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*Selected Rights of Female Criminals in the Light of Polish and International Legal Regulations in the Context of Crime Theory*

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Wybrane prawa kobiet przestępczyń w świetle polskich i międzynarodowych uregulowań prawnych na tle teorii przestępczości

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### ABSTRACT

The article puts forward a thesis about the particularly unfavourable situation of female criminals on the labour market. It is treated as a negative premise for effective social rehabilitation. This thesis is proven through the presentation of concepts explaining the specificity of women's crime, as well as difficulties in their social rehabilitation related to unequal treatment on the labour market. Since Poland's accession to the EU, the situation of women pertaining to equal treatment and discrimination in the workplace has improved markedly, but there is still much to be done. As far as legal provisions are concerned, women are afforded solid protection, though there is still room for improvement. A great imbalance exists between the rights of mothers and fathers to a paternity leave, which enforces the idea of women as stay-at-home mothers as well as puts them at a disadvantage when it comes to access to and termination of employment, promotion and so on. Employers may, therefore, see women as more costly and less productive than men, which negatively affects women's employment opportunities (which is especially visible in the case of female criminals). This article is an attempt to show that changing the law itself is not sufficient and will not afford full and effective protection against gender discrimination in the workplace. Changing the society's perception of women is crucial if their rights are to be fully realised and women themselves must also know the extent of their rights and be willing to take advantage of them without fear of being discriminated against at work, because of their gender and criminal history

**Key words:** female criminals; discrimination based on gender and crime; Labour Code; Polish law; international law

## INTRODUCTION

Criminality and women's rights are two extremely complex and convergent subjects with mutual interactions difficult to present in such a short paper. Therefore, our main focus shall be to present the legal situation of women with regards to regulations concerning gender related equal treatment and (non)discrimination within one sphere: right to work, ability to exercise it and meaning of this phenomenon in the rehabilitation process. At the same time, we assume that the background for female crime as well as the manner in which women are treated are, from a social and cultural perspective, immanently connected on the feedback basis. It means that female crime and its qualitative characteristics stems, to a large extent, from the problem of gender inequality, whereas an "internal transformation" defining the objective of rehabilitation, in the instance of women, is far more difficult also on those grounds. We also adopt an assumption about meaning of work which is fundamental to the rehabilitation process and which should perform two functions fulfilling the primary needs (social and economic) and the needs of higher order (social and personal fulfilment). In the instance of women, the right to work is not always exercised in the manner showing that the principle of equal treatment of both sexes is observed. Discrimination of female criminals is even more evident within this area. Hence, social awareness should be raised, in particular among penitentiary institution representatives, with regards to unequal treatment and discrimination of women as a crime factor and, at the same time, a factor co-determining the success (effectiveness) of the rehabilitation process. It is proven by, for example, an analysis concerning the link between crime and unemployment, or the economic conditions and crime, or crime and experiencing inequality (Altindag, 2012; Brush, 2007; Carmichael, Ward, 2001; Caruso, 2014; Diraditsile, Ontetse, 2017; Edmark, 2005; Hooda, 2018; Öster, Agell, 2007; Raphael, Winter-Ebmer, 2001; Wadsworth, 2001; Wu, Wu, 2011). The longitudinal studies of criminal careers show that the duration of unemployment increases the number of convictions for women, which is not the case for men (Verbruggen, Blokland, van der Geest, 2012; Naffine, Fale, 1989). Discrimination on the labour market is also treated as one of the main factors of female delinquency (Engelhardt, Rocheteau, Rupert, 2008). This is why it is important to raise social awareness, and primarily the awareness of representatives of penitentiary institutions, regarding the issue of unequal treatment and discrimination of women as a factor of crime and at the same time a factor co-determining the success (effectiveness) of the rehabilitation process.

Contemporary criminological female crime theories assume that it requires a multispectral analysis – bio-psycho-social-cultural (similarly to male crime) but in this instance the problem of illustrating as well as explaining this phenomena is far more intricate (Biel, 2009; Burzyński, 1879 after: Szajna, 2017, pp. 29–45; see: Cabalski 2013, pp. 27–85; Denno, 1994, pp. 80–180; Hoyt, Scherer, 1998, pp. 81–107;

Schaffner, 1999, pp. 40–65; 2007, pp. 1229–1248; Steffensmeier, Schwartz, Zhong, Ackerman, 2005, pp. 355–405). In the context of violation of women’s rights (e.g. inequality on the labour market), the explanations of female delinquency, which are derived from the theory of social control, power control, strain and subcultural theories or social stigmatisation, are truly vital. It is argued that more attention should be paid to understanding the “role strain” inherent in women, as well as the attempts to negotiate ambiguous or contradictory gender roles, and the concepts of role strain, which offer a promising explanation of contemporary patterns of female delinquency (Berger, 1989, p. 375; Campaniello, Gavrilova, 2018). It is assumed that understanding and preventing crime in case of both women and men can be strengthened by adopting and developing a gender-integrated theory of delinquency, based on a comprehensive study of developmental, psychological and socio-ecological determinants (Hoyt, Scherer, 1998, p. 81). Female criminals differ from male criminals in many respects (Chesney-Lind, 1989; Shawn, 2010). The scope and nature of female crime are different. Firstly, women’s involvement in crime is very different from that of men. Girls commit fewer offences and the committed ones are less serious. Secondly, women are treated differently by justice officials and are usually easier to rehabilitate. Overall, the extent, intensity, destructiveness and frequency of female delinquency are much lower compared to male delinquency. One can therefore speak of a feminist model of crime or a pattern of criminal behaviour of women (Cauffman, 2008; Matos, 2018).

Even if the feminist topics are not included in our analyses, women, undoubtedly, are a group particularly vulnerable to discrimination and social exclusion – in numerous fields customarily, culturally and legally women have been a social category subject to a power limiting their full rights. In many countries a refusal to treat women with equality is sanctioned by public policy, law or even (or most of all) by customarily sanctioned social practices<sup>1</sup>. There is a silent social consent to gender discrimination even in the developed western countries. After all, equality of men and women is guaranteed with various international documents, ratified also by the Polish government. The most important ones shall be discussed in this paper. They promote the obligation of a state and its institutions, including penitentiary ones, to undertake action to prevent, enforce and penalise acts of prejudicial discrimination on the grounds of sex (generic roles), background (race, social status) and faith (religion). Nevertheless, legal regulations shall not provide equal treatment of women if the society and its institutions lack awareness to respond actively to acts of sex-based discrimination.

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<sup>1</sup> The WHO data shows that globally more women die at the hands of their partners than of cancer, every year two million girls are at the hazard of circumcision, every third woman is a victim of violence, rape or other humiliating practices (such as “honour killings” for adultery, sati practice, while in developed European countries or the United States domestic violence or human trafficking).

## GENDER DISCRIMINATION ON THE LABOUR MARKET

The laws concerning equality and non-discrimination in employment have undergone extensive development and significant improvement in the recent years. Poland had ratified many crucial international instruments concerning equality and non-discrimination, such as ICCPR, ICESCR, CEDAW and the ILO Fundamental Conventions, all of which provide extensive protection against gender discrimination in many spheres of life, including employment. These instruments concern the access to and termination of employment, promotion and equal pay, among other important provisions, thereby affording solid protection to working women. However, it must be stressed that Poland has not ratified all of the international instruments on non-discrimination at work. None of the specific ILO Conventions, such as Maternity Convention or Workers with Family Responsibilities Convention, were ratified. They contain many specific provisions, which protect pregnant women and women on maternity leave. This suggests a lack of commitment on the part of Poland to the labour market issues around discrimination in general. Nonetheless, the accession to the European Union in 2004 had forced Poland to introduce many new legal provisions in the Labour Code and by virtue of being a member of the EU, Poland is obliged to automatically transpose EU Directives into the national law. As a result, non-discrimination provisions are being developed regularly and the situation of women on the labour market is improving.

Therefore, it must be stressed that the Polish law on equality and non-discrimination in employment is better now than it has ever been, but that does not mean it is flawless. The Labour Code provides detailed regulations in the area of equality and non-discrimination in employment. In theory, women are protected from unjustified dismissals, denial of employment, promotion and vocational training. These rights are protected especially in regard to pregnancy and parenthood. However, in practice, even when women are aware of their rights, they are reluctant to use them. Their traditional role in the family, which is reflected in the highly uneven distribution of parental leave rights, puts women in a position where they are seen as “problematic” and costly by employers and often decide to come back to work as soon as possible to avoid losing employment. In sum, though there are many legal protections, there are still issues with their fulfilment in practice.

## INTERNATIONAL AND EUROPEAN INSTRUMENTS

The principle of equality and non-discrimination is necessary for the protection and fulfilment of human rights. It has even been said to belong to the “*jus cogens*”<sup>2</sup> norms, “because the whole legal structure of national and international public order

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<sup>2</sup> *Jus cogens* (peremptory norm) is a fundamental international norm/principle from which no derogation is permitted.

rests on it and it is a fundamental principle that permeates all laws” (*Inter-American Court of Human Rights Advisory Opinion OC-18/03*, p. 99). This principle encompasses many topics, but the focus here will be on the work-related rights of women. The principle of equality stipulates that everyone should receive equal treatment and opportunities. Equality may be formal or substantive. Formal equality simply means that everyone should be treated in the same way at all times. Substantive equality aims at bringing about true equality in that it considers various social or cultural factors that lead to a differential treatment of particular persons/groups. Such examination ensures better understanding of notions such as workplace privilege and instead of treating everyone in the same way, it recognises the need for temporary positive action in order to eliminate those factors that lead to discriminatory treatment.

The principle of equality and non-discrimination is included in all major international instruments. One of the purposes of the Charter of the United Nations (UN Charter) is to promote and encourage respect “for fundamental freedoms for all without distinction as to race, sex, language and religion” [Article 1(3)]. The Universal Declaration of Human Rights (UDHR) already mentions in the Preamble the equal rights of all humans and even singles out the equality between men and women, however, the formal recognition of principle of equality is found in Article 7 which proclaims that “all are equal before the law and are entitled without any discrimination to equal protection of the law”. These are the first international human rights instruments, and all other instruments were, to some extent, based on them.

The International Covenant on Economic, Social and Cultural Rights (ICESCR) contains a lot of provisions concerning work. Article 2 concerns non-discrimination and Article 3 provides for the equality between men and women. The ICESCR also secures the right to work (Article 6) and equality in remuneration and promotion at work [Article 7(a)(i) & 7(c)].

The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) is of great importance for gender equality. Article 1 defines “discrimination against women” as “any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field”. Article 11 CEDAW deals with the field of employment and specifies various labour rights, the enjoyment of which should be equal between men and women, such as the right to work, equality in the process of recruitment, job promotion, vocational training and remuneration. It also prohibits discrimination on grounds of marriage or maternity in that it explicitly states that dismissal on grounds of pregnancy, maternity leave or marital status is prohibited. It also contains provisions that allow the parents to combine work and family responsibilities.

The International Labour Organisation (ILO) deals specifically with labour rights and it affords a broad scope of protection against discrimination. The principle of equality and non-discrimination lays at the heart of the ILO. To begin with, two out of eight fundamental ILO Conventions relate to this principle. The Equal Remuneration Convention (C100) is dedicated in full to the prohibition of gender discrimination in the payment of wages/salaries and all other forms of pay. The definition of discrimination in the Discrimination (Employment and Occupation) Convention (C111), Article 1(1) is so wide that it is able to cover any kind of discrimination in employment and leaves space for potential new grounds of discrimination to be considered [Article 1(1)]. Although, not indicated in the Convention itself, the General Survey on the fundamental ILO Conventions (*Giving globalisation a human face...*, 2008) makes it clear that: “any discrimination – in law or in practice, direct or indirect – falls within the scope of the Convention” (ibidem, p. 312).

Additional provisions regarding the principle of equality and non-discrimination are found in the Workers with Family Responsibilities Convention (C156), specifically in Articles 3, 4 and 8 which provide a wide range of protection for working parents. Extensive protection against discrimination is also found in the Termination of Employment Convention (C158). It provides specifically that a worker may be terminated only for “a valid reason” (Article 4) and enumerates specific reasons on basis of which termination is precluded (Article 5). Regarding the access to employment, the Employment Promotion and Protection against Unemployment Convention (C168), provides that the Member States should seek to ensure “the promotion of full, productive and freely chosen employment” (Article 2) while respecting the principle of equality and the prohibition of discrimination (Article 6). There are also specific conventions which aim to protect women, such as the Maternity Protection Convention (C183). In accordance with C183 Articles 8 and 9, there can be no discrimination of women in relation to the access and termination of employment and they must return to the same or similar post. The issue of gender discrimination is therefore well-covered by the ILO.

The rights of every individual in the EU are found in the Charter of Fundamental Rights of the European Union (EU Charter). Article 20 of the EU Charter contains equality before the law provision, while Article 21 prohibits discrimination on grounds of sex (among others). Equality between men and women, especially in the field of employment is stressed in Article 23. Although the EU Charter is binding on State Parties, it only applies when they are implementing EU law (*Strategy for the effective implementation...*, 2010).

The EU Directives constitute another source of non-discrimination law. They are a part of the EU’s secondary law and once they are adopted at the EU level, the State Parties have an obligation to implement them at the national level. Gender-based discrimination was most recently addressed in the Gender Equality Direc-



tive (Recast). This Directive had consolidated several existing EU directives and ECJ case law into a single text. The Gender Equality Directive (Recast) also took into account the developments in the case law of the European Court of Justice and included them in the final text. Therefore, the new Gender Equality Directive covers equal treatment and non-discrimination principle in relation to access to employment, promotion, vocational training and working conditions, including pay (Article 1 & 14), but the prohibition of discrimination also extends to trade union rights and the issue of dismissals [Article 14(1)(c) & (d)]. “Positive action” is also recommended (Article 3). This Directive sets the burden of proof on the respondent (Article 19), so it is an important source of protection against gender discrimination.

The European Social Charter provides for an extensive set of labour rights, some of which are binding on the State Parties (Part III, Article A – Undertakings). Many of those rights pertain to equality and non-discrimination (Articles 4, 8, 20 and 24), but the State Parties are legally bound by only Article 20 which concerns equality with regard to access to employment, vocational guidance and training, terms of employment and career development, while other rights may, or may not be selected as constituting a binding obligation on a state. In addition, non-discrimination provision in the European Social Charter can only be invoked in connection with another Charter right, but it is nonetheless an important source of protection against discrimination.

As gender discrimination is often caused by pregnancy or the upbringing of children, two other EU directives shall be considered, namely the Pregnant Workers Directive and the Parental Leave Directive. The Pregnant Workers Directive, Article 10 provides for the non-discrimination of pregnant workers in that they are protected from dismissal during pregnancy and maternity leave and the employer who dismisses women employees within this period of time must provide extensive reasoning for it in writing. The Parental Leave Directive facilitates the reconciliation of work and family responsibilities. Both parents have an individual right to parental leave, which shall be granted for at least 4 months “and to promote equal opportunities and equal treatment between men and women, should, in principle, be provided on a non-transferable basis”. To facilitate equality between men and women, at least 1 out of 4 months should be non-transferable (Clause 2). When the parental leave ends, worker should be returned to the same job, or to an equivalent post within the company. Also, Member States are to take necessary measures to prevent discriminatory treatment of workers due to them taking a parental leave (Clause 5). After the return to work, in order to better reconcile work and family responsibilities, there should be a more flexible working timetable available upon the worker’s request (Clause 6).

In conclusion, it is well established under international and European law that gender discrimination of any kind in employment is prohibited, even though its’

implementation can be problematic and ratification of specific instruments and provisions protecting women is not always mandatory. The situation of women in Poland has improved markedly over the years, but these issues nonetheless apply to the Polish labour market.

## THE CONSTITUTION AND THE LABOUR CODE

The main instruments in the Polish Law that contain the prohibition of discrimination at work provisions are the Constitution and the Labour Code. The basic provisions on equality and non-discrimination in Poland are included in the most important legal act, the Constitution of the Republic of Poland (1997). Article 32 stipulates that: “All persons shall be equal before the law. All persons shall have the right to equal treatment by public authorities”. It goes on to state that: “No one shall be discriminated against in political, social or economic life for any reason”. The Constitution also specifically singles out gender in Article 33, where it states that: “Men and women shall have equal rights in [...] economic life [...] in particular, regarding [...] employment and promotion, and shall have the right to equal compensation for work of equal value”<sup>3</sup>.

More detailed provisions are found in Chapter II of the Labour Code titled: Equal treatment in employment. Article 18<sup>3a</sup> (Prohibition against discrimination in employment), paragraph 1 states that: “Employees should be treated equally in relation to establishing and terminating an employment relationship, employment conditions, promotion conditions, as well as access to training in order to improve professional qualification, in particular regardless of sex [...]”. Paragraph 2 prohibits direct and indirect discrimination on any ground referred to in paragraph 1 and provides their definitions.

Article 18<sup>3b</sup> provides for a burden of proof in discrimination claims. Normally, the burden of proof is found in the Civil Code in Article 6 which states that the burden of proof rests on a person who brings the claim to court. However, this regulation is altered in cases relating to discrimination. It is sometimes called a “reverse burden of proof” as it requires both sides to provide facts supporting their case. If the claimant is able to put forward enough facts to make discrimination likely, then the burden of proof shifts to the employer who must, in turn, provide “objective reasons” for the differentiation that had occurred (Jaśkowski, Maniewska, 2018).

In accordance with Article 18<sup>3b</sup>, there are certain situations where differentiation will not constitute discrimination based on gender. This is especially true in

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<sup>3</sup> The Equal Treatment Act (ETA) also concerns discrimination, albeit largely outside of the labour market, so it will not be discussed here (Dz.U. 2010 Nr 254 poz. 1700, Ustawa z dnia 3 grudnia 2010 r. o wdrożeniu niektórych przepisów Unii Europejskiej w zakresie równego traktowania). Retrieved from <http://prawo.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20102541700>



the event of a woman becoming a parent as there are certain jobs that such women cannot perform. In Article 176 of the Labour Code, women who are pregnant or breastfeeding are prohibited from performing work “that is especially strenuous or harmful to health” (*Labour Code*, Article 176). The Council of Ministers had provided a list of such prohibited works (*Ordinance of the Council of Ministers...*, 2017). However, pregnancy and breastfeeding are temporary situations so pregnant women should not be barred from a permanent position due to this temporary situation. It seems there is a danger that women may be sometimes barred completely from a certain job that they would otherwise have access to only due to pregnancy or breastfeeding as there is no express obligation to consider their situation as temporary in terms of access to employment.

However, there are also many provisions protecting pregnant women. Article 177 para 1 of the Labour Code stipulates extensive protection against termination of employment of pregnant women and women on maternity leave<sup>4</sup>. Also, each female employee should return to the position she held before maternity leave, or to an equivalent position (*Labour Code*, Article 183<sup>2</sup>). The same rule applies to childcare leave (*Labour Code*, Article 186<sup>4</sup>). In accordance with the above articles, the termination of employment of pregnant worker or worker on maternity leave may only occur in the event of bankruptcy or liquidation of the employer (*Labour Code*, Article 177, para 4). Therefore, it seems that the protection against the termination of employment is quite strong, although there is no mention of any protection immediately after the maternity leave ends. An employee who has just ended maternity leave needs steady employment, so there should be some protection immediately after the women’s return to work.

## WORKERS WITH FAMILY RESPONSIBILITIES

It is also important to mention the specific issues that the parents raising children are facing. They are at risk of losing employment due to a long absence on the labour market and this affects primarily women. For now, due to the State’s failure in the provision of childcare institutions<sup>5</sup>, the parents must largely cope with childcare themselves, especially at the early stages. There are several provisions in the Labour Code that facilitate the reconciliation of work and family life.

First, Articles 67<sup>5</sup> to 67<sup>17</sup> on teleworking allows a person to work largely outside of the actual workplace. Such a place may well be the employee’s home,

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<sup>4</sup> Nonetheless, this protection is not absolute as there may be “reasons justifying termination without notice through her fault” as stated in the Labour Code, op.cit., Article 177(1).

<sup>5</sup> The fact that this situation is steadily improving does not go without notice here, but there is still much to be done.

which means that the teleworker can conduct his work and take care of the child since he/she is at home. The parent is able to pursue a professional career while also being able to take care of the child without the need for any special arrangements. Second, Article 142 stipulates that upon the employee's written request, an employer may arrange an individual working timetable within the employee's working time system. It provides a lot of flexibility and ensures the employee's individual situation and needs will be considered. Third, Article 143 provides for a shortened working week. The employee may perform work for less than 5 days a week, but his daily working time will be extended (no more than 12 hours). Although such a schedule is limited to a one-month period, it means more flexibility for an employee as he may work more on some days and be free on the otherwise normal working days. It is perhaps even more important that such an employee still works full time (so does not lose earnings) but may gain some free days in order to take care of the child. Fourth, Article 144 introduces yet another system, where the work is being conducted on Fridays, Saturdays, Sundays and during Holidays. Again, daily working time cannot exceed 12 hours and it is limited to a one-month period, but should the parents combine Article 143 and 144, they may be able to take care of the child without any outside support. It is, of course, quite tiresome and harmful to the relationship between the parents, but without any other options, it may become necessary. Finally, Article 186<sup>7</sup> para 1 states that an employee who is entitled to a childcare leave may file a written request to the employer to reduce working time to not less than half of the full-time schedule in the period of the employee's entitlement to the childcare leave. Moreover, it is actually an obligation of the employer to accept such requests. Although the employee does not work full-time, he still remains at work (does not lose skill or knowledge) while also being able to better take care of the child.

All these flexible forms of work are very important for women in particular, as they are normally at a greater risk of discrimination because of maternity. They are expected to take care of the children, but upon returning to work may be discriminated against by their employers. Ability to continue working while raising a child decreases chances of gender discrimination. The actual extent of this problem in real life will be discussed next.

## GENDER DISCRIMINATION – THE CURRENT SITUATION

Although the women's position on the Polish labour market has improved over the years since the accession to the EU, they still face obstacles in the access to employment and promotion opportunities as well as struggle to stay in employment. Even though, the Polish anti-discrimination law provides extensive protection against discriminatory treatment in employment, it works well only in theory. The Polish Central Statistics Office concluded that women are less active

on the labour market than men. In 2015, out of the entire population, only 48.6% of women were active in employment compared to 65% of men. Even when the report limited the employment rate to the working age population, women constituted 70.3% while for men it was 78.8%. The Central Statistics Office also indicated that in 2015, for 1000 active men on the labour market, 538 men were inactive, while for 1000 active women, 1056 were inactive. According to the OECD Report on Poland (2016, pp. 27–28), the “labour force participation and employment rates are still among the lowest in the OECD, especially for women”. The Report also indicates the need for better opportunities to combine work and family responsibilities so that women can remain in employment. The child-care coverage remains low, forcing young women to take longer maternity leaves or older women to retire and take care of their grandchildren.

The effective implementation of equality and non-discrimination provisions is, therefore, important for two reasons. First, discrimination by employers has both cultural and institutional roots. There are various harmful stereotypes and prejudices against women in Poland which have a negative impact on employment opportunities. Women are seen as weaker, less available, less productive and more costly than men. This is a result of traditional views of women as stay-at-home mothers. The highly unequal distribution of the parental leave rights between men and women mean that employers prefer to employ men. Second, victims of discrimination might be unaware of their rights or unwilling to bring a case to the courts. Anti-discrimination laws are a relatively new addition to the Polish legal system and without substantial and wide-ranging support for awareness-raising policies from both the State and the employers, the protection afforded by the law will not be effective in practice. To sum up, the effective implementation of anti-discrimination laws in Poland is a challenge.

Women are technically well-protected under the Labour Code provisions since they cannot be dismissed during pregnancy or maternity leave (and other types of leaves) and the employers are obliged to return them to the same position that they occupied before going on maternity leave, or at least to an equivalent position. Employers also cannot refuse to employ pregnant women simply because of their condition, as that will constitute gender discrimination. In addition, women have access to various kinds of leaves in order to take care of their children, not only maternity leave, but also to additional maternity leave and child-care leave. This may also constitute a problem.

This extensive protection for women in case of pregnancy may be the cause of a less-discussed form of gender discrimination. Alicja Sielska (2015, p. 44) discussed in depth the rights of women on the labour market in relation to the costs incurred by the employers. “Labour [...] is the measure of productivity, the cost of which is dependent on the level of productivity. This means that on the free market, the more productive an element is, the more costly it will be”. An example was put

forward of a situation where a woman and a man with the same qualifications apply for a job, but a woman requests less money, so the employer, looking to maximise profits, will choose a woman as a cheaper labour force. The point here is to explain that employers' primary concern is to minimise costs and maximise productivity, so women who need to take long maternity leaves will be seen as costly and less productive than men, which increases the risk of discrimination. The employer may incur considerable costs by employing a woman over a man. The prohibition of dismissal during pregnancy and various types of leaves, necessity to employ a temporary staff member and the need to return women to their previous post all cost the employer not only money and time, but also to some extent the overall productivity at this specific post in the company (new, perhaps less experienced staff member, or outdated knowledge of women after they return to work). Also, pregnant women who become ill, keep 100% of their pay for 33 days (Labour Code, Article 92, para 1). Alicja Sielska calls this situation "institutional discrimination" and indicates that it is often overlooked. Nonetheless, from an economical point of view, it might constitute a serious problem connected to the discrimination of women on the labour market (Sielska, 2015, pp. 52–53). This is not to say that women should have less rights in relation to motherhood, but as it may negatively affect their employment opportunities, other solutions should be considered.

It is also important to point out that the rights of mothers and fathers are highly unequal in the Polish legal system. Clearly, after giving birth, a woman needs to take maternity leave, but she is given much more rights afterwards compared to the father. In the Polish society, women are still largely expected to take care of home and family and this is reflected in the law. Article 180 para 1 of the Labour Code stipulates that a woman employee may, after at least 14 weeks of maternity leave, return to work if she transfers the rest of her leave to a father. In that case, a father has a right to a part of the women's maternity leave. However, a father's independent right to paternity leave constitutes a mere 2 weeks (Article 182<sup>3</sup>, para 1). Such distribution of parental leaves puts women at a disadvantage and only reinforces the stereotype of a woman as a sole carer of children.

There is also one other serious problem with paternity leave. As an individual, a father's paternity leave right is only two weeks, and it is only dependent on a father being employed. The same goes for the childcare leaves that are equal for both parents. However, the rules for sharing of maternity leave are different. A woman employee can share her maternity leave with the father whether he is employed or not. In case of the mother being unemployed, the father, whether he is employed or not, does not have a right to a share of maternity leave (*The Report of the ombudsman reconciling the family and work responsibilities...*, 2015, p. 11). This means that an unemployed woman has to use all her maternity leave by herself, as the father will only be able to take two weeks of leave that are his individual entitlement. Such a situation worsens the unemployed women's chance

of finding employment. A more equal share of parenthood rights would have a potential of improving women's opportunities on the labour market. This is a largely theoretical/legal analysis and the actual impact of maternity on women will be discussed in the following section.

First and foremost, it must be stressed that legal protection with regard to parenthood is extensive in Poland. However, the use of all available parental leaves will have negative effects on the opportunities of both parents on the labour market, especially women. Such long absence from the labour market will make it harder to further one's career or even to enter or stay in employment. "Access to childcare is among the key factors determining women's situation in the labour market. Availability of suitable childcare is an essential step towards preventing discrimination against women on the grounds of maternity and marriage and ensuring their right to work" (*Alternative Report on the implementation of CEDAW for Poland*, 2014). Poland had failed in the provision of childcare as in 2014, only 4% of under three-year-olds were covered. However, there have been significant improvements (20%) for three – to five-year-olds in the recent years with 71% attendance in 2012/13 compared to 32.6% in 2007 (p. 9). Still, from the birth of a child until it reaches 3 years, there is practically no help for parents, so they need to depend on themselves or their family members.

Since there are by far not enough care institutions, parents need to work and take care of children at the same time or stop working altogether. The childcare nowadays is still centred around the idea of women bringing up children. As such, they are often discriminated against in employment, as they are seen as more costly and less available. The parents face the most difficult situation before children reach the age of 3 as childcare coverage significantly increases from there. Although the situation is dire, there have been steps by the government to improve the coverage of children under 3 years old. The Law on Care for Children Aged 0–3 (2011) was introduced in 2011 and provides for detailed legal rules as to the functioning of different forms of childcare, such as children's clubs, daytime carers and work of nannies. However, due to the ineffectiveness of the new law, an Act Amending the Law on care of children under 3 and certain other laws came into force in 2013. Overall, this Act makes it easier to finance childcare institutions. Article 1(21) includes a possibility of government funding up to 80% of costs in each given case. Also, along with the 2011 Act, the "Maluch" (Small Child) Programme was introduced with an aim to increase the overall attendance of children by creating new childcare institutions. In 2018, the Ministry of Family, Work and Social Policy has devoted 450 million (złoty) to the creation of new childcare institutions (*Program Maluch*, 2018, 2020). Although, there is still a long way to go, the situation in this area is improving.

As to the childcare of three – to five-year-olds, the situation is much better as 71% of children attended pre-schools in years 2012–2013. However, there are

still problems with its long-term realisation. CEDAW Report indicates that most successes were a result of “short-term EU Funding”. Also, “there is a striking disproportion in access to public pre-school facilities between cities and rural areas” (*Alternative Report...*, 2014, p. 50). The Act on the Amendment of School Education System (2013) and certain other Acts could bring some positive changes in this respect as the communes may receive some funding from the state budget [Article 1(7)]. However, whether this will work in practice seems to be largely dependent on each commune and its’ ability to organise childcare.

The remainder of this section will be based on the Report of the Ombudsman (2015) which analysed both law and practice in the area of the reconciliation of work and family responsibilities. The mere existence of laws or opportunities does not mean an automatic change in social practices. The Ombudsman’s report had looked mainly at the employers’ practices and attitudes, as well as the individual strategies of the employees aiming to reconcile work and family life. The studied groups were composed of the representatives of various companies (big, medium and small), mothers and fathers up until the age of 40 and trade unions. One overall trend can be seen. The employees often use flexible forms of working time, and work part-time to raise the child, but as far as different kinds of parental leaves are concerned, only maternity and two-week paternity leaves are in general use, while the other leaves are used sparingly.

The mothers were predominantly found to be taking the basic maternity and additional maternity leave, rarely the childcare leave, and even less the educational leave. The reasoning behind that was economical (educational leave is unpaid), and there was a fear that such a long absence will negatively affect the career or even result in losing the job. Since the employer must find someone to fill the post during maternity leave, the prolonged absence may mean that the employer will decide it is better to keep the worker with up-to-date knowledge. It is true that the Labour Code protects from dismissal during maternity leave and the employer must return a mother to her previous post, but there is no protection after that. Many women are encouraged to return quickly for part-time work in order to keep up with the changes on the labour market. Some women who took childcare and educational leave usually worked part-time. Also, the social security is paid even when the mother takes childcare or educational leave, so in case of low earnings, it might be better to take those leaves due to lack of childcare facilities, or the money for nannies (*The Labour Code*, 1974, pp. 21–24). In sum, women fear discrimination on the labour market caused by long absence. Also, the financial considerations and fear of halting one’s career mean that women limit themselves to taking maternity leave and additional maternity leave, or they return fast and gradually come back to work using the flexible working time arrangements that are provided for in the Labour Code.

The fathers, on the other hand, often used the two-week paternity leave, but only a handful used any other opportunities. The most important factors that cause



hardships include: stereotypes on the role of the father as a breadwinner; lack of incentives or strategies for the promotion of paternity leave; lack of profitability as men usually earn more than women; fear of losing a job and halting one's career; lack of knowledge of the rights of fathers; and the dependence of using paternity leave on the employment status of the mother. Clearly, the traditional view of family in the Polish society means that there is no widespread practice of using parental leaves by fathers. The employers declared that they do not mind when the father takes more time-off, but neither do they actively encourage it. Both mothers and fathers have pointed out that some employers still have a stereotypical view of the role of fathers and mothers. Moreover, on rare occasions when the fathers do decide to take more paternity leave, they do so not because they actually want to share the family responsibilities, but because mothers fear losing their job, or because it is simply financially more profitable (mother earns more or father doesn't work). In addition, unequal treatment of mothers and fathers in taking parental leaves is a significant factor which limits the fathers' use of their rights. Even when the fathers are aware of their rights, the actual use of them is still "unwelcome" in some private companies (*The Labour Code*, 1974, pp. 26–32). Therefore, the persistent stereotypes in the Polish society and their negative consequences on the fathers' professional careers are often the root cause of them taking no more than the basic two-week paternity leave.

The formal and informal solutions for the reconciliation of work and family life after the employee's return to work constitute another problem. Although the employers do not usually refuse such requests, the disapproval on the part of the employers is quite visible. In addition, even when the children have gotten a place at a children's club, it is still hard to organise care in the afternoons. Although, parents can get some days off, they do so at the expense of working more on other days which constitutes a problem whether the children have access to children's clubs or not. Since there is little access to children's clubs, a great majority of parents must organise care for their children all by themselves. Since employers value productivity and profitability and not always understand the parents' needs, often the employees feel pressure to live up to those expectations and accept conditions of work that will make it more difficult to reconcile it with childcare. Many mothers have stressed the negative attitude of employers towards the use of flexible work arrangements (*The Labour Code*, 1974, pp. 33–38). To sum up, employers usually grant the employees' requests for flexible working arrangements not because they want to or are understanding of the specific needs of parents, but because the law requires them to do so. This attitude leaves the employees feeling insecure about their employment and forces them to use flexible work arrangements as seldom as possible.

The attitude of an employer proves to be a significant factor in the reconciliation of work and family life. Parents who feel pressured to work more often

turn to more informal ways of providing childcare, such as help from family or friends, mainly grandparents. Here, the impact of culture and traditions is clear. It is mostly grandmothers that take care of children, sometimes even their help is expected and is thought of almost as an obligation, rather than a form of voluntary help (*The Labour Code*, 1974, pp. 38–43). Even though, there are also some positive attitudes and practices towards formal and informal ways of reconciling work and family responsibilities visible in Polish companies, such as a gradual return to work, limiting business trips or the availability of “mother with a child” room. Still these arrangements are usually aimed at mothers, not fathers. Although various childcare options are available to fathers, it is still met with little “social acceptance” (*The Labour Code*, 1974, pp. 43–54). Therefore, though there are legal provisions in place for the reconciliation of work and family life, they often bear the burden of gender inequality. Also, the employers’ attitudes and deeply rooted stereotypes about women to a large extent prevent their use beyond the basic maternity leave (often 20 weeks) and the short two-week paternity leave.

### EQUALITY POLICIES AND PLANS

As discussed above, although the Polish law on equality and non-discrimination in employment is well-developed, some issues remain, which prevent its full realisation in practice. Traditional views about women are still rooted deep within the Polish society and they have a negative impact on women’s employment opportunities. Nonetheless, there is some commitment toward substantive equality between men and women as several policies and programmes were implemented with the aim of achieving gender equality.

The National Action Plan (2013) on equal treatment prepared by the Plenipotentiary for Equal Treatment is particularly important for the attainment of equality between men and women. Its main goals included the raising of the standards of conducting anti-discrimination policies and the equality between men and women on the labour market. The proposed actions in this area included the promotion of sharing parental rights, equal treatment of both parents and development of childcare institutions. Another important policy is the Ordinance of Ministers on the National Action Plan on Employment (2015). The general aim is to raise the employment rate for people between 20 and 64 years of age. Out of many strategies to do it, those that have impact on the equality and non-discrimination in employment is the support for mobility and employability of workers on the labour market and supporting disadvantaged groups such as women, parents or older persons who are most at risk of being discriminated against in employment.

Both these policies show the will on the part of the Government to improve the situation of women on the labour market. The National Action Plan focused

solely on the sphere of employment and the work-life balance. Since the traditional views of women are still prevalent, it is of great importance to the women's professional careers to be able to share responsibilities with their partners or, at least, have access to childcare institutions. Also, the employers' views of women as more costly and less productive may change. Prompt return to work and greater involvement of fathers in childcare will likely decrease the possibility of gender discrimination due to maternity. Some of these ideas were also continued through the National Action Plan on Employment. Although it concerned unemployment in general, it also included strategies that focused on the access to employment of the disadvantaged groups, such as women and it recognised that preventing discrimination is important in tackling unemployment.

There are also other policies with the aim of achieving gender equality<sup>6</sup>. First, the PROGRESS Programme (2007–2013) supported the development and coordination of the EU Policies in 5 fields: employment; social security; conditions of work; counteracting discrimination; and equality between men and women. Its purpose was to effectively implement EU regulations concerning the protection and equal treatment of workers through, for example, the exchange of information and experience, the shaping of the EU policies and legislation or the inclusion of the issue of equality in all policy areas (the aims of the *Programme PROGRESS*, 2007–2013). However, in 2010, the subject area of this programme had been changed to 'micro-financing' (Decision No 284/2010/EU..., 2010). It is also difficult to ascertain its actual impact on Poland. There are only general reports on the various information sharing activities, but there are no country specific reports. That is not to say that this programme did not have a positive impact overall, but it is hard to ascertain what impact it had on a specific country. In addition, since the EU law and policies are being developed all the time, such programme should have continued in order to ensure up to date information in the area of equality in employment, but after just a couple of years it has been concluded and replaced by a new topic which does not concern equality between men and women.

Also the EQUAL Initiative (2004–2008) is worth mentioning. The main aim of this initiative was to discover new ways of eliminating all forms of discrimination on the labour market. It had been divided into 3 "Phases". During Phase 1, Poland has focused its efforts in several key areas<sup>7</sup>. First topic concerned the facilitation of entry and re-entry to the labour market and promotion of the open labour market. It focused on the provision of equal opportunities to groups experiencing inequality due to lack of qualifications and low level

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<sup>6</sup> Only the most important recent policies concerning equal treatment on the labour market will be discussed.

<sup>7</sup> There are 5 topics in the Polish EQUAL Initiative, but the last one concerns refugees so it will not be discussed here.

of education (mainly in rural areas). Second topic was about the strengthening of the national social economy, mostly by engaging local communities to support and activate groups at risk of exclusion. The third topic focused on the need to educate companies on how to better deal with structural changes in the economy and how to make use of new technologies. The aim was to ensure the development of companies and prevent reduction in staff, which is very important for older workers and women. Fourth topic concerned the reconciliation of work and family life and reintegration of parents who left the labour market. It included support for the development of institutions for childcare and dependants, improving professional qualifications and the promotion of flexible forms of employment (*Community Initiative Program EQUAL*). Phase 2 concerned the testing of these new solutions, while Phase 3 focused on the spreading of good practices into national and international politics. However, this initiative lasted only 4 years (2004–2008) and was concluded in 2008.

Still, some of the projects based on the EQUAL Initiative and their results were discussed (*Biuletyn EQUAL*, 2008). They were overall positive and as long as they were funded, they seemed to operate quite well. However, their long-term impact varied after the funding was withdrawn. As an example, the programme “Flexible worker – family based on partnership” had a very positive and seemingly lasting impact in the region of Podlasie (North-East Poland). It focused on four areas. First, the flexible forms of employment have been tested and promoted and were found to be functioning well. Second, some of the childcare institutions had extended the working hours to 21 and at the time of the report, they were still open in the evenings. Third, action was taken to prevent the employees’ knowledge from becoming outdated. To that end, various individual trainings were organised for persons on parental leaves. Fourth, a social campaign called the “Partnership Day” was organised to discuss the roles of each of the parents in taking care of the family with the aim of changing various negative attitudes. There were plans to repeat similar campaigns in the future. As shown, action was taken to reconcile work and family life and it may have long-lasting positive impact in this area.

Another example is the “Partnership-Family-Equality-Work” programme, which was directed at women with outdated professional knowledge, working women at risk of losing jobs due to maternity and women whose parental responsibilities hamper their professional advancement. One of the projects within this programme concerned teleworking. Special handbook for employers as well as a vocational training programme were prepared to ensure the effective operation of this type of work. The beneficiaries still worked within this scheme after the end of this project so it may also be functioning well in the future. Another programme was the so-called “Day Mum”. The idea was to set up small childcare ‘institutions’ in private homes, but due to lack of funding after the project was concluded, they ceased to operate. However, nowadays this may change as the new

law (*The Act Amending the Law on care of children under 3...*, 2013) was introduced which should make it easier for such forms of childcare to operate. One last project was called the “Work under a patronage” and concerned women returning to work after long-term unemployment. A special form of action was implemented whereas a motivational and psychological support was coupled with vocational training and internship. Also, a handbook for career counsellors was created and was met with significant interest. To sum up, both of the discussed projects focused on ensuring greater equality of women, either by promoting the sharing of family responsibilities or by supporting stable employment of women with small children. Therefore, the EQUAL Initiative definitely had positive results in the areas where it was being implemented. The only downside is that the lack of funding after the end of the project may hamper the long-term positive impact of such projects. This proves that policies do have impact on discrimination in employment, but it is crucial that they are continued, even if the programme itself is concluded. To sum up, even though it was mostly due to the action by the EU, Poland had introduced quite a few policies and programmes that aim to improve the situation of women on the labour market. It may take time, but these policies have a real potential of improving the women’s position on the labour market.

## CONCLUSION

To conclude, the legal provisions concerning non-discrimination on the ground of gender are quite extensive as they cover all of the most important areas. Especially, the provisions on pregnant workers and parental leaves are well-developed. However, some of these rights only work well in theory. Firstly, pregnant women are entitled to various kinds of leaves, such as maternity leave, additional leave or childcare leave, but even after the basic maternity leave women often come back to work because they fear dismissal. For the same reason, childcare leave is rarely used. Secondly, fathers are entitled to a mere two weeks of paternity leave as their individual right and although they can technically have a share of the maternity leave, in practice they again rarely use this opportunity. Thirdly, fathers are only entitled to a share of maternity leave if the mother is in employment. Such unequal division of parental leaves only reinforces the stereotype of a woman as solely responsible for raising children and deepens the already existing prejudices against female workers.

There are also several different flexible working “schemes” to help both parents raise their child. There is no differentiation in law between men and women other than the short breaks from work to allow mothers to breastfeed. The employees may ask for an individual timetable, shortened working week or a gradual return to work, mostly through part-time work. Due to failure of the state in the provision of childcare institutions, those flexible work schemes are extremely im-

portant, especially for women who are expected to take care of children and so are at a greater risk of being discriminated against on the labour market. In theory, both parents have the same rights here, but in practice women are more likely to use them frequently due to their perceived role as child carers. This situation will continue until the social and cultural perspectives on women change, which is why both the law and different equality policies and plans as well as the change in the attitudes of the employers are extremely important in combating gender discrimination on the labour market.

#### FINAL REFLECTION – INEQUALITY AS AN IMPORTANT FACTOR DIVERSIFYING FEMALE CRIME

Numerous analysis of female crime (Biel, 2009; Berger, 1989; Cabalski, 2013; Campaniello, Gavrilova, 2018; Denno, 1994; Hoyt, Scherer, 1998; Schaffner, 1999; Schaffner, 2007; Steffensmeier, Schwartz, Zhong, Ackerman, 2005) emphasise that the crime activity criterium varies for both sexes, for example: women mainly act individually and crimes against property or life are usually profit driven (result of social exclusion, hence reduced access to goods such as work or money) or indirectly or directly related to protection of their inalienable rights. Whereas the motivation of male crime acts and their group nature is more frequently associated with a desire to impress others or a personality based need for strong sensations and exposure to risky experiences. Notably, the social consequences of punishable acts perpetrated by women are more severe than in the instance of men; women, due to their generically and socially attributed roles encounter a stronger social condemnation for the acts perpetrated. This may give rise to secondary and defensive pathologisation under the “self-fulfilling prophecy” principle. Yet, it stems from common as well as scientifically “proven” concepts, which are not free from a subjectivity determined with the approach of their authors, feminist or anti-feminist (Kolarczyk, Kubiak, Wierzbicki, 1984, pp. 77–78; see: Hołyst, 2009). The concept of a moral superiority of women (Burzyński, 1879 after: Szajna, 2017, pp. 30–31) as well as the complementary concept of an absence of a “healthy femininity” (Cowie, Cowie, Slater, 1968 after: Kolarczyk, Kubiak, Wierzbicki, 1984, p. 80) assume that if a woman becomes a criminal she is more demoralised than a male criminal which additionally reduces her social status and conditions a higher degree of social ostracism she is subjected to (including the field of work). Similar meaning features in the concept of female crime as a protest against morality (Thomas, 1907 after: Szajna, 2017, p. 33), which imposes on a woman a role and position subordinate to family and society, directly indicates inequality of treating women as a factor of their criminality. Crime diversification on the grounds of sex is emphasised through the concept of diversified social roles, at the same time indicating female subservience towards



men within the act of committing a crime and a fundamental factor of female crime, which is experiencing the state of inequality and striving to eliminate its effects (Biel, 2009, pp. 176–192; Kolarczyk, Kubiak, Wierzbicki, 1984, p. 80; Lernell, 1973, p. 248). Female crime dependence on the state of inequality they experience is particularly emphasised in feminist criminology. The causative factor indicated is the disproportion of power among men and women, which limits women's access to values such as prestige, status, economic independence, expected affluence standard, essential economic security (as originating from work performed) or psychological potential for self-fulfilment. A sense of social injustice and a sense of wrong experience due to male supremacy in the world they have dominated, which constitutes a developmental trauma and validates a gender determined traditionally subservient division of social roles are, therefore, a fundamental factor in female crime.

We do not propose in this paper a thesis that this is the sole factor of female crime, we only adopt an assumption that experiencing social inequality is a significant and specific factor with respect to other causes which explain human crime regardless of their gender (see: Lee, 2017). We also do not contend that inequality on the labour market and the unemployment experienced to a greater extent by women (Cook, Watson, Parker, 2014) are the only factors that distinguish male and female delinquency. Unemployment is important, but other labour market conditions, such as wage levels and unequal pay, also appear to have a significant impact on decisions to commit crime. However, little research has been done on the relationship between wage levels and unequal pay with crime, hence this is an area of research to be undertaken in the future (Lee, 2017).

Only selected laws and presented in a summarised version, which are to restore the state of equal treatment of both sexes, shall not be effective without a change of social awareness within the area of complexity of the image of female crime. An important fact here is that unequal treatment may be a factor in female crime as well as the fact that female crime is perceived by the society in a different manner, causing an additionally severe ostracism, stigmatisation and condemnation of female criminals and also paradoxically a more difficult rehabilitation – as confirmed with numerous research studies and concepts. Female crime is also determined through a specific social role attributed to women, whereas the rehabilitation process is inhibited through unequal access to social goods such as work which provides satisfaction (self-fulfilment) and a feeling of economic safety.

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## STRESZCZENIE

W artykule postawiono tezę o szczególnie niekorzystnej sytuacji kobiet przestępczyń na rynku pracy. Potraktowano to jako negatywną przesłankę efektywnej resocjalizacji. Dowód na słuszność tezy przeprowadzono poprzez wybiórczą prezentację koncepcji wyjaśniających specyfikę przestępczości kobiet, a także trudności w ich resocjalizacji, co wiąże się z nierównym traktowaniem na rynku pracy. Od czasu przystąpienia Polski do Unii Europejskiej sytuacja kobiet związana z równym traktowaniem i dyskryminacją w miejscu pracy znacznie się poprawiła, wciąż jednak pozostaje wiele do zrobienia. Jeśli chodzi o przepisy prawne, kobietom zapewnia się solidną ochronę, lecz nadal istnieje wiele obszarów zaniedbanych. Występuje zwłaszcza duża nierównowaga pomiędzy prawami matek i ojców do urlopu rodzicielskiego, co utrwała stereotyp kobiet jako matek pozostających w domu oraz stawia je w niekorzystnej sytuacji w zakresie dostępu do pracy i rozwiązania stosunku pracy, awansu itp. Pracodawcy postrzegają kobiety jako bardziej kosztorodne i mniej produktywne w pracy niż mężczyźni, co negatywnie wpływa na możliwości zatrudniania kobiet. W artykule podjęto próbę wykazania, że sama zmiana prawa nie jest wystarczająca, gdyż nie zapewnia pełnej i skutecznej ochrony przed dyskryminacją ze względu na płeć w miejscu pracy (co szczególnie widoczne jest w przypadku kobiet przestępczyń). Zmiana postrzegania kobiet przez społeczeństwo ma kluczowe znaczenie, jeśli ich prawa mają być w pełni realizowane. Co więcej, kobiety same muszą znać zakres swoich praw i być gotowe do korzystania z nich bez obawy o bycie dyskryminowanymi w miejscu pracy ze względu na płeć i kryminalną przeszłość.

**Słowa kluczowe:** kobiety przestępczynie; dyskryminacja ze względu na płeć i przestępczość; kodeks pracy; prawo polskie; prawo międzynarodowe