justice of the European Union delivered a landmark decision regarding a Dutch case. In 1981, Mrs. Dekker applied for a job as a teacher while being three months pregnant. Even though she was recommended by the committee to the VJV Centrum as the most suitable candidate for the post, she was not appointed to the job. In the letter providing the reasoning of the refusal of her employment by the VJV she read that due to her pregnancy, she could not be employed since her insurer would not reimburse the maternity benefits that would need to be provided to her, which would result in a financial inability of the company to hire a replacement for Mrs. Dekker.<sup>152</sup> Such a refusal was in accordance with the internal rules that empowered VJV to not reimburse the employer in the event of employee's inability to perform its duties that did not provide any derogation in case of pregnancy.<sup>153</sup> The case was referred to the European Court of Justice on the basis of raising an interpretation problem with Council Directive 76/207. The most important question

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<sup>150</sup>P. FOUBERT, Š. IMAMOVIĆ, *The pregnant workers directive: must do better....*, op. cit., p. 311

<sup>151</sup>J. MALISZEWSKA-NIENARTOWICZ, *Pregnancy Discrimination in the European Union Law Its Legal Character and the Scope of Pregnant Women Protection*, *Mediterranean Journal of Social Sciences*, 2013, p. 441

<sup>152</sup> Judgment of the Court of Justice of European Union of 8 November, 1990, Dekker (C-177/88), ECLI:EU:C:1990:383, Par. 2

<sup>153</sup> Dekker, Par. 4

to be decided was whether an employer directly or indirectly breached the principle of equal treatment by refusing to employ the worker on the grounds of pregnancy. Moreover, it was also problematic as to whether the inability to work in connection with pregnancy could be assimilated with inability to work on the basis of sickness.<sup>154</sup> The Court in its judgment decided that refusal to enter into employment contract with the women found most suitable for the position, based on the possibility of adverse effects on the business due to employment of a pregnant women constituted direct discrimination on the grounds of sex. Moreover, there should be no assimilation allowed in the case of an inability to work on account of pregnancy and illness.<sup>155</sup>

Further clarification of the issue and its limitations of the judgment of the Court from 8 November 1990 was found in the case of *Handels- og Kontorfunktionærernes Forbund I Danmark and Dansk Arbejdsgiverforening*. Mrs. Hertz, a part-time Aldi worker, was dismissed from her work based on the periods of absence from work that would normally result in the termination of the employment contract. She started her work in 1982, and in 1983 was on sick leave due to complications linked to her pregnancy. After the birth and 24 months of maternity leave, she returned to work in late 1983. The illness connected with her pregnancy and confinement resulted in the necessity for her to take leave in 1984 for 100 days.<sup>156</sup> The case of Mrs. Hertz was referred to the Court as difficulties arose connected with interpretation of Council Directive 76/207. The question was whether the protection against dismissal extends to illnesses that may be attributable to the pregnancy. In this case, the Court decided that the Directive does not preclude a dismissal that has its basis in absences due to illness even if it is connected with pregnancy or confinement.<sup>157</sup> The Court emphasised that there is no reason to distinguish between an illness connected with a pregnancy and other illnesses, since male and female workers are equally exposed to illness, so the working status of pregnant women should be assessed as that of men in the same circumstances.<sup>158</sup> In this ruling, the European Court of Justice limited the protection of women.

A further important judgement is to be found in the interpretation of the rule by the Court on 14 July 1994, in the case of *Mrs. Webb and EMO Air Cargo (UK) Ltd*. Mrs. Webb, recruited together with 16 other employees, started work on 1 July 1987, which occurred after she realised that she might be

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<sup>154</sup> Dekker, Par. 6

<sup>155</sup> Dekker, Judgment (1)

<sup>156</sup> Judgment of the Court of 8 November of 1990, *Hertz* (C-179/88), ECLI:EU:C:1990:384, Par. 2,3,4

<sup>157</sup> *Hertz*, Judgment

<sup>158</sup> *Hertz*, Par. 16-17

pregnant. After confirmation of the pregnancy to the employer, she received a letter informing her of her dismissal due to the fact that the position she was interviewed for was clear that it was related to cover for another employee who was pregnant, namely a Mrs. Stewart. The termination of her employment contract occurred even though it was envisaged that her work would continue even after return of Mrs. Stewart from maternity leave.<sup>159</sup> The first action of Mrs. Webb in front of the Industrial Tribunal was not really successful, as direct discrimination on the grounds of sex was not found due to the determination that Mrs. Webb was not able to perform the work to which she was primary recruited. As a result of a couple of unsuccessful appeals, the case went to the House of Lords that expressed a belief that it was uncertain as to whether existing laws prohibited dismissal in such a case, with there being problems in determining the right balance between the protection against discrimination based on pregnancy and the weight that should be attached to the reasons for recruitment.<sup>160</sup> The questions were referred to the Court of Justice of the European Union. The Court recognized that it is legitimate in the light of the principle of equality to protect a woman's biological condition connected with her privacy. Taking into consideration the harmful effect of the termination of the contract of employment on the woman's physical and mental state, special protection required the prohibition of dismissal from the beginning of the pregnancy to the end of maternity leave.<sup>161</sup> Moreover, the Court underlined that the comparison of the pregnant woman's situation is incomparable with a male not capable of working on medical or other grounds.<sup>162</sup> Therefore, the implementation of the principle of equal treatment for men and women was interpreted by the Court as granting unlimited protection to the women, authorizing a strong prohibition of the dismissal, regardless of the character of the employment relationship.<sup>163</sup>

What can we conclude so far is that Court recognized here that pregnancy, since it can only affect women, should under no circumstances be compared with male medical issues and any less favourable treatment in that regard should constitute direct discrimination on the ground of sex. It means that in case of a pregnant women we are not constructing the argument characteristic for a sex discrimination claim based on treatment less favourable than that of a person of another sex, or a comparable situation. We are dealing here with an exception, based on the conviction that, logically, no

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<sup>159</sup>Judgment of the Court of Justice of European Union of 14 of July 1994, Webb (C-32/93) ECLI:EU:C:1994:300,Par. 3-4

<sup>160</sup>Webb, Par. 11 & 14

<sup>161</sup>Webb,Par. 21-22

<sup>162</sup>Webb,Par. 24-25

<sup>163</sup> Webb, Judgment



right comparator can be found.<sup>164</sup> Such an approach allowed for development of the path away from the concept of formal equality in the direction of substantial equality, meaning no strict identical treatment was applied and the specific needs of pregnant women were taken into account.<sup>165</sup> That did not, however, extend to the period after maternity leave and absences due to the illnesses, even if they were attributable to pregnancy or confinement. That contradicts the standpoint of scholars who believes that it is not possible to build a discrimination case, and it does not matter whether it is direct or indirect, as they argue that the existence of a comparator is an essential part of the assessment, thus coming to the conclusion that removing the comparator makes the concept meaningless.<sup>166</sup>

As Foubert and Imamović argue, the Court of Justice of the European Union is also worthy of criticism. They argue that the Court should learn from the European Court of Human Rights in that the ECtHR has, in the current decade, taken a more progressive approach towards matters of work-life reconciliation.<sup>167</sup> In order to support such a statement, two things are needed: a presentation of the acknowledged perspective of the Court of Justice of European Union in its judgments and, secondly, an illustration of how such matters are portrayed by the ECtHR.

On 12 July 1984 the Court of Justice of European Union issued a decision in case of Ulrich Hofmann v Barmer Ersatzkasse. The applicant was a man who took unpaid leave from work in order to take care of a child for a period of maternity leave that covered time from end of the statutory eight weeks of protective period until the child was about 6 months old, due to the decision of the mother to return to work.<sup>168</sup> The applicant claimed that in the case in question the right to the payment that was enjoyed by women while being on maternity leave should be paid also him, as he believed that such leave was in fact concerned with care of the child by the mother, rather than being linked to the women's state of health.<sup>169</sup> Due to the negative decisions of the country's court, the appeal reached Landessozialgericht that decided to stay proceedings and ask question of the Court of Justice of European Union as to the compatibility of the German legislation with the Equal Treatment Directive.<sup>170</sup> The crucial issue of the preliminary ruling was whether the leave introduced by the

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<sup>164</sup>K. DANIELS, L. MACDONALD, *Equality, Diversity and Discrimination: A Student Text*, Chartered Institute of Personnel and Development, 2005, p. 147

<sup>165</sup>G. FINLAY, *Protective measures for pregnant ... op. cit.*, p.2

<sup>166</sup>J. MALISZEWSKA-NIENARTOWICZ, *Pregnancy Discrimination in the European... op. cit.*, p. 442

<sup>167</sup>P. FOUBERT, Š. IMAMOVIĆ, *The pregnant workers directive: must do better...*, *op. cit.*, p. 311

<sup>168</sup>Judgment of the Court of 12 July 1984, Hofmann, ECLI:EU:C:1984:273 par. 2

<sup>169</sup>Hofmann, par. 4

<sup>170</sup>Hofmann, par. 5-6



national legislator – which was payable on the net remuneration of the concerned person, relating to the period of time between the protective period for employed mothers and the child reaching six months, and which was granted only to mothers without an alternative of claim by employed fathers – was compatible with Equal Treatment Directive.<sup>171</sup> At the beginning it is important to reiterate the main arguments Mr. Hofmann provided that listed the characteristics he found to be convincing that maternity leave as introduced by the national legislator was with intention of the protection of the child rather than the mother. Maternity leave in Germany at the time of the claim was not only withdrawn in the case of child's death, but also was optional and conditional upon the previous record of employment.<sup>172</sup> Mr. Hofmann believed that burdens of a diverse nature that employed women were about to be protected from could be accomplished without discriminatory measures. As an alternative, he came up with the idea of the introduction of parental leave in order to enable men to share caring responsibilities, so that women could return to work.<sup>173</sup> Unfortunately, the Court had decided to leave a broad discretion for Member States in the area of social measures and commented that the Equal Treatment Directive was not intended to interfere in the organization of family, as it is responsibility of parents to divide household work between themselves.<sup>174</sup> Furthermore, the Court authorised the introduction by Member States of provisions protecting women with respect to pregnancy and maternity. Therefore, the Court found legitimate the protection of women's biological condition during pregnancy and in the period after giving birth as well as the protection of the special relationship of newborn children and mother. Moreover, as the protection of such a special relationship qualified the provisions provided by the German legislator, it was held compatible with the Equal Treatment Directive – i.e. that the introduction of maternity leave without possibility of alternative takeover by father was compatible, even if the period in question exceeded the protective time reserved for the mother.<sup>175</sup>

The principles established in the Hofmann case reduced the capability of the European Union to advance equal opportunities for women in the market of paid employment for considerable period of time. The lack of criticism towards the introduction of lengthy maternity leave all around Europe, which could be enjoyed solely by women, confirmed the stereotype of the mother as the primary carer

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<sup>171</sup>Hofmann, par. 6

<sup>172</sup>Hofmann, par. 10

<sup>173</sup>Hofmann, par. 11

<sup>174</sup>Hofmann, par. 24-25

<sup>175</sup>Hofmann, par. 27-28

of the child and supported the idea of the exclusivity of bonding and caring time only for women, while excluding such a possibility for fathers.<sup>176</sup>By the imposition of such a standard the men who were willing to actively engage in childcare were pulled back and the legitimacy of their social role was put into question.

The further confirmation of this standpoint can be found in the more recent ruling of the Court in *Betriu Montull* from 2014. The Court here reaffirmed that fathers do not have an autonomous right to maternity leave that would be independent of the rights of the mother. This is most harmful in the case of self-employed partners, who according to law in some Member States would not be covered by a state social security scheme.<sup>177</sup> It is disappointing to see that the CJEU did not follow the opinion of Advocate General Melchior Wathelet, who argued that lengthy maternity leave due to its detachment from the mother's biological condition should not be covered by the Equal Treatment Directive exception provided in Article 2(3).<sup>178</sup>The failure of the Court to permit the transfer of the optional period of maternity leave to the father as recommended by the Advocate General was a missed opportunity to fulfil the promise of the European Union that utmost importance should be the maximisation of efforts towards the achievement of gender equality.

Not all of the judgments of the Courts are, however, negative. On September 2010, the Court of Justice of the European Union issued a judgment in the case of *Mr. Roca Alvarez*. The applicant was a male employee of the company *Sesa Start Espana ETT SA*. In 2005, he was refused leave for his child (under nine months of age) that, according to reformed Spanish legislation, was provided for the mother as well as the father as long as both were employed. Since he was not given time-off on the basis of a lack of satisfaction of one of the conditions, namely that the mother of the child according to the law should be an employee, and in the case here she was self-employed, *Mr Roca Alvarez* claimed discriminatory treatment on the basis of sex.<sup>179</sup> The first instance court, claiming that the leave provided by national law is reserved for "female employees" decided not to follow the request of the applicant. Therefore *Mr. Roca Alvarez* appealed to the High Court, which decided to further refer the case to the Court of Justice of the European Union. The main concern of the Court requesting the preliminary ruling was whether the Equal Treatment Directive precluded the national law of Spain providing the possibility to exercise the right to leave by the mother in order to take care of the child

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<sup>176</sup>P. FOUBERT, Š. IMAMOVIĆ, *The pregnant workers directive: must do better...*, op. cit., p. 312

<sup>177</sup>*Ibidem*, p. 312

<sup>178</sup>*Ibidem*, pp. 312-313

<sup>179</sup>Judgment of the Court (Second Chamber) of 30 September 2010, *Roca Alvarez*, ECLI:EU:C:2010:561, par.10-11

during the first months of life in various ways, and that at the same time restrict the use of right by the father to the situation when the child's mother was an employed person.<sup>180</sup> The Court at the beginning emphasised that the principle of equal treatment forbid discrimination based on marital or family status.<sup>181</sup> The Court further admitted that the Spanish legislation that introduced the provisions, differentiated the position of mother and father even though their need for the possibility of a reduction in the hours of work for the purpose of looking after the child should be held comparable.<sup>182</sup> As underlined by the Court, different treatment on the basis of sex can be justified, in particular when pregnancy and maternity are considered. Therefore temporary affirmative action is in order because by promoting equal opportunities, they are designed to remove inequalities already existing.<sup>183</sup> In line with such a possibility, the measures introduced in order to protect a woman's biological condition during and after pregnancy and to protect the special relationship of newborn children and mother are allowed. Nevertheless, as progress in national legislation had been made and the leave that Mr. Roca Alvarez wished to use was already detached by the case law from the biological fact of breastfeeding, it would seem to be granted to parents in their capacity to look after the child.<sup>184</sup> Of course, the Court used to rule in favour of the measures that in appearance are discriminatory, but which in practice contribute to the reduction of existing inequalities.<sup>185</sup> That however could not be said about the leave in question, as placing fathers in a disadvantaged position regarding the possibility to take time-off to care for their newborn children – which in fact is contributing to a more equal distribution of care work – cannot be qualified as an appropriate compensatory measure.<sup>186</sup> For that reason the Spanish legislation was found by the Court as to be not compliant with the Equal Treatment Directive, as long as it did not ensure the same rights for the father of the child as to the mother regarding the take of leave during first months after birth of the child.<sup>187</sup>

This ruling was applauded for its progressiveness by the academic legal community. While the formalistic approach of the Court is disappointing, it is not possible to deny that the Court also

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<sup>180</sup> Roca Alvarez, par 18

<sup>181</sup> Roca Alvarez, par 20

<sup>182</sup> Roca Alvarez, par. 24-25

<sup>183</sup> Roca Alvarez, par. 26

<sup>184</sup> Roca Alvarez, par. 29 and 31

<sup>185</sup> Roca Alvarez, par. 33

<sup>186</sup> Roca Alvarez, par. 35

<sup>187</sup> Roca Alvarez, Ruling

positively pointed out that fathers should be holders of rights to the same extent as mothers, which does challenge the stereotype of a subsidiary role of men in the area of parental duties.<sup>188</sup>

The real question is whether in further judgements the Court of Justice of the European Union will finally get out from the trap established by the Hofmann ruling and its successors and will follow the equality friendly position that was provided for in Roca Alvarez. Recent legislative developments in the Union suggest that care issues are recognised as being important for the prosperity of labour market and in the future the Court of Justice of the European Union undoubtedly will have further occasion to consider complicated work-life balance matters.<sup>189</sup>

The new approach of the European Court of Human Rights provides useful indication of the influence of social changes in bringing modifications in attitudes towards the developments of rights. Therefore, should developments regarding the Pregnant Workers Directive take a lesson from the Strasbourg Court? In answering this, we should examine a landmark Grand Chamber judgment from the early 2010s.

On 22 March 2012, the ECtHR Grand Chamber issued a judgment in the case of Konstantin Markin v. Russia. The applicant claimed discriminatory treatment on the basis of sex, as he was refused parental leave as lengthy as women occupying the same job: the restriction of the right was justified with his employment in military service.<sup>190</sup> As the result of the policy in Russia, Mr. Markin was allowed to take three months of parental leave, instead of the requested 3 years; however, he was recalled to duty in less than two months, meaning that even the right that was allowed in the first place was not fully exercised by him.<sup>191</sup>

The applicant claimed that there was an infringement of Article 14 of the Convention when taken in conjunction with Article 8 of the Convention, as he experienced discrimination on the basis of sex as he was not granted parental leave to the same extent as a female military servant would be statutorily entitled.<sup>192</sup>

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<sup>188</sup> P. FOUBERT, Š. IMAMOVIĆ, *The pregnant workers directive: must do better...*, op. cit., p. 313

<sup>189</sup> *Ibidem*, p. 314

<sup>190</sup> Judgment of European Court of Human Rights of 22 March 2012, Grand Chamber, Konstantin Markin v. Russia (Application no. 30078/06), par. 3

<sup>191</sup> Markin, par. 15

<sup>192</sup> Markin, par. 76

In its judgment the Chamber found that Mr. Markin was not only discriminated against when compared to women, as all of military female servants were entitled to parental leave, but also a different treatment could be claimed when compared to civilian men and women due to the restriction was imposed on him on the grounds of his military status.<sup>193</sup> It is worth appreciating that the Court has drawn attention to the fact that social rights guaranteed to the individuals should not be overlooked even in sectors that are connected with national security.

The Chamber rightfully observed that society had changed and a more equal distribution of care of children has been recognised by State Parties to the Convention, which is also grounded in the introduction in an absolute majority of the European countries through provisions on parental leave that is guaranteed equally for men and women.<sup>194</sup>

Regarding the context of the case, which is of a special nature – namely that within the military system – the Chamber admitted that working within such a discipline might require a limitation on certain rights and freedoms. It is important to stress here that there is a wide margin of appreciation granted to Member States to impose restrictions under Article 5 (the right to liberty and security), Article 9 (freedom of thought, conscience and religion), Article 10 (freedom of expression) and Article 11 of the Convention (freedom of assembly and association). Conversely, the Court characterises life and family matters by a narrower margin of appreciation and therefore any restriction imposed on the rights of military personnel would be limited.<sup>195</sup>

In its assessment, the Court firstly pointed out that Article 14 can be relied on only when enjoyment of the rights and freedoms guaranteed in the Convention are at stake.<sup>196</sup> Further, it indicated that in order to violate Article 14 of the Convention, discriminatory treatment needed to lack a legitimate aim or not be proportional to achieve its aims.<sup>197</sup> Due to the expansive interpretation of the Court and the importance of the alleged violation, the protection of the rights of the applicant was found necessary, even without the explicit guarantee of such in the Convention.

As reiterated by the ECHR, the achievement of gender equality is of an utmost importance and stands high on the Council of Europe agenda. For this reason, “references to traditions, general

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<sup>193</sup> Markin, par. 98

<sup>194</sup> Markin, par. 99

<sup>195</sup> Markin, par. 100

<sup>196</sup> Markin, par. 124

<sup>197</sup> Markin, par. 125

assumptions or prevailing social attitudes in a particular country are insufficient justification for a difference in treatment on the grounds of sex”. Therefore, according to the ECtHR, gender stereotypes cannot justify discrimination.<sup>198</sup> The forward-looking viewpoint that men and women should have the same possibilities in taking care of children as there should be no primary or secondary roles in the family in the area of unpaid work in the form of care constitutes a very progressive approach and should be seen as commendable.

Moreover, the ECtHR draws its attention to the misconceived attempt to justify discriminatory treatment by reference to temporary affirmative action. It clarifies here that the measures introduced by the Russian Government in the case of Mr. Markin – namely the differences in entitlement to parental leave by men and women in military service – not only cannot be qualified as positive action, but worse, they reinforce stereotypes and put in a disadvantageous situation the family life of both parents.<sup>199</sup>

For these reasons, the Court held by sixteen votes to one that in the case in question there was a violation of Article 14 of the Convention in conjunction with Article 8 of the Convention.<sup>200</sup>

The progress made by the Court in the Markin judgment is worthy of recognition. It overrules here its judgment from 1998 (the Petrovic v Austria judgement) that due to the lack of a common standard in European States in the area of allowances for paternity leave held that there is no discriminatory treatment in the meaning of the Convention when national law provides parental leave allowances for mothers and at the same time refused same right to fathers.<sup>201</sup> Taken into consideration the social developments that occurred in Europe in recent years, the admitted evolution of the situation in State Parties, especially in the areas of law and the acknowledged role of men as the carer, the ECtHR changed its attitude towards the issue and ruled progressively in favour of a more equal distribution of care work.<sup>202</sup> This approach should be the path that the European Court of Justice should also follow, as there should be no space for gender stereotypes in law, policies or judgments because this is for what the changes in our society have indicated.

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<sup>198</sup> Markin, par. 127

<sup>199</sup> Markin, par. 141

<sup>200</sup> Markin, judgment

<sup>201</sup> Judgment of European Court of Human Rights, Petrovic v Austria, (156/1996/775/976)

<sup>202</sup> P. FOUBERT, Š. IMAMOVIĆ, The pregnant workers directive: must do better..., op. cit., p. 315

## NATIONAL IMPLEMENTATION OF THE PREGNANT WORKERS DIRECTIVE AND THE PARENTAL LEAVE DIRECTIVE

As was underlined earlier, the implementation of the Directives in national policies may often lead to incompatibilities between the Member States policies and the European Union secondary legislation. Instead of harmonisation, we are often faced with the introduction of the measures that do not fulfilling the purposes that the Commission had in its mind when preparing its proposals or which may even contradict them.

This Chapter will conduct a closer examination of the national policies in Portugal and Poland to see how the legal framework concerning parenthood was set up, taking into consideration that both countries are Member States of the European Union – since 1986 and 2004 respectively – therefore both of them were obliged to implement the Maternity Leave Directive (1992) and the Parental Leave Directive (2010). First of all, the background of the countries will be presented in order to understand the construction of the current systems. The description of the leave provided in legislation will then be detailed. Lastly, a comparison of the relevant characteristics of the system will be provided in order to allow for the assessment of which system better contributes to the final aim – namely, a more equal participation in childcare sharing and caring.

Starting with Portugal, the country is considered to be part of southern Europe, an area within which, following World War II, the most popular policy model introduced was that of the male-breadwinner model. It was only following the 1980s that the countries of the southern European block started to recognise the legitimacy of more diverse work-life arrangements.<sup>203</sup> The southern European welfare regime can be defined as a social policy that provides low support by the state for the family with a correspondingly high level of family commitment, which is characterised by its nature as a traditional view of childcare, women's employment and solidarity of the family.<sup>204</sup> Portugal had significantly developed its leave policy, meaning that changes would be needed that would break with the continuity of the regime typical for the welfare state in the southern European region.<sup>205</sup>

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<sup>203</sup>A. ESCOBEDO, K. WALL, *Leave policies in Southern Europe: continuities and changes*, *Community, Work & Family*, 2015 p. 220

<sup>204</sup>*Ibidem*, p. 220

<sup>205</sup>*Ibidem*, p. 220



The transition from the Salazar dictatorship to democracy (begun with the ‘Carnation Revolution’, 1974) amounted to the rejection of the traditional model of the family and resulted in the implementation of assistance in a more egalitarian system in Portugal, namely the full-time dual-earner model, which provided gender-equality incentives and the greater availability of childcare services.<sup>206</sup> However, it is mostly over the last decade that developments have occurred that, together with the economic and fiscal crisis post-2008, contributed to the move from the male-breadwinner model to the dual-earner household. The new model is typified by short but well-paid leave with the support of childcare (whether formal or informal).<sup>207</sup> Among the factors consolidating the recorded changes are the increased level of female education, increased divorce rates bringing more diverse forms of family constructions into play, the increasing cost of housing and greater insecurity of work for men.<sup>208</sup> Even in 2008, before the major impacts of the economic crisis were felt in Portugal, dual-earner couples constituted 73% of all coupled, with only 7% working part-time, a level that is comparable to the approach popular in northern Europe.<sup>209</sup>

The population of Portugal was estimated in July 2017 to be 10,839,514. The age structure shows that people between the age of 25 and 54 years constitute 41.72% of the population, which translates into 2,298,920 male and 2,223,184 female individuals. The median age of population was estimated to be 42.2 years with the median age for men being 40.2 years and 44.4 years for women.<sup>210</sup> In terms of birth rates, fertility in Portugal has continuously declined since 2000, with a total fertility rate for 2017 estimated at 1.53 children born per woman, well below the population replacement rate.<sup>211</sup> However, an important sub-trend within this should be noted: the fertility of employed women has increased.<sup>212</sup>

The current system in Portugal is very much influenced by the Swedish system and was substantially reformed by the governing Socialist party in 2009. The name of the leave was changed from maternity leave to “initial parental leave”. This introduced one main type of leave, reserving the

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<sup>206</sup>Ibidem, p. 225

<sup>207</sup>Ibidem, p. 221

<sup>208</sup>Ibidem, p. 221

<sup>209</sup>Ibidem, p. 221

<sup>210</sup> INDEX MUNDI, Portugal Demographics Index Profile 2018, [website] available at: [https://www.indexmundi.com/portugal/demographics\\_profile.html](https://www.indexmundi.com/portugal/demographics_profile.html) (accessed 23 July 2019)

<sup>211</sup> INDEX MUNDI, Portugal Demographics Index Profile 2018, [website] available at: [https://www.indexmundi.com/portugal/demographics\\_profile.html](https://www.indexmundi.com/portugal/demographics_profile.html) (accessed 23 July 2019)

<sup>212</sup> A. ESCOBEDO, K. WALL, Leave policies in Southern Europe..., op. cit., p. 221

first six mandatory weeks for the mother and allowing the rest of the time to be divided between the parents. The incentive to share leave was strengthened by granting an additional one month in the event of the father deciding to benefit from the leave for at least 30 days, whether continuously or in two parts, while the mother returned to work.<sup>213</sup> The paternity leave available only for fathers was set at 25 working days paid at 100% of earnings: fifteen of the days are mandatory.<sup>214</sup> Moreover, both of the parents are entitled to the extension of leave, by taking complementary parental leave for a period of three months at 25% of previous average earnings, provided that this is taken directly after the initial parental leave.<sup>215</sup>

Therefore, according to the law, employed and self-employed workers and also individuals voluntarily insured under the parental leave scheme are entitled to 120 days (17 weeks) of the initial parental leave or 150 days (21 weeks) with an optional extension. The mandatory element for mothers is six weeks after giving birth. Moreover, should a worker be at risk, there is the possibility to extend the leave for a period of time prescribed by a medical certificate. For multiple births the legislators allowed for four extra weeks. Paternity leave is entitled for fathers employed in the private as well as in the public sector. If it is possible, fathers should inform the employer about their intention of taking paternity leave at least five days in advance. A compulsory 15 days should be taken within 30 days following confinement, with five taken consecutively and immediately after birth.<sup>216</sup> Moreover fathers have an option to benefit from additional ten days of paternity leave and further in the event of multiple births the right to an additional two days for each child other than the first. The individual right to additional parental leave is three months per parent. The cash benefits differ depending on the choices made by parents. Workers are entitled to 100% of benefits of average daily wages if they take 120 days of initial parental leave or 80% if they take 150 days, all paid by the state Social Security. The fathers-only leave is paid at 100% of the worker's average daily wage, with additional parental leave paid at 25%.<sup>217</sup>

The second country for this analysis is Poland, situated in central Europe. Prior to 1989 and the collapse of Communist governments in central and eastern Europe, the structure and principles of

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<sup>213</sup> A. ESCOBEDO, K. WALL, *Leave policies in Southern Europe...*, op. cit., p. 225

<sup>214</sup> K. WALL, M. Leitão, Portugal country note, in Blum, S., Koslowski, A., Macht, A. and Moss, P. (eds.) *International Review of Leave Policies and Research*, 2018. Available at: [http://www.leavenetwork.org/lp\\_and\\_r\\_reports/](http://www.leavenetwork.org/lp_and_r_reports/), pp. 333-335

<sup>215</sup> A. ESCOBEDO, K. WALL, *Leave policies in Southern Europe...*, op. cit., p. 225

<sup>216</sup> K. WALL, M. Leitão, Portugal country note..., op. cit., pp.340-342

<sup>217</sup> *Ibidem* pp. 340-342

maternity and paternity provisions before 1989 were based on socialist policy idea that considered family to be an important part of the system. Policy makers were driven by law to strive to achieve high levels of fertility to increase the population size. This happened in Poland through the implementation of generous maternity leave provisions as an incentive for women to have more children.<sup>218</sup> The burden of taking care of children was not intended to engage men in the domestic division of labour. Women were intended to be the ones who should meet the work-life balance by firstly quitting the labour market for the purpose of childrearing and only after a few years come back to full-time employment. The confirmation of such a theory can be found through the provision of maternity benefits, which were eligible only for women, and a lack of child care facilities for children under the age of three years. The breaking point for this system was the collapse of the eastern bloc, exemplified by the fall of the Berlin Wall, which resulted in massive economic restricting and upheaval, fiscal cutbacks and massive unemployment.<sup>219</sup> Prior to 1989, the Polish policy in the area of maternity and childcare might be seen as forcing women out of the labour market and putting them in a position of dependency.<sup>220</sup> What unfortunately has to be said in central and eastern Europe is that women were hit disproportionately by the post-1989 transition process, as the issue of gender was overlooked when social and economic transition was taking place.<sup>221</sup>

Women in central and eastern Europe are still perceived as primary child-carers and therefore, taking into consideration the place of women in the family, civil society as well as the labour market puts them in the position of an increased chance to fall into poverty, due to their dependence on welfare benefits instead of a long-term sustainable source of income.<sup>222</sup>

In July 2017, the population of Poland was estimated at 38,476,269. The age structure shows that people between the ages of 25 and 54 years constitute 43.48% of the population, which translates to 8,447,418 males and 8,283,757 females. The median age of population was estimated to be 40.7 years an age for men of 39 years and 42.4 years for women. Looking at birth rates, the fertility levels in Poland are continuously declining. The total fertility rate for 2017 was estimated at 1.35 children per

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<sup>218</sup> E. FODOR, CH. GLASS, J. KKAWACHI, L. POPESCU, Family policies and gender in Hungary, Poland and Romania, *Communist and Post-Communist Studies* 35, 2002, p. 479

<sup>219</sup> *Ibidem*, p. 481

<sup>220</sup> *Ibidem*, p. 486

<sup>221</sup> *Ibidem*, p. 497

<sup>222</sup> *Ibidem*, p. 476

woman. Unique in Europe is the scale of homogeneity of the population in Poland: as of 2011, 96.9% was classified as belonging to the Polish ethnic group.<sup>223</sup>

The family-centred policy in Poland can in part be explained by the high level of societal conservatism, the long-standing position of importance of the Roman Catholic Church, and – more recently – the influence of the PiS-led conservative government.<sup>224</sup> The Polish system is an example of leave that is lengthy and women-centred.<sup>225</sup> The length of maternity leave depends on the number of children born at once. The birth of the first child entitles maternity leave of 20 weeks, with the first 14 weeks reserved for the mother, allowing for an allocation of six weeks to the father. The birth of a second child results in an entitlement to 31 weeks, the third 33 weeks, the fourth 35 weeks and the fifth and further 37 weeks. Up to six weeks may be taken by the mother before the date of giving birth.<sup>226</sup> Employed fathers have the right to paternity leave in Poland of up to 14 calendar days that can be taken in a maximum of two periods of not less than 7 days: this is not extended in the event of multiple births. It is a non-obligatory leave and the father's right is irrespective of the maternity leave of the mother. Men are entitled to use it during the period of 24 months after the date of birth of the child. An application for leave should be submitted to the employer no later than seven days prior to the commencement of leave. Additionally, fathers are granted special leave in the event of childbirth for two days. This leave is paid at 100% of daily salary.<sup>227</sup> Parental leave in Poland is granted for the period of 32 weeks in case of giving birth to one child and up to 34 weeks in the case of multiple births. The right to take leave may be exercised after maternity leave has ended and both parents are entitled to it. Under Polish law, there is no provision for the non-transferability of the leave, therefore the entire period of time might be taken by the mother under the current state of law. The parental leave allowance is paid at the amount of 100% of the maternity allowance for the first six weeks of leave and

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<sup>223</sup> INDEX MUNDI, Poland Demographics Index Profile 2018, available at:

[https://www.indexmundi.com/poland/demographics\\_profile.html](https://www.indexmundi.com/poland/demographics_profile.html) (accessed 23 June 2019)

<sup>224</sup> E. FODOR, CH. GLASS, J. KAWACHI, L. POPESCU, Family policies..., op. cit., p. 489

<sup>225</sup> A. ESCOBEDO, K. WALL, Leave policies in Southern Europe... , op. cit., p. 219

<sup>226</sup> A. LANKAMER-PRASOLEK, K. LANKAMER, E. PREDWOJSKA, R. TONDER, Uprawnienia pracowników związane z rodzicielstwem; prawo pracy, zasiłki macierzyńskie i opiekuńcze; komentarze, przykłady, kompletna dokumentacja, ODDK Spółka z ograniczoną odpowiedzialnością Sp. k., Gdańsk 2013, p. 38

<sup>227</sup> EUROPEAN COMMISSION, Employment, Social Affairs and Inclusion, Poland-parenthood, available at: <https://ec.europa.eu/social/main.jsp?catId=1124&langId=en&intPageId=4719&fbclid=IwAR1NEpvf6atEEf-wRa5urO4C8E9jrhSfeuCNNI8gbrJaEKMhHmU4e8HQg1Q> (accessed 23 June 2019)

then 60% for remaining period.<sup>228</sup> What is problematic is that in theory parental leave is the right of either parent but in practice is often viewed as an extension of maternity leave.

As we can see, the systems in Portugal and Poland differ significantly. It is difficult to explain such a long time of maternity leave in Poland and there is no substantive reason through which it can rationally be supported. The obligation of women to stay 14 weeks at home and take care of the children has no medical explanation from the biological point of view and the maternity leave provision constitutes one of the longest in Europe. According to the newest Convention of the International Labour Organization (no. 183), the mandatory period of maternity leave should be six weeks out of fourteen in total.<sup>229</sup> In Portugal, the system reflects this and that should be seen as commendable. In Poland, the traditional division of roles is strengthened firstly by the possibility of parental leave to be used as a prolonged maternity leave for women and secondly by the non-obligatory character of paternity leave.<sup>230</sup> The Portuguese system is not only friendly for both parents in sharing childcare responsibilities, but there are also incentives provided for fathers to encourage changes in the work-life balance for both parents. Moreover, part of paternity leave in Portugal is obligatory, which contributes to a shift in family responsibilities.

Statistics show that in 2012 in Poland, amongst all the persons collecting maternity allowances, 69% constituted women and 31% men. However, what needs to be pointed out is that for men the percentage of the payment received was mainly the result of their enjoyment of paternity leave. The weak take up of the leave by fathers is reflected in the statistics of the Social Fund Insurance. According to Social Fund Insurance data from 2011, the average period for the time of payment of the allowances was 16 weeks in case of women and only 8 days in the case of men.<sup>231</sup> This clearly shows that the implementation of the Pregnant Workers Directive and the Parental Leave Directive in Poland has not fulfilled the goal of the European Union to support more equal use of leave by parents and to minimise the negative effects of time-off from the labour market by women on the earnings of mothers while protecting her during the period necessary for recovery. From the other perspective in Portugal, since the sharing-bonus was introduced as an incentive and came into effect in May 2009, the participation of fathers in the sharing of maternity leave has increased significantly, from only 596

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<sup>228</sup>Ibidem, Poland- Parenthood

<sup>229</sup>A. KUROWSKA, Ocena zasadności założeń reformy urlopów i zasiłków związanych z opieką nad małym dzieckiem, Fundacja na Rzecz Nauki Polskiej, 2013, p. 158

<sup>230</sup>Ibidem, p. 157

<sup>231</sup>Ibidem, p. 159-160

fathers in 2008 to 16,426 fathers in 2010 who shared initial parental leave. Moreover, the growth in fathers' take-up is continuing and according to data from 2017 the participation of the men in the Initial Parental Leave constituted 24,109 (34%). Furthermore, in 2017, the number of fathers who took the father's only parental leave, estimated in relation to the granted Initial Parental Leaves constituted a rate of 87.2 % for obligatory days and 74.6% for optional days.<sup>232</sup>

Therefore, we can observe that even though the European Union calls itself the pioneer in the area of gender equality, there seems to be an acceptance of negligence in that area amongst Member States. In its efforts to impose an obligation on countries to introduce measures that as their goal should increase the participation of men in childcare, which would also increase women's participation in the labour market, the impact in reality has led to different results in different countries. Not only was Poland allowed to introduce lengthy maternity leave thus reinforcing the pre-existing stereotype of women as the primary carer, but it also turned a blind eye to a policy that accepted the possibility of the women being solely responsible for childcare during parental leave. Through viewing the leave policy in Portugal, we can see that from the other side, the European Union created an environment for the introduction of a system that supports a more equal division of childcare and contributed to the advancement of gender equality. This shows how important the willingness of the Member State is in the process of the implementation of laws and how conservatism might be a blindfold holding back important changes and slowing or retarding advancements in gender equality.

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<sup>232</sup> K. WALL, M. Leitão, Portugal country note..., op. cit., pp.340-342

## CONCLUSION

It is not new to acknowledge that there is a deeply rooted stereotype in which women are the primary caregivers for children. No matter how much one would like to refute this, escaping such an image appears to be extremely difficult and changes seem to be relatively slow. Partially responsibility for this should be assigned to the European Union, which is not capable of escaping the stereotype in its legislation and in measures that are inconsistent with the established goals.

Historically, through their assigned role in society, women were excluded from public life. The “label” of the primary carer of the family, giving the secondary role to men, was explained by the designation of nature. As society changed, a new reality led to the increase of the dual-earner family model and a higher level of female participation in the labour market. Since care and work are indispensable elements for the majority of the families, actions in favour of their reconciliation are of the utmost importance, especially given Europe struggle with the serious issue of low fertility rates, which will result in continuous demographic decrease.

Even though maternity protection is a universally recognised fundamental right without which gender equality cannot be achieved, there is still a lack of adequate improvement in European Union legislation. It has not been possible to revise the system established in 1992 with the Pregnant Workers Directive. It is encouraging that pregnancy has gained such protection, especially from dismissal, and that the ‘no male comparator’ was held confirmed in discrimination cases. This demonstrates that finally the needs of pregnant workers have been taken into consideration. But it is obviously not enough. The lack of critique in the European Union of lengthy maternity leaves without the possibility of sharing the leave with fathers makes the bonding and care in the first weeks of the life of the child an exclusive requirement for women. Such a stereotype, left unchallenged, cannot be accepted and needs to be addressed.

One can hardly look to the EU Charter of Fundamental Rights, which since 2009 has constituted the general principles of law, for the advancement of these rights as the Charter simply reiterates standards that were already previously established, although there is reference in the provisions that creates a necessary link between pregnancy and equality measures.

The weak regulation provided in the Parental Leave Directive does not help in countering the outdated view of parenthood. Unfortunately, because of a lack of consideration for existing economic



hierarchies, the practical impact of its provisions has been marginal. Missing incentives for the gender-neutral division of care makes the system unable to fulfil its goals and the Parental Leave Directive system has encouraged women to stay longer at home as, in many countries, the leave in question can be used to prolong maternity leave. The solution to the problem is paid parental leave and to create an obligatory character within paternity leave.

The research has showed that the European Union should learn from the Council of Europe, namely in the forming a closer relationship between the Court of Justice of the European Union and the European Court of Human Rights that could be beneficial for the development of women's rights in Europe. Such a statement is supported by the activity of the Strasbourg Court, firstly in its inventive interpretation of the measures that were not the primary guaranteed in the European Convention on Human Rights and secondly through its due recognition of social changes that have taken place in Europe. It is well known that case law is a useful tool in the development of rights and it has proved to be crucial in amendments to the law. However, it can also turn out to be a blind alley. As have observed, the Court of Justice of the European Union has been trapped in the interpretation provided via the Hofmann case, followed by *Betriu Montull*, which allowed for the wide discretion of Member States in the development of their own leave policies. This has led to the stereotypical overburdening of women with care work, with an inability for men to share responsibilities. The major cause for such an approach may be found in the health and safety origins of the maternity protection, isolated from equality legislation. Positive developments can be found in the *Roca Alvarez* case where the Court ruled in favour of equal rights for either parent in taking care of children in the first months of life. Nevertheless, its approach was disappointingly formalistic, and this make it uncertain as to the position of the Court in the further cases concerning parenthood. It remains to be seen whether the European Court of Justice will break free from the Hofmann judgement and will continue with the advancement initiated in the *Roca Alvarez* case. The European Court of Human Rights in this respect has proved to be very progressive, as it has found the strength and legal justification to recognise the equal role of both parents in caregiving for children and has refuted the myth of the subsidiary role of the father in care work, as it admitted that the need for either parent to take care of the child is comparable. As the Strasbourg Court has found out, the reinforcement of the stereotype that the woman is a primary caregiver is disadvantageous for family life and for both parents. That statement is obviously correct as a gender balance needs to be obtained not by giving more rights to the representatives of one sex without taking into consideration the other sex, as it is a common fight that will not be resolved by

unilateral acts. The legal texts excluding men from having the same status as women in parental leave may only bring the opposite effect to that which we strive to achieve in Europe.

As fertility is dropping with every year in both Poland and Portugal, the determination to increase the birth rate is high. The lack of the influence of leave policies towards the overall demographic decrease however has the hidden positive indication that in Portugal the fertility among employed women has increased. Regarding the implementation of the Directives in Portugal, the effects should undoubtedly be assessed as favourable with respect to contributing to equality in childrearing activities. Maternity leave, the so called “initial parental leave” equipped with the sharing-bonus as its purpose has a more equal take up of leave. From the other side, the system in Poland is worthy of criticism as the policy is women-centred and still encourages women to stay longer at home. The lengthy maternity leave and parental leave that can be used as an extension of maternity leave does not only makes no change to the imbalanced roles, but also reinforces the existing stereotype. It is sad that the EU system was unable to prevent such a regulation that with 14 compulsory weeks of leave for mothers has no logical explanation.

Statistics reveals that the current system in Poland is not encouraging the equal sharing of care between men and women, nor increasing population growth. The low enjoyment of leave by fathers is caused by the strong stereotype of women who are seen to be responsible for childrearing: there are no incentives provided for in the legislation for a more equal distribution of care, as this is not the purpose of the leave policy of the country. Conversely, Portugal may be seen as having a very positive impact on the redefinition of roles in the area of care for children. The current construction of the leave policy encourages men to equally participate in unpaid work activities, and hopefully in the long term this will lead to the satisfaction of the goals of the achievement of gender equality at a swifter pace.

The Recast Directive emphasises the EU commitment to the achievement of gender equality and the promotion of it in all its activities. This sounds fine, but the reality is harsher. By only ensuring the protection of women we will not be able to tackle the roots of inequalities. Without allowing men to exercise the same rights and responsibilities over same tasks as those for which women used to be solely responsible, we will never bring desired changes. In the current state of things, the reality is that employers value men more, or are willing to hire older women or men instead of young women as they look at them through the cost of the leave they may take, what can be termed ‘indirect discrimination’.

The European Union calls itself a pioneer in the promotion of gender equality. As the organisation is no longer merely an economic union, an important dimension has proved to be the social aspect. Nevertheless, the diversity of the countries united in this unique organisation does not make progress in social matters any easier, especially as it is often a costly investment. In this regard, there are some points that should be emphasised. At the point of the adoption of the principle of equal pay for equal work, the Union was not concerned with women's rights as much as with the competitiveness of the labour market. The absence of women's rights on its agenda was problematic. Nowadays, even though women's rights is on the agenda, the costs associated with reforms and the growing conservatism of governments in many Member States blocks greater protection. What is more, the withdrawal of the Maternity Leave revision in 2015 resulted in the broader approach of the Commission in addressing the issue of female participation in the labour market, and more specifically their underrepresentation, in adopting in 2019 Work-Life Balance Directive. We are still paying a high price for the compromise in the area of pregnancy protection made in 1990s and the protection introduced via the legal basis that is principally not related to social measures is at the risk of remaining deadlocked. Hopefully a new solution presented by the Commission will not appear to be a resignation from the improvements in the area of pregnancy legislation, as it requires further reforms. Let us remember that in 1992 the Commission perceived the adopted legislation as only the first step in the matter as improvements in the areas of the duration of maternity leave, protective measures considering night work and the level of allowances paid for maternity leave were intended to be developed.<sup>233</sup>

To conclude, the direction of the development of EU law regarding parenthood is currently undergoing a period of transformation. The broader approach taken in the new legislation shows that the harmonisation in the Union has changed the strategy for the achievement of gender equality. The efforts towards the improvement of women's equal participation in the economy has shifted its targets. In focus is no longer just women, as women-centred policies that awarded higher levels of protection to only one sex have proved not to be the best solution. New beliefs have developed the path that provides work on the inclusion of men into the reform. More concretely, the proper way to face the challenges of our times lies in allowing men to exercise the same rights, so that the same tasks can be carried out, as those for which women are currently solely responsible. Bringing the rights into balance connects both sexes in the common battle and slowly amends existing disadvantages. It needs to be assumed that

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<sup>233</sup> EUROPEAN COMMISSION, Press Release on adoption of Directive on...op. cit.

work and the family are not in conflict and that protection should be awarded for all forms of employment.

With regard to the assessment of the EU contribution to the achievement of gender equality, it is unfortunate that the level of harmonisation achieved thus far has been mainly designed while social and economic interests were perceived as conflicting with each other. All in all, is EU legislation capable of tackling the roots of inequalities? It is, for certain, moving into that direction. Will new legislation on Work-Life Balance in the EU reduce the effects that childcare responsibilities have on mothers and will the work environment become more friendly for women? Member States have three years to implement the newest piece of legislation, and for its effects we will have to wait even longer. Will the Court of Justice of the European Union introduce a more critical approach towards policies supporting the stereotypes of women as primary caregivers? With recently introduced changes, hopefully new cases will appear in front of the Court and the rectification of such an approach will be possible.

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8. OPINION OF ADVOCATE GENERAL SHARPSTON delivered on 14 September 2017(1) Case C-103/16, Jessica Porras Guisado v Bankia, ECLI: EU:C:2017:691